

FILED
Court of Appeals
Division III
State of Washington
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96902-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE CASE # 354237

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FIBIA AND RADU BAHNEAN,

Appellant/Petitioner

v.

HSBC BANK USA NA,

Respondents

FIBIA AND RADU BAHNEAN'S MOTION FOR
DISCRETIONARY REVIEW BY THE WASHINGTON SUPREME
COURT

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RULES

I. IDENTITY OF MOVING PARTY

The Petitioner/ Appellants, Fibia Bahnean and Radu Bahnean seek the relief designated in Part 2 below.

II. STATEMENT OF RELIEF SOUGHT

Fibia and Radu Bahnean request that the Washington Supreme Court accept discretionary review of the published decision in this case by the Court of Appeals, Division Three (hereinafter the “Court of Appeals”). Case No. 354237 (January 29, 2019).

III. SUMMARY OF ISSUES PRESENTED

1. Whether the issue of when an installment contract secured by real property begins to run is an issue of substantial public interest that should be determined by the Supreme Court.
2. Whether the law regarding the statute of limitations for the breach of installment contracts outlined by the Washington Supreme Court in passing in *Herzog v. Herzog*, 23 Wn.2d 383 (1945) was altered by the Washington Legislature's passage of RCW 4.16.005.
3. Whether this courts precedent in *Herzog* is relevant to an analysis of modern contracts.
4. Whether the Court of Appeals erred when it held that the statute of limitations on the note begins to run on each installment as it came due.

IV. STATEMENT OF THE CASE

A. There Has Been an Increase in Cases Regarding the Statutes of Limitations on Installment Contracts

The Great Recession forced thousands of Washington borrowers to default on their loans in the years 2007-2010. Many lenders elected not to foreclose on the borrowers, even when the borrowers left the property and tried to restart their lives somewhere else. This left many Washington

borrowers responsible for properties that they believed had been taken by their lenders. The various Courts of Appeal have addressed a number of appeals related to this issue. Some examples include: *Edmundson v. Bank of Am.*, 194 Wn. App. 920, 378 P.3d 272 (2016); *Merceri v. Bank of N.Y. Mellon*, 4 Wn. App. 2d 755, *Cedar W. Owners Ass'n v. Nationstar Mortg., LLC*, 2019 Wash. App. LEXIS 279, *Parker v. Parkview Trails, LLC*, 2018 Wash. App. LEXIS 1352; *Erickson v. America's Wholesale Lender*, 2018 Wash. App. LEXIS 811; *Heintz v. U.S. Bank Trust, N.A.*, 2018 Wash. App. LEXIS 97; *4518 S. 256th, LLC v. Karen L. Gibbon, PS*, 195 Wn. App. 423, 382 P.3d 1, 2016.

All of these decisions were reached within the last two years and show a trend of statutes of limitations disputes that are becoming a more common dispute given the long delays some lenders have taken to foreclose on properties.

B. The Only Supreme Court Precedent On this Issue is Outdated and not Applicable to Most Modern Contracts.

The common precedent cited by the various courts of appeal is the Supreme Court's case *Herzog v. Herzog*. 23 Wn.2d 383 (1945). However, the contract analyzed in that case was fundamentally different from a note secured by real property. The court in *Herzog* addressed the statute of limitations on an agreement to forbear from in personam enforcement of a

money judgment. Anything else is dicta. The Supreme Court's dicta in a 1945 case should not be the principle authority for deciding the multiple statutes of limitations cases now reaching the Courts of Appeals arising from nonactions taken by lenders during the Great Recession.

C. The Supreme Court Has Never Addressed Statutory Changes Since 1945.

There has been a host of statutory changes since 1945 that alter the way contracts are enforced and obligations secured by real property are conducted. For example, the Washington Legislature added a new provision to RCW 4.16 in 1989. Washington Laws 1989 Chapter 14 § 1.

This provision provides:

Except as otherwise provided in this chapter, and except when in special cases a different limitation is prescribed by a statute not contained in this chapter, actions can only be commenced within the periods provided in this chapter after the cause of action has accrued.

RCW 4.16.005.

