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Appellate Case No. H035400

Santa Cruz Superior Court Case No. CV162804

SUPREME COURT
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IN THE
SUPREME COURT OF CALIFORNIA

DAVID BIANCALANA, Plaintiff and Appellant

v.

T.D. SERVICE COMPANY, Defendant and Respondent

After a Decision by the Court of Appeal,
Sixth Appellate District

T. D. SERVICE COMPANY'S PETITION FOR REVIEW

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ISSUES PRESENTED

Since an error made by a foreclosure trustee in the course of processing a nonjudicial foreclosure justifies the rescission of the sale and the holding of a new sale if it directly results in a grossly inadequate price, especially if no trustee's deed upon sale has yet been issued, does the processing and announcement of a credit bid by the foreclosure trustee after it is duly submitted by the foreclosing beneficiary constitute an element of the duties of the foreclosure trustee in the processing of the nonjudicial foreclosure such that a failure to announce that bid correctly justifies setting aside the sale?

WHY REVIEW SHOULD BE GRANTED

This question presents a timely and ripe issue of major significance to foreclosure trustees and participants in foreclosure sales, particularly in light of the vast increase in the number of foreclosures in recent years due to current economic conditions.

There is an extensive line of cases holding that even slight unfairness or irregularity in the processing of a nonjudicial foreclosure sale which results in a grossly inaccurate price is a sufficient basis for setting aside the sale and holding a new sale. See, for example Sargent v. Schumaker (1924) 193 Cal. 122, 129; Winbigler v. Sherman (1917) 175 Cal. 270, 275;

Whitman v. Transtate Title Company (1985) 165 Cal.App.3d 312, 323;

Angell v. Superior Court (1999) 73 Cal.App.4th 691, 701.

This line of cases was distinguished in 2001 in the case of 6 Angels, Inc. v. Stuart-Mortgage, Inc. (2001) 85 Cal.App.4th 1279 which held that where the error was outside the scope of the foreclosure proceedings, it did not justify setting aside the sale even if the result was a grossly inadequate price. The issue presented by 6 Angels then is whether the error under consideration falls within the scope of processing the nonjudicial foreclosure by the trustee.

The more recent case of Millennium Rock Mortgage, Inc. v. T.D. Service Company (2009) 179 Cal.App.4th 804 held that an error by an auctioneer acting as agent for the trustee in announcing the credit bid duly submitted by the beneficiary, whereby the credit bid was applied to the wrong property, justified setting aside the sale since it resulted in a grossly inadequate price, particularly since no trustee's deed upon sale had been recorded. Footnote 4 of the Millennium Rock decision, in keeping with other cases such as Passanisi v. Merit-McBride Realtors, Inc. (1987) 190 Cal.App.3d 1496, 1503, confirmed that the processing of a credit bid submitted by the trustee falls within the statutory framework at Civil Code § 2924 et seq., since it is the subject of Civil Code § 2924h, such that the error in announcing that credit bid constituted a procedural error in the

foreclosure process that would justify setting aside the sale where a grossly inadequate price resulted.

In the instant case, the appellate court took a conflicting and contrary position, holding that in processing the credit bid duly submitted by the beneficiary, a foreclosure trustee is merely acting as an agent for the beneficiary as in the 6 Angels case such that the error made by the trustee in processing the credit bid was not a procedural error in the course of a foreclosure that in turn would justify setting aside the sale. Trustees and other participants in foreclosure sales need clarification as to whether the processing of a credit bid duly submitted by the foreclosing beneficiary is in fact a procedural part of the nonjudicial foreclosure process. If so, if an error in that process results in a grossly inadequate price, is the trustee therefore entitled to rescind the mistaken sale and re-hold it using the actual credit bid? Otherwise, to quote Millennium Rock, “ ... if the sale is allowed to stand, it will deprive a blameless beneficiary of its entitlement to the full amount of its credit bid and result in a windfall to a purchaser” This Court should grant review to confirm that an error in processing a credit bid duly submitted by the foreclosing beneficiary represents a procedural error in the processing of a nonjudicial foreclosure, and therefore in keeping with the multiple other cases on point, where that error results in a grossly inadequate price the sale may be set aside and a new

sale held based upon the actual credit bid amount submitted by the beneficiary.

