NO. 96139-5

SUPREME COURT OF THE STATE OF WASHINGTON

KEVIN ERICKSON, as Personal Representative of the Estate of Ryan Erickson,
Petitioner,

v.

AMERICA'S WHOLESALE LENDER, a New York corporation,

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC., an inactive Washington corporation,

and

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR GSAA HOME EQUITY TRUST 2006-1, QUALITY LOAN SERVICE CORP. OF WASHINGTON,
Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This Court should deny Kevin Erickson's petition for review. The Decision of the Court of Appeals does not conflict with any other decision of the Court of Appeals or of this Court. Nor does the decision of the Court of Appeals raise any issue of substantial public interest. To the contrary, this case represents a straightforward application of established Washington law by the Court of Appeals, to hold on undisputed facts that a non-judicial foreclosure undertaken by U.S. Bank National Association as Trustee for GSAA Home Equity Trust 2006-1 ("US Bank") was timely commenced within the relevant limitation period. The decision is correct and raises no issues calling for review by this Court.

II. IDENTITY OF RESPONDENT

US Bank was a defendant in the Superior Court, was the appellee in the Court of Appeals, and is now the respondent in this Court.

III. ISSUES FOR REVIEW

The issues stated in Erickson's petition for review do not merit review by this Court. US Bank does not seek review of any additional issues.

IV. STATEMENT OF THE CASE

Kevin Erickson asserted a quiet title claim against US Bank, seeking to eliminate the lien of a deed of trust burdening real property located in

Puyallup, Washington. CP 1–8 (Complaint). Erickson relied on the theory that the statute of limitation on the promissory note underlying the deed of trust had expired before US Bank had begun a non-judicial foreclosure of the real property on June 25, 2015. *Id.*

The mortgage loan in question was made to Ryan Erickson on October 26, 2005.[1] *See* CP 22, 49–53 (Decl. of David Hammermaster and Exhibit C (promissory note)); CP 87, 90–105 (Decl. of Fay Janati and Exhibit A (deed of trust)). The promissory note Ryan Erickson signed is an installment note that calls for monthly payments and does not fully mature until the year 2035. CP 49–53 (promissory note). After defaulting at various times on his monthly mortgage payments, Ryan Erickson entered into a repayment plan agreement on March 28, 2008 to cure his delinquent payments. *See* CP 87, 116–126 (Decl. of Fay Janati and Exhibit E (repayment plan agreement)). However, as of the payment due July 1, 2008, Ryan Erickson once again defaulted on the loan payments. *See* CP 87, 127–129 (Decl. of Fay Janati and Exhibit F (loan transaction history)).

On September 17, 2008, the loan servicer sent a document entitled "Notice of Intent to Accelerate," which stated that the loan was in default,

[1] Ryan Erickson died in a tragic accident. Petitioner Kevin Erickson represents Ryan Erickson's estate. This answer generally uses the term "Erickson" to refer to petitioner Kevin Erickson, and uses the borrower Ryan Erickson's full name where necessary for clarity.

stated the amount needed to cure the default, and read in part, "[i]f the default is not cured on or before October 17, 2008, the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time." (emphasis original). CP 87, 112–114 (Decl. of Fay Janati and Exhibit D (September 17, 2008 notice)).[2]

Ryan Erickson did not cure the default or make any payments after July 2008. *See* CP 87, 127–129 (Decl. of Fay Janati and Exhibit F (loan transaction history)). The loan servicer then initiated non-judicial foreclosure proceedings at various times by recording notices of trustee's sale on the following dates: January 5, 2009; July 14, 2010; December 10, 2014. *See* CP 88, 139–159 (Decl. of Fay Janati and Exhibits H–I (January 5, 2009 notice; July 14, 2010 notice)).[3] However, no foreclosure sale occurred, and Ryan Erickson (or his estate) accordingly continued at all times to hold title to the real property.

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[2] The servicer had sent two similar notices before the March 28, 2008 repayment plan: the first on October 17, 2007; and the second on December 17, 2007. CP 87, 106–111 (Decl. of Fay Janati and Exhibits B–C).

[3] The final notice of trustee's sale recorded December 10, 2014 did not appear in the trial court's record, although it was discussed in the briefing presented to the trial court. *See* CP 197 (US Bank's Response and Reply in Support of Cross-Motion for Summary Judgment). However, the document is publicly recorded in the official records of Pierce County, and is thus a document of which a court may properly take judicial notice. *See* ER 201; *Jackson v. Quality Loan Service Corp.*, 186 Wn. App. 838, 844–45, 347 P. 3d 487 (2015) (noting appropriateness of judicial notice of publicly recorded documents in foreclosure action). A true and correct copy of the December 10, 2014 notice was submitted to the Court of Appeals as Exhibit A to US Bank's answering brief.

