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COURT OF APPEALS

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NO. 32963-8-II

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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T.D. ESCROW SERVICE, INC. dba T.D. SERVICE COMPANY  
Appellants,  
vs.

WILLIAM UDALL et al

Respondents

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BRIEF OF APPELLANT T.D. SERVICES, INC.

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## **I. ASSIGNMENT OF ERROR**

The trial court erred in denying T.D. Escrow Service's ("T. D.") motion for summary judgment and granting William Udall's ("Udall") cross motion for summary judgment quieting title to certain real property that was the subject of a foreclosure auction when the unambiguous language of RCW 61.24.050 requires both delivery and recording of a deed of trust before a trustee's sale becomes final and neither delivery nor recording occurred in the case at bar.

## **II. ISSUES PRESENTED**

- A. When the plain language of the Washington Deed of Trust Act, RCW 61.24.050, requires delivery and recording of a Trustee's Deed to constitute a valid and final sale, did the trial court err in granting summary judgment on a claim to quiet title following a non-judicial foreclosure sale in which it was undisputed that the Trustee's Deed was neither delivered nor recorded?
- B. When the Trustee's Deed was neither delivered or recorded, did the trial court err in denying the Defendant's motion to quash the *lis pendens* and award attorney fees under RCW 4.28.328?

## **III. STATEMENT OF FACTS**

The material facts are undisputed. William Brown failed to make his mortgage payments to U.S. Bank (hereinafter "Bank"). Bank then appointed T.D. Escrow, d/b/a T.D. Service Company (hereinafter "T.D.") as successor trustee and directed it to commence the non-judicial foreclosure proceedings. On September 19, 2003, a notice of trustee's sale was recorded in Pierce County stating the property would be sold to satisfy the underlying debt of \$137,197.06, plus costs

and fees. (CP15). The notice informed all that the property would be sold “as provided by statute.” (CP16). Mr. Udall had also received certain bidding information, including the amount of the debt, about 8 weeks before the sale. (CP84). On April 16, 2004, a foreclosure auction was conducted in Tacoma, Washington. Donna Hayes, an employee of ABC Messenger Service, conducted the auction bidding for T.D. (CP52).

On the morning of the sale, the T.D. processor, Linda Surguine, correctly calculated the opening bid amount at \$159,422.20, which included the mortgage debt plus interest and the trustee’s costs and fees. She communicated this to the agent at ABC who prepared the sale sheet for the ABC auctioneer who would ultimately conduct the sale. (CP11-13, 23). Nevertheless, Donna Hayes opened the bidding for the property at *exactly* \$100,000 *less* than the debt. (CP33). The highest (and only) bidder was William Udall, the Respondent, who bid one dollar more than \$59,422.20.<sup>1</sup>

Mr. Udall was not naïve concerning the non-judicial foreclosure process, having purchased approximately 100 properties at foreclosure sales since 1995. (CP53). He describes his interest in foreclosure properties as a “hobby,” but it was his habit to buy a property at a foreclosure sale, undertake the necessary repairs, and sell the property at a profit as “quick as possible.” (CP53-54).

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<sup>1</sup> Remarkably, on the same day, at the same sale, Mr. Udall also purchased *another* property from the same ABC auctioneer, Donna Hayes, for exactly \$100,000 less than the actual debt of \$129,000. (CP55).

On April 16, 2004, after bidding the \$59,422.20, Mr. Udall did not have the necessary funds on his person, as required by the auction notice, so he went to the Bank and got a check for this sum which he gave to the auctioneer. The auctioneer gave Mr. Udall a "receipt," (CP35), but did not, consistent with T. D. policy, issue the trustee's deed at that time. (CP58).

The auctioneer could not issue the deed because the trustee must sign the deed and it is T.D.'s policy to verify the validity of a bid and receipt of funds, as well as check for intervening bankruptcies and other potential problems that might affect the sale before issuing a trustee's deed. (CP58). This review is part of the trustee's job as fiduciary to both the grantor and the foreclosing beneficiary. *Id.*

Udall's funds were transmitted to the main office of T.D. in Santa Ana, California, where the mistake was discovered. T.D. then notified Mr. Udall of the mistake and refunded his money in full on April 21, 2004, less than one week after the sale. (CP57). Mr. Udall rejected the refund. No deed was ever issued. T.D. resumed the foreclosure process by recording a new Notice of Foreclosure rescheduling the sale. (CP19).

