IN THE COURT OF APPEALS 03/11/97

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00803 COA

BOBBY RAY WILLS

APPELLANT

v.

BANK OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HONORABLE RICHARD MCKENZIE

COURT FROM WHICH APPEALED: FORREST COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WAYNE HYNUM

ATTORNEY FOR APPELLEE:

M. RONALD DOLEAC

NATURE OF THE CASE: SUMMARY JUDGMENT

TRIAL COURT DISPOSITION: BANK WAS ENTITLED TO COLLECT FORECLOSURE DEFICIENCY

EN BANC

McMILLIN, P.J., FOR THE COURT:

This case is an appeal from a grant of summary judgment awarded to the plaintiff, Bank of Mississippi, in an action against Bobby Ray Wills. The suit, commenced in the Circuit Court of Forrest County, was on a contract of guaranty executed by Wills to facilitate a loan from the bank to Redemption Ranch, Inc. We affirm the trial court.

I.

The Facts and the Course of the Proceedings in the Trial Court

The bank, in 1983, made a loan of $448,000.00 to Redemption Ranch, secured by a real estate deed of trust. Wills had previously executed a continuing contract of guaranty in favor of the bank by which he personally guaranteed the obligations of Redemption Ranch. There is no dispute that the guaranty contract obligated Wills as a guarantor of the 1983 loan.

Redemption Ranch defaulted on the loan, and, as a first step in the collection process, the bank initiated foreclosure of its deed of trust. The bank was the successful bidder at the foreclosure sale with a bid of $300,000.00. The balance due on the loan immediately prior to foreclosure was $410, 846.75.

More than one year after the foreclosure sale, the bank filed suit against Redemption Ranch and Wills, seeking a joint and several judgment against these parties in the amount of $110,846.75 together with interest accruing after the sale date. Redemption Ranch was dismissed from the suit under the time bar of section 15-1-23 of the Mississippi Code of 1972, which requires a suit against the debtor for a deficiency arising after foreclosure to be commenced within a year of the sale.

Wills's defense of the action was based solely on the proposition that the amount bid by the bank at foreclosure was less than the fair market value of the real property. He argues that the true measure of his obligation was an amount calculated by subtracting the fair market value of the collateral from the pre-sale debt. His contention before this Court is that, until the trial court determined the proper credit against the debt arising from the foreclosure sale, his obligation on his contract of guaranty could not be determined. Thus, he contends, summary judgment was inappropriate since there were unresolved issues of fact that substantially affected the relief to which the bank was entitled.

The trial court determined, in effect, that the right to dispute the proper credit against the debt when the creditor is the successful bidder at a sale was an equitable remedy available only to the principal debtor and, thus, not available to a guarantor. Having resolved this question of law against Wills, the court found that there were no remaining uncontroverted facts and that the bank was entitled to judgment as a matter of law. The court, therefore, entered summary judgment in favor of the bank and Wills perfected this appeal.

II.

The Issue on Appeal

This appeal presents a pure question of law. We must address the issue of whether a guarantor is entitled to the equitable considerations available to the principal debtor as set out in *Lake Hillsdale*

Estates, Inc. v. Galloway, 473 So. 2d 461 (Miss. 1985). That case stands for the proposition that, when a real estate-secured creditor is the successful bidder at a foreclosure and subsequently seeks a deficiency judgment from his debtor, "something more than a difference between the price paid at the foreclosure and the amount of the indebtedness must be demonstrated before the mortgagee is entitled to a deficiency judgment." *Id.* at 466. Exactly what the "something more" is, the court did not make totally clear.

Wills argues that the *Lake Hillsdale* decision requires the creditor who bids the collateral in at the sale to credit the market value of the property against the debt. In the context of this case, two questions present themselves when considering this assertion. First, we must consider whether this is an accurate statement of the law concerning the principal debtor's rights when confronted with a deficiency claim. Secondly, even assuming that Wills has correctly characterized the principal debtor's rights, we must determine if those same rights are available to a guarantor of the debt.

