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# Premature notice of trustee sale: Knapp v Dohertym, 2004

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**Slightly premature service of notice of nonjudicial foreclosure sale did not invalidate sale when trustor was not prejudiced.**
*Knapp v Doherty* (2004) 123 CA4th 76, 20 CR3d 1

In November 2002, approximately one year after the original date noticed for the foreclosure sale and after 14 postponements of the sale date, the Knapps lost their home through nonjudicial foreclosure. Before the sale, the Knapps did nothing to cure their default. After the buyer at the trustee sale sued to evict them, the Knapps sued to set aside the trustee sale, claiming that the sale notice was never served, as required by statute. The trial court granted summary judgment for the lender, trustee, and buyer.

The court of appeal affirmed. Ordinarily, a material defect in the notice would void a nonjudicial foreclosure. Here, however, the court found that a copy of the notice of trustee sale was served on the Knapps by registered or certified mail and by first class mail. The court explained that there is no statutory requirement that the Knapps receive *actual notice* so long as the notice was provided in compliance with the statute. The court also held that, although the trustee sale notice was served nine days prematurely, that minor procedural irregularity did not prejudice the Knapps, who had received adequate notice of the sale.

***THE EDITOR'S TAKE:*** The trouble with safe harbors is that they present problems for the ship that arrives somewhat off course but nevertheless still manages to land safely. Under the UCC's requirement that foreclosure sales be conducted in a commercially reasonable manner, what happened here should have been a simple matter, because the lender clearly had waited long enough and the borrowers were fully aware that their home was going to be sold. But for a real estate foreclosure sale conducted under the Civil Code, compliance with the statutory requirements turns more on whether the "*i*"s were dotted and the "*t*"s crossed than on whether the actual conduct of a sale really affected the outcome.

This decision is somewhat of a rarity in concluding that there was a technical breach—but that it did not really matter. I, too, think there was a breach and that it didn't matter, but I'm not certain those two conclusions would have led me to rule that the sale should therefore be upheld. Luckily, the judges had to decide that one, not me.

There certainly was a breach. Civil Code §2924(b) says a beneficiary cannot send a notice of sale (NOS) less than three months after a notice of default (NOD) was given. In this case the NOD was recorded September 5, and the NOS was mailed November 28. Even if some discrepancy occurred due to use of the recording date for the NOD and the mailing

date for the NOS, November 28 is still over a week before the proper date of December 5—a gap I would call more than "slightly premature."

But, just as certainly, that inopportune notice did not matter. It did not lead to an untimely sale: The original date set for sale by the NOS was December 27—still more than the 20 days required by CC §2924b(c)(3) and §2924f—and the actual sale date was 11 months after that. And the borrowers were always fully aware of these times.

So how does one decide whether the sale should be upheld or nullified? The legislature has never really explicated its reasons for the two different time periods following the notice of default and the notice of sale, although the logic is not hard to fathom. The three-month wait after an NOD is intended to give borrowers time to get their finances back together, to cure their defaults by paying their arrearages, and thus enable them to continue on as owners and mortgagors.

The 20-day time period after that serves an entirely different purpose. It is certainly not designed just to give the borrowers an extra three weeks to fix things up. (Indeed, in earlier versions of the statute the right of reinstatement ended once the NOS had been sent.) This second period is there because, after the first three months, there is no reason to hold out hope for the debtors to cure, and it is time to go about the business of notifying the public that a foreclosure sale is coming up.

The separation is not perfect. Although the 20 days is intended to give buyers time to get their bids ready, there is no harm in also allowing the debtors to use that time to save their property, *i.e.*, to reinstate (pay only the arrearages) during the next 15 days, and to redeem (pay the entire debt) during the last 5 days.

In that kind of environment, a too-hasty notice of sale is harmful only if it prematurely terminates a right of reinstatement, or sets a premature sale date, or causes people to get too confused to act properly. Since none of those evils happened here, the conclusion is justified that the error did not matter. (That conclusion might seem to need a trial to support it, but it probably has sufficient prima facie validity to support a summary judgment for the lender in the absence of any declaration by the debtor (or by bidders) as to how any prejudice arose from it.)

That still leaves open the final question of what judges should do when they believe there was a violation, but they think it didn't matter. Does the doctrine of harmless error apply to safe harbors? In the reverse case, *i.e.*, when there is actual harm despite full compliance with the formalities (*e.g.*, when notices were properly mailed by the creditor but never received by the debtors), the safety of the harbor trumps the fact that the ship sank. In this

case, the judges filled in another panel of the picture by adding that there is no liability for not landing at an unsafe harbor so long as the ship stayed afloat.

I discussed this case with Stephen Dyer, one of my collaborators on our California Real Estate Finance Casebook, who raised the following additional questions:

- What should a foreclosure trustee do if it discovers the sale is scheduled prematurely, either before it has been conducted or afterwards, but before a trustee's deed has been delivered to the purchaser?
- Will the recitals in the trustee's deed make a difference?
- If courts now must also decide whether a procedural defect is significant enough to warrant setting aside a sale, how does that standard get defined?
- With so many trustee sales going on, would a bright-line standard be more sensible, even if it does sometimes seem to operate arbitrarily?

I wish I had answers to any of these. *—Roger Bernhardt*