BACKGROUND

Defendant T.D. Service Company was the trustee processing a nonjudicial foreclosure sale (CT. p. 34, ln. 20 to p. 35, ln. 5). Pursuant to Civil Code § 2924h(b) the beneficiary submitted to T.D. Service Company as trustee its credit bid for the auction in the amount of \$219,105 which was intended to be announced as the opening bid for the sale (CT. p. 35, lns. 10-14). However, in preparing the materials to be given to the auctioneer to announce the opening credit bid at the sale an error was made in that instead of this opening bid submitted by the beneficiary, the figure conveyed by T.D. as trustee to the auctioneer as the opening credit bid was instead the delinquency amount of \$21,894.17 (CT. p. 35, lns. 15-26). Once this erroneous figure was entered into the computer by the trustee as the credit bit, it was automatically conveyed as the opening bid to the auctioneer, and also automatically went into the sale phone available to persons calling to determine the opening bid figure (CT. p. 35, ln. 27 to p. 36, ln. 2 and p. 83, lns. 9-11). As such, when plaintiff called to confirm the amount of the opening bid, that figure was reported to him rather than the actual credit bid duly submitted by the beneficiary (CT. p. 83, lns. 9-16).

When the sale was held, the auctioneer acting as agent for the trustee pursuant to Civil Code § 2924a announced the mistaken opening credit bid

figure of \$21,894.17 rather than the actual credit bid submitted by the foreclosing beneficiary (CT. p. 35, ln. 27 to p. 36, ln. 2 and p. 84, ln. 4). Plaintiff, the only bidder attending the sale, therefore submitted a bid of \$21,896, which was declared to be the high bid at the sale (CT. p. 36, lns. 4-6 and p. 84, lns. 6-7). Because of this error by the trustee, the actual credit bid of \$219,105 duly submitted by the beneficiary was never announced (CT. p. 35, ln. 10 to p. 36, ln. 6).

When the sale figures were reviewed after the auction, the error was quickly discovered (CT. p. 36, lns. 7-8). Plaintiff was promptly advised that the error had been made and that since it had resulted in an inadequate price of less than a tenth of the credit bid that was actually submitted by the beneficiary, the sale would be rescinded and re-held (CT. p. 36, lns. 8-11 and p. 84, lns. 15-23). T.D. Service Company as trustee declined to issue a trustee's deed upon sale resulting from this auction, and never did so (CT. p. 36, lns. 8-11 and p. 84, lns. 15-23). The \$22,000 cashier's check from plaintiff was promptly returned to him, although he refused to accept it (CT. p. 36, lns. 10-11 and p. 84, lns. 24-5). He filed suit to enforce the sale (CT. p. 1).

In the course of the lawsuit, T.D. Service Company filed a summary judgment motion (CT. pp. 25-67). The court denied the motion, largely relying upon the case of 6 Angels, Inc. v. Stuart-Mortgage, Inc. (2001) 185 Cal.App.4th 1279 (RT. Vol. 1, esp. p. 4, lns. 8-20; CT. p. 101). No notice

of ruling was served by plaintiff or by the court (CT. p. 123, lns. 14-15). Thereafter, when the appellate decision in Millennium Rock, Inc. v. T.D. Service Company (2009) 179 Cal.App.4th 804 was issued, distinguishing the 6 Angels case where the error was made in the course of processing a duly submitted credit bid as part of the foreclosure, T.D. filed a motion for reconsideration (CT. pp. 110-115 and 119-125). The trial court determined that the Millennium Rock case represented new law that was material to this situation, and that reconsideration was therefore appropriate (RT. Vol. 2 and CT. pp. 135-6). It further determined that summary judgment should be granted in favor of defendant T.D. Service Company (RT. Vol. 2 and CT. pp. 132-4). Plaintiff appealed (CT. pp. 139-140), and the court of appeal reversed, holding that a trustee processing the credit bid submitted by the foreclosing beneficiary is merely acting as agent, and therefore 6 Angels rather than Millennium Rock is the appropriate authority.

LEGAL DISCUSSION

I.

THE PROCESSING BY THE TRUSTEE OF THE CREDIT BID
SUBMITTED BY THE FORECLOSING BENEFICIARY IS A
CENTRAL PART OF THE FORECLOSURE PROCESS, SO IF IT IS
HANDLED INCORRECTLY AND RESULTS IN A GROSSLY
INACCURATE PRICE, THE TRUSTEE SHOULD BE JUSTIFIED IN
RESCINDING AND RE-HOLDING THE SALE.

