Supreme Court Case No. S198562

Appellate Case No. H035400

Santa Cruz Superior Court Case No. CV162804

IN THE

SUPREME COURT OF CALIFORNIA

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DAVID BIANCALANA, Plaintiff and Appellant

v.

T.D. SERVICE COMPANY, Defendant and Respondent

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

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# T. D. SERVICE COMPANY'S REPLY BRIEF ON THE MERITS

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The core of plaintiff's argument in his Answer Brief on the Merits is that defendant T.D. Service Company attempts to create a new measure of immunity for a foreclosure trustee where none is justified. But that analysis misconstrues both defendant T.D. Service Company's argument as well as the extensive line of cases dating back decades upon which T.D.'s argument is based. Plaintiff is certainly correct that the all-inclusive statutory framework at Civil Code § 2924 et seq. is intended to facilitate a swift, efficient and final sale of the nonjudicial foreclosure process. But that is not the exclusive purpose of this statutory framework. It is also intended to achieve the best possible price. Bank of Seoul & Trust Company v. Marcione (1988) 198 Cal.App.3d 113, 119; Kleckner v. Bank of America (1950) 97 Cal.App.2d 30, 33; Hill v. Gibralter Savings & Loan Association (1967) 254 Cal.App.2d 241, 243; System Investment Corp. v. Union Bank (1971) 21 Cal.App.3d 137, 153.

In keeping with these goals of obtaining the best possible price while maintaining a swift and efficient means of completing the foreclosure sale for the benefit of all interested parties, there is a longstanding policy as expressed by Justice Kaufman in Whitman v. Transtate Title Company (1985) 165 Cal.App.3d 312, 323:

> "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."

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; Residential Capital LLC v. Cal-Western Reconveyance Corp. (2003) 108 Cal.App.4th 807, 822; Melendrez v. D & I Investment, Inc. (2005) 127 Cal.App.4th 1238, 1258; Angell v. Superior Court (1999) 73 Cal.App.4th 691, 701, Millennium Rock Mortgage, Inc. v. T.D. Service Company (2009) 179 Cal.App.4th 804, 811, and even the dicta of 6 Angels Inc. v. Stuart-Wright Mortgage, Inc. (2001) 85 Cal.App.4th 1279, 1285 upon which plaintiff's case is totally founded.

So this is not a matter of immunity for the trustee, but rather a well-established, quick and efficient means of correcting a procedural error in the course of processing the nonjudicial foreclosure without need for court intervention. Where the trustee's deed has not yet been issued and therefore the statutory presumptions of Civil Code § 2924(c) are not yet in place, this policy allows for a swift, efficient resolution of the error, that is fully consistent with the goals underlying the nonjudicial foreclosure process itself. Accordingly, if this court reverses the Biancalana appellate decision, rendering it consistent with the other cases involving a procedural error by the trustee which gave rise to a grossly inadequate price, it would not be creating a new form of immunity, but rather would simply be confirming this longstanding policy and eliminating the vague and unexplained exception that was otherwise created by the Sixth District Court of Appeal in Biancalana. A determination that this error by the trustee in processing the credit bid duly submitted by the beneficiary which

in turn resulted in the mistaken acceptance of a bid for $21,896 in lieu of the actual credit bid of $219,105 would be consistent with the multiple other cases cited above confirming that such an error justifies setting aside the sale.

While the foreclosure itself proceeds swiftly, so too does this longstanding prompt and efficient means of addressing an error in the foreclosure process that results in a grossly inadequate price. For example, in the Biancalana scenario, the problem was recognized promptly after the sale and the funds were returned to plaintiff within 48 hours, and well before any trustee's deed would have been issued. Had this lawsuit not been filed, a new notice would have been published and the sale completed within approximately 30 days pursuant to the notice requirements in Civil Code § 2924b. Plaintiff would have had the same opportunity to bid at that sale, albeit based upon the actual credit bid submitted by the beneficiary and not upon the error that gave rise to his windfall.

