SUPREME COURT NO. 100728-1

COURT OF APPEALS No. 82162-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

GARY MERRITT AND JEANETTE MERRITT

Appellants,

vs.

USAA FEDERAL SAVINGS BANK,

Respondent.

PETITION FOR REVIEW

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Whether a bankruptcy discharge affects the accrual of the statute of limitations on enforcement of a deed of trust.

IV. THE SUPREME COURT SHOULD ACCEPT THIS DECISION FOR REVIEW

1) Conflict with Supreme Court decisions. The decision of the Court of Appeals is in conflict with two decisions of the Supreme Court.

    a. Herzog v. Herzog, 23 Wn.2d 383, 161 P.2d 142 (1945). The Supreme Court ruled that "when recovery is sought on an obligation payable by installments, the statute of limitations runs against each installment from the time if becomes due; ***that is,***

from the time when an action might be brought to recover it". Id. at 388 (emphasis added). The ruling in this case conflicts with the Supreme Court's ruling in Herzog.

b. Pratt v. Pratt, 121 Wash. 298, 209 P. 535 (1922). The Supreme Court ruled that "when a debt secured by a mortgage is barred by the statute of limitations, the mortgage is also barred". Id. at 300. The ruling in this case conflicts with the Supreme Court's ruling in Pratt.

2) Public Interest. Accrual of the statute of limitations is of substantial public interest and should be determined by the Supreme Court.

a. There are many homeowners in similar circumstances.

b. Limits on enforcement of deeds of trust is good public policy.

c. Statutes of limitation promote justice and ensure fairness which is good public policy.

V. STATEMENT OF THE CASE

Gary and Jeannette Merritt own property encumbered by deeds of trust. CP 164, 263, 482, 826 and 843. USAA is the beneficiary of the deeds of trust. Each deed of trust secures payment on a HELOC. Gary and Jeannette Merritt filed bankruptcy on November 13, 2012. CP 173. They received a discharge on February 13, 2013. CP 173. They have made no payments on the debt within six years of commencing the quiet title actions. CP 158. It is their position that the statute of limitations has run on enforcement of the deeds of trust.

Gary and Jeannette Merritt are owners of four parcels of real property. CP 177, 368, 579, and 840. Each of the properties was acquired by the Gary and Jeanette Merritt personally. CP 177, 368, 579, and 840. All the debt to USAA is owed by them personally. CP 37, 247, 509, and 767. USAA has liens on each of the properties. CP 164, 263, 482, 826, and 843. All of the deeds of trust are executed by the Gary and Jeanette Merritt personally. CP 169, 268, 487, 848, and 856.

Gary and Jeanette Merritt filed Chapter 7 bankruptcy on November 13, 2012, in the U.S. Bankruptcy Court Western District of Washington at Seattle, under cause No. 12-21422-KAO. CP 173. They were granted a discharge under 11 U.S.C. §727 on February 13, 2013. CP 173. USAA was listed in the bankruptcy and any debt owed to it was discharged. 11 U.S.C. §727. Gary and Jeanette Merritt have made no payments on the debt secured by the deeds of trust since within 6 years of commencing the quiet title actions. CP 158.

On July 8, 2020, Gary and Jeanette Merritt brought four quiet title actions in Snohomish County Superior Court to remove the liens of USAA. Their argument for removing the liens was that the statute of limitations had run and the deeds of trust were no longer enforceable. On USAA's motion for summary judgment the court ruled against Gary and Jeanette Merritt. Gary and Jeanette Merritt appealed. The court of appeals also ruled against Gary and Jeanette Merritt. Gary and Jeanette Merritt now seek review of the Washington State

Supreme Court.