Prior to the Biancalana appellate decision it was well accepted that “while mere inadequacy of price, standing alone, will not justify setting aside a trustee’s sale, gross inadequacy of price coupled with even slight unfairness or irregularity is a sufficient basis for setting the sale aside.” Whitman v. Transtate Title Company (1985) 165 Cal.App.3d 312, 323 (emphasis added). See also: Sargent v. Shumaker (1924) 193 Cal. 122, 129; Winbigler v. Sherman (1917) 175 Cal. 270, 275; Residential Capital v. Cal-Western Reconveyance Corp. (2003) 108 Cal.App.4th 807, 822 (“Only a properly conducted foreclosure sale, free of substantial defects in procedure, creates rights in the high bidder at the sale.”)

As the court held in Angell v. Superior Court (1999) 73 Cal.App.4th 691, 701:

“Thus, ‘[t]he sale is completed for most purposes affecting the rights of the trustor and junior liens when the auctioneer

accepts the final bid, even though the deed is not given until a subsequent time. However, when there is a defect in the foreclosure which is discovered before the trustee's deed is delivered to the purchaser, there is no deed which creates the conclusive presumption of validity in favor of a bona fide purchaser. Therefore, if a defect in the foreclosure process is discovered after the trustee has accepted a bid, but prior to the delivery of the trustee's sale [sic], the trustee can abort the sale, return any funds received to the purchaser, plus interest, and process another foreclosure." (citation.) (emphasis added.)

It is a well established custom and practice in keeping with Civil Code § 2924h(b) as confirmed in cases such as Passanisi v. Merit-McBride Realtors, Inc. (1987) 190 Cal.App. 3d 1496, 1503, that as part of the foreclosure process the credit bid from the foreclosing beneficiary is submitted to the trustee prior to the sale, and then announced by the auctioneer to start the bidding. (See also Millennium Rock Mortgage, Inc. v. T.D. Service Company (2009) 179 Cal.App.4th 804, Ftn. 4.) The acceptance and announcement of this credit bid, authorized by Civil Code § 2924h(b), is an integral part of the sale process. Once that bid is submitted by the beneficiary and accepted by the trustee, it is an effective and irrevocable bid pursuant to Civil Code § 2924h(a) which provides:

“Each and every bid made by a bidder at a trustee's sale

under a power of sale contained in the deed of trust or mortgage shall be deemed to be an irrevocable offer by that bidder to purchase the property being sold by the trustee under the power of sale for the amount of the bid.”

It is this announcement of the credit bid submitted by the beneficiary that is the clerical or ministerial act of the trustee or its auctioneer-agent that brings it within the all-inclusive statutory framework set forth in Civil Code § 2924 et seq. See I.E. Associates v. Safeco Title Insurance Company (1985) 39 Cal.3d 281, 288; Banc of America Leasing & Capital LLC v. 3 Arch Trustee Services, Inc. (2009) 180 Cal.App.4th 1090, 1097; Residential Capital v. Cal-Western Reconveyance Corp. (2003) 108 Cal.App.4th 807, 827; Kachlon v. Markowitz (2008) 168 Cal.App.4th 316, 334. Generally neither a trustee nor an auctioneer actually bids at the sale. The trustee or auctioneer merely announces the amount of the credit bid which is determined and submitted by the beneficiary, and not by the trustee or auctioneer.

At the time it was to be announced at the sale, the actual credit bid in this case was already a final and irrevocable bid pursuant to the statutory framework as contained in Civil Code § 2924h. This credit bid can no more be disregarded than can any other bid submitted for sale (See Bank of Seoul & Trust Co. v. Marcione (1988) 198 Cal.App.3d 113, 118-9). A credit bid that has been submitted to the trustee merely needs to be

announced at the sale, and the failure to recognize and announce it as submitted is a breakdown in the sale process that falls directly within the statutory framework since it specifically concerns the duties of the trustee and auctioneer in processing the nonjudicial foreclosure.

The appellate court in the present case effectively held that the processing of the credit bid by the trustee is outside the scope of the trustee's foreclosure duties. It equated this act instead to that discussed in 6 Angels, Inc. v. Stuart-Mortgage, Inc. (2001) 85 Cal.App.4th 1279. In 6 Angels, the beneficiary intended to bid \$100,000, but its outside servicing agent, not the foreclosure trustee, instead submitted a lower bid of \$10,000 by mistake. The appellate court discussed the significance of this mistake as follows:

“Here, the only potential procedural irregularity identified by appellants is the clerical error that DMI [the beneficiary's servicer] allegedly made when instructing Mortgage Default Service [the trustee] on the opening bid. However, this error, which was wholly under DMI's control and arose solely from DMI's own negligence falls outside the procedural requirements for foreclosure sales described in the statutory scheme and . . . is 'dehors the sale proceedings.' (citation.) Because there is no procedural error here independent of the inadequacy of the price, we conclude that summary

adjudication was properly granted.” 85 Cal.App.4th at 1285. (emphasis added.)