A.

The Principal Debtor's Rights in a Deficiency Suit

The *Lake Hillsdale* decision does not pronounce such a simple rule as Wills would urge. It does not declare that, in every case where the creditor is the successful bidder at foreclosure, the debtor is entitled to credit for the fair market value of the collateral. Rather, in *Lake Hillsdale*, the court said that ". . . in order to obtain a deficiency judgment, the mortgagee has the burden of proving its entitlement under principles of equity to a deficiency judgment." *Id.* at 466. The court went on to say that the proper inquiry is, first, to "determine if the mortgagee has endeavored to collect the indebtedness out of the land. Then, it must be determined whether the value of the property satisfies the debt of the mortgagor or creates a surplus." *Id.*

What result such an inquiry will compel does not seem as simple as Wills would suggest. Certainly, it would have been within the authority of the Mississippi Supreme Court in *Lake Hillsdale* to adopt a bright-line rule regarding the role of fair market value of collateral in the computation of a deficiency. The court chose not to do so, instead leaving undisturbed its earlier pronouncement that such cases must be "decided on a case by case basis under equitable principles . . . ." *Mississippi Valley Title Ins. Co. v. Horne Constr. Co.*, 372 So. 2d 1270, 1274 (Miss. 1979).

Subsequent cases dealing with deficiency suits discuss to some extent the role of the collateral's value, but again, do not adopt a hard and fast rule. In *Wansley v. First National Bank of Vicksburg*, the supreme court held that "before we will respect them for deficiency purposes, terms of a foreclosure sale must be commercially reasonable." *Wansley v. First Nat'l Bank* , 566 So. 2d 1218, 1224 (Miss. 1990). In *Shutze v. Credithrift of America, Inc.*, the court cited *Wansley* for the proposition that "particularly where the foreclosing creditor buys at foreclosure, it must give the debtor *fair credit for the commercially reasonable value of the collateral." Shutze v. Credithrift of Am., Inc.*, 607 So. 2d 55, 66 (Miss. 1992) (emphasis supplied) (citation omitted). It is difficult to find such a holding in the *Wansley* decision. Nevertheless, conceding for the sake of argument this pronouncement to be binding precedent, there is the added troubling consideration that the *Shutze* opinion speaks of "commercially reasonable value," a phrase apparently borrowed from the Uniform

Commercial Code (*See Wansley v. First Nat'l Bank of Vicksburg*, 566 So. 2d at 1224-25) rather than "fair market value." There is no indication that the two values are synonymous.

This Court is thus left with a high degree of uncertainty as to whether even the principal debtor would have been entitled to the relief now claimed by Wills in this appeal. Leaving that question, for the moment, we turn to the separate question of whether Wills, as guarantor, is automatically entitled to the same considerations that Redemption Ranch might have enjoyed, as difficult as those considerations might be to define. If, in fact, Wills is not, then the difficult task of sorting out the rights of the principal debtor after foreclosure under the present state of our jurisprudence can be reserved for another day.

B.

May the Guarantor Automatically Claim the Principal Debtor's Defenses?

Our consideration must begin with the proposition that the defenses available to the principal debtor remain purely equitable in nature. The pronouncement to that effect in the *Mississippi Valley Title Insurance Company* case has not been overruled. The court suggested, without deciding, that the bar to a deficiency might be based on principles of equitable estoppel. *Mississippi Valley Title Ins. Co.*, 372 So. 2d at 1273-1274. It may well be that the apparent subsequent difficulty the supreme court has experienced in attempting to quantify the rights of the debtor in such situations arises out of the very fact that the rights are equitable in nature and not simple rules of law and are, thus, subject to the case-by-case analysis mandated by the *Mississippi Valley* opinion. *Id.* at 1274.

