

LIU, J.

SUPREME COURT
FILED

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Deputy

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

T. D. SERVICE COMPANY'S REPLY TO ANSWER TO
PETITION FOR REVIEW

Lawrence J. Dreyfuss (Bar No. 76277)
The Dreyfuss Firm, PLC
7700 Irvine Center Drive, Suite 710
Irvine, California 92618
(949) 727-0977

Attorneys for Defendant and Respondent
T. D. Service Company

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THE BIANCALANA APPELLATE DECISION CREATES SERIOUS
CONFUSION BY CONFLICTING DIRECTLY WITH THE HOLDINGS
OF MULTIPLE PRE-EXISTING REPORTED DECISIONS.

The arguments raised by Appellant in his Answer to the Petition for Review demonstrates the inconsistency of the Biancalana decision compared with other pre-existing reported cases, and further demonstrates an underlying flaw in thinking central to the Biancalana decision. As Appellant confirms at page 5 of his Answer, “Neither 6 Angels¹ nor Millennium Rock² changed the law as stated in Bank of Seoul³.” All of those cases confirmed that if an error is made by the trustee in processing a nonjudicial foreclosure, and that error results in a grossly inadequate price being paid, the sale may be set aside and re-held. 6 Angels further pointed out that if the error is made not by the trustee, but rather by a third party, in that case the beneficiary’s loan servicer, it does not satisfy this requirement that there be an error in the course of processing the foreclosure itself. So Appellant is absolutely correct that all of these cases were consistent as were the many other cases cited in Respondent’s Petition. But the Sixth Appellate District’s Biancalana decision does not follow this pattern, and its holding is in fact totally opposite the holdings of these other cases.

As Appellant acknowledges, Respondent T.D. Service Company in this instance was the trustee processing the nonjudicial foreclosure, and not outside the scope of the foreclosure such as the servicing agent in 6 Angels. Further, as Appellant acknowledges at page 4 of his Answer, the error that

¹ 6 Angels, Inc. v. Stuart-Mortgage, Inc. (2001) 85 Cal.App.4th 1279

² Millennium Rock Mortgage, Inc. v. T.D. Service Company (2009) 179 Cal.App.4th 804

³ Bank of Seoul & Trust Company v. Marcione (1988) 198 Cal.App.3d 113

was made here “was wholly under T.D. Service’s control . . .” in its capacity as trustee. As such, the error was directly in the course of processing the nonjudicial foreclosure and therefore is in keeping with the circumstances underlying the decisions in Millennium Rock, Bank of Seoul, and the other such cases involving errors by the trustee, as distinguished from 6 Angels in which the error was not made by the trustee but rather was outside the scope of the foreclosure.

In addition, Appellant at pages 3 and 4 of his Answer makes the same erroneous argument that his counsel made on rebuttal at the hearing of the appeal. Specifically, Appellant takes the position that in order to justify relief, the error must have occurred at the sale itself since in the Bank of Seoul case and in Millennium Rock the error happened to manifest itself at the auction sale. That is likewise a distinction that the Biancalana appellate court seemed to make. But it ignores the fact that the trustee’s all-inclusive duties pursuant to the statutory framework at Civil Code § 2924 et seq. are not merely to hold the auction sale, but rather to process the entire nonjudicial foreclosure from processing the notice of default through issuance of the trustee’s deed. Although in several cases, including Bank of Seoul, the error occurred at the sale itself, in actuality the error justifies setting aside the sale if it occurs anywhere within the foreclosure process. In Millennium Rock the error was actually made prior to the foreclosure when the auctioneer misrecorded the credit bid information that he prepared for subsequent use at the foreclosure sale. 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 sale itself, but rather earlier in processing the foreclosure notices. As the Angell court explained:

“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." (emphasis added).

