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COURT OF APPEALS

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SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 32963-8-II

T.D. ESCROW SERVICE, INC. d/b/a T.D. SERVICE COMPANY,

Respondent

v.

WILLIAM UDALL, et al.,

Petitioners.

Petition for Discretionary Review

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I. IDENTITY OF PETITIONER

Petitioner, William Udall, et. al. (Mr. Udall), asks this Court to accept review under RAP 13.4 of the decision of the Court of Appeals, Division II, designated in Part II of this Petition. Petitioner's attorney is: Yvonne M. Mattson, Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim LLP, 600 University Street, Ste. 2100, Seattle, WA, tel: (206) 676-7587, WSBA No. 35322.

II. COURT OF APPEALS DECISION

Petitioner requests review of the Published Opinion of the Court of Appeals, Division II, in No. 32963-8-II, filed on March 28, 2006.¹ That Opinion concluded that Mr. Udall was not entitled to the property because the sale was not concluded under the Court's interpretation of RCW 61.24.050.

If this Court does not accept review, the Court of Appeals' restrictive interpretation of RCW 61.24.050, which is contrary to Washington's Deed of Trust Statute and case law, will stand, and a non judicial foreclosure sale that is absent procedural error or fraud will not transfer any property rights to the successful bidder unless and until the trustee, at its unilateral discretion, chooses to deliver the trustee's deed to the successful bidder.

¹ Udall v. TD Escrow Services, Inc., ___ Wn. App. ___, 130 P.3d 908 (2006).

One of purposes of Washington's Deed of Trust Act is to promote stability of land titles. As such, this Petition involves issues of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). Notably, the Court of Appeals designated its opinion a "**Published Opinion.**" A copy of the Court of Appeals' decision is in the Appendix, Exhibit A.

III. ISSUE PRESENTED FOR REVIEW

Do property rights transfer to the successful bidder at a non judicial foreclosure sale when the trustee accepts the highest bid, and is that transfer of property rights presumed final at least as to price save procedural error or fraud?

IV. STATEMENT OF THE CASE

A. Statement of Facts

1. Prior to the Sale

Mr. Udall, petitioner in this action, is in the business of buying properties at non judicial foreclosure sales in order to make repairs and upgrades to the properties with the intent of selling those properties for a profit; however, due to the risky nature of foreclosure sales, some properties are sold at a loss. (CP 75, 87). Mr. Udall began purchasing properties from foreclosure sales around 1995 and has purchased approximately one hundred properties through the foreclosure process. (CP 75). In his ten years in the industry, other than on April 16, 2004, Mr.

Udall has never encountered a situation where a trustee refuses to deliver the trustee's deed and attempts to unwind the transfer of property by claiming that until the trustee delivers the deed to the highest bidder, the non judicial foreclosure sale is an empty gesture and means nothing. (CP 85).

Mr. Udall subscribes to a service that provides very limited foreclosure information on all Pierce County Properties. (CP 76). The information provided is limited to the real property address, the grantor's name, the trustee's name, the trustee's phone number, and the tax assessed value of the property. (CP 76). The information does not include a copy of the title report. (CP 76). A person interested in purchasing property at a foreclosure sale must contact the trustee to obtain any additional information, including the amount of the opening bid. (CP 76).

Based on the limited information that Mr. Udall obtains from the trustee (if any) and based on experience, Mr. Udall determines whether he is going to bid on the property at the foreclosure sale. Generally, the day prior to the sale, Mr. Udall will call the trustee and attempt to obtain the opening bid information. (CP 76). Only if he receives the opening bid will he view the property. (CP 77). With regard to the real property at issue in this case, Mr. Udall did not receive an opening bid prior to the date of sale, nor did he have an opportunity to view the property prior to the foreclosure sale. (CP 78).

2. *The Sale*

On Friday, April 16, 2004, Mr. Udall attended a non judicial foreclosure sale at the Pierce County Courthouse and purchased the real property at issue. (CP 78). The trustee who conducted the auction on behalf of T.D. Service (successor trustee) was Donna Hayes, an employee of ABC Messenger Service (“ABC”). (CP 78). As the trustee’s agent, Ms. Hayes called the opening bid at \$59,422.19 and read the standardized script. (CP 108). Mr. Udall had no knowledge of where that number came from: he did not receive the intended opening bid the day prior to the sale, he had not seen the property, nor had he received a title search on the house. (CP 78-79). After Ms. Hayes cried the sale, Mr. Udall cast the highest bid on the property in the amount of \$59,422.20. (CP 107). This was an inherently risky decision because if Mr. Udall discovered a problem with the property, he would not have been permitted to rescind his offer to purchase. (CP 81). Pursuant to the procedural requirements, Mr. Udall tendered a check to Ms. Hayes for \$59,422.20 on April 16, 2004, which was subsequently negotiated. (CP 112).

Ms Hayes, acting as trustee, gave Mr. Udall a receipt for the payment, which stated “VESTING CANNOT BE ALTERED ONCE THE AUCTIONEER COMPLETES THIS RECEIPT.” (CP 107).

3. *After the Sale*

After the sale, Mr. Udall went to Ticor Title Company to check the title on the property. (CP 82). Additionally, Mr. Udall entered the property to check the condition of both the house and the premises. (CP 82).

On April 17, 2004, Mr. Udall began making repairs on the house. (CP 82). He pressure-washed the back of the house and the deck, performed general lawn maintenance, filled nail holes in the walls, and painted portions of the exterior of the house. (CP 82). Additionally, he removed the items left in the residence and paid to dispose of the items at the county dump. (CP 82).

