

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2009-022982

02/23/2010

HONORABLE BETHANY G. HICKS

CLERK OF THE COURT  
M. Sahli  
Deputy

B T CAPITAL L L C

WILLIAM H DOYLE

v.

T D SERVICE COMPANY OF ARIZONA, et al.      ROGER L COHEN

JOSEPH E COTTERMAN  
KEVIN J RATTAY

MINUTE ENTRY

On January 25, 2010, the parties presented oral arguments in support of defendant TD Service Company of Arizona's Motion to Dismiss; defendant Point Center Financial's Motion to Dismiss and Joinder in defendant TD Service Company's Motion to Dismiss; and plaintiff BT Capital's Cross-Motion for Summary Judgment, following which the Court took the matter under advisement.

Because the motions rely upon evidence outside the pleadings, the parties have stipulated, in accordance with Rule 12(b), that the motions to dismiss be treated as motions for summary judgment. In order to prevail on a motion for summary judgment, the moving party must show that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law.

This case concerns a trustee's sale of real property pursuant to a deed of trust securing an encumbrance of approximately \$24,150,000. The statutory requirements for a trustee's sale are set forth in A.R.S. §§33-808 and 809. They include, among others, a requirement that the trustee

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record, post, mail and publish a copy of a notice of sale containing a legal description of the trust property. In the instant case, the notice of sale was not posted at the trust property but, instead, at another location, which was the trustor's mailing address. In addition, the purported street address of the trust property on the notice of sale was the same mailing address and not the address of the trust property. Furthermore, the purported legal description of the trust property contained in the notice of sale that was recorded, mailed, posted and published actually described additional property which was not part of the trust property. Finally, the owner of an access easement over and across the trust property was not given notice of the trustee's sale, as required by A.R.S. § 33-809.

An appraisal of the property commissioned by the beneficiary of the deed of trust six months prior to the sale estimated the value of the trust property at \$36 million. At the sale, defendant TD Service, acting on behalf of the trustor and beneficiary of the deed of trust, entered an initial bid of \$1,000,000. Plaintiff BT Capital submitted a bid of \$1,000,001. Defendant TD Service then concluded the trustee's sale. However, subsequent to the sale date, defendant TD Service refused to deliver a trustee's deed to plaintiff BT Capital, apparently based on its discovery of the irregularities in the sale described above, whereupon these proceedings ensued.

Arizona law requires strict compliance with the notice requirements of the deed of trust statutes, presumably at least in part to ensure vigorous bidding and a sale price closer to the property's fair market value for the benefit of both the trustor and the beneficiary of the deed of trust. A trustee's sale which does not comply with the statutory notice requirements is void. *Patton v. First Fed. Sav. & Loan Ass'n of Phoenix*, 118 Ariz. 473, 578 P.2d 152 (1978). In addition, inadequacy in the sales price, coupled with irregularities in sales process, may justify setting aside a foreclosure sale as a matter of equity. *Krohn v. Sweetheart Prop. Ltd. et al*, 203 Ariz. 205, 52 P3d 774 (2002). In a recently decided California case, *Millenium Rock Mortgage, Inc., v. T.D. Service Company*, 179 Cal.App.4th 804, 102 Cal.Rptr.3d 544 (Cal App. 3d Dist)(2009), the California Court of Appeals held, in connection with a trustee's sale involving similar procedural irregularities and price disparities, that irregularity in the description of the trust property, gross inadequacy of the sale price and inequity in the result made the sale voidable at the option of the trustee. Given the similarity in the statutory regime for deed of trust sales in California and Arizona, this case is instructive.

With respect to plaintiff BT Capital's argument that A.R.S. §33-811(C) provides the sole remedy for addressing defects in the sale process, the Court does not agree. First, A.R.S. §33-811(C) does not apply to the trustee, and therefore would not prevent the trustee from discovering and correcting an irregularity in the sale process prior to completion of the sale and, second, one party with an interest in the trust property (by virtue of its ownership of an access

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easement over and across the trust property) simply did not receive notice of the sale. Therefore, the premise from which plaintiff BT Capital proceeds, that “proper notice was given”, is simply not correct.

Inasmuch as the sale was void, or voided by the trustee, there cannot be any basis for a breach of contract action (count one), for a claim based on recording and filing a subsequent notice of sale (count four) or for a declaratory judgment regarding the ownership of the trust property (count five). Furthermore, as trustee pursuant to the deed of trust, defendant TD Service acted as the “common agent” of the trustor and the beneficiary in the attempted sale of the trust property. *Federal Home Loan Bank v. Long Beach Federal Sav. & Loan Ass’n*, 122 F.Supp 401 (D. Ca. 1954). As such, defendant TD Service had no duty to plaintiff BT Capital. Accordingly, defendant TD Service cannot have liability for breach of any duty owed to plaintiff BT Capital. Accordingly, the negligence (count two), negligent misrepresentation (count three) and punitive damages claims (count six) are all inapposite.

At the end of the day, it would appear that procedural irregularities which occurred in the course of a statutorily mandated process, and thereby voided the process, prevented the plaintiff from obtaining an inequitable windfall at the expense of the trustor and the beneficiary of the deed of trust.

Accordingly,

**IT IS ORDERED** the Complaint of plaintiff BT Capital is hereby dismissed as against all defendants. Having dismissed the Complaint, the other pending matters in this proceeding, including plaintiff BT Capital’s Motion to Amend Complaint would appear to be moot and therefore will not be addressed.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>