NO. 51556-3-II

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

97931-6

U.S. BANK, N.A., AS TRUSTEE FOR LSF8 MASTER PARTICIPATION TRUST,

Plaintiff/Respondent,

vs.

JACK W. BAILEY, an individual, *et al,*

Defendants,

JASON HAGEN, an individual,

Defendant/Appellant.

APPEAL FROM THE SUPERIOR COURT

HONORABLE GREGORY GONZALES

PETITION FOR REVIEW

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Table of Contents

Table of Authorities

Washington Cases:

Federal Cases:

Federal Statutes:

Washington Statutes

Rules:

IDENTITY OF PETITIONER

This Petition for Review is made on behalf of Jason Hagen, appellant before the Court of Appeals.

COURT OF APPEALS DECISION

Mr. Hagen seeks review the decision of the Court of Appeals filed November 5, 2019, affirming a trial court decision dismissing his counterclaim made under RCW 7.28.300.

ISSUES PRESENTED FOR REVIEW

The following issues are presented for review:

1. Is an obligation accelerated when the deed of trust that secures the obligation states that acceleration is necessary to proceed to non-judicial foreclosure, a notice of default states that the obligation will be accelerated if delinquent payments are not made within thirty days, and a notice of trustee's sale is recorded on or about the thirtieth day from the issuance of the notice of default?

2. Is the period of limitation tolled by institution of non-judicial foreclosure proceedings?

3. Was the period of limitation effectively extended by the time between the filing of a bankruptcy petition and the grant of a discharge when the secured party could easily have obtained relief from the automatic stay?

STATEMENT OF THE CASE

I. Operative Facts

Jack Bailey and Sharon Bailey owned a residence located at 16203 N.E. 36th Ave., Ridgefield, Washington (the Property). (CP 24; CP 46) In July of 2002, the Baileys borrowed $269,997.77 from Household Realty Corporation (Household). The loan is evidenced by a Loan and Repayment Agreement. It called for monthly payments of $2,754.46 over a period of thirty years. (CP 165-67) The Baileys executed a Deed of Trust pledging the Property as security for the loan. The Deed of Trust named Household as the beneficiary. (CP 215-220) The Deed of Trust contains the following language in paragraph 17 as is pertinent:

> . . .(U)pon Borrowers' breach of any covenant or agreement of Borrower in this Deed of Trust, including the covenants to pay when due any sums secured by this Deed of Trust, Lender, prior to acceleration, shall give notice to Borrower...specifying (1) the Breach; (2) the action required to cure such breach; (3) a date not less than 30 days from the date the notice is mailed to Borrower, by which such breach must be cured; and (4) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the sums secured by this Deed of Trust; 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 and the right to bring a court action to assert the nonexistence of a default or any other defense of Borrower to acceleration and sale. If the breach is not cured on or before the date specified in the

> notice, Lender, at lender's option may declare all of the sums secured by this Deed of Trust to be immediately due and payable without further demand and may invoke the power of sale and any other remedies permitted by applicable law. . .

(CP 218)

The Baileys fell behind in making their payments by the first part of 2009. Household appointed Regional Trustee Services Corporation (the Trustee) as successor trustee under the Deed of the Trust. (CP 55-56) The Trustee prepared a Notice of Default to the Baileys dated May 15, 2009. (CP 172-74) It alleged that the Baileys owed $42,320.11 in overdue payments and other charges. It went on to state in paragraph 5(c):

> If the default(s) described above is (are) not cured within thirty days of the mailing of this notice, the lender hereby gives notice that the entire principal balance owing on the notes secured by the Deed of Trust. . . and all accrued and unpaid interest, as well as costs of foreclosure, shall immediately become due and payable. Notwithstanding acceleration, the grantor or the holder of any junior lien or encumbrance shall have the right after acceleration to reinstate by curing all defaults and paying all costs, fees and advances, if any, made pursuant to the terms of the obligation and/or deed of trust on or before 11 days prior to a Trustee's sale.

(CP 173) This notice was mailed to the Baileys on May 18, 2009. (CP 59)

The Baileys made no further payments. (CP 265; CP 409) The Trustee then recorded a Notice of Trustee's Sale on June 19, 2009. (CP

58-61) It set a trustee's sale for September 18, 2009. The notice stated that the principal of the amount due was $270,336.87, an amount greater than that initially borrowed. (CP 59)

On September 17, 2009, the Baileys filed for Chapter 7 bankruptcy protection. (CP 63-118) In their petition, they stated that the Property had a value of $274,000.00 but that it was security for debt totaling $338,411.00. (CP 72) They agreed to surrender the Property. (CP 107-108) The Baileys subsequently moved out of the Property by no later than October 31, 2009. (CP 409)

