

SUPREME COURT
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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

DAVID BIANCALANA'S
ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The auctioneer opened the bidding at a non judicial foreclosure sale and announced the beneficiary's credit bid as directed by the trustee, T.D. Service Company. Respondent David Biancalana placed a higher bid and was awarded the sale. He paid the consideration. T.D. Service Company later claimed that it had made a mistake in the credit bid amount it had given to the auctioneer. Rather than be held responsible to its beneficiary for its mistake, T.D. Service Company wanted to set aside the sale.

A foreclosure sale can be overturned only for a procedural error in the statutory foreclosure sale process, coupled with gross inadequacy of price. *Bank of Seoul & Trust Co. v. Marcione (1988)* 198 Cal.App.3d 113.

Respondent T.D. Services has never identified any procedural error in the statutory foreclosure sale process.

ISSUE

When a trustee makes an error in the processing and announcement of a beneficiary's "credit bid" during foreclosure

proceedings on a deed of trust, and the trustee has not yet issued a trustee's deed to the highest bidder at the foreclosure sale, does the trustee have discretionary authority to set aside the foreclosure sale due to that error.

FACTUAL SUMMARY

David Biancalana (hereinafter Biancalana) successfully bid on a piece of real property located at 434 Winchester Drive in Watsonville, California at a nonjudicial foreclosure sale where T.D. Service Company (hereinafter T.D. Services) was the trustee.

Prior to the sale, the beneficiary provided a specified credit bid in the amount of \$219,105 to T.D. Services to use as the opening bid for the sale. (C.T. page 35, lines 10-14) However T.D. Services erroneously submitted the delinquency amount of \$21,894.17 to the auctioneer as the opening credit bid on the property. (C.T. page 35, lines 15-26)

While researching upcoming foreclosure sales, Biancalana learned of the scheduled sale and on the day of the sale called the telephone number T.D. Services 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. (C.T. page 83, lines 9-16) After

checking comparable property values and asking a colleague to physically view the property, Biancalana called the recording again. The amount of the opening bid was unchanged. (C.T. page 83, lines 9-16)

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. Having arrived before the scheduled start of the sale, Biancalana discussed the property and other foreclosures with the auctioneer. The auctioneer called T.D. Services twice before the start of the sale and spoke to two different employees, both of whom advised him the opening bid for the property was \$21,894.17. (C.T. page 91, lines 15-23) The auctioneer was not instructed by T.D. Services to make any further bids over and above the opening bid.

The sale commenced and the auctioneer, as instructed, announced the opening bid of \$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. (C.T. page 91 lines 18-22; page 84 lines 1-7) The auctioneer accepted the cashier's check from Biancalana. (C.T. page 91, lines 18-22; page 84, lines 1-7)

T.D. Services discovered the mistake when it reviewed its sales figures. (C.T. 35, line 10) A day or two later T.D. Services notified Biancalana that the opening bit submitted was incorrect, that the sale was void and that a new foreclosure sale would be scheduled. (C.T. page 36, lines 8-11; page 84, lines 15-23) T.D. Services did not issue a trustee's deed upon sale and returned Biancalana's cashier's check. (C.T. page 36, lines 12-13) Biancalana rejected the returned check and sent it back to T.D. Services. (C.T. page 36, lines 10-11; page 84, lines 24-25)

PROCEDURAL HISTORY

Biancalana filed suit for quiet title, specific performance, declaratory and injunctive relief. T.D. Services filed a Motion for Summary Judgment. The Superior Court denied T.D. Services' motion on the basis that its internal mistake was outside the statutory foreclosure process and that T.D. Services failed to provide any information on the value of the property. (R.T., Vol. 1, page 3, lines 19-26 and page 4, lines 1-20; C.T. page 10, lines 4-8)

T. D. Services filed a Motion for Reconsideration based on *Millennium Rock Mortgage v. T.D. Service Company*, (3rd Dist., 2009) 179 Cal. App.4th 804. The court granted the Motion for

Reconsideration and immediately granted T.D. Services' Motion for Summary Judgment. (R.T. Vol. 2, page 254, lines 10-14 and page 259, lines 20-25).

Biancalana appealed. The Sixth Appellate District overturned the Superior Court's decision finding that the T.D. Service's error was made in the course and scope of its duty as the beneficiary's agent, wholly under T.D. Service's control and arising solely from its negligence. The Sixth District held that there was no procedural irregularity in the foreclosure sale and that T.D. Service's Motion for Summary Judgment should have been denied.

T.D. Services filed the Petition for Review.

STANDARD OF REVIEW

The orders of the Superior Court are final and appealable and will be reviewed on a de novo basis, as the issues are questions of law.

ARGUMENT

I. PUBLIC POLICY DEMANDS THAT BUYERS ARE ABLE TO RELY ON THE PUBLIC SALE PROCESS

The public policy underlying the comprehensive framework governing foreclosure sales is a concern for swift, efficient, and final sales. *6 Angels v. Stuart-Wright Mortgage (2d Dist. 2001) 85*

Cal.App.4th 1279 , 1287, citing Moeller v. Lien (1994) 25 Cal. App4th 822, 832.

The Legislature dictated that the non judicial foreclosure sale process go forward in a prescribed manner, quickly and efficiently. The non judicial foreclosure process requires approximately 120 days from the notice of default to the conclusion of the public sale. This is a speedy, effective alternative to the judicial foreclosure process which requires a year or more to complete. In addition to requiring the courts' time, judicial foreclosures tie up housing and commercial property leading to inefficient use of community assets and often to dilapidation.

