

Ariz. high court may weigh Chandler site

by **Luci Scott** - Nov. 11, 2011 03:50 PM
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The Arizona Supreme Court has been asked to get involved in the feud over who owns Elevation Chandler, the abandoned 10.5-acre construction site near Loops 101 and 202.

The dispute has ramifications for all trustee sales in Arizona's commercial real-estate industry, appellants say.

California-based Point Center Financial, the lender that foreclosed, and TD Service Company of Arizona, the company that held a flawed trustee sale, have asked the Supreme Court to review the state Court of Appeals' decision that favored Tom Peltier of BT Capital, a Phoenix foreclosure speculator.

BT Capital claims it won the property for \$1,000,001 at a trustee sale on June 15, 2009, but TD Service and Point Center disagree.

Elevation Chandler, on the southern edge of Westcor's Chandler Fashion Center, was to have been a high-rise luxury hotel topped by condominiums. Developer Jeff Cline of Scottsdale had visions of building a second tower of condos, as well as a parking garage and a fitness center.

Construction stopped abruptly in April 2006.

On the day of the trustee sale, the outstanding balance due was at least \$32.7

million.

TD Service made several errors in the notice and posting of the sale.

At the sale, auctioneer Steve Vadas made an opening bid of \$1 million for Point Center, and Peltier of BT Capital bid \$1,000,001. No further bids were made, even though Point Center had told TD Service earlier to bid up to \$25 million if there was competition. After Peltier's bid, the auctioneer called his home office and was told to award the property to BT Capital.

That sale was actually the second Elevation Chandler sale that day. One had been held about noon, at which Point Center had the winning bid. Peltier showed up about 4 p.m. asking about the Elevation Chandler sale, which had been scheduled for 2 p.m. When he was told the sale had been held, he insisted he be given a chance to bid, so the auctioneer held a second sale.

The next day, a standoff occurred between Peltier and TD Service. TD Service said the second sale was invalid and it refused to accept the balance from Peltier, who would not take back his \$10,000 deposit.

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BT Capital filed a lawsuit in Maricopa County Superior Court against TD Service and Point Center Financial for breach of contract, negligence, negligent misrepresentation and punitive damages.

Maricopa County Superior Court Judge Bethany Hicks dismissed BT Capital's complaint, so BT Capital appealed.

On Sept. 27, 2011, the state Court of Appeals reversed Hicks' decision, saying TD Service couldn't void a completed bidding process.

TD Service and Point Center Financial are asking for a review by the state Supreme Court.

Despite BT's lawsuit, another trustee sale was held July 1, 2010, at which time Point Center took back the property.

Joseph Cotterman, Phoenix attorney for Point Center, said if the Supreme Court hears the case, Point Center will ask the court to rule that the sale that occurred at noon June 15 invalidated the attempt to sell the property at 4 p.m.

A second question for the Supreme Court from Point Center stems from the third trustee sale on July 1, 2010, at which Point Center foreclosed. Peltier attended that sale but didn't bid, saying he already owned the property.

"We're asking the Supreme Court to find that sale (on July 1, 2010) trumped everything that came before, and as a result of that one, everything else about this case is moot," Cotterman said.

Phoenix attorney Roger Cohen, who represents TD Service, said his client is

asking the Supreme Court three questions, including how much discretion a trustee like TD Service has.

"The main thing we're asking is for the court to look at is whether the duties of the trustee are limited to ministerial acts -- doing something by rote -- or whether the trustee has discretion," Cohen said.

"We believe the trustee, after the bidding is closed, has discretion to look at the record to see whether all of the statutory requirements have been satisfied before accepting payment," Cohen said.

A second question from TD Service is whether the Court of Appeals erred in treating the case as contractual rather than statutory.

The Appeals Court relied on a case in Washington state that treats the process as contractual, but a California case follows the principle that it's statutory.

Finally, TD Service wants to know whether the court should look at a combination of "inadequacy of price" and errors in the bidding process.

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Superior Court Judge Hicks cited the price and the errors when she dismissed BT's complaint.

Even if the Arizona Supreme Court refuses to review the case, the battle is far from over.

If the court denies the case a hearing, Cotterman said, "I think the appellate court ruling will stand, but that doesn't mean BT wins. It says Point Center and TD don't win for the reasons the trial court said."

The appellate court told the litigants to go back to Superior Court and finish the case.

"It still leaves room for any party to win," Cotterman said. "There are several issues we could win on at trial court, because the Appeals Court left several issues open."

Cotterman said he hopes the Supreme Court will hear will hear the appeal because "we think in an economy, and especially a real-estate climate like Arizona has, they're very important questions, and some haven't been answered by the court before."

Because of the high volume of foreclosures in Arizona, this dispute is not simply academic, TD Service said in court papers.

"This opinion goes to the heart of the rights, duties and obligations of an essential participant in these sales -- the trustee -- thereby raising a significant issue of statewide importance," TD said in court papers.

Litigation has discouraged potential buyers, who are leery of a parcel with a clouded title. However, Archstone Apartments of Englewood, Colo., did sign a letter of intent and received financing to buy the property.

That letter was signed in August. Archstone did not return *TheRepublic's* phone calls.

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