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Supreme Court of Texas.
Myrad Properties, Inc., Petitioner,
v.
Lasalle Bank National Association, as Trustee for the Registered Holders of
GMAC Commercial Mortgage Securities, Inc., Commercial Mortgage Pass-Through
Certificates, Series 1997-C1, Robin Green, and Melissa Cobb, Respondents.
No. 08-0444.

March 31, 2009.

Appearances:
Miguel S. Rodriguez, Taylor & Dunham, LLP, Austin, TX, for petitioner.
Keith Miles Aurzada, Bryan Cave LLP, Dallas, TX, for respondents.

Before:

Wallace B. Jefferson, Chief Justice, Scott A. Brister, Harriet O'Neill, Nathan L. Hecht, Dale Wainwright, Phil Johnson, Paul W. Green, Don R. Willett, David M. Medina, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 08-0444, Myrad Properties, Inc., v. LaSalle Bank National Association.

MARSHALL: May it please the Court, Mr. Rodriguez will present argument for the Petitioner. The Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF MIGUEL S. RODRIGUEZ ON BEHALF OF THE PETITIONER

ATTORNEY MIGUEL S. RODRIGUEZ: Good morning. May it please the Court, my name is Miguel Rodriguez, Counsel for Myrad Properties. Myrad has brought this appeal to overturn the decision of the Court of Appeals by reaffirming two key tenants of Texas Law relating to foreclosure and deeds. First, in a foreclosure, the Notice of Sale, and Texas law holds that the Notice of Sale and Auction must clearly and unambiguously identify the property to be sold. There should be no question in anyone's mind attending a foreclosure sale as to the identity of the property that will be sold at foreclosure. Second, the correction deeds use must be confined only to correcting Scribner's

errors. A correction deed cannot be used to add additional property to a deed. This Court's reaffirmation of these principles has an impact beyond the litigants to this case.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well the question is what is the property described in the Deed of Trust. Is it two or one?

ATTORNEY MIGUEL S. RODRIGUEZ: It is one.

CHIEF JUSTICE WALLACE B. JEFFERSON: In the deed of trust?

ATTORNEY MIGUEL S. RODRIGUEZ: Excuse me, in the Deed of Trust, there's two properties attached as collateral.

CHIEF JUSTICE WALLACE B. JEFFERSON: And the Notice of Sale says "proceeds to sell both the real property, any personal property described in the Deed of Trust." So why wouldn't that be a sufficient description above Le Grand and La Casa, I can't remember their name.

ATTORNEY MIGUEL S. RODRIGUEZ: Yeah, there's two apartment complexes that are collateral to the Deed of Trust. One is the Casa Grande and the other is La Casa. The Notice of Sale defines the term "property" in as to what will be sold that day. The definition of property in the Notice of Sale is that which is attached as a good name, which is just the Casa Grande. The only use of reference to the Deed of Trust, which was identified by the Defendants in this case is the 9.604 election language and if you, upon review of the Notice of Sale, the first sentence of that paragraph says that the Deed of Trust may encumber, not does encumber, but may encumber both real and personal property. This is simply a form use of 9.604 election language. It is not meant to identify the property to be sold. Its purpose is to 96, is to comply with 9.604 and provide the election. Under 9.604, the holder of the Deed of Trust can either upon default can either proceed against the personal property and then be confined and governed by Rule 9, excuse me, Article 9 of the UCC or it can elect under 9.604 to proceed against both the real and personal property. If it makes that election, then it can foreclose pursuant to the Deed of Trust as to the real and personal property. That's all that's being done by that language. It is not meant to identify the property that's going to be sold at foreclosure. The rules of construction of deeds and notices of sale should be harmonized and a harmonized reading of the Notice of Sale would show that all the definitions as set forth in the notice are in the first couple of pages. There's a heading, such as borrower, date of sale, time of sale, place of sale. Those are all defined terms as used in the Notice. Property is one of those defined terms. Property is defined as that which is attached as Exhibit A.

JUSTICE PAUL W. GREEN: As I recall, it seems to me that the parties knew exactly what was going on here. There wasn't any mistake about the fact that both properties were being foreclosed upon, is that true?

ATTORNEY MIGUEL S. RODRIGUEZ: That is not true, Your Honor, and.

JUSTICE PAUL W. GREEN: Apart from the Notice?

ATTORNEY MIGUEL S. RODRIGUEZ: Apart from the Notice. Every single action of the lender in this case pointed to a sale of only the Casa Grande Apartments.

JUSTICE NATHAN L. HECHT: Why would they do that?

ATTORNEY MIGUEL S. RODRIGUEZ: The Deed of Trust allows the holder of the Deed of Trust, specifically allows the lender to sell in part or parcels.

JUSTICE NATHAN L. HECHT: Sure, I know they can, but why would they?

ATTORNEY MIGUEL S. RODRIGUEZ: Because it was advantageous to them for whatever reason.

JUSTICE NATHAN L. HECHT: But what was the reason. It was one loan, one default, one security. Why divide it up?

ATTORNEY MIGUEL S. RODRIGUEZ: Well, any market reason. This was 2006.

JUSTICE NATHAN L. HECHT: What was the market reason?

ATTORNEY MIGUEL S. RODRIGUEZ: The rec, the rec.