In the 6 Angels case, it was the beneficiary itself through its servicer who made the error by submitting a credit bid in the amount of only \$10,000 when it intended to bid \$100,000. In submitting its bid, the beneficiary was acting like any other bidder at a sale. In submitting its bid, the beneficiary in 6 Angels was not acting as the independent foreclosure trustee required to process the foreclosure pursuant to the detailed statutory framework set forth in Civil Code § 2924 *et seq.* As such, the sole justification for the claim by the appellant in 6 Angels for setting aside the sale was inadequacy of price. As 6 Angels itself held, mere inadequacy of price alone does not justify the setting aside of a foreclosure sale. However, as the 6 Angels court likewise explained, and as other cases including those cited above have long held, such an inadequacy of price coupled with a procedural irregularity directly within the processing of the foreclosure does justify the setting aside and re-holding sale. But the appellate court in the present case held that in processing the beneficiary’s credit bid, a trustee is merely acting as an agent like the servicer in 6 Angels, apparently finding that this processing of the credit bid is somehow outside the scope of the trustee’s statutory duties.

This analysis is contrary to the recent appellate decision in Millennium Rock Mortgage, Inc. v. T.D. Service Company (2009) 179

Cal.App.4th 804, which in turn was the new legal decision that Judge Almquist focused upon in reversing his initial position concerning the propriety of summary judgment in this case. The material circumstances in the present case are analogous to those before the court in the Millennium Rock decision. In both instances the foreclosing beneficiary submitted a proper credit bid to the trustee for the pending sale. In both instances that credit bid was accepted, but at both sales the wrong bid amount was mistakenly announced to open the bidding. In Millennium Rock, the credit bid was for \$382,544.46, but was erroneously announced to be \$51,447.50 (about 13% of the intended bid). In the present case, the credit bid submitted by the beneficiary was \$219,105, but the amount mistakenly announced was \$21,894 (about 10% of the actual credit bid). The appellate court in Millennium Rock expressly distinguished the 6 Angels case by pointing out that in 6 Angels “the beneficiary’s negligent miscalculation of the amount of its credit bid was totally extrinsic to the proper conduct of the sale itself” (179 Cal.App.4th at 811), whereas in Millennium Rock, as in the present case, the error was made by the trustee and auctioneer in announcing that credit bid within the scope of the foreclosure. In holding that it was appropriate to cancel the sale due to this intrinsic error in dealing with the credit bid directly within the foreclosure process, the Millennium Rock court explained:

“Due to the contradictory descriptions of the property,

the auctioneer's mistake went to the heart of the sale.
Moreover, if the sale is allowed to stand, it will
deprive a blameless beneficiary of its entitlement to
the full amount of its credit bid and result in a windfall
to a purchaser which acquired the property for only
one-seventh of the amount that should have been set as
the opening bid had the sale been conducted properly.
Since irregularity, gross inadequacy of the price, and
unfairness were all abundantly present, the sale was
voidable at the option of the trustee. (cite). The trial
court erred in reaching the opposition conclusion.”
(emphasis added, 179 Cal.App.4th at 811).

The appellate court in the present case distinguished Millennium
Rock because in that case the auctioneer made the error by mixing up two
properties for which two different credit bids applied. But this assumes that
the auctioneer who is merely an agent for the trustee should be treated
differently from the trustee itself, and that an auctioneer's error in handling
the credit bid justifies setting aside the sale whereas the trustee's does not.
But that analysis ignores the various cases cited above in which the error
justifying setting aside the sale was an error by the trustee and not the
auctioneer, who is merely the trustee's agent. It further ignores the
distinction in 6 Angels between the outside agent and the trustee, as well as

the public policy discussed above that is the foundation of the Millennium Rock decision.

