

CERTIFIED FOR PUBLICATION

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)**

MILLENNIUM ROCK MORTGAGE, INC.,

Plaintiff and Respondent,

v.

T.D. SERVICE COMPANY,

Defendant and Appellant.

C059875

(Super. Ct. No.
34-2008-00015011-CU-OR-GDS)

ORDER MODIFYING OPINION
AND DENYING REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

1. Millennium has filed a petition for rehearing asserting that our decision was based on "erroneous factual conclusions." The argument is best summed up by the following passage: "Specifically, although the Declaration [of the auctioneer, Byran Moulton,] states that Mr. Moulton is provided with a written 'script' for each sale, it does not state whether Mr. Moulton reads off of that script in conducting each sale. And, it most certainly does not state he read from his 'scripts' in conducting this particular sale. Rather, this Court merely infers that Mr. Moulton 'read from a script for a different

foreclosure, but called out the street address for the subject property.'" (Fn. omitted.)

From this premise, Millennium concludes that the record is ambiguous as to what occurred at the auction and that, instead of construing that ambiguity in favor of the trial court, we (1) reached factual conclusions based on speculation and conjecture and (2) failed to resolve all evidentiary conflicts in favor of the order appealed from. The claim is unpersuasive for the following reasons.

The quote Millennium attributes to us does not appear anywhere in our opinion. We never said the auctioneer *read from* the script; we stated only that he *used* the script for the 13th Avenue property, which had all the correct information except the property address. Moulton declared that when he conducts an auction he is provided a script for each property; that each script includes the TS number, legal description or APN number, and street address; and that on this occasion he had scripts for both the 13th Avenue and the Arcola Avenue properties. He then conducted the auction for **TS No. 352885** (i.e., the 13th Avenue property) by calling out the Arcola Avenue address, but "[t]he rest of the information that *I announced* was correct." (Italics added.) The only rational inference that can be drawn from these statements is that Moulton conducted the auction for TS No. 352885 by announcing all the information applicable to the 13th Avenue property *except* for the Arcola Avenue street address. No speculation or conjecture is required to reach this conclusion. Indeed, Millennium does not propose any contrary

inference that could be drawn reasonably from Moulton's statements.

2. Millennium also contends we violated Government Code section 68081 because neither party contended "that the procedural error in this case was that the incorrect address was read in connection with the trustee's sale of the 13th Avenue property." This assertion is based on an unreasonable construction of the statute. Section 68081 applies only where a decision is "based upon an *issue* which was not proposed or briefed by any party to the proceeding." (Gov. Code, § 68081, *italics added*.) The issues in this case were whether *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.* (2001) 85 Cal.App.4th 1279 was controlling, whether the mistake was extrinsic or intrinsic to the foreclosure sale, and whether the trial court erred in granting the injunction. Both parties' briefs addressed those issues. Section 68081 does not require the appellate court to grant a rehearing merely because its analysis of a particular issue diverges from those of the briefs. The only requirement is that the parties have a fair *opportunity* to brief the issues. (*People v. Alice* (2007) 41 Cal.4th 668, 677; accord, *Postal Instant Press, Inc. v. Kaswa Corp.* (2008) 162 Cal.App.4th 1510, 1517.) As long as the basis for our decision was "fairly included within the issues raised," no supplemental briefing is required. (*Alice*, at p. 679.)

It is ordered that the published opinion filed herein on November 24, 2009, be modified as follows:

On page 9, the first sentence of the second full paragraph beginning with "According" and ending with "property." is modified to **add** the following text: "**which stood uncontradicted,**" so that the sentence now reads:

According to his declaration, which stood uncontradicted, the auctioneer conducted the subject auction by using the script for the 13th Avenue property.

With the above modification, the petition for rehearing is denied.

This modification does not constitute a change in the judgment. **(CERTIFIED FOR PUBLICATION.)**

BY THE COURT:

SIMS, Acting P. J.

HULL, J.

BUTZ, J.