VI. COURT OF APPEALS RULING

The Court of Appeals stated that "The Merritts contend the February 2013 bankruptcy discharge triggered the six-year statute of limitations for enforcing the deeds of trust, and because USAA did not initiate a foreclosure before February 2019, they are entitled to quiet title on the properties as a matter of law". Merritt v. USAA, No. 82162-8-I slip opinion 4-5 (March 28, 2022). The court found that "This argument, however, is based on an erroneous reading of Edmundson, as this court recently explained in Copper Creek Homeowners' Association v. Wilmington, No. 82083-4-I, slip op. (January 18, 2022)." Merritt at 5.

> "In Copper Creek, a homeowners association obtained a deed in lieu of foreclosure from homeowners who defaulted on their homeowner assessments. Id. at 5. The association sought to extinguish a senior security interest held by the homeowners' lender, arguing that the statute of limitations barred enforcement of the lender's deed of trust. Id. at 2-5. The trial court concluded that under Edmundson, the six-year statute of

> limitations accrued on the entire note on the date of the homeowners' bankruptcy discharge, even though a significant amount of the debt was not due on the date of discharge. Id. at 12. On appeal, the court reversed, clarifying that Edmundson did not establish a new rule that a bankruptcy discharge triggers the running of the statute of limitations on the entire debt. Id. at 17. The court stated:
>
> > In Edmundson, this court did not [establish] that bankruptcy discharge of liability on an installment note accelerates the maturity of the note. [It] did not [establish] that the discharge kickstarts the running of the deed of trust's final statute of limitations period. [It] did not [establish] that discharge is an analog to acceleration and triggers the statute of limitations on the entire obligation.

Merritt at 5.

The court followed its analysis in Copper Creek and found that the trial court correctly concluded that the Merritts' bankruptcy discharge did not cause the statute of limitations on the enforcement of the deed of trust to run on payments that became due after discharge. Id. at 5-6. A bankruptcy discharge eliminates a debtor's personal liability on a promissory note,

but it does not terminate a lender's claim against the debtor. Johnson v. Home State Bank, 501 U.S. 78, 84, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991). "Rather, a bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor in personam—while leaving intact another—namely, an action against the debtor in rem." Id. The creditor's lien survives bankruptcy and remains with the real property until foreclosure. Dewsnup v. Timm, 502 U.S. 410, 417, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992). Bankruptcy does not accelerate an installment note or trigger the statute of limitations on enforcement of a deed of trust, it only eliminates the debtor's personal liability. Copper Creek at 21. The debtor's in rem liability remains intact: "The debt, the note, and the payment schedule remain unchanged." Id. at 6.

> The court found that the "HELOC Agreements and the payment schedule set out in those agreements, as well as USAA's ability to foreclose the deeds of trust in an in rem proceeding, all remained intact after the Merritts' bankruptcy discharge". Merritt at 6. It also stated that "Under Copper Creek, USAA's lien remains

> valid and enforceable because the HELOC Agreements, and the obligations to make monthly installments under them, do not expire until 2025 at the earliest. The bankruptcy discharge did not start the running of the six-year statute of limitations on installment payments the Merritts' owed after the bankruptcy discharge; if USAA does not accelerate the installment debt, it has six years from the date of any missed installment payment to foreclose to collect those payments. The Merritts are thus not entitled to the relief they seek. We therefore affirm the dismissal of their quiet title action.

Merritt at 6-7.

VII. CONFLICTING RULINGS

The ruling in Merritt conflicts with two Supreme Court decisions and one recent unpublished Court of Appeals decision.

1) Herzog v. Herzog, 23 Wn.2d 383, 161 P.2d 142 (1945).

   The Supreme Court ruled that "when recovery is sought on an obligation payable by installments, the statute of limitations runs against each installment from the time if becomes due; ***that is, from the time when an action might be brought to recover it***". (emphasis added) Id. at

388. The ruling in this case conflicts with the Supreme Court's ruling in Herzog.

2) Pratt v. Pratt, 121 Wash. 298, 300, 209 P. 535 (1922). It has long been the rule in Washington that "when a debt secured by a mortgage is barred by the statute of limitations, the mortgage is also barred". Id. at 300. The ruling in this case conflicts with the Supreme Court's ruling in Pratt.

