

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DAVID BIANCALANA,

Plaintiff and Appellant,

v.

T.D. SERVICE COMPANY,

Defendant and Respondent.

H035400

(Santa Cruz County

Super. Ct. No. CV162804)

Plaintiff David Biancalana successfully bid on a piece of real property at a trustee's sale. Defendant trustee T.D. Service Company (TD) subsequently discovered it had erroneously conveyed the delinquency amount (\$21,894.17) to the auctioneer, instead of the correct opening credit bid of \$219,105 submitted by the beneficiary to TD. TD informed Biancalana of the error, declined to issue a trustee's deed on sale and returned his cashier's check. Biancalana retendered the check to TD and demanded it issue the trustee's deed. When it failed to do so, he sued for quiet title, specific performance, declaratory and injunctive relief.

TD's motion for summary judgment was initially denied. After TD successfully moved for reconsideration on the grounds of "new law," the trial court granted TD's motion and entered judgment in its favor.

On appeal, Biancalana argues that the trial court erred in granting TD's motion for summary judgment as there was no irregularity in the foreclosure sale process. Biancalana also argues that the trial court erred in granting TD's motion for reconsideration as the case it determined constituted "new law" (i.e., *Millennium Rock*

*Mortgage, Inc. v. T.D. Service Co.* (2009) 179 Cal.App.4th 804 (*Millennium Rock*)) did not represent a change in the law, but simply applied existing law to a new fact pattern.

We agree that the trial court erred in granting TD's motion for summary judgment and shall reverse the judgment.<sup>1</sup>

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

### *A. The foreclosure sale*

On or about July 22, 2008, TD was substituted in as trustee under a deed of trust securing real property located at 434 Winchester Drive in Watsonville, California (the subject property). TD subsequently provided notice that the subject property would be sold at a foreclosure sale scheduled to take place on September 10, 2008. The beneficiary submitted a specified credit bid in the amount of \$219,105 for TD to use as the opening bid for the sale. However, TD erroneously submitted the delinquency amount of \$21,894.17 to the auctioneer as the opening credit bid on the subject property.

While researching upcoming foreclosure sales, Biancalana learned of the scheduled sale of the subject property and, on the day of the sale, called the telephone number TD listed on the sales notice to inquire about the opening bid. The recording advised that the opening bid for the property was \$21,894.17. After checking comparable property values and asking a colleague to physically view the property, Biancalana again called the recording. The amount of the opening bid was unchanged.

Biancalana decided to bid on the property, so he obtained a cashier's check in the amount of \$22,000 and proceeded to the auction site. Having arrived before the scheduled start of the sale, Biancalana discussed this property and other foreclosures with the auctioneer. The auctioneer called TD twice before the start of the sale and spoke to

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<sup>1</sup> Based on that finding, we need not and do not consider whether the trial court properly granted reconsideration of its prior order denying TD's motion for summary judgment.

two different employees, both of whom advised him the opening bid for the property was \$21,894.17. The auctioneer was not instructed by TD to make any further bids on the property over and above the opening bid.

The sale commenced and the auctioneer, as instructed, announced that the opening bid on the subject property was \$21,894.17. Biancalana submitted a bid of \$21,896 and, when no other bids were forthcoming, the auctioneer declared this as the high bid. The auctioneer accepted a cashier's check in the amount of \$22,000 from Biancalana.

TD discovered the mistake when it reviewed sales figures from September 10, 2008. On September 11 or 12, 2008, TD notified Biancalana that the opening bid it submitted was incorrect, that the sale was void and that a new foreclosure sale would be scheduled. TD did not issue a trustee's deed upon sale and returned Biancalana's cashier's check. Biancalana rejected the check and sent it back to TD. When TD refused to issue the deed, Biancalana sued TD, among other defendants,<sup>2</sup> for quiet title, specific performance, declaratory and injunctive relief.

*B. TD's motion for summary judgment*

TD moved for summary judgment, arguing that the sale was invalid because its error precluded the beneficiary's proper opening bid of \$219,105 from being announced at the auction. This procedural defect, coupled with the inadequate price, meant the sale was improper and voidable. Since the trustee's deed had not been issued, and TD was willing to return Biancalana's cashier's check, TD was entitled to a judgment in its favor.