It has long been recognized that equitable defenses are personal in nature. *See, e.g., Newman v. Checkrite Cal., Inc.*, 912 F. Supp. 1354, 1375 (E.D. Cal. 1995); *Pyrodyne Corp. v. Pyrotronics Corp.*, 847 F.2d 1398, 1402 (9th Cir. 1988). This brings us face to face with the question of whether

a guarantor, sued on his separate contract of guaranty, may assert an equitable defense personal to the principal debtor. We conclude that he may not.

There is little doubt that the obligations of a guarantor are distinct from that of the principal debtor and, in some instances, are more demanding. The facts of the case now under consideration offer one such example. The shorter statute of limitations in section 15-1-23 by which Redemption Ranch escaped liability was not available to Wills, whose obligation is measured by the longer general statute of limitations applicable to written contracts. *See* Miss. Code Ann. § 15-1-49 (1972); *First Nat'l Bank v. Drummond*, 419 So. 2d 154, 160 (Miss. 1982). In another example, the debtor may avoid his obligation under the note by obtaining a bankruptcy discharge, yet the guarantor's obligation remains unaffected by this discharge. *NCNB Tex. Nat'l Bank v. Johnson*, 11 F.3d 1260, 1265 (5th Cir. 1994); Restatement (Third) of Suretyship and Guaranty § 34 cmt. b (1996).

Whatever may be the equitable considerations that prompted the decision in *Lake Hillsdale*, those considerations do not apply to a guarantor. Under the contract of guaranty executed in this case, the bank had the right to release the collateral without affecting Wills's obligation under his guaranty contract. With that consideration in mind, it could be fairly argued that Wills received more than he

was entitled to under his contract when the bank foreclosed on the property before bringing an action to enforce his guaranty obligation.

Up until the moment the foreclosure sale was completed, Wills had available to him remedies by which he could have protected his rights in this matter. He could have, at any time prior to sale, honored his obligation under the guaranty contract by paying the indebtedness and becoming subrogated to the rights of the bank in any collateral. He elected not to do so and, by his inaction, now seeks to unilaterally shift the risks associated with marketing the collateral from himself to the bank. Such a right does not exist under the contract, and it is difficult to discern what equitable principle would sustain this risk-avoidance tactic.

When a guarantor fails to move to protect his interests in a situation such as this, only three possible explanations suggest themselves. One, he may not have had knowledge that the foreclosure was in progress. The law is clear that publication of the foreclosure notice is sufficient notice even to the principal debtor, and no equitable considerations would be invoked by a claim of lack of actual notice. Second, he may have known of the sale and simply failed to honor his contractual obligation prior to sale. Certainly, such a course of action does not give rise to notions of equity. Third, he may have lacked the capacity to perform his contractual obligation. We are aware of no principle of equity that would excuse performance of contractual obligations based solely on lack of capacity. In such a case the court would be attempting to balance the equities between the creditor, who makes a loan in reliance on the guarantor's assurance that he will perform, and the guarantor, who solemnly promised to act in just this situation but now asserts his inability to do so through no fault of the creditor. In this situation, as in the other two we have mentioned, it is difficult to discover what equitable principle would compel the creditor to give the guarantor credit for a court-imposed theoretical determination of the fair value of the property and then force the creditor to assume the very real risk of an inability to realize anything approaching that value on the open market.

Equitable defenses are affirmative in nature and must be pled. *See* M.R.C.P. 8 (c); *Goode v. Village of Woodgreen Homeowners Ass'n*, 662 So. 2d 1064, 1077 (Miss. 1995). Inherent in the case-by-case nature of such equitable defenses is the idea that underlying facts must be asserted that would demonstrate the party's entitlement to such consideration under equitable principles. Whether there may be facts that would have entitled Wills to raise an equitable defense to this action based upon *his* position in the matter, and not that of the principal debtor, is a question not before the Court because Wills failed to assert such facts by affidavit or otherwise in opposing the summary judgment motion. He was content to raise, in a somewhat oversimplified manner, a supposed equitable bar that may have been available to the principal debtor and to claim that defense as his own.