The appellate court dismissed T.D. Service Company's role as trustee in this matter as being "the beneficiary's agent." But this description misconstrues the relationship of the parties. Cases such as I.E. Associates v. Safeco Title Insurance Company, supra and Hatch v. Collins (1990) 225 Cal.App.3d 1104 point out that a trustee is not an agent or trustee in the normal sense of those words. Rather it is an independent third party whose duties and actions are controlled by the statutory framework of Civil Code § 2924 et seq. Cases such as Heritage Oaks Partners v. First American Title Insurance Company (2007) 155 Cal.App.4th 339, 345 likewise confirm that this is not a regular principal/agency relationship, but rather a dual agency with statutory controls. If plaintiff's theory of *respondeat superior* were correct, then the same relationship would apply to the trustor as well since this is a dual agency. In cases such as Little v. CFS Service Corp. (1987) 188 Cal.App.3d 1354, in which the trustee forgot to mail notice to the trustor and the sale was therefore set aside since the trustee's deed was not yet issued, the result would need to have been contrary because the trustor would likewise be responsible for its dual agent's errors on this same theory of *respondeat superior*. On the contrary, the statutory framework which controls the duties and actions of the trustee are fully laid out in Civil Code § 2924 et seq., and it is that framework that

was mistakenly violated here when the credit bid submitted by the beneficiary pursuant to Civil Code § 2924h was erroneously announced at the auction. Since there was therefore a procedural error by the trustee that directly resulted in a grossly inaccurate price, it was appropriate to set aside and re-hold the sale.


CONCLUSION

The public policy expressed in the Millennium Rock decision was to protect innocent beneficiaries from the impact of an error made by an auctioneer acting on behalf of the independent foreclosure trustee in processing the credit bid if that error results in gross inadequacy of the price paid. This is consistent with the multiple cases holding that an error by the trustee in processing a foreclosure that results in a grossly inaccurate price justifies setting aside and re-holding the sale. It can be distinguished from the 6 Angels case in which the beneficiary through its servicer, and not the trustee, had direct and total control over the error. The Biancalana appellate decision contradicts these holdings by determining that a trustee in processing a credit bid is merely the beneficiary's agent and not an independent trustee bound to comply with the statutory framework at Civil Code § 2924 et seq. The Supreme Court should resolve this conflict and confirm that the processing by the trustee of a duly submitted credit bid is an integral part of the foreclosure process such that an error in that processing that results in a grossly inaccurate price justifies rescinding and

re-holding the sale, particularly if the trustee's deed upon sale has not yet
been recorded.

DATED: December 7, 2011

THE DREYFUSS FIRM
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CERTIFICATION OF NUMBER OF WORDS

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Dated: December 7, 2011

THE DREYFUSS FIRM, PLC



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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

Court of Appeal - Sixth App. Dist.
FILED

OCT 31 2011

MICHAEL J. YERLY, Clerk

DAVID BIANCALANA,
Plaintiff and Appellant,

v.

T.D. SERVICE COMPANY,
Defendant and Respondent.

H035400
(Santa Cruz County Super. Ct. No. CV162804)

By _____
DEPUTY

Plaintiff David Biancalana successfully bid on a piece of real property at a trustee's sale. Defendant trustee T.D. Service Company (TD) subsequently discovered it had erroneously conveyed the delinquency amount (\$21,894.17) to the auctioneer, instead of the correct opening credit bid of \$219,105 submitted by the beneficiary to TD. TD informed Biancalana of the error, declined to issue a trustee's deed on sale and returned his cashier's check. Biancalana retendered the check to TD and demanded it issue the trustee's deed. When it failed to do so, he sued for quiet title, specific performance, declaratory and injunctive relief.

TD's motion for summary judgment was initially denied. After TD successfully moved for reconsideration on the grounds of "new law," the trial court granted TD's motion and entered judgment in its favor.

On appeal, Biancalana argues that the trial court erred in granting TD's motion for summary judgment as there was no irregularity in the foreclosure sale process. Biancalana also argues that the trial court erred in granting TD's motion for reconsideration as the case it determined constituted "new law" (i.e., *Millennium Rock*

Mortgage, Inc. v. T.D. Service Co. (2009) 179 Cal.App.4th 804 (*Millennium Rock*)) did not represent a change in the law, but simply applied existing law to a new fact pattern.

We agree that the trial court erred in granting TD's motion for summary judgment and shall reverse the judgment.¹

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *The foreclosure sale*

On or about July 22, 2008, TD was substituted in as trustee under a deed of trust securing real property located at 434 Winchester Drive in Watsonville, California (the subject property). TD subsequently provided notice that the subject property would be sold at a foreclosure sale scheduled to take place on September 10, 2008. The beneficiary submitted a specified credit bid in the amount of \$219,105 for TD to use as the opening bid for the sale. However, TD erroneously submitted the delinquency amount of \$21,894.17 to the auctioneer as the opening credit bid on the subject property.