The Supreme Court has never addressed what impact RCW 4.16.005 makes on when a statute of limitations begins to run. This provision provides an action to enforce a claim must be filed within a set period of time after the cause of action accrues. A plain reading of this statute is that a statute of limitations begins to run when a party has a right

to pursue an action – even if the party does not want to pursue the action at that time.

D. The Court of Appeals Theory is Inconsistent with the Structure of the Washington Deed of Trust Act.

Most of the mortgage contracts in Washington are Deeds of Trust governed by 61.24 et seq. This was based in 1965 – twenty years after the Herzog case. 1965 c 74 § 1. The Washington Deed of Trust Act presumes that a foreclosure will be on an entire loan and not simply on the past due installments. For example, the form Notice outlined in RCW 61.24.040(d) states: “The above-described real property will be sold to satisfy the expense of sale and the obligation secured by the Deed of Trust as provided by statute.” The structure of the Deed of Trust Act presumes that the entire loan becomes enforceable on breach and not simply that past due installments become enforceable. In other words, the Deed of Trust Act presumes that the cause of action for foreclosure accrues on any default in the contract as to the entire contract.

E. The Bahnean Mortgage Agreements.

The Bahneans executed a Promissory Note and/or an Adjustable Rate Rider in favor of GreenPoint Mortgage Funding, Inc., a California corporation. ("GreenPoint"). On or about October 27, 2006, the Bahneans granted a Note and Deed of Trust to Greenpoint, which was recorded on

October 31, 2006 under Kittitas County Recording No. 200610310062

("the DOT"). CP 00102-00134.

The note and deed of trust contain several specific provisions that will be referred to repeatedly in the argument below. These provisions are as follows:

Note

3. PAYMENTS (A) Time and Place of Payments I will make a payment on the first day of every month, beginning on December 1, 2006 . Before the First Principal and Interest Payment Due Date as described in Section 4 of this Note, my payment will consist only of the interest due on the unpaid principal balance of this Note. Thereafter, I will pay principal and interest by making a payment every month as provided below.

I will make my monthly payments of principal and interest beginning on the First Principal and Interest Payment Due Date as described in Section 4 of this Note. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date, and if the payment includes both principal and interest, it will be applied to interest before Principal. If, on November 1, 2036 , I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at P.O. Box 79363, City of Industry, CA 91716-9363 or at a different place if required by the Note Holder.

CP 00102

7. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charges for Overdue Payments

If the Note Holder has not received the full amount

of any monthly payment by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.000 % of my overdue payment of interest, during the period when my payment is interest only, and of principal and interest thereafter. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal that has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

CP 00104.

Deed of Trust

22, Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the

default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property at public auction at a date not less than 120 days in the future. The notice shall further inform Borrower of the right to reinstate after acceleration, the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale, and any other matters required to be included in the notice by Applicable Law. If the default is not cured on or before the date specified in the notice, Lender at its option, may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and/or any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

CP 00060.

F. Quiet Title Case.

The Bahneans lost their business in the great recession and had to start their lives over in Texas. The last payment the Bahneans made to Greenpoint, or any successor in interest, occurred on June 23, 2008. On July 23, 2008, the Bahneans became delinquent on this debt. The debt at issue was subsequently assigned to Defendant HSBC Bank USA, NA as Trustee for Deutsche Alt-A Securities Inc. Mortgage Loan Trust, Mortgage Pass-through Certificates Series 2006-AR, ("HSBC"). Ocwen Loan Services LLC became the new servicer of the loan.

They believed that HSBC or its predecessors in interest would foreclose on the property. The Bahneans later learned that HSBC had not foreclosed on the property when they were charged with utilities associated with the property. That is when they discovered that Ocwen had failed to take any steps to foreclose on the property over the past six years after the Bahneans has defaulted on their loan and started their lives over again in a new state. Seeing that more than six years had passed since default, the Bahneans filed a lawsuit in Kittitas County seeking quiet title to the property on March 9, 2015.

The Bahneans filed an action on March 9, 2015 in Kittitas County Superior Court seeking a judgment for quieting title against HSBC and any other claimants to an interest in the property. CP 00001. HSBC appeared in this case and subsequently filed a counterclaim against the Bahneans seeking judicial foreclosure on May 19, 2015. CP 00011-00024.