US Bank then recorded the operative notice of trustee's sale on June 25, 2015. CP 88, 160–166 (Decl. of Fay Janati and Exhibit J (June 25, 2015 notice of trustee's sale)). Erickson filed his action to quiet title on October 6, 2015. CP 1–8. Because the relevant facts were undisputed, Erickson and US Bank submitted cross-motions for summary judgment. CP 20–21 (Erickson's motion for summary judgment); CP 69–85 (US Bank's opposition to Erickson's motion for summary judgment and cross-motion for summary judgment). The Superior Court granted summary judgment in US Bank's favor and dismissed Erickson's quiet title claim. CP 206–208 (order on cross-motions for summary judgment).

Erickson appealed, and the Court of Appeals then affirmed in an unpublished opinion. The Court of Appeals held (as relevant to the issues raised in Erickson's petition for review): (1) that the September 17, 2008 notice did not itself accelerate the loan; and (2) that the various non-judicial foreclosure proceedings initiated by the loan servicer after the default tolled the underlying statute of limitation for an action on the underlying debt. This petition for review of the decision of the Court Appeals followed.

V. ARGUMENT

A. The Court of Appeals correctly applied established Washington law to hold that the September 17, 2008 Notice of Intent to Accelerate did not accelerate the mortgage loan.

The decision of the Court of Appeals does not conflict with any other Washington decision relating to acceleration or foreclosure. To the contrary, the decision simply follows established Washington law. The first issue presented by Erickson's petition accordingly does not merit review.

The Erickson Deed of Trust provided the lender with the unilateral option to accelerate the loan upon default. *See* CP 100 (deed of trust, ¶ 22). Acceleration is not automatic upon default or upon any other event—the lender must affirmatively exercise the option. *Id.*; *see also A.A.C. Corp. v. Reed*, 73 Wn. 2d 612, 615, 440 P. 2d 465 (1968).

Under long-established Washington law, a lender's exercise of a right to accelerate "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." *Glassmaker v. Ricard*, 23 Wn. App. 35, 37, 593 P. 2d 179 (1979) (citing *Weinberg v. Naher*, 51 Wn. 591, 594, 99 P. 736 (1909)). Mere default of payments will not accelerate a loan even if the loan documents say that acceleration is automatic upon default—an affirmative election on the lender's part is always required. *See Coman v. Peters*, 52 Wn. 574, 576–77, 100 P. 1002 (1909). Similarly, "[d]efault in

payment alone does not work an acceleration." *Edmundson v. Bank of America*, 194 Wn. App. 920, 378 P. 3d 272 (2016).

Washington case law has consistently emphasized the requirement of a clear, affirmative action on a lender's part, finding acceleration only in instances whether a lender states clearly and unequivocally that the entire debt is *immediately* due. *See, e.g., Meyers Way Development Ltd. Partnership v. University Savings Bank*, 80 Wn. App. 655, 660–61, 910 P. 2d 1308 (1996) (bank exercised option to accelerate when bank sent letter to borrowers notifying them that it had elected to accelerate the loan and that the full debt was immediately due and owing); *Rodgers v. Rainer Nat. Bank*, 111 Wn. 2d 232, 235, 757 P. 2d 976 (1988) (trustee accelerated loan by rejecting partial payment and demanding principal and interest in full); *Jacobsen v. McClanahan*, 43 Wn. 2d 751, 752–53, 264 P. 2d 253 (1953) (lender accelerated loan by giving notice of default and refusing to accept partial payments).

This Court's seminal decision in *Weinberg* is particularly instructive in this case. In *Weinberg*, the noteholder had sent two letters to the borrower stating that if the borrower did not meet the terms of the note, the noteholder would call the loan due on a certain date. The *Weinberg* court reviewed these letters and held, "the language of the first is that the loan will be called in if the mortgagor does not before the end of the week make the insurance

policy payable to the mortgagee; and the second is that the mortgagee will insist on an insurance policy or call in the loan. These letters but threaten an exercise of the option [to accelerate] . . . They do not amount to an actual call of the loan or to an exercise of the option." 51 Wn. at 597.