3) Luv v. West Coast Servicing, Inc. No. 81991-7-1 (Wash. Ct. App. Aug. 2, 2021). The court of appeals has applied Edmundson recently in in Luv v. West Coast Servicing, Inc. No. 81991-7-1 (Wash. Ct. App. Aug. 2, 2021). The court found that once the statute of limitations ran on the last payment due prior to the bankruptcy discharge, the statute of limitations ran on enforcement of the entire debt.

In Luv the court reviewed the findings in Edmundson.

> "the Edmundson court also held that a bankruptcy discharge commences the six-year statutory limitation period for enforcing a deed of trust for an obligation payable in installments. Edmundson, 194 Wn. App. at 930-31 (citing Herzog v. Herzog, 23 Wn.2d 382, 388, 161 P.2d 142 (1945)). The court reasoned that the statute of limitations does not accrue after discharge because, at that point, no future installment payments are due and owing on the note or deed of trust. 194 Wn. App. at 931.

Luv, slip. Op. at 5. The Court of Appeals then applied those principles to the facts of Luv:

> "Luv received a chapter 7 discharge of his personal liability on the note on March 11, 2009. Under Edmundson, the six-year statute of limitations on the note was triggered on March 1, 2009, the date that Luv's last payment was due prior to his bankruptcy discharge. Enforcement of the deed of trust was thus time barred after March 1, 2015. As of the date of discharge, the creditor could no longer enforce Luv's personal liability, and its only remaining recourse was to foreclose on the property in rem. WSC sought to foreclose more than three years after

> expiration of the statute of limitations. Accordingly, the trial court did not err in extinguishing the deed of trust and quieting title in Luv …
>
> The Edmundson court based its reasoning on settled law from the Washington Supreme Court holding that "when recovery is sought on an obligation payable by installments, the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it." 194 Wn. App. at 930 (quoting Herzog, 23 Wn.2d at 388. "A statute of limitation does not invalidate a claim, but rather 'deprives a plaintiff of the opportunity to invoke the power of the courts in support of an otherwise valid claim." Walcker, 79 Wn. App. at 743 (quoting Stenberg v. Pac. Power & Light Co., 104 Wn.2d 710, 714, 709 P.2d 793 (1985))."

Id. at 6-7.

VIII. PUBLIC POLICY

This petition involves issues of substantial public interest that should be determined by the Supreme Court. Gary and

Jeanette Merritts' circumstances are not unique. A reasonable statute of limitations period encourages public trust of the judicial system. Justice and fairness weigh in favor of a reasonable statute of limitations period.

1) This is not a unique situation. There are many homeowners who, due to the great recession, are in circumstances similar to Gary and Jeanette Merritt. Their properties were subject to second mortgages. And around 2008 the properties where worth less than what was owed on the first mortgage. These homeowners, due to circumstances beyond their control, had to file bankruptcy. Some lenders quit accepting payments on the debts. Because the lender would not realize anything from a foreclosure, no action was taken to enforce the lien. Despite a bankruptcy discharge, and no payments having been made, the deed of trust remains as a cloud on the title.

Many of these homeowners become aware of the

lien when they attempt to sell or refinance their house. Or they get notified by a third party who has purchased the debt for pennies on the dollar that there is a lien and they intend to foreclose. The surge in recent case law is indicative of this common situation.

2) Limits on enforcement of deeds of trust. It is poor public policy to allow a deed of trust to be enforced without limits:

> We are unpersuaded by Benson and McLaughlin's policy argument. It is unclear how an unlimited right to foreclose on a deed of trust would provide greater certainty of titles rather than the converse. Furthermore, the goal of statutes of limitations is to force claims to be litigated while pertinent evidence is still available and while witnesses retain clear impressions of the occurrence. *Our policy is one of repose; the goals are to eliminate the fears and burdens of threatened litigation and to protect a defendant against stale claims.*
>
> These goals are generally applicable in foreclosure proceedings, whether based on mortgages or deeds of trust.