The plaintiff filed a motion for summary judgment on August 12, 2015. CP 00034-00042. The court partially granted and partially denied the Plaintiff's motion on November 10, 2015. CP 199-203. It held that all payments that came due prior to February 15, 2009 were barred by the statute of limitations but that any payments that came due after that date were not barred by the statute of limitations. Id.

The court further found that the Greenpoint Note had not been accelerated. Id.

Armed with these findings, HSBC filed a motion for summary judgment on March 30, 2017. CP 0204. This motion was granted on June 2, 2017 and a Judgment was entered. CP 326-336. The Appellants subsequently appealed from this judgment. CP 337.

The Court of Appeals Division III, entered an unpublished decision affirming the trial court on January 29, 2019. The Bahneans seek review of this decision.

V. ARGUMENT

A. This Court Should Grant Review Because the Interpretation of Statutes of Limitation With Respect to Mortgage Contracts is of issue of substantial public interest that should be determined by the Supreme Court.

The Supreme Court may grant review when an issue is of substantial public interest that should be determined by the Supreme Court. There has been a significant increase in statute of limitations cases as illustrated above. The Courts of Appeal do not have clear direction from the Washington Supreme Court regarding how a default on an installment contract secured by real property should be interpreted.

Further, the Washington Supreme Court has not looked at these issues for more than seventy years, even though the statutory scheme surrounding the statutes of limitation and for nonjudicial foreclosure have changed significantly.

For example, the addition of RCW 4.16.005 to the statute in 1989 must have done something to impact when a statute of limitations runs. The Bahneans contend that the language "cause of action has accrued" provides that a party may not contract for a longer statute of limitations than provided for by statute.

The Washington Supreme Court, has held with respect to insurance contracts that a cause of action accrues, "on the date the insurer breaches the contract of insurance." *Schwindt v. Commonwealth Ins. Co.*, 140 Wn.2d 348 (2000). A similar rule should apply to both insurance contracts and lender contracts.

The Lender in this case, had the right to pursue an action on the entire contract at the time the Bahneans failed to make a principal and interest payment in September of 2008. This right arose from the provision in the Note that stated: "If I do not pay the full amount of each monthly payment on the date it is due, I will be in default." This language stresses that the failure of a borrower to pay a monthly installment is not just a breach of the agreement to pay that installment, but that it places the

borrower in default with respect to the entire loan. If a borrower is in default, the Lender has accrued a cause of action to enforce the entire contract.

The Lender slept on its rights for more than six years. It is time for the Washington Supreme Court to examine when a statute of limitations accrues with respect to an installment contract secured by real property.

VI. CONCLUSION

In conclusion, the Bahneans ask this court to review the Division III Court of Appeals Opinion at issue.

February 28, 2019

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JANUARY 29, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

RADU BAHNEAN and FIBIA)	No. 35423-7-III
BAHNEAN, a married couple,)	
)	
Appellants,)	
)	
v.)	
)	
HSBC BANK USA, N.A., as Trustee for)	
Deutsche Alt-A Securities Inc. Mortgage)	
Loan Trust, Mortgage Pass-through)	
Certificates Series 2006-AR6, a foreign)	UNPUBLISHED OPINION
corporation,)	
)	
Respondent,)	
)	
EMC MORTGAGE LLC;)	
SNOQUALMIE PASS UTILITY)	
DISTRICT; ALL OCCUPANTS OF THE)	
REAL PROPERTY KNOWN AS 132)	
HYAK DRIVE , SNOQUALMIE PASS,)	
WASHINGTON 98068,)	
)	
Third Party Defendants.)	

PENNELL, J. — Radu and Fibia Bahnean appeal the superior court’s adverse orders of summary judgment, and a judgment and decree of foreclosure. We affirm.

FACTS

Husband and wife Radu and Fibia Bahnean executed a promissory note (“Note”) on or about October 23, 2006, in favor of GreenPoint Mortgage Funding, Inc. The Note was secured by a deed of trust (“Deed of Trust”) encumbering real property that the

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Bahneans purchased two years prior in Kittitas County, Washington (“the Property”). This loan was obtained so the Bahneans could pay off debt they incurred to build a structure on the Property.