The Court of Appeals properly applied these precedents to reject Erickson's contention that the servicer's September 17, 2008 notice accelerated the loan. The Court of Appeals noted that the notice merely warned of future acceleration if the default remained uncured. Opinion 6–7. The Court of Appeals further noted that the servicer had never declared the entire debt immediately due or refused to accept installment payments.[4] *See id.* The Court of Appeals correctly held that the notice "simply informed [the borrower] of a future contingent event," and thus did not accelerate the loan. *Id.* at 7. This holding does not conflict with any decision of the Court of Appeals of or this Court—to the contrary, the holding necessarily flows from the relevant precedents.

B. The decision of the Court of Appeals does not conflict with *Walcker v. Benson and McLaughlin*.

The second issue raised in Erickson's petition also lacks merit, for similar reasons. The decision of the Court of Appeals does not conflict with

[4] Although Erickson does not address the point in his petition for review, the Court of Appeals also correctly noted that the September 17, 2008 notice was in fact a pre-acceleration notice expressly required by the loan documents in this case *before* the loan could be accelerated. *See* Opinion 7.

the decision in *Walcker v. Benson and McLaughlin, P.S.*, 79 Wn. App. 739, 904 P. 2d 1176 (1995). The *Walcker* case simply held that the right of non-judicial foreclosure of a deed of trust does not extend beyond the limitation period for enforcement of the underlying debt. 79 Wn. App. at 746.

Walcker is inapplicable here, because the note at issue in that case was a demand note on which the statute of limitation had expired. In contrast, the Erickson loan is an installment loan that does not fully mature until the year 2035. The statute of limitation for installment loans begins to run individually against each installment as it becomes due. *See Edmundson*, 194 Wn. App. at 929; *see also Herzog v. Herzog*, 23 Wn. 2d 382, 388, 161 P. 2d 142 (1945); *cf. Walcker*, 79 Wn. App. at 742 (holding that the six-year statute of limitation begins running on a demand note on the date it is signed).

Foreclosure of the Erickson deed of trust would thus be timely up to November 1, 2041 (six years after the maturity date).[5] And as explained above, the Erickson loan was never accelerated so as to cause the statute of limitation to begin running on the entire amount of the debt. *See Washington Federal v. Azure Chelan LLC*, 195 Wn. App. 644, 663, 382 P. 3d 20 (2016);

[5] At least with respect to amounts falling due on the maturity date. In this case, none of the defaulted installments fall outside of the six-year limitation period, because the limitation period was tolled by various non-judicial foreclosure proceedings, as described below.

see also RCW 62A.3-118(a). The Court of Appeals' holding that US Bank's June 25, 2015 foreclosure was timely is accordingly correct and does not conflict in any way with *Walcker*.

C. The Court of Appeals' tolling analysis correctly applied Washington law and does not upset the balance of interests reflected in the Deeds of Trust Act.

Non-judicial foreclosure proceedings under a deed of trust toll the statute of limitation for an action on the underlying obligation. *Bingham v. Lechner*, 111 Wn. App. 118, 131, 45 P. 3d 562 (2002). The tolling period does not continue indefinitely, however. In *Albice v. Premier Mortgage Services of Washington, Inc.*, the Court of Appeals held that the tolling continues only during the 120 days in which the trustee is entitled to continue the original sale. 157 Wn. App. 912, 927–28, 239 P. 3d 1148 (2010); *see also* RCW 61.24.040(6) (setting 120-day outside limit for continuance of scheduled trustee's sale).

US Bank's non-judicial foreclosure on June 25, 2015 was timely as to each and every defaulted payment, because the limitation period was tolled by non-judicial foreclosure proceedings. The number of days between the borrower's default as of July 1, 2008, and commencement of the operative non-judicial foreclosure on June 25, 2015 is 2,550, or approximately seven years. However, because the statute of limitation was tolled for a total of 662 days as outlined in the table below, the amount of

time that elapsed between default and foreclosure for purposes of the statute of limitation was 1,888 days, or approximately 5.2 years.

Notice of Trustee's Sale Recorded	Initial Sale Date	120 Days From Initial Sale Date	Tolling Days
1/5/2009	4/3/2009	8/1/2009	208
7/14/2010	10/15/2010	2/12/2011	213
12/10/2014	4/10/2015	8/8/2015	241

See CP 139–157 (notices of trustee's sale recorded January 5, 2009 and July 14, 2010).[6]

Erickson's petition appears to argue that tolling should not apply in this case, but provides no reason the holding in *Bingham* and the cases that follow it should not govern the result in this case. Erickson cites RCW 4.16.230—which was not discussed in the briefing below—but the citation only bolsters US Bank's position. RCW 4.16.230 tolls the relevant statute of limitation where there is a statutory prohibition on commencing an action. In a non-judicial foreclosure under the Deeds of Trust Act, the

[6] As noted above in footnote 3, the final notice of trustee's sale recorded December 10, 2014 did not appear in the trial court's record, but was submitted to the Court of Appeals as Exhibit A to US Bank's answering brief, and is a publicly-recorded document of which judicial notice is appropriate.