Mr. Udall brought this action against the trustee and the lender, but not the owner, to determine if he had acquired valid title. A *lis pendens* was recorded by Udall on June 3, 2004 under Pierce County Auditor's No. 200406031170.

T.D. moved for summary judgment on December 30, 2004, arguing that under RCW 61.24.050, a non-judicial foreclosure sale is not final until the trustee's deed is delivered and recorded, and the *lis pendens* should be quashed

and attorney fees awarded because title did not transfer. (CP38-49). Judge Kathryn J. Nelson denied T.D.'s motion on February 4, 2005 and granted Udall's cross motion for summary judgment to quiet title, and awarded Udall statutory attorney fees and costs. (CP151-157).

T.D. timely appealed, asking this Court to determine as a matter of law that because the deed was neither delivered nor recorded as required by the unambiguous language of the statute, the sale was not final and title cannot be quieted in Udall.

#### **IV. ARGUMENT**

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "The motion will be granted, after considering the evidence in the light most favorable to the nonmoving party, only if reasonable persons could reach but one conclusion." Reynolds v. Hicks, 134 WN.2d 491, 495, 951 P.2d 761 (1998). "When reviewing a summary judgment order, an appellate court engages in the same inquiry as the trial court." *Id.*

Here the trial court erred in denying T.D.'s motion for summary judgment and granting Udall's cross motion for summary judgment when the statute requires both delivery and recording of a trustee's deed before a foreclosure sale is final. This court should therefore reverse the trial court's summary judgment on

behalf of Udall and find as a matter of law that the sale was not final, that T.D. could void the sale upon discovery of the improper bid, and that title did not vest in Udall because the Trustee's Deed was not delivered or recorded.

**A. The Washington Deed Of Trust Statute, RCW 61.24.050, Requires Both Delivery And Recording Before A Non-judicial Foreclosure Sale Becomes Final.**

The dispositive question before this Court is whether RCW 61.24.050 requires delivery and recording of the trustee's deed before a non-judicial foreclosure sale is final. The trial court erred in failing to conduct its analysis as a question of the non-judicial foreclosures statutory scheme rather than as a breach of contract analysis.<sup>2</sup> Because neither delivery nor recording occurred before T.D. Services rejected Udall's bid, the trial court erred in quieting title in Udall. RCW 61.24.050 provides:

*When delivered to the purchaser, the trustee's deed shall convey all of the right, title, and interest in the real and personal property sold at the trustee's sale which the grantor had or had the power to convey at the time of the execution of the deed of trust, and such as the*

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<sup>2</sup> This important distinction was underscored by a very similar California case that rejected the 6 Angels case relied upon by the appellant. In Residential Capital v. Cal-Western, 108 Cal. App. 4<sup>th</sup> 807, 820-821 (2003), the court discussed the kind of analysis it believed would be appropriate:

We are convinced that it is unhelpful to analyze trust deed non-judicial foreclosure sales issues in the context of common law contract principles. First, the foreclosure sale affects not only the two parties to the sale (the bidder and the trustee) but also the three parties to the trust deed (the trustor, trustee and beneficiary). It is difficult to apply two-party contract principles to a transaction involving the rights of parties to a trust deed foreclosure auction sale and different parties to the trust deed whose rights are affected by the sale. Second, trust deed non-judicial foreclosure sales are comprehensively regulated by the detailed statutory scheme set forth in section 2924 et seq., which is not based on common law contract principles. We therefore decline the suggestion of Residential Capital and the defendants to base our decision on common law contract principles of voidness and its corollaries of voidability, enforceability, invalidity and illegality. Rather, we conclude the case should be decided on principles of interpretation of the statutory scheme setting forth the rules of trust deed nonjudicial foreclosure sales.

grantor may have thereafter acquired. If the trustee accepts a bid, then the trustee's sale is final as of the date and time of such acceptance *if the trustee's deed is recorded within fifteen days thereafter*. After a trustee's sale, no person shall have any right, by statute or otherwise, to redeem the property sold at the trustee's sale. (Emphasis supplied).