Generally upon completion of the non judicial foreclosure process, the lender receives payment on the loan or the ownership of the property. The trustor is relieved of the debt. The buyer, if there is one, purchases the property he/she desires. This turns the stock of available housing in a community, spurs new lending and real property improvement, and as a result the economy continues to move forward. All of this takes place without the necessity (and protection) of court oversight or intervention.

In order to insure that non judicial foreclosures are fair and lawful, the Legislature designed a detailed, transparent process. The statute provides a predictable, exhaustive framework for all to follow. It protects the rights of the parties involved in any particular foreclosure, encourages bidders to participate in the public sale and allows all to rely on the process. To further the public policy underlying the statute, courts must protect the parties' and the public's reliance on these settled rules and processes.

"In general, third party bidding should be encouraged. . .

Where the foreclosure process itself complies with state law and the other parties to the process have not engaged in fraud or similar unlawful conduct, the court should be especially hesitant to upset third party expectations. This is especially the case where, as here (a mistake by a lender or its agent in bidding) mortgagees can easily protect themselves by employing simple common-sense precautions."

Restatement (Third) of Property (Mortgages) section 8.3; Reporter's Note to cmt c (1997)

When an auctioneer opens the public sale by announcing the property description and then places a credit bid as directed by the trustee, all present rely on that announcement. Neither the auctioneer

nor the prospective buyers have access to information which would allow them to determine whether the announced credit bid is the "true bid" or "correct bid" of the trustee on behalf of the beneficiary.

Properties are often sold at foreclosure sales for less than the market value. Foreclosure sales can be held on second or even third trust deeds. All of these factors affect opening credit bids and the ultimate sale price of the property. There is no clue available to prospective bidders which would allow them to guess whether an opening credit bid is correct or not. And, putting them in a position to have to do so discourages participation in the sale and creates an unpredictable and unreliable sale process.

Unless beneficiaries assume the risk of error in price, a low opening bid at a foreclosure sale will invariably trigger suspicion about the sale's finality, deterring buyers and impairing the efficacy of foreclosure sales. *6 Angels v. Stuart-Wright Mortgage, Inc.* (2001) 85 Cal.App.4th 1279, 1288, *citing Rauer v. Hertwick* (1971) 175 Cal. 278. That is not in anyone's best interest.

David Biancalana proceeded to the foreclosure sale on the Watsonville property check in hand. Neither he nor Kim Stoner, the auctioneer, had any idea that an employee at T.D. Services had made

a clerical error, or that there had been a miscommunication between trustee and beneficiary, or that a secret “accepted” bid or a secret agreement existed. Stoner received the opening bid from T.D. Services, verified it twice, and both he and Biancalana relied on the statutory process to complete the sale. Biancalana left the court house steps knowing nothing of an alleged error. He relied on the statutory process that mandates open, public bidding. That reliance should be upheld.

II. THE SALE TO BIANCALANA COMPLIED WITH THE MANDATORY STATUTORY PROCEDURE

Civil Code section 2924-2924i. provides a "comprehensive legislative scheme" regulating the nonjudicial foreclosure of deeds of trust. *Smith v. Allen* (1968) 68 Cal.2d 93, 95. The statute is not vague or ambiguous. Rather, it sets forth a detailed, specific and exacting process which includes: extensive notice provisions with documents that contain specific language, structure and type set; time limitations; and recording, posting and service requirements. It also mandates a "public sale". The specificity of the requirements allows the procedure to be understood, verified against the written requirements outlined in the statute, and scrutinized by all parties to the foreclosure

process and all potential buyers. This results in trustee deed sales that are open, efficient, fair and reliable.

The foreclosure procedure being statutorily prescribed must be strictly complied with. *Steven M. Whitman v. Transtate Title Company*, (1985) 165 Cal. App.3d 312, 322, *citing System Inv. Corp. Union Bank* (1971) 21 Cal.App.3d 137, 152-153; 55 Am Jur 2d Mortgages at 647, 649.

T.D. Services complied with every requirement.

III. PUBLIC SALE PROCESS SHOULD BE UPHELD

Originally, Civil Code section 2924 was introduced to prevent practices which resulted in manipulation of bidding at trustee sales. *Baron v. Colonial Mortgage Service Co. of California* (1980) 111 Cal.App.3d 316, 322 citing Cf. Assem. Bill No. 1914 (1972 Reg. Sess.) July 20, 1972 . To address this problem the Legislature mandated a public sale process; specific as to the time and place of the sale and manner of bidding. Civ. Code sec. 2924

“These provisions cover every aspect of exercise of the power of sale contained in a deed of trust . . .The property must be sold at public

auction to the highest bidder. The statute specifies the time and place for the sale ... It also specifically sets forth the procedures relating to bidding: The right of the trustee to first qualify bidders, the acceptable forms of cash or cash equivalents, the requirement that the funds be deposited before the sale is concluded, the right of the foreclosing beneficiary to offset his debt (“bid his paper”), the liability of a high bidder who fails to deposit the purchase price, and the liability of persons conspiring to chill bidding (*section 2924h*). The amount of expenses and trustees fees that may be charged is also prescribed. (*sections 2924c, 2924d*)”

I.E. Associates v. Safeco Title Insurance Company (1985) 39 Cal.3d 281, 285-286.