On April 18, 2004, Mr. Udall returned to the property to install baseboard molding in the house. (CP 82). He again returned to the property on April 19, 2004, to measure for and order a door that needed to be replaced. (CP 82). Further, he replaced light bulbs and light fixtures, reinstalled the mini-blinds, and painted the handrail in the house. (CP 83).

4. *Trustee's Attempt to Unwind the Sale*

On Tuesday, April 20, 2004, Mr. Udall spoke with Vanessa of T.D. Service who informed him that T.D. Service made a mistake. (CP 83). Shortly thereafter, T.D. Service sent Mr. Udall a check for \$59,422.20, the amount that he paid for the property. (CP 83). Further, T.D. Service mailed Mr. Udall a letter dated April 21, 2004, indicating that it was refusing to deliver the trustee's deed for the property, even

though the property was sold at the non judicial foreclosure sale, and even though there was no procedural error or fraud. (CP 83).

B. Procedural History

Plaintiff filed this lawsuit on June 3, 2004. CP 1-8. The parties filed cross-motions for summary judgment. CP 38-49, 113-133, 134-139. The trial court entered its Order Denying Defendant T.D. Service's Motion for Summary Judgment and Request to Quash the Lis Pendens and Granting Plaintiff William N. Udall's Cross Motion for Summary Judgment on February 4, 2005, granting summary judgment to Mr. Udall and denying summary judgment to T.D. Service. CP 140-142. The trial court entered its Judgment Summary on February 14, 2005. CP 145-148. T.D. Service filed a Notice of Appeal on February 16, 2005. CP 149-157. The Court of Appeals, Division II, issued its Published Opinion reversing the trial court decision and entering summary judgment in favor of T.D. Service on March 28, 2006. Appendix, Ex. A. The Court of Appeals also denied T.D. Services' request for attorney fees under RCW 4.28.328.²

V. ARGUMENT

This Court will accept a petition for review if it involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). This Petition meets this standard with respect to two different

² Mr. Udall does not seek review of this portion of the Court of Appeals' decision.

issues: 1) the stability of land titles; and 2) the finality of the non judicial foreclosure sale process.

Significantly, the Court of Appeals ordered that its opinion be published, designating it a “**Published Opinion.**” The decision, therefore, has precedential value. RCW 2.06.040. In deciding whether to publish the opinion, the Court was required to consider whether the decision: 1) determines an unsettled or new question of law or constitutional principle; 2) modifies, clarifies, or reverses an established principle of law; 3) is of general public interest or importance; or 4) is in conflict with a prior opinion of the Court of Appeals. RAP 12.3(d) (emphasis added). The publishing of the decision, therefore, demonstrates that Mr. Udall’s Petition satisfies the requirements for discretionary review.

Both Washington and California law say that a deal is formed when the trustee accepts the highest bid at a non judicial foreclosure sale and save procedural error or fraud that deal is presumed to stand and is final at least as to price. When Mr. Udall’s successful bid was accepted at the April 16, 2004 non judicial foreclosure sale, a deal was formed that cannot be undone and property rights transferred to Mr. Udall. Despite the fact that Mr. Udall was the highest bidder and despite the fact that the trustee accepted his bid, Respondent refuses to deliver the deed. The effect of the Court of Appeals’ decision and the Respondent’s position is that until the purchaser receives the deed from the trustee to record, the

foreclosure sale means nothing. The transfer of property rights to the purchaser, Mr. Udall, is an empty gesture, despite the successful culmination of the sale of the property at the auction.

The Court of Appeals' decision is wrong. It is not supported by Washington's Deed of Trust Act or California law. The law states that absent procedural error or fraud, a sale is final at the non judicial foreclosure sale. Delivery and recording of the trustee's deed only affects a case where there is a procedural error. Even then, the delivery and recording of the trustee's deed cures those procedural errors. Here, it is undisputed that there were no procedural errors so the sale was final when the trustee accepted the bid. Thus, this Court should reverse the decision of the Court of Appeals and reinstate the trial court's entry of quiet title in favor of Mr. Udall.

A. RCW 61.24.050, Washington's Deed of Trust Act, transfers property rights to the successful bidder at a non judicial foreclosure sale when the Trustee accepts the highest bid, and save procedural error or fraud that transfer of property is presumed final at least as to price.

Washington's Deed of Trust Act requires T.D. Service to deliver the trustee's deed to Mr. Udall:

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 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). Notably, the statute begins with “[w]hen delivered to the purchaser.” The word “when” assumes delivery will occur and creates an implied duty on the trustee to deliver the deed. The legislature could have chosen to use the word “if” instead of “when,” just as it did later in the same statute when discussing recording, but the legislature chose to use “when.” Although the legislative history is unclear as to statutory intent, it appears that the statute intended to create a presumption of delivery.

In addition to requiring the trustee to deliver the trustee's deed, the statute is unambiguous to the extent that it renders a sale final at the date and that the trustee accepts a bid. RCW 61.24.050. The plain language of RCW 61.24.050 states that a foreclosure sale is final the moment the “gavel falls.” “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 15 days thereafter. RCW 61.24.050 (emphasis added). The clause stating that a sale is final “if the trustee's deed is recorded within fifteen days thereafter” is simply intended to protect the highest bidder at a non-judicial foreclosure sale from late bankruptcy filings. Specifically, it clarified that if the deed was recorded within 15 days, then the transfer of

property rights occurred on the date of the sale. Moreover, the highest bidder obtained the property before the bankruptcy. On the other hand, if the deed was not recorded within 15 days, then the sale was not final as of the date and time of sale, but instead was final as of the date that deed was recorded. Thus, in that case, the sale could be avoided by a bankruptcy filed after the sale, but before the deed was recorded.

