2003

Foreclosure purchaser vs late redeeming owner: Nguyen v Calhoun, 2003

Roger Bernhardt
Golden Gate University School of Law, rbernhardt@ggu.edu

Foreclosure purchaser vs late redeeming owner: *Nguyen v Calhoun,* 2003

Roger Bernhardt

Purchaser at foreclosure sale acquired title to property, regardless of defaulting borrower's sale of property on same day as foreclosure sale, when lender did not receive mortgage payoff until three days after foreclosure sale.

Nguyen v Calhoun (2003) 105 CA4th 428, 129 CR2d 436

In 1994, Chavez obtained a loan on a residence secured by a deed of trust. When Chavez stopped making payments on the loan in March 1998, Chavez's lender recorded a notice of default and election to sell. Attempting to sell the property before foreclosure, in late April, Chavez contracted to sell the property to Nguyen, who was aware of the pending foreclosure. In late June, the lender recorded a notice of trustee sale scheduled for July 9. The escrow company (Financial Title) was aware of the scheduled sale, and also knew that the sale had been postponed one day and was set for July 10, at noon. The funds for Nguyen's new loan were received in escrow by wire on July 9 at 1:30 p.m. On July 10, Financial Title closed escrow on the sale, recorded the grant deed transferring title to the property to Nguyen, and sent the lender (1) a check by Federal Express and (2) a fax of the final escrow settlement statement. The check and fax were not received until July 13.

Not having received notice of the funding of Nguyen's loan, the lender proceeded with the foreclosure as scheduled, on July 10 at noon. The foreclosure trustee complied with all statutory requirements and the crier accepted Calhoun's bid, giving him a sworn declaration of trustee sale. As is customary, the trustee deed was to be delivered later. On Monday, July 13, the lender received the faxed escrow statement and check from Financial Title, and three days later issued a refund check to Financial Title and Chavez. On July 31, the trustee sent its trustee deed to Calhoun, who recorded it on August 3. Nguyen sued to quiet title; the trial court found that the conditions for a timely escrow were met and that title had passed to Nguyen.

The court of appeal reversed. As grantee, Nguyen took title to the property subject to the lender's preexisting deed of trust. To protect his interest in the property from the pending foreclosure, Nguyen had to ensure that the underlying obligation to the lender was satisfied. That did not occur, because the debt was not paid before the foreclosure sale. Depositing a check in the mail (or with a courier) does not constitute payment. Although there is an exception to that general rule when the lender has directed the borrower to mail the payment, that was not the case here. Because the payment sent by the escrow holder via Federal Express was not received until three days after the foreclosure sale, the debt remained unsatisfied at the time of the foreclosure sale.

The court also concluded that the foreclosure sale could not be set aside based on the lender's alleged breach of an oral agreement to postpone the trustee sale, and there was no other basis for invalidating the trustee sale.

THE EDITOR'S TAKE: I felt very sorry for this plaintiff, who lost the house he had just purchased to a trustee sale bid that was a mere five cents higher than what he believed had

been paid to extinguish that loan the day before. On the other hand, I felt equally exasperated at the inept and nonchalant way he went about trying to protect himself. Couldn't he have called back the next morning to make sure his message had been received? Couldn't he have at least double checked the fax number and recipient's name?

To the above list of blunders, I was tempted to add: Couldn't he have sued the lender for damages rather than suing the uninvolved purchasers to set aside the sale. But, based on the court's recitation of facts, it doesn't look like that theory would have gotten anywhere either. While the opinion does hold that the defendants were BFPs protected by the trustee's recitals, that does not really matter in light of the substantive holding that it was proper for the lender to go to sale anyway.

But while neither the buyers nor the lender seem in jeopardy here, these facts make further litigation among other parties likely. The loser here was the innocent buyer of the property, not the defaulting trustor-seller. Did their sales contract really permit title to be transferred subject to an unpaid (and very delinquent) mortgage? Was cash actually paid to the seller? If so, can it be recovered under either a breach of contract theory or breach of the statutory covenant against encumbrances? Did the escrow instructions really permit payment to the seller before the mortgage was either extinguished or released of record? If so, who drafted them? And, if not, why did the escrow agent let that happen? Finally, what about the broker who had put the deal together? Did his duty to protect the parties end once the contract was signed, even though the escrow had to close in a timely fashion for the contract to be meaningful? —*Roger Bernhardt*