Under the Note, the Bahneans agreed to pay a principal of \$490,000, plus interest, in monthly installments for 30 years, beginning on December 1, 2006. The Note was set to mature on November 1, 2036, and provided that if the Bahneans failed to “pay the full amount of each monthly payment on the date it is due, [the Bahneans] will be in default.” Clerk’s Papers (CP) at 104. The Note further provided that if the Bahneans were in default, “the Note Holder may send [the Bahneans] a written notice telling [them] that if [they] do not pay the overdue amount by a certain date, the Note Holder may require [them] to pay immediately the full amount of Principal that has not been paid and all the interest” owed on such amount. *Id.* The Note includes a “No Waiver” clause specifying the Note holder’s failure to accelerate the loan after default does not waive the right to acceleration at a future date if the Bahneans are in default. *Id.*

The Deed of Trust similarly provided that the “Lender shall give notice to [the Bahneans] prior to acceleration following [the Bahneans’] breach of any covenant or agreement in this Security Instrument.” *Id.* at 121. As to the notice to be provided, the Deed of Trust states:

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The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to [the Bahneans], by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property at public auction at a date not less than 120 days in the future.

Id.

The Bahneans stopped making installment payments on their loan in mid-2008.

Although the Bahneans were in default, the Note holder did not accelerate the loan.

On July 31, 2009, the Bahneans filed for Chapter 7 bankruptcy protection in Texas. Shortly thereafter, GreenPoint assigned the Deed of Trust to HSBC Bank USA, N.A (“HSBC Bank”). Then, on October 28, 2009, the bankruptcy court entered a discharge order for the Bahneans.

On June 4, 2014, the loan servicer sent the Bahneans a notice of default. This notice stated that payments on the loan were past due, which meant that the Bahneans were in default; it advised them of the actions necessary to cure the default and deadlines for those actions, and that failure to cure the default could result in acceleration of the loan and foreclosure. This notice in and of itself did not accelerate the loan. The notice stated that, as of June 4, 2014, the total amount past due was \$164,613.56.

On March 9, 2015, the Bahneans initiated an action in Kittitas County Superior Court seeking to quiet title and for a declaratory judgment. The Bahneans acknowledged

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that they had defaulted on the Note in mid-2008 when they first missed an installment payment. Because a six-year statute of limitations applied to enforcement of the Note, the Bahneans reasoned that the statute of limitations period had expired and they were entitled to title of the Property free and clear.

HSBC Bank answered the Bahneans' complaint, asserted a counterclaim against the Bahneans, and filed a third party complaint for judicial foreclosure. HSBC Bank averred that the statute of limitations had not run and that the bank remained entitled to enforcement of the Note.

The superior court agreed with HSBC Bank, finding that because the Note had not been accelerated or reached maturity, the bank's counterclaim and third party complaint to enforce the Note were not barred by the statute of limitations, and HSBC Bank was entitled to recover delinquent installment payments that became due after February 15, 2009. Based in part on these findings, the superior court ultimately (1) granted summary judgment to HSBC Bank, and (2) entered a judgment and decree of foreclosure.

The Bahneans appeal.

ANALYSIS

In their briefing, the parties dispute whether the applicable statute of limitations is RCW 62A.3-118(a), regarding negotiable instruments, or RCW 4.16.040, which governs

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written contracts regarding land. We need not resolve this dispute. Regardless of which statute applies, the limitations period is six years. Our inquiry, therefore, looks to when the six-year period began to run. This is a matter governed by the terms of the Note, not statute.

Different types of promissory notes carry different rights of enforcement, which can alter the commencement date of the statute of limitations period. One type of promissory note is a demand note. As the name indicates, a demand note is due on demand. Once demand is made, the note holder is entitled to enforcement in full and a cause of action for nonpayment accrues. *See Nilson v. Castle Rock Sch. Dist.*, 88 Wn. App. 627, 630, 945 P.2d 765 (1997).