The Court of Appeals' interpretation of Washington's Deed of Trust Act leads to impractical results. Washington courts do not interpret a statute in a matter that leads to "absurd and fundamentally unjust results." Flanigan v. Dept. of Labor and Indus., 123 Wn.2d 418, 426, 869 P.2d 14 (1994). Under the deed of trust, the lender is permitted to conduct a sale when the borrower defaults on the loan. (CP 94, 96). The deed of trust only gives the lender one right to sell the property through its power of sale provision. (CP 96). The power of sale in this case was exhausted on April 16, 2004, when all statutory notice procedures were followed and when the trustee's agent cried the opening bid and sold the property to Mr. Udall, the highest bidder at the sale. Under the interpretation adopted by the Court of Appeals, non judicial foreclosure sales can be final into perpetuity because a trustee can resell a property anytime that it refuses to deliver the trustee's deed, even when there is no fraud or procedural errors. In effect, the non judicial foreclosure sale means nothing. This interpretation is incorrect. To allow a trustee to argue that a sale is not

complete until it chooses to deliver the trustee's deed allows a trustee to freely disregard its contractual obligations and sale finality because it could always argue that a purchaser has no right to possession simply by refusing to deliver the trustee's deed when, as in this case, there is no procedural error or fraud, but only the trustee's own unilateral mistake in price.

B. Other Courts hold that a non judicial foreclosure sale is completed at the moment the highest bid is accepted by the trustee, and save procedural error or fraud, those courts hold that the sale is final, at least as to price.

Other courts that have considered when a foreclosure sale was final have held that the sale was complete and final at the moment the bid was accepted by the trustee. In Tucker v. Ameriquest Mortgage Co., 290 B.R. 134, 135 (E.D. Mo. 2003), the court denied a Chapter 13 debtor's request to set aside a pre-bankruptcy foreclosure sale because the sale was complete at the end of the auction. The court held that the sale was completed prior to the commencement of the debtor's Chapter 13 case, when the bid was accepted by the trustee, and the trustee's deed was issued to the high bidder, but not yet recorded. Id. at 337. The court reasoned that "[a] foreclosure sale is complete at the end of the auction." Id. at 136-37, citing In re Brown, 75 B.R. 1009 (E.D. Pa. 1987). The court noted that a sale is final at the auction and that delivery of the trustee's deed is simply a ministerial act:

A power of sale foreclosure sale is an auction held pursuant to statute. At the auction, the acceptance of the bid by the trustee constitutes an executory contract of sale. The purchaser becomes the equitable owner of the real property and has a right to a Trustee's Deed upon payment of the bid price to the Trustee. The deliver of the Trustee's Deed evidences the transfer. It is not the sale but the final step in the sale. The deed relates back to the contract. As between the parties, title is considered to have vested from the time the contract was made.

Id. at 137 (emphasis added) (internal citations omitted).

Similarly, in In re Grant, 303 B.R. 205, 210 (Nev. 2003), the court held that a Chapter 13 debtor could not unwind a foreclosure sale because the sale was final at the auction and delivery of the trustee's deed was purely ministerial:

The acceptance of a bid at an auction is signified by the fall of the hammer by the auctioneer's announcement 'sold.' J. PERILLO, 1 CORBIN ON CONTRACTS § 4.14 (1993). 'After such an acceptance, the sale is consummated.' Id. A foreclosure sale is not legally complete or binding until the purchaser has actually paid the amount bid. 59A. C.J.S. MORTGAGES § 641 (1998). Title is deemed to have vested from the day the bid for the property was made.

Id. at 209-10 (emphasis added).

Under the undisputed facts of this case,³ the sale was final at the non judicial foreclosure sale, and, pursuant to Washington's Deed of Trust Act, T.D. Service must deliver the trustee's deed to Mr. Udall for

³ It is undisputed that there was no procedural error or fraud at issue in this case. The only issue in this case is the trustee's refusal to deliver the trustee's deed based on its unilateral mistake in price.

recording. It is undisputed that Mr. Udall was the highest bidder on the property. (CP 107). It is also undisputed that Mr. Udall paid the bid price to the trustee and that T.D. Service subsequently negotiated Mr. Udall's check. (CP 112). Moreover, it is undisputed that the trustee announced that the property was "sold" to Mr. Udall, as per the script read at the auction, and gave him a receipt for payment. (CP 107). Thus, the foreclosure sale was final at the end of the auction and cannot now be unwound by T.D. Service.

C. This Court must grant discretionary review in order to uphold the integrity of the process of foreclosure sales.

The public policy underlying the comprehensive framework governing foreclosure sales is a concern for final sales in order to promote stability, while maintaining proper notice to interested parties. This Court must reverse the Court of Appeals' entry of summary judgment in favor of T.D. Service in order to uphold the integrity of the foreclosure process and to ensure that the foreclosure process is equitable.