JUSTICE NATHAN L. HECHT: They could have had a reason, but did they?

ATTORNEY MIGUEL S. RODRIGUEZ: This is a Summary Judgment record and unfortunately the record, the specific record on that point is limited just to the testimony of Mr. Vickery and Mr. Vickery, who is a representative of Capmark, the servicer on the loan, said that they found, he found equity in the property and wanted to and one of the reasons for foreclosure was to liquidate the equity for the benefit of the lender perhaps. The and there's also evidence from the appraisers that the property was valued collectively at far more than the bid price at sale.

JUSTICE NATHAN L. HECHT: It's just, I never heard of a lender going in and bidding four times as much as was owed on a piece, on the security that he was foreclosing on.

ATTORNEY MIGUEL S. RODRIGUEZ: Your Honor, I don't know that on this record, on Summary Judgment, we can go into the full mind of the lender in this case, but there is some important facts that could give us an indication of why they may have done so and one of the reasons is that the Casa Grande Apartments is right outside the gates of Ft. Hood and there has been talk and this is, again, we're necessarily going outside a little bit of the Summary Judgment record, but as a practical matter, Ft. Hood, given the activity there and this apartment's proximity to it, there's been talk of expanding Ft. Hood beyond just its normal boundaries and condemning the property. I know this Court is familiar with what happens on condemnation in the AIC Management case. In that case, that was George Bush International Airport went out and started trying to expand two additional properties. All of a sudden, everybody came out of the woodwork and wanted to say that they owned this piece of property which had up to that point been probably deemed not worth as much and so this is what was in the mind.

JUSTICE NATHAN L. HECHT: I can see they might want the property, but why would if you're owed $978,000 and there's two properties and one's worth three times what the other one is, why wouldn't you bid one-fourth and call it a day? You wouldn't take the risk.

ATTORNEY MIGUEL S. RODRIGUEZ: Your Honor, I cannot explain why the lenders chose to bid what they did and that's really the important distinction here. The notice, the option, the deed all point to the sale of one property. Why the bid price.

JUSTICE PAUL W. GREEN: Going back to my point, five days before the sale it says your client's bankruptcy counsel sent a letter to one of the Trustees and discussing the fact that there were two properties being foreclosed on. So, in fact, the parties did know that they were talking about two properties.

ATTORNEY MIGUEL S. RODRIGUEZ: Well I have three points to raise as to that comment. First of all, at no point did Myrad ever seek bankruptcy or and there is no bankruptcy counsel. There's an attorney who like me, like counsel for defendants all have represented their clients in a bankruptcy court. There is never any indication that the bankruptcy was filed or to be filed.

JUSTICE PAUL W. GREEN: A lawyer for your client.

ATTORNEY MIGUEL S. RODRIGUEZ: Right and so the key part here is

that the Deed of Trust allowed the lender to foreclose in part or parcels.

JUSTICE PAUL W. GREEN: I understand that.

ATTORNEY MIGUEL S. RODRIGUEZ: And if the lawyer's letter, the lawyer for my client's letter, this is before we were engaged, why she put references to both properties, I'm not sure, but certainly the facts would have indicated that the lender could have, under the Deed of Trust, foreclosed on both properties.

JUSTICE PAUL W. GREEN: But at least there is somebody representing your client that knew five days before the sale that both properties were involved. Maybe something happened in those five days that would have changed that.

ATTORNEY MIGUEL S. RODRIGUEZ: As I recall, the, well, I guess the key point is not whether or not my clients what they knew about what was going on was going to happen at that sale because I think the intent of the parties and expressed in the documents themselves reveal the sale of one piece of property. I think the Court of Appeals, both the majority and dissent on the Court of Appeals recognized that regardless of whatever the borrower is in the borrower's mind, the key part of the notice is not necessarily the mind of the borrower, it's the mind of the public and when you're going to call people to auction, the idea is to ensure that you're going to identify the property so the people arrive at the auction on the day of the auction and know what they're bidding on.

JUSTICE DAVID M. MEDINA: There's only one bidder here right? Was there more than one bidder?

ATTORNEY MIGUEL S. RODRIGUEZ: There is only one bidder and there's a good reason for that because there was only one property advertised for sale.

JUSTICE DAVID M. MEDINA: Was there any confusion as to what the bidder was bidding on?

ATTORNEY MIGUEL S. RODRIGUEZ: In our minds, there wasn't because at the auction, Mr. Strickland clearly identified that he was he described the property description for only one piece of property, which was the Casa Grande Apartments. The Notice identified the Casa Grande Apartments. Mr. Strickland at sale and this is, we have it specifically identified. It was elicited in a temporary junction hearing, which was attached in part of the Summary Judgment record, exactly what he said at that sale and that is quoted on our brief. He says, "July 16, 1997, Myrad Properties, Inc., Volume 3645, Page 300, A tract of land" so not multiple, "but a tract of land" is what he said, "in Bell County, Texas, part of the John R. Smith survey," and it goes on to list the rest of the survey, lot block and acreage for just the Casa Grande Apartments. Anyone attending that and this kind of goes back to Justice Hecht's point of the price, anyone attending that would have said, I'm here to bid on the Casa Grande Apartments. If for whatever reason the public believed that the fair price of the Casa Grande Apartments was not the bid price, the credit bid price, then they would have, then there may have not been a reason for those persons to outbid the lender on the credit bid and that's the critical problem with the way this was structured because when the lender arrives at the sale, the lender apparently as is now arguing that they were there to buy two pieces of property, but all the other bidders in the sale would have been led to believe that there was only property for sale and so how is the best price going to be achieved for that property if the public only is thinking about one piece of property and the lender is thinking about a wholly, is thinking about two pieces of

property.

