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NO. 32963-8-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

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

Appellants,

vs.

WILLIAM UDALL, *et al.*,

Respondents

REPLY BRIEF OF APPELLANT T.D. SERVICES, INC.

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ORIGINAL

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I. INTRODUCTION

The Washington Deed of Trust Act, RCW 61.24.050, which regulates the non-judicial foreclosure process, was promulgated to make it easier for lenders and creditors to realize on a security interest in real property following a debtor's default and protect the debtor from wrongful foreclosure, while at the same time ensuring an efficient and inexpensive transfer of land title. The Act does not have the purpose of providing a windfall profit to a bidder at the expense of the lenders and/or debtor as argued by the respondent. Allowing a third party to benefit from a scrivener's error that was not the fault of the lender, the debtor, or the trustee, frustrates the purpose of the Act and should not be permitted.

The rule proposed by the appellant is based upon statutory construction and allows for rescission with statutory interest. This would apply to the kind of mistake that does not fulfill the goals of the foreclosure process such as the bid not producing enough to pay the lender, a bankruptcy stay precluding transfer, or a last minute agreement to postpone the sale not transmitted to the trustee.

The rule urged by the respondent is based upon a breach of contract analysis, and would expose the trustee to loss of the benefit of the third party bidder's bargain. The corresponding loss to the lender is not

addressed by respondent, but would undoubtedly result in further litigation to recoup the full amount of the debt from the trustee.

We urge this court to articulate the statutory rule dealing with the discovery of a substantial mistake in the foreclosure sale process prior to delivery of the trustee's deed.

II. REPLY TO STATEMENT OF FACTS

Mr. Udall, an extremely savvy bidder at foreclosure sales, having purchased more than100 properties through such sales, minimized any risk to himself by careful preparation prior to bidding. Moreover, he possessed specialized knowledge in the value of property, by virtue of his 15 years as a real estate agent and broker and 20 years as a professional property manager. (CP 74 at 8, 9; CP 75 at 10-11).

Mr. Udall carefully prepared for each and every foreclosure sale he attended and assiduously eliminated foreseeable risk before ever bidding. For example, on the Thursday before the Friday foreclosure sales, Udall always knew the opening bid on any property in which he was interested so he could prepare to buy it on the Friday. He would call the trustee and ask for the opening bid "on every one of them." (CP 76 at 17) He also visited the properties after obtaining the opening bid, knew the assessed value, and would then go to a title company get a quick title search to discover whether or not what was being sold was a second or third

mortgage. (CP 79 at 26-27) He always brought the opening bid plus one dollar to the bidding in the form of a cashier's check. (CP 77 at 21:8-25) Such meticulous preparation ensured that Udall did not buy a pig in the poke.

On April 16, 2004, however, Udall abandoned his customary precaution by bidding on properties upon which he had done no investigation. He failed to obtain the bids on the day before the auction, failed to visit the property, (CP 77 at 20:18-19), failed to contact the title company prior to the sale, and failed to bring a cashier's check to the proceedings.

When he arrived at the auction on the morning of April 16, 2004, and saw the opening bid, however, something changed. Udall cast off his cautious, risk-averse cloak and threw caution to the wind. Without benefit of a title search, a bankruptcy check, or a preplanned withdrawal for the cashier's check, once he saw that opening bid, Udall asked the auctioneer, whom he had known for more than six years, (CP 79 at 28:15-19) to hold off on completing the sale of this house until he could get a check. (CP 79 at 29:8-21). Udall knew the assessed value of the house as well as the principal amount showing, in this case $137,000, which he knew to be the amount owing six to eight weeks before the sale. (CP 84 at 46:11-25, 47:1-4) And so, when he saw that the opening bid was only $59,442.20,

he rushed about to ensure a successful bid on a property that should have had a starting bid of exactly $100,000 more, and which he believed would be worth at least $180,000 on the open market.

Moreover, this entire scenario was repeated on a second piece of property that Udall also bought that morning, again cried by the same auctioneer, Donna Hayes. Again, Udall did not follow his usual pattern of obtaining the opening bid the day before, checking with the title company, bringing a cashier's check for the opening bid. Indeed, Udall had no intention of bidding on this house before arriving at the auction on April 16, 2004. (CP 80 at 33:17-25, 34:1-19). Nevertheless, under the most suspicious of circumstances, he obtained this second property for $29,000, which was exactly $100,000 less than the called for bid on that property. (CP 84 at 49:11-12)

III. REPLY ARGUMENT

RCW 61.24.050 clearly and unambiguously gives the trustee discretion in accepting a bid, and requires both delivery and recording of a deed of trust before a trustee's sale becomes final:

> 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.

