Supreme Court No. 96902-7
Court of Appeals No. 35423-7-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FIBIA AND RADU BAHNEAN,

Plaintiffs and Counterclaim Defendants-Petitioners,

v.

HSBC BANK USA, N.A., AS TRUSTEE FOR DEUTSCHE ALT-A SECURITIES INC. MORTGAGE LOAN TRUST, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-AR,

Defendant and Third-Party Plaintiff-Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Petition for Review before this Court arises out of the Bahnean's misguided attempt to obtain title to their Property free of a mortgage lien, despite their admitted default. At trial, the Bahneans contended that enforcement of their Note was time-barred under a six-year statute of limitations for breach of a written contract, RCW 4.16.040. Rejecting this argument, the Trial Court found that the Note was a negotiable instrument governed by the statute of limitations set forth in RCW 62A.3-118(a), which only precluded the Trust[1] from obtaining installment payments due more than six years prior to the filing of the Trust's foreclosure complaint, but did not preclude foreclosure on the remaining amounts due.

On appeal, the Washington Court of Appeals, Division III, affirmed, determining that it did not matter whether RCW 62A.3-118(a) or RCW 4.16.040 applied, because both statutes provide that the limitations period for an installment contract runs separately from the date each installment payment is due. *Bahnean v. HSBC Bank USA*, No. 35423-7-III, 2019 WL 365802, at *2 (Wash. Ct. App. Jan. 29, 2019).

[1] The Trust's complete name is HSBC Bank USA, N.A., as Trustee for Deutsche Alt-A Securities Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2006-AR.

Now seeking review before this Court, the Bahneans contend that this Court should reject over 100 years of its own precedent, and find that RCW 4.16.040 runs from the date of a party's first default on an installment contract, and precludes enforcement of the Note in this case. The argument is not supported by reason or authority, and the Bahneans fail to identify an important public interest or conflict among any courts that would warrant this Court's review.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the Court of Appeals correctly determine that the statute of limitations did not preclude enforcement of the Note?

2. Is there any basis, as required under the Washington Rules of Appellate Procedure ("RAP"), Rule 13.4(b), for this Court to accept discretionary review of the Court of Appeals' unpublished opinion affirming grant of summary judgment in this routine foreclosure case?

3. Is the Trust entitled to an award of attorney's fees and costs incurred in responding to the Bahneans' Petition for Review?

III. COUNTERSTATEMENT OF THE CASE

A. The Bahneans Take Out a Loan to Purchase Property

In October 2006, the Bahneans executed a promissory note for $490,000.00 ("Note") secured by a deed of trust ("Deed of Trust") encumbering property owned by the Bahneans for the purpose of paying

off debt they had incurred. (CP 44, ¶¶ 7-8; CP 253 at 15:15-16:2; CP 257, ¶ 7.) The Note provided that the Bahneans would repay the loan in monthly installments, concluding November 1, 2036. (CP 257, ¶ 6; CP 270, §§ 1, 3.) Under the Note, the failure to pay an installment would constitute a default, and the Note Holder could – at its option and at a time of its choosing – require immediate payment of the Note in full. (CP 60, § 22; CP 104, § 7.)

The Note was subsequently transferred to HSBC Bank USA, N.A., as Trustee for the Deutsche Alt-A Securities Inc. Mortgage Loan Trust, Mortgage Pass-through Certificates Series 2006-AR (the "Trust"), and Ocwen Loan Servicing, LLC ("Ocwen"), became the servicer of the loan. (CP 36 at 4-16; CP 96 ¶ 1; CP 99, ¶ 11.)

B. A Notice of Default is Issued and the Bahneans File a Lawsuit to Stop Foreclosure Efforts; the Trust Counterclaims for Foreclosure

It is undisputed that the Bahneans fell into default under the terms of the Note and Deed of Trust. On June 4, 2014, Ocwen sent a notice of default ("Notice of Default") to the Bahneans regarding their Loan, providing various information and advising that the failure to cure may result in acceleration and/or foreclosure. (CP 99, ¶ 13; CP 137-142.)