The meaning of a statute is a question of law that is reviewed de novo.

Burton v. Lehman, 153 Wn.2d 416, 103 P.3d 1230 (2005). In determining the meaning of a statute, the court's fundamental objective is to ascertain and carry out the Legislature's intent. Dep't. of Ecology v. Campbell & Gwinn L.L.C., 146 Wn. 2d 1, 9, 43 P.3d 4 (2002). Where statutory language is plain and unambiguous, a court will not construe the statute but will glean the legislative intent from the words of the statute itself. Bravo v. Dolsen Cos., 125 Wn.2d 745, 752, 888 P.2d 147 (1995). In undertaking this plain language analysis, the court must be careful to avoid "unlikely, absurd or strained" results. State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987). Here, the unambiguous language of RCW 61.24.050 lends itself to only one interpretation—delivery and recording of a trustee's deed is a necessary pre-requisite before a non-judicial foreclosure sale is final.

Because the unambiguous language of the statute provides as much, this Court should find that the trial court erred in quieting title in Udall when neither delivery nor recording of the trustee's deed occurred prior to T.D.'s discovery of the erroneous opening bid by Donna Hayes.

1. **The Deed Of Trust Act Requires The Highest Fiduciary Duty From The Trustee To The Mortgagor and Mortgagee, Thereby Obliging T.D. to Reject The Erroneous Bid.**

The Washington Deed of Trust Act was enacted in 1965 to provide an alternative to the state's mortgage foreclosure process. *See generally*, John Gose, The Trust Deed Act in Washington, 41 Wash. L. Rev. 94-95 (1966). The Act authorizes the foreclosure of deeds of trust without court action. RCW 61.24.040. This non-judicial foreclosure process makes it easier for a lender to realize on a security interest in real property following a debtor's default. Joseph L. Hoffman, Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust, 59 Wash. L. Rev. 323, n.19 (1984).

The act has three public policy objectives:

First, the non-judicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles.

Cox v. Helenius, 103 Wn. 2d 383, 387, 693 P.2d 683 (1985)

(internal citations omitted).

The deed of trust is a three-party real property security device involving the debtor (or 'grantor'), the lender (or 'beneficiary'), and the trustee. Gose, 41 Wash. L. Rev. at 96, n. 5. Upon default by the grantor, the beneficiary may either foreclose the deed of trust judicially, as a mortgage, or direct the trustee to commence the non-judicial foreclosure process. Hoffman, 59 Wash. L. Rev. at

324, n. 13. Prior to initiating foreclosure, the act requires that a default has occurred and that no action is pending to enforce an obligation secured by the deed of trust. RCW 61.24.030(3, 4). Only then, after giving 30 days notice and an opportunity to cure, may the trustee begin the foreclosure proceedings. RCW 61.24.030(7).

The trustee of a deed of trust occupies the most important role in the non-judicial proceedings. The trustee assumes a role of fiduciary for both the mortgagee and the mortgagor. Cox, 103 Wn. 2d at 389. This duty is exceedingly high and the trustee must act impartially between them. Cox, 103 Wn. 2d at 389. The trustee is bound to present the sale under every possible advantage to the debtor as well as the creditor, and must “take reasonable and appropriate steps to avoid the sacrifice of the debtor’s property and his interest.” Cox, 103 Wn. 2d at 389.<sup>3</sup> In this case, neither the grantor is nor the beneficiary’s interests were advanced because the property was auctioned for far less than the debt and, of course, no surplus was generated for the grantor. The trustee is now saddled with a potential negligence claim by the lender and possibly the grantor.