RCW 61.24.050 (emphasis added).

Mr. Udall should not be awarded a windfall profit to the detriment of the lender and debtor in this non-judicial foreclosure sale on what was clearly an erroneous opening bid that was undoubtedly known by Mr. Udall, but was discovered by the trustee before delivery and recording of the deed of trust.

A. The Ordinary Meaning Of The Words That The Legislature Added In The 1998 Amendments Can Only Be Construed To Mean that Delivery and Recording of the Trustee's Deed Is A Precondition of The Finality of Sale.

Courts are required to construe a statute according to the legislative intent, and where the statutory language is plain and unambiguous, courts are not permitted to construe the statute, but must 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). Nothing about the language of RCW 61.24.050 is either ambiguous or difficult.

Despite the plain language of the statute, Udall argues that the statute is ambiguous in some situations, but not ambiguous in others. (Resp. Br. at 7). For example, Udall maintains that the plain language of

RCW 61.24.050 states that a foreclosure sale is final the moment the gavel falls, and emphasizes the phrase that a sale is final "as of the date and time of such acceptance," but simply ignores the statutory language that precedes the finality of sale clause by adding "**if** the trustee accepts a bid **then** the trustee's sale is final..."**if** the trustee's deed is recorded within 15 days thereafter." RCW 61.24.050 (Emphasis added) (Resp. Br. at 7) Udall ignores the discretion to accept the bid and also ignores the requirement for delivery to the purchaser and recording upon which the entire first sentence of RCW 61.24.050 is based and instead characterizes it as a purely a "ministerial act." (Resp. Br. at 8) These are important words and give a trustee some flexibility when problems arise. There is no basis to conclude that the legislature intended otherwise.

Unlike Udall, courts may not ignore certain inconvenient words or phrases in a statute, but must consider all words and phrases and assume that the legislature intended each word to be operative. Cox v. Helenius, 103 Wn. 2d 383, 387-88, 693 P.2d 683 (1985)("We are required, when possible, to give effect to every word, clause and sentence of a statute. No part should be deemed inoperative or superfluous unless the result of obvious mistake or error."); Prime Const. Co., Inc, v. Seattle-First Nat. Bank, 558 P.2d 274, 16 Wn.App. 674 (1977) (Statute may not be strictly construed for some purposes and loosely construed for others, and will not

be extended beyond its plain terms by construction or implication.) Under such imperative, this Court has no choice but to give effect to both phrases that Udall chooses to ignore.

Indeed, Udall's interpretation of the statute requires one to accept some phrases while rejecting others—a very strained reading of the statute. (Resp. Br. at 7-8) But this is precisely the tack that courts may not engage in when undertaking a plain language analysis. Instead, courts must avoid "unlikely, absurd or strained" results. State v. Stannard, 109 Wn.2d 36, 742 P.2d 1244 (1987). The plain language of the statute requires delivery and recording of the deed before a non-judicial sale if final.

B. One Purpose of the 1998 Revisions to the Deed of Trust Act Was to Provide An Exact Definition of Finality of Sale.

Prior to 1998, the statute included neither the phrase: "*When delivered to the purchaser*" or the phrase: "*if the trustee's deed is recorded within fifteen days thereafter.*" These were definitive changes inserted into the statute to provide an exact time for finality of the non-judicial foreclosure sale. Prior to the 1998 revisions, the statute did not state with certainty when a trustee's sale was deemed "final."

An example of problems caused by the statute's failure to precisely define the time when the trustee's sale became final occurred in the realm

of bankruptcy. Before 1998, when a bankruptcy was filed after the conclusion of a trustee's sale, but before the trustee's deed was recorded, the Bankruptcy code brought the foreclosed property into the bankruptcy estate, stayed the recording of the trustee's deed, and permitted the bankruptcy trustee to avoid the transfer of the debtor's interest in the property. See e.g. In re Williams, 124 B.R. 311 (Bankr. C.D. Cal. 1991); In re Walker, 861 F.2d 597 (9th Cir. 1988). This was because the exact time when the sale became final was not clear in the pre 1998 statute. Thus, by clarifying the time of the sale, the Legislature ensured that the creditors rights would not be short circuited by a late bankruptcy filing after the non-judicial foreclosure sale. See, 27 Washington Practice, Creditor's Remedies, § 3.68 (2003 supplement). See also, Craig Fielden, *An Overview of Washington's 1998 Deed of Trust Act Amendments*. Real Property Probate & Trust Section Newsletter, Vol. 26, No. 2 at 8 (legislative history relating to the 1998 amendment to RCW 61.24.050).