Because he neither pled an equitable defense personal to him nor alleged any facts that would support such a defense, the trial court was correct in disregarding his attempt to borrow an affirmative defense that might exist in favor of another.

Having properly adjudicated the unavailability of the only equitable defense raised, the trial court correctly determined that there were no unresolved issues of fact and entered summary judgment. That judgment is affirmed.

THE JUDGMENT OF THE FORREST COUNTY CIRCUIT COURT GRANTING SUMMARY JUDGMENT IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE

AWARDED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., THOMAS, P.J., COLEMAN AND SOUTHWICK, JJ., CONCUR. PAYNE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY DIAZ AND KING, JJ. HERRING, J., NOT PARTICIPATING.

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PAYNE, J., DISSENTING:

Bobby Ray Wills signed as unconditional guarantor on debts of Redemption Ranch, later secured by a mortgage held by Bank of Mississippi (BOM). BOM sought to recover the post-foreclosure deficiency balance on the loan seeking summary judgment against Wills. The Circuit Court of Forrest County granted summary judgment to BOM. Wills appeals arguing that the trial court erred in granting summary judgment for BOM on a foreclosure deficiency, when the evidence did not show that BOM paid "fair value" for the real property at the foreclosure sale. I would reverse the trial court’s granting of summary judgment and remand the cause for a hearing to establish the fair market value of the foreclosed property and subsequent determination of the amount of deficiency owed to BOM, if any.

STATEMENT OF THE FACTS

In 1983, Redemption Ranch, Inc. borrowed the sum of $448,000 from Bank of Mississippi. The loan was secured by a deed of trust to two parcels of land, with improvements, totaling 316 acres. The bank's pre-loan appraisals, which are the only appraisals on the property, totaled $825,000 ($600,000 and $225,000, respectively).

In 1978, Wills had signed a "Continuing Guaranty Agreement" which guaranteed that he would pay the debts of Redemption Ranch owed to BOM. After Redemption Ranch defaulted on the loan, BOM foreclosed on the properties. The foreclosure sale was held on March 4, 1988, with $410, 846.75 owing on the loan. BOM purchased both parcels of land at the foreclosure sale for the sum of $300,000. Thus, a deficiency of $110,846.75 remained on the loan.

On March 31, 1989, BOM filed suit against Redemption Ranch and Bobby Ray Wills to recover an alleged deficiency of $110,846.75. Redemption Ranch was dismissed from the suit because of the one year statute of limitations. BOM sought and was granted summary judgment against Wills in the amount of $110,846.75.

STANDARD OF REVIEW

In determining whether the trial court properly granted a motion for summary judgment, this Court conducts a de novo review of the record. *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993); *Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co.*, 594 So. 2d 1170, 1172 (Miss. 1992). A trial court may grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56(c). A fact is material if it "tends to resolve any of the issues, properly raised by the parties." *Webb v. Jackson*, 583 So. 2d 946, 949 (Miss. 1991) (citing *Mink v. Andrew Jackson Casualty Ins. Co.*, 537 So. 2d 431, 433 (Miss. 1988)). The evidence must be viewed in the light most favorable to the non-moving party. *Morgan v. City of Ruleville*, 627 So. 2d 275, 277 (Miss. 1993) (citing *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 362 (Miss. 1983)). If, in this view, the moving party is entitled to a judgment as a matter of law, then summary judgment should be granted in that party's favor. *Id.*

DISCUSSION

Wills argues that summary judgment should not have been granted on a foreclosure deficiency because there was no evidence showing that fair value was received for the property at the foreclosure sale. BOM argues that the issues of fair value and commercial reasonableness are personal to the original debtor and are not available to Wills.