Meanwhile, the trustee's sale scheduled for September 18, 2009, did not go forward because of the automatic stay. Household did not seek relief from the stay to proceed with foreclosure. (CP 132-38) The Baileys were granted a discharge in their bankruptcy on December 16, 2009. (CP 120)

In September of 2011, the Baileys executed a quit claim deed conveying their interest in the Property to Jason Hagen. (CP 169) In August of 2014, Household assigned the Deed of Trust to Plaintiff U.S. Bank, N.A. as Trustee for LSF8 Master Participation Trust. (CP 406-407)

II. Procedural Facts.

Plaintiff filed this action on September 22, 2015. (CP 1-22) It sought to judicially foreclose the Deed of Trust that the Baileys had

executed in 2002. This was the first judicial or non-judicial foreclosure action that had been taken since 2009 when the Baileys had filed for bankruptcy protection.

After the filing of an amended complaint, Mr. Hagen answered and counterclaimed to quiet his title in the Property based on RCW 7.28.300. He alleged that the obligation secured by the Deed of Trust had been accelerated in June of 2009 and that Plaintiff's action was barred by the applicable statute of limitations because it was filed after June of 2015. (CP 23-48)

On August 21, 2017, Plaintiff moved for judgment on the pleadings to dismiss Mr. Hagen's counterclaim. The motion assumed that acceleration had occurred in June of 2009 but argued that the action had been filed before the limitation period had run. It claimed that the limitation period had been extended by the abandoned 2009 non-judicial foreclosure and the by Baileys' bankruptcy filing. (CP 122-28) Mr. Hagen responded to the motion. (CP 139-53) On October 18, 2017, he filed a summary judgment motion. He contended that the obligation had in fact been accelerated in June of 2009 and that the limitation period had not been effectively extended by either the abandoned 2009 non-judicial foreclosure or the Baileys' bankruptcy. (CP 186-212)

The two motions were heard together. On February 15, 2018, the trial court entered the Order on Motions. That order granted Plaintiff's motion for judgment on the pleadings; denied Mr. Hagen's motion for summary judgment; and dismissed Mr. Hagen's counterclaim with prejudice.[1] (CP 431-33) Mr. Hagen then appealed, and the Court of Appeals affirmed.

ARGUMENT

I. Mr. Hagen's Position.

Mr. Hagen's counterclaim was based on RCW 7.28.300 which provides as follows:

> The record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien.

Mr. Hagen has asserted that the obligation to Household was accelerated at the latest on June 19, 2009, when the Notice of Trustee's Sale was recorded. This action was filed on September 22, 2015—outside the six year limitation period set out in RCW 4.16.040. Plaintiff has asserted that the limitation period was tolled while nonjudicial foreclosure proceedings

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[1] The order also contained appropriate findings and language to comply with CR 54(b) and RAP 2.2(d). (CP 433)

were pending and during the time between the Baileys' bankruptcy filing and their receipt of a discharge. Neither claim has merit. Since the action was filed more than six years from the acceleration, Mr. Hagen is entitled to a decree quieting title in the property free of Plaintiff's claim.

II. Acceleration.

Since the Baileys agreed to pay Household in installments ending in 2032, the period of limitation can begin only if the obligation was accelerated. Acceleration requires some act on the part of the creditor to accelerate. The act may be the giving of formal notice to the effect that the whole debt is declared to be due, or by the commencement of an action to recover the debt, or by any means by which it is clearly brought home to the payors of the note that the option is exercised. *Weinberg v. Naher,* 51 Wash. 591, 594, 99 P. 736 (1909); *4518 S. 256th LLC v. Karen L. Gibbons, P.S.*, 195 Wn.App. 423, 434-36, 382 P.3d 1 (2016) The deed of trust requires acceleration preceded by notice before the beneficiary of the deed of trust can institute of non-judicial foreclosure proceedings. The Notice of Default provided the notice that the Deed of Trust requires. The recording of the Notice of Trustee's Sale was the act showing that acceleration has indeed occurred.

