73834-8

ORIGINAL

No. 73834-8-I

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION I

4518 S. 256th LLC, Appellant,

v.

KAREN L. GIBBON, P.S., Trustee, RECONTRUST, N.A., Trustee; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS") acting as nominee for COUNTRYWIDE HOME LOANS, INC., a Beneficiary; THE BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK, as Trustee for the certificateholders of the CWABS, Inc. Asset-backed Certificates, Series 2006-7, Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

This matter addresses a narrow issue of law: at what point does acceleration occur on an obligation that is secured by a statutory Deed of Trust. The Appellant, 4518 S. 256th LLC, requests that this Court reverse the trial court's order on Cross-Motions for Summary Judgment wherein the trial court determined that acceleration had not occurred. The Deed of Trust in question was recorded in May 2006 and an initial Notice of Default had been forwarded to the borrowers in July 2008. A Notice of Trustee's Sale was recorded in August 2008; however, the trustee's sale never took place. A second Notice of Default was issued in October 2014 – six years after the initial Notice of Default – and a second Notice of Trustee's Sale was recorded in January 2015, with a sale scheduled for June 2015.

The trial court's ruling flies in the face of express language in the statutory Deed of Trust, the Notice of Trustee's Sale, the Deed of Trust Act (RCW 61.24.010 *et seq.*) and Washington State case law. The trial court's order should be reversed and the Appellant's Motion for Summary Judgment should be granted on the basis that acceleration of the loan occurred, triggering the running of the statute of limitations, which had expired as to the Respondent's claims.

II. RESPONSE TO STATEMENT OF THE ISSUE

The trial court erred by denying Appellant 4518 S. 256th LLC's motion for summary judgment and granting Mortgage Electronic Registration Systems, Inc. ("MERS") and the Bank of New York Mellon f/k/a The Bank of New York as Trustees for the certificateholders of the CWABS, Inc., Asset-backed Certificates, Series 2006-7's ("Bank of New York's") motion for summary judgment because, as a matter of law, the obligation had been accelerated and the statute of limitations had already run. 4518 S. 256th LLC was entitled to have title to the subject property quieted in the LLC as against the Respondent, as a matter of law.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Can the Trustee foreclose on and sell the Subject Property pursuant to the statutory Deed of Trust dated May 25, 2006 when the 2006 Promissory Note was accelerated and the six-year statute of limitations for collection of the debt evidenced by the Promissory Note has expired?

IV. STATEMENT OF THE CASE

A. Original Debt Obligation.

Appellant 4518 S. 256th, LLC ("4518 S 256th") is a Nevada limited liability company and the owner of the real property located at 4518 S. 256th Place, Kent, King County, Washington 98032 (the "Subject Property"). CP

1. 4518 S 256th acquired its interest in and is the exclusive legal title holder to the Subject Property, which is situated in Kent (Tax Parcel Number 3832310540), pursuant to a Quitclaim Deed from predecessors in title and grantors Teodoro A. Puebla and Elizabeth Villalovos (collectively referred to herein as "Puebla"). CP 4.

In May 2006 predecessor title holders Puebla executed a promissory note pursuant to an obligation incurred with regard to the Subject Property. CP 7-8. The promissory note was secured by a statutory Deed of Trust dated May 25, 2006 and recorded on May 31, 2006, under King County Auditor's File No. 20060531000742 ("Deed of Trust") identifying Teodoro A. Puebla and Elizabeth A. Villalovos, husband and wife, as grantors to Landsafe Title of Washington, as Trustee, to secure an obligation in favor of Mortgage Electronic Registration Systems, Inc., as beneficiary. CP 8.

On or about July 10, 2008, a Notice of Default was issued to Puebla. Thereafter, on or about July 17, 2008 a Successor Trustee, Recontrust Company, was appointed. CP 8. On or about August 9, 2008 Trustee Recontrust Company issued a Notice of Trustee's Sale alleging that Puebla was in default with regard to the obligation and announcing that the sale of the Subject Property would be held on November 14, 2008. CP 8. See also CP 12-16. The Notice of Trustee's Sale was dated August 9, 2008 and

recorded as King County Auditor's File No. 20080815001023. *Id.* The sale scheduled for November 14, 2008 never took place.

