When is a Foreclosure Sale Final?

California Court of Appeals Gives Industry a Big Win When it Comes to Unwinding a Foreclosure Sale

by T. Robert Finlay, Esq. and Jonathan D. Fink, Esq. of Wright, Finlay & Zak, LLP

For decades, lenders have battled third party purchasers in court over whether a mistaken foreclosure sale can be unwound. While the answer has always been dependent on a variety of complex factors, the issue has become even more complex since the 2021 enactment of California *Civil Code* § 2924m. Fortunately, in *Applegate v. Carrington Foreclosure Services, LLC.*, the Court of Appeals recently granted broad discretion to loan beneficiaries who need to unwind a mistaken or unintended foreclosure sale (or just to help the borrower avoid foreclosure).

Since its enactment, *Civil Code* § 2924m has created a cottage industry of would be post-sale purchasers suing the foreclosure trustees and beneficiaries on deeds of trust for daring to rescind a foreclosure sale for which the prospective purchaser thought they could swoop in and get valuable property for a bargain price by outbidding the high bidder at that sale. In *Applegate*, a foreclosure sale was held in which the property was sold to the foreclosing beneficiary for just $100. The sale was unwound prior to the receipt of any over-bids under Section 2924m, but bids came in afterwards anyway. Applegate, one of the frustrated overbidders, filed suit, claiming that the sale was not, and could not be, unwound and that he was the highest prospective bidder and, as such, was entitled to the property.

The foreclosure trustee, represented by Wright, Finlay & Zak, prevailed on summary judgment, on three grounds: (i) that there was no private right of action under Section 2924m; (ii) that the sale was properly unwound; and (iii) that, regardless, Applegate had failed to comply with all the requirements for a valid notice of intent to bid under Section 2924m. Applegate appealed, insisting that a private right of action was necessarily implied under 2924m (citing to the *Mabry* decision's view of 2923.5 when HBOR was first being litigated), that the rescission of the sale was a sham, and that he had "substantially complied" with the requirements of Section 2924m.

In a published decision, the appellate court (unfortunately) found it unnecessary to decide whether there was a private right of action as it agreed with defendants' other two points. Specifically, the court held that, because the sale was subject to Section 2924m, the sale does not become final until the timeframes under Section 2924m have been satisfied (i.e., 15 days from the sale for a notice of intent to overbid and 45 days to actually tender a valid overbid if a notice of intent was received). Therefore, the trustee had the discretionary power to cancel or unwind the foreclosure sale for any reason, even to protect the beneficiary's interests. Under the ruling in *Applegate*, a beneficiary now has broad discretion to unwind a foreclosure sale to a third party during the post-foreclosure bidding period, giving beneficiaries the ability to clear bidding mistakes at the foreclosure sale and help borrowers who may have been a day or so late in sending in loss mitigation documentation, reinstatement or payoff funds, avoid foreclosure.

While not as newsworthy, but also very important, the court determined that a prospective bidder must *strictly* comply with the requirements of Section 2924m's overbidding process.

While, in an ideal world, the Court would have resolved the still open question of whether there is a private right of action under Section 2924m at all, the published opinion still provides a major victory for foreclosure trustees and beneficiaries needing to unwind a foreclosure sale.

If you have any questions regarding the contents of this article, please feel free to contact Robert Finlay at rfinlay@wrightlegal.net or Jonathan Fink at jfink@wrightlegal.net.

T. Robert Finlay, Esq.
rfinlay@wrightlegal.net

Robert Finlay is a founding Partner of WFZ.

Jonathan D. Fink, Esq.
jfink@wrightlegal.net

Jonathan Fink is a Partner at WFZ.

Disclaimer: The above information is intended for information purposes alone and is not intended as legal advice. Please consult with counsel before taking any steps in reliance on any of the information contained herein.