The Court of Appeals rejected that contention. Its decision is at odds, however, with the well settled rule that all instruments are to be

interpreted according to the intent of the parties, and clear and unambiguous language will be given its manifest meaning. See, e.g. *Burton v. Douglas County,* 65 Wn2d 619-621-22, 399 P.2d 68 (1965); *Greenback Beach & Boat Club, Inc. v. Bunney,* 168 Wn.App. 517, 522, 280 P.3d 1133 (2012) If the language of the deed of trust is thought to be ambiguous, the actions taken on behalf of Household confirm that acceleration is necessary. Acceleration is not necessary to a trustee's sale, and a Notice of Default need not contain any language concerning acceleration. RCW 61.24.030. The acceleration language was included in the Notice of Default because someone believed that it was required by the deed of trust for there to be non-judicial foreclosure. And acts of the parties show their interpretation of the language of any instrument. *Berg v. Hudesman,* 115 Wn.2d 657, 661, 801 P.2d 220 (1990) Based on this conflict with decisions of the Court of Appeals and the Supreme Court, the Court should take review. RAP 13.4(b)(1), (2)

One other matter must be discussed at this point. In *Terhune v. North Cascade Trustee Services, Inc.,* 9 Wn.App.2d 708, 446 P.3d 683 (2019), Division Two of the Court of Appeals ruled that an obligation was not accelerated even though the deed of trust at issue contained language requiring acceleration prior to the non-judicial foreclosure in language

virtually identical to that in this case. The Terhunes have sought review of the decision of the Court of Appeals.

In our case, the Court relied heavily on its opinion in *Terhune v. North Cascade Trustee Services, supra,* to affirm the trial court's ruling. It is submitted that the Court should take review of this matter if it also takes review of *Terhune v. North Cascade Trustee Services, supra,* because the same issues are presented.

III. Tolling of the Limitation Period While Non-Judicial Foreclosure Is Pending.

Since the Court of Appeals found that the obligation had not been accelerated, it did not reach the issues of whether the time during which non-judicial foreclosure proceedings are excluded from the limitation period. The Court should take review of this question because decision allowing such exclusion conflict with decisions of the Supreme Court and the Court of Appeals. Furthermore, there are conflicting decisions of the Court of Appeals on this issue. RAP 13.4(b)(1), (2)

The notion that time during which a non-judicial foreclosure proceeding is pending should be excluded from any limitation period is not supported in the relevant statute of limitations, RCW 4.16.040. As it states:

The following actions shall be commenced within six years:

(1) An action upon a contract in writing. . .

Limitation periods can be tolled by the filing of a summons and complaint. As RCW 4.16.170 provides:

> For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

Statutes of limitations are governed by their plain meaning. *Tingey v. Haisch,* 159 Wn.2d 652, 152 P.3d 1020 (2007) Furthermore, a Court cannot read language into a statute that the legislature may have omitted. In other words, a Court cannot adopt an interpretation of a statute that adds language that simply isn't there. *Jenkins v. Bellingham Municipal Court,* 95 Wn.2d 574, 579, 627 P.2d 1316 (1981); *Restaurant Development, Inc., v. Cannawill, Inc.,* 150 Wn.2d 674, 80 P.3d 598 (2003) Courts will not read into statutes of limitation an exception that the statute does not contain though the exception might be reasonable and equitable. *Rushlight v. McLain,* 28 Wn.2d 189, 199, 182 P.2d 62 (1947); *O'Neill v.*

Estate of Murtha, 89 Wn.App. 67, 73-74, 947 P.2d 1252 (1997) This rule must be applied vigorously where non-judicial foreclosure is at issue because non-judicial foreclosure statutes must be strictly construed in favor of borrowers. *Albice v. Premier Mortgage Services of Washington, Inc.,* 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) Since there is nothing in either RCW 4.16.040(1) or RCW 4.16.170 that allows tolling of the limitation period while a non-judicial foreclosure is pending, there can be no such tolling.

There is conflict among the Divisions of the Court of Appeals on this issue. Division One has held in many cases that such tolling exists. See, e.g.. *Edmundson v. Bank of America, N.A.,* 194 Wn.App. 920, 378 P.3d 272 (2016) The lead opinion in *U.S. Bank National Association v. Ukpoma,* 8 Wn.App.2d, 254, 438 P.3d 141 (2019), decided by Division Three, concluded that no such tolling was available. The cases from Division One rely on language in *Bingham v. Lechner,* 111 Wn.App. 118, 45 P.3d 562 (2002) But as Division Three pointed out in *U.S. Bank National Association v. Ukpoma, supra,* 8 Wn.App.2d at 260, the Court in *Bingham v. Lechner, supra,* did not analyze the question.

In light of the conflict between the divisions of the Court of Appeals and in light of the fact that allowing tolling during periods where non-judicial foreclosure proceedings are pending conflicts with decisions

of the Supreme Court and the Court of Appeals, the Court should take review to resolve this issue. RAP 13.4(b)(1), (2) It should hold that the limitation period is not tolled while a non-judicial foreclosure is pending because the statute of limitations does not allow for such a result.

IV. Tolling While Bankruptcy Proceedings Are Pending.

Plaintiff has claimed that the roughly ninety day period between the Baileys' filing for bankruptcy protection and their receiving their discharge should not be counted as part of the limitation period. Its argument is based on RCW 4.16.230 which provides as follows:

> When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action.