On October 28, 2014, Ocwen received written correspondence from the Bahneans concerning the Loan. ("2014 Letter"). (CP 99, ¶ 14;

CP 144-145.) The 2014 Letter did not dispute the existence of the Loan, but instead disputed the *amount* of the Loan, expressed concerns that payments had not been properly applied, and requested a breakdown of amounts owing on the Loan, and other information. (CP 144-145.)

On March 9, 2015, the Bahneans filed the underlying action, seeking a judgment to quiet title to the Property on the grounds that the statute of limitations had expired on the Trust's ability to enforce the Note and Deed of Trust. (CP 1; 3-4.) In response, the Trust filed an Answer and Third-Party Complaint for Judicial Foreclosure. (CP 11-24.)

C. The Trial Court Rules that the Statute of Limitations Has Not Run on the Note and Enters a Judgment of Foreclosure

The Bahneans moved for summary judgment, arguing that the statute of limitations entitled them to quiet title to the Property and to dismissal of the Trust's foreclosure action. (CP 34-42.) According to the Bahneans, they defaulted on the Note in July 2008, and the failure of the Trust to sue on the Note or foreclose during the six years following that date now precluded their ability to do so pursuant to RCW 4.16.040(1), which the Bahneans argued was the relevant statute of limitations. (CP 38-39.) The Motion further argued that the Bahneans' 2014 Letter to Ocwen did not acknowledge the Loan, which would reset the statute of limitations. (CP 39-40.) In support of the Motion, the Bahneans each

filed a declaration attesting to the date of their default and declaring that their 2014 Letter was not intended to acknowledge the debt, but merely to "dispute and understand, post-bankruptcy, the amount of the debt which they had successfully avoided." (CP 44, ¶¶ 9, 15-18; CP 76, ¶¶ 9, 14-17.)

The Bahneans were deposed the following month, and the assertions in their declarations contradicted their sworn deposition testimony. For instance, Fibia Bahnean testified that the 2014 Letter was prepared by her attorney and she did not know why the letter was prepared or why it asked any specific question. (CP 184:18-21; CP 184:24-185:7; CP 185:23-186:25.) Radu Bahnean testified that he could not recall the 2014 Letter and could not recall signing the declaration submitted in support of his Motion for Summary Judgment. (CP 177:15-16; 178:12-179:3; 179:17-19.) Moreover, Mr. Bahnean was asked to examine the statement in his declaration that he "never intended to acknowledge any debt to HSBC via our 10/21/14 letter; [but] merely sought to dispute and understand, post-bankruptcy, the amount of the debt which we had successfully avoided." (CP 179:12-180:9.) Reviewing that sentence, Mr. Bahnean was asked if he could explain what he meant by that sentence. (CP 180:8-9.) He testified, "No, I can't. Because I can't understand it. I can't understand what's written here." (CP 180:10-11.)

The Trust opposed the Bahnean's motion for summary judgment, arguing that under Washington law the statute of limitations on negotiable instruments and installment contracts does not start to run until maturity or acceleration of the Loan; that the Loan did not mature until 2036 and had not been accelerated; and that, in any event, the 2014 Letter was a clear acknowledgment of the debt that reset the limitations period. (CP 81-93.)

The Trial Court found the Note was a negotiable instrument and the limitations period in RCW 62A.3-118(a) therefore applied, and the Trust was entitled under the statute to enforce all installment payments coming due after February 15, 2009. (CP 202-203, ¶¶1-4.)[2] In light of this Order, the Trust moved for summary judgment, adjusting its calculation of the total owed on the debt to remove payments coming due prior to February 15, 2009. (CP 207; CP 257-258, ¶ 9.) The Court granted the motion (CP 326-330) and later entered a Judgment and Decree of Foreclosure for a debt of more than $680,000. (CP 331-336.)

