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WHEN DOES A MISTAKEN BID WARRANT SETTING ASIDE THE FORECLOSURE SALE?

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As most trustees' know, mistaken bids unfortunately happen from time to time. But, the question is whether a California court, when faced with an inadvertent bidding error, will uphold the sale or set it aside?

This exact issue was recently revisited in *Millennium Rock Mortgage, Inc. v. T.D. Service Co.*¹ In *Millennium*, the beneficiary, JP Morgan Chase, hired T.D. Service Co (TD) to conduct a non-judicial foreclosure sale on the property located on Arcola Ave. TD submitted to the auctioneer an opening credit bid of \$382,544.46. However, at the sale, the auctioneer incorrectly bid \$51,447.50. Millennium Rock Mortgage, Inc. (MRM) submitted the winning bid of \$51,500.00. When TD learned of the mistake, it returned the purchase price to MRM and refused to issue the Trustee's Deed. MRM subsequently sued TD for quiet title and to enjoin a new trustee's sale of the Arcola Ave Property.

During the litigation, the parties discovered that the auctioneer's script contained a clerical error, which caused the auctioneer to announce the street address of Chase's property located on Arcola Ave, and the TS number, opening bid, and legal description of a different property located on 13th Ave.

Given the obvious mistake, the Court *voided* the sale, ruling that the auctioneer's error constituted a procedural irregularity that created a fatal ambiguity in determining which property was being auctioned.

In determining whether the procedural error was sufficient to void the sale, the Court found that the contradictory descriptions of the property went to the heart of the sale, and if the sale was validated, it would deprive the blameless beneficiary of the full amount of the credit bid, and result in a windfall to the pur-

chaser who obtained the property for a fraction of the amount owed. Great result for the industry!

However, not all innocent mistakes will result in a rescission of sale. In the infamous *6 Angels*² case, the Court refused to unwind a foreclosure sale to a 3rd party that had resulted from a mistaken bid. In that case, the Notice of Sale listed an indebtedness of \$144,656.17. Prior to the sale, the loan servicer sent a letter to the foreclosure trustee to start the auction at the incorrect price of \$10,000, rather than the correct price of \$100,000.00.

At the auction, *6 Angels* purchased the property for \$10,000.01. Soon after learning of the mistake, the loan servicer instructed the foreclosure trustee to return sale proceeds to *6 Angeles* and not to issue the Trustee's Deed. *6 Angeles* subsequently filed a quiet title claim, and prevailed on summary judgment, which was upheld on appeal.

In the *6 Angels* appeal, the Court reasoned that the only procedural irregularity in the foreclosure, i.e., the loan servicer's clerical error on the bid, resulted from the servicer's own negligence and fell outside the scope of California's non-judicial foreclosure statutes. The Court went on to point out that because the error in *6 Angels* was within the beneficiary's discretion and control, the beneficiary is solely responsible for the mistake. The Court held that unless beneficiaries take responsibility for their own mistakes, every time there is a low opening bid at sale, it will cause suspicion in the mind of buyer about the finality of the sale, thus deterring buyers and impairing the efficacy of foreclosure sales.³ For these reasons, the Court held that the servicer's clerical error was not sufficient to invalidate the foreclosure sale.

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How does one reconcile the facially inconsistent holdings in the *Millennium* and *6 Angels* cases? The key difference between the rulings is found in the source of the mistaken bid. In *6 Angels*, the Court focused on the fact that the mistake was within the beneficiary's control and, consequently, did not let the beneficiary off the hook for its own mistake. However, in the *Millennium* case, the auctioneer made the mistake, not the beneficiary. Because the mistake in the *Millennium* case was outside the control of the beneficiary, the Court held that it would be unjust for the beneficiary to lose its security for a fraction of the debt. The lesson to be learned in deciding whether a mistaken bid warrants unwinding a foreclosure sale to a third party is whether the mistake was within the control of the beneficiary. If it was, the sale can potentially be set aside. But, if the beneficiary makes the mistake, the sale is most likely valid.⁴

1. 179 Cal.App.4th 804 (2009)
2. 85 Cal. App. 4th 1279, 1284 (2001).
3. *6 Angels* at 1288, citing *Rauer v. Hertwick* (1917) 175 Cal. 278 [165 P. 946].
4. Of course, before making any decision to invalidate a foreclosure sale due to a mistaken bid or any other procedural irregularity, the trustee and/or beneficiary should consult with its' counsel.



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