

SUPREME COURT  
**FILED**

DEC 23 2011

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Deputy

**Supreme Court Case No: S198562** *filed 12/9/2011*  
Appellate Case No: H035400  
Santa Cruz Superior Court Case No: CV162804

IN THE

SUPREME COURT OF CALIFORNIA

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DAVID BIANCALANA, Plaintiff and Appellant

v.

T.D. SERVICE COMPANY, Defendant and Respondent

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After a Decision by the Court of Appeal,  
Sixth Appellate District

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**ANSWER TO  
T.D. SERVICE COMPANY'S PETITION FOR REVIEW**

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## INTRODUCTION

**Defendant/Respondent T.D. Service's Petition for Review should be denied as the code and case law related to the foreclosure sale process is consistent and clear. This area of law is important but well settled. As there is no conflict in the law, there are no grounds for review under California Rule of Court 8.500(b).**

Specifically, T.D. Service's Petition should be denied for the following reasons:

1. The Sixth District Court of Appeal followed the existing rule of law in deciding the case;
2. There is no conflict in the rule of law governing the process of nonjudicial foreclosure sales;
3. The Six District's decision in *Biancalana* supports the public policy of public, transparent and predictable nonjudicial foreclosure sales.

## FACTUAL SUMMARY

The following facts are summarized from the appellate court's decision:

David Biancalana (hereinafter Biancalana) successfully bid on a piece of real property located at 434 Winchester Drive in Watsonville, California at a nonjudicial foreclosure sale where T.D. Service Company (hereinafter T.D. Services) was the Trustee.

Prior to the sale, the beneficiary submitted a specified credit bid in the amount of \$219,105 to T.D. Services to use as the opening bid for the sale. (C.T. page 35, lines 10-14) However T.D. Services erroneously submitted the delinquency amount of \$21,894.17 to the auctioneer as the opening credit bid on the property. (C.T. page 35, lines 15-26)

While researching upcoming foreclosure sales, Biancalana learned of the scheduled sale and on the day of the sale called the telephone number T.D. Services 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. (C.T. page 83, lines 9-16) After checking comparable property values and asking a colleague to physically view the property, Biancalana called the recording. The amount of the opening bid was unchanged. (C.T. page 83, lines 9-16)

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. Having arrived before the scheduled start of the sale, Biancalana discussed the property and other foreclosures with the auctioneer. The auctioneer called T.D. Services twice before the start of the sale and spoke to two different employees, both of whom advised him the opening bid for the property was \$21,894.17. (C.T. page 91, lines 15-23) The auctioneer was not instructed by T.D. Services to make any further bids over and above the opening bid.

The sale commenced and the auctioneer, as instructed, announced the opening bid of \$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. (C.T. page 91 lines 18-22; page 84 lines 1-7) The auctioneer accepted the cashier's check from Biancalana. (C.T. page 91, lines 18-22; page 84, lines 1-7)

T.D. Services discovered the mistake when it reviewed its sales figures. (C.T. page 35, line 10) A day or two later T.D. Services notified Biancalana that the opening bid it submitted was incorrect, that the sale was void and that a new foreclosure sale would be scheduled. (C.T. page 36, lines 8-11; page 84, lines 15-23) T.D. Services did not issue a trustee's deed upon sale and returned Biancalana's cashier's check. (C.T. page 36, lines 12-13) Biancalana rejected the returned check and set it back to T.D. Services. (C.T. page 36, lines 10-11; page 84, lines 24-25) When T.D. Services refused to issue the deed, Biancalana filed suit for quiet title, specific performance, declaratory and injunctive relief.

## DISCUSSION

### I. THE LAW GOVERNING THE NON JUDICIAL FORECLOSURE SALE PROCESS IS CLEAR.

California Civil Code section 2924 outlines the process for the sale of property under the power of sale contained in any deed of trust or mortgage. **The sale must be held in the county where the property is located, by public auction, Monday through Friday between the hours**

of 9 am and 5 pm. CA Civ. Code section 2924 (a)-(g); *I.E. Associates v. Safeco Title Insurance Company* (1985) 39 Cal.3d 281, 285-286.

This is the foreclosure sale process required by code. The Biancalana sale complied with these requirements.

**A foreclosure sale can be overturned only for a procedural error in the statutory foreclosure sale process, coupled with gross inadequacy of price. *Bank of Seoul & Trust Co. v. Marcione* (1988) 198 Cal.App.3d 113.**

This is the well settled rule of law establishing the requirements for overturning a foreclosure sale. This was the law applied by the Sixth District in deciding the Biancalana case. The Court found that T.D. Services' internal error was not a procedural error in the statutory foreclosure process. The Court stated that T.D. Services error was "in the course and scope of its duty as the beneficiary's agent... was wholly under T.D. Services' control and arose solely from its negligence." Therefore, the Biancalana purchase could not be overturned.

In making this determination, the Sixth District compared the decisions in *6 Angels Inc v. Stuart-Mortgage, Inc.* (2001) 85 Cal.App4th 1279 (hereinafter *6 Angels*) and *Millennium Rock Mortgage Inc. v. T.D. Service Co* (2009) 179 Cal.App.4<sup>th</sup> 804. (hereinafter *Millennium Rock*) The appellate courts in these cases applied the exact same rule of law as stated in the code and *Bank of Seoul*.