1. Public policy mandates finality of foreclosure sales.

The Deed of Trust Act, RCW 61.24, is designed to advance three goals:

First, the non-judicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity 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).⁴ Put another way, the public policy underlying the comprehensive framework governing foreclosure sales is a concern for swift, inexpensive, and final sales to promote stability, while maintaining proper notice to interested parties. Thus, the purpose of the act is to provide finality in non judicial foreclosure sales, and not to relieve the trustee of the consequences of its own unilateral mistake where there is no procedural error or fraud in the sale. For the reasons stated below, this Court must reverse the decision of the Court of Appeals because any other result would frustrate rather than promote the policy underlying the Deed of Trust Act by adding uncertainty to the finality of foreclosure sales.

Foreclosure sales are, by nature, inherently risky. The high bidder (purchaser) at the auction has no knowledge of the true value of the property; does not know whether the property is being inhabited by the person in default; often, as in Mr. Udall's case, has never seen the property; does not know whether the sale will be invalidated by the bankruptcy court for last minute, presale bankruptcies; may inadvertently purchase a second mortgage, forcing the purchaser to suffer a substantial financial loss; and does not know the condition of the property.

⁴ In Cox, there was a procedural error in the notice of the sale. 103 Wn.2d at 388, 693 P.2d 683. The trustee knew that the borrowers believed that the foreclosure sale had been halted; nevertheless, he continued with the sale. Id. at 384-85.

Here, there are no procedural irregularities. Procedural irregularities occur when proper notice is not given to interested persons pursuant to the deed of trust and/or Washington law.⁵ The only error in this case was the trustee's unilateral irregularity in price, an error wholly under the control of the trustee and its agent, ABC. (CP 12). Unless the parties responsible for the error in price are required to assume the risk of their errors, a low opening bid at a foreclosure sale will invariably trigger suspicions about a sale's finality, which will deter buyers and impair the efficacy of foreclosure sales.

2. *Equity dictates that T.D. Service deliver the trustee's deed to Mr. Udall.*

As noted, there was no procedural error in the sale. All parties agree that the required notices were provided to all interested parties. This Court must reverse the decision of the Court of Appeals, otherwise the **public's confidence** in the foreclosure process will be **undermined**. Furthermore, the purchaser is left without any remedy. On the other hand, if the lender or beneficiary is discontent with the manner in which the sale

⁵ The Deed of Trust provides the procedural steps that must be taken to provide notice to property parties. It states:

If Lender invokes the power of sale, Lender shall give written notice to Trustee of the occurrence of an event of default and of Lender's election to cause the Property to be sold. Trustee and Lender shall take such action regarding the notice of sale and shall give such notices to Borrower and to other persons as applicable law may require.

(CP 96).

was conducted, the lender and beneficiary have a cause of action against the trustee or its agent.

If the roles were reversed, Mr. Udall could not withdraw from the sale after it was completed at the non judicial foreclosure sale. (CP 81). For instance, one could easily imagine Mr. Udall purchasing property where a borrower defaulted on a second mortgage and the lender exercised its power under the deed of trust to conduct a non judicial foreclosure sale. Proper notice was given to all interested parties. Mr. Udall was the highest bidder at the foreclosure sale, delivered a check to the trustee, which was subsequently cashed, and received a receipt that was signed by both the trustee and Mr. Udall. Mr. Udall later discovered that he purchased a second mortgage and desired to return the property to the trustee. In fact, this exact scenario occurred. (CP 81). Because Mr. Udall's mistake was not discovered until after the non judicial foreclosure sale was final, the trustee enforced the sale and Mr. Udall suffered a substantial financial loss. (CP 81). See also In re McDuffie, 114 N.C. App. 86, 440 S.E. 2d 865 (1994) (where the court refused to allow a purchaser to undo a sale based on the purchaser's mistaken high bid). Just as a purchaser cannot unwind a sale after the sale is final at the non judicial foreclosure sale, absent a procedural irregularity or fraud, a trustee should not be able to unwind a sale after it is final.

D. In addition to the requirement of RCW 61.24.050, the deed of trust requires that T.D. Service deliver the trustee's deed.

Section 18 of the deed of trust requires that T.D. Service sell the property to Mr. Udall because he was the highest bidder at the foreclosure sale:

After the time required by applicable law and after publication of the notice of sale, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order the Trustee determines.

(CP 96, 97). Further, the deed of trust requires that T.D. Service deliver the trustee's deed to Mr. Udall: "Trustee shall deliver to purchaser the Trustee's deed conveying the Property without covenant or warranty, express or implied." (CP 97).

Here, it is undisputed that there was not any deficiency in the notice provided regarding the sale. Further, it is undisputed that Mr. Udall: 1) was the highest bidder at the non judicial foreclosure sale; 2) delivered a check for the bid amount to the trustee, which the trustee accepted and subsequently negotiated; and 3) obtained a receipt from the trustee for his payment. T.D. service simply made a unilateral mistake in price and now asks the court to ignore the contract that was formed at the non judicial foreclosure sale and unwind the sale. Under these undisputed facts, this Court should grant this petition for discretionary review.

E. A California court deciding identical facts ruled that the trustee must deliver the trustee's deed to the highest bidder at the foreclosure sale.

