

The Marin Lawyer



PRESIDENT’S MESSAGE ADIOS Y GRACIAS

I have thoroughly enjoyed serving as your president this year. I have far too many people to thank who did amazing work, and provided unwavering support, for the Marin County Bar Association in 2013. Lengthy individual thanks make for boring writing, so to all Board members, committee and section chairs and active members, volunteers and participants, a collective and heartfelt thank you.

I was intending to avoid the cliché “year in review” December President’s Message. However, the pressure of the moment, compels me to do it. But let’s review some of the work done and changes made in 2013 with an eye to the how it benefits all of you—our valued members.

1. **New Computer Database:** The new computer data system, IntelLinx, has already improved efficiency in our invoicing process and tracking of Association and Section Dues. What many of you do not know is that **YOU** can, and should, now log in and see and update your account information, email, phone, bio, pictures, and practice areas. When the public or your colleagues want to “Find a Lawyer”, they are increasingly turning to that section of the MCBA website. Our new system also tracks your CLE credits earned through the MCBA and has many other features for individual members. **MEMBER BENEFIT: Log in to the member section. Look at your account. Update it. Load your picture and make sure your information is accurate. Then, use the site as you now use the paper directory to locate other members,**

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Calendar of Events

December 10th
Barristers Section Meeting
6 – 7:15 pm

December 11th
Holiday Party
5 – 8 pm

January 11th
2014 Installation Dinner
The Tavern at Lark Creek
6 pm

Look for details each month in
The Marin Lawyer

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Beverly Robin Green was Guest Editor of this issue of *The Marin Lawyer*.
Kate Rockas is Series Editor for 2013.

A HOLIDAY MESSAGE

By Beverly Robin Green

As your December Guest Editor of the Newsletter, and as a member of our MCBA Board, and 2014 ADR Section Chair, I just want to say a big “Thank You” to all the members of the Marin Bar for the genuine professional courtesy, civility, cooperation, collaboration, nay, even mentorship and friendship I have seen from our members, in contrast to some, shall we say, other approaches to the practice of law.

As I see the beginning of a 3rd generation of lawyers in my own family, I hope our younger generation of lawyers get to enjoy the (usually, anyway) camaraderie of my father’s generation. Of course,



(Continued on page 7.)



Scott D. Rogers

TRUSTEE'S FORECLOSURE SALE MAY NOT BE FINAL WHERE TRUSTEE MAKES AN ERRONEOUS BID

By Scott Rogers and Ted Klaassen
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Theodore K. Klaassen

The California Supreme Court has provided some much-needed clarity as to when a foreclosure trustee can void a completed foreclosure sale and cause the property to be auctioned again. In *Biancalana v. T.D. Service Co.*, 56 Cal. 4th 807 (2013), the foreclosure trustee was allowed a “do-over” where, through no fault of the lender, the trustee entered an erroneous opening bid on the

lender’s behalf resulting in a grossly inadequate sale price. The supreme court ruled that the trustee had the discretionary authority to declare the sale void.

EMC Mortgage Corporation (EMC) made a loan secured by a deed of trust on real property located in Watsonville, California. After the loan went into default, EMC caused the trustee, T.D. Service Company (TD), to process a power of sale foreclosure to enforce the loan. Shortly before the foreclosure sale, EMC in writing advised TD to enter an opening credit bid at the sale on behalf of EMC in the amount of \$219,105. Included with these instructions, EMC informed TD that the amount delinquent with respect to the loan (exclusive of principal)

totaled \$21,894.17. On two occasions the day before the sale, TD erroneously informed prospective bidder David Biancalana (Biancalana) that the opening bid would be the delinquency amount of \$21,894.17 instead of the desired credit bid of \$219,105. The next day at the trustee’s sale, TD instructed the auctioneer to enter an opening credit bid in the amount of \$21,894.17. Based upon his prior calls to TD, Biancalana attended the sale with a cashier’s check in the amount of \$22,000. The auctioneer at the foreclosure sale accepted Biancalana’s bid in the amount of \$21,896, received no higher bids, and announced completion of the sale to Biancalana.

Two days after the foreclosure sale and before delivering or recording a trustee’s deed, TD informed Biancalana that the sale was void because TD “had not offered the property for a high enough bid amount.” Biancalana refused TD’s tendered return of Biancalana’s cashier’s check. Biancalana then filed the subject action to quiet title in his favor as the successful bidder at the trustee’s foreclosure sale.

