Supreme Court Case No. S198562

Appellate Case No. H035400

Santa Cruz Superior Court Case No. CV162804

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

SUPREME COURT
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T. D. SERVICE COMPANY'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Since cases have held that 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?

SUMMARY OF CASE

This case arises from a non-judicial foreclosure of real property located at 434 Winchester Drive, Watsonville, California ("Property"). Defendant T.D. Service Company ("T.D.") was the trustee processing the subject sale. The foreclosing beneficiary submitted its credit bid in the amount of $219,105. In processing this bid in relation to the foreclosure, T.D. as trustee made an error in recording this bid and submitting it to the auctioneer, such that the credit bid mistakenly reported was only $21,894.17, less than 10% of the actual credit bid. The plaintiff, David Biancalana, took advantage of this error by making his own bid of $21,896 which in turn was incorrectly declared to be the high bid at the sale. Prior

to issuing the trustee's deed, T.D. quickly recognized its error and advised Mr. Biancalana that the sale would be set aside and re-held. His check was promptly returned to him. It is T.D.'s position that since this error occurred directly within the foreclosure process and since it resulted in this drastically reduced price as compared with the actual credit bid duly submitted by the beneficiary, and since no trustee's deed was recorded, T.D. as trustee was entitled to void the sale and hold a new auction. Plaintiff sued to enforce the sale.

Since the facts are undisputed and the only issue is the legal question of whether this error was in the course of the foreclosure itself so that the sale could be voided by the trustee, T.D. filed a motion for summary judgment. The court denied the motion, but no notice of ruling was served by plaintiff or the court. With this case still pending, the law concerning this issue was subsequently clarified in the case of Millennium Rock Mortgage, Inc. v. T.D. Service Company (2009) 179 Cal.App.4th 804, which held that an error by the auctioneer acting on behalf of a trustee in processing a credit bid would in fact justify setting aside a foreclosure sale if it resulted in a significantly reduced price and the trustee's deed was not yet delivered. T.D. therefore filed a motion for reconsideration, pointing out this clarification of the law as outlined in the Millennium Rock decision. The trial judge agreed that the new Millennium case was applicable to the circumstances of this sale and therefore entered summary

judgment in favor of defendant T.D. Service. Plaintiff appealed. The Sixth District Court of Appeal reversed, holding that a trustee in processing a credit bid within a nonjudicial foreclosure is merely acting as agent for the beneficiary, and therefore is not entitled to set aside and re-hold the sale even if the error directly resulted in a grossly inadequate price paid.

FACTUAL AND PROCEDURAL SUMMARY

Although the parties disagree as to their legal significance, the material facts underlying this case are undisputed. T.D. Service Company was substituted in as independent trustee to process the non-judicial foreclosure of the real property located at 434 Winchester Drive, Watsonville, California ("Property") (CT p. 34, ln. 20 – p. 35, ln. 5). The foreclosure sale was scheduled to take place on September 10, 2008 (CT p. 35, lns. 6-7).

Pursuant to Civil Code § 2924h(b) the beneficiary submitted to T.D. as trustee its credit bid for the auction in the amount of $219,105 which was intended to be announced as the opening credit bid for the sale (CT p. 35, lns. 10-14). However, in preparing the materials for the auctioneer to announce at the sale, an error was made by T.D. in that instead of crediting this opening bid duly submitted by the beneficiary, the figure recorded by T.D. as trustee and conveyed to its auctioneer as the opening credit bid was instead the current delinquency amount (exclusive of foreclosure costs) of $21,894.17 (CT p. 35, lns. 15-26). Since this figure was conveyed to the

auctioneer as the purported opening credit bid submitted by the beneficiary, it likewise automatically went into the computerized 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). Plaintiff alleges that he in fact called this sale phone and obtained this incorrect figure as the purported opening bid. (CT p. 83, lns. 9-16)

When the sale was held, since the erroneous opening credit bid had been submitted to the auctioneer, he erroneously announced that figure of $21,894.17 as the opening 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 in the amount 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, the actual credit bid of $219,105 submitted by the beneficiary to T.D. was not conveyed to the auctioneer, and was effectively disregarded (CT p. 35, ln. 10 to p. 36, ln. 6).

