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**Frustrated high bidders at void foreclosure sales:  
*Residential Capital v Cal-W. Reconveyance, 2003*  
Roger Bernhardt**

**High bidder at nonjudicial foreclosure, who did not receive trustee's deed because trustor and beneficiary agreed to valid postponement of sale, is only entitled to return of consideration paid plus interest.**

*Residential Capital, LLC v Cal-W. Reconveyance Corp.* (2003) 108 CA4th 807, 134 CR2d 162

Residential Capital submitted the high bid at a nonjudicial foreclosure sale conducted under the power of sale in a trust deed encumbering residential real property. The trustee under the trust deed did not deliver to Residential Capital a trustee's deed to the property because it learned after the bidding that the trustor and the beneficiary under the trust deed had agreed to postpone the sale. See CC §2924g(c)(2). The trustee made a full refund of the purchase price plus three days' accrued interest to Residential Capital. Residential Capital sued the trustee and the beneficiary for breach of contract and negligence. The trial court granted defendant's motion for summary judgment.

The court of appeal affirmed, holding that Residential Capital was not entitled to breach of contract or negligence damages. The court rejected Residential Capital's argument that the foreclosure sale conducted after the postponement agreement was not void but merely voidable. The court found it "unhelpful to analyze trust deed nonjudicial foreclosure sales issues in the context of common law contract principles," and decided the case by interpreting the statutory scheme setting forth the rules of trust deed nonjudicial foreclosure sales. The court explained that only a properly conducted foreclosure sale, free of substantial defects in procedure, creates rights in the high bidder at the sale. The court concluded that, because the agreement to postpone the sale by the trustor and beneficiary was discovered before the trustee's deed was issued, Residential Capital's relief was limited, as a matter of law, to return of its money plus interest, even though Residential Capital's bid was accepted at the nonjudicial foreclosure sale. Because a trustee's deed was not issued, the intent of the statutory scheme—that "the sanctity of title of a bona fide purchaser be protected"—did not extend to Residential Capital.

***THE EDITOR'S TAKE:*** This decision holds that a high bidder at a foreclosure sale, who is later denied a trustee's deed because of a purported foreclosure defect discovered after its bid was accepted, has no claim to "benefit of the bargain" damages. (Specific performance was not pled as an alternative remedy, but it seems fairly certain that that relief would also have been denied.) What is uncertain is whether the bidder went remediless because the sale was bad for being conducted in violation of a postponement agreement or because that fact was discovered in time, *i.e.*, before delivery of the deed. Both conditions existed and it is hard to know their comparative importance. What would the result have been if the deed

had already been delivered before the postponement agreement was discovered? Or, what if the claimed postponement agreement had ultimately turned out not to exist?

In a column discussing *6 Angels, Inc. v Stuart-Wright Mortgage, Inc.* (2001) 85 CA4th 1279, 102 CR2d 711, reported in 24 CEB RPLR 80 (Mar. 2001), I complained that the court had overlooked the difference between a foreclosure sale where the high bid has been accepted but the trustee's deed has not yet been delivered and a sale where that deed has already been delivered. I suggested that when the high bidder is seeking to compel delivery of the deed, the test ought to be whether that relief was "just and reasonable" (see CC §3391(2), enumerating grounds for refusing specific performance), whereas the standard in cases where delivery had already occurred should be whether there were grounds to set aside a completed foreclosure sale. In *Residential Capital*, however, the court goes even farther, stating: "[I]f the trustee's deed with the appropriate recitations has been issued to a bona fide purchaser, the purpose of the statutory scheme to provide a prompt and efficient remedy for creditors is implemented by the [CC] section 2924 statutory presumption of finality." This suggests to me that the court believes that delivery of a trustee's deed completely validates an otherwise invalid trustee sale.

I am not so sure that a delivered trustee's deed does that much. It is true that it includes some recitals about sale propriety, but to me those afford only partial comfort. Civil Code §2924 provides that mailing, delivery, and posting of the notices of default and sale are conclusively deemed proper in favor of a BFP, but it says nothing about whether the sale was conducted in violation of a postponement agreement (or in violation of any other time constraint). Thus, the code section does not necessarily imply that a trustor who wishes to challenge the sale as premature must do so before the trustee's deed is actually delivered, or that the trustor is barred—in case of a sale to a third party—from seeking to set the sale aside once delivery has occurred. I think we have to wait until that issue is actually litigated before we know the answer.

The existing cases answer only the easy questions—involving either sale defects that were undisputed and acknowledged before the deed was delivered, thus making it completely proper for the trustee to decline to deliver the deed, (*e.g.*, the beneficiary agreed that it had consented to postpone or the trustee discovered that it had failed to send a notice), or irregularities that were held not to constitute defects in a post-delivery challenge (*e.g.*, a beneficiary's bid that was clerically incorrect). They offer no guidance as to what should happen when the outcome is less clear. If the trustor tells the trustee that there was an agreement to postpone, but the beneficiary denies it, how should the trustee behave? Should it act like an escrow agent—or even a common agent, as the opinions often say it is—and interplead or freeze until the matter is resolved, or should it act only as the beneficiary's agent and ignore everything the trustor says?

I suggest—at least until there is further judicial or legislative clarification—that trustees, when confronted with conflicting stories, ought to continue to follow the beneficiary’s instructions as to moving ahead with the sale or delivery of the deed, but at the same time should make sure that the foreclosure purchaser is informed of the trustor’s contention. It is not up to the trustee to decide who is right, but the trustee may well have a duty to see that information potentially affecting value (*e.g.*, that might lead to invalidation of the sale) is not withheld from the buyers. What the parties then decide to do about the information is not up to the trustee—it at least has discharged its duties in not suppressing what it knew. —  
*Roger Bernhardt*