C. The Deed of Trust Statute Was Promulgated to Protect Borrowers and Lenders, Not Bidders, and Must Be Construed In Favor Of Borrowers.

By arguing that requiring delivery and recording of the deed is either unfair to the buyer (Resp. Br. at III. B., C.) or will destroy the integrity of the non-judicial foreclosure (Resp. Br. at III. D.), Udall misapprehends the purpose of the Deed of Trust Statute, which goal is to

protect and benefit the borrowers and lenders--not the bidders. See, e.g., Moeller v. Lien, 30 Cal. Rptr.2d 777, 25 Cal.App.4th 822 ("The purposes of the nonjudicial foreclosure sale statutes are to protect the trustor (debtor) from wrongful loss of the property and to provide a quick, inexpensive and efficient remedy for creditors of defaulting debtors.")(citing 4 Miller & Starr, Cal. Real Estate (2nd ed. 1989) § 9:121, P.388).

Indeed, because Deed of Trust foreclosures are undertaken without judicial scrutiny, courts require that special care be taken to ensure protection of the rights of the borrower and the lender and construe the statute in favor of the borrowers. Queen City Sav. & Loan Ass'n v. Mannhalt, 49 Wn.App. 290, 295, 742 P.2d 754 (1987)("The Deed of Trust statutes thus strip borrowers of many of the protections available under a mortgage. Therefore, lenders must strictly comply with the Deed of Trust statutes, and the statutes and Deeds of Trust must be strictly construed in favor of the borrower.")(overruled on other grounds by Queen City Sav. & Loan Ass'n v. Mannhalt, 111 Wn.2d 503, 760 P.2d 350 (1988). The court here must take special care to favor the rights of the debtor and creditors rather than the rights of a bidder.

D. Deed of Trust Statutes Are Statutory Frameworks Not Intended To Be Governed By Common Law Contract Principles.

Udall's insistence on analyzing this case as a breach of contract (Resp. Br. at 10-11) ignores the whole point of the Deed of Trust statute, which is to remove the property from the throes of common law contracts and provide the defaulting debtor and the supporting creditors some measure of protection that is not available to either in the common law. Indeed, the Deed of Trust is entirely a creature of statute, created to circumvent the common law and provide certain protections for the borrower and the lender and facilitate transfer of property while protecting the rights of the lender and the debtor. The parties are not free to "contract around" its protections by, for example, agreeing the foreclosures can take place in 30 days rather than what is specified in the statute.

Udall relies upon a single California intermediate appellate case, 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc., 85 Ca.App.4th 1279, 102 Cal. Rptr. 2d 711 (2001), in asking this court to apply common law contract analysis rather than statutory interpretation and permit Udall to obtain a $100,000 windfall at the expense of the lender, the borrower, and ultimately, the trustee. But Udall's reliance on 6 Angels is misplaced.

6 Angels does not "mirror" this case, (Resp. Br. at 21 n. 4), is not, of course, controlling in Washington, and in light of other later cases that

criticize the rationale employed by the 6 Angels court, is not even persuasive.

First, there are important differences between 6 Angels and the case at bar. In 6 Angels, it was the lender that erroneously informed the auctioneer the day before the auction that the opening bid for the property in question was $10,000, rather than $100,000. 6 Angels, Inc, 85 Ca.App.4th 1279 at 1284. Here, the trustee conveyed the correct opening bid the morning of the auction. Here, it was the auctioneer, not the trustee, who announced the erroneous opening bid, and she did so, not the day before when someone could have or should have noticed the error, but at the moment of auction. Unlike 6 Angels, here there was no opportunity to correct the error. Indeed, when Udall noticed the bid, he completely abandoned his careful, methodical practice and rushed about to secure the funds and information in order to capitalize on this mistake. (CP 79 at 28:15-19, 29:8-21, 84 at 46:11-25, 47:1-4)