CHIEF JUSTICE WALLACE B. JEFFERSON: Were you obligated, the Court of Appeals says recognizes in its argument that you would have to come forth with evidence that potential buyers were misled by the description and they say you haven't done that. What's your response?

ATTORNEY MIGUEL S. RODRIGUEZ: The action that Myrad has brought and the action that was on Cross Motion for Summary Judgment, which was before the Trial Court, was the validity of the Correction Deed and the validity of the Substitute Trustee's Deed as a conveyance of just the one piece of property. It was not a wrongful foreclosure action. There has never been a wrongful foreclosure action brought by Myrad in this case. The standard used by the Court of Appeals concerning chill bidding is a standard that is applicable only to actions for wrongful foreclosure. Our Client...

JUSTICE HARRIET O'NEILL: So here the bank messed up. I mean, that's pretty clear. What should they have done once they realized they messed up? What do you think would be the proper procedure other than by Correction Deed?

ATTORNEY MIGUEL S. RODRIGUEZ: The proper procedure for the bank would have been to exercise, would have been to tender the property back immediately and so if they intended to foreclose on two pieces of property and the Substitute Trustee reflected the one, the minute they knew about it, they would go and say here are the keys back. We are not going to exercise ownership over the Casa Grande Apartments.

JUSTICE HARRIET O'NEILL: Is there an avenue for doing that? I've.

ATTORNEY MIGUEL S. RODRIGUEZ: It can be done.

JUSTICE HARRIET O'NEILL: I'm sure you have refused that tender and then what?

ATTORNEY MIGUEL S. RODRIGUEZ: It is not our, the tender needs to be made for us to, for the record to reflect whether we would have refused it or not and the law, as I understand it on the issue of tender for rescission purposes is that either the lender must either give it back to the borrower or if the borrower refuses under that circumstance that the lender then would tender it into the custody of a court or in trust or in escrow or some other method to divest itself because of the ownership because the key part of rescission is the right not to exercise control. It's an equitable remedy and so the equitable obligation of the lender in that circumstance is to not exercise the control once it knows if there is a problem.

JUSTICE PHIL JOHNSON: As I understand though, the Deed was filed the day of the property was stricken off and then shortly after that, you filed a Declaratory Judgment Action, is that correct? And wasn't part of their pleading a plea to rescind the site, to rescind this transaction?

ATTORNEY MIGUEL S. RODRIGUEZ: In the amended pleading and well, there was a Declaratory Judgment action and a TRO filed. The TRO requested that the Trial Court enjoin the lender from filing a Correction Deed. It did not request that the lender be enjoined from tendering the property back. There is nothing in this.

JUSTICE PHIL JOHNSON: Did they respond and plead for rescission?

ATTORNEY MIGUEL S. RODRIGUEZ: There was a plead of rescission, which was never tendered and it's important to note that not only did the lender take possession of La Casa, it took possession ultimately of after judgment, of course, of Casa Grande. It has also sold that property to a third party, 2908 Lake Road Properties, even with the presence of a lis pendence in the file. This property was marketable. It's worth something because why would a third party purchase this land

even under a lis pendence and market it for $2.1 million. Now what they should have done, what the lender should have done is say here is your keys back and it doesn't take much. There's not much refusal in that because give the keys back. You don't, the property manager, you can put your own property manager on there. You leave the property manager in place and then you go and repost again.

JUSTICE NATHAN L. HECHT: The borrower could say a deal's a deal.

ATTORNEY MIGUEL S. RODRIGUEZ: That, the borrower in that case with not having possession or whatever, that may or may not have to be a subject of an action. The Bonilla case is the Court of Appeals decision said that upon completion of the sale, the Trustee was without right to cancel without having to go to court. Now they were in court and they could have tendered the property back and pled their right to repost in front of the Trial Court at that point.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The Court is now ready to hear argument from the Respondents.

MARSHALL: May it please the Court, Mr. Aurzada will present argument for the Respondents.

ORAL ARGUMENT OF KEITH MILES AURZADA ON BEHALF OF THE RESPONDENT

ATTORNEY KEITH AURZADA: May it please the Court for the Counsel, Your Honor, this case provides this Court the opportunity to restate its prior rulings regarding foreclosure sales and enforcing them when there's no demonstrated harm to the borrower and to avoid an attempt in this circumstance to seek a windfall and an unjust result. I think it's fair to say that the fundamental issue before the Court today is what notice is necessary when foreclosing on real property in Texas under Section 51.0002 of the Texas Property Code. I think it's clear that the Courts in this State have consistently held that there are two issues at stake in noticing a foreclosure sale. One is notice to the borrower and I think it's appropriate to employ an actual notice standard. If we go to the record in this case, I would note that the record clearly shows that the demand of intent to accelerate the Notice of Default, the acceleration and opposing Counsel's letter all demonstrate, opposing Counsel's letter to the lender, all demonstrate actual knowledge of the lender's intent. The second avenue and need for notice is adequate notice to the public and this is to inform the third-party public in order to maximize the likelihood of a profitable and marketable sale at the foreclosure sale. The remedy or the ability to set aside a foreclosure sale only arises if there is an irregularity in the sale that does, in fact, chill the bidding.