While researching upcoming foreclosure sales, Biancalana learned of the scheduled sale of the subject property and, on the day of the sale, called the telephone number TD listed on the sales notice to inquire about the opening bid. The recording advised that the opening bid for the property was \$21,894.17. After checking comparable property values and asking a colleague to physically view the property, Biancalana again called the recording. The amount of the opening bid was unchanged.

Biancalana decided to bid on the property, so he obtained a cashier's check in the amount of \$22,000 and proceeded to the auction site. Having arrived before the scheduled start of the sale, Biancalana discussed this property and other foreclosures with the auctioneer. The auctioneer called TD twice before the start of the sale and spoke to

¹ Based on that finding, we need not and do not consider whether the trial court properly granted reconsideration of its prior order denying TD's motion for summary judgment.

two different employees, both of whom advised him the opening bid for the property was \$21,894.17. The auctioneer was not instructed by TD to make any further bids on the property over and above the opening bid.

The sale commenced and the auctioneer, as instructed, announced that the opening bid on the subject property was \$21,894.17. Biancalana submitted a bid of \$21,896 and, when no other bids were forthcoming, the auctioneer declared this as the high bid. The auctioneer accepted a cashier's check in the amount of \$22,000 from Biancalana.

TD discovered the mistake when it reviewed sales figures from September 10, 2008. On September 11 or 12, 2008, TD notified Biancalana that the opening bid it submitted was incorrect, that the sale was void and that a new foreclosure sale would be scheduled. TD did not issue a trustee's deed upon sale and returned Biancalana's cashier's check. Biancalana rejected the check and sent it back to TD. When TD refused to issue the deed, Biancalana sued TD, among other defendants,² for quiet title, specific performance, declaratory and injunctive relief.

B. TD's motion for summary judgment

TD moved for summary judgment, arguing that the sale was invalid because its error precluded the beneficiary's proper opening bid of \$219,105 from being announced at the auction. This procedural defect, coupled with the inadequate price, meant the sale was improper and voidable. Since the trustee's deed had not been issued, and TD was willing to return Biancalana's cashier's check, TD was entitled to a judgment in its favor.

In his opposition, Biancalana argued there was no procedural irregularity in the sale, and TD could not void the sale merely because it mistakenly submitted the incorrect amount as the beneficiary's opening credit bid. Relying on *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.* (2001) 85 Cal.App.4th 1279 (*6 Angels*), Biancalana

² The parties do not discuss the status of the proceedings with respect to these other defendants, and they are not parties to the appeal.

contended that TD's mistake was committed outside the procedures set forth in the statutory foreclosure scheme and thus the sale could not be voided.

The trial court heard the motion on September 14, 2009, and denied it.

C. TD's motion for reconsideration

TD subsequently moved for reconsideration of its summary judgment motion, citing *Millennium Rock, supra*, 179 Cal.App.4th 804, as representing "a change in the law." According to TD, *Millennium Rock* involved "virtually identical" circumstances and, in that case, the Court of Appeal determined that a foreclosure sale was voidable due to the announcement of an incorrect opening credit bid.

Biancalana argued reconsideration was not warranted because *Millennium Rock* did not represent a change in the law relating to foreclosure sales, but merely applied existing law to a different set of facts. Biancalana also noted that, in *Millennium Rock*, the operative mistake was made by the auctioneer, not the beneficiary's agent, and was thus part of the sales process.

After granting reconsideration, the trial court granted TD's motion for summary judgment, finding "the mistake made by the trustee in causing the credit bid submitted by the foreclosing beneficiary to be reported incorrectly at the foreclosure sale was within the scope of the statutory duties of the foreclosure trustee and directly resulted in a grossly inadequate price received at the sale as compared with the amount of the credit bid submitted by the foreclosing beneficiary. As a result, [Biancalana] is seeking a windfall profit at the expense of the innocent beneficiary and it is therefore appropriate, since no trustee's deed upon sale was recorded, for the sale to be set aside and reheld with the checks submitted by [Biancalana] having been returned to him."

Biancalana timely appealed.

II. DISCUSSION

A. Standard of review

The standard of review for an order granting a motion for summary judgment is de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*)). The trial court's stated reasons for granting summary judgment are not binding on the reviewing court, which reviews the trial court's ruling, not its rationale. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.)