In his opposition, Biancalana argued there was no procedural irregularity in the sale, and TD could not void the sale merely because it mistakenly submitted the incorrect amount as the beneficiary's opening credit bid. Relying on *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.* (2001) 85 Cal.App.4th 1279 (*6 Angels*), Biancalana contended that

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<sup>2</sup> The parties do not discuss the status of the proceedings with respect to these other defendants, and they are not parties to the appeal.

TD's mistake was committed outside the procedures set forth in the statutory foreclosure scheme and thus the sale could not be voided.

The trial court heard the motion on September 14, 2009, and denied it.

*C. TD's motion for reconsideration*

TD subsequently moved for reconsideration of its summary judgment motion, citing *Millennium Rock, supra*, 179 Cal.App.4th 804, as representing "a change in the law." According to TD, *Millennium Rock* involved "virtually identical" circumstances and, in that case, the Court of Appeal determined that a foreclosure sale was voidable due to the announcement of an incorrect opening credit bid.

Biancalana argued reconsideration was not warranted because *Millennium Rock* did not represent a change in the law relating to foreclosure sales, but merely applied existing law to a different set of facts. Biancalana also noted that, in *Millennium Rock*, the operative mistake was made by the auctioneer, not the beneficiary's agent, and was thus part of the sales process.

After granting reconsideration, the trial court granted TD's motion for summary judgment, finding "the mistake made by the trustee in causing the credit bid submitted by the foreclosing beneficiary to be reported incorrectly at the foreclosure sale was within the scope of the statutory duties of the foreclosure trustee and directly resulted in a grossly inadequate price received at the sale as compared with the amount of the credit bid submitted by the foreclosing beneficiary. As a result, [Biancalana] is seeking a windfall profit at the expense of the innocent beneficiary and it is therefore appropriate, since no trustee's deed upon sale was recorded, for the sale to be set aside and reheld with the checks submitted by [Biancalana] having been returned to him."

Biancalana timely appealed.

## II. DISCUSSION

### A. *Standard of review*

The standard of review for an order granting a motion for summary judgment is *de novo*. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*.) The trial court's stated reasons for granting summary judgment are not binding on the reviewing court, which reviews the trial court's ruling, not its rationale. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.)

On appeal from a summary judgment, we apply the same three-step process as the trial court. "Because summary judgment is defined by the material allegations in the pleadings, we first look to the pleadings to identify the elements of the causes of action for which relief is sought." (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 159.) We then examine the moving party's motion. A defendant moving for summary judgment has the initial burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (o); *Aguilar, supra*, 25 Cal.4th at p. 850.)

Next, if the moving papers make a *prima facie* showing that justifies a judgment in the defendant's favor, the burden shifts to the plaintiff to make a *prima facie* showing of the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at p. 849; *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003.) Material facts are those that relate to the issues in the case as framed by the pleadings. (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 67.) Where there is no triable issue of material fact, "and the sole remaining issue is one of law, it is the duty of the trial court to determine the issue of law." (*Federal Deposit Ins. Corp. v. Superior Court* (1997) 54 Cal.App.4th 337, 345.)

*B. Law regarding foreclosure sales*

Civil Code sections 2924 through 2924k “provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust. The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.” (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830.)

Once the trustee’s deed has been delivered, a rebuttable presumption arises that the foreclosure sale has been conducted regularly and properly. (*Moeller v. Lien, supra*, 25 Cal.App.4th at p. 831.) Where the deed has not been transferred, the sale may be challenged on the grounds of procedural irregularity. (*Id.* at pp. 831-832.) It is the burden of the party challenging the trustee’s sale to prove such irregularity. (*Hatch v. Collins* (1990) 225 Cal.App.3d 1104, 1113.) However, “mere inadequacy of price, absent some procedural irregularity that contributed to the inadequacy of price of otherwise injured the trustor, is insufficient to set aside a nonjudicial foreclosure sale.” (*6 Angels, supra*, 85 Cal.App.4th at p. 1284.)

*C. There was no procedural irregularity in the foreclosure sale*

Here, TD discovered the error prior to issuing the trustee’s deed, and thus the rebuttable presumption of procedural regularity does not apply. The trial court, when it first considered TD’s motion for summary judgment, reviewed the undisputed material facts and found the case was governed by *6 Angels*, and found in favor of Biancalana. On reconsideration, the court decided that the case was governed by *Millennium Rock*, and found in favor of TD. Biancalana argues that the trial court was right the first time and that there was no procedural irregularity in the sale. We agree.

