



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**BT CAPITAL v. TD SERVICE COMPANY and
POINT CENTER FINANCIAL
CV-11-0308-PR**

PARTIES:

Petitioners: TD Service Company (“TD”) and Point Center Financial (“PCF”)

Respondent: BT Capital (“BT”)

FACTS:

This litigation arises from a botched trustee’s sale and an even more badly botched “do over” of the same sale later the same day (“the 2009 sale”). TD, the trustee and agent for the lender, PCF, made multiple errors in the content and posting of the notice. The notice gave the wrong address for the property, was posted at the wrong address, gave an inaccurate legal description of the property (including land that was not part of the sale), and failed to provide notice to an easement holder who was entitled to notice.

The first sale allegedly was held at noon on the appointed date, and PCF acquired the property for a credit bid of \$1,000,000. A representative of BT, however, showed the auctioneer a notice indicating that the sale was to take place at 2:00 p.m., and TD directed the auctioneer to “re-cry” the auction.

At the “do over” of the sale at 3:30 p.m. the same day, TD made an opening bid of \$1,000,000 on PCF’s behalf. Thereafter, BT, a third party bidder, offered \$1,000,001. TD failed to follow PCF’s bidding instructions, which authorized TD to make a credit bid up to \$25,000,000, and it let the property go to BT. When BT tendered the full purchase price the day after the sale, though, TD refused to accept it and declared the sale void because “there had been a mistake in communicating the correct bid instructions.”

BT sued to enforce the sale. After six months of litigation, the trial court found the sale was void, citing procedural defects in the statutorily required notice under A.R.S. § 33-811(C). The trial court reasoned that because the relevant statutes mandate strict compliance, a trustee’s sale that does not adhere to statutory notice requirements is void. The trial court also referred to inadequacy of price as a factor.

The trial court’s decision opened the way for yet another trustee’s sale (“the 2010 sale”). BT objected and sought an injunction to stop the 2010 sale, but injunctive relief was denied, the sale went forward, and this time PCF purchased the property for a credit bid.

The court of appeals reversed the trial court’s order in a published opinion and held as a matter of first impression that bidding errors made by one party or its agents in holding the

trustee's sale do not justify setting aside an otherwise valid sale simply because the end result is that the sales price is inadequate. Further, TD as trustee did not have statutory authority to invalidate a non-judicial deed of trust sale in the absence of timely filed objections pursuant to A.R.S. §33-811(C) or an injunction. Finally, the court held that the trustee's failure to provide proper notice to holders of an easement across the property being sold at the trustee's sale did not render the sale void.

ISSUES:

TD Service's petition:

1. The Arizona foreclosure statutory scheme provides that a trustee's sale shall be completed on payment by the purchaser of the price bid "in a form satisfactory to the trustee," and that subsequent issuance of the trustee's deed as described in A.R.S. §33-811 is a "ministerial act." A.R.S. §33-819(A). The statutory scheme provides further that a trustee's deed issued in a foreclosure proceeding is "conclusive evidence" of compliance with the statutes relating to notice and conduct of the sale. A.R.S. §33-811(B). In a case of first impression, the court of appeals determined that the trustee has no discretion to verify that the sale is conducted in accordance with the statutory requirements before issuing the deed, thereby effectively determining that any act by the trustee after the sale is a mere ministerial act. Did the court of appeals err?
2. The court of appeals determined that, at the close of the trustee's sale and acceptance of the winning bid, marked by the fall of the auctioneer's hammer, or exclamation of an expression such as "sold," the winning bidder acquires enforceable contract rights, including rights against the trustee. Did the court err in treating the sale as a contractual process rather than a strictly statutory process?
3. Following the Restatement, and despite a split among jurisdictions, the court of appeals held that bidding errors coupled with inadequacy of price is insufficient to justify setting aside a trustee's sale. Is this determination, and adoption of the Restatement, contrary to Arizona public policy?

Point Center Financial's Petition:

1. Did the court of appeals err in holding that a trustee sale auction held at approximately 3:30 p.m. on June 15, 2009 was not void even though the property had already been sold earlier that day by the same trustee at another trustee sale auction conducted pursuant to the same deed of trust underlying the 3:30 p.m. sale?
2. Did the court of appeals err in declining to rule that a regularly-conducted trustee sale auction of the property that occurred post-judgment in this case in July, 2010, which both the trial court and the court of appeals

refused to enjoin, rendered moot some, or all, of appellant BT Capital, LLC's claims?

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