> Nor is it clear that an unlimited foreclosure period would conserve judicial resources. Indeed, the owner of record facing nonjudicial foreclosure of a deed of trust may ask a court to restrain the sale by contest[ing] the alleged default on any proper ground. Any such action certainly would expend judicial resources, as this case has demonstrated.

Walcker v. Benson & McLaughlin, P.S., 79 Wn. App. 739, 745–46, 904 P.2d 1176, 1179 (1995) (emphasis added, internal citations omitted).

Allowing foreclosure more than 6 years after a bankruptcy discharge when no payments have been made would undermine the public's trust. Statutes of limitations promote justice and ensure fairness by "preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Langlois v. BNSF Ry. Co., 8 Wn. App. 2d 845, 862, 441 P.3d 1244, 1253 (2019) (quoting

Burnett v. New York Cent. R. Co., 380 U.S. 424, 428, 85 S. Ct. 1050, 1054, 13 L. Ed. 2d 941 (1965)).

3) Promoting justice and ensuring fairness. Statutes of limitation promote justice and ensure fairness by "preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Langlois v. BNSF Ry. Co., 8 Wn. App. 2d 845, 862, 441 P.3d 1244 (2019). "[T]hese goals are generally applicable in foreclosure proceedings, whether based on mortgages or deeds of trust." Walcker, 79 Wn. App. at 746 (stating that "the goals are to eliminate the fears and burdens of threatened litigation and to protect a defendant against stale claims.")

There are many homeowners in similar circumstances to Gary and Jeanette Merritt. A reasonable statute of limitations period will promote fairness and justice.

IX. ACCELERATION

Upon acceleration, the entire balance becomes due and triggers the statute of limitations for all remaining installments. Copper Creek citing 4518 S. 256, 195 Wn. App. at 434-35. It is not necessary that the debt be "accelerated" for Gary and Jeanette Merritt to prevail. It is not our position that a bankruptcy discharge accelerates the debt.

The court addressed this issue in Luv. " Edmundson cannot be read to stand for the proposition that bankruptcy discharge eliminates or accelerates the debt; rather, discharge triggers the statutory limitation period during which a creditor may enforce the deed of trust". Id, at 7.

In Copper Creek the Court of Appeals stated:

> "In Edmundson, this court did not [establish] that bankruptcy discharge of liability on an installment note accelerates the maturity of the note. [It] did not [establish] that the discharge kickstarts the running of the deed of trust's final statue of limitations period. [It] did not [establish] that discharge is an analog to acceleration and triggers the statute of limitations on the entire obligation"

Merritt at 5.

Gary and Jeanette Merritts' theory does not rely on acceleration of the amount due. That is a separate theory for when the statute of limitations is triggered. For Gary and Jeanette to prevail it is not necessary that the debt was "accelerated".

X. APPLICATION OF STATUTE OF LIMITATIONS TO THE FACTS OF THIS CASE

When could an action be brought to recover the debt owed by Gary and Jeanette Merritt to USAA? Gary and Jeanette Merritt received their bankruptcy discharge on February 12, 2013. CP 173. The last monthly payment due on any of the loans prior to discharge would have been no earlier than January 11, 2013. Six years after that would be January 10, 2019. The statute of limitations ran at that time.

The key language in Herzog is "*from the time when an action might be brought to recover it"*. Herzog, at 145 (emphasis added). The statute of limitations accrues on an

installment note from the time the payment comes due. However, when there is a bankruptcy discharge, no action can be brought to recover on future installments. Therefore, the statute of limitations runs from the last payment that came due prior to the discharge.

Nearly every rule associated with enforcement of the statute of limitations is derived from court rulings. Deed of trust remedies are subject to RCW 4.16.040, the six-year statute of limitations. Copper Creek, citing Merceri, 4 Wn. App. 2d at 759. The RCW defining that statute of limitations is very brief:

> The following actions shall be commenced within six years (1) An action upon a contract in writing, or liability express or implied arising out of a written agreement, except as provided in RCW 64.04.007(2).

