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**Acceptance of payments reinstates mortgage:
Bank of America v La Jolla Group, 2005
Roger Bernhardt**

Lender's acceptance of trustor's payment curing default on deed of trust reinstated trustor's loan, thus rendering later nonjudicial foreclosure sale invalid.

Bank of America v La Jolla Group II (2005) 129 CA4th 706, 28 CR3d 825

The Selesias owned a home in Fresno worth \$115,000, and were trustors on a deed of trust securing a loan of \$15,000. When the Selesias missed several payments, Bank of America (Bank), the lender and trust deed beneficiary, ordered the trustee to record a Notice of Default and Election to Sell, and a notice that a trustee sale would be held on November 12, 2002. On November 8, 2002, the Selesias made a payment on the loan, which the Bank accepted, reinstating the loan. The Bank failed to inform the trustee that the default had been resolved and, on November 12, the trustee sold the home to La Jolla Group II (La Jolla), a partnership in the business of buying at foreclosures, for \$15,500. Over the next month, La Jolla recorded the deed (November 20), the trustee notified La Jolla of the mistake (November 25), La Jolla filed an unlawful detainer against the Selesias (December 3), the trustee recorded a Notice of Rescission of Trustee's Deed (December 5) and tendered a refund check to La Jolla (December 9), which La Jolla refused to accept. Bank sued to cancel the Trustee's Deed Upon Sale, and both the trustor and La Jolla brought related actions. The trial court granted summary adjudication to the Bank, ruling that the trustee sale and the Deed Upon Sale were both void and invalid, and that the Notice of Rescission validly put title back to the place it was as of November 20, before La Jolla had recorded its deed.

The court of appeal affirmed. The essential nature of a trustee's right to foreclose is a contractual agreement with the trustor that provides for foreclosure as the beneficiary's remedy for the trustor's default. When the Selesias (trustors) and Bank (beneficiary), after a default, entered into another contractual agreement to reinstate the loan, Bank no longer had a contractual basis under which it could exercise the power to foreclose. As a result, the sale was invalid.

The court rejected La Jolla's argument that the Selesias' cure was untimely under CC §2924c(a)(1) and (e) (which provides a trustor the right to cure and reinstate a defaulted loan up to five business days before the date noticed for the trustee sale). Here, the Selesias' loan was reinstated by mutual agreement with Bank, not under the statutory right to cure. The statutory presumptions of valid title applicable in a valid foreclosure sale cannot apply to render a sale valid when the beneficiary had no right to exercise the power of sale; accordingly, the issues of whether the sale was properly noticed and whether La Jolla was a bona fide purchaser were irrelevant in this matter. At most, the recital in the trust deed that a default had occurred created a rebuttable presumption regarding default, which was overcome with evidence that the Selesias and Bank had agreed to reinstate the loan.

THE EDITOR'S TAKE: A plethora of variables makes it hard for counsel to give a firm opinion regarding the effectiveness of recitals in a trustee deed.

The first variable is the nature of the challenged irregularity. Sometimes, trustors complain because they were not given the notices that the code promises them (see, *e.g.*, *Little v CFS Serv. Corp.* (1987) 188 CA3d 1354, 233 CR 923). Since the most common version of trust deed recitals deals explicitly with the giving of notices, and since these acts are usually handled by the trustee itself (who is also doing the reciting), this constitutes its own category. Irregularities usually involve the behavior of the beneficiary, rather than the trustee—for example, telling (or allegedly telling) the trustors that they could have more time to pay (see, *e.g.*, *Residential Capital, LLC v Cal-Western Reconveyance Corp.* (2003) 108 CA4th 807, 134 CR2d 162, reported in 26 CEB RPLR 160 (July 2003)) or, as here, accepting full payment of arrearages from the trustors and then selling anyway. Conduct that may come within one particular recital may not fall under another.

In this case, the irregularity was easy to call because the lender accepted the funds. Technically, trustors lose their rights to reinstate the loan within the last five days before the sale, and during that time have only the right to redeem, *i.e.*, pay in full. Although the payment here was tendered with only four days to go, it was nevertheless accepted, making it easy for the court to hold that the reinstatement period had been contractually prolonged. This is the customary outcome, and no beneficiary should count on being able to go to sale once all arrearages have been cured—even if this occurs only a few minutes before bidding is to start. When the tendered payment is sufficient, refusing it while there is still time may only worsen matters for the lender. Rejecting a lesser, insufficient payment may be different, but still risky.

The second variable is what the recitals say. Recitals that purport only to deal with mailing, publishing, posting, and delivering of notices of default and sale are obviously less comprehensive than those that add that the trustee complied with all statutory requirements and performed all its duties; they are far narrower than recitals that make reference to the fact or nature of the trustor's default. A recital that covers an irregularity of one type is not going to be of much help in a case where the irregularity is of a different sort.

In this case, by virtue of a rather narrow reading of what the recitals actually said—and ignoring inclusion of the phrase “default having occurred”—it was not hard for the court to hold that recitals of proper mailing said nothing about an agreement to cancel the sale if a late payment was accepted. In any event, we are all better off that the overbroad language of *Moeller v Lien* (1994) 25 CA4th 822, 30 CR2d 777—lumping all recitals together—has been made manageably narrower.

The third variable is the location of the recitals. Civil Code §2924—which makes some recitals conclusive—cannot do the job on its own; it operates only if there are, in fact, recitals in the trustee deed. The effect of the statute is with regard to the recitals enumerated in the statute; recitals that are in the trustee deed but not mentioned in the statute may have some nonstatutory effect of indefinite scope. Furthermore, the allowed impact of the recitals in the trustee deed may also depend on what the deed of trust says about that matter. Presumably, recitals that were first authorized in the deed of trust and then contained in a trustee deed have a different effect than recitals that were in one document but not the other.

(especially if the deed of trust purports to give them conclusive, rather than merely presumptive, effect.

The *LaJolla* opinion gives us the language of the statute and the trustee deed, but does not reveal what the deed of trust said. That omission may amount to a rejection of the distinction I just made—or, alternatively, the court may just have not thought about it.

The fourth variable is how far post sale events have progressed. Theoretically, recitals play no role when the trustee deed was not delivered at all because the trustee learned of the problem “in time” and then refused to deliver its deed to the foreclosure purchaser. I have argued that different standards ought to apply before and after delivery (see my column in 24 CEB RPLR 80 (Mar. 2001)), but I may be alone on that matter. Additionally, even when the deed has already been delivered, if enough information had come to the attention of the purchaser before its receipt or recording of the deed, that also could make a difference under recording act logic. See my comment accompanying the summary of *Residential Capital*, *supra*, in 26 CEB RPLR 161 (July 2003).

Plug in all those variables and all this case may hold is that when a beneficiary mistakenly goes ahead with a foreclosure sale after having accepted the trustor’s satisfactory payment, and the trustee drops its hammer and delivers its deed but then seeks to cancel, the recitals in the deed that the notices had been properly sent will be enough to save the purchaser’s title. Change a fact or two and who knows what will result? —*Roger Bernhardt*