First, it is instructive to review the law in regard to the debtor's rights when a foreclosure of the property occurs and a deficiency is sought. There are two distinct questions: first, regarding the foreclosure sale itself and second, regarding any deficiency judgment.

(1) ADEQUACY OF SALES PRICE AT FORECLOSURE SALE

The Mississippi Supreme Court has made it clear that "absent any irregularity in the conduct of a foreclosure sale, it may not be set aside unless the sales price is so inadequate as to shock the

conscience of the Court ‘or to amount to fraud.’" *Allied Steel Corp. v. Cooper*, 607 So. 2d 113, 118 (Miss. 1992) (citations omitted). The court continued: "[T]o shock the conscience of the Court, the bid price must be so inadequate that ‘it would be impossible to state it to a [person] of common sense without producing an exclamation at the inequality of it.’" *Id.* (citations omitted). "A legal determination of the adequacy of the purchase price is predicated upon the establishment of the fair market value of the property." *Cooper*, 607 So. 2d at 118 (citing *Haygood v. First Nat’l Bank*, 517 So. 2d 553, 556 (Miss. 1987); *Lake Hillsdale Estates, Inc. v. Galloway*, 473 So. 2d 461, 465 (Miss. 1985)). "The determination of the fair market value is a question for the trier of fact." *Cooper*, 607 So. 2d at 118 (citing *Myles v. Cox*, 217 So. 2d 31, 34 (Miss. 1968)). "A survey of Mississippi cases concluded that the threshold of unconscionability lies around forty percent of fair market value." *Cooper*, 607 So. 2d at 120 (citation omitted).

"We have emphasized that ‘this rule concerns only the legality of the foreclosure sale for purposes of vesting title to the collateral in the creditor or other purchaser at foreclosure. It has nothing whatsoever to do with the separate and distinct question of what, if any, deficiency judgment may be allowed.’" *Shutze v. Credithrift of America, Inc.*, 607 So. 2d 55, 65-66 (Miss. 1992) (quoting *Wansley v. First Nat’l Bank*, 566 So. 2d 1218, 1224 (Miss. 1990)).

(2) AMOUNT OF DEFICIENCY (IF ANY)

"For purposes of deficiency judgment against the debtors, our cases have long recognized that the terms of foreclosure or other dispositions must be commercially reasonable and that, particularly where the foreclosing creditor buys at foreclosure, it must give the debtor fair credit for the commercially reasonable value of the collateral." *Shutze*, 607 So. 2d at 66 (citing *Wansley*, 566 So. 2d at 1221-22, 1224-25). "The same principle protects the rights of a junior lien creditor . . . ." *Shutze*, 607 So. 2d at 66 (citing *Builders Supply Co. v. Pine Belt Sav. & Loan Ass’n.*, 369 So. 2d 743, 745 (Miss. 1979)). "[S]omething more than a difference between the price paid at the foreclosure [sale] and the amount of the indebtedness must be demonstrated before the mortgagee is entitled to a deficiency judgment." *Lake Hillsdale Estates, Inc. v. Galloway*, 473 So. 2d 461, 466 (Miss. 1985) (citing *Mississippi Valley Title Ins. Co. v. Horne Constr. Co.*, 372 So. 2d 1270, 1272 (Miss. 1979)), *quoted in Federal Land Bank v. Wolfe*, 560 So. 2d 137, 140 (Miss. 1989). In both *Lake Hillsdale* and *Mississippi Valley Title*, the mortgagee was the sole bidder at the foreclosure sale which established a substantial deficiency judgment. "[I]n order to obtain a deficiency judgment, the mortgagee has the burden of proving its entitlement under principles of equity to a deficiency judgment." *Lake Hillsdale Estates, Inc.*, 473 So. 2d at 466.

In *Wolfe*, the Mississippi Supreme Court extended to mortgagees the broad equitable protection given to mortgagors by stating "[i]f we are to protect mortgagors from unscrupulous mortgagees at foreclosure, it follows that the mortgagee must have wide latitude to prove his effort to diminish mortgagee’s loss and thereby protect the mortgagor." *Federal Land Bank of Jackson v. Wolfe*, 560 So. 2d 137, 141 (Miss. 1989).