Household could have lifted the stay because the property had no equity and because the Baileys had surrendered it. It is not entitled to rely on RCW 4.16.230 for that reason.

This result follows from the interpretation that has been given to a similar statute RCW 4.16.180. It provides as follows in pertinent part:

> If the cause of action shall accrue against any person who is a nonresident of this state, or who is a resident of this state and shall be out of the state . . .such action may be commenced within the terms herein respectively limited after the coming, or return of such person into the state. . . and if after such cause of action shall have accrued, such person

> shall depart from and reside out of this state...the time of his or her absence...shall not be deemed or taken as any part of the time limit for the commencement of such action.

In essence, the statute provides that the period of limitation does not include the time that the defendant resides outside the State. In *Summerrise v. Stephens,* 75 Wn.2d 808, 454 P.2d 224 (1969), the Court held that the tolling provisions of the statute would not apply when the defendant could be served with process out-of-state under RCW 4.28.185, Washington's long arm statute. It noted that the purpose of RCW 4.16.180 was to preserve a limitation period when service on the defendant was not possible. It then stated that there was no good reason to allow tolling if the non-resident defendant could nonetheless be served. 75 Wn.2d at 813-14 The Court came to a similar conclusion in *Smith v. Forty Million,* 64 Wn.2d 912, 395 P.2d 201 (1964), when it held that RCW 4.16.180 would not toll the statute of limitations against non-resident motorists who cause collisions because they can be served under the provisions of RCW 46.64.060.

As RCW 4.16.170 makes clear, filing and service are necessary to toll any limitation period. RCW 4.16.180 was enacted to deal with issues of service of process while RCW 4.16.230 addresses the inability to file suit. If tolling is unavailable when the plaintiff can serve a non-resident

plaintiff, then tolling should also be unavailable when the plaintiff can take steps to lift an injunction like the automatic stay. Also, if a plaintiff is required to exercise diligence by serving a non-resident, a plaintiff should also be required to exercise diligence by seeking to lift the automatic stay. Finally, if the existence of a statutory mechanism such as RCW 4.28.185 eliminates the tolling in RCW 4.16.180, then the statutory mechanism to lift the automatic stay should also eliminate the tolling provisions of RCW 4.16.230. There is no principled reason to differentiate between the two.

There is no doubt that Household could have successfully lifted the automatic stay. The Court is required to lift the automatic stay if there is no equity in the property and the property is not necessary to any reorganization. As 11 U.S.C. § 362(d)(2) says:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if--
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective organization.

(Emphasis added)

Neither Household nor the Trustee moved to lift the automatic stay. The Bankruptcy Court would have been required to grant such a

request. As their petition makes clear, the Baileys had no equity in the Property. The term "equity" means the difference between the value of property and the sum of all encumbrances upon it. *Stewart v. Gurley,* 745 F.2d 1194, 1195-96 (9th Cir. 1984) The Baileys stated in their bankruptcy filing that the Property was worth $274,000 but that it was encumbered by obligations totaling $338,411.00. The Baileys did not seek any reorganization in their bankruptcy. They also agreed to surrender the Property. A party that surrenders property must vacate within thirty days of filing for bankruptcy protection. As 11 U.S.C. § 521(a)(2) states:

> (2) if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—
>
> > (A) within thirty days after the date of the filing of a petition under chapter 7 of this title . . . or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property; and
> >
> > (B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph. . .

The Baileys acted on their intention to surrender by vacating the Property by no later than October 31, 2009.

If Household had requested that the stay be lifted, it would have been entitled this relief within thirty days of making its request. As 11 U.S.C. § 362(e)(1) states in part:

> Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section.

In *Merceri v. Deutsche Bank AG,* 2 Wn.App.2d 143, 408 P.3d 1140 (2018), the Court of Appeals held that the ability to obtain relief from the stay did detract from the tolling effect of RCW 4.16.230. However, the opinion does not contain the arguments made here based on *Summerise v. Stephens, supra, and Smith v. Forty Million, supra.*

In short Household had the power to lift the stay within thirty days of making a request to do so. On that basis it cannot rely on RCW 4.16.230. A contrary ruling is at odds with the reasoning in *Summerise v. Stephens, supra*, and *Smith v. Forty Million, supra,* and therefore conflicts

with Supreme Court decision. The Supreme Court should take review for that reason. RAP 13.4(b)(1)

CONCLUSION

For the reasons given above, the Supreme Court should take review and reverse the decisions of the Court of Appeals and the trial court. This matter should be remanded with directions to grant Mr. Hagen's motion for summary judgment on his counterclaim quieting his title in the Property free of Plaintiff's claim.