2. **In 1998, The Legislature Mandated That Delivery and Recording Are Necessary For Completion of Sale.**

Prior to 1998, RCW 61.24.050 provided:

That the deed of the trustee at a non-judicial foreclosure, executed to the purchaser shall convey the interest in the property which the grantor had or

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<sup>3</sup> It should be noted that notwithstanding these protections, Washington Law does not accord any protection to bidders at a non-judicial sale except that the trustee must not mislead them. See, MacPherson v. Perdue, 21 Wn. App. 450, 585, P.2d 830 (1978).

had the power to convey at the time of the execution by him of the deed of trust, and such as he may have thereafter acquired. After sale, as in this chapter provided, no person shall have any right by statute or otherwise to redeem from the deed of trust or from the sale.

Thus, before 1998, the statute did not address the rights of a high bidder at a non-judicial foreclosure, the right of a trustee to accept or reject a bid, nor the issue of precisely when a non-judicial foreclosure sale becomes final. These are important considerations because once the gavel has come down in a non-judicial foreclosure sale, but before the deed is delivered and recorded, a multiplicity of unexpected events may occur such as the errors that occurred in this case, late filed Bankruptcies, death of a party, defective notice, etc. (CP58).

In 1998, the Legislature amended the statute and clarified these ambiguities concerning finality of sale and transfer of deed:

*When delivered to the purchaser, the trustee's deed shall convey all of the right, title, and interest in the real and personal property sold at the trustee's sale which the grantor had or had the power to convey at the time of the execution of the deed of trust, and such as the grantor may have thereafter acquired. If the trustee accepts a bid, then the trustee's sale is final as of the date and time of such acceptance if the trustee's deed is recorded within fifteen days thereafter. After a trustee's sale, no person shall have any right, by statute or otherwise, to redeem the property sold at the trustee's sale. (Emphasis supplied).*

RCW 61.24.050

Thus, according to the amended statute, two things must occur before a bidder acquires title and the sale becomes final: (1) delivery of the trustee's deed, and (2) recording within fifteen days of the acceptance of a bid. RCW 61.24.050.

By adding the two new prerequisites to the act, the Legislature declared that a bid is not automatically accepted--rather, it is an offer that the trustee has the power to accept or reject. Once proper delivery and recording has occurred there is a statutory presumption of validity of the sale and a conclusive presumption of validity in favor of a *bona fide* purchaser. RCW 61.24.040(f)(7) absent delivery and recording, the sale is not final.

Nevertheless, regardless of the unambiguous language of this statute and the undisputed fact that the deed of trust was neither delivered nor recorded, the trial court quieted title in Udall as a matter of law. (CP156). In so doing, the trial court violated its duty to give effect to every word, clause, and sentence of the statute. “No part [of the statute] should be deemed inoperative or superfluous unless the result of obvious mistake or error.” *Cox*, 103 Wn.2d at 388, quoting 2A C. Sands, Statutory Construction § 46.06, at 63 (4<sup>th</sup> ed. 1973).

In quieting title in Udall, the trial court failed to give effect to the clauses, “when delivered to the purchaser” and “the sale is final . . . if the trustee’s deed is recorded within fifteen days thereafter.” RCW 61.24.050. Instead, the court deemed those clauses inoperative and meaningless.

Here, T.D. did everything in its power to represent both the mortgagee and mortgagor and present the property fairly. When it discovered the error on the part of the auctioneer, T.D. immediately attempted to remedy the error by returning the full price to Udall. What T.D. could not do was deliver the trustee’s

deed, and Udall did not record the deed. The sale was therefore never finalized according to the statute and ownership did not vest in Udall. In order to give effect to the amended words, clauses and sentences of RCW 61.24.050, this Court must find that the trial court erred as a matter of law.

**B. Even If RCW 61.24.050 Did Not Mandate Delivery And Recording For Finality Of A Non-judicial Foreclosure Sale, The Trial Court Erred In Quieting Title In Udall When The Deed Was Not Delivered And There Were Irregularities In The Sale.**

A trustee's high fiduciary duty to both mortgagor and mortgagee requires that the trustee ensure that the non-judicial foreclosure process is free of irregularity, notice is adequate, and bankruptcy proceedings have not intervened between the sale and the transfer of the deed. Although no published Washington case discusses the necessity of delivery and recording of deed for finality of a non-judicial foreclosure sale under RCW 61.24.050<sup>4</sup>, common law supports the requirement that delivery and recording of a deed must occur before a sale is final.