[2] Due to the Bahneans' failure to secure a transcript, the record is not clear how the Court reached the February 15, 2009 date. The Trust filed its counterclaim for foreclosure on May 15, 2015. (*See* Case No. 15-2-00062-7, Doc. 4.) However, the Trial Court did not preclude recovery on payments due prior to May 15, 2009 (six years prior to the date of filing for foreclosure), but instead precluded recovery on installment payments due prior to February 15, 2009. Presumably, the Court found that the statute of limitations was tolled three months by the Bahneans' bankruptcy, which lasted from their petition on July 31, 2009 to discharge on October 28, 2009. (CP 2, ¶¶ 10-11). This is consistent with the law in Washington. *See Merceri v. Deutsche Bank Ag*, 408 P.3d 1140, 1146 (2018) (finding the filing of a Chapter 7 Bankruptcy Petition tolled the six year limitations period for foreclosing on a deed of trust.)

D. The Bahneans' Appeal and Petition for Review

On appeal, the Bahneans argued that the Trial Court erred in applying RCW 62A.3-118(a) rather than RCW 4.16.040, and that RCW 4.16.040 required that the six year limitations period ran on the entire Note from the date of the first default. (Opening Br. at 7.) The Court of Appeals of Washington, Division III rejected the argument and affirmed the Trial Court. *Bahnean v. HSBC Bank USA*, No. 35423-7-III, 2019 WL 365802, at *3 (Wash. Ct. App. Jan. 29, 2019). The Court determined that it did not need to decide whether RCW 62A.3-118(a) or RCW 4.16.040 applied, because both statutes contained a six-year limitations period that ran from the date each installment was due under the contract because the contract had never been accelerated. *Id*. at *2-3.

IV. REASONS WHY REVIEW SHOULD BE DENIED

This Court should deny the Bahneans' Petition for Review because the Bahneans' Petition fails to show any actual error in the Court of Appeals' ruling, ignores alternative arguments the Court of Appeals could have independently relied on in order to affirm, and fails to satisfy this Court's standards for review.

A. The Bahneans' Petition for Review is Unsupported by Authority and Raises No Legitimate Legal Issue

The Bahneans' Petition fails to identify any error in the Court of Appeals' interpretation of the law, as further discussed below.

1. The Note's language does not cause an action for the entire Note to accrue at the moment of an initial default

The Bahneans argue that RCW 4.16.040 does not run separately from each installment due under the Note because the language in the Note specifies that the borrower is in default upon the first failure to pay an installment, and this is therefore the time that a cause of action accrues under the Note. (Petition at 11 (citing CP 104 ¶ 7(B).) To the contrary, when an installment payment is missed, a cause of action accrues only as to that installment payment. The lender may not sue on the entire note unless and until the lender has first provided clear and unequivocal notice of acceleration. *See Jacobson v. McClanahan*, 43 Wn. 2d 751, 754, 264 P.2d 253 (1953) (noting right to sue on installment payment does not accrue until installment payment comes due); *Cedar West Owners Association v. National Mortgage, LLC*, 434 P.3d 554, 559 (Wash. Ct. App. 2019) (holding statute of limitations runs on an installment contract "against each installment from the time it becomes due [because] that is [the] time when an action might be brought to recover it.")

2. Parties to a contract with severable obligations may breach the contract on multiple occasions, leading to a separate limitations period for each breach

The Bahneans contend that this Court's precedent in *Herzog v. Herzog*, 23 Wn.2d 382, 387-88, 161 P.2d 142 (1945) that the statute of

limitations on an installment contract runs from the date each installment is due was altered by the 1989 addition of RCW 4.16.005, which states that statute of limitations periods commence at the time "the cause of action has accrued." RCW 4.16.005. (Petition at 3, 11.) RCW 4.16.005 did not change the law, but rather reiterates long-standing authority in Washington that statutory limitation periods run from the date a cause of action accrues. *Bush v. Safeco Ins. Co. of Am.*, 23 Wn. App. 327, 329, 596 P.2d 1357, 1358 (1979) ("A cause of action generally accrues for purposes of the commencement of the statute of limitations when a party has a right to apply to court for relief"); RCW 4.16.010 (1983) ("Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued . . . .")