When the September 10th sale figures were reviewed, the error was quickly discovered (CT p. 36, lns. 7-8). On either September 11 or September 12, 2008, plaintiff was advised by T.D. that this error had been made and that since it resulted in a grossly inadequate price, less than a tenth of the credit bid that was actually submitted by the beneficiary, the sale would be cancelled and reheld (CT p. 36, lns. 8-11 and p. 84, lns. 15-23). T.D. declined to issue a trustee's deed upon sale resulting from the

September 10th auction, and never did so (CT p. 36, lns. 12-13). The $22,000 cashier's check from plaintiff was promptly returned to him, but he in turn rejected it and sent it back to T.D., demanding that the trustee's deed be issued (CT p. 36, lns. 10-11 and p. 84, lns. 24-5). When T.D. refused to comply, plaintiff filed suit (CT p. 1).

Since these facts are undisputed, T.D. filed a summary judgment motion which was heard September 14, 2009 (CT pp. 25-67). The court denied the motion at that time, largely relying upon the case of 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc. (2001) 85 Cal.App.4th 1279 (RT Vol. 1, especially 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, the appellate decision of Millennium Rock Mortgage, Inc. v. T.D. Service Company (2009) 179 Cal.App.4th 804 was published, distinguishing the 6 Angels case since the error concerning a credit bid was made in the course of the processing of the foreclosure rather than by the beneficiary in calculating its own bid (CT pp. 110-115). Based upon this new decision, T.D. filed a motion for reconsideration of the order denying summary judgment (CT pp. 119-125). This motion was heard on March 8, 2010 (RT, Vol. 2). The court determined that the Millennium Rock case represented new law material to this situation and that reconsideration was therefore appropriate (RT Vol. 2 and CT pp. 135-6). In reviewing the undisputed facts, the court determined that summary judgment was in fact appropriate in light of the

Millennium Rock reasoning, and it entered summary judgment in favor of defendant T.D. (RT Vol. 2 and CT pp. 132-4). Plaintiff appealed (CT pp. 139-140). The Sixth Appellate District reversed, largely based upon its holding that

> ". . . 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."

STANDARD OF REVIEW

The granting of summary judgment is subject to *de novo* review to determine whether triable issues of material fact exist and if not, then whether the law supports the judgment based on those undisputed facts. See Wiener v. Southcoast Childcare Centers, Inc. (2004) 32 Cal.4th 1138, 1142; Lonicki v. Sutter Health Central (2008) 43 Cal.4th 201, 206; Buss v. Superior Court (1997) 16 Cal.4th 35, 60. As to the related issue of whether the trial court had jurisdiction to reconsider its initial denial of the summary judgment motion based upon a subsequent change in the law, it appears that appellate courts have reviewed this issue based upon an abuse of discretion

standard. See, for example, International Insurance Company v. Superior Court (1998) 62 Cal.App.4th 784, 788.

ARGUMENT

I.

IN KEEPING WITH MULTIPLE PRIOR DECISIONS, THE SIGNIFICANT PROCEDURAL ERROR COUPLED WITH AN INADEQUATE PRICE PAID JUSTIFIED SETTING ASIDE THE FORECLOSURE SALE, PARTICULARLY SINCE NO TRUSTEE'S DEED WAS RECORDED.

All of plaintiff's causes of action, for quiet title, declaratory relief, specific performance and injunction, are founded upon his claim that the September 10, 2008 foreclosure sale was valid and that he is therefore entitled to receive a trustee's deed upon sale based upon his bid of $21,896. The fundamental issue before this court is therefore whether the trustee was justified in setting aside that sale in light of the trustee's error in processing it since that error directly resulted in this being declared the high bid in disregard of the competing credit bid of $219,105 submitted by the foreclosing beneficiary.