On or about April 12, 2010, Recontrust Company, N.A. was appointed as Successor Trustee as recorded with the King County Auditor's office as File Number 20100415000002. CP 8-9. On or about November 21, 2011, Recontrust Company, N.A. filed a Notice of Discontinuance of Trustee's Sale which was recorded as King County Auditor's File No. 20111128000561 and recorded again as King County Auditor's File No. 20111128000674. CP 18.

B. Recent Efforts to Foreclose Pursuant to Deed of Trust.

On or about October 21, 2014, upon information and belief, a Second Notice of Default was issued to Puebla. On or about December 23, 2014, Defendant Karen L. Gibbon, P.S. was appointed as a Successor Trustee pursuant to that instrument dated December 23, 2014 and recorded with the King County Auditor's office as File Number 20150106002063. CP 9.

On or about January 29, 2015, Defendant Karen L. Gibbon, P.S., Trustee, issued a Notice of Trustee's Sale announcing that the sale of the Subject Property would be held on June 12, 2015. CP 20-23. The Notice of Trustee's Sale was recorded on February 2, 2015 as King County Auditor's File No. 20150202001055. *Id.* The Notice demands payment of amounts

due from January 1, 2008 through January 1, 2015 which confirms that at no point during the six-year pendency period was the arrearage ever brought current by the borrower. *Id.*

Below is a summary of the relevant dates:

Date	Event
07.10.2008	1st - Notice of Default
08.09.2008	1st - Notice of Trustee's Sale (recorded August 15, 2008)
11.21.2011	Discontinuation Of Trustee's Sale
10.21.2014	2nd - Notice of Default
01.29.2015	2nd - Notice of Trustee's Sale (recorded 02.02.2015)

Accordingly, for a period in excess of six years from acceleration of the obligation (i.e., from August 9, 2008), the Trustee and Beneficiary failed to preserve their claims pursuant to the obligation evidenced by the Promissory Note. Therefore, pursuant to RCW 4.16.040, the applicable statute of limitations has expired, barring their claims.

C. Procedural History.

On June 5, 2015 a Stipulated Order Restraining Trustee's Sale was entered by the trial court commissioner restraining and prohibiting the sale of the Subject Property until further Order of the Court.

On July 31, 2015 the trial court heard cross-summary judgment motions filed by Appellant 4518 S. 256th and by Respondents MERS and Bank of New York. The issue before the trial court on both motions was whether the debt obligation evidenced by the Promissory Note and secured pursuant to the statutory Deed of Trust had been accelerated, triggering the running and expiration of the statute of limitations. CP 89-101; *see also* CP 25-41. After oral argument, the trial court denied the Appellant's motion for summary judgment and granted the Respondents' motion for summary judgment, dismissing the Appellant's civil action with prejudice. CP 184-186. The Court further awarded the Respondents their attorneys' fees. CP 228.

V. STANDARD OF REVIEW

Contract interpretation is a question of law when the interpretation does not depend upon the use of extrinsic evidence. *Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.*, 176 Wn.2d 502, 517, 296 P.3d 821 (2013); see also *Mut. of Enumclaw v. USF Ins. Co.*, 164 Wn.2d 411, 424 n.9, 191 P.3d 866 (2008) (noting that when a contract presents no ambiguity and no extrinsic evidence is required to make sense of the contract terms, contract interpretation is a question of law); *Keystone Masonry, Inc. v. Garco Constr., Inc.*, 135 Wn.App. 927, 932, 147 P.3d 610 (2006) ("[a]bsent

disputed facts, the legal effect of a contract is a question of law that we review *de novo*.").

The *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. *Momah v. Bharti*, 144 Wn.App. 731, 749, 182 P.3d 455 (2008) (quoting *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)); *Anderson v. Weslo, Inc.*, 79 Wn.App. 829, 833, 906 P.2d 336 (1995).

Statutory interpretation is a question of law, which the appellate court reviews *de novo*. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007); *Jewels v. City of Bellingham*, 183 Wn.2d 388, 394, 353 P.3d 204 (2015).