In *6 Angels*, the beneficiary's servicing agent miscalculated the amount owed on the subject property and instructed the trustee to set the opening bid at \$10,000, as opposed to \$100,000. When the trustee opened the bidding at \$10,000, 6 Angels bid \$10,000.01 and was announced as the high bidder. When it learned of the mistake, the servicing agent instructed the trustee to return the funds to 6 Angels and refrain from issuing a trustee's deed. The trial court quieted title in favor of 6 Angels. (*6 Angels, supra*, 85 Cal.App.4th at pp. 1282-1283.)

The Court of Appeal affirmed, finding that "this error, which was wholly under [the agent]'s control and arose solely from [the agent]'s own negligence, falls outside the procedural requirements for foreclosure sales described in the statutory scheme." (*6 Angels, supra*, 85 Cal.App.4th at p. 1285.) Absent some procedural irregularity, mere inadequacy of the purchase price is insufficient to set aside a foreclosure sale. (*Id.* at pp. 1284-1285.)

In *Millennium Rock*, however, the trustee (coincidentally, also TD) was instructed by the beneficiary to submit an opening credit bid of \$382,544.46, including foreclosure fees and costs, to the auctioneer for certain real property located on Arcola Avenue in Sacramento. TD submitted that bid to the auctioneer as instructed. (*Millennium Rock, supra*, 179 Cal.App.4th at p. 807.)

On the day of the sale, a second unrelated property, located on 13th Avenue in Sacramento, was also scheduled to be auctioned and the beneficiary's credit bid for that property was \$51,447.50. The auctioneer, in accordance with his custom and practice, conducted the auctions using a script that contained the trustee sale number, the legal description of the property being auctioned and the property's address. The script prepared for the 13th Avenue auction contained the proper trustee sale number and legal description of the property, but due to a clerical error, listed the address for the Arcola Avenue property, rather than the 13th Avenue property. Consequently, when conducting the sale for the 13th Avenue property, the auctioneer read from the script and announced

that the opening bid for the Arcola Avenue property was \$51,447.50. Millennium Rock Mortgage, Inc., was awarded the property after submitting the high bid of \$51,500. The trial court, relying on the holding in *6 Angels*, enjoined TD from holding a new sale of the Arcola Avenue property. (*Millennium Rock, supra*, 179 Cal.App.4th at pp. 807-808.)

The Court of Appeal reversed, finding that the auctioneer's mistake in the case before it was unlike the mistake of the beneficiary's agent in *6 Angels*. "The auctioneer called out the legal description and credit bid applicable to one property, while announcing the street address of a different property. This created a fatal ambiguity in determining which property was being auctioned. [¶] Due to the contradictory descriptions of the property, the auctioneer's mistake went to the heart of the sale. . . . Since irregularity, gross inadequacy of the price, and unfairness were all abundantly present, the sale was voidable at the option of the trustee." (*Millennium Rock, supra*, 179 Cal.App.4th at p. 811, fns. omitted.)

In the instant case, TD was acting as the beneficiary's agent in preparing the property for the foreclosure sale. It submitted the incorrect credit bid to the auctioneer, and twice confirmed the incorrect bid when the auctioneer called to inquire just prior to the sale. Consequently, the mistake was made by TD in the course and scope of its duty as the beneficiary's agent, not by the auctioneer as in *Millennium Rock*. The auctioneer simply announced the bid submitted by TD. The error was wholly under TD's control and arose solely from its negligence, just like the error that occurred in *6 Angels*. As a result, there was no procedural irregularity in the foreclosure sale and TD's motion for summary judgment should have been denied.

### **III. DISPOSITION**

The judgment and order are reversed. The trial court is directed to vacate its order granting TD's motion for summary judgment and enter a new order denying that motion. Biancalana is entitled to his costs on appeal.



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Premo, J.

WE CONCUR:

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Rushing, P.J.

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Elia, J.

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| Trial Court:   | Santa Cruz County Superior Court<br>Superior Court No. CV162804      |
| Trial Judge:   | Hon. John Jeffrey Almquist   |
| Attorneys for Plaintiff/Appellant:<br>David Biancalana     | Dawson, Passafuime, Bowden &<br>Martinez<br>Kathleen Morgan-Martinez |
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