JUSTICE DAVID M. MEDINA: Why was there no harm to the borrower?

ATTORNEY KEITH AURZADA: In this particular circumstance, Your Honor?

JUSTICE DAVID M. MEDINA: Right.

ATTORNEY KEITH AURZADA: There is no harm to the borrower because number one, the lender bid the entire debt. Number two, I don't think the standard is necessarily harm to the borrower. It is that the irregularity in the sale.

JUSTICE DAVID M. MEDINA: That's what you said.

ATTORNEY KEITH AURZADA: Then I misspoke, Your Honor.

JUSTICE DAVID M. MEDINA: Okay.

ATTORNEY KEITH AURZADA: The irregularity in the sale must chill the bidding. That is the standard. In this case, there was no harm to

the borrower because this is a non-recourse loan and so there was no, the borrower would not have been personally liable, but notwithstanding that, the entire debt was bid and they're seeking a windfall for the property without showing evidence that there was a chilled, that the bidding was chilled on account of an irregularity in the notice. And so the issue is whether or not there's adequate notice to the public. In this case, I believe that there is two means specifically for determining that there was adequate notice. First and foremost, the notice of the trust sale referenced the volume and page of the Deed of Trust. And if you look at the Miller v. Gibraltar case, that case was a situation where the posted notice actually described adequately three separate tracts of land in the Harrisburg annexation to the City of Texas. So looking at the notice in that case, it was clear that you could not discern which piece of property was to be sold. The Court there held that notwithstanding that fact, the foreclosure sale was valid because the public could have cleared the confusion by looking at the Deed of Trust records and, in this case, that same fact holds true.

JUSTICE DALE WAINWRIGHT: But not just looking at the Deed of Trust? The original Deed of Trust was accurate, but the substitute trustee's deed was not accurate.

ATTORNEY KEITH AURZADA: Your Honor, I am prepared today to.

JUSTICE DALE WAINWRIGHT: And when we're talking about notice to the public, the title companies, home builders, the realtors say this is going to wreck the plan of salvation because we need a substitute deed of trust that's accurate because we all rely on it. We don't look at all the other records is what the inference is. We go to the deed of trust.

ATTORNEY KEITH AURZADA: Yes, Your Honor, I'd like to address your point in several ways. First by looking at this particular notice and then talking about the more global policy considerations this particular notice in two places provided the description beyond merely the attachment, which was Exhibit A to the Trustee's Deed, which described only the Casa Grande property.

JUSTICE HARRIET O'NEILL: Before you go into that, let me just ask you, if the notice, if this Notice of Sale had said the property in Exhibit A, Tract 1 and there was no other reference to the Deed of Trust, then would you agree that regardless of windfall, regardless of mistake, all that would have been sold would be tract one?

ATTORNEY KEITH AURZADA: Yes.

JUSTICE HARRIET O'NEILL: So your entire argument relies on ambiguity in the Notice?

ATTORNEY KEITH AURZADA: I think it does not necessarily turn on ambiguity because there's an issue of interpretation. Either way, I think we get to the same result. I think this notice can be read to be non-ambiguous, that it transferred both tracts or you can say that there's an internal inconsistency in the Notice and, if so, then the question then becomes did that irregularity chill the bidding at the sale.

JUSTICE HARRIET O'NEILL: But what if it unambiguously only conveyed one tract?

ATTORNEY KEITH AURZADA: Then only one tract would have been conveyed at the sale.

JUSTICE HARRIET O'NEILL: Because I can easily read when the Notice says property, we're selling "A" and then all it says is together with improvements and personal property described in the Deed of Trust, that seems fairly clear to me that it's this tract with any personal property on it.

ATTORNEY KEITH AURZADA: Your Honor, I would beg to differ for a couple of reasons. One the language in the Notice together with all improvements and personal property described in the Deed of Trust would be rendered null by that interpretation and that construction of this Agreement. Furthermore, that would render null the language that the holder elects to proceed against and sell both the real property and the personal property described in the Deed of Trust.

JUSTICE HARRIET O'NEILL: Well, but if the property is defined as one tract, that's not inconsistent. It's going to sell the real and personal property that is the property described.

ATTORNEY KEITH AURZADA: If you went to the Deed of Trust in this circumstance and you look at the second page, you would see that the definition of "improvement" includes the buildings erected on the capital "L" land. The definition of "land" is A1 and A2 and if you look at the plain language and you use the policy in Mercer v. Bludworth which clearly says that when construing a deed, the greatest estate is to be transferred, then you have to take into account that additional language. Had this notice said a partial foreclosure sale or a sale of only like you said the property described in Exhibit A1 and put a period at the end of that phrase, I think this would be a totally different case.

JUSTICE HARRIET O'NEILL: Well, that's the way I read the description of property. But you rely on the second piece that goes more into the description about they can elect to proceed against real and personal is that broad language.