VI. ARGUMENT

A. General Discussion: Acceleration.

Typically, actions based on written contracts must be commenced no later than six years after breach or said actions are barred. *See* RCW 4.16.040 (2015). The general rule for debts payable by installment provides: "[a] separate cause of action arises on each installment, and the statute of limitations runs separately against each...." *See* 31 Richard A. Lord, WILLISTON ON CONTRACTS § 79:17, at 338 (4th ed.2004); *see also* 25 David K. Dewolf, Keller W. Allen & Darlene Barrier Caruso, WASHINGTON

PRACTICE: CONTRACT LAW AND PRACTICE § 16:20, at 196 (2012–13 Supp.) ("Where a contract calls for payment of an obligation by installments, the statute of limitations begins to run for each installment at the time such payment is due"). *See also* Hassler v. Account Brokers of Larimer County, Inc., 274 P.3d 547, 553 (Colo.2012); and Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 208–09, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997).

However, if an installment obligation is accelerated — either automatically by the terms of the agreement or by the election of the creditor pursuant to an optional acceleration clause — the entire remaining balance of the obligation becomes due and payable immediately. This triggers the statute of limitations for all installments that had not previously become due. *See* 31 Richard A. Lord, *supra*, § 79:17, at 338; § 79:18, at 347–50; 12 AM.JUR.2D, BILLS & NOTES § 581.

B. Acceleration in the Context of statutory Deed of Trust.

In the instant case, there are several significant facts that indicate that an acceleration must have taken place more than six years prior to the commencement of the most recent foreclosure, thus barring the pending foreclosure by application of the statute of limitations.

First, the **Deed of Trust** states at Paragraph 22 as follows:

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.

If Lender invokes the power of sale, Lender shall give written notice to Trustee of the occurrence of an event of default and of Lender's election to cause the Property to be sold. Trustee and Lender shall take such action regarding notice of sale and shall give such notices to Borrower and to other persons as Applicable Law may require. After the time required by Applicable Law and after publication of the notice of sale, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of the Property for a period or periods permitted by Applicable Law by public announcement at the time and place fixed in the notice of

> sale. Lender or its designee may purchase the Property at any sale.
>
> Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it or to the clerk of the superior court of the county in which the sale took place.

CP 116 (emphasis added).

The initial notice reference in Paragraph 22 is the Notice of Default required pursuant to RCW 61.24.030. The Notice of Default required pursuant to Paragraph 22 *presumes* that if the default is not cured, an acceleration will occur. Specifically, "The notice shall further inform Borrower of the right to reinstate **after** acceleration[.]" CP 116 (emphasis added).

Thereafter, Paragraph 22 indicates that if the default is not cured the Lender "may require immediate payment in full of all sums secured by this Security Instrument without further demand **and** may invoke the power of sale." The use of the term "and" is significant, as courts presume that "and" functions conjunctively. *State v. Kozey, 183 Wash. App. 692, 698, 334 P.3d 1170, 1173 (2014) review denied, 182 Wash. 2d 1007, 342 P.3d 327 (2015).*

By definition, the "immediate payment in full of all sums secured by this Security Instrument" is an acceleration (i.e., all payments become immediately due and payable). So, stated differently, when a default is not cured, the Lender's option is to accelerate **and** invoke the power of sale. Paragraph 22 does not contemplate any scenario where the Lender can invoke the power of sale **without** acceleration, as the Respondent alleges.

The Notice of Trustee's Sale dated August 9, 2008 states that "A written notice of default was transmitted by the Beneficiary or Trustee to the Borrower and Grantor [. . .] on July 10, 2008." CP 14. Thereafter, presumably because the default was not cured, the power of sale was invoked by scheduling the trustee's sale under the Notice of Trustee's Sale dated August 9, 2008. CP 12-16. Thus, the acceleration **had to have occurred** when or before the power of sale was invoked – otherwise the power of sale could not have been invoked at all, pursuant to the statutory Deed of Trust.

C. Acceleration in the Context of Washington Statutory Language.

RCW 61.24.090, the Washington statute for curing defaults before a deed of trust foreclosure sale, offers additional guidance as to the moment acceleration takes place. RCW 61.24.090(1) mentions reinstatement of arrears any time up to the 11th day before the sale date as follows:

> (1) At any time prior to the eleventh day before the date set by the trustee for the sale in the recorded notice of sale, or in the event the trustee continues the sale pursuant to RCW 61.24.040(6), at any time prior to the eleventh day before the actual sale, the borrower, grantor, any guarantor, any beneficiary under a subordinate deed of trust, or any person having a subordinate lien or encumbrance of record on the trust property or any part thereof, **shall be entitled to cause a discontinuance of the sale proceedings by curing the default or defaults set forth in the notice, which in the case of a default by failure to pay, shall be by paying to the trustee:**
>
> > (a) **The entire amount then due under the terms of the deed of trust and the obligation secured thereby, other than such portion of the principal as would not then be due had no default occurred**,

See RCW 61.24.090(1)(a) (emphasis added).