Plaintiff in the Answer Brief on the Merits attempts to "parade the horribles" by indicating that if sales can be set aside in this manner, persons would be dissuaded from bidding at sales and the system would effectively fall apart. But this argument ignores the fact that this is precisely the system that has been in place for decades with no such disastrous results. The multiple cases cited above have long confirmed that where an error by the trustee results in a grossly inadequate price and the trustee's deed has not yet been issued, the trustee is entitled to set aside the sale and hold a new sale. Surely this possibility that a sale may be set aside has not discouraged the dozens of bidders who line up at foreclosure sale sites daily throughout California. On the contrary, just as the statutory foreclosure procedure provides a balanced benefit to all parties to the foreclosure process, this longstanding policy of allowing the re-holding of a sale that

resulted in a grossly inadequate price due to an error by the trustee benefits the foreclosure bidder among others by providing assurance that the funds bid will promptly be returned rather than tied up in protracted litigation. This ability to rescind a mistaken sale has avoided much litigation over time. By reversing this longstanding trend and creating confusion as to when a sale may be set aside, the Biancalana decision creates unnecessary doubt and confusion that should be avoided. This longstanding procedure works, and there is no reason to reverse or complicate it after all this time.

Contrary to plaintiff's argument, there is no detrimental reliance by a bidder on the sales information made available by the trustee prior to the auction. There can be many reasons that a bidder attending a sale will not end up taking title to the property. Not only are sales often postponed at the auction for a variety of reasons as authorized by Civil Code § 2924f, there are multiple reasons that completed sales may be set aside, including later discovered bankruptcy filings, situations where an agreement to postpone was reached with the borrower (see Garcia v. World Savings FSB (2010) 183 Cal.App.4th 1031) and instances of detrimental reliance by the trustor (see Aceves v. U.S. Bank (2011) 192 Cal.App.4th 218). Moreover, the bidder may simply be outbid by some other participant at the sale. What plaintiff seeks to protect here is simply his windfall constituting the grossly inadequate price that resulted directly from the trustee's error. As the court held in Millennium Rock Mortgage, Inc. v. T.D. Service Company (2009) 179 Cal.App.4th 804, 811:

> "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 who 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."

In plaintiff's Answer Brief on the Merits, he argues that the Millennium Rock court voiced no interest in protecting the rights of the beneficiary at the expense of forfeiting a windfall for the outside bidder. As can be seen from this quote, plaintiff is wrong on that point.

Plaintiff complains that if he had a change of heart after the sale, he would have had no right to cancel his bid and get his money returned. That of course is true since his change of heart does not fall within the sale process itself and therefore would not allow for the setting aside of the sale. This in turn is comparable to the situation found in 6 Angels v. Stuart-Wright Mortgage, Inc. (2001) 85 Cal.App.4th 1279 where the error was made by the servicer for the beneficiary who was therefore not the independent trustee processing the foreclosure. The longstanding rule allowing for the sale to be set aside only applies where the error is made by the trustee or its agent directly within the course of processing the nonjudicial foreclosure. An error or change of heart by an outside entity, whether a bidder or the beneficiary acting as a bidder, does not fall within this policy, and therefore does not justify setting aside the sale.

In light of the multiple cases cited above, the real issue is not whether the trustee should be entitled to set aside a foreclosure sale where an error is made in the course of processing the foreclosure that results in a grossly inadequate price, since there is already ample authority confirming that remedy. The issue is whether the processing of the credit bid submitted by the foreclosing beneficiary is within the trustee's duties in processing the sale. The court in Millennium Rock, supra already

determined that the processing of the credit bid falls within those duties in its statement at Footnote 4 that

> "Section 2924h, subdivision (b) grants to the beneficiary the right to enter a credit bid for 'the total amount due the beneficiary including the trustee's fees and expenses.' Prior to the sale, JP Morgan instructed the trustee to enter such a credit bid for the Arcola Avenue property."

Accordingly, as discussed in the Millennium Rock quote cited earlier, that court confirmed that a sale may be set aside in order to protect the blameless beneficiary's entitlement to the full amount of that credit bid. See also Passanisi v. Merit-McBride Realtors, Inc. (1987) 190 Cal.App.3d 1496, 1503. Plaintiff argues that the statutory framework does not discuss in detail the manner in which the credit bid is to be processed. But what would be the point of including a reference to the ability of the beneficiary to credit bid in Civil Code § 2924h if the legislature did not intend that this credit bid be given full force and effect? It would be absurd to interpret this provision to mean that a beneficiary has the right to submit a credit bid but that the trustee is entitled to ignore it.

