

65004-1

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NO. 65004-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

RANDY BREIWICK,

Appellant,

vs.

FIRST AMERICAN TITLE INSURANCE COMPANY;
CITIMORTGAGE, INC. and CITIBANK N.A.,

Appellees.

APPELLANT'S REPLY BRIEF

Submitted By:

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Breiwick submits this brief in specific reply to the arguments of Appellee (“Citi”), organized by reference to the particular section of Appellee’s Brief addressed.

I. APPELLEE’S BRIEF. Section A.4.

It is clear from the record that Citi had communicated its bid to the Trustee days before the sale. (CP 48). It is also clear that Citi did not appear at the sale and that its bid was announced by the auctioneer. (CP 28, 46). Citi would have the court conclude that the correspondence between it and the Trustee days before the sale is part of the process to be included within the ambit of “defective bidding”. The focus must necessarily be on the role of the Trustee under RCW 61.24 *et. seq.*, as the discretion exercisable by RCW 61.24.135 lies solely with the Trustee. It is submitted that the trustee’s role is to protect the process, not protect the participants from their own negligence. With that scope in mind, the only authority submitted to the Court that attempts to encapsulate the process to be orchestrated by the Trustee holds that the communication of the bid to the trustee by the beneficiary in advance of the sale is outside the process. *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.* 85 Cal.App. 4th 1279 [102 Cal.Rptr. 2d 711] (2001).

II. APPELLEE’S BRIEF. Section A.5.

Citi misconstrues Breiwick’s argument and overlooks the over-arching ruling in *Udall v. T.D. Escrow Services*, 159 Wn.2d 903, 154 P.3d 882

(2007). The *Udall* court's holding goes far beyond merely addressing the specific facts of that case. The *Udall* court articulated its holding as follows: "We hold that RCW 61.24.050 mandates that a trustee deliver the trustee's deed to the purchaser following a nonjudicial foreclosure sale, absent procedural irregularity that voids the sale." *Udall, supra, p. 916.*

As noted in Breiwick's opening brief, there is no bright line demarcation between procedural errors that void a sale and procedural errors that might be excused. *Appellant's Opening Brief, p. 17, including fn.1.* The argument recognizes that the legislature may have intended to legislate greater discretion for the trustee than what the *Udall* ruling allows, but the degree to which the legislature relaxed the scope of that discretion does not necessarily encompass relief from the specific mistake addressed in *Udall*. Stated otherwise, Breiwick argues that the statute permits a trustee to withhold a deed for circumstances less egregious than a void sale, but not to the extent of relieving a bidder of the consequence of its own unilateral mistake in communicating a bid. The argument can be refined even further, recognizing that the mistake in *Udall* was the trustee's error, not the error of the bidder; in such a circumstance it would not be misguided to conclude that the legislature gave the trustee the discretion to relieve an innocent beneficiary from the consequence of the trustee's mistake, without authorizing the trustee to relieve the beneficiary of its own unilateral mistake.

III. APPELLEE’S BRIEF. Section A.6.

Breiwick concedes that no citation to authority is submitted in support of its argument. The argument is directed to the potential consequences of an overbroad reading of RCW 61.24.135, which has yet to occur, but is the position advocated by Citi in this case. Breiwick submits that a fair and logical reading of RCW 61.24.135 would not invite a bidder, whether beneficiary or third party, to suggest that the Trustee refuse to complete a sale because said bidder made a unilateral mistake. However, if the statute is so broadly construed, can it reasonably be denied that a broad avenue of attack will then be opened to anyone having second thoughts about a sale bid? Post-sale litigation and title instability are indeed foreseeable and likely, both of which undermine the goals of the deed of trust foreclosure statute.

IV. APPELLEE’S BRIEF. Section A.7.

Having cited extensively from California authority, Citi’s argument that California authority cited by Breiwick should be discounted is hardly persuasive.

V. APPELLEE’S BRIEF. Section A.8.

As noted in Udall, equitable intervention is sometimes justified (“*Grossly inadequate purchase price together with circumstances indicating some additional unfairness may provide sufficient equitable grounds to set aside a nonjudicial foreclosure sale.*” Udall, p. 914), but inadequacy of price alone is not sufficient. *Id.* p. 915. Citi’s quantum argument regarding a benchmark for price inadequacy ignores *Steward v. Good*, 51 Wash.App. 509, 514-15, 754 P.2d 150,

review denied, 111 Wash.2d 1004 (1988), a case cited by the *Udall* court, in which a sale for eight percent of the property's value was upheld. Moreover, Citi's argument attempts to satisfy the two prongs of the test for equitable intervention with price inadequacy alone, arguing that its own mistake leading to the alleged inadequate price is also the additional unfairness. As the *Udall* court observed, a nonjudicial foreclosure sale discharges the borrower from liability on the secured obligation (*Udall*, p. 916). Therefore, in the case at bar as in *Udall*, delivery of the deed will not cause the borrower any harm. Citi is the victim of its own mistake, not any procedural irregularity or misconduct of any other party. Citi cites no authority for the rather unique argument that refusing to relieve a beneficiary from its own negligent communication of its bid can be the procedural unfairness justifying relief from the sale.

VI. APPELLEE'S BRIEF. Section B.

Breiwick stands on his opening brief on this issue.

Respectfully submitted this 27th day of September, 2010.

FINE, p.s.



BRUCE FINE, WSBA #758
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**COURT OF APPEALS
DIVISION 1
OF THE STATE OF WASHINGTON**

Bruce Fine, being first and duly sworn upon oath, deposes and says:

I am the attorney for the Appellants herein, I hereby certify that on the 27th day of September, 2010, I sent via ABC Legal Messenger the Appellant's Reply Brief to the following parties at the following addresses:

Original and copy of Appellant's Reply Brief to:

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DATED September 27, 2010



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