Thereafter, RCW 61.24.090(3) states that, "[u]pon receipt of such payment the proceedings shall be discontinued, the deed of trust shall be reinstated and the obligation shall remain **as though no acceleration had taken place**." *See RCW 61.24.090(3)(emphasis added).* The statute clearly presumes the acceleration "had taken place" ***before*** the grantor's reinstatement. As stated above, reinstatement means payment of the arrears on or before the eleventh (11^{th}) day prior to the trustee's sale.

In summary, the Deed of Trust allows the Lender/Beneficiary to accelerate **and** invoke the power of sale after an uncured default. The invocation of the power of sale presumes an acceleration. Additionally,

RCW 61.24.090(3) presumes acceleration because the payment referenced in RCW 61.24.090(1) cures the default "**as though no acceleration had taken place**."

D. Acceleration and Washington Case Law.

The language in the statutory Deed of Trust and in the Washington statutes regarding acceleration and foreclosures is consistent with an established record of Washington court decisions on the issue. In *Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank*, the Court of Appeals recognized that nothing in the Deed of Trust Act prohibits the acceleration of a loan. *See Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank*, 80 Wn.App. 655, 669-70, 910 P.2d 1308 (1996). Rather, the Court recognized that RCW 61.24.090(1)(a) simply precludes the creditor from enforcing the acceleration election prior to the eleventh day before the date of the trustee's sale. This allows the debtor to reinstate the loan prior to that time by paying the amount which would have been due under the terms of the Deed of Trust if no default had occurred. *See id.* at 669-70. Stated differently, this presumes acceleration has occurred in conjunction with the Lender/Beneficiary invoking the power of sale.

Persuasive authority indicates the same. The election of the creditor to accelerate in the case of a nonjudicial foreclosure is sufficiently indicated by the fact that the creditor claims the whole debt to be due by its

advertisement of the property for sale, or by the commencement of a suit for foreclosure of the entire mortgage. *See e.g.*, C.J.S. MORTGAGES § 680. *See also* Heist v. Dunlap & Co., 193 Ga. 462, 466, 18 S.E.2d 837, 840 (1942) ("[I]t is not essential that before exercise of the power, or before foreclosure, the grantee give the grantor notice or make demand for the past-due installment, but that the advertisement under the power, or institution of a foreclosure action, is sufficient notice of the grantee's election [to accelerate] under the option.").

In Washington the Notice of Trustee's Sale is advertised and published in a paper of general circulation indicating in its content that a sale will take place on a certain day for the total of the unpaid obligation of the grantor. Case law from other jurisdictions advises that the publication notice does not have to affirmatively mention the exercise of the acceleration clause to effect an acceleration:

> "Whether or not the mere act of advertising property for sale under power is without more a sufficient election to declare the debt due under the option to accelerate maturity, it is unnecessary that the advertisement should affirmatively recite the exercise of such option, where it does recite that the debt is past-due and that the sale will be had in accordance with the power of sale . . ."

See Redwine v. Frizzell, *184 Ga. 230, 190 S.E. 789, 792-93 (1937)(citations omitted).*

Texas courts have explored this issue thoroughly and conclude that the Notice of Trustee's Sale is itself notice of acceleration: "[W]e conclude that we may reasonably infer that a notice of intent to accelerate followed by a notice of a trustee's sale constitutes a notice of acceleration." *See* McLemore v. Pac. Sav. Bank, FSB, 872 S.W.2d 286, 292 (Tex. App. 1994), *writ dismissed by agreement (July 28, 1994). See also* Meadowbrook Gardens, Ltd. v. WMFMT Real Estate Ltd. P'ship, 980 S.W.2d 916, 918-19 (Tex. App. – Fort Worth 1993, *pet. denied*).