DATED this 4 day of December, 2019.

BEN SHAFTON WSB#6280
Of Attorneys for Jason Hagen

APPENDIX OF STATUTES

RCW 61.24.030 as of and before July 26, 2009. The statute was amended effective July 26, 2009, in Laws of Washington, Chapter 292 Section 8 in ways that are not material here.

It shall be requisite to a trustee's sale:

> (1) That the deed of trust contains a power of sale;
>
> (2) That the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes; provided, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially. Real property is used for agricultural purposes if it is used in an operation that produces crops, livestock, or aquatic goods;
>
> (3) That a default has occurred in the obligation secured or a covenant of the grantor, which by the terms of the deed of trust makes operative the power to sell;
>
> (4) That no action commenced by the beneficiary of the deed of trust is now pending to seek satisfaction of an obligation secured by the deed of trust in any court by reason of the grantor's default on the obligation secured: PROVIDED, That (a) the seeking of the appointment of a receiver shall not constitute an action for purposes of this chapter; and (b) if a receiver is appointed, the grantor shall

be entitled to any rents or profits derived from property subject to a homestead as defined in RCW 6.13.010. If the deed of trust was granted to secure a commercial loan, this subsection shall not apply to actions brought to enforce any other lien or security interest granted to secure the obligation secured by the deed of trust being foreclosed;

(5) That the deed of trust has been recorded in each county in which the land or some part thereof is situated;

(6) That prior to the date of the notice of trustee's sale and continuing thereafter through the date of the trustee's sale, the trustee must have MAINTAIN a street address in this state where personal service of process may be made , AND THE TRUSTEE MUST MAINTAIN A PHYSICAL PRESENCE AND HAVE TELEPHONE SERVICE AT SUCH ADDRESS ; and

(7) That at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default shall be transmitted by the beneficiary or trustee to the borrower and grantor at their last known addresses by both first class and either registered or certified mail, return receipt requested, and the beneficiary or trustee shall cause to be posted in a conspicuous place on the premises, a copy of the notice, or personally served on the borrower and grantor. This notice shall contain the following information:

> (a) A description of the property which is then subject to the deed of trust;
>
> (b) Each county in which the deed of trust is recorded and the document number given to the deed of trust upon recording by each county auditor or recording officer;
>
> (c) That the beneficiary has declared the borrower or grantor to be in default, and a concise statement of the default alleged;

(d) An itemized account of the amount or amounts in arrears if the default alleged is failure to make payments;

(e) An itemized account of all other specific charges, costs, or fees that the borrower, grantor, or any guarantor is or may be obliged to pay to reinstate the deed of trust before the recording of the notice of sale;

(f) The total of (d) and (e) of this subsection, designated clearly and conspicuously as the amount necessary to reinstate the note and deed of trust before the recording of the notice of sale;

(g) That failure to cure the alleged default within thirty days of the date of mailing of the notice, or if personally served, within thirty days of the date of personal service thereof, may lead to recordation, transmittal, and publication of a notice of sale, and that the property described in (a) of this subsection may be sold at public auction at a date no less than one hundred twenty days in the future;

(h) That the effect of the recordation, transmittal, and publication of a notice of sale will be to (i) increase the costs and fees and (ii) publicize the default and advertise the grantor's property for sale;

(i) That the effect of the sale of the grantor's property by the trustee will be to deprive the grantor of all their interest in the property described in (a) of this subsection; and

(j) That the borrower, grantor, and any guarantor has recourse to the courts pursuant to RCW 6.24.130 to contest the alleged default on any proper ground.

APPENDIX—COURT OF APPEALS DECISION

Filed
Washington State
Court of Appeals
Division Two

November 5, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

U.S. BANK TRUST, N.A. as trustee for LSF8 MASTER PARTICIPATION TRUST, Respondent, v. JACK BAILEY, an individual; SHARON J. BAILEY, an individual; JASON HAGEN, an individual; HOUSEHOLD FINANCE CORPORATION III, a Washington corporation; MOUNT VISTA ASSOCIATION AKA MOUNT VISTA HOMEOWNERS ASSOCIATION, a Washington corporation; Clark Regional Wastewater District, a Special Purpose District and Public Agency, and all other person or parties unknown claiming any legal or equitable right, title, estate, lien, or interest in the real property described in the complaint herein, adverse to Plaintiff's title, or any cloud on Plaintiff's title to the Property, Appellant.	No. 51556-3-II UNPUBLISHED OPINION

LEE, A.C.J. — Jason Hagen appeals the superior court's order granting U.S. Bank's Civil Rule (CR) 12(c) motion for judgment on the pleadings, denying Hagen's motion for summary judgment, and dismissing his counterclaim to quiet title. We affirm.