California has ruled that absent procedural error or fraud, a non judicial foreclosure sale is final, and a trustee must bear the consequences of its unilateral mistake in price and deliver the trustee's deed to the highest bidder.⁶ See Melendrez v. D&I Investment, Inc., 127 Cal. App. 4th 1238, 1250 (2005) (stating that there is a conclusive presumption of validity when there are no procedural errors). In 6 Angels, Inc. v. Stuart Wright Mortgage, Inc., 85 Cal. App. 4th 1279, 1288, 102 Cal. Rptr. 2d 711 (2001), a California court held that the non judicial foreclosure sale was final under virtually identical facts. There, 6 Angels successfully bid \$10,000.01 on a piece of real property offered for \$10,000.00 at a foreclosure sale. Id. at 1282. The Appellant, DMI, refused to transfer the trustee's deed to 6 Angels, contending that the property should have been offered at \$100,000. Id. The trial court granted summary judgment on 6 Angels' claim to quiet title and judgment was subsequently entered in

⁶ Respondent will attempt to have this Court believe that there is a circuit split in California. Respondent is incorrect. In Residential Capital v. Cal-Western Reconveyance, 108 Cal. App. 4th 807, 820-21, 134 Cal. Rptr. 2d 162 (2003), there was a procedural defect in the sale: The trustee told the beneficiary that the sale would be postponed, but the trustee failed to postpone the sale; thus, the notice requirement was not followed. The Court stated, "if there is a defect in procedure which is discovered after the bid is accepted, but prior to deliver of the trustee's deed, the trustee may abort the sale to a bona fide purchaser..." Id. In Mr. Udall's case, it is undisputed that there was no procedural error and that all parties received proper notice. The only error in this case was the trustee's unilateral mistake in price, discovered after the conclusion of the non judicial foreclosure sale, which mirrors the facts in 6 Angels, not Residential Capital.

favor of 6 Angels. Id. at 1282-83. DMI appealed and the court of appeals affirmed. Id. at 1283.

The court found in favor of 6 Angels for the following reasons: 1) mere inadequacy of price, absent some procedural irregularity that contributed to the inadequacy of price or otherwise injured the trustor, is insufficient to set aside a non-judicial foreclosure sale, Id. at 1282; 2) the error was wholly under DMI's control and arose solely from DMI's own negligence and the error was not procedural, Id. at 1285; 3) the public policy underlying the statutory framework governing California's foreclosure sales was intended to promote swift, efficient, and final sales and any other result would add uncertainty to the finality of foreclosure sales, Id. at 1287; and 4) recession of contract on the basis of a unilateral mistake is unavailable to a party who assumed the risk of the mistake in entering into the contract. Id.

Under California's analysis of this issue, the Court must find in favor of Mr. Udall. All parties agree that proper notice was given to all interested parties; thus, there was no procedural irregularity in the foreclosure sale that would give the trustee a ground to unwind the sale. Further, there was no fraud in the foreclosure sale. Further, the error in this case was wholly under T.D. Service's control, as it set the internal procedures to communicate the opening bid to the trustee. Moreover, the mistake was unilaterally made by T.D. Service: it should bear the burden

of its mistake, not Mr. Udall. Finally, allowing a trustee to refuse to deliver a trustee's deed every time that it makes a mistake would add uncertainty to the finality of foreclosure sales because a low opening bid would invariable trigger **public** suspicions about a sale's finality.

VI. CONCLUSION

This Court should grant Mr. Udall's Petition for Discretionary Review. The Petition involves issues of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

The Court of Appeals' decision is wrong. Washington law states that a contract is formed at a non judicial foreclosure sale, and save procedural error or fraud that deal is presumed to stand and is final at least as to price. Here, the property rights transferred to Mr. Udall on April 16, 2004, when his successful bid was accepted at the non judicial foreclosure sale. The effect of the Court of Appeals' decision and the Respondent's position is that until the purchaser receives the deed from the trustee to record, the foreclosure sale means nothing. The transfer of property rights to the purchaser, Mr. Udall, is an empty gesture despite the successful culmination of the sale of the property at the auction. Accordingly, Mr. Udall respectfully requests that this Court accept this Petition for review and reinstate the decision of the trial court.

RESPECTFULLY SUBMITTED this 28th day of April, 2006.

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

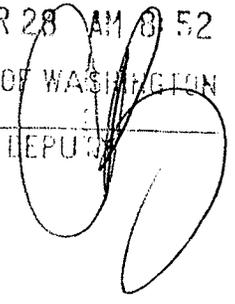
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STATE OF WASHINGTON

BY _____
DEPUTY



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WILLIAM UDALL, an individual, CLETE
BREMNER, and individual, and GREGORY
D. SARGENT, an individual,

Respondents,

v.

T.D. ESCROW SERVICES, INC. d/b/a T.D.
SERVICE COMPANY, a Washington
Corporation, U.S. BANCORP f/k/a FIRSTAR
BANK, NA, a Washington Corporation, and
T.D. SERVICE FINANCIAL
CORPORATION, a California Corporation,

Appellants.

No. 32963-8-II

PUBLISHED OPINION

Hunt, J. — T.D. Escrow (TD) appeals the trial court's grant of summary judgment to William Udall in a quiet title action arising from a statutory non-judicial foreclosure sale of property for which TD was the trustee. Udall offered the winning bid at a price the auctioneer had mistakenly set \$100,000 lower than TD had authorized. TD refused to deliver the deed to Udall and to record it. TD argues that the trial court erred in denying its motion for summary judgment and in granting summary judgment to Udall, because the deed was neither delivered nor recorded as required to complete the purely statutory sale under RCW 61.24.050. Udall

counters that summary judgment was proper under common law breach-of-contract principles and, therefore, TD could not rescind the sale based on a unilateral mistake in the auction price.

We hold that (1) RCW 61.24.050, not the common law, applies to this statutory non-judicial foreclosure sale; (2) the sale was not completed under the strict terms of the statute; and (3) therefore, Udall was not entitled to the property. Accordingly, we reverse the trial court's grant of summary judgment to Udall and grant summary judgment to TD.