The sale must be held in the county where the property is located, by public auction, Monday through Friday between the hours of 9 a.m. and 5 p.m. *Civ. Code sec. 2924g(a)*

Biancalana purchased the Watsonville property at the public auction in Santa Cruz County on Wednesday, September 10, 2008 at 10 am. (C.T. page 83, lines 1-3 and 84, lines 1-8)

A. THE CODE REQUIRES THAT PROPERTY BE SOLD BY BIDDING AT THE PUBLIC AUCTION

The Superior Court in granting T.D. Service's Motion for Summary Judgment stated, "the code doesn't actually say when a bid becomes a bid..." (R.T. Vol. 2, page 258, lines 12-13) That is incorrect. The code is very specific as to the bidding process. It specifies a time and a place, and it requires a public bid at an auction. (*Civ. Code sec. 2924g and h*)

A public sale, or public auction is a sale where the public has been invited to bid, the bidding is competitive, and the high bid is accepted. *See* 4 ALR2d ("What constitutes a "public sale") at 575-579.

Anyone can attend and bid at the public foreclosure sale, including the trustee and beneficiary. The right of the trustee and beneficiary to bid at the foreclosure sale is exactly the same as that of the general public. *Miller Starr, California Real Estate 3d* at 10:204. Neither the trustee nor the beneficiary chose to attend the sale of the Watsonville property. Instead, T.D. Services directed the auctioneer to place a bid of \$21,894.17 on behalf of the beneficiary.

“Anyone, including the beneficiary under a deed of trust, may bid on property at a trustee’s sale. . . The only distinction between the creditor-beneficiary and any other bidder is that the creditor-beneficiary is entitled to bid on credit up to the amount of the total obligation he is owned.” *Passanisi v. Merit-McBride Realtors* (1987) 190 Cal.App.3d 1496, 1497.

Just like any other bidder, the beneficiary may purchase the property at the sale. The only distinction between the beneficiary and other bidders is that the beneficiary can make a "credit bid" which allows the beneficiary to bid by a credit of the secured debt owed without depositing cash as is required by the other bidders at the sale. *Miller Starr, supra* at 10:204

The beneficiary, or the trustee on its behalf, may bid more or less than the amount owed to it at the public auction. It is not required to bid the full amount of its debt. It can intentionally make an underbid in an amount less than the unpaid balance of the obligation owed to it, perhaps as a strategy to stimulate bidding or as a result of decreasing property values. The beneficiary who bids more than the amount of the balance of the secured debt is required to produce cash

the same as any other bidder for any amount of the bid in excess of the secured debt owed to it. *Miller Starr supra* at 10:204.

B. BIDS AT THE PUBLIC AUCTION ARE IRREVOCABLE

“Each and every bid made by a bidder at a trustee’s sale under a power of sale contained in a 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. Any second or subsequent bid by the same bidder or any other bidder for a higher amount shall be a cancellation of the prior bid.” *Civ. Code sec. 2924h(a)*

The sale is complete when the auctioneer accepts the highest bid and closes the sale. *CA Comm. Code sec. 2328(2)* “For purposes of this subdivision, the trustee’s sale shall be deemed final upon the acceptance of the last and highest bid.” *Civ. Code sec 2924h(c)*

Kim Stoner, the auctioneer at the trustee’s sale of the Watsonville property where Biancalana was the high bidder, announced from his script: “Any bid that you make is irrevocable and cannot be withdrawn. Your bid will be cancelled only by a higher bid or a postponement. The first bid must be higher than the opening bid

and I will sell the property to the last and highest bidder. I will not pronounce a property sold until I have funds in hand.” (C.T. page 93)

The acceptance of the high bid by the auctioneer and tender of the bid amount by the buyer completes the contract for the purchase of the property. The beneficiary was bound by the irrevocable bid placed by T.D. Services on its behalf. Biancalana was the high bidder at the sale; bound by his irrevocable bid.

C. PRIVATE BIDDING IS NOT ALLOWED

The law does not allow for private bidding by anyone, including the beneficiary. T.D. Services, as agent on behalf of the beneficiary, provided the credit bid to the auctioneer prior to the commencement of the sale. The independent auctioneer opened the public auction and announced the credit bid; T.D. Services declined to bid further, although the code allows it to do so, and the auctioneer often receives such direction. (C.T. page 90, lines 24-27; page 91, lines 1-2) The public sale was the beneficiary's opportunity to bid. The code does not authorize another venue for bidding for the trustee or beneficiary.

In this case, T.D. Services is attempting to usurp the public statutory process by claiming that it had accepted a private bid from the beneficiary prior to the public sale. (C.T. page 35, lines 10-14) It claims to have made an error in transmitting this “accepted” amount to the auctioneer. T.D. Services supplies a Bid Information Form as evidence of the beneficiary’s bid. (C.T. page 58) This form does not place a bid on the property, nor does it indicate any “acceptance” of a bid by T.D. Services. It merely shows the total amount the beneficiary intended T.D. Services to bid on the property: \$219,105. This does not qualify as bidding during the statutory process. It occurred behind closed doors at some other time and place than the public sale in Santa Cruz County. T.D. Services could not have "accepted" a bid from the beneficiary, as only the auctioneer can accept bids during the public sale.

D. PUBLIC POLICY REQUIRES A TRANSPARENT, PUBLIC SALE PROCESS

Although, T.D. Services claims an error which resulted in it giving the “incorrect” opening bid to the auctioneer, in fact no one knows what occurred and why. What is being framed as an "error" could have been a planned taxable benefit, or an intended underbid

and a strategy designed to bring more potential buyers to a low end property auction during a falling real estate market. Perhaps T.D. Services' error was neglecting to submit additional bids to the auctioneer on behalf of the beneficiary over the \$21,894.17 initial credit bid. Whatever happened was completely in the control of T.D. Services and is known only to them. It was invisible to both the auctioneer and Biancalana, the bidder at the public sale. In fact, Kim Stoner, the auctioneer, was never informed by T.D. Services that it was disputing the sale or that it found fault with the sale process.