The statutory framework sets out various requirements for the nonjudicial foreclosure to be processed by the trustee, but does not attempt to describe every detail of each task to make that procedure effective. It is understood that the mailings require postage to be affixed even though that requirement is not specifically spelled out. The obligation to post notices does not describe how those notices need to be affixed to the property. As can be seen in the case of Bank of Seoul & Trust Company v. Marcione (1988) 198 Cal.App.3d 113, 118-119 duties associated with the foreclosure process are presumed to be incorporated into that process. In Bank of Seoul the trustee, through its auctioneer, was obligated to make sure that a

third party bidder understood how to bid so that the best possible bid price would be obtained, yet no such requirement is expressly spelled out in statutory framework which merely calls upon the trustee to accept bids that are made.

Likewise, in virtually every foreclosure processed in California the foreclosing beneficiary submits a credit bid that will be announced by the trustee through its auctioneer as the opening bid at the sale. Technically Civil Code § 2924h does not even describe how the auction is to be initiated, so it is a matter of custom as implied by the statute that the sale opens with the credit bid submitted by the beneficiary. If, as in the present action, an error is made by the trustee directly within the processing of the foreclosure whereby that credit bid is not given its full force and effect, this is precisely the type of error on the part of the trustee in processing the nonjudicial foreclosure that justifies setting aside the sale where, as here, the error results in a grossly inadequate price. As the Millennium Rock court held, this bidding process initiated by the beneficiary's credit bid goes to the very heart of the foreclosure process.[1] Plaintiff argues that no error in the foreclosure process has been identified by the trustee in this instance. But precisely this error in processing the credit bid has been described in detail throughout this litigation, and plaintiff's argument in this regard would only make sense if the statute were interpreted as intending that credit bids duly submitted by the beneficiary may simply be ignored. Such an analysis is directly contrary to the statement above from Millennium Rock that a blameless beneficiary should not be deprived of its entitlement to the full amount of its credit bid.

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[1] ". . . the auctioneer's mistake went to the heart of the sale." (179 Cal.App.4th at 811).

Plaintiff attempts to distinguish this case from Millennium Rock because in Millennium Rock the error was made by the auctioneer and not the trustee whereas it was the trustee who made the error in the present case. The Biancalana court of appeal in distinguishing this case from Millennium Rock likewise mistakenly relied upon this purported distinction between the auctioneer and the trustee. Yet this purported distinction is itself without basis. The statutory framework at Civil Code § 2924, and specifically § 2924h which describes the auction itself, does not speak of duties of an auctioneer. It merely provides at Civil Code § 2924a that the trustee may make use of an agent in processing the foreclosure, and this could include an auctioneer. But the duties in processing the entire foreclosure are ultimately the duties of the trustee. In Millennium Rock, the error justified setting aside the sale not because it was committed by the auctioneer, but rather because it represented a mistake made directly within the processing of the nonjudicial foreclosure. As such, it was ultimately a breach of the responsibility of the trustee. In most of the various cases identified above which confirm the longstanding policy that a sale may be set aside where an error is made in the processing of the nonjudicial foreclosure that results in a grossly inadequate price, the error was made by the trustee and not by an auctioneer acting as agent for the trustee.

Similarly, plaintiff as well as the Biancalana appellate court take the position that the error must occur at the foreclosure sale itself and not earlier in the process, and they purport to rely upon the Millennium Rock decision for this conclusion. Yet this analysis misstates even the factual scenario in Millennium Rock. In that case, the error did not occur at the sale itself. Rather, in its factual background section the Millennium Rock court pointed out that the auctioneer in that case makes use of a script that he prepares prior to the sales and that includes information such as the

trustee's sale number, the legal description of the property, the property address, and the amount of the credit bid submitted by the foreclosing beneficiary. As that factual background further explained, the auctioneer did not mix up his scripts at the sale, but rather when he created the scripts prior to the sales he transposed the credit bid amounts such that the credit bid submitted for the Arcola Avenue address was included within the 13th Avenue script rather than that actually submitted for the 13th Avenue address. Accordingly, when the auctioneer announced the credit bid to open the bidding for the 13th Avenue property, as a result of the mistake in the script that he earlier prepared, he called out the wrong address and therefore the credit bid did not match the property for which it was being announced. So just as in the present situation, this was not an error made at the foreclosure sale, but rather an error made in the preparation of the documentation intended to be used on behalf of the trustee at the sale concerning the announcement of the credit bid duly submitted by the foreclosing beneficiary.