ATTORNEY KEITH AURZADA: Yes. And I would say that this is not, an interpretation of a notice like this is not new or unfounded. If you look at the RT v. Summers, RTC v. Summers case out of the Northern District of Texas, in that case there was a foreclosure notice that described two parcels of land. It described one as being too big. It over described and it described another as being too small and so notwithstanding that error in the description on Summary Judgment, the Court approved the foreclosure sale and did not set it aside even though the Trustee's Deed, in effect, conveyed more property than was described in the Notice. And so I think under that circumstance and that's the proper reading because you're really looking at did the irregularity in the sale chill the bidding because between the borrower and lender, it's clear and as a matter of policy, I don't think it's, I think it's sound policy that absent an effect on the outside world, the borrower and lender relationship should not be affected due to just an error, which I think is ultimately where this case boils down to is that you cannot allow a windfall to occur under the facts and circumstances of this case.

CHIEF JUSTICE WALLACE B. JEFFERSON: This is a, it's a public auction, the bidding is all public? Someone's conducting the sale, is that how it works?

ATTORNEY KEITH AURZADA: Yes, Your Honor, it's conducted by the substitute Trustee.

CHIEF JUSTICE WALLACE B. JEFFERSON: So if I'm one of the bidders and I walk in and I hear La Salle bid $978,000 for one piece of property, I might think that's, they're paying too much for that one piece and I'm not going to match that bid. Isn't that what the Court of Appeals is talking about? Isn't that how the public could be misled?

ATTORNEY KEITH AURZADA: That is the potential for misleading the public, but I will tell you that the case law in Texas says that you can clear up that confusion merely by contacting or talking to the Trustee either in advance of the sale or at the sale. So there's no

record here that somebody was at the Courthouse steps ready to bid and did not on account of an alleged irregularity in the notice.

JUSTICE DAVID M. MEDINA: Does it matter what the bidder, LaSalle, here thought it was getting?

ATTORNEY KEITH AURZADA: Yes, I think it does and it's clear in the record under Mr. Vickery's testimony that it was his intent to foreclose on both pieces of property. It's also clear that the borrower knew and believed that to be the same thing, the same case to be true. Only when they realized that there was an error, it gave them the opportunity to sandbag the lender and take a piece of property it would otherwise get as a result of not completely paying the indebtedness.

JUSTICE PHIL JOHNSON: So Why? They file suit promptly after this foreclosure and joined issue on it and did you promptly plead for rescission and to repost and try to go through that?

ATTORNEY KEITH AURZADA: Your Honor, that's exactly what we argued for on the Summary Judgment record in this case was, in fact, we argued for rescission, and the response by the Petitioners was that we were estopped somehow from rescinding the sale.

JUSTICE PHIL JOHNSON: So does the Summary Judgment Record reflect whether the property was subsequently sold or.

ATTORNEY KEITH AURZADA: It does not.

JUSTICE PHIL JOHNSON: The amici here seem to be concerned that you can sometime after the deed, the substitute Trustee's deed was filed, you can then file a Correction Deed and include a separate tract of property without any kind of a proceeding or reposting or anything.

ATTORNEY KEITH AURZADA: Two things are at issue there, Your Honor. It was our intention to rescind. That offer, in fact, was denied when we offered it. We were then in in front.

JUSTICE PHIL JOHNSON: Is that in the Summary Judgment record?

ATTORNEY KEITH AURZADA: That is not in the Summary Judgment record to be honest with you other than we pled for it. We asked for that remedy and ultimately I think that can be the remedy, the appropriate remedy in this case if the Court construes that there was that there's an irregularity that requires that inequity. Now, the.

JUSTICE NATHAN L. HECHT: How, if the property's been sold?

ATTORNEY KEITH AURZADA: If the property has subsequently been sold?

JUSTICE NATHAN L. HECHT: It has been hasn't it?

ATTORNEY KEITH AURZADA: It has been, Your Honor, that is not in the Summary Judgment record, but it has been.

JUSTICE NATHAN L. HECHT: How can rescission be an alternative?

ATTORNEY KEITH AURZADA: It's been accounted for in the contract with the buyer. The concept or rescission has been accounted for.

JUSTICE PHIL JOHNSON: Well in the record as it comes to us, there's a pleading for rescission.

ATTORNEY KEITH AURZADA: Yes, Your Honor.

JUSTICE PHIL JOHNSON: And that's been denied and the Summary Judgment has been granted to the Petitioner here.

ATTORNEY KEITH AURZADA: The Summary Judgment was granted in my client's favor except on the rescission request.

JUSTICE PHIL JOHNSON: I'm sorry, for the Respondent correct.

ATTORNEY KEITH AURZADA: So except for rescission, we were granted Summary Judgment.

JUSTICE SCOTT A. BRISTER: Rescission was alternative.

ATTORNEY KEITH AURZADA: Yes, Your Honor.

JUSTICE SCOTT A. BRISTER: So you would have no reason to press for rescission after you won everything.

ATTORNEY KEITH AURZADA: Yes, Your Honor, correct.

JUSTICE DAVID M. MEDINA: Now you said all the parties were aware of what was being sold and somebody sandbagged and after the fact they filed this claim. What if the party that owned the property was subject to foreclosure wasn't aware that the second tract was also being auctioned, just thought the first set of apartment complexes were being auctioned, looked at the paper and said okay, that's fine. We will satisfy whatever comes out of there and we still have our other piece of property and then you later go and then do this amendment. Does that matter?