> [C]ertainly [the creditor] must be allowed to introduce evidence that would demonstrate something more than the difference between the price paid at foreclosure and the amount of indebtedness owing at the time of foreclosure, then certainly [the creditor] must be allowed to introduce evidence that would demonstrate that it is entitled to a deficiency

> judgment and evidence that would portray the efforts made to recover by [the creditor], including evidence of unsuccessful attempted sale of the foreclosed property, decline of land values immediately before or after the foreclosure sale, and any additional effort it may have made to reduce the deficiency of the debtor.

. . . .

> [T]he subsequent valuations and actions of the creditor/purchaser at the foreclosure sale are relevant. It is, however, not just the valuation that is relevant. The totality of the actions taken by the creditor purchaser at the foreclosure sale to satisfy the full debt from the property foreclosed become relevant to the entitlement of [the creditor] to a deficiency judgment.

. . . .

> Certainly, [the creditor] should have the opportunity to clearly demonstrate through its offer of evidence that it is entitled to a deficiency judgment and that it has been prudent in its attempt to satisfy the debt in full through the sale of the property.

Id.

In *Mississippi Valley Title*, the court quoted *Corpus Juris Secundum* with approval:

> The mortgagee's right to a deficiency decree usually depends on the facts and circumstances of each case, and, since the mortgaged premises constitute the primary fund for the payment of the mortgage debt, it is only where the mortgagee has endeavored to collect it out of the land that a just judgment for deficiency can be entered. While it has been held that the power to render a deficiency decree is governed by the rules which would apply at law, it has also been held that the court has jurisdiction after a foreclosure sale to determine any intervening fact which would make it inequitable to enter a deficiency decree. Accordingly, no right to a deficiency judgment vests until plaintiff satisfies equity that it would be equitable, in the light of the sale price, to authorize a deficiency judgment.

Mississippi Valley Title Ins. Co. v. Horne Constr. Co., 372 So. 2d 1270, 1272 (Miss. 1979) (quoting 59 C.J.S. *Mortgages* § 778 (1949)).

DISCUSSION

A creditor is not required to first seek payment from the collateral or the defaulting debtor, and may seek satisfaction of the debt directly from the guarantor after the debtor defaults. "Ordinarily, absent a contract or bad faith, a mortgagee is not compelled to foreclose upon collateral at any particular time, or at all." *Merchants Nat'l Bank v. Stewart*, 608 So. 2d 1120, 1128 (Miss. 1992) (citation omitted). However, the bank, having elected the remedy of foreclosure and suit for deficiency against

the guarantor, is bound thereby.

I believe it is unsound to deny guarantors the benefits of fair market value that the debtor is entitled to receive. It is clear that to deny any type of obligor, including guarantors, such protection would defeat the purpose of fairness in a transaction secured in whole or in part by real property. A creditor in Mississippi should not be allowed to manipulate the sources of recovery in order to realize debt satisfaction in amounts greater than the balance of the debt due. *See Federal Land Bank of Jackson v. Wolfe*, 560 So. 2d 137, 140-42 (Miss. 1989). Certainly it is irrefutable that a creditor is entitled to one single satisfaction of an outstanding debt. The threshold issue to be resolved when a creditor is seeking a deficiency judgment on a debt is to determine whether any deficiency, in fact, remains. A guarantor contracts to pay the debt upon the default of the debtor only to the extent that the debt was not satisfied. If we were to accept BOM's position that Wills, as guarantor, is not afforded the same protection as the debtor and is not entitled to fair market value credit, then we would allow creditors to completely control and *possibly* manipulate the collection process with no obligation whatsoever to insure that no windfall to the creditor occurs. Thus, lenders under no such obligation could receive a windfall at the expense of the guarantor. I am convinced that it is not our role to facilitate such situations. It is clear from *Wolfe* that the Mississippi Supreme Court allows protection from unscrupulous creditors. The majority's failure to extend the fair market value credit to guarantors would result in exactly what *Wolfe* was trying to prevent. *Wolfe*, 560 So. 2d at 141.