Unlike the beneficiary in 6 Angels, the blameless beneficiaries both in Millennium Rock and in Biancalana duly submitted the credit bids intended to open the bidding. But the trustee or its auctioneer agent wrote down the wrong number for the duly submitted credit bid, and a grossly inadequate price directly resulted. The distinction between 6 Angels that precludes setting aside the sale, and the multiple other cases including Millennium Rock that allow the sale to be re-held is not the timing of the error or whether it was committed by the auctioneer as opposed to the trustee. Rather the issue is whether the error occurred within the course of the nonjudicial foreclosure as processed by the trustee. In 6 Angels the error was made by the beneficiary's outside servicer and therefore was not within the foreclosure process. In Biancalana as in Millennium Rock and

the various other cases cited, the error was made by the independent trustee directly within the processing of the foreclosure in relation to the duly submitted credit bid. Therefore, in order to protect the blameless beneficiary and to avoid the otherwise resulting grossly inadequate price, the trustee was fully justified in setting the sale aside with the intent of re-publishing the notice of trustee's sale and re-holding the sale based upon the actual credit bid submitted by the beneficiary.

Plaintiff argues that T.D. complied with everything set forth in the statutory framework. This is simply not true. It caused to be announced a mistaken opening credit bid pursuant to Civil Code § 2924h as $21,894.17, the reinstatement amount, when the actual credit bid duly submitted by the beneficiary was $219,105. That was a critical error that harmed the innocent beneficiary and directly resulted in that grossly inadequate price so as to justify re-holding the sale. The credit bid submitted by the beneficiary pursuant to Civil Code § 2924h is by its nature the opening bid for the foreclosure auction. Such a duly submitted credit bid cannot be ignored anymore than any other bid. So where an error is made in the processing of that credit bid, it is essential that the trustee be entitled to protect the blameless beneficiary's interest by re-holding the sale and obtaining the highest possible price for the benefit of all parties to the foreclosure, including the trustee who may otherwise be subject to resulting tax consequences.

Plaintiff argues that a beneficiary is entitled to bid less than the full amount of its debt. Of course that is true. That is precisely what is deemed to have occurred in 6 Angels. There may be many reasons for a beneficiary not to make a full credit bid. But the difference between the 6 Angels scenario and the present situation is that in 6 Angels the beneficiary through its servicer in fact made a bid less than the amount of its debt. In the

present case the beneficiary intended to have the bidding opened at $219,105 and duly submitted its credit bid in that amount. In 6 Angels the beneficiary was deemed to be bound by the bid that it submitted. By contrast in the present case plaintiff argues that the beneficiary should be bound by a bid that it never made. While it is certainly understandable that plaintiff would like to gain the benefit of the windfall that he achieved, there is no possible justification for deeming the beneficiary to be bound by a bid that it never made to begin with. As the 6 Angels court stated,

> "Here, the only potential procedural irregularity identified by appellants is the clerical error that [the servicer] allegedly made when instructing [the trustee] on the opening bid. However, this error, which was wholly under [the servicer's] control and arose solely from [the servicer's] own negligence, falls outside the procedural requirements for foreclosure sales described in the statutory scheme, and, like the secretary's error in Crofoot, is 'dehors the sale proceedings.' (Crofoot v. Tarman, supra 147 Cal.App.2d at p. 447.) Because there is no procedural error here independent of the inadequacy of price, we conclude that summary adjudication was properly granted."

Precisely the opposite situation exists in the present case. It was not the beneficiary or its outside servicer who made the error such that the error was outside the procedural requirements for the foreclosure sale. The beneficiary made no such error whatsoever. It was the trustee acting directly within the statutory requirements of processing the foreclosure who made the error. So by implication from 6 Angels itself, since the circumstances were opposite, so should be the result.

Plaintiff argues that the beneficiary's bid is irrevocable, and 6 Angels confirms that policy. But such a bid should be irrevocable only if the beneficiary actually makes it. Where, as here, the trustee errs in logging in and announcing the opening bid, there is no reasonable rationale for binding the beneficiary to a bid it never made to begin with. Plaintiff argues that "what happened was completely in the control of T.D. Services." That statement is undisputed. It is precisely because the error was completely within the control of the trustee and therefore within the scope of the processing of the foreclosure, as contrasted with an error made by the beneficiary's servicer outside the scope of the foreclosure, that brings into play the policy allowing the sale to be set aside where that error by the trustee directly results in gross inadequacy of price.