The courts have been left to expand on the meaning of this statute. Maturity[1], acceleration[2], demand notes versus installment notes[3], and resorting to remedies under the deeds of

[1] A.A.C. Corp. v. Reed, 73 Wn2d 612, 615, 440 P.2d 463 (1968).
[2] See, 4518 S. 256th, LLC v. Karen L. Gibbon, PS, 195 Wn. App.423, 435-436, 382 P.3d 1 (2016)
[3] Herzog v. Herzog, 23 Wn2d 382, 387, 161 P.2d 142 (1945).

trust act[4], are all court interpretations of the RCW 4.16.040(1). No Washington statute addresses how maturity, acceleration, or installments affect the statute of limitations. Before Edmundson, no previous Washington Court of Appeals or Supreme Court ruling had addressed the effect of a bankruptcy discharge on the running of the statute of limitations.

XI. NO NEW RULE

In Copper Creek the court asserts the decision in Edmundson "focused on whether any of those payments was no longer enforceable in the foreclosure action". Copper Creek at 17. However, the decision in Edmundson focused on more than which payments were no longer enforceable in the foreclosure action. The case also addressed the affect of a bankruptcy discharge.

The court first did the analysis of the running of the statute of limitations without reference to the bankruptcy

[4] See, U.S. Bank NA v. Kendall, 9 Wash.App2d 1044 "Case law clearly states that commencement of nonjudicial foreclosure proceedings tolls the six-year limitations period". Citing, Bingham v. Lecher, 111 Wn. App. 118, 127, 45 P.3d 562 (2002)

discharge. The payments were due on the first of the month and the homeowner made their last payment in October 2008. "the statute of limitations accrued on November 1, 2008 for that missed payment only. November 1, 2014 was six years later." Edmundson at 931. The court established that the statute of limitations had not run on any of the payments. However, because bankruptcy discharge affects the statute of limitations it continued its analysis.

Then for *subsequent* payments due December 1, 2008 up to the homeowners discharge the court did the additional analysis. This was necessary because the statute of limitations continued to accrue on each missed payment until the Edmundsons no longer had personal liability under the note. "They no longer had such liability as of the date of their bankruptcy discharge, December 31, 2013. Thus, from December 1, 2008, through December 1, 2013, the statute of limitation accrued for each monthly payment under the terms of the note as each payment became due." Edmundson at 931.

The Notice of Default was transmitted by first class and certified mail to the Edmundsons on October 23, 2014. Id. at 923. There is no reason for the court to stop its analysis as of the date of discharge unless discharge affected its analysis. If the court was merely addressing which payments were enforceable in the foreclosure action its analysis would have gone to November 1, 2014 (the month the statute of limitations was tolled by the Notice of Default).

Edmundson did not announce a new rule, it merely applied the existing rule that "the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it" to the facts before it. Edmundson at 930.

Cedar W. Owners Ass'n v. Nationstar Mortg. LLC.,7 Wn. App. 2d 473, 434 P.3d 554 (2019) gives guidance as to the analysis a court engages in when it is determining which installments are barred by the statute of limitations when there has been no discharge. "We adhere to the decision in

Edmundson and hold the statute of limitations accrues for each monthly installment from the time it becomes due". Cedar at 484. "The commencement of a nonjudicial foreclosure proceeding tolls the six-year statute of limitations period". Id. at 488. "Under the circumstances of this case, we conclude the Notice of Trustee's Sale and not the Notice of Default tolled the statute of limitations". Id. at 489. The Notice of Trustee's Sale was recorded October 18, 2016. Id. at 562. The payments were due on the first day of the month. Id. at 479. "Nationstar is entitled to foreclose on installment payments due on and after November 1, 2010". Id. at 490. The court created a 6-year window by counting 6 years back from the date of the tolling of the statute of limitations to determine which installments were time barred.