In *6 Angels*, the beneficiary gave an incorrect opening bid to its servicer which resulted in the incorrect amount being given to the auctioneer. The auctioneer opened the bidding with the amount given and the property was sold. The Court of Appeal found that the error was outside the statutory process and upheld the sale. *6 Angels at 1285*

In *Millennium Rock* the auctioneer made an error during the public auction by announcing the legal description and credit bid applicable to one property while announcing the street address of a different property. This caused confusion and created a fatal ambiguity in determining which property was being auctioned. The auctioneer's mistake went to the "heart of the sale", and that coupled with gross inadequacy of price and unfairness allowed the sale to be voided. *Millennium Rock at 811*

Neither *6 Angels* nor *Millennium Rock* changed the law as stated in *Bank of Seoul*.

In *Biancalana*, *6 Angels* and *Millennium Rock*, the Courts of Appeal applied the rule of law to differing sets of facts. There is no conflict in the decisions or confusion as to the rule of law which would merit the Supreme Court's review of *Biancalana*.

## **II. IN BIANCALANA THE SIXTH DISTRICT FURTHERS THE PUBLIC POLICY OF PREDICTABLE, OPEN, PUBLIC FORECLOSURE SALES.**

The Legislature mandated by code that a foreclosure sale be conducted in public, during normal business hours in the county where the property is located. By this system, it insures fairness, transparency and

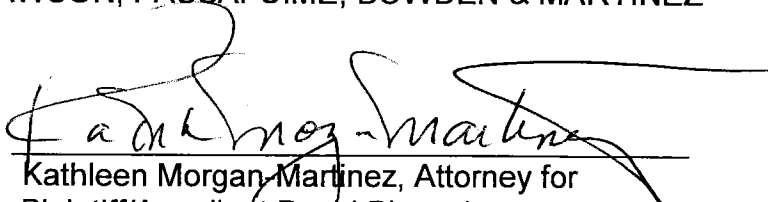


predictability in the process. Bidding occurs at the public auction; the law does not allow for private bidding. Yet T.D. Services argues that the internal direction it received from the beneficiary prior to the day of sale was somehow a "bid" within the statutory foreclosure sale process. This position of supporting bidding in secret, outside the public eye, invites confusion, manipulation of the system, distrust and fraud and, as such, is contrary to public policy. The Sixth District rejected secret bidding and upheld the transparent public process in its ruling in *Biancalana*. This public policy should be further upheld by the Supreme Court by denying T.D. Service's Petition for Review.

### CONCLUSION

In *Biancalana* the Sixth District Court of Appeal applied the existing rule of law relating to the foreclosure sale process as stated in the civil code and case law. It was consistent with prior appellate decisions. The case supports the public policy of predictable, open and transparent foreclosure sales. As such there are no grounds for review by the Supreme Court, and Plaintiff/Appellant David Biancalana respectfully requests the Court to deny T.D. Service's petition.

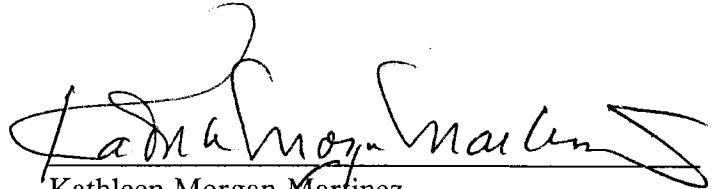
December 20, 2011      DAWSON, PASSAFUIME, BOWDEN & MARTINEZ

  
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2  
3 **CERTIFICATION OF NUMBER OF WORDS**

4 I hereby certify that this brief consists of approximately 1,315 words counted by the Word  
5 word processing program used to generate this brief.

6 Executed on this 20 day of December, 2011, in Santa Cruz County, California.

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9 Kathleen Morgan-Martinez  
10 Attorney for Appellant,  
11 David Biancalana  
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1 **PROOF OF SERVICE**

2 **[C.C.P. 1013a, 2015.5]**

3 I declare that I am employed in the County of Santa Cruz, California. I am over the age of  
4 eighteen years and not a party to this action. My business address is 4665 Scotts Valley Drive, Scotts  
Valley, California, 95066.

5 On December 22, 2011, I served copies of the following documents in the above captioned  
6 action: *Appellant's Answer to Respondent's Petition for Review*. on the interested party in said case as  
7 indicated below:

8  **(BY PERSONAL SERVICE)** I served a copy of said document(s) by hand delivery to the  
interested parties at:

9  **(BY FACSIMILE)** I served a copy of said documents(s) via facsimile transmission to the  
10 interested parties at: Edward Newman, Esq. Fax#476-1422

11  **(BY OVERNIGHT FED EX DELIVERY SERVICE)** I served a copy of said document(s)  
to be sent via overnight delivery service to the interested parties listed below:

12  **(BY REGULAR MAIL)** I served a copy of said document( ) to be placed in a United States  
13 mail depository, in a sealed envelope with postage fully prepaid, to the below addressee:

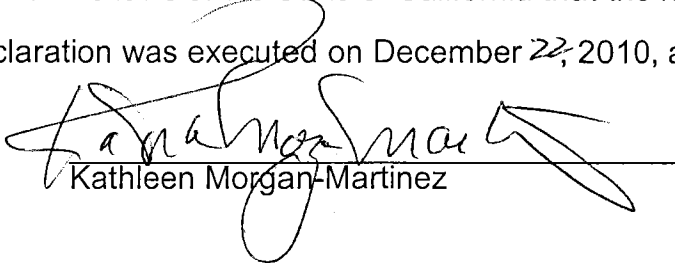
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19 Honorable Jeff Almquist  
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21 Sixth Appellant District  
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23 I declare under penalty of perjury under the laws of the State of California that the foregoing  
24 is true and correct and that this declaration was executed on December 22, 2010, at Scotts  
25 Valley, California.

26   
27 Kathleen Morgan-Martinez  
28