Herzog and its progeny do not conflict with RCW 4.16.005, but instead clarify *when* a cause of action accrues, noting 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." *Herzog*, 23 Wn. 2d at 388. *See also Graves v. Cascade Nat. Gas Corp.*, 51 Wn. 2d 233, 238-39, 316 P.2d 1096 (1957) (noting statute of limitations on a contract payable in installments ran from date of each separate installment, because the "statute runs from the time that the cause of action arises"); *Cedar West Owners Association*, 434 P.3d at 559

(holding statute of limitations runs from the time each installment becomes due because that is the "time when an action might be brought to recover it.")

The Bahneans also cite *Schwindt v. Commonwealth Ins. Co.*, 140 Wn. 2d 348, 997 P.2d 353 (2000) in support of their argument that their first breach of the Note should have commenced the running of the limitations period, arguing that under *Schwindt* the statute of limitations ran on an insurance contract on the date of breach of the contract. (Petition at 11). However, the *Schwindt* case deals with a single breach under the insurance contract, *i.e.*, the insurance company's denial of coverage for a single claim under the policy. *Schwindt*, 140 Wn. 2d at 353. As Washington courts have recognized for years, a "cause of action accrues when the party has the right to apply to a court for relief," *Gazija v. Nicholas Jerns Co.*, 86 Wn. 2d 215, 219, 543 P.2d 338 (1975), and this right can occur more than once when there are multiple breaches of a contract with severable obligations. *Graves*, 51 Wn. 2d at 238-39 (holding that for a contract requiring monthly payment for services, the "period of limitations began to run from the date that each month's bill was payable," resulting in a new limitations period for each unpaid month); *City of Snohomish v. Seattle-Snohomish Mill Co.*, 118 Wn. App. 1032, 2003 WL 22073066, *3 (2003) (noting that if suit were "to recover the amount

stated in monthly water bills, *Graves* would be directly on point, and the City's cause of action would accrue when each bill became due.")

In *A.A.C. Corp. v. Reed*, 73 Wn. 2d 612, 616, 440 P.2d 465 (1968), the Washington Supreme Court further explained that the reason multiple breaches of an installment contract can occur is because the failure to make a single installment payment does not obviate the remainder of the contract. When an installment payment is missed, "[t]he extended credit, as a matter of public record, does not terminate upon default alone." 73 Wn. 2d at 616. Instead, it terminates when the lender exercises its option to accelerate the debt. *Id*. Because a contract with severable payment obligations remains valid after the failure of one of those obligations unless and until a party exercises a contractual right to sue on all the obligations (here, accelerate the debt), it is possible to have multiple breaches of an installment contract until the lender, at its option, chooses to litigate the past breaches by accelerating the note in its entirety.

With regard to acceleration, the Bahneans overlook the fact that their Note and Deed of Trust does *not* require a lender to accelerate their debt and demand and sue for the entire debt, but instead provides a right for the lender to do so – but only at its option. As this Court has noted, "[t]he law is settled in this jurisdiction that even if the provision in an installment note provides for the automatic acceleration of the due date

upon default, mere default alone will not accelerate the note. A fortiori, the same result occurs when the note may be accelerated only at the option of the holder." *A. A. C. Corp.*, 73 Wn. 2d at 615. Here, it is undisputed that the Bahneans are in default and the Trust did not accelerate the Loan prior to filing suit. Accordingly, "the statute of limitations for each monthly payment accrued as the payment became due. There was no acceleration of the maturity date of the note." *Id*.