On appeal from a summary judgment, we apply the same three-step process as the trial court. "Because summary judgment is defined by the material allegations in the pleadings, we first look to the pleadings to identify the elements of the causes of action for which relief is sought." (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 159.) We then examine the moving party's motion. A defendant moving for summary judgment has the initial burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (o); *Aguilar, supra*, 25 Cal.4th at p. 850.)

Next, if the moving papers make a prima facie showing that justifies a judgment in the defendant's favor, the burden shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at p. 849; *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003.) Material facts are those that relate to the issues in the case as framed by the pleadings. (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 67.) Where there is no triable issue of material fact, "and the sole remaining issue is one of law, it is the duty of the trial court to determine the issue of law." (*Federal Deposit Ins. Corp. v. Superior Court* (1997) 54 Cal.App.4th 337, 345.)

B. Law regarding foreclosure sales

Civil Code sections 2924 through 2924k “provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust. The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.” (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830.)

Once the trustee’s deed has been delivered, a rebuttable presumption arises that the foreclosure sale has been conducted regularly and properly. (*Moeller v. Lien, supra*, 25 Cal.App.4th at p. 831.) Where the deed has not been transferred, the sale may be challenged on the grounds of procedural irregularity. (*Id.* at pp. 831-832.) It is the burden of the party challenging the trustee’s sale to prove such irregularity. (*Hatch v. Collins* (1990) 225 Cal.App.3d 1104, 1113.) However, “mere inadequacy of price, absent some procedural irregularity that contributed to the inadequacy of price of otherwise injured the trustor, is insufficient to set aside a nonjudicial foreclosure sale.” (*6 Angels, supra*, 85 Cal.App.4th at p. 1284.)

C. There was no procedural irregularity in the foreclosure sale

Here, TD discovered the error prior to issuing the trustee’s deed, and thus the rebuttable presumption of procedural regularity does not apply. The trial court, when it first considered TD’s motion for summary judgment, reviewed the undisputed material facts and found the case was governed by *6 Angels*, and found in favor of Biancalana. On reconsideration, the court decided that the case was governed by *Millennium Rock*, and found in favor of TD. Biancalana argues that the trial court was right the first time and that there was no procedural irregularity in the sale. We agree.

In *6 Angels*, the beneficiary's servicing agent miscalculated the amount owed on the subject property and instructed the trustee to set the opening bid at \$10,000, as opposed to \$100,000. When the trustee opened the bidding at \$10,000, 6 Angels bid \$10,000.01 and was announced as the high bidder. When it learned of the mistake, the servicing agent instructed the trustee to return the funds to 6 Angels and refrain from issuing a trustee's deed. The trial court quieted title in favor of 6 Angels. (*6 Angels, supra*, 85 Cal.App.4th at pp. 1282-1283.)

The Court of Appeal affirmed, finding that "this error, which was wholly under [the agent]'s control and arose solely from [the agent]'s own negligence, falls outside the procedural requirements for foreclosure sales described in the statutory scheme." (*6 Angels, supra*, 85 Cal.App.4th at p. 1285.) Absent some procedural irregularity, mere inadequacy of the purchase price is insufficient to set aside a foreclosure sale. (*Id.* at pp. 1284-1285.)

In *Millennium Rock*, however, the trustee (coincidentally, also TD) was instructed by the beneficiary to submit an opening credit bid of \$382,544.46, including foreclosure fees and costs, to the auctioneer for certain real property located on Arcola Avenue in Sacramento. TD submitted that bid to the auctioneer as instructed. (*Millennium Rock, supra*, 179 Cal.App.4th at p. 807.)

On the day of the sale, a second unrelated property, located on 13th Avenue in Sacramento, was also scheduled to be auctioned and the beneficiary's credit bid for that property was \$51,447.50. The auctioneer, in accordance with his custom and practice, conducted the auctions using a script that contained the trustee sale number, the legal description of the property being auctioned and the property's address. The script prepared for the 13th Avenue auction contained the proper trustee sale number and legal description of the property, but due to a clerical error, listed the address for the Arcola Avenue property, rather than the 13th Avenue property. Consequently, when conducting the sale for the 13th Avenue property, the auctioneer read from the script and announced

that the opening bid for the Arcola Avenue property was \$51,447.50. Millennium Rock Mortgage, Inc., was awarded the property after submitting the high bid of \$51,500. The trial court, relying on the holding in *6 Angels*, enjoined TD from holding a new sale of the Arcola Avenue property. (*Millennium Rock, supra*, 179 Cal.App.4th at pp. 807-808.)