(C.T. page 92, lines 3-6)

In this case, an error was made by T.D. Services. But in another case, the so called "error" could easily be collusion, fraud or price manipulation. There is no way for this to be easily determined, as it takes place outside the public eye. The highly structured statutory nonjudicial foreclosure sale process is reliable because it is open and transparent, and the public eye is the insurance that the Legislature put in place to keep the process correct and fair. To allow a trustee after the close of a public auction that proceeded according to statute to claim a mistake that was invisible to the public and attempt to back out of the sale is to open the door to manipulation and fraud in

a process that the Legislature created to be structured, clear, open and reliable. This is against public policy. It will allow the setting aside of the mandated public process by any trustee or beneficiary dissatisfied with the price obtained at a foreclosure sale by giving them the option of claiming "mistake" to back out of the deal and try for a better price. This would undermine the process, allow fraud and encourage litigation.

It is a cardinal principle of statutory construction that every word, phrase and provision of the statute is to be given meaning and that a statute will not be interpreted in such a way as to render a portion of the statutory language meaningless. *Whitman v. Transtate Title Company* (1985) 165 Cal.App.3d 312. 320. A public sale, is just that, a sale occurring in public, open to competitive bidding. Nowhere in the foreclosure statute is private bidding allowed. In fact, the Legislature's intent in mandating this public process was to disallow private agreements, secret bids and bidding irregularities. Allowing "bids" made outside the public eye into the public sale process is to make the public auction process meaningless.

IV. T.D. SERVICES IS NOT PROTECTED FROM ITS OWN MISTAKES

Courts have enunciated the trustee's duty in the conduct of a sale. "A sale under a power in a mortgage or trust deed must be conducted in strict compliance with the terms of the power. The sale must be conducted fairly, openly, reasonably, and with due diligence and sound discretion to protect the rights of the mortgagor and others..." *Brown v. Busch* (1957) 152 Cal.App.2d 200 citing *Kleckner v. Bank of America* (1950) 97 Cal.App.2d 30, 33.

Originally, this process was mandated to protect the trustor/mortgagor. *Baron v. Colonial Mortgage Service Company* (1980) 111 Cal.App.3d 316, 322. Those protections have come to extend to all that participate in the process. "The duty may thus fairly be said to extend to all participants in the sale, including prospective bidders." *Id* at 324.

Civil Code section 2924 was enacted to protect the trustor by mandating a predictable, transparent system. All participants to the sale, including the buyers, are entitled to the benefits of the protections given by that system. Absent from the code and

legislative intent is the goal of protecting trustees from their own mistakes.

Under the accepted rules of construction, courts have required that a statute be construed with reference to the scheme of which it forms a part, in such a way as to achieve harmony among the parts. *Id* at 322 citing *Prunty v. Bank of America* (1974) 37 Cal.App.3d 430, 436. Civil Code section 2924h, regulating the manner of bidding at trustee sales, is essentially a supplemental enactment to Civil Code section 2924, which regulates the power of sale. *Baron* at 322. In section 2924 the Legislature relieved the trustee from liability for its reliance upon information provided to it in good faith by the beneficiary. The Legislature also provided that the trustee in following the foreclosure procedure as outlined in the code would not be subject to portions of Civil Code sec 1788, et seq, the Rosenthal Fair Debt Collection Practices Act. What the Legislature did not do is relieve the trustee from liability for its own mistakes. It did not define the foreclosure sale process to include every act of the trustee, as argued by T.D. Services. (T.D. Services' Brief, page 17) Certainly if it had wanted to do that, it would have done so, especially given the comprehensive framework it provided in that statute.

T.D. Services has never identified any procedural error in the outlined statutory foreclosure sale process. Instead T.D. Services is trying to redefine the statutory process by adding to it and expanding it beyond the code so that its internal mistake can be included within it. T.D. Services is arguing to be relieved of its liability for its failure to put in place an internal business procedure to insure information from its clients is handled correctly. No business in this State enjoys that kind of legal protection from its own negligence. There is no public policy supporting such a protection, and there is nothing in the code indicating that the Legislature intended trustees to have such immunity.

V. THE ERROR BY T.D. SERVICES WAS MADE OUTSIDE THE FORECLOSURE SALE PROCESS

A nonjudicial foreclosure sale is accompanied by a common law rebuttable presumption that it “was conducted regularly and fairly.” *Melendrez v D&I Investments*, (6th Dist. 2005) 127 Cal. App. 4th 1238, 1258, quoting *Brown v. Busch* (1967) 152 Cal.App.2d. 200, 204. This presumption can be rebutted only by substantial evidence of prejudicial procedural irregularity. *Id.*

T.D. Services argues the sale of 434 Winchester, Watsonville, to David Biancalana should be set aside because its internal “error” was procedural irregularity in the foreclosure sale process. To make this argument, T.D. Services attempts to pull its mistake into the statutory scheme, despite the fact that internal trustee/beneficiary company processes are absent from the process outlined in the code.

The error made by T.D. Services occurred well before the mandated public auction began. As a result of T.D. Services’ internal “error”, it published the incorrect amount in its notices to the public. Biancalana first saw the notice of sale in the Santa Cruz Record. (C.T. 83 page, lines 7-8) As a result of its internal “error”, T.D. Services advertized an opening bid of \$21,894.17 in its phone recording to alert potential bidders to the status of the sale. Prior to the sale, David Biancalana heard that telephone recording. (C.T. page 83, lines 9-16) The auctioneer, Kim Stoner, was given this same opening bid in two telephone calls with T.D. Services before beginning the public auction. (C.T. page 90, lines 19-23 and page 91, lines 15-20) These are internal company processes that occurred before the public auction began. Once the auctioneer called the sale at the assigned date and time, he announced the property description, he

submitted the opening credit bid as directed by T.D. Services, and the public process had begun. The sale proceeded according to statute.