3. The Bahneans fail to provide a convincing argument that the precedent in *Herzog* is not relevant to an analysis of modern contracts

The Bahneans' Petition for Review asserts without explanation that *Herzog* should be reconsidered because it is not "relevant to an analysis of modern contracts" and further argue that the contract in the *Herzog* case did not concern a note secured by real property. (Petition at 2-3.) The *Herzog* case is relevant because it analyzed the statute of limitations applicable to any contract requiring severable payment obligations, finding that "[t]he rule supported by the weight of authority is 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 . . . ." 23 Wn.2d at 386. The fact that *Herzog* does not concern a note or mortgage specifically is immaterial, particularly in light of the over 100 years of Washington Supreme Court precedent discussing notes and

mortgages as installment contracts that give rise to separate statute of limitations periods commencing on the date each installment payment is due.[3] The Bahneans provide this Court no reason to overturn this long-established precedent.

4. It is irrelevant that Washington's Deed of Trust Act governing nonjudicial foreclosure envisions foreclosure of an entire loan

The Bahneans argue that *Hodges* is inconsistent with the Washington Deed of Trust Act, which presumes that any "foreclosure will be on an entire loan," not on certain installment payments. (Petition at 5.) The argument is irrelevant because (1) the Washington Deed of Trust Act's focus is the process through which a trustee can sell property through a nonjudicial foreclosure, a substantially different process than the judicial action at issue here, *Washington Fed. v. Harvey*, 182 Wn. 2d 335, 337, 340 P.3d 846 (2015), and (2) no party has argued that a lender may foreclose on property in order to pursue an installment payment rather than the entire loan.

5. Independent grounds existed for affirming the Trial Court

Further, review of the Court of Appeals' application of RCW 4.16.040 in this case is unwarranted and futile because the Trial Court's

[3] *See White v. McMillan*, 37 Wash. 34, 36, 79 P. 495, 496 (1905); *Weinberg v. Naher*, 51 Wash. 591, 99 P. 736 (1909); *First Nat. Bank v. Parker*, 28 Wash. 234, 237, 68 P. 756, 757 (1902); *A. A. C. Corp. v. Reed*, 73 Wash. 2d 612, 615, 440 P.2d 465, 467 (1968).

decision could have been affirmed by the Court of Appeals on two independent, alternative grounds: (1) the statute of limitations set forth in RCW 62A.3-118(a) applies and unambiguously provides that the statute runs from the due date of each installment payment and (2) the Bahneans acknowledged their debt in 2014, re-starting the limitations period.

RCW 62A.3-118(a) provides the statute of limitations for negotiable instruments, including the promissory note executed by the Bahneans. *Alpacas of America, LLC v. Groome*, 179 Wn. App. 391, 396, (2014); *Fed. Fin. Co. v. Gerard*, 90 Wn. App. 169, 172, 949 P.2d 412, 413 (1998); RCW 62A.3-102(a). That statute provides that "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the **due date or dates** stated in the note or, **if a due date is accelerated, within six years after the accelerated due date**." RCW 62A.3-118 (emphasis added). The statute unambiguously provides that the limitations period on a negotiable instrument runs from the date each installment payment is due, unless the note is accelerated. In the proceedings below, the Bahneans argued that the statute did not apply to the standard Note in this case because it was not a negotiable instrument, contrary to numerous Washington

authorities.[4] The Court of Appeals determined that it did not need to address the negotiability of the note, because application of RCW 62A.3-118 and RCW 4.16.040 resulted in the same limitations period under both statutes. *Bahnean*, 2019 WL 365802, at *2. The crux of the Bahneans' Petition for Review is their argument that this Court should re-evaluate RCW 4.16.040; however, such an investment is not warranted when RCW 62A.3-118 is the actual limitations period that applies and when the ability to enforce the Note clearly has not expired under that statute.