But more importantly, and what Udall fails to address at all, is the criticism of 6 Angels by a more recent California case. In Residential Capital v. Cal-Western, 108 Cal. App. 4th 807, 134 Cal. Rptr.2d 162 (2003), after a debtor default, institution of non-judicial foreclosure proceedings, and proper notice, a sale was set for September 26, 2000. On September 25, 2000, the trustee sent an email to the auctioneer,

instructing it to cancel the sale because a new loan had been negotiated between the debtors and the lender. Residential Capital, 108 Cal. App. 4th at 811-12. The auctioneer did not read the email, conducted the auction, and Residential Capital placed the winning bid on the property. Residential Capital, 108 Cal. App. 4th at 812. The mistake was realized and the trustee returned the purchase price plus interest and refused to issue the trustee's deed. Residential Capital sued on breach of contract theories, and the defendants moved for summary judgment on the grounds that no contract had been formed between Residential Capital and themselves. The trial court granted the summary judgment for the trustee, and found that because the deed was never delivered, the sale was void. Residential Capital, 108 Cal. App. 4th at 820-21. On appeal, the court affirmed the summary judgment dismissal, and specifically rejected the 6 Angels analysis:

> 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.

The court, considering the purposes of the statutory scheme, determined the proper inquiry was whether there was a substantial defect in the statutory procedure that was prejudicial to the interests of the trustor and the claimants and concluded that there was a defect in notice that was prejudicial to the rights of the debtor to protect his encumbered real property from loss. Residential Capital, 108 Cal. App. 4th at 822.

The rationale of the Residential Capital court is persuasive here because it considers the purpose behind the Deed of Trust statutes. This is not simply a breach of contract wherein the only parties involved are the trustee and Udall. There is the secured lender, who is trying to get back the money that is owed on the property; there is the borrower, who is trying to get the best bid price on the property to alleviate his debt (and perhaps generate a surplus); and there is the trustee, who is trying to get the best price possible and carry out the sale in a way that protects the interests of both of the parties to whom he owes the highest fiduciary duty.

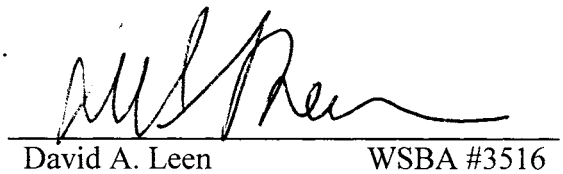
Here, the issue is not just a disparity between the lien amount and the assessed value of the property—the problem is that by miscalling the

bid, the auctioneer gave Udall a windfall to the detriment of the legitimate creditors as well as the debtor. The borrower's interest in having the entire lien paid off is furthered by recognizing that the sale was not final until the deed was delivered and filed. The creditor's interest in securing repayment of its advances is furthered by recognizing that the sale was not final until the bid was accepted, and the deed was delivered and filed. To interpret the statute otherwise would favor a bidder over the debtor and creditors and give him a windfall to the debtor and lender's detriment, thus frustrating the purpose of the statute. We argue here, as we argued below, that rescission with interest is the appropriate remedy when the sale cannot be properly concluded.

IV. CONCLUSION

This court should construe the Deed of Trust statute according to its unambiguous terms, reverse the trial court, and grant T.D.'s motion to dismiss Udall's action and to quash the *lis pendens* because the deed of trust was neither delivered nor recorded. This court should also 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 30th day of August, 2005.



David A. Leen WSBA #3516
Attorney for Appellant,
T.D. Services

CERTIFICATE OF SERVICE

I, Nancy Searle, certify that I am a resident of the State of Washington, over the age of twenty-one years, not a party to the proceeding or interested therein, and competent to be a witness herein. My business address is: David Leen & Associates, PLLC, 520 E Denny Way, Seattle, Washington 98122.

On the date of August 30, 2005, I caused true and correct copies of: the Reply Brief of Appellant T.D. Services, Inc. and this Certificate of Service to be served on the following parties:

Court of Appeals, Division II
850 Broadway Suite 300
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Via ABC Messenger

DATED the 30th day of August, 2005

Nancy Searle

Nancy Searle

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CERTIFICATE OF SERVICE

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ORIGINAL

CERTIFICATE OF SERVICE

I, Nancy Searle, certify that I am a resident of the State of Washington, over the age of twenty-one years, not a party to the proceeding or interested therein, and competent to be a witness herein. My business address is: David Leen & Associates, PLLC, 520 E Denny Way, Seattle, Washington 98122.

On the date of August 31, 2005, I caused true and correct copies of: the Reply Brief of Appellant T.D. Services, Inc. and this Certificate of Service to be served on the following parties:

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Via ABC Messenger

DATED the 31st day of August, 2005

Nancy Searle

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