The Court of Appeal reversed, finding that the auctioneer's mistake in the case before it was unlike the mistake of the beneficiary's agent in *6 Angels*. "The auctioneer called out the legal description and credit bid applicable to one property, while announcing the street address of a different property. This created a fatal ambiguity in determining which property was being auctioned. [¶] Due to the contradictory descriptions of the property, the auctioneer's mistake went to the heart of the sale. . . . Since irregularity, gross inadequacy of the price, and unfairness were all abundantly present, the sale was voidable at the option of the trustee." (*Millennium Rock, supra*, 179 Cal.App.4th at p. 811, fns. omitted.)

In the instant case, TD was acting as the beneficiary's agent in preparing the property for the foreclosure sale. It submitted the incorrect credit bid to the auctioneer, and twice confirmed the incorrect bid when the auctioneer called to inquire just prior to the sale. Consequently, the mistake was made by TD in the course and scope of its duty as the beneficiary's agent, not by the auctioneer as in *Millennium Rock*. The auctioneer simply announced the bid submitted by TD. The error was wholly under TD's control and arose solely from its negligence, just like the error that occurred in *6 Angels*. As a result, there was no procedural irregularity in the foreclosure sale and TD's motion for summary judgment should have been denied.

III. DISPOSITION

The judgment and order are reversed. The trial court is directed to vacate its order granting TD's motion for summary judgment and enter a new order denying that motion. Biancalana is entitled to his costs on appeal.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.

Trial Court:	Santa Cruz County Superior Court Superior Court No. CV162804
Trial Judge:	Hon. John Jeffrey Almquist
Attorneys for Plaintiff/Appellant: David Biancalana	Dawson, Passafuime, Bowden & Martinez Kathleen Morgan-Martinez
Attorney for Defendant/Respondent: T.D. Service Company	The Dreyfuss Firm Lawrence J. Dreyfuss

1 PROOF OF SERVICE (By Mail)
2 (CCP Section 1013a(3))

3 I am over the age of 18, and I am not a party to the within action. I am employed by THE
4 DREYFUSS FIRM. PLC, in the County of Orange, at 7700 Irvine Center Drive, Suite 710,
Irvine, CA 92618.

5 On December 8, 2011, I served the attached: **T.D. Service Company's Petition for**
6 **Review** on the interested parties in this action by placing true copies thereof in sealed envelopes,
addressed as follows:

7 **Dawson, Passafuime, Bowden & Martinez**
8 **4665 Scotts Valley Drive**
9 **Scotts Valley, CA 95066**
10 **Fax: 831-438-2812**
11 **Attorneys for Plaintiff**

California Court of Appeals
Sixth Appellate District
333 W. Santa Clara Street, #1060
San Jose, CA 95113

12 **Honorable Jeff Almquist**
13 **Santa Cruz Superior Court**
14 **701 Ocean Street**
15 **Santa Cruz, CA 95060**

16 [X] (By Mail) I placed said envelopes for collection and mailing, following ordinary
17 business practices, at the business offices of THE DREYFUSS FIRM, PLC at the address set
18 forth above, for deposit in the United States Postal Service. I am readily familiar with the
19 practice of THE DREYFUSS FIRM, PLC for collection and processing of correspondence for
20 mailing with the United States Postal Service, and said envelopes will be deposited with the
21 United States Postal Service on said date in the ordinary course of business. I am aware that on
22 motion of the party served, service is presumed invalid if postal cancellation date or postage
23 meter date is more than one day after date of deposit for mailing in affidavit.

24 [] (By Facsimile Transmission) I served the above-described document on the
25 interested parties in this action by sending a true copy thereof by facsimile transmission
26 pursuant to California Rules of Court, Rule 2009(i)2, from facsimile machine number (949)
27 450-0668. The facsimile machine I used complied with California Rules of Court, Rule
28 2003(3), and no error was reported by the machine. Pursuant to Rule 2009(i)4, I caused the
machine to print a transmission record of the transmission

I declare that I am employed in the office of a member of the Bar of this Court at whose
direction the service was made. I declare, under penalty of perjury under the laws of the State
of California, that the above is true and correct.

Executed on December 8, 2011, at Irvine, California.


Roma Klein