FACTS

The parties do not dispute the material facts. When William Brown failed to make home mortgage payments to his lender, U.S. Bank, U.S. Bank's trustee, T.D. Escrow (TD), instituted foreclosure proceedings. TD hired ABC Messenger Service to sell the property at a public auction. On September 19, 2003, TD filed a notice of trustee sale. The notice stated that Brown was in arrears for \$137,197.06 in loan obligations and \$10,834.18 for other charges and fees.

On April 16, 2004, TD directed ABC to start the auction bidding at \$159,422.20. But ABC started bidding at \$59,421.20, and William Udall bid \$59,422.20. ABC accepted Udall's bid and gave him a receipt for his purchase, which included the words "VESTING CANNOT BE ALTERED ONCE THE AUCTIONEER COMPLETES THIS RECEIPT!" Clerk's Papers (CP) at 35.

Consistent with its general practice after an auction sale and before issuing a deed, TD took time to verify the validity of the bid and the receipt of funds for the sale, to check for intervening bankruptcy filings, and to check other circumstances. This process led TD to discover the auctioneer's bidding-price mistake and, subsequently, to void the sale. Five days

after the auction, on April 21, 2004, TD sent Udall a refund, explaining that the auctioneer had not been authorized to open the bidding at \$59,421.20. Udall rejected the refund.

On June 3, 2003, Udall sued TD and U.S. Bank to quiet title; Udall also filed a lis pendens on the property. TD moved for summary judgment, to quash the lis pendens, and for attorney fees. Udall filed a cross motion for summary judgment. The trial court denied TD's motions and granted Udall's cross motion for summary judgment.

TD appeals.

ANALYSIS

I. STANDARD OF REVIEW

When reviewing an order of summary judgment, we engage in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issue of material fact. CR 56(c). The court must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Wilson*, 98 Wn.2d at 437.

II. NON-JUDICIAL FORECLOSURE SALES

Udall argues that (1) RCW 61.24.050, the Deeds of Trust Act, is ambiguous; and (2) accordingly, courts must use the common law of contract to supplement the Deeds of Trust Act. He contends TD was obligated to deliver the deed to him because he had a valid contract with TD, which TD could not rescind based on its unilateral mistake.

Washington courts have yet to address whether the common law of contracts applies to nonjudicial foreclosure sales. Addressing this issue of first impression, we reject Udall's

arguments and hold that Washington’s Deeds of Trust Act, RCW 61.24.050, not the common law of contracts, controls non-judicial foreclosure sales pursued under this statute.

A. Deeds of Trust Act

Our Legislature enacted Washington’s Deeds of Trust Act (Act) to supplement the time-consuming judicial foreclosure process. John A. Gose, *The Trust Deed Act in Washington*, 41 WASH. L. REV. 94, 95-96 (1966). The Act prescribes detailed procedures that the parties must follow in order for a trustee to sell property in a nonjudicial foreclosure sale at a public auction. *See, e.g.*, RCW 61.24.010 and .040. Once these presale requirements are met, the property can be sold.

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 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 added.) The Act does not explain the meaning of “final” in the context of a “trustee’s sale,” whether the trustee has an obligation to deliver a deed, and, if so, when the delivery must occur. Therefore, we endeavor to interpret the Legislature’s intent for these gaps.

B. Statutory Construction

When interpreting a statute, our primary objective is to ascertain and to carry out the Legislature’s intent and purpose. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). To determine legislative intent, we look first to the plain language of the statute. *Fraternal Order*, 148 Wn.2d

at 239. If a statute is ambiguous, we use principles of statutory construction, legislative history, and relevant case law to provide guidance in construing a statute's meaning. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005).

In addition, we must construe the Act to further three objectives. First, the statutory non-judicial foreclosure process should remain efficient and inexpensive. Second, it should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, it should promote the stability of land titles. *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). In addition, because nonjudicial foreclosures lack the judicial oversight inherent in judicial foreclosures, we strictly apply and interpret the Act in favor of the borrower. *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 111, 752 P.2d 385, *review denied*, 111 Wn.2d 1004 (1988).

C. "Final" Sale—Recording and Delivery

TD argues that a RCW 61.24.050 foreclosure sale is valid only if the deed is recorded and delivered. We agree that the deed must be delivered in order to convey real property rights under Washington's Deeds of Trust Act.

1. History

The pre-1998 version of RCW 61.24.050 provided:

The deed of the trustee, *executed* to the purchaser, shall convey the interest in the property which the grantor had or 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.

RCW 61.24.050 (1996) (emphasis added). This pre-1998 version contained a number of ambiguities. For example, the term "executed" could mean "signed, done, given, performed, and

delivered,” or a combination of these acts. *See* BLACK’S LAW DICTIONARY 609 (8th ed. 1999). Similar to the current version, this version of the Act did not establish when a foreclosure sale under the Act is completed, even though it uses the phrase “after sale.”

Recognizing that nonjudicial foreclosure practice under the Act departed from strict statutory requirements, the Legislature sought to clarify the Act’s ambiguities and requirements, including when a trustee’s sale is final. S.B. REP. on Engrossed Substitute S.B. (ESSB) 6191, 55th Leg., Reg. Sess. (Wash. 1998).¹ Accordingly, in 1998, the Legislature amended the Act to reflect then current practices. S.B. REP. on ESSB 6191. The amended Act read, in pertinent part, as follows:

When *delivered* to the purchaser, the trustee’s deed shall convey all of the right, title 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. . . .