If that was all the Edmundson stood for, the court's analysis would have stopped at "the statute accrued on November 1, 2008 for that missed payment only. November 1, 2014 was six years later." Edmundson at 931. There is no need

for the court to state "from December 1, 2008 through December 1, 2013, the statute of limitations accrued for each monthly payment under the terms of the note as each payment became due" unless the bankruptcy discharge affected the analysis. Id. If discharge did not affect the analysis, the analysis would not have stopped with the December 1, 2013 payment.

XII. THE DEED OF TRUST IS ONLY A LIEN

Under the laws of this state, a mortgage creates nothing more than a lien in support of the debt which it is given to secure. Pratt v. Pratt, 121 Wash. 298, 300, 209 P. 535. In this state the mortgage creates a lien only, and is an incident to, and collateral security for, the debt, when the principal (the debt) is barred, no action can be maintained upon the mortgage itself (the collateral security for the debt). Id. at 301-302. Where the debt evidenced by the note, if there be one, is the principal thing, and the mortgage or deed of trust is a mere incident to it – that an action to foreclose is barred when the note is barred; that

the statute of limitation applies equally to both. Id. at 302. That the mortgage creates nothing but a lien that an action upon the mortgage is barred when the statute of limitations has run against the debt which the mortgage was given to secure. Id. at 303. When a debt secured by a mortgage is barred by the statute of limitations, the mortgage is also barred. Id.

XIII. ATTORNEY FEES

The Merritts are entitled to their attorney fees under RCW 4.84.330 and the deeds of trust. Here, the both the loan agreements (CP 38, 248, 510, and 768) and the deeds of trust (CP 167, 266, 485, 846, and 855) provide for collection of attorney fees. The Merritts are entitled to reasonable attorney fees and costs incurred on appeal.

XIV. CONCLUSION

The statute of limitations on enforcement of a deed of trust is 6 years. USAA's deeds of trust are unenforceable. The

court should quiet title as to the five deeds of trust encumbering the Merritt's property.

WORD COUNT CERTIFICATION

I certify that Appellant Gary and Jeanette Merritt's Petition for Review contains 4261 words and is in compliance with the word limits imposed by RAP 18.17.

Respectively submitted this 27th day of April 2022.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

On April 27, 2022, I electronically filed the forgoing with the Washington Supreme Court via the Appellate Court's Portal which will send notification and a copy of such filing to the following:

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FILED
3/28/2022
Court of Appeals
Division I
State of Washington

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

GARY L. MERRITT and JEANETTE A. MERRITT, Appellants, v. USAA FEDERAL SAVINGS BANK, Respondent.	)	No. 82162-8-I (Consolidated with 82163-6-I, 82164-4-I, 82165-2-I) DIVISION ONE UNPUBLISHED OPINION

ANDRUS, A.C.J. — Gary and Jeanette Merritt appeal the dismissal of four quiet title actions they brought against their lender, USAA Federal Savings Bank. The Merritts obtained home equity lines of credit from USAA on four residential properties and executed deeds of trust to secure their loans. The Merritts stopped paying these installment debts when they filed for bankruptcy in 2012. Six years after their 2013 bankruptcy discharge, they sought to quiet title against USAA, arguing that the six-year statute of limitations barred it from enforcing any of the deeds of trust.

We affirm the trial court's summary judgment rulings in favor of USAA. The bankruptcy discharge did not start the running of the six year statute of limitations on any installment payments the Merritts owed pre- or post-discharge; USAA has

six years from the date of any unpaid installment payments to foreclose to collect these debts.

FACTS

Gary and Jeanette Merritt executed five separate "Home Equity Line of Credit Agreements" (HELOC Agreements) with USAA between 2005 and 2007. Loan no. 347097, dated May 19, 2005, set a credit limit of $74,000, to be repaid in monthly installments over a period of 240 months, with a maturity date in 2025. Loan no. 82961418, dated January 18, 2007, set a credit limit of $51,000, to be repaid in monthly installments over a period of 220 months, with a maturity date also in 2025. The Merritts secured both loans by executing deeds of trust on a residence located at 7601 69th Street NE., in Marysville.