T.D. Services instructed the auctioneer to enter only one bid, a credit bid of \$21,894.17 to open the bidding. This was the only bid placed on behalf of the beneficiary at the trustee's sale. The auctioneer did not ignore or disregard the credit bid. He placed the credit bid that was submitted to him. Biancalana did not take "advantage" of T.D. Services' error. (T.D. Services' Brief, page 1) He had no knowledge of it. Neither did the auctioneer, until he was told by Biancalana months later. (C.T. page 92, lines 3-6)

The beneficiary's "actual credit bid" (T.D. Services' Brief, page 16) of \$219,105 was not "effectively disregarded," as argued by T.D. Services (T.D. Services' Brief, page 4), rather that amount never became a bid. T.D. Services may have disregarded the direction of the beneficiary, but that is an internal matter between those two parties. It may result in a dispute between T.D. Services and the beneficiary, but it is not a procedural error in the statutory process.

A foreclosure sale can be overturned only for a procedural error in the statutory foreclosure sale process, coupled with gross

inadequacy of price. *Bank of Seoul & Trust Co. v. Marcione (1988)*

198 Cal.App.3d 113

There are numerous non judicial foreclosure cases surrounding postponement issues and arising from defects in the statutorily required notices. The notice requirements in the code are detailed and comprehensive, providing a structure which allows the trustor the opportunity to cure the default.

In comparison, the foreclosure sale requirements are brief and simple: the sale must occur at a public auction conducted in the county where the property is located, Monday through Friday between 9 a.m. and 5 p.m. There are few cases on the sale procedure itself.

The arguments from both parties in the present case have revolved around the two appellate court decisions addressing what is considered to be procedural error in the statutory sales process: 6 *Angels v. Stuart-Wright Mortgage, Inc. (2001) 85 Cal.App.4th 1279* and *Millennium Rock v. T.D. Service Company (2009) 179 Cal.App.4th 804.*

6 Angels

In *6 Angels*, the beneficiary's independent loan servicing agent company calculated the credit bid incorrectly and transmitted this

incorrect information to the trustee. The trustee gave the incorrect amount to the auctioneer and the property was sold. The Court found that the beneficiary's servicing agent's mistake fell "outside the procedural requirements for foreclosure sales described in the statutory scheme . . . and is "dehors the sale proceeding." *6 Angels at 1285* Since there was no procedural error, the Court in *6 Angels* upheld the sale.

It is worth noting that the Court in *6 Angels* recognized that the opening credit bid was placed at the public sale, not in the day(s) before when the beneficiary's servicer transmitted the intended opening bid amount to the trustee, which is T.D. Services' position in the present case. "The auctioneer at the sale made an opening bid of \$10,000 on behalf of SWM (the beneficiary). . . ." *6 Angles at 1283* Clearly the credit bid in *6 Angels* occurred at the public auction, exactly as it occurred in the present case.

Both in *6 Angels* and the present case, an incorrect opening bid was given to the auctioneer by an agent of the beneficiary. In both cases, the opening bid was announced and the property sold. The fact that an error occurred before the bid was conveyed to the auctioneer was and is irrelevant to the sale process. T.D. Services' mistake was

outside the statutory process, just like the mistake that occurred in *6 Angels*.

In *6 Angels* and the present case, the statutory process was followed. The only difference between *6 Angels* and the *Biancalana* case is the source of the error. In *6 Angels* it was the beneficiary's servicing agent; in the present case it was the trustee. Both were agents for the beneficiary under their respective deeds of trust. See *Munger v. Moore* (1970) 11 Cal.App. 3d 1

Despite T.D. Service's arguments to the contrary, the trustee has been recognized by the courts as an agent of the beneficiary when acting for it during the foreclosure process as far back as 1937, in *Scott v Security Title Insurance and Guarantee Company* (1937) 9 Cal.2d 606. As an agent for the beneficiary, the trustee's actions are those of its beneficiary, and its mistakes are the mistakes of its beneficiary. *Scott v. Security Title Insurance and Guarantee Company* (1937) 9 Cal.2d 606; *Munger v. Moore* (1970) 11 Cal.App. 3d 1.

The Sixth District in *Biancalana* found that T.D. Services was acting as the beneficiary's agent in preparing for the trustee sale. The mistake T.D. Services made was in the course and scope of its duty

and as the beneficiary's agent. T. D. Services submitted the incorrect amount to the auctioneer and twice confirmed the incorrect bid when the auctioneer called to inquire just before the sale. The mistake was totally under T.D. Service's control and arose solely from its negligence. As the beneficiary's agent, T.D. Services' mistake became the mistake of the beneficiary.

When the agent trustee breaches its duty to its beneficiary, the agent can be held liable. *See* 55 Am Jur 2d Mortgages sec. 699. T.D. Services is attempting to be released from its liability for its lack of due care so that it cannot be held responsible to the beneficiary. The concern expressed by T.D. Services that the trustee may not have the funds to repay its beneficiary for its mistake is irrelevant to the discussion here. (T.D. Services' Brief, page 14) That is a business risk that can be addressed by a beneficiary by requiring its trustees to have adequate capital or error and omissions insurance; it is not a basis for protecting a trustee from liability for its mistakes.