ATTORNEY KEITH AURZADA: If the facts were such that the actual notice - First and foremost I think the answer to your question, if I understood it correctly, is that only piece of prosperity would have been sold if the actual Notice and understanding of the parties was that one was to be sold.

JUSTICE DAVID M. MEDINA: No, understanding of only one party and the party who owned the property that was subject to foreclosure, but the bank and the bidder thought they were getting both properties and then you later go and do what you did here, which was file the correction.

ATTORNEY KEITH AURZADA: Okay, then it would become a question of was it reasonable in spite of actual notice, was it reasonable to believe to the contrary.

JUSTICE DAVID M. MEDINA: Right.

ATTORNEY KEITH AURZADA: And I believe that would be a legal interpretation of whatever the notice was here: there's no question that both sides, both sides meaning the bank and the borrower, understood that the foreclosure was to be on two pieces of property and the testimony that's in the record of Mr. Vickery, it's clear that he intended to bid at the foreclosure sale on two pieces of property.

JUSTICE HARRIET O'NEILL: So what would the rule of law be that you are advocating for that if a notice describes one piece of property and refers to the Deed of Trust and it's sold, you can encompass a second piece of property through a Correction Deed? I'm back to Justice Johnson's question is that it seems to be not as between these two parties, but as to third parties and the ability to sweep a second piece that's not in the original description into a correction.

ATTORNEY KEITH AURZADA: First, I don't believe this is an attempt to sweep an additional piece of property into the correction because the language of the Notice encompasses that second piece of property and I think the Correction Deed was, in fact, there and designed to correct a clerical error and to clarify the title records. As it relates to the second part of your question which if there is a misunderstanding, the rule of law needs to be the same as it's been since the Miller v. Gibraltar case. Same law that was cited by the Third Court of Appeals that says if there's an irregularity in the sale and there is evidence in the record that it chilled the bidding, in that case the sale may be set aside. I wanted to...

JUSTICE PAUL W. GREEN: What seemed to be question of fact at the time when you have a notice that says one thing, a deed of trust that says something else going back to what Justice O'Neill was talking about, why wouldn't, you say there's no evidence in the record one way or the other or if they were there to chill the bidding, but why wouldn't that be a fact question?

ATTORNEY KEITH AURZADA: It is a fact question. But in this case, it's not, because there is no evidence in the record to suggest that the bidding was chilled. If there was one piece of evidence that the

bidding was chilled, then this becomes a fact issue that needs to be tried with a jury and not resolved on Summary Judgment.

JUSTICE PAUL W. GREEN: You say that now after the fact that the borrower should have been there to somehow raise that question. Well that never happens, would it?

ATTORNEY KEITH AURZADA: Well, in this case, the borrower did attend the sale. And moreover because of the actual notice requirement in the statute, in fact by Certified mail, it allows the borrower to be in the very best position to determine if there is interest in bidding for the sale. The borrower has actual notice by Certified mail under the statute. They have the ability to seek another loan to repay it, try to find potential bidders to bid up the price at the sale.

JUSTICE PAUL W. GREEN: But how would anybody know. I mean you got several people standing around and as was pointed out, somebody bids $1 million for a property that's worth half that or whatever it was and he says well, they just don't speak up.

ATTORNEY KEITH AURZADA: The reason is that the cases have held that where there's a means of getting complete information and namely calling the Trustee or speaking to the Substitute Trustee to discern what is being sold, that means is available to the public.

JUSTICE NATHAN L. HECHT: But if the Trustee has been asked here, he would have said just the one apartment, which is what he said at the sale.

ATTORNEY KEITH AURZADA: I'm not sure that's what he would have said.

JUSTICE NATHAN L. HECHT: He said it at the sale.

ATTORNEY KEITH AURZADA: We're speculating. We're speculating. At the sale, we know what he said. He read the volume and page and then said a tract of land. That's the correct statement of what's in the record, but we don't know that anybody was there to bid on a tract of land. And the borrower's always going to be in the best position to figure that out and to find that out and if the.

JUSTICE HARRIET O'NEILL: Well, it doesn't really matter whether someone's there because people look at, I mean, there are postings of this well in advance and so the fact that no one's there doesn't necessarily mean there wouldn't have been bids if it had been properly posted and we're focusing on whether people are standing on the Courthouse steps bidding, but they're going to peruse the notice before they show up.

ATTORNEY KEITH AURZADA: Well they're going to peruse the Notice and to the extent there is anything less than absolute clarity, they are going to have the option to contact the Trustee ahead of time.

CHIEF JUSTICE WALLACE B. JEFFERSON: But looking at this again, if you're looking at the definition of the property that's going to be sold, the way I'd read it is to say it's a real property described in Exhibit A, which is that smaller tract, the Casa Grande, which is attached to this Notice together with all improvements and personal property, I would read it to say on that property described in the Deed of Trust. I wouldn't, in reading this, I wouldn't think we were talking about completely there's an additional separate tract or even multiple other tracts of land. I wouldn't read it that way.

ATTORNEY KEITH AURZADA: Your Honor, I think that you can't add additional words when you're describing this language.