The ability to set aside a non-judicial foreclosure sale in the face of inadequacy of price and procedural irregularity comports with Washington law. In Cox v. Helenius, the trustee conducted a foreclosure sale despite having notice that an action on the obligation existed, and sold a property valued at \$200-300,000 for \$11,783. Cox, 103 Wn. 2d at 386, 387. The court invalidated the sale because the plaintiffs had filed a lawsuit after receiving notice of default, but before the

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<sup>4</sup> T.D. has, however, litigated this same issue before in Spokane County Superior Court, No. 97-2-03939-2, affirmed in an *unreported* opinion, Henricks v. T.D., 100 Wn.App. 1053, (2002). This is *not* called to this Court's attention as a precedential authority as prohibited by RAP10.4(h), but rather to show that T.D.'s conduct in this case was based, in part, in reliance on the ruling it received in the Henricks case.

initiation of foreclosure, thereby violating the statutory requirement that no action be pending on the obligation secured by the deed of trust. Cox, 103 Wn. 2d at 388. In dictum, however, the court noted that even without the statutory violation, the inadequacy of price plus the trustee's actions would have voided the sale. Cox, 103 Wn.2d at 388.

In his motion for summary judgment, Udall relied heavily upon an intermediate appellate case in California, where the trustee in a non-judicial foreclosure had wired the wrong numbers to the auctioneer, authorizing the auctioneer to start the bidding at \$10,000 for a \$100,000 property. 6 Angels, Inc., v. Stuart-Wright Mortgage, Inc., 85 Cal.App.4<sup>th</sup> 1279 (2001). 6 Angels was the high bidder with a bid of \$10,000.01, but the trustee refused to transfer the deed because of the inadequacy of the price. The trial court granted summary judgment in favor of 6 Angels, and the court of appeals affirmed, noting that a mere inadequacy of price, absent some procedural irregularity that contributed to the inadequacy of price or otherwise injured the trustor, was insufficient to set aside a non-judicial foreclosure sale. 6 Angels, 85 Cal.App. at 1279-80.

The trial court here should have distinguished 6 Angels for several reasons. First, the trustee, T.D., calculated the correct bid at \$159,422.20, and sent the correct bid to the auctioneer, who on her own, opened the bidding at \$100,000 less than the obligation. Second, the inadequacy of price on the two parcels ought to have put an experienced bidder like Udall on notice of a procedural defect sufficient to set aside a non-judicial foreclosure sale. *See*, 6 Angels, 85 Cal. App.

4<sup>th</sup> at 1286-87 (noting that when deed has not been delivered, the sale may be successfully challenged if there is a procedural irregularity and gross inadequacy of price is sufficient to put a skilled and experienced purchaser on notice of procedural defect)(citing Estate of Yates, 25 Cal.App.4<sup>th</sup> 511, 520-23 (1994)).

It is clear from the record here that Udall was very experienced at non-judicial foreclosure sales, having bought more than 100 properties at such sales. Getting two pieces of property on the same day, from the same auctioneer, each for \$100,000 less than the published price is enough to establish a procedural irregularity.

A more recent California decision in a case very similar to the case at bar, rejected 6 Angels and held that the actual transfer of the deed determined the finality of the sale and that in the time between a successful bid and the transfer of the deed, a sale could be aborted. Residential Capital v. Cal-Western Reconveyance, 108 Cal. App. 4<sup>th</sup> 807, 134 Cal. Rptr. 2<sup>nd</sup> 162 (2003).

In Residential Capital, after the bidding and before the deed was delivered, the trustee discovered that the grantor (homeowner) and grantee (secured lender) had agreed to postpone the sale. When the trustee informed the high bidder, Residential Capital, about the mistake and refused to issue the deed, Residential Capital sued the trustee for specific performance. The trial court dismissed the action on summary judgment. The California Court of Appeals (4<sup>th</sup> District) affirmed, holding that the statutory conclusive presumption of validity of the sale does not occur until delivery of the deed:

Although, a non-judicial foreclosure sale is generally complete upon acceptance of a bid by the trustee, the conclusive presumption [of validity] does not apply until a trustee's deed is delivered. Thus, if there is a defect in the procedure which is discovered after the bid is accepted, but prior to delivery of the trustee's deed, the trustee may abort the sale to a bona fide purchaser, return the purchase price and restart the foreclosure process.