Millennium Rock

While the error in *6 Angels* occurred outside the public foreclosure sale process, the auctioneer's error in *Millennium* occurred during the sale itself. The auctioneer scrambled the information on

two properties he was selling at foreclosure sales. During the public sale he read out loud from a script which contained the address for one property coupled with the APN and credit bid for the other. The Court found that there was an “inherent inconsistency in the auctioneer’s description of the property being offered for sale. . . This created a fatal ambiguity in determining which property was being auctioned.” *Id at 811*. In very basic terms, *Millennium* is a case where the auctioneer probably sold the wrong property. But in fact, no one was sure because as a result of the confusion in the public sale, it was unclear which property was purchased by the buyer.

There is no basis for T.D. Services’ representation that the Biancalana transaction mirrors that in *Millennium*. All of the identification information on the Watsonville property was clear, and Biancalana knew exactly what he was buying.

T.D. Services represents that the error in *Millennium* was made “by the trustee” and auctioneer in announcing that credit bid within the scope of the foreclosure. (T.D. Service's Brief, pages 11 and 12) This is inaccurate. There is nothing in *Millennium* stating that there was an error on the part of the trustee. The mistake was made by the independent auctioneer at the public auction. “The Auctioneer’s Error

Constituted an Irregularity Sufficient to Void the Sale.” *Millennium at 811*.

The mistake in *Millennium* cannot be characterized solely as an incorrect credit bid. This argument was rejected by the *Millennium* court: “The parties characterize the auctioneer’s mistake as simply announcing the wrong opening bid for the Arcola Avenue property. But that description grossly oversimplifies the nature of the error, which was more nuanced and multifaceted.” *Id at 811*. The correct information, including the correct credit bids had been supplied to the auctioneer. The auctioneer switched the information and announced the incorrect information at the public sale.

The issue in *Millennium* was the ambiguity in the statutory public sale caused by the inconsistency in the APN and the street address. “Due to the contradictory descriptions of the property, the auctioneer’s mistake went to the heart of the sale.” *Id at 811* A contract for sale is not formed when there is ambiguity as to what is being sold and purchased. This was the basis of the Court’s decision, not an intent to protect the beneficiary.

Although the Court decided *Millennium* solely by analysis of the statutory foreclosure sale process, *Millennium* is also a contract

case. There could not have been a meeting of the minds required to form a contract in *Millennium* because the parties did not know what property was being auctioned. Was it the property known by street address, or the one designated by APN? Without an agreement on the subject matter of the contract, there can be no contract. This confusion went to the “heart of the sale” and caused the “fatal ambiguity” in the public sale process. *Millennium at 811*. This is clearly an error within the public sale, because a contract for sale of the property was not formed.

These cases demonstrate what is considered by the Courts to be within the foreclosure process, and what is not. The *6 Angels* error, which did not occur during the process outlined in the code, was found to be outside the foreclosure sale process. The Court upheld that sale. The *Millennium* error that occurred during the statutory public sale, causing an ambiguity in the sale itself, was an error within the foreclosure sale process. Therefore the Court went on to analyze the price paid for the property and ultimately set aside the sale.

T.D. Services’ internal mistake in the present case occurred in its offices before the opening bid was announced at the public auction, just like the error in *6 Angels*. There was no mistake by the auctioneer

or confusion or ambiguity in the public sale, as there was in *Millennium*. T.D. Services' error occurred outside the statutory process.

Biancalana is not about processing a credit bid; it is about adhering to a statutory process. None of T.D. Service's internal processes: answering the phone, entering the data into the computer, transferring the sale information to the phone line, preparing the paperwork, sending the information and opening bid to the auctioneer and confirming the credit bid are listed in the code as part of the foreclosure process. If internal trustee or beneficiary business practices, such as these, are added into the statutory process, as being advocated by T.D. Services in this case, what becomes of the transparency and predictability that are the public policy underlying the statutory scheme? It will be gone, and the insurance that the Legislature devised to protect the parties and the public will disappear.

VI. THE TRUSTEE MAY NOT RESCIND THE CONTRACT ON THE BASIS OF UNILATERAL MISTAKE

There is no provision in Civil Code section 2924 for rescission of a foreclosure sale contract except when the buyer fails to provide

good funds. As high bidder at the sale, Biancalana was bound to pay the amount he bid, and the trustee was bound to sell the property for that price.

Biancalana immediately paid the amount bid with a cashier's check and received a receipt. Biancalana could not have returned home and later had the option of backing out of the contract if he discovered he had made a mistake and over paid for the property. Yet that is what T.D. Services is trying to do. T.D. Services claims it has a right to rescind the contract because it made a mistake. But, this contract cannot be rescinded on the basis of unilateral mistake. Rescission of a contract on the basis of a unilateral mistake is unavailable to a party who assumed the risk of the mistake in entering into the contract. This applies to mistakes of trustees. *6 Angels v. Stuart-Wright Mortgage* (2001) 85 Cal.App.4th 1279, 1287 quoting *Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, 1096-1099; *Rest.2d Contracts, sec. 154* rejecting the argument of unilateral mistake to relieve a beneficiary of its error which resulted in an incorrect opening credit be being given to an auctioneer at a foreclosure sale. (See further discussion of *6 Angels, supra* at page 24 *et. seq.*)

VII. THERE WAS NO EVIDENCE THAT THE PRICE PAID FOR THE PROPERTY WAS INADEQUATE

A great disparity between the sales price and the value of the property alone is not sufficient grounds for setting aside a foreclosure sale. *Moeller v. Lien* (1994) 25 Cal. App4th 822, 832.