Further, even if this Court found the statute of limitations began to run on the date of the Bahneans' initial default, the Bahneans re-started the statute of limitations because their 2014 Letter to Ocwen (CP 144-145) constituted a written and signed acknowledgment of the debt that did not indicate an intent not to pay. RCW 4.16.280; *Matson v. Weidenkopf*, 101 Wn. App. 472, 478 (2000); *Jewell v. Long*, 74 Wn. App. 854, 857 (1994).

[4] *See Brown v. Washington State Dep't of Commerce*, 184 Wn.2d 509, 524, 359 P.3d 771, 777 (2015) ("The promissory note at issue in this case is a negotiable instrument governed by article 3 of the UCC.") *See also JP Morgan Chase Bank, N.A. v. David Morton, et al.*, No. 49846-4-II, 2018 WL 1505501, at *2 (Wash. Ct. App. Mar. 27, 2018) (unpublished) (considering note and deed of trust in foreclosure case before it and noting it is a negotiable instrument subject to Chapter 62A.3 RCW); *N. W. Mortgage Inv'rs Corp. v. Slumkoski*, 3 Wn. App. 971, 972, 478 P.2d 748, 749 (1970) (same); *Bucci v. Nw. Tr. Servs., Inc.*, 197 Wn. App. 318, 332, 387 P.3d 1139, 1146 (2016*), review den. sub nom. Bucci v. Nw. Tr. Servs*., 188 Wn.2d 1012, 394 P.3d 1011 (2017) (rejecting borrowers' argument that note secured by deed of trust was not a negotiable instrument.); *Manning v. Mortgage Elec. Registration Sys., Inc*., No. 73908-5-I, 196 Wn. App. 1043, 2016 WL 6534890, at *5 (2016) (unpublished) (same).

B. The Bahneans' Petition Does Not Satisfy any Requirement for Acceptance of Review

The Bahneans' Petition suffers a further defect in that it fails to satisfy this Court's requirements for review under RAP 13.4(b). The Bahneans' primary argument that review is warranted focuses on their claim that the Washington Supreme Court has not considered the application of the statute of limitations to an installment contract since the 1945 decision, *Herzog v. Herzog*, 23 Wn. 2d 383. This is not a basis for review under RAP 13.4; moreover, it is incorrect. In 1965, the Supreme Court considered *A.A.C. Corp v. Reed*, and again confirmed that the limitations period for suing on the entirety of an installment contract does not run from the date of the first untimely payment, but instead from the date of the lender's election to accelerate. 73 Wn. 2d at 616.

Further, this Court has recently denied review in other cases challenging the same precedent,[5] and all three divisions of the Washington Court of Appeals have recently confirmed in cases heard during the last six months that the statute of limitations set forth in RCW 4.16.040(1) runs against each installment from the time it becomes due. *See Cedar W. Owners Ass'n v. Nationstar Mortg., LLC*, 434 P.3d 554, 560 (Wash. Ct. App. 2019) (Division I); *CitiMortgage, Inc. v. Moseley*, No. 50895-8-II, 2019 WL 1040391, at *5 (Wash. Ct. App. Mar. 5, 2019) (Division II);

[5] *Merceri v. Bank of New York Mellon*, 434 P.3d 84, 87 (Wash. Ct. App.), *rev. den.*, 192 Wn. 2d 1008, 430 P.3d 244 (2018)

U.S. Bank Nat'l Ass'n as Tr. of Holders of Adjustable Rate Mortg. Tr. 2007-2 v. Ukpoma, 438 P.3d 141, 144 (Wash. Ct. App. 2019) (Division III). This rule is not only the clear law in Washington, it is the "general rule" across the country.[6]

