Botched Sales Update
by
Dave Knapper

Unfortunately, mistakes happen in conducting trustee's sales. It's not a question of if, but only when, a sale is cried-out that shouldn't for a myriad of possible reasons. Typically, it's a consequence of a last-minute occurrence a lender failed to timely bring to the attention of a trustee. Things like undisclosed forebearance agreements, reinstatements or even full pay-offs, all cause trustees to groan mightily after-the-fact.

Regardless of the reason, bidders (to the extent they are not so aggressive as to claim they have obtained good title), want what they paid immediately reimbursed, plus significant coin for their time and trouble. In fairness to these bidders, when a botched sale occurs, it's understandable why they are gravely disappointed, and expect somebody to pay substantially for the mistake committed. For after all, here in Arizona, when bidders fail to pay their bids, oftentimes because they themselves made the mistake of bidding too high, they are "liable to any person who suffers loss or expenses as a result, including attorney's fees." A.R.S. § 33-811(A). Thus, when bidders fail to honor their undertakings in connection with trustee's sales, they suffer the consequences. *Id*. Accordingly, they expect the door should swing both ways.

And so, again, upon being advised of botched sales, bidders demand significant coin. But, if they end-up filing a lawsuit, are they going to be successful in recovering their benefit-of-the bargain, or perhaps even greater, lost-profit, damages? Well, it depends upon the state where the botched trustee's sale was conducted.

Specifically, in the appellate courts of Texas, *Diversified Inc. v. Walker*, 702 S.W.2d 717 (Tex.App. 1985) (*reh den*. 1986) and *Diversified v. Gibraltar Sav*, 762 S.W.2d 620 (Tex. App. 1988), Colorado, *Turman v. Castle Law Firm, LLC*, 04CA1364 (Colo.App. January 12, 2006), and presumably California, *Residential Capital v. Cal-Western*, 108 Cal.App.4th 807, 134 Cal.Rptr.2d 162 (2003) and *Bank of American v. La Jolla Group II*, 129 Cal.App.4th 706, 28 Cal.Rptr.3d 825 (2005), bidders are apparently out-of-luck because those states seem to detest them. However, in the District of Columbia, *Basiliko v. Pargo Corporation*, 532 A.2d 1346 (D. C. App. 1987), bidders have been accorded favorable treatment.

Finding in favor of a disgruntled bidder, the District of Columbia Court of Appeals reasoned:

> In this case, the contractual breach was occasioned by a circumstance - - the erroneous foreclosure of the loan - - that

> was within the sole knowledge and control of the seller/lender Montgomery Federal and its agents, trustees Karp and Early. Under such circumstances, it would be especially unfair for the buyer to be required to bear the risk of this mistake. *Cf. Trans World Airlines, Inc. v. Skyline Air Parts, Inc.*, 193 A.2d 72, 74 (D.C. 1963) (impossibility of performance provides no defense to suit for contract damages against seller of goods who "knew or should have known" that he did not have right to convey);
>
> * * * *
>
> Therefore, the rule of *caveat emptor* can provide no basis for exempting the foreclosure sale vendor from the usual obligation that "a vendor is bound to know that he can deliver that which he professes to sell." [*citation omitted*].
>
> * * * *
>
> [T]he contention that it would be bad policy to award benefit of the bargain damages to a disappointed purchaser at a foreclosure sale because such an award would amount to a "windfall" to such a buyer is also without merit. It may be true that prices at foreclosure sales classically surface somewhere below fair market value. [*citation omitted*] This fact, however, is an argument for – rather than against – the award of benefit of the bargain damages in this case. By awarding contract damages to Basiliko, we assure all future bidders at foreclosure sales that their expectation will be compensated if the seller breaches for reasons such as those that occurred in this case. By compensating foreclosure buyers – just as buyers generally – for this risk, we enhance the public policy of maintaining the adequacy of foreclosure sale prices, [*citation omitted*], and reinforce the legal duty of trustees to garner a reasonable price for mortgagor and mortgagee [*citations omitted*].