TD sought summary judgment claiming that it had properly set aside the foreclosure sale based upon a significant procedural irregularity in the sale process resulting in a grossly inadequate sale price. The trial court denied TD’s motion in reliance upon *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.*, 85 Cal. App. 4th 1279 (2001). In *6 Angels*, the lender’s loan servicer (as opposed to the trustee’s) error in submitting an erroneous bid instruction to the trustee was held to be outside the statutory foreclosure process and thus insufficient grounds to void the completed foreclosure sale. Upon TD’s motion for reconsideration following the decision in *Millennium Rock Mortgage, Inc. v. T.D. Service Co.*, 179 Cal. App. 4th 804 (2009), the trial court reversed its ruling and granted TD’s motion for summary judgment. In *Millennium Rock*, the trustee was permitted to void a completed foreclosure sale where the trustee mistakenly announced an erroneous street address for the property being sold.

In *Biancalana*, the court of appeal reversed the trial court finding that TD’s mistake was not a procedural irregularity in the statutory foreclosure process and, consequently, that TD lacked the discretionary authority to declare the foreclosure sale void.

In a unanimous decision, the California Supreme Court reversed the holding of the court of appeal and affirmed the trial court’s entry of summary judgment in favor of TD. In its opinion, the supreme court determined that: (i) TD’s mistake was part of the foreclosure sale process, (ii) there was a gross inadequacy of the sale price, (iii)

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(Trustee's, continued from page 6.)

although a limited agent of EMC, TD's error could not be imputed to EMC, and (iv) public policy concerns to avoid potential fraud at, and manipulation of, trustees' sales and to reduce litigation would not be impaired by allowing trustees limited discretionary authority to void sales in these circumstances.

Notwithstanding judicial validation of a foreclosure trustee's discretion to elect a "do-over" in the Biancalana situation, trustees and lenders still need to be diligent in their foreclosure processing practices, as the trustee's discretion is likely to be very narrowly construed. The court made it clear that the trustee cannot void a sale to save the lender from the lender's own negligence in making a credit bid. Also, in order for the trustee to void a sale, it must demonstrate a "gross inadequacy" of price, so a mistake resulting in a significantly (but not grossly) inadequate price will not permit the trustee to void the sale. Although not directly before it, the court clearly indicated there would have been a different outcome had the trustee's deed been issued to the purchaser. In any event, to avoid potential mistakes in foreclosure processing, Lenders and trustees should always clearly communicate before, and immediately after, the sale to ensure that the lender's credit bid expectations have been met.

Scott Rogers is a partner in the Palo Alto office of Rutan & Tucker, LLP where he specializes in real estate finance, equity and lease transactions, title insurance and real estate litigation. He is the former Chair of the Real Property Section of the State Bar of California. Scott obtained both a J.D. and M.B.A. from UCLA.

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(A Holiday Message, continued from page 1.)

we all know (as parents and/or children ourselves), that we learn from example. So, Marin County Bar, let's renew our efforts and continue to show the integrity that we want to continue to teach, to our fellow lawyers, new and old, local or out of county, and our respect for our hard-working judges and court staff. One way to do this is to get involved with our Bar Association. There will be lots of opportunities to get involved in 2014! Please consider joining a Section or Sections of your interest, and volunteer for one of our Committees. You will be more than welcome if you do.

Thank you for reading these thoughts I wanted to share with you, as we look forward to another wonderful year in Marin, where we are reputed to have the best lifestyle for our children and the highest life expectancy in the country for men (women are still ahead on this). I could have used my Guest Editor spot to write about an area of the law that I want to share my thoughts on (I am writing an article on "WORK FOR HIRE – PITFALLS FOR THE UNWARY EMPLOYER" for the 2014 Newsletter), but, for now, I'll let you get right to the interesting articles we have this month, including one not to miss from our own Judge Duryee. Hope to see you all at the MCBA Holiday Party on Wednesday, December 11th, from 5 – 8 PM, at Resolution Remedies, Courthouse Square, 1000 Fourth Street, on the Eighth Floor.

HAPPY HOLIDAYS TO ALL!

Beverly Robin Green is a partner in the Law Offices of Green & Green, with an emphasis on practicing IP, Entertainment, and Business Law, and a Mediator with Green Mediation, with an emphasis on resolving all types of Disputes, including Business, IP, Real Property, Labor, Estates and Probate. For more information please see the Firm websites at: www.GreenAndGreen.com and www.GreenMediation.biz.



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