Adequacy of price only comes into play after the court finds a procedural irregularity in the sale process, *6 Angels at 1285*, citing *Crofoot v. Tarman* (1957) 147 Cal.App.2d 443,446; *Sargent v. Shumaker* (1924) 193 Cal. 122, 129-130.

Because there was no procedural error in the foreclosure process, the Superior Court should not have addressed the adequacy of the price Biancalana paid for the Watsonville property. But it did, despite the fact that T.D. Services provided no evidence on the value of the property. There were no evaluations, appraisals or market analysis. The sole testimony presented was T.D. Services' declaration concerning the amount of the secretly "accepted" beneficiary bid. (C.T. page 35, lines 14) This does not determine the value of this small Watsonville condominium, especially given the deteriorating housing market. This was specifically noted by the Superior Court in

its initial ruling denying T.D. Services' Motion for Summary Judgment. (C.T. page 101, lines 7-8)

Property value and adequacy of price are issues of fact, not of law. Failing to provide undisputed evidence on these issues is a fatal error that should have doomed T.D. Service's motion. But once the court granted the Motion for Reconsideration and reversed its ruling granting T.D. Services' Motion for Summary Judgment, it found that the price Biancalana paid was inadequate.

"The fact that the buyer paid less than the property's fair market value-giving rise to the contention that the consideration was "inadequate" is of no legal consequence. Indeed, it is common knowledge that at forced sales such as a trustee's sale the full potential value of the property being sold is rarely realized." *Melendrez at 1254, citing Horton v. Kyburz (1959) 53 Cal.2d 59, 65; Strutt v. Ontario Sav. & Loan Assn. (1972) 28 Cal. App. 3d. 866,877.*

Low prices in trustee's sales are common. The auctioneer in this case, Kim Stoner, noted it is not uncommon for him to receive a low opening bid from a trustee. (C.T. page 91, lines 5-14) If this had been an exceptionally low opening bid on a valuable piece of property, it is likely that the courthouse steps would have been

crowded. But no one went to the sale except Biancalana. And if no one had bid on the Watsonville property at all, title to the property would have reverted to the beneficiary for the opening bid of \$21,894.17.

There is considerable financial risk involved in purchasing property at a foreclosure sale. The foreclosure sale buyer is buying property "as is", virtually unheard of in California with the exception of probate and trustee foreclosure sales. The prospective buyer is largely bidding blind. The property could have significant structural problems and defects unknown to the buyer. Prices obtained at a trustee's sale will reflect this uncertainty and risk.

The law does not require that the purchaser's consideration be fair market value of the property or anything approaching it. The buyer only has to part with something of value in exchange for the property. *Melendrez, supra at 1252*. "There being some consideration, the law will not attempt to measure the amount thereof." *6 Angels supra at 1288, quoting 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts section 210 at 218-21*.

Although it was not necessary for the Court in *6 Angels* to analyze the adequacy of the price (as the Court found that the mistake

occurred outside the statutory process) the Court noted that 6 Angels' payment of \$10,001 (which was 10% of the amount intended as the opening credit bid of \$100,000) was "ample consideration for the sale." *6 Angels at 1288.*

In *Lancaster Sec. Inv. Corp. v. Kessler, (1958) 159 Cal.App.2d 649*, the Court upheld a foreclosure sale where the buyer paid between 5% and 6% of the market value of the property.

In *Rauer v. Hertweck, (1917) 175 Cal. 278*, the Court upheld a foreclosure sale with a sale amount of between 1% and 2% of the market value.

Biancalana's payment of \$21,896.00 was "something of value" and approximately 10% of the amount intended as the credit bid. Biancalana's purchase price was ample consideration for the sale and adequate under the law.

VIII. THE COURT ERRED IN GRANTING T.D. SERVICES' MOTION FOR RECONSIDERATION BECAUSE THERE WAS NO CHANGE IN THE LAW

California Code of Civil Procedure section 1008 allows any party affected by an order to make application to the same judge or court based upon new or different facts, circumstances or law to

reconsider the matter, and modify, amend or revoke the prior order.

After having its Motion for Summary Judgment denied, Defendant T.D. Services made application to the court for reconsideration of its decision based on change in the law in *Millennium, supra*. However, there had been no change in the law, and T.D. Services' motion should have been denied. The Superior Court even noted as much at the hearing. (R.T., Vol 2. page 258 lines 20-26 and 259, lines 1-2)

Millennium did not change the law; it applied the law to a new set of facts.

CCP 1008 is jurisdictional: The court only has jurisdiction if there is the required change. If the court does not meet the jurisdictional requirements, it acts in excess of its authority. *Gilberd v. AC Transit (1995) 32 Cal.App. 4th 1494* In the present case, the court acted in excess of its authority when it granted T.D. Services' Motion for Reconsideration as there was no change in the law.¹ Since

¹ Respondent cites *International Insurance Company v. Superior Court (1998) 62 Cal.App.4th 784* to support its argument that there was a change in the law in the present case which would provide a basis for the trial court to reconsider its prior decision. However the Court in *International Insurance* only held that a trial court's decision about what is or is not a change in the law, without other compelling facts, does not justify writ relief.

there was no new law, the trial court in the present case exceeded its jurisdictional authority.

CONCLUSION

The purposes of the comprehensive framework regulating the foreclosure sale process are: 1) to provide the beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor; 2) to protect the debtor from wrongful loss of the property; and 3) to ensure that a properly conducted sale is final between the parties. *Moeller, supra, at 830*

Not included in that public policy is protecting beneficiaries or trustees from their mistakes.