So an error by the trustee anywhere in the foreclosure process, and not merely at the auction sale, will justify setting aside the sale if the trustee's deed has not yet been recorded and if the error results in a grossly inadequate price. Yet again this line of cases is directly contradicted by the Biancalana decision which improperly distinguished Millennium Rock which involved an error that manifested itself at the sale from the current situation because here the error was made by the trustee in taking down the credit bid had duly been submitted to the trustee by the beneficiary pursuant to Civil Code § 2924h(b). As discussed in the Petition for Review, it is a well established custom and practice in keeping with this statutory provision and as confirmed in cases such as Passanisi v. Merit-McBride Realtor's Inc. (1987) 190 Cal.App.3d 1496, 1503 and Millennium Rock Mortgage, Inc. v. T.D. Service Company supra at footnote 4, that the submission of a credit bid from the foreclosing beneficiary prior to the sale, to be announced by the auctioneer to start the bidding, is an integral part of the sale process. As such, in accepting that credit bid and using it to start the bidding at the auction, the trustee is not engaged in any secret or nefarious bidding as Appellant implies, but rather is merely complying with the provisions in Civil Code § 2924h in the course of processing the

nonjudicial foreclosure. If it were intended as a secret or private bid as characterized by Appellant, it would not be made available on the sale phones usually designated on the Notice of Trustee's Sale or announced as the opening bid at the foreclosure auction.

The situation in the Biancalana case did not involve a secret or private process, but rather the usual submission of a credit bid by the foreclosing beneficiary as occurs in virtually every nonjudicial foreclosure in California. Unfortunately in this particular instance the trustee, acting fully within that capacity in processing the nonjudicial foreclosure, took down the bid incorrectly and thereby made an error directly within its duties in processing the foreclosure, which in turn resulted in a grossly inadequate bid. In keeping with the vast preexisting line of cases cited above including Millennium Rock, Bank of Seoul, Little v. CFS, and Angell v. Superior Court, as well as Whitman v. Transstate Title Company (1985) 165 Cal.App.3d 312, 323; Winbigler v. Sherman (1917) 175 Cal. 270, 275, Sargent v. Shumaker (1924) 193 Cal. 122, and Residential Capital v. Cal-Western Reconveyance Corp. (2003) 108 Cal.App.4th 807, 822, it was therefore appropriate for Respondent as trustee to rescind the erroneous sale which resulted in the inadequate price and to re-hold the sale so as to avoid the effects of that error. The Biancalana decision takes the totally opposite position and thereby creates unjustified confusion by contradicting directly these pre-existing decisions. While as noted above “(n)either 6 Angels nor Millennium Rock changed the law as stated in Bank of Seoul,” Biancalana itself directly does so.

It is respectfully suggested that this Supreme Court resolve this confusion by hearing the Biancalana case so as to reiterate and clarify that an error made by a foreclosure trustee anywhere in processing the nonjudicial foreclosure, including in processing the credit bid duly

submitted by the beneficiary pursuant to Civil Code § 2924h(b), which in turn results in a grossly inadequate price, justifies setting aside the erroneous sale, particularly where the trustee's deed has not yet been recorded. Particularly during this time of expanded foreclosure activity, unless and until this point is clarified, there will be increased litigation and ongoing confusion concerning when a sale may be rescinded and reheld in this context.

DATED: December 30, 2011

Respectfully submitted,

THE DREYFUSS FIRM
A Professional Law Corporation



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

1014-2312

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

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

6 On December 30, 2011, I served the attached: **T.D. Service Company's Reply to
Answer to Petition for Review** on the interested parties in this action by placing true copies
7 thereof in sealed envelopes, addressed as follows:

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

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

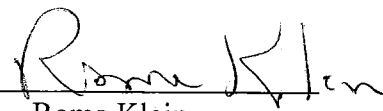
13 **Honorable Jeff Almquist**
14 **Santa Cruz Superior Court**
15 **701 Ocean Street**
16 **Santa Cruz, CA 95060**

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

25 **(By Facsimile Transmission)** I served the above-described document on the
26 interested parties in this action by sending a true copy thereof by facsimile transmission
27 pursuant to California Rules of Court, Rule 2009(i)2, from facsimile machine number (949)
28 450-0668. 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 December 30, 2011, at Irvine, California.


Roma Klein