RCW 61.24.050 (emphasis added).

In this amended version, the Legislature separated delivery of the deed and finality of the sale into two distinct parts. The Legislature first changed the word “executed” to “delivery,” which more narrowly defined when property rights are conveyed: “When *delivered* to the purchaser, the trustee’s *deed shall convey* all of the right, title. . . .” RCW 61.24.050 (emphasis added). According to the plain meaning of this sentence, a person acquires no rights to the property sold by non-judicial foreclosure until the deed is delivered. Thus, a foreclosure sale itself, including the acceptance of an auction bid, without delivery of the trustee’s deed, conveys no property rights under the Act.

¹ “Ambiguities about court involvement and other requirements are clarified, and when a trustee’s sale is final is made clear.” S.B. REP. on ESSB 6191.

The Legislature then defined, in a separate sentence, when a sale under the Act is final: “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. . . .” RCW 61.24.050 (emphasis added). Here, “finality” refers only to establishing the date and finality of the sale, which become operative retrospectively only if the deed is recorded within 15 days after this final sale date.

2. Recording requirement

In amending the Act, the Legislature did not indicate that the purpose for requiring recording under RCW 61.24.050 differed from the general purpose for recording other documents under the Recording Act, RCW 65.08.² That general purpose is to place subsequent purchasers on notice of property’s transfer from one owner to another,³ not to convey rights in land to the purchaser. *See* RCW 65.08.070; *Allen v. Graaf*, 179 Wash. 431, 439, 38 P.2d 236 (1934).

A final sale date, established through recording, serves various purposes of the Act unrelated to conveyance. For example, a sale date is necessary to establish title priority and superiority against those who later record an interest in the property after the sale (e.g., bankruptcy filings). The final sale date also serves as the point after which no other person can redeem an interest in the property, thereby allowing the purchaser to obtain clear title. RCW

² *Accord* 4 WASHINGTON REAL PROPERTY DESKBOOK 3D *Deeds of Trust* § 47.9(1) (1996) (nonjudicial procedures [are] designed . . . to give notice of the proceeding to all parties with an interest in the property arising subsequent to the one being foreclosed).

³ For example, for purposes other than statutory nonjudicial foreclosure sales under the Act, unrecorded deeds are valid conveyances. *J.W. Fales Co. v. O.H. Seiple Co.*, 171 Wash. 630, 649-50, 19 P.2d 118 (1933).

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61.24.050. The final sale date further denotes the point at which a purchaser can possess the property or bring an unlawful detainer action against an unauthorized person living on the property. RCW 61.24.060.

We reiterate that we must strictly apply and interpret the Act in favor of the borrower, which in this case is Williams, on whose behalf the bank instituted foreclosure procedures to satisfy his debt. *See Koegel*, 51 Wn. App. at 111. We hold, therefore, that under the Act, (1) delivery of the trustee's deed is necessary to convey rights in real property sold during a statutory nonjudicial foreclosure sale of property; and (2) failure to record the deed within 15 days of the sale merely precludes establishing a final sale date. Here, TD never delivered the deed to Udall, so Udall acquired no rights in the property under the Act. Whether TD recorded the deed within 15 days of the purported sale date is irrelevant to the conveyance of property rights.

3. Duty to convey

Udall further argues that, under the Act, TD had a duty to deliver the deed to him. Again, we disagree.

The Act provides: “[T]he trustee or its authorized agent *shall* sell the property at public auction to the highest bidder,” RCW 61.24.040(4) (emphasis added); and, “The purchaser *shall* forthwith pay the price bid and on payment the trustee *shall execute* to the purchaser its deed.” RCW 61.24.040(7) (emphasis added). We agree with Udall that this statutory language imposes on the trustee, or its authorized agent, an obligation to sell the property to the highest bidder *and* to execute the deed to the highest bidder; but the inquiry does not end here. Under RCW 61.24.050, this obligation arises only if and when the trustee *accepts* a bid: “*If* the trustee accepts a bid, then the *trustee’s sale is final . . .*” RCW 61.24.050 (emphases added).

A principal, such as TD, is responsible to a third party, such as Udall, only when it gives its agent *actual* authority to act on its behalf or when the principal manifests to a third party, based on reasonable, objective interpretation, that the agent has *apparent* authority to act on its behalf. *See King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994).⁴ Udall has failed to show either real or apparent authority on the part of auctioneer ABC.

TD hired ABC as its agent to conduct the public auction. But TD did not authorize ABC to sell the property or to accept a bid for less than \$159,421.20. *See* RCW 61.24.040(4) and .050. Therefore, ABC did not have actual authority to sell the property to Udall for \$59,422.20.

Nor does the record show that ABC had apparent authority to sell the property at the mistakenly low opening price that Udall bid and ABC “accepted.” The only arguable communication between Udall and TD was indirect, through TD’s September 19, 2003 Notice of Trustee’s Sale; this Notice stated that the property owner owed the lender \$148,031.24, and the property would be priced higher than \$148,000 in order to satisfy the existing debt. This Notice of Trustee’s Sale did not establish that auctioneer ABC had apparent authority to open bidding at \$59,421.20 or any other price lower than that necessary to satisfy seller Brown’s debt on the property. *See King, supra*.