Residential Capital, *supra*, 108 Cal.App 4<sup>th</sup> 818, *citing* Moeller v. Lien, 25 Cal. App. 4<sup>th</sup> 822, 831-32 (1994). *Accord*, Angell v. Superior Court, 73 Cal. App. 4<sup>th</sup> 691 (1999) ("We hold that a material mistake which is discovered after the acceptance of a bid but before issuance of a trustee's deed justifies the trustee's refusal to complete the sale."); 4 Miller & Starr, Cal. Real Estate (2<sup>nd</sup> ed. 1989) §9:151 p. 499-500. The Washington statutory scheme has the same presumption of validity as California. RCW 61.24.040(f)(7).

The court in Residential Capital rejected the holding in 6 Angels, and concluded its analysis based upon statutory construction:

...if the defect is detected before the trustee's deed is issued, the successful foreclosure sale bidder has not been seriously prejudiced and its remedy is limited to the return of the sale price plus interest....

The authorities hold that restitution is an adequate remedy when the foreclosure sale was not held in compliance with the statutory procedural requirements.

Residential Capital, 108 Cal. App. 4<sup>th</sup> at 807-808.

Here, the trustee calculated the correct bid at \$159,422.20, and sent that to the auctioneer who then, on her own, opened the bidding at \$100,000 less than the

obligation. When the trustee realized that the bid had opened well below the obligation whose numbers had been correctly relayed to the auctioneer, the trustee had a duty to the beneficiary, as well as the grantor, to void the sale and reschedule the foreclosure.

Moreover, Udall has suffered no damage from the rescission of the sale. T.D. refunded his bid, and although T.D. should be responsible for several weeks worth of statutory interest, Udall can claim no damages from being an unsuccessful bidder at the sale. *See, Little v. CFS Service*, 188 Cal.App 3rd 1354, 1361-62 (1987)(holding that “refund of the bid amount with interest is a sufficient remedy for not completing the sale”).

C. **A Non-judicial Foreclosure Sale Is An Auction “With Reserve.”**

Requiring delivery and recording of a trustee’s deed before a sale is final accords with settled auction law where a non-judicial foreclosure sale is considered an auction “with reserve” that can be nullified under certain circumstances.<sup>5</sup> In California, if the trustee believes that no bid is adequate, all bids may be rejected. *Pacific Ready-cut Homes v. Title Guaranty. & Trust Co.*, 103 CA 1, 283 P. 963 (1929). In Texas, there is no cause of action against a trustee to enforce a high bid. *Diversified v. Walker*, 702 S.W.2d 717 (1986 Tex.) In Washington, in the context of an auction of personal property, reservation may be exercised *after* the sale and regardless of whether the bidder “knew or heard”

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<sup>5</sup> An auction “with reserve “ is to be contrasted with an auction of such things as an antique vase that can be seen, inspected, and delivered to the highest bidder on the spot.

about the reservation. Continental Can v. Commercial, 56 Wn. 2d 456, 459, 347 P.2d 887 (1959). And under Cox, an inadequate sale price is a basis to reject a bid.

The notice of sale in the property at issue here, read at the auction, clearly states that at the sale the property is sold with no warranties as to title or any recorded instruments evidencing an interest, lien, rights of redemptions, and is “contingent” in nature on such things as no intervening bankruptcies. (CP 33). Mr. Udall was therefore on notice that the foreclosure sale was an auction “with reserve” and suffers no injustice by having his bid rejected.