Loan no. 584967, dated January 29, 2007, set a credit limit of $79,000, to be repaid in monthly installments over a period of 240 months, with a maturity date in 2027. To secure this loan, the Merritts executed a deed of trust on a residence located at 9926 53rd Drive NE, Marysville.

Loan No. 584885, dated February 2, 2007, set a credit limit of $98,000 to be repaid in monthly installments over a period of 240 months, with a maturity date in 2027. The Merritts granted USAA a deed of trust on a residence located at 5217 63rd Drive NE, in Marysville, as collateral for this loan.

Loan no. 622723, dated May 3, 2007, set a credit limit of $64,500, to be repaid in monthly installments over a period of 240 months, with a maturity date in

2027. The Merritts also executed a deed of trust to secure this line of credit, encumbering residential property located at 1083 Alder Street.[1]

The five deeds of trust contain similar commitments from the Merritts: they agreed "that all payments under the [HELOC Agreement] will be paid when due and in accordance with the terms of the [HELOC Agreement] and this Security Instrument." If the Merritts failed to make any payment when due, USAA had the option to accelerate the secured debt and foreclose the deed of trust. The deeds of trust granted to USAA the power to sell the real estate to pay off the loan.

On November 13, 2012, the Merritts filed for Chapter 7 bankruptcy. In their schedules of creditors, they identified Wells Fargo as holding a secured first mortgage of $184,032 and USAA as holding a partially secured second mortgage of $125,016 on the house located at 7601 69th Street NE. They identified USAA as a creditor holding "unsecured nonpriority claims" of an additional $241,955, and Gary Merritt testified that the debt listed in this schedule is the debt owing to USAA under the HELOC Agreements.[2] The bankruptcy court issued an order of discharge under 11 U.S.C. § 727 on February 13, 2013.

The Merritts made no payments to USAA on the debts secured by the deeds of trust after their November 13, 2012 bankruptcy filing. And it is undisputed that USAA did not accelerate the debts or initiate any foreclosures to collect the debts.

[1] The deed of trust that Gary Merritt identified as the one encumbering the Alder Street residence appears to relate to a different residential property. The parties, however, do not dispute that a deed of trust naming USAA as the lender secured this HELOC Agreement.

[2] It is unclear why the Merritts identified USAA as an unsecured creditor given that they executed deeds of trust to secure the USAA lines of credit. But the Merritts do not appear to dispute that USAA had security interests in the four residential properties at issue here.

On July 8, 2020, the Merritts filed four separate quiet title actions against USAA. Relying on Edmundson v. Bank of Am., 194 Wn. App. 920, 378 P.3d 272 (2016), the Merritts argued that the statute of limitations on enforcement of the deeds of trust ran six years after February 12, 2013, the day before their bankruptcy discharge. They asked the court to declare the USAA deeds of trust and any resultant lien on their property to be extinguished.

The trial court rejected the Merritts' reading of Edmundson, and concluded that because the HELOC Agreements are installment contracts, the last payments of which are not due until 2025 at the earliest, the statute of limitations had not begun to run on payments the Merritts failed to make after the bankruptcy discharge. The trial court granted summary judgment in favor of USAA. The Merritts appeal.

ANALYSIS

Appellate courts review a summary judgment order de novo and perform the same inquiry as the trial court. Borton & Sons, Inc. v. Burbank Props., LLC, 196 Wn.2d 199, 205, 471 P.3d 871 (2020). A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." CR 56(c). When the underlying facts are undisputed, we review de novo whether the statute of limitations bars an action. Edmundson, 194 Wn. App. at 927-28.