CHIEF JUSTICE WALLACE B. JEFFERSON: Yeah, but I'm just, I'm trying to get to a common sense reading of this description of the property by any objective person. It seems to me and tell me why it wouldn't be this way that the, it's talking about the propriety described in

Exhibit A together with whatever buildings and cars and trucks and.

ATTORNEY KEITH AURZADA: It's the reference to the Deed of Trust, which is exactly what the Amicus have raised is that we need to be able to rely on the public records. The reference to the volume and page should be the actual record, the record that counts and in this case, if you went and looked at the Deed of Trust, you would see clearly that it includes two pieces of property and then you would read the Notice and you be noticed is hereby given of holder's election to proceed against the sale.

CHIEF JUSTICE WALLACE B. JEFFERSON: But then there'd be an obligation anytime and maybe this is what you're advocating that all buyers must review, if there's a Deed of Trust as it mentioned in the sale of the property, all buyers need to go and review that before bidding on any property.

ATTORNEY KEITH AURZADA: I am advocating that, Your Honor, because this is not a two-party contract to sale. If there's only, there's only one thing you can get certainty of in a foreclosure sale and that is what you are buying. The property could be on fire at the time of the sale. This is an as-is, no warranty proposition. I see that my time is up.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Wainwright.

JUSTICE DALE WAINWRIGHT: Even if the property is on fire, you need to know which property it is and whether it's one property or two, right?

ATTORNEY KEITH AURZADA: But as a foreclosure bidder, that is the one piece of information that you can gain clarity on in advance of the bid by either reviewing the Deed of Trust or speaking to the Trustee directly to find out what is it you are selling.

JUSTICE DALE WAINWRIGHT: If the Trustee prepared and filed the, and recorded the Substitute Deed or the Substitute Trustee's Deed, correct?

ATTORNEY KEITH AURZADA: In this case, yes.

JUSTICE DALE WAINWRIGHT: And it only identified one tract?

ATTORNEY KEITH AURZADA: The Trustee's Deed suffers or suffers from, suffers or benefits, depending on your perspective, the same language in the Notice which says together with all improvements and personal property described in the Deed of Trust.

JUSTICE DALE WAINWRIGHT: Do you think that the Substitute Trustee's Deed describes both tracts? I thought earlier you acknowledged that it only provided.

ATTORNEY KEITH AURZADA: It does describe both tracts if you read that language, which is clearly on its face and has operative meaning, in my opinion.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions?

JUSTICE PHIL JOHNSON: I have one. Under your theory, there would be no time limitation on when the correction Deed could be filed I take it?

ATTORNEY KEITH AURZADA: Yes, Your Honor, and the cases bear me out on that. I'm drawing a blank on the exact name of the case, but I will tell you there was a Correction Deed approved in the cases cited in our brief that allowed a Corrective Deed to be filed 20 years later.

JUSTICE PHIL JOHNSON: Twenty years later and if there were, for example, four pieces of property in the Deed of Trust and the Substitute Trustee's Deed conveyed one, 20 years later you could file a Correction Deed conveying all four under your theory of the case.

ATTORNEY KEITH AURZADA: If the under my theory of the case, yes, if the, if the Notice could be interpreted. You'd have to go to the

Notice. If the Notice could be interpreted to include all four then yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counselor.

REBUTTAL ARGUMENT OF MIGUEL S. RODRIGUEZ ON BEHALF OF PETITIONER

ATTORNEY MIGUEL S. RODRIGUEZ: I'd like to address a couple of key points. One, there is nothing both in the Summary Judgment record or anywhere else in the record because it never happened, the lender never tendered the property back in rescission to Myrad.

JUSTICE PHIL JOHNSON: Yeah, but that's the alternative to the Summary Judgment is it not?

ATTORNEY MIGUEL S. RODRIGUEZ: It's not for this reason. In order to achieve the equitable remedy for rescission, the proper course of action is to tender the property either into Myrad or to the Court, neither of which was ever done.

JUSTICE NATHAN L. HECHT: Not if it's futile and did you resist rescission?

ATTORNEY MIGUEL S. RODRIGUEZ: It was never offered and so there is no evidence that it would have been futile and so you have to get to the first step first, which is to make the tender and the tender was never done.

JUSTICE SCOTT A. BRISTER: And when you sue for rescission, obviously doesn't that imply you would have to give the property back. I mean, you couldn't if you wanted rescission, you'd have to give it back otherwise it's no rescission.

ATTORNEY MIGUEL S. RODRIGUEZ: And you would also not be able to enjoy the fruits of that property during the course of that. So the idea is for the equitable remedy of rescission, tender the property back. Let the Court decide whether the underlying Deed ...

JUSTICE SCOTT A. BRISTER: So a pleading of rescission is never enough.

ATTORNEY MIGUEL S. RODRIGUEZ: Well in the case of when you're taking custody and control of property, that would be the case. In other words, you would need to, you can't enjoy the fruits of the ownership. In other words, they're collecting, this is an income-producing property collecting rents.

JUSTICE SCOTT A. BRISTER: So you would have to tender that back with the property at the appropriate time, but I'm just asking is it your position that if you plead rescission, that's never enough alone. There always has to be at the same time as the pleading, before the pleading, it can never be after the pleading that you tender the property and the fruits.

ATTORNEY MIGUEL S. RODRIGUEZ: In this particular case.

JUSTICE SCOTT A. BRISTER: No, no.