It is well established that California public policy requires that a foreclosure trustee use ". . . all reasonable efforts to secure the best possible or a reasonable price." Kleckner v. Bank of America (1950) 97 Cal.App.2d 30, 33. Multiple cases have held 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; Rauer v. Hertweck (1917) 175 Cal. 278, 280-1; Bock v. Losekamp (1919) 179 Cal. 674, 676; Odell v. Cox (1907) 151 Cal. 70, 74 ("If the inadequacy can be connected with or shown to result from any mistake, accident, surprises, misconduct, fraud, or irregularity, the sale will generally be vacated, unless the complainant was himself in fault, or the right of innocent third parties have become dependent on the sale."); 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."); Melendrez v. D&I Investment, Inc. (2005) 127 Cal.App.4th 1238, 1258.

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.)

Once the trustee's deed is recorded, a conclusive presumption of the validity of the sale in favor of a bona fide purchaser for value takes effect pursuant to Civil Code § 2924(c). There is also a common law presumption that a sale was conducted regularly and fairly (Brown v. Busch (1957) 152 Cal.App.2d 200, 204), but this presumption will be rebutted by substantial evidence of a prejudicial procedural irregularity. Melendrez v. D&I Investment, Inc. (2005) 127 Cal.App.4th 1238, 1258. "Of considerable significance as well is whether a trustee's deed has been prepared and delivered to the buyer." *Ibid.* Since the presumptions are contained within the trustee's deed, they do not take effect until that deed is delivered or recorded. Accordingly, as the Melendrez decision pointed out, multiple decisions have ratified the cancellation of sales in which errors resulted in grossly inadequate prices being paid, so long as the trustee's deed was not yet delivered to a bona fide purchaser.

The Sixth District Court of Appeal distinguished all of these cases, holding instead that the error here was "just like the error that occurred in 6 Angels." In 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc. (2001) 85 Cal.App.4th 1279, the beneficiary's outside servicing agent, and not the foreclosure trustee, intended to bid $100,000, but submitted a lower bid of $10,000 by mistake. The appellate court in 6 Angels 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 the 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 price, we conclude that summary adjudication was properly granted." (emphasis added.)
> 85 Cal.App.4th at 1285.

In the 6 Angels case, it was therefore 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 through its servicer 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 the 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 the other cases cited above have long held, such an inadequacy of price coupled with a procedural irregularity directly within the processing of the foreclosure by the trustee does justify the setting aside of the sale.

This distinction underlied 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 care are similar to those before the appellate court in the Millennium Rock decision. In both instances the foreclosing beneficiary duly submitted a proper credit bid to the trustee for announcement at the pending sale. In both instances the credit bid was accepted, but at both sales the wrong bid amount was mistakenly announced. 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) due to an error by the auctioneer acting on behalf of the trustee. 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) due to an error by the trustee itself.

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 not by the beneficiary outside the sale process but instead by the independent trustee and its auctioneer in announcing that credit bid directly within the scope of the foreclosure. In holding that it was appropriate to cancel the sale due to this intrinsic error within the foreclosure process in dealing with the credit bid, 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).

Accordingly, the Millennium Rock court addressed many of the same issues that were raised by plaintiff in the underlying appeal, and rejected them. It found that since there was a credit bid duly submitted by the beneficiary at seven times the amount of the bid submitted by the plaintiff at the foreclosure sale, "gross inadequacy of the price" was "abundantly present" based upon that fact alone. Likewise, in the present case, the credit bid actually submitted by the foreclosing beneficiary was more than ten times the amount bid by the plaintiff. Using the same analysis as the appellate court in Millennium Rock, such a discrepancy is itself sufficient evidence of gross inadequacy of price. In prior briefing plaintiff argued that there was no proof offered that $21,894 was not a fair price paid since other cases have confirmed foreclosures where less than 10% of the market value was paid. But Millennium Rock confirmed that gross inadequacy of price is present where the error by the trustee directly resulted in acceptance of this much lower bid despite the actual credit bid ten times higher that was submitted by the beneficiary and should have been the opening bid amount at the sale. Contrary to plaintiff's assertion,

by accepting the credit bid for use as the opening bid at the auction, a trustee is not engaged in any secret or nefarious bidding. Rather it is merely complying with the provisions and intent of Civil Code § 2924h. If it were meant to be a secret or private bid as characterized by plaintiff, it would not be made available on the sale phone designated on the Notice of Trustee's Sale or announced as the opening bid at the sale. In this instance the trustee unfortunately mistakenly took down that duly submitted credit bid, and that in turn is why a grossly inadequate price was bid by plaintiff at the sale.