On appeal plaintiff questions whether the error as described in the underlying motion is truly what occurred. But this was not an issue plaintiff raised in the trial court. Plaintiff never disputed that the trustee logged in incorrectly the credit bid that was actually submitted by the beneficiary. Plaintiff's argument at the time was that the beneficiary should be bound by the opening bid as announced regardless of whether it matched the actual credit bid submitted by the beneficiary. This new argument is therefore not timely, and should be disregarded. But this is not to say that in an appropriate situation a bidder lacks standing to contest whether an error was been made and therefore whether the sale may be set aside. As discussed above, where an error is made by the trustee in processing the foreclosure and that error directly results in a grossly inadequate price, in that circumstance the sale can be set aside and re-held. But if the bidder or some other affected party seeks to argue that one of these elements is lacking such as whether the error was made by the trustee in processing the foreclosure, or whether it directly resulted in the grossly inadequate price,

there is nothing to prevent it from filing an action seeking such a determination. That was the case in 6 Angels where the court found that the error was not made in the course of processing the foreclosure. It was likewise the situation in Millennium Rock where the court found there was such an error in processing the credit bid. But in this instance plaintiff offered no evidence to show that the error was not as described such that the trustee misrecorded the amount of the credit bid duly submitted by the beneficiary. Summary judgment was therefore appropriate.

Plaintiff further argues that there was not sufficient evidence here of an inadequate price since in some cases courts have found that the price paid was adequate even where it represented a small percentage of the fair market value of the property being foreclosed. But this issue was directly addressed by the court in Millennium Rock and it goes to the very concept of an error in announcing the actual credit bid submitted by the foreclosing beneficiary. As the Millennium Rock court pointed out,

> "There is no dispute that Millennium's accepted bid of $51,500 constituted only one-seventh of the opening credit bid that should have been announced for the Arcola Avenue Property. Thus, gross inadequacy of the price has been established."

The circumstances in the present case are even more extreme. Here, the bid mistakenly announced to open the sale was not merely one-seventh the amount of the credit bid submitted, but was less than one-tenth that amount. In this situation, as the Millennium Rock court confirmed, the issue is not whether $21,894 in and of itself would represent a legitimate bid, but rather whether the bid should be deemed grossly inadequate when contrasted with the actual credit bid of ten times that amount that was duly submitted by the beneficiary but mistakenly ignored by the trustee. As the

Millennium Rock case confirmed, such a discrepancy in and of itself represents "abundant" evidence of the gross inadequacy of the price paid.

Plaintiff also argues that this is a "contract case" which precludes rescission of the contract based upon unilateral mistake. But plaintiff's assumption here is misplaced. Under the statute of frauds, a contract for the sale of real property does not exist until it is embodied in writing and signed by the party against whom it is to be enforced. In the context of a foreclosure, such a writing is embodied in the trustee's deed upon sale. Not only might such a deed be viewed under certain circumstances as a contract, but as a matter of law it contains certain statutory presumptions that may be relied upon by a bona fide purchaser for value. See Civil Code § 2924(c). It is precisely for this reason that courts are less likely to allow a sale to be set aside once the trustee's deed has been recorded. But in the absence of a trustee's deed no such "contract" has been executed by the trustee. No trustee's deed was delivered in the present case. The rescission and re-holding of the sale is not based upon a unilateral mistake or other theory founded in basic contract law. Rather it arises from the longstanding policy discussed above that in the context of nonjudicial foreclosure a sale may be set aside if an error by the trustee in processing that foreclosure directly resulted in a gross inadequacy of price.

The Biancalana appellate decision represents an unjustified and unnecessary departure from this well-established and effective policy. It should therefore be reversed and this court should thereby confirm that an error by the trustee in processing and announcing the opening credit bid duly submitted by the foreclosing beneficiary justifies the setting aside and re-holding of the foreclosure sale in the event that error directly results in a

grossly inadequate price at the sale, particularly where, as here, the trustee's deed has not yet been issued.

Respectfully submitted,

DATED: May 1, 2012

THE DREYFUSS FIRM
A Professional Law Corporation

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

1014-2312

## CERTIFICATION OF NUMBER OF WORDS

I hereby certify that this brief consists of approximately 4,524 words counted by the Word word processing program used to generate this brief.

Dated: May 1, 2012

THE DREYFUSS FIRM, PLC

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

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 May 1, 2012, I served the attached: **T.D. Service Company's Reply Brief on the Merits** on the interested parties in this action by placing true copies thereof in sealed envelopes, addressed as follows:

**Dawson, Passafuime, Bowden & Martinez**
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**Honorable Jeff Almquist**
**Santa Cruz Superior Court**
**701 Ocean Street**
**Santa Cruz, CA 95060**

[ 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 May 1, 2012, at Irvine, California.

Roma Klein