E. Acceleration as to its Applicability on the Statute Of Limitations

In accordance with RCW 4.16.040 and RCW 7.28.300 the Respondents had six years from the date of acceleration of the obligation within which to file a claim and seek relief regarding the alleged default against the owner of the Subject Property. Pursuant to the above analysis, the acceleration occurred in conjunction with the Notice of Trustee's Sale recorded on August 9, 2008.[1]

It is undisputed that the Trustee's Sale scheduled for November 14, 2008 never happened. Instead, a Notice of Discontinuance of Trustee's Sale was filed on November 21, 2011. CP 18. No further action was taken

[1] In the alternative, and under a narrower view of the above analysis, the Notice of Trustee's Sale states the "the entire balance" was due after November 3, 2008.

against the Subject Property or the debtors until the recent Notice of Default and Notice of Trustee's Sale which occurred more than six years after August 9, 2008 (the date of acceleration of the underlying obligation).[2]

The Notice of Trustee's Sale dated January 29, 2015 specifically indicates that the default extends from January 1, 2008 through January 2, 2015, thereby establishing that at **no point during the six-year pendency was the arrearage brought current**. The Respondents failed to file a claim within the six-year period of time and, as a result, are forever barred from seeking relief pursuant to the Deed of Trust or under any alternate legal theory with regard to the Subject Property.

F. The Trial Court erred in granting the Respondent's Motion for Summary Judgment and Denying the Appellant's Motion for Summary Judgment on the issue of acceleration.

The Appellant was entitled to have title to the Subject Property quieted in the Appellant's name pursuant to RCW 7.28.300. The statute states in relevant part:

> 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. *See* RCW 7.28.300 (2015).

[2] Or more six years after "the entire amount" was due (beginning November 4, 2008).

The Washington Court of Appeals directly addressed the application of RCW 7.28.300 to Deeds of Trusts in the case of *Walcker v. Benson and McLaughlin*, 79 Wn. App. 739, 904 P.2d 1176 (1995), *rev. den.*, 129 Wn.2d 1008, 917 P.2d 129 (1996). In *Walcker*, the Walckers executed a promissory note in favor of Benson and McLaughlin and executed a Deed of Trust to secure the note. *See id.* at 741. However, the Walckers never made payment on the note and Benson and McLaughlin never took any action to collect the note. *See id.* More than six years after execution of the promissory note and Deed of Trust, Benson and McLaughlin commenced a nonjudicial foreclosure of the Deed of Trust. *See id.* The Walckers filed an action to quiet title and to restrain the trustee's sale contending the foreclosure was barred by the statute of limitations. *See id.* The trial court concluded that the Deed of Trust survived even after the six year statute of limitations expired to sue on the note and ruled in favor of Benson and McLaughlin. *See id.*

The Walckers appealed, and the Court of Appeals focused on precisely the issue presented by the Respondents' actions in this case:

> "The sole issue in this appeal is whether the right of nonjudicial foreclosure of a deed of trust extends beyond the limitation period for enforcement of the underlying debt."
>
> *See Walcker*, 79 Wn. App. at 741.

The Court of Appeals reversed the trial court and found the Deed of Trust foreclosure was barred by the following reasoning:

> "[T]he 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. *Summerrise v. Stephens*, 75 Wn.2d 808, 811, 454 P.2d 224 (1969). 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. *Ruth v. Dight*, 75 Wn.2d 660, 664, 453 P.2d 631 (1969); *Stenberg v. Pacific Power & Light Co.*, 104 Wn.2d at 714, 709 P.2d 793 (1985).
>
> 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." RCW 61.24.030(6)0); see RCW 61.24.130. Any such action certainly would expend judicial resources, as this case has demonstrated.
>
> The plain language of RCW 61.24.020 states that, "[e]xcept as provided" in the deed of trust act, mortgage law applies to foreclosure of deeds of trust. The act does not address the applicability of statutes of limitations. Therefore, RCW 7.28.300, which expressly makes the statute of limitations a defense in mortgage foreclosure proceedings, applies to foreclosure of trust deeds as well. **Because Benson and McLaughlin failed to initiate its foreclosure within the applicable six-year limitation period, the foreclosure should be barred**."
>
> *Walcker,* 79 Wn. App. at 745-746 (emphasis added.)