Basiliko at 1349-1350.

Conversely, and by way of example, finding against a bidder, the Texas Court of Appeals held that a successful bidder at a foreclosure sale bids "at his peril." *Diversified*

Inc. v. Walker, 702 S.W.2d at 723. And, if a foreclosure sale is void (for instance, because a lender agrees to cancel a sale, but does not instruct the retained trustee to do so), the involved bidder is not entitled to recover damages for lost profits. *Id*. at 724.

But, interestingly enough, to my knowledge, no Texas, Colorado or California appellate court has yet to explicitly acknowledge that the District of Columbia has ruled to the exact opposite of them; in favor of bidders, let alone, attempted to explain why the District of Columbia's reasoning is wrong.

Then again, to my knowledge, no appellate state court has yet to jump on the District of Columbia's bandwagon by explicitly adopting its bidder-friendly point of view.

Significantly, no Arizona appellate court has yet addressed this particular issue.

Therefore, following botched Arizona trustee's sales, compromising with bidders is perhaps justified, unless and until an Arizona appellate court issues a decision codifying which side of the fence we are situated. And, where the attorney's fee "tail" will shortly be wagging the principal damages' "dog," avoiding the substantial expense of litigating a botched trustee's sale makes even more sense.

For all bidders in Arizona need do is to cite to *Basilko* and remind the involved trial court that Arizona follows the general law of auctions by recognizing that a purchaser at an auction sale is entitled to recover from the seller for a breach of the sale contract. *Altfillisch Const. Co. vs. Torgerson Const.*, 120 Ariz., 438, 586 P.2d 999 (1978). And, while is "black-letter" law that a seller who breaches a contract for the sale of real property is liable to the would-be purchaser for compensatory damages measured by, at a minimum, the difference between the sales contract price and the fair market value at the time that the property should have been conveyed, in *Gilmore v. Cohen*, 95 Ariz. 34, 386 P.2d 81 (1963), the Arizona Supreme Court held that lost profits, if proven and greater than the difference between contract price and fair market value, are the proper measure of a plaintiff's damages for a defendant's failure to convey realty. *Accord Republic Nat. Life Ins. Co. v. Red Lion Homes*, 704 F.2d 484, 489 (10th Cir. 1983), *citing Gilmore* (purchaser held entitled to recover its lost profits as damages for vendor's breach of contract to convey unimproved lots where profits would have been generated from building and selling houses on those lots).

Moreover, Arizona bidders will also argue that the inability to perform a contract for the sale of real property is not a defense to an action for breach of contract. *Ingram v. Lundsford*, 216 Va. 785, 224 S.E.2d 129 (1976); *Brand v. Lowther*, 285 S.E.2d 474 (W. Va. 1981).

And, from there, bidders will further argue that botched trustee's sales are similar to real estate deals where sellers sell property promised to another, quoting *Phipps v. CW Leasing, Inc*. 186 Ariz. 397, 400, 923 P.2d 863 (App. 1996), which states that "[a] property owner is liable for damages if he conveys [real property] to a third person without honoring [a pre-existing] right of first refusal."

I have personal knowledge of trial courts in both Maricopa and Pima County recently ruling in favor of bidders. But, I also have personal knowledge of other trial courts ruling against them.

In summary, until an Arizona appellate decision is issued, we must recognize that different courts, whom are comprised of different people, have different viewpoints as to whether or not disgruntled bidders deserve more than a return of their bid deposit following botched trustee's sales.

David L. Knapper is a sole practioner, having practiced law in Arizona for over 20-years, is the past President of the ATA, currently serves as its Education Chairperson, is "AV" rated by Martindale-Hubbell, and regularly represents beneficiaries, trustees and bidders in connection with a myriad of foreclosure litigation-related matters. He can be reached by telephone at (602) 252-0809 or by e-mail at david.knapper@azbar.org.