This remedy of setting aside and re-holding the sale where there was an error in the foreclosure process itself that directly resulted in a grossly inadequate price represents the most efficient means of addressing the problem. It avoids unnecessary litigation and best protects the innocent beneficiary since there is no guaranty that the trustee who might otherwise be sued has funds to make the beneficiary whole. Moreover this prompt and reasonable result is solely at the expense of an unwarranted windfall resulting directly from a mistakenly announced opening credit bid that was never intended to begin with. This approach, authorized by the multiple cases cited above, therefore represents a much more efficient and sound means of achieving a just and fair result than the contrary determination set forth in the Biancalana appellate decision.

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.) It is without reasonable dispute that virtually every nonjudicial foreclosure sale processed in California opens with a credit bid submitted beforehand by the foreclosing beneficiary or its servicer and announced by the auctioneer acting on behalf of the trustee. 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 for announcement by the auctioneer acting for the trustee, it is an effective and irrevocable bid pursuant to Civil Code § 2924h(a).

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. 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.

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 could 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. If a beneficiary cannot rely upon the efficacy of its duly submitted credit bid, there would be a total breakdown of this standard foreclosure practice, leading to a more expensive and complex process.

The Biancalana appellate court distinguished Millennium Rock because in that case the auctioneer and not the trustee 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 that is the foundation of the Millennium Rock decision of protecting the innocent beneficiary at the expense of the unintended windfall to a purchaser. Plaintiff has argued that the error justifying setting aside the foreclosure sale must occur at the sale itself as seemingly happened in Millennium Rock. But this argument disregards the fact that a trustee's duties within the statutory framework at Civil Code § 2924 et seq. are not limited to the auction, but rather include the entire processing of the foreclosure from notice of default through issuance of the resulting deed. Other cases such as Little v. CFS Service Corp. (1987) 188 Cal.App.3d 1354 and Angell v. Superior Court (1999) 73 Cal.App.4th 691, 701 authorized setting aside and re-holding the sale where the error by the trustee occurred not at the auction, but rather earlier in processing the foreclosure notices.

In the 6 Angels case, it was the beneficiary itself through its servicer who made the error. In submitting its bid, the beneficiary's servicer 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.* But the Biancalana appellate court 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. The Biancalana appellate court therefore equated T.D.'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, the result would need to have been to the contrary because the trustor would likewise be

responsible for its dual agent's errors on this same theory of *respondeat superior*.

The key distinction between the situation underlying the 6 Angels case that precluded cancellation of the sale from that found in the other cases where such cancellation was permitted was that in the latter cases the error was made by the trustee or its auctioneer-agent in the course of processing the foreclosure. Since that is likewise the situation in the present case, this case falls within the line of cases allowing for cancellation of the mistaken sale, and should be distinguished from the 6 Angels scenario in which the trustee had no such involvement in the error that resulted in the grossly inadequate price. The processing of a duly submitted credit bid pursuant to Civil Code § 2924h is a key function of the trustee within the statutory framework defining its duties. Accordingly where an error is made by the trustee in announcing that credit bid, the trustee should be entitled to rescind and re-hold the sale if a grossly inadequate price resulted from that error and no trustee's deed has been delivered.

II.

THE COURT ACTED WITHIN ITS SOUND DISCRETION IN CONSIDERING AND GRANTING T.D. SERVICE COMPANY'S MOTION FOR RECONSIDERATION OF ITS PRIOR INTERIM RULING DENYING THE SUMMARY JUDGMENT MOTION SINCE IT DETERMINED THERE TO BE AN INTERVENING CHANGE OR CLARIFICATION IN THE LAW.

Code of Civil Procedure § 1008 authorizes a subsequent application for an order contrary to a prior order denying a motion so long as that application is made within ten days of service of written notice of entry of the order, and it is based upon new or different facts, circumstances, or law, and brought before the same judge who made the initial order. In this instance, although the order denying defendant T.D.'s motion for summary judgment was entered in October of 2009, no notice of entry of that order was ever served. As such, the ten day timeframe set forth in CCP § 1008 never expired, and the application for reconsideration submitted to the same judge was timely.

