2001

The Home Equity Sales Contract Act and vacant property: In re Phelps, 2001

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

The Home Equity Sales Contract Act and vacant property: *In re Phelps,* 2001

Roger Bernhardt

Home Equity Sales Contract Act, prohibiting fraud against homeowner facing foreclosure, does not apply when homeowner does not reside in home.

In re Phelps (2001) 93 CA4th 451, 113 CR2d 217

Rocha moved out of her home after it went into foreclosure. She was later contacted by Phelps, who induced her to transfer the property to him. Phelps pleaded guilty to violating the Home Equity Sales Contract Act (HESA) (CC §§1695–1695.17), which outlaws the unfair, deceptive, or coercive conduct of "equity purchasers" and "foreclosure consultants" who seek to acquire residences from or render paid advice to financially distressed homeowners whose residences are in foreclosure. The Act is intended to protect homeowners who are poor, elderly, or financially unsophisticated—*i.e.,* those particularly vulnerable to the wiles of such "consultants" who induce the sale of these properties for a fraction of their true value. The court of appeal granted Phelps's petition for a writ of habeas corpus, allowing him to withdraw his guilty plea, finding that he had not violated the law.

The HESA applies to residences in foreclosure "which the owner occupies as his or her principal place of residence." CC §1695.1(f). Phelps argued that, because Rocha had already moved out of her home when he approached her, he was not covered by the statute. After laboring to find Phelps's conduct covered under the statute, the court relented, holding that the "crucial element"—that the homeowner is approached while residing in the home—must be present to trigger the statute. The court stated (93 CA4th at 458):

[A]n owner who has moved out presumably feels less stress and pressure, and is therefore less likely to enter into a disadvantageous deal in the hope of staving off foreclosure. [Footnote omitted.] Thus, the Legislature could rationally have chosen to extend the statutory protections only to those owners still attempting to remain in their homes.

▶***THE EDITOR'S TAKE:*** The Home Equity Sales Contract Act covers "residential real property consisting of one- to four-family dwelling units, one of which the owner occupies as his or her principal place of residence." CC §1695.1(b). That description includes four components:

1. The units must be *dwelling* units—commercial or storefront properties are not included;
2. There must be *one to four* of them—large apartment buildings are not included;
3. The owner must *occupy* one of them—absentee landlords are not included; and
4. It must be the owner's *principal* residence—vacation homes also are not included.

The court points out that decent arguments could be made for eliminating some of these refinements, but the legislature has chosen not to do so. Thus, owners of grocery stores, vacation condos, big apartment buildings, and even little apartment buildings or single-family houses—

that the owners rent out but don't live in—do not fall within the proscriptions of the statute, meaning that "equity purchasers" can offer to buy them even while they are in foreclosure.

We have a number of statutes that apply to owner-occupied one-to-four-unit properties, regardless of whether they constitute principal residences (see, *e.g.*, CC §1917.006 (shared-appreciation loans); CC §2924.i (balloon-payment loans); and CCP §580b (purchase money antideficiency rule)).

We also have statutes that apply to owner-occupied single-family houses: Some are confined to principal residences (*e.g.*, CC §1923 (reverse mortgages); Rev & T C §§69.5 (transfer of base-year value) and 401.4 (valuation of single-family dwellings)); others impose the owner-occupancy and one-to-four restrictions but not the principal-residence requirement (*e.g.*, Bus & P C §10242.6 (loan interest prepayment); CC §2924f (foreclosure sale notice requirements); CC §2949 (loan acceleration on junior encumbrance); Fin C §779 (fraudulent loan exclusion); Health & S C §25174.7 (hazardous waste disposal fee exemption); and CCP §726 (one-action rule)). Although I can certainly say that none of these statutes are designed to benefit or burden an absentee landlord, it is hard to explain why some apply to single-family houses but not small apartment buildings; or why some protect all owner-occupants when others protect only owner-occupants who make the property their primary residence.

And then, finally, we do have some statutes that apply to small residential properties—*i.e.*, single-family dwellings or one-to-fours that do not require owner occupancy and cover absentee landlords. These include, *e.g.*, CC §2954.9 (right of loan prepayment) and Bus & P C §§5536.3 (release of architect's plans), 7018.5 (disclosure to owner of contractor's lien rights), 7195 (home inspections), and 10229 (sale of secured notes).

It would be fascinating to listen to the legislative debates over which of these various restrictions should be applied to each given rule. —*Roger Bernhardt*