The record contains no other arguable communication between TD and Udall, direct or indirect. Thus, Udall cannot satisfy the requirement that, to establish “apparent authority,” the

⁴ The Act explicitly permits trustees to use agents, thereby incorporating agency law principles. RCW 64.24.040. Moreover, other courts have applied agency law principles. In some jurisdictions, auctioneers serve only a ministerial function, especially if the trustee is required to be present during the auction. In others, the trustee may delegate power to an auctioneer to sell property and, if the auctioneer accepts the bid, the sale is valid. *See* 55 AM. JUR. 2D *Mortgages* § 549 (1996).

principal (TD) must have manifested to the third party (Udall) that the agent (ABC) had *apparent* authority to act on its behalf. Here, there was no such communication that Udall could have reasonably and objectively interpreted as creating such apparent authority in ABC.⁵ *See King*, 125 Wn.2d at 507.

Thus, under RCW 61.24.040(4), ABC lacked actual or apparent authority to sell the property for \$59,422.20. And under RCW 61.24.050, ABC lacked actual or apparent authority to accept a bid for this amount. Therefore, we hold that TD did not have a duty to deliver the deed to Udall and that the sale was void for failure to meet the Act's statutory requirements.

D. Contract Law

The Act provides a detailed set of procedures for nonjudicial foreclosure sales such as the one here. *See generally* Joseph L. Hoffmann, *Court Actions Contesting The Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 WASH. L. REV. 323 (1984). Applying the common law of contracts would interfere with these statutory procedures and contravene the Act's purpose and policy.

First, contract law is not directly applicable because a deed of trust necessarily involves three parties—the debtor, the lender, and the trustee (rather than two contractual parties, *Court Actions*, 59 WASH. L. REV. at 323, and possibly a fourth party, the purchaser at the foreclosure

⁵ In our view, ABC's mere appearance at the auction and pronouncement of the mistakenly low opening bid does not meet the Act's requirement for a communication between TD and Udall establishing a reasonable belief that ABC had apparent authority to sell the property at this price.

Further detracting from Udall's claim of apparent authority was his vast experience as a sophisticated, foreclosure-sale purchaser who has purchased 100 foreclosed properties since 1995. Such an experienced foreclosure-sale purchaser should have had actual knowledge of ABC's lack of actual or apparent authority to sell the property at the auctioneer's opening bid price because this bid was \$90,000 lower than the known amount the foreclosure sale had to yield to satisfy the property owner's debt.

sale. Second, applying contract law could contravene the Act's policies by making the process more lengthy (e.g., no finality), inefficient (e.g., more procedures), and expensive (e.g. litigation). *See Cox*, 103 Wn.2d at 387. Third, contract law is not necessarily interpreted in favor of borrowers, which is contrary to the Legislature's explicit requirement in the Act. *See Koegel*, 51 Wn. App. at 111. Lastly, if applied, contract law could provide exceptions to a narrowly prescribed statutory process that demands strict compliance. *See Koegel*, 51 Wn. App. at 111.

We hold, therefore, that the common law of contracts, including unilateral mistake,⁶ is inapplicable to nonjudicial foreclosure sales under Washington's Deeds of Trust Act.

III. ATTORNEY FEES

TD argues that we should award it attorney fees under RCW 4.28.328. We disagree.

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.

⁶ The parties cite two California Court of Appeals cases, neither of which holds that common law contract principles may supplement California's nonjudicial foreclosure laws: *Residential Capital, LLC v. Cal-Western Reconveyance Corp.*, 134 Cal. Rptr. 2d 162 (2003) (contract principles do not apply in nonjudicial foreclosure sales); *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.*, 102 Cal. Rptr. 2d 711 (2001) (holding that a party making a unilateral mistake in bid price was not a procedural irregularity that would justify the trustee from withholding the deed).

Moreover, we are not bound by California courts' interpretations of California law. Thus, we do not rely on these cases here.

Courts have held that, to show a lack of substantial justification for filing a lis pendens, the aggrieved party must be able to prove that the claimant did not have a reasonable basis in fact or in law to file the lis pendens.⁷ Such is not the case here.

TD placed the property on sale at a public auction, and Udall offered the opening bid price, which the auctioneer accepted. The receipt the auctioneer gave Udall stated that he had a vested interest in the property. Udall had a reasonable basis to believe that he had an interest in the property and, therefore, had "substantial justification" to file a lis pendens when TD refused to deliver the deed. RCW 4.28.328. We hold, therefore, that TD is not entitled to attorney fees under RCW 4.28.328, and we deny its request.

Accordingly, we reverse summary judgment for Udall, grant summary judgment for TD, and order the lis pendens removed from the property.

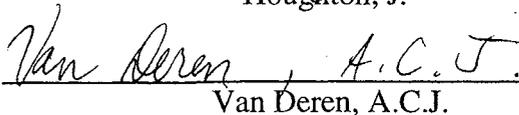


Hunt, J.

We concur:



Houghton, J.



Van Deren, A.C.J.

⁷ See *Richau v. Rayner*, 98 Wn. App. 190, 198, 988 P.2d 1052 (1999) (no substantial justification when claimants assumed that they had the rights to property without any factual basis to support such as belief); *Keystone Land & Dev. Co. v. Xerox Corp.*, 353 F.3d 1070, 1075-76 (9th Cir. 2003) (in interpreting Washington law, the court held that substantial justification exists where a claimant relied on a valid and viable legal theory to file a lis pendens).

fn

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 22th day of April, 2006, I did serve true and correct copies of the foregoing via legal messenger by directing delivery to and addressed to the following:

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