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Conspiring to fix foreclosure bidding: Lo v Jensen, 2001

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Court may set aside nonjudicial foreclosure sale under CC §2924h(g) when two buyers combine to restrain competition and buy property at inadequate price.

Lo v Jensen (2001) 88 CA4th 1093, 106 CR2d 443

Plaintiffs owned a condominium in Malibu. When they defaulted on their homeowners association obligations, the association brought nonjudicial foreclosure proceedings. Defendants, two seasoned investors specializing in foreclosure properties, each believed that the property was worth at least $150,000 and were prepared to bid $100,000. Instead, they collaborated in making a successful joint bid of $5412. Defendants claimed that they had agreed to share expenses and profits and to contribute different skills to the venture, but also admitted that they would have joined forces without those contributions. Plaintiffs challenged the sale on the grounds that defendants' primary motive was to restrict competition and not to carry on as co-owners in a business. The trial court found that defendants had violated CC §2924h(g) and set aside the sale.

The court of appeal affirmed. Civil Code §2924h(g) makes it

unlawful for any person, acting alone or in concert with others, (1) to offer to accept or accept from another, any consideration of any type not to bid, or (2) to fix or restrain bidding in any manner, at a sale of property conducted pursuant to a power of sale in a deed of trust or mortgage.

The evidence showed that defendants had joined together to eliminate competition and that they benefited from the lack of competition to the owners' detriment— "precisely the conduct which §2924h(g) forbids." 88 CA4th at 1097. Moreover, the evidence showed that their agreement was intended not to combine skills and expertise but to hold down the sales price. Because defendants' conduct was unfair and the price was inadequate, the court had the power to vacate the sale under CC §2924h(g).

▶***THE EDITOR'S TAKE:*** When two defendants are held liable for conspiring to restrain the bidding and they were the only two witnesses who testified at the trial, it suggests to me that someone really mishandled the trial preparation. How much foresight does it take to tell them to keep their mouths shut? I'm not a criminal attorney, but since the statute appears to criminalize that kind of conduct, couldn't they have pled the Fifth Amendment even if they had to take the witness stand? (And did they really have to spill out the entire sordid story that only the two of them knew about?)

Professional foreclosure bidders make their living by avoiding competition among themselves; stories abound of the notorious "40 thieves" of Southern California who with their winks and nods made sure that the bidding stayed under their control. I would not expect to hear any of those characters ever declare from the witness stand that he had worked it all out in advance with the other bidders (and such collusion seems provable by circumstantial evidence only in rare cases, *e.g.*, when the former rivals have already individually qualified bids much larger than they suddenly seem interested in making). Civil Code §2924h(g) may state a noble goal, but not one that is going to cause much trouble to insiders possessing any minimal amount of intelligence.

The code section itself does not say that the remedy for conspiratorial bid chilling is vacation of the sale; it merely declares such behavior "unlawful," and states that the criminal sanctions are in addition to "any other remedies." Although foreclosure sales can be set aside for irregularity, that has generally referred to the conduct of the auctioneer or the beneficiary, not to outsiders whose presence did not disrupt the sale. However, it is not hard to predict that when property with $150,000 or $160,000 of equity is sold at foreclosure for $5000, judges are going to do whatever they possibly can to correct the situation, even if the rules have to get bent somewhat. As here.

While I doubt that professional bidders are going to worry too much about this decision, there is one situation in which it can have dangerous implications if people are not careful. In most mortgage foreclosure cases, the lending bank intends to enter a credit bid of all or most of what it is owed, although it would much prefer to see some outsider appear at the sale and take the property off its hands. But what if such a potential buyer contacts the bank before the sale, to find out how much the bank plans on bidding and also to ask whether the bank will finance her acquisition of the property (by waiving the requirement that the bid be cash rather than credit)? While that might be quite agreeable to the bank, an agreement to do so could get it (and the bidder) in trouble. The bank was previously intending to enter a bid itself, *i.e.*, be a bidder at the sale, and if it now steps aside and does not bid, to accommodate that outside bidder, how do you distinguish that from what Jensen and Ko did in the reported case?

If I were advising the bank, I would recommend that it always acquire the property itself at the foreclosure sale and then resell it (perhaps by a prearranged contract of sale) to the outsider, at least until further cases or statutes make it clearer that the alternative described above does not constitute a conspiracy to restrain prices. —*Roger Bernhardt*