Plaintiff has argued that the motion for reconsideration was unjustified since the Millennium Rock decision purportedly was not a change in the law. The appellate court did not reach this issue. A similar issue was considered in the case of International Insurance Company v.

Superior Court (1998) 62 Cal.App.4th 784. In the International Insurance case, the court held that

> "... when a trial court concludes there has been a change of law that warrants reconsideration of a prior order, it has jurisdiction to consider and change its order. International's contention that a 'change of law' occurs only when the 'controlling rules of law have been altered or clarified [so that] adherence to the previous decision would result in [the defeat of] a just cause' is creative but unnecessarily convoluted and wholly unsupported by any relevant authority." 62 Cal.App.4th at 788.

The Millennium Rock decision was the first case to apply the right of a trustee to void a sale where the trustee's error that resulted in a grossly inadequate price concerned the mistaken processing of a credit bid duly submitted by the foreclosure beneficiary. That is why Judge Almquist interpreted this subsequent appellate decision as new law, justifying a reversal of his original ruling on the summary judgment motion. Judge Almquist agreed that the Millennium Rock decision represented new law in clarifying the impact of an error by a trustee in processing the credit bid. With the guidance provided by the Millennium Rock decision, he reconsidered his initial interim ruling denying the summary judgment motion, and determined instead based upon the undisputed material facts

that judgment was warranted. In Blake v. Ecker (2001) 93 Cal.App.4th 728, 739 (reversed on other grounds), the court confirmed that an appellate decision during the course of a lawsuit may represent a change in the law sufficient to justify jurisdiction for reconsideration under CCP § 1008. Since the motion for reconsideration in this case was timely and in front of the same judge, and since it was based upon new law as set forth in the Millennium Rock appellate decision published after the denial of the motion for summary judgment and prior to the motion for reconsideration, this motion was proper.[1]

CONCLUSION

The public policy expressed in the Millennium Rock decision was to protect an innocent beneficiary from the impact of an error made by an auctioneer acting on behalf of the independent foreclosure trustee in processing a credit bid duly submitted by the beneficiary 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 should be distinguished from the 6 Angels case in which the

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[1] If for any reason this court determines that the Millennium Rock decision was not new law as defined by CCP § 1008, but that summary judgment was warranted as Judge Almquist determined on reconsideration, it should refer the case back to Judge Almquist so that he may make that same determination sua sponte as was suggested in Le Francois v. Goel (2005) 35 Cal. 1094.

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 delivered.

Respectfully submitted,

DATED: March 15, 2012

THE DREYFUSS FIRM
A Professional Law Corporation

By: LAWRENCE J. DREYFUSS
Attorneys for Defendant and Respondent T.D. Service Company

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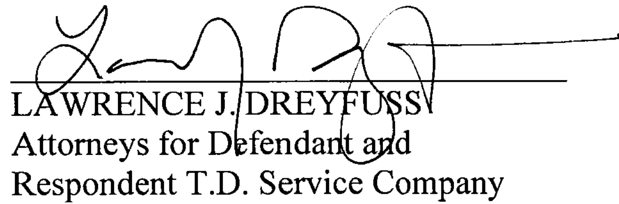
CERTIFICATION OF NUMBER OF WORDS

I hereby certify that this brief consists of approximately 5,380 words counted by the Word word processing program used to generate this brief.

Dated: March 15, 2012

THE DREYFUSS FIRM, PLC



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

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

On March 15, 2012, I served the attached: **T.D. Service Company's Opening Brief on the Merits** on the interested parties in this action by placing true copies thereof in sealed envelopes, addressed as follows:

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

[ ] **(By Facsimile Transmission)** I served the above-described document on the interested parties in this action by sending a true copy thereof by facsimile transmission pursuant to California Rules of Court, Rule 2009(i)2, from facsimile machine number (949) 450-0668. The facsimile machine I used complied with California Rules of Court, Rule 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 March 15, 2012, at Irvine, California.

Roma Klein