Such an extension of fair market value to guarantors is consistent with the law in regard to guaranties. Generally, the satisfaction of a debt, by payment or otherwise, discharges the guarantor. 38 Am. Jur. 2d *Guaranty* §78 (1968). I would include the fair market value of the land to be among the types of payments which may satisfy the outstanding debt if the creditor elects foreclosure as his remedy.

Additionally, if the guarantor were obligated to pay the judgment, the debtor could arguably be obligated to reimburse the guarantor for sums paid on behalf of the debtor. Without the fair market value protection extended to the guarantor, the debtor could be required to reimburse the guarantor for the amount paid by the guarantor which would exceed the amount the debtor himself could be required to pay had the creditor sought the deficiency directly from the debtor. Thus, the protection afforded the debtor by Mississippi case law is circumvented, and the creditor is the only winner.

Also instructive is the guaranty agreement itself which includes:

> This is a guaranty of payment not of collection (the intent of this instrument being to make each of the undersigned liable as if the maker of Debtor's obligations) . . . . Each of the undersigned hereby expressly binds himself unconditionally as original promisor and maker of Debtor's obligations and liabilities to the same extent and with the same effect as if he [Wills] signed the instrument evidencing the same as original maker.

Thus, the instrument itself places Wills in the position of the debtor as to liability. Likewise, Wills should be afforded the protection of fair market value credit to which the debtor is entitled.

I caution, however, that this is not an extension of *special* protection to guarantors. Indeed, this would only be an extension to guarantors of the fair market value credit that is afforded to debtors. I do not intend to represent that the guarantor should somehow be interpreted to be relieved of his

liability under a guaranty agreement. Rather, I seek to insure that the creditor does not receive a windfall at the guarantor's expense.

The majority places some significance in the court's reference in *Shutze* to the "commercially reasonable value" as opposed to fair market value. After reviewing *Shutze* and the case it cites, *Wansley*, I find any distinction to be unnecessary. I believe the court's use of the term "commercially reasonable value" in place of fair market value was not an attempt to establish a new standard of value. Commercially reasonable was used in both *Shutze* and *Wansley* in reference to the terms of a foreclosure sale, a factor which is considered in determining the appropriateness of a deficiency judgment against a debtor. I find the *Shutze* reference to "commercially reasonable value" to be unremarkable, and certainly not decisive in the present case.

Turning to the case at bar, there is nothing in the record which shows the fair market value of the properties at the time of the foreclosure. We do have BOM's successful bid of $300,000 and the pre-loan appraisal amounts totaling $825,000--the difference of $525,000, within a period of approximately five years, at least suggests further inquiry is warranted. However, in dismissing the cause on summary judgement, the trial court never reached the issue of fair market value. It is clear that BOM was well within its rights in exercising its remedy of foreclosure against the property. However, in doing so, I believe that BOM bound itself to seek full satisfaction of the debt from the land itself. I believe equity requires that Wills is entitled to a review of the fair market value of the land at the time of the foreclosure sale so as to insure that BOM does not enjoy a windfall at the expense of Wills. After determining the fair market value, the trial court can then determine what deficiency, if any, can be collected from Wills.

I believe that the trial court erred in granting BOM's motion for summary judgment. There is unfinished business in the trial court and I would reverse and remand for proceedings on the issue of determining (1) fair market value of the properties at the time of foreclosure and (2) what, if any, deficiency remains on the loan which may be collected from Wills, as guarantor.

DIAZ, AND KING, JJ., JOIN THIS SEPARATE WRITTEN OPINION.