**D. Since Udalls’s Bid Was Not Accepted By The Trustee And No Delivery Or Recording Of Deed Occurred, This Court Should Quash The *Lis Pendens* As A Matter Of Law And Award Attorney Fees**

A quiet title action is equitable in nature. Hauter v. Rannich, 39 Wn. App 328, 331, 693 P.2d 168 (1984); Washington State Bar Association, Washington Real Property Deskbook, §67.1, 67.2 (Third ed. 1997). Generally, a quiet title action must be brought by one in possession.<sup>6</sup> *See generally*, Washington Real Property Deskbook. §67.2. In order to succeed in an action to quiet title, a person must have a valid interest in, and a right to possession of, the real property:

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<sup>6</sup> Here, where Udall has neither an interest nor right to possession, the trial court erred in quieting title. Indeed, title was still vested in the grantor, Mr. Brown, who has not even been joined as a party, as required by Washington law. Johnston v. Medina Improvement Club, 10 Wn.2d 49, 116 P.2d 272 (1941). An equity court could not take Mr. Brown’s title without notice and an opportunity to be heard. CR 19 requires the joinder of any party who claims an interest to the subject of the action and is so situated that the disposition of the action in his absence may, as a practical matter, impair or impede his ability to protect that interest. In the absence of the owner being joined as a party, the Court is precluded from rendering a judgment for rescission or specific performance. *See*, Blodgett v. Orton, 14 Wn.2d 270, 274, 127 P.2d 671 (1942).

Any person having a *valid subsisting interest* in real property, and a *right to the possession thereof*, may recover the same by action in the superior court of the proper county, to be brought against ... the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title...

RCW 7.28.010 (emphasis added).

Here, it is Udall who created the cloud on the title by filing this action and *lis pendens* even though he had acquired no title because no deed was issued or recorded following the sale. RCW 61.24.050. There is therefore no title to “quiet,” and the trial court erred.

Because Udall had neither a valid subsisting interest in the property nor a right to the possession, this court should quash the *lis pendens* as a matter of law. The court should also grant attorney fees according to RCW 4.28.328<sup>7</sup>, which allows actual damages and reasonable attorney fees incurred by an aggrieved party when the *lis pendens* is filed without “substantial justification”. Attorney fees should also be granted under RAP 18.1(a) because T.D. was forced to appeal the erroneous trial court decision.

## V. CONCLUSION

This court should reverse the trial court's quiet title action and grant T.D.'s motion to dismiss Udall's action and to quash the *lis pendens* because the

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<sup>7</sup> RCW 4.28.328(3) provides:

Unless the claimant establishes a substantial justification for filing the *lis pendens*, a claimant is liable to an aggrieved party who prevails in defense of the action in which the *lis pendens* was filed for actual damages caused by filing the *lis pendens*, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

deed of trust was neither delivered nor recorded, order T.D. to refund the bid price plus statutory interest up to the April 24, 2004 (the date upon which T.D. tendered the refund), direct Udall to remove the *lis pendens*, and award reasonable attorney fees to T.D. under RCW 4.28.328 and RAP 18.1.

DATED this 20<sup>th</sup> day of June, 2005.



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David A. Leen  
Attorney for Appellant,  
T.D. Services

WSBA #3516



1 Yvonne Mattson  
2 Dale L. Carlisle WSBA #03156  
3 Gordan Thomas Honeywell  
4 1201 Pacific Avenue, Suite 2100  
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6 on the date indicated below.

7 Said mail contained the following documents: Brief of Appellant T.D. Services.

8 **SIGNED AND DATED** in Seattle, Washington this 24<sup>th</sup> day of June,  
9 2005.

10 Nancy Searle  
11 Nancy Searle

12 STATE OF WASHINGTON )  
13 ) :ss.  
14 COUNTY OF KING )

15 On this day personally appeared before me Nancy Searle to me known to be the  
16 individual described in and who executed the within and foregoing instrument, and  
17 acknowledged that she signed the same as her free and voluntary act and deed, for the  
18 purposes therein mentioned.

19 **SUBSCRIBED AND SWORN** to before me this 24<sup>th</sup> day of June, 2005.

20 Cathleen A. Donohue  
21 NOTARY PUBLIC in and for the State of  
22 Washington residing at Everett  
23 Commission Expires: 1-19-08