ATTORNEY MIGUEL S. RODRIGUEZ: Okay.

JUSTICE SCOTT A. BRISTER: I'm asking about all cases.

ATTORNEY MIGUEL S. RODRIGUEZ: Okay, in all cases in this context let's say, in the context of real property where real property is an issue, income-producing property, the proper course of action to receive the equitable remedy is to tender the property back.

JUSTICE SCOTT A. BRISTER: I'm just asking about plead to equitable remedy.

ATTORNEY MIGUEL S. RODRIGUEZ: You'd certainly plead it if you go to court.

JUSTICE SCOTT A. BRISTER: You're telling me you believe the rule, I'm a little rusty on my decision rules, but you're telling me the rule of rescission is before you file that pleading, you have to have tendered the property and the fruits back.

ATTORNEY MIGUEL S. RODRIGUEZ: No, now before you file the property, you should do it as soon as you can whether you've pleaded or not. If you plead it first and then tender the property that's fine or tender the property first.

JUSTICE SCOTT BRISTER: In this case, they wouldn't need it at all if we affirmed the Court of Appeals. They wanted the Summary Judgment. They wanted the Court of Appeals. They wouldn't need rescission. They got the same thing they would accomplish by going through your longer process.

ATTORNEY MIGUEL S. RODRIGUEZ: Focusing on the remedy of rescission, that remedy is foreclosed if not complied with under equity.

JUSTICE HARRIET O'NEILL: Okay, let me just ask this in terms of disposition. If we agreed with you on the Correction Deed piece, but it then be a remand to allow them to pursue their alternative relief of rescission?

ATTORNEY MIGUEL S. RODRIGUEZ: Under the particular circumstance, normally it might have, but under the particular circumstances of this case where the property has now been sold to a third party, I'm not sure how you fashion the remedy of rescission to undo what we've done before.

JUSTICE SCOTT A. BRISTER: They say they've got a deal in the deed to the third party that they get it back if they need it.

ATTORNEY MIGUEL S. RODRIGUEZ: In order to rescind, there would have to be a lot of things happening. Then at that point what you would have to account for the rents.

JUSTICE PHIL JOHNSON: Now isn't that up to the Trial Court? That's not in this record at all as I understand it. Isn't that what the Trial Court supposed to do and look at?

ATTORNEY MIGUEL S. RODRIGUEZ: That's correct, Your Honor.

JUSTICE PHIL JOHNSON: So we're talking about what we're, what you, Justice O'Neill as I understood the question is what happens here if we send it back.

ATTORNEY MIGUEL S. RODRIGUEZ: That's, okay, I misunderstood you.

JUSTICE HARRIET O'NEILL: We could not render on decision.

ATTORNEY MIGUEL S. RODRIGUEZ: It would be a remand and to go back to the Trial Court to see whether under the facts and the law the lender would be entitled to the remedy of rescission and on this also to be clear, the lender never moved for Summary Judgment on rescission either.

JUSTICE NATHAN L. HECHT: But you're going to resist rescission should we or not. You're going to cave on recission.

ATTORNEY MIGUEL S. RODRIGUEZ: Well, Your Honor, if Myrad has property accounted for the rents and the income produced by this property, we actually may satisfy the debt and come out ahead and so rescission is not necessarily a bad thing to my client. All we're asking for them because there's equity in this property, if we can account for the rents over the last two years, the debt may be paid off, possibly, and a surplus and in other words, the opportunity for us to retain the property itself and the benefits of the equity and all the investments that have been in the property over the last 10 years.

JUSTICE SCOTT A. BRISTER: And the interest that would have been running on the note.

ATTORNEY MIGUEL S. RODRIGUEZ: Exactly, in other words, you account for principal, interest and you set that off against the income of the property over time.

JUSTICE DAVID M. MEDINA: Very quickly, Mr. [inaudible] said that all three parties were aware of what was actually being sold at the auction. Is that correct?

ATTORNEY MIGUEL S. RODRIGUEZ: The only evidence of the record that my clients were had any indication is a "re:" line at the top of the letter from the Counsel for the Defendants at the time. That's the only evidence in the record. There's nothing in the record by deposition or other testimony as to what was in the mind of my clients.

JUSTICE DAVID M. MEDINA: I see time's expired, but Chief may I ask another question?

CHIEF JUSTICE WALLACE B. JEFFERSON: Oh certainly.

JUSTICE DAVID M. MEDINA: What's your response to this sandbagging statement?

ATTORNEY MIGUEL S. RODRIGUEZ: Your Honor, this is an attempt, this whole lawsuit is an attempt to enforce the foreclosure as written by the lender. The lender appointed the Trustee. The lenders appointed Trustee, drafted all of the documents , drafted the documents identifying one property, drafted the Deed, filled in the price that was to be put in and directed the Trustee to bid at at sale. Every single piece of that was put in by the lender in this case. We're only asking, we had only asked to enforce the Deed as written by the lender and enforce the procedure as done by the lender. That's all we've asked in this case. If there's any time left, I would ask the Court that if there is any question on whether or not it was unclear about what the Notice said or the procedure said at best it's a fact issue and the Summary Judgment record, this could not have been decided on on Summary Judgment on that issue if there was ambiguity. Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Rodriguez. The cause is submitted and the Court will take another brief recess.

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