The Legislature mandated a detailed statutory scheme regulating nonjudicial foreclosure of properties. What is included in that statutory process is stated in the code. It is open, measurable, transparent and predictable. It is against public policy to allow internal company practices, private deals or secret bids to overtake the public process.

T.D. Services argues that this is not a case of secret bids or agreements, yet it wants a dollar amount never bid at the public auction to be considered the beneficiary's credit bid. Contrary to the

requirement in the code, it wants the public auction to no longer be held in public. If the Court were to adopt T.D. Services' position, a bidder at a foreclosure sale would never know if he/she is participating in a valid auction because there may be a silent, secret credit bid lurking outside the public process. And, it would provide an easy out for a beneficiary or trustee that is unhappy with the proceeds of the sale to later claim there was a "mistake" or a secret bid left on the table. The predictability and reliability that are fundamental to the process would be lost.

In this case, T.D. Services is attempting to be relieved of its liability to its beneficiary for failing to do its job by trying to pull its internal business mistake into the statutory process. That position is not supported in the law. No private sector business in this State has that kind of immunity. To judicially create this exception to the rule would require clear Legislative direction or intent, or a strong public policy in support. Both are lacking here.

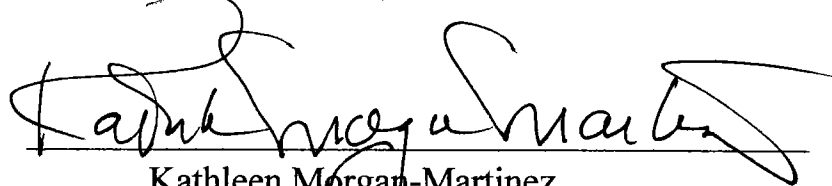
The Legislature developed the nonjudicial foreclosure process to be open, transparent, measurable and reliable. In this way it insures fairness to the parties, encourages public participation in the sale and supports the stability and prosperity of communities. To expand the

statute to include internal business practices of trustees and beneficiaries would be to open the door to fraud, price manipulation and collusion. These outcomes would completely undermine and likely destroy the nonjudicial foreclosure sale process in California.

This case is not about processing a credit bit, but rather about complying with a statute. T.D. Services complied with the requirements of Civil Code section 2924 et. seq. in the foreclosure of the Watsonville property. The auctioneer, Kim Stoner, held a public sale that complied with the both the civil and commercial codes. David Biancalana was the high bidder and paid the consideration due. The Court should uphold the statutory public sale, and Biancalana should be found to be the owner of the Watsonville property.

April 10, 2012

DAWSON, PASSAFUIME, BOWDEN & MARTINEZ

A handwritten signature in black ink, appearing to read 'Kathleen Morgan-Martinez', written over a horizontal line.

Kathleen Morgan-Martinez,
Attorney for Plaintiff/Appellant David Biancalana

CERTIFICATION OF WORD COUNT

I, Kathleen Morgan-Martinez, certify that the word count in Appellant's Response to Opening Brief herein, is 7,838 words.

1 **PROOF OF SERVICE**

2 **[C.C.P. 1013a, 2015.5]**

3 I declare that I am employed in the County of Santa Cruz, California. I am over the age of
4 eighteen years and not a party to this action. My business address is 4665 Scotts Valley Drive, Scotts
5 Valley, California, 95066.

6 On April 11, 2012, I served copies of the following documents in the above captioned action:
7 *David Biacalana's Answer Brief on the Merits* . on the interested party in said case as indicated below:

8 **(BY PERSONAL SERVICE)** I served a copy of said document(s) by hand delivery to the
interested parties at:

9 **(BY FACSIMILE)** I served a copy of said documents(s) via facsimile transmission to the
10 interested parties at:

11 **(BY OVERNIGHT FED EX DELIVERY SERVICE)** I served a copy of said document(s)
to be sent via overnight delivery service to the interested parties listed below:

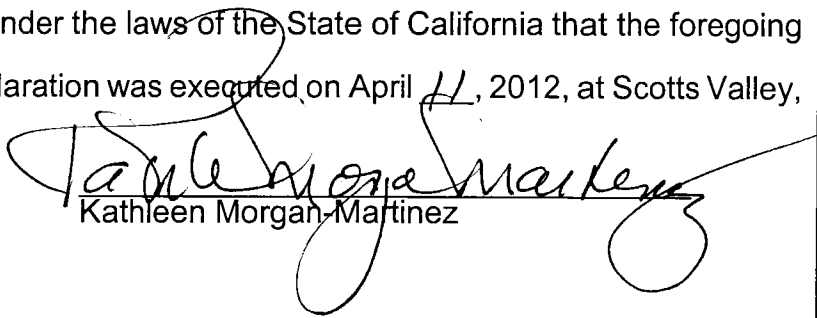
12 **(BY REGULAR MAIL)** I served a copy of said document() to be placed in a United States
13 mail depository, in a sealed envelope with postage fully prepaid, to the below addressee:

14 Lawrence J. Dreyfuss
The Dreyfuss Firm
15 7700 Irvine Center Drive, Suite 710
Irvine, CA 92618

16 Superior Court of Santa Cruz County
17 Honorable Jeff Almquist
701 Ocean Street
18 Santa Cruz, CA 95060

19 California Court of Appeals
Sixth Appellant District
20 333 W. Santa Clara Street, #1060
San Jose, CA 95113
21

22 I declare under penalty of perjury under the laws of the State of California that the foregoing
23 is true and correct and that this declaration was executed on April 11, 2012, at Scotts Valley,
24 California.

25 
Kathleen Morgan-Martinez
26
27
28