An installment note is different. A borrower with an installment note is protected from having to make payment in full on demand. Instead, the borrower need only make payments in increments according to the schedule set by the note. When a borrower fails to make an installment payment on a loan, the only right of action that accrues immediately is to demand payment of the delinquent installment, not the note as a whole. As a consequence, a new statute of limitations “runs against each installment from the time it becomes due.” *Herzog v. Herzog*, 23 Wn.2d 382, 387-88, 161 P.2d 142 (1945).

An acceleration clause can convert an installment note into a demand note. When a loan is accelerated, the borrower no longer has the protection of making payments only in installments. Instead, the entire amount of the loan becomes due on demand by the note holder.

While an acceleration clause can convert a loan from an installment note to a demand note, this is not something that happens automatically upon nonpayment of an installment. *A.A.C. Corp. v. Reed*, 73 Wn.2d 612, 615, 440 P.2d 465 (1968). Instead, whether and when conversion via acceleration occurs depends on the terms of the note. *See id.*; *Edmondson v. Bank of Am.*, 194 Wn. App. 920, 931-32, 378 P.3d 272 (2016). If a note holder opts not to exercise its rights to accelerate a note, the note does not convert from an installment note to a demand note. *Merceri v. Bank of N.Y. Mellon*, 4 Wn. App. 2d 755, ___ P.3d ___, *review denied*, 192 Wn.2d 1008, 430 P.3d 244 (2018).

Because the Bahneans' Note had neither matured nor been accelerated, it remained an installment note and was subject to the rules relevant thereto. Thus, the superior court correctly held that because the Note had not yet matured and had never been accelerated, it remained due and owing and was, therefore, subject to enforcement. The only portions of the Note that HSBC Bank had lost the right to enforce were the outstanding installment payments that became due up to February 15, 2009.

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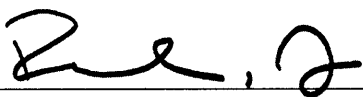
ATTORNEY FEES

HSBC Bank requests an award of costs and attorney fees pursuant to RAP 14.2 (governing costs), RAP 18.1 (governing attorney fees and expenses), and RCW 4.84.330 (governing attorney fees in actions on contracts). Because the Deed of Trust and the Note provide for an award of attorney fees to the prevailing party who is required to litigate to enforce or interpret the provisions of the contract, we grant HSBC Bank's request for fees and costs as the prevailing party.

CONCLUSION

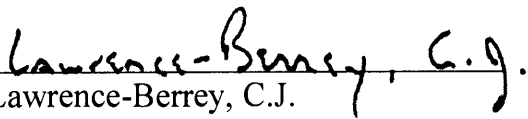
We affirm the orders and judgment of the superior court.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

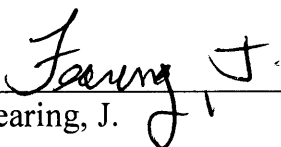


Pennell, J.

WE CONCUR:



Lawrence-Berrey, C.J.



Fearing, J.

Renee S. Townsley
Clerk/Administrator

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January 29, 2019

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CASE # 354237
Radu Bahnean, et ux v. HSBC Bank USA, N.A.
KITTITAS COUNTY SUPERIOR COURT No. 152000627

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Washington Supreme Court. RAP 13.3(b), 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact that the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. RAP 12.4(b). Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of the opinion (may also be filed electronically or if in paper format, only the original need be filed). RAP 13.4(a). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates each is due. RAP 18.5(c).

Sincerely,

A handwritten signature in cursive script that reads "Renee S. Townsley".

Renee S. Townsley
Clerk/Administrator

RST:btb

Attachment

c: **E-mail** Honorable L. Candace Hooper

DO NOT CITE. SEE GR 14.1(a).

Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 35423-7

Title of Case: Radu Bahnean, et ux v. HSBC Bank USA, N.A.

File Date: 01/29/2019

SOURCE OF APPEAL

Appeal from Kittitas Superior Court

Docket No: 15-2-00062-7

Judgment or order under review

Date filed: 06/02/2017

Judge signing: Honorable L. Candace Hooper

JUDGES

Authored by Rebecca Pennell

Concurring: George Fearing

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