FACTS

On July 11, 2002, Jack and Sharon Bailey obtained a loan for $291,102.72. The loan was secured by a deed of trust for property located in Clark County (the property). The Deed of Trust required that notice of default be provided prior to acceleration. And the Deed of Trust provided that if a breach is not cured, "Lender, at Lender's option, may declare all of the sums secured by this Deed of Trust to be immediately due and payable without further demand and may invoke the power of sale and any other remedies permitted by applicable law." Clerk's Papers (CP) at 218. The Baileys stopped making payments on the loan in August 2008.

On May 15, 2009, the Baileys received a notice of default for a total of $40,906.86. The notice of default stated,

> If the default(s) described above is (are) not cured within thirty days of the mailing of this notice, the lender hereby gives notice that the entire principal balance owing on the note secured by the Deed of Trust described in paragraph 1 above, and all accrued and unpaid interest, as well as costs of foreclosure, shall immediately become due and payable. Notwithstanding acceleration, the grantor or the holder of any junior lien or encumbrance shall have the right after acceleration to reinstate by curing all defaults and paying all costs, fees and advances, if any, made pursuant to the terms of the obligation and/or deed of trust on or before 11 days prior to a Trustee's sale.

CP at 173. A notice required by the Fair Debt Collection Practices Act[1] stated that the entire amount owed under the loan was $311,221.42. However, this was not noted as the amount currently due.

On June 19, 2009, Regional Trustee Services recorded a notice of Trustee's sale. The notice included a default amount of $46,208.58, which included delinquent payments starting

[1] 15 U.S.C. chapter 41.

August 16, 2008. The notice stated that the principal amount owed under the loan, which would be satisfied by the trustee's sale, was $270,336.87 plus interest, charges, and fees (that were not calculated in the notice).

Between June 2011 and January 2014, the Baileys were sent several notices of the right to cure default.[2] The June 2011 notice stated that the total amount due was $116,368.02. The January 2014 notice stated that the total amount due was $182,659.48. None of the notices included the full amount due under the loan.

On September 17, 2009, the Baileys petitioned for bankruptcy. The Baileys included the property in the bankruptcy, listing its value as $274,000 and disclosing a secured claim on the property for $338,411. The Baileys intended to surrender the property in the bankruptcy. On December 16, 2009, the United State Bankruptcy Court discharged the Baileys' personal debts in bankruptcy.

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[2] These notices were attached as exhibits to the Declaration of Nathaniel Mansi. Hagen objected to Mansi's declaration because there was not sufficient basis in the declaration to demonstrate Mansi had personal knowledge that the notices were mailed to the Baileys. The superior court declined to rule on Hagen's objection to Mansi's declaration and considered the declaration. Before this court, Hagen states that "[t]hese letters cannot be considered because there is no competent evidence that they were sent to the Baileys." Br. of Appellant at 20. However, Hagen does not argue that the superior court erred by declining to rule on his objection and considering the declaration.

We do not consider issues or assignments of error that are not supported by argument or citation to authority. RAP 10.3(a)(6); *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004), *review denied*, 155 Wn.2d 1015 (2005). "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290, *review denied*, 136 Wn.2d 1015 (1998). Therefore, we do address whether the Mansi declaration may be considered. Furthermore, regardless of the subsequent notices, we would reach the same conclusion based on the language of the notice of default to the Baileys.

On the September 26, 2011, the Baileys executed a quit claim deed and transferred the property to Jason Hagen.[3]

On September 22, 2015, U.S. Bank filed a complaint for foreclosure against the Baileys and Hagen. On January 12, 2017, Hagen filed an answer to U.S. Bank's complaint and included a counterclaim to quiet title to the property.[4]

On August 21, 2017, U.S. Bank filed a CR 12(c) motion for judgment on the pleadings seeking to dismiss Hagen's counterclaim to quiet title. On October 18, 2017, Hagen filed a motion for summary judgment on his counterclaim to quiet title.

On February 15, 2018, the superior court entered an order on the motions. The superior court granted U.S. Bank's CR 12(c) motion for judgment on the pleadings. The superior court denied Hagen's motion for summary judgment. And the superior court dismissed Hagen's counterclaim to quiet title. The superior court also ruled that the order dismissing Hagen's counterclaim to quiet title should be entered as final judgment.

Hagen appeals.

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[3] The record before us relating to the Baileys' bankruptcy is limited. The record shows that the Baileys intended to surrender the property in bankruptcy and their personal debt was discharged in bankruptcy. But the records provide no explanation as to how the Baileys could quit claim the property to Hagen a year after they supposedly surrendered the property in bankruptcy.

