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*Biancalana v. T.D. Serv. Co.*

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*Biancalana v. T.D. Serv. Co.* (2013) 56 C4th 807

In *Biancalana v. T.D. Serv. Co.* (2013) 56 C4th 807, the trustee under a deed of trust mistakenly gave the auctioneer an opening bid of less than 10 percent of what the beneficiary had instructed it to credit bid. The high bidder at the sale paid with a cashier's check but 2 days later, the trustee declared the sale void, returned the check, and refused to issue a deed. The high bidder then brought this action against the trustee and won on summary judgment. But the court of appeal reversed, and then the supreme court reversed the appellate court.

The trustee's error constituted an irregularity within the foreclosure sale process. Although it occurred before the sale started, it resulted in the announcement of a mistaken opening bid by the beneficiary.

The conclusive presumption in favor of a bona fide purchaser that a sale has been conducted regularly does not apply until the trustee's deed was delivered; here the trustee discovered the error before it delivered the deed. In this context, gross inadequacy of price and even slight unfairness or irregularity is sufficient to set the sale aside. The error was an irregularity by the trustee in its duty to conduct the sale fairly and to secure the best price for the trustor's benefit. The trustee's error could not be imputed to the beneficiary because the trustee deviated from the beneficiary's instructions.

**THE EDITOR'S TAKE:** We want foreclosure sales to be both fair and final, but what does that mean when those two values conflict? If the sale is made final, the result won't be fair, when making it fair means we would have to rob it of its finality. This is a troublesome issue for the courts, as demonstrated by the convoluted procedural history of this case. The trial court first ruled for the foreclosure purchaser and upheld the sale, but then on reconsideration held for the trustee and vacated the sale it had just upheld. Next, the court of appeal reversed the trial court, siding with the purchaser, but the supreme court reversed the court of appeal, going back to the trustee's side. The fact that the high court's decision was unanimous does not mask the obvious difficulty that all of the judges confronted in getting to that result.

I have argued that an essential factor to be considered in dealing with these cases is whether the flaw was discovered before or after the trustee's deed was actually delivered to the purchaser. This decision confirms that position: The auctioneer

accepted the purchaser's bid money immediately after the sale, but did not deliver a deed to him at that time, discovering the bidding mistake two days later and then refusing to deliver a deed. I think that the time before delivery of a trustee's deed is like the time before close of escrow in a negotiated sale: In that situation, a frustrated purchaser suing for specific performance has to show that the relief sought is fair and reasonable and the consideration was adequate, which is unlikely to be the case when the beneficiary's bid was 90 percent off because of a misplaced decimal point.

On the other hand, when delivery of the trustee's deed has already occurred, and the former owner or former lender is suing to rescind that completed transaction, different standards come into play—including the fact that the trustee's deed contains recitals of regularity that are conclusive when the bidder is a BFP. The same sale that might have been stopped pre-close by a timely discovery of error will not necessarily be undone post-close when the same discovery is belated.

Other variables may be relevant, too. According to the court, the size of the mistake matters, to satisfy the "gross inadequacy of price" requirement. But since that inadequacy now seems to be measured by the difference between the intended credit bid and the actual credit bid (rather than by the difference between the value of the property and the amount of the actual bid), the inevitable 90-percent differences that result from dropped decimals should generally meet this requirement.

What may cause the most disputing is how to allocate responsibility for the mistake. The cases seem to hold that the mistake has to occur on the trustee's (or auctioneer's) part rather than the beneficiary's, to qualify it as an "irregularity" warranting sale relief. If the beneficiary misinstructs the trustee or auctioneer as to the amount of its desired credit bid, that error looks like it will not qualify as the right kind of irregularity. Perhaps allocation of such fault will not always be so easy to ascertain, but I worry that such a test can become subjective and moralistic in order to reach other kinds of outcomes.

In the aftermath of this holding, I would advise a foreclosure purchaser to do as much as it can toward prodding the auctioneer to deliver the trustee's deed to it as soon as possible (and then record it immediately thereafter) so as to put itself on the good side of this distinction. Conversely, I would advise a beneficiary who has discovered the possibility of error at its sale (or a trustor who believes that something was done improperly at the sale) to communicate that discovery or belief to the trustee and/or purchaser as soon as possible—preferably before delivery of the deed—so as to offset the effect of the recitals contained in it and the prospects of having the bona fide purchaser defense overcome the defects. And making a tender never hurts.