Accordingly, the Respondents' claims pursuant to the Deed of Trust are forever barred by the statute of limitations, pursuant to RCW 4.16.040(1) and RCW 7.28.300. The trial court erred by denying the Appellant's motion for summary judgment quieting title to the property. Instead, the trial court

granted the Respondents' motion which set in motion the sale of the property, thereby damaging the Appellant. The trial court's decision would imply that a lender need not ever accelerate an obligation before invoking the power of sale. This implication simply cannot be supported and is contradicted by the operative language in the Deed of Trust, Notice of Default and statutory framework governing nonjudicial foreclosure sales. The trial court's decision should be reversed

G. The Appellant is entitled to an Award of Attorney Fees and Costs.

The American Rule states that attorney fees may be awarded if authorized by contract, statute, or a recognized ground in equity. *See City of Seattle v. McCready, 131 Wn.2d 266, 931 P.2d 156 (1997).* Attorney fees are properly awarded on a contract when the contract containing the attorney fee provision is central to the controversy. *See Hemenway v. Miller, 116 Wn.2d 725, 742, 807 P.2d 863 (1991).*

In this case the center of controversy is whether the Trustee can foreclose a 2006 Deed of Trust. This Deed of Trust contains the following attorney fee provision:

> 26. **Attorneys' Fees.** Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument. The term "attorneys' fees," whenever used in this Security Agreement, shall include without limitation

> attorneys' fees incurred by Lender in any bankruptcy proceeding or on appeal.
>
> See CP 116.

Since the attorney fee provision must be read as bilateral pursuant to RCW 4.84.330, Plaintiff is properly entitled to attorney fees and costs incurred in defeating the enforceability of the 2006 Deed of Trust. *See Quality Food Centers v. Mary Jewell T, LLC., 134 Wn. App. 814, 818, 142 P.3d 206 (2006).* An award of fees and costs is proper even if the written agreement is ultimately invalidated by the Court. *See Labriola v. Pollard Group, 152 Wn.2d 828, 100 P.3d 791 (2004).* The Appellant thus respectfully requests that the Court reverse the trial court's decision not to grant the Appellant its attorney's fees.

Pursuant to RAP 18.1, a party may recover attorney's fees on appeal where authorized by applicable law. *Dan's Trucking, Inc. v. Kerr Contractors, Inc., 183 Wn.App. 133, 143, 332 P.3d 1154 (2014).* Where a prevailing party is entitled to attorney fees below, that party is entitled to attorney's fees if they prevail on appeal. *Sharbono v. Universal Underwriters Inc. Co., 139 Wn.App. 383, 423, 161 P.3d 406 (2007).* The Appellant should have been the prevailing party at the trial court and should have received an award of attorney's fees. Because the contract provision

authorizes an award of attorney's fees to the prevailing party, the Appellant is entitled to an award of its attorney's fees on appeal pursuant to RAP 18.1.

VII. CONCLUSION

If the trial court's decision is upheld by this Court, the result will be that a lender need never accelerate an obligation prior to invoking the power of sale and nonjudicially selling the borrower's property. Furthermore, since acceleration need never be triggered, a lender may thereby completely avoid the consequences of the running of the six-year statute of limitations for the entire period of the installment obligation plus six additional years (i.e., 36 years in the instant case).

Such a result is contradicted not only by commonsense and by the intent of having a statute of limitations in the first place, but also by the express language in the operating documents, the governing statutes, case law and persuasive authority. If the trial court's erroneous decision is not reversed, the statute of limitation intended to ensure prompt action upon claims becomes essentially meaningless and lenders have no obligation whatsoever to take timely and prompt steps to protect their interests. Instead, and as a result, borrowers' credit will be held hostage by lenders for decades while lenders have the luxury of deciding when the market suits their needs as far as foreclosing on the property.

The Appellant respectfully requests that the Court reverse the trial court's decision with regard to whether acceleration has occurred and thereby grant the Appellant's Motion for Summary Judgment and deny the Respondent's Motion for Summary Judgment on this legal issue.

The Appellant further requests that the Court award the Appellant it's attorney's fees in the underlying case and on appeal.

Respectfully submitted this 14th day of December, 2015.

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Certificate of Service

I, the undersigned, hereby certify under penalty of perjury of the laws of the State of Washington that I caused the foregoing Brief of Appellant to be served upon:

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DATED this 14th day of December, 2015 at Tacoma, Washington.

E Thompson

~~Kimberly Lampman~~
Elizabeth Thompson