[4] Hagen's counterclaim sought to quiet title against U.S. Bank and any of its predecessors in interest. Hagen sought the judgment quieting title based on his claim that U.S. Bank's foreclosure action was barred by the statute of limitations. *See Terhune v. North Cascade Trustee Services, Inc*, ___ Wn. App. 2d ___, 446 P.3d 683, 689 (2019) ("If the statute of limitations has expired on a promissory note secured by a deed of trust on real property, the owner is entitled to quiet title on the property."). And Hagen did not seek to quiet title against the Bailey's, nor does there appear to be a dispute between the Baileys and Hagen regarding title to the property.

ANALYSIS

Hagen argues that the superior court erred by granting the order on motions because the loan was accelerated in June 2009, and therefore, the statute of limitations barred U.S. Bank's foreclosure action.[5] Because the language in the May 2009 notice of default did not accelerate the loan, the statute of limitations did not bar the foreclosure. Therefore, the superior court did not err in entering the order on motions.

A. LEGAL PRINCIPLES

We review a superior court's dismissal under CR 12(c) de novo. *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012). CR 12(c) states, in relevant part, "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Dismissal is appropriate when it appears beyond doubt that the plaintiff cannot prove any set of facts, consistent with the complaint, that may entitle him or her to relief. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). We presume the plaintiff's allegations are true, and we may consider hypothetical facts not included in the record. *Id.*

We review summary judgment orders de novo. *Washington Federal v. Azure Chelan, LLC*, 195 Wn. App. 644, 652, 382 P.3d 20 (2016). Summary judgment is appropriate if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR

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[5] Hagen also argues that the statute of limitations was not tolled or "extended" by initiating the nonjudicial foreclosure or the bankruptcy. However, because we hold that the loan was not accelerated we do not address tolling. Moreover, this appeal does not address the substantive foreclosure—it only addresses the superior court's order dismissing Hagen's counterclaim to quiet title to the property. The superior court's order would only be erroneous if the foreclosure was entirely barred by the statute of limitations. Because the loan was not accelerated, the statute of limitations does not bar the foreclosure and the superior court properly dismissed Hagen's counterclaim to quiet title.

56(c). "'A material fact is one upon which the outcome of the litigation depends.'" *Washington Federal*, 195 Wn. App. at 652 (quoting *Dong Wan Kim v. O'Sullivan*, 133 Wn. App. 557, 559, 137 P.3d 61 (2006), *review denied*, 159 Wn.2d 1018 (2007)). We review facts and inferences in the light most favorable to the non-moving party. *Washington Federal*, 195 Wn. App. at 652.

RCW 4.16.040(1) provides a six year statute of limitations for actions on promissory notes and deeds of trust. *Westar Funding, Inc. v. Sorrels*, 157 Wn. App. 777, 784-85, 239 P.3d 1109 (2010). When the note is paid in installments, the six year statute of limitations runs against each individual installment when it is due. *4518 S. 256th, LLC v. Karen L. Gibbon, PS*, 195 Wn. App. 423, 434, 382 P.3d 1 (2016), *review denied*, 187 Wn.2d 1003 (2017). However, when a note is accelerated, "the entire remaining balance becomes due and the statute of limitations is triggered for all installments that had not previously become due." *Id.* at 434-35. "If the lender elects to accelerate the debt after a breach, the acceleration must be clearly and unequivocally expressed to the debtor." *Washington Federal*, 195 Wn. App. at 663.

An owner of property is entitled to quiet title to the property if the statute of limitations has expired on a promissory note secured by a deed of trust. *Cedar W. Owners Ass'n v. Nationstar Martg., LLC*, 7 Wn. App. 2d 473, 482, 434 P.3d 554, *review denied*, 193 Wn.2d 1016 (2019); RCW 7.28.300.[6]

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[6] RCW 7.28.300 provides,

> The record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien.

B. NO ACCELERATION OF LOAN

Hagen argues that the language in the notice of default in May 2009 was sufficient to accelerate the loan. Specifically, Hagen asserts that because the Baileys failed to cure the default, the loan was automatically accelerated. However, we recently resolved this issue contrary to Hagen's assertion.