Moreover, the analysis has the same result whether the final notice of trustee's sale is considered or not. If the limitation period had been tolled for only 421 days (using only the first two non-judicial foreclosures), rather than 662 days (using all three), the number of days between default and foreclosure for purposes of the statute of limitation would be 2,219, or approximately 5.8 years. US Bank's foreclosure would thus fall within the six-year mark as to every defaulted payment under either analysis.

foreclosing party is statutorily prohibited from commencing or maintaining an action on the underlying obligation. *See* RCW 61.24.030(4) (it is a requisite to a trustee's sale "[t]hat 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 . . .")

Thus, from the time a notice of trustee's sale is recorded up to the time the sale is discontinued, the foreclosing party is prohibited from prosecuting an action to collect the underlying debt. The statute of limitation for an action on such debt is accordingly properly tolled, just as the *Bingham* and *Albice* courts have held. Indeed, even the recent, unpublished *Heintz* case cited in Erickson's petition notes that a non-judicial foreclosure "tolls the statute of limitations until 120 days after the date scheduled for nonjudicial foreclosure of the deed of trust." *Heintz v. U.S. Bank Tr., N.A. for LSF9 Master Participation Tr.*, No. 76297-4-I, 2018 WL 418915, at *3 (Wn. App. Jan. 16, 2018), review denied sub nom. *Heintz v. US Bank Tr.*, 190 Wn. 2d 1016, 415 P. 3d 1194 (2018).

Erickson's further argument that non-judicial foreclosure proceedings should not toll the statute of limitation if they do not result in a sale is also nonsensical. If a timely foreclosure does result in a sale, no tolling analysis is necessary or even possible because the foreclosure sale itself precludes any further claim on the underlying obligation. It is only when a foreclosure sale does not actually occur within 120 days of the original sale date that tolling could be relevant, as in the *Bingham*, *Albice*, and *Heintz* cases.

Finally, Erickson's argument that the decision of the Court of Appeals below upset the balance of interests reflected in Washington's Deeds of Trust Act is erroneous. As described above, the beneficiary is barred from pursuing an action on the underlying debt during non-judicial foreclosure proceedings. Moreover, where the beneficiary does initiate non-judicial foreclosure, the borrower enjoys numerous statutory protections that would not be available in the context of an action on the underlying debt, including among others the right to initial contact from the beneficiary or its representative (RCW 61.24.031), the unilateral right to cure any default up to eleven days before the foreclosure sale (RCW 61.24.090), and the right to meet with the beneficiary and participate in foreclosure mediation (RCW 61.24.163). Many borrowers can and do take advantage

of these protections to avoid foreclosure.[7] Moreover, the borrower retains both title and the right to use and enjoy the property during the pendency of any non-judicial foreclosure proceedings, even if the borrower has long since defaulted. None of these rights are disturbed in any way by the decision of the Court of Appeals in this case.

This case accordingly presents no issue of substantial public interest. Rather, the decision of the Court of Appeals represents a straightforward application of the tolling appropriately recognized by Washington law during the pendency of non-judicial foreclosure proceedings.

VI. CONCLUSION

The issues presented by Erickson's petition are inconsequential and do not merit review. Erickson's petition fails to identify any conflict between the decision of the Court of Appeals and any other decision. It

[7] *See, e.g.*, Quarterly Performance Report issued by the Washington Department of Commerce, available at https://deptofcommerce.app.box.com/s/z9sov8mwh6lelqormtdwvhma08cymbdo (noting a total of 105 homes retained through Washington's foreclosure mediation program in the second quarter of fiscal year 2018 alone) (last accessed August 20, 2018).

further fails to identify any issue of substantial public interest raised by this case. Erickson's petition for review should be denied.

Respectfully submitted this 27th day of August, 2018.

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By: *s/Garrett S. Garfield*

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CERTIFICATE OF SERVICE

I hereby certify that on the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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s/Garrett S. Garfield
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HOLLAND AND KNIGHT LLP

August 27, 2018 - 12:45 PM

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