The Merritts contend the February 2013 bankruptcy discharge triggered the six-year statute of limitations for enforcing the deeds of trust, and because USAA

did not initiate a foreclosure before February 2019, they are entitled to quiet title on the properties as a matter of law. This argument, however, is based on an erroneous reading of Edmundson, as this court recently explained in Copper Creek Homeowners' Association v. Wilmington, No. 82083-4-I, slip op. (January 18, 2022).

In Copper Creek, a homeowners association obtained a deed in lieu of foreclosure from homeowners who defaulted on their homeowner assessments. Id. at 5. The association sought to extinguish a senior security interest held by the homeowners' lender, arguing that the statute of limitations barred enforcement of the lender's deed of trust. Id. at 2-5. The trial court concluded that under Edmundson, the six-year statute of limitations accrued on the entire note on the date of the homeowners' bankruptcy discharge, even though a significant amount of the debt was not due on the date of discharge. Id. at 12. On appeal, this court reversed, clarifying that Edmundson did not establish a new rule that a bankruptcy discharge triggers the running of the statute of limitations on the entire debt. Id. at 17. This court stated:

> In Edmundson, this court did not [establish] that bankruptcy discharge of liability on an installment note accelerates the maturity of the note. [It] did not [establish] that the discharge kickstarts the running of the deed of trust's final statute of limitations period. [It] did not [establish] that discharge is an analog to acceleration and triggers the statute of limitations on the entire obligation.

Id. at 20.

We adhere to our analysis in Copper Creek. The trial court correctly concluded that the Merritts' bankruptcy discharge did not cause the statute of limitations on the enforcement of the deed of trust to run on payments that became

due after discharge. A bankruptcy discharge eliminates a debtor's personal liability on a promissory note, but it does not terminate a lender's claim against the debtor. Johnson v. Home State Bank, 501 U.S. 78, 84, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991). "Rather, a bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor in personam—while leaving intact another—namely, an action against the debtor in rem." Id. The creditor's lien survives bankruptcy and remains with the real property until foreclosure. Dewsnup v. Timm, 502 U.S. 410, 417, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992). Bankruptcy does not accelerate an installment note or trigger the statute of limitations on enforcement of a deed of trust, it only eliminates the debtor's personal liability. Copper Creek at 21. The debtor's in rem liability remains intact: "The debt, the note, and the payment schedule remain unchanged." Id.

In this case, the HELOC Agreements and the payment schedule set out in those agreements, as well as USAA's ability to foreclose the deeds of trust in an in rem proceeding, all remained intact after the Merritts' bankruptcy discharge. As the trial court indicated, there may be installment payments that USAA cannot now collect because they are time-barred by the statute of limitations, but the Merritts did not ask the trial court to decide that issue. They sought only a determination that USAA's lien, in its entirety, is no longer valid. Under Cooper Creek, USAA's lien remains valid and enforceable because the HELOC Agreements, and the obligations to make monthly installments under them, do not expire until 2025 at the earliest. The bankruptcy discharge did not start the running of the six-year statute of limitations on installment payments the Merritts owed after the

bankruptcy discharge; if USAA does not accelerate the installment debt, it has six years from the date of any missed installment payment to foreclose to collect those payments. The Merritts are thus not entitled to the relief they seek. We therefore affirm the dismissal of their quiet title action.

Both parties requested an award of attorney fees on appeal. Attorney fees and costs are awarded to the prevailing party if "applicable law grants to a party the right to recover reasonable attorney fees." RAP 18.1(a). As the prevailing party, USAA is entitled to an award of attorney fees under the terms of the parties' loan agreements, which provide for the recovery of "all expenses of collection, enforcement or protection of [USAA's] rights and remedies under" the agreements. We therefore award attorney fees to USAA conditioned on its compliance with RAP 18.1(d).

Affirmed.

Andrus, A.C.J.

WE CONCUR:

LAW OFFICE OF KEN SCHNEIDER

April 27, 2022 - 1:40 PM

Filing Petition for Review

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