In *Terhune v. North Cascade Trustee Services, Inc.*, we held that "[a] default on the loan alone will not accelerate a note, even if an installment note provides for automatic acceleration upon default." ___ Wn. App. 2d ___, 446 P.3d 683, 689 (2019). We also held that future, conditional language is not sufficient to actually accelerate the loan because acceleration "'must be made in a clear and unequivocal manner which effectively apprises the maker that the holder has exercised his right to accelerate the payment date.'" *Terhune*, ___ Wn. App. 2d ___, 446 P.3d at 688-89 (quoting *Merceri v. Bank of N.Y. Mellon*, 4 Wn. App. 2d 755, 761, 434 P.3d 84 (2018)). In *Terhune*, the lender sent the borrower a notice of default that stated that the loan "will be accelerated" if the default was not cured by the specified date. ___ Wn. App. 2d ___, 446 P.3d at 689 (bold face omitted). We held that the "argument that the failure to cure automatically triggered acceleration is inconsistent with the rule that the lender must take some affirmative action to accelerate a note." *Terhune*, ___ Wn. App. 2d ___, 446 P.3d at 689. This is especially true in cases where subsequent notices demonstrate that the lender is seeking to recover past due installments rather than the entire amount due. *Terhune*, ___ Wn. App. 2d ___, 446 P.3d at 689-90.

Here, the May 2009 notice of default stated that the loan "shall immediately become due and payable" *if* the default is not cured within 30 days. CP at 173. This was a conditional

provision. And just as the language "will be accelerated" is not sufficient to automatically accelerate the loan, the language in the May 2009 notice of default is not sufficient to automatically accelerate the loan. Also, the May 2009 notice of default and all subsequent notices that were sent to the Baileys show that only past due amounts, rather than the full amount of the outstanding loan, was being sought. Therefore, the superior court properly determined that the May 2009 notice of default did not accelerate the loan.

Because the notice of default did not automatically accelerate the loan, the statute of limitations on the foreclosure did not expire. Therefore, U.S. Bank's foreclosure action was not barred and Hagen was not entitled to quiet title to the property. *Terhune*, ___ Wn. App. 2d ___, 446 P.3d at 689 (owner entitled to quiet title on the property if the statute of limitations has expired on a promissory note secured by a deed of trust on the real property). Accordingly, the superior court properly granted judgment in favor of U.S. Bank, denied Hagen's motion for summary judgment, and dismissed Hagen's counterclaim to quiet title. We affirm.

Hagen also argues that the loan was automatically accelerated as a precondition of the nonjudicial foreclosure action. Hagen's argument is unpersuasive.

First, "the initiation of nonjudicial foreclosure proceedings does not automatically accelerate a note." *Terhune*, ___ Wn. App. 2d ___, 446 P.3d at 689. Second, the language that Hagen relies on from the Deed of Trust does not demonstrate that the loan must be accelerated prior to nonjudicial foreclosure or a Trustee's sale. The Deed of Trust states,

> Lender, at Lender's option, *may* declare all of the sums secured by this Deed of Trust to be immediately due and payable without further demand and *may* invoke the power of sale and any other remedies permitted by applicable law.

CP at 218 (emphasis added). The language "may" is permissive and does not require that the Lender accelerate the loan prior to initiating a sale. Therefore, Hagen's argument that the loan was automatically accelerated by the Notice of Trustee's sale also fails.

Although we have already decided that the conditional language in the notice of default does not accelerate the loan, we address Hagen's argument that judgment on the pleadings is inappropriate because he has presented a hypothetical set of facts that would entitle him to relief. Hagen' argument conflates factual allegations with legal conclusions. Hagen is correct that, when we consider a judgment on the pleadings, we accept his allegations as true. *Burton*, 153 Wn.2d at 422. But the factual allegations are not in dispute here. Both parties agree regarding the actual language contained in the notice of default, which are the facts; they disagree regarding the legal effect regarding that language, which is a legal conclusion. We are not required to accept Hagen's legal argument that the language in the May 2009 notice of default accelerated the loan. *See Burton*, 153 Wn.2d at 422 (questions of law underlying a motion to dismiss are reviewed de novo). Accordingly, we affirm the superior court's order on the motions.

Similarly, there are no genuine issues of material fact that were presented to the court. The only dispute is whether the language in the May 2009 notice accelerated the loan. We already resolved that issue in *Terhune*—the loan at issue was not accelerated. Therefore, the superior court also properly denied Hagen's motion for summary judgment on his counterclaim.

Because the superior court properly granted U.S. Bank's motion on the pleadings regarding Hagen's counterclaim to quiet title and properly denied Hagen's motion for summary judgment on his counterclaim to quiet title, the superior court did not err by granting U.S. Bank's CR 12(c)

motion, denying Hagen's motion for summary judgment and dismissing Hagen's counterclaim to quiet title. Accordingly, we affirm the superior court's order on the motions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, A.C.J.

We concur:

Worswick, J.

Cruser, J.

CARON, COLVEN, ROBISON & SHAFTON PS

December 04, 2019 - 1:53 PM

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Appellate Court Case Title:	U.S. Bank, N.A., Respondent v. Jason Hagen, Appellant
Superior Court Case Number:	15-2-02626-1

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