The Bahneans' Petition for Review essentially requests that this Court disturb its long-standing precedent that acceleration of a note does not occur until the lender provides clear and unequivocal notice that it has accelerated the note. That precedent is also supported by more than 100 years of precedent from this Court. *See, e.g., Glassmaker v. Ricard*, 23 Wn. App. 35, 593 P.2d 179 (1979) (quoting *Weinberg*, 51 Wash. 591, 594, 99 P. 736 (1909)); *Puget Sound Mut. Sav. Bank v. Lillions*, 50 Wn. 2d 799, 803, 314 P.2d 935, 938 (1957). Altering this precedent would fundamentally disrupt the rights of borrowers to receive notice when a

[6] *See* Annotation, *When Statute of Limitations begins to run against action to recover upon contract payable in installments*, 82 A.L.R. 316 (orig. 1933, West 2018) (collecting cases and noting "the general rule" that the statute of limitations "begins to run from the expiration of the period fixed for the payment of each instalment as it becomes due, for the part then payable."); Baxter Dunaway, *Law of Distressed Real Estate*, 6 L. Distressed Real Est. § 73:87 (West 2019) ("The general rule regarding the running of the statute of limitations for installment contracts is that the limitations period begins running from the time each individual installment becomes due"); 25 David K. Dewolf, Keller W. Allen, & Darlene Barrier Caruso, Washington Practice: Contract Law and Practice § 16:21, at 511 (3d ed. 2014) ("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."); 18 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Transactions § 20.10, at 61 (2d ed. Supp. 2018) ("Where there has been no explicit acceleration of the note, the statute of limitations does not run on the entire amount due and non-judicial foreclosure can be begun within six years of any particular installment default and the amount due can be the then principal amount owing."); 31 Richard A. Lord, Williston on Contracts § 79:17, at 338 (4th ed. 2004) ("A separate cause of action arises on each installment, and the statute of limitations runs separately against each, except where the creditor has a right to accelerate payments on default and does so.")

lender opts to accelerate, and also obviate their right to avoid suit by curing their default at any time prior to receiving notice of acceleration. *Glassmaker*, 23 Wn. App. at 38 (finding lender could not sue on accelerated loan where borrowers cured default prior to receiving notice of acceleration); *Weinberg*, 51 Wash. at 596-97 (holding borrower remains able to tender overdue amounts to avoid acceleration at any time prior to acceleration by clear and unequivocal communication by lender).

The Bahneans also have not identified an important public interest warranting review. RAP 13.4(b)(4). They attempt to garner the sympathy of the Court by arguing that lenders are routinely delaying foreclosure in situations where borrowers have abandoned the property and re-started their lives, believing foreclosure has occurred. (Petition at 2-3.) They complain that the lender here slept on its rights for more than six years. (Petition at 11-12.) However, a lender has no obligation to rush to take responsibility for distressed Property, or to foreclose at the convenience of a borrower who has failed to keep his loan commitments. *Jacobson v. McClanahan*, 43 Wn. 2d 751, 754, 264 P.2d 253 (1953) (noting lender's failure to foreclose on first default does not prevent foreclosure on subsequent defaults). Indeed, the Deed of Trust executed by the Bahneans specifically provided that forbearance by the lender was not considered a waiver of the right to exercise any remedy in the future, including foreclosure. (CP 00057, § 12.)

Moreover, frequently, it is the borrowers who intentionally cause delay, prejudicing the right of a lender to foreclose. *See, e.g., Honse v. Clinton*, 190 Wn. App. 1022 (2015) (noting finding that purchasers of property had engaged in scheme to delay foreclosure). In any event, it is difficult to imagine how any borrower, who is the record owner of the property and must receive notice of foreclosure, could be unaware of whether a foreclosure has or has not occurred – except by willful ignorance or disregard.

Here, there is no evidence in the record that the Bahneans believed their Property had been previously foreclosed, or that they were harmed in any way by the delay in foreclosure. To the contrary, the Bahneans have taken an opportunistic approach to their lengthy default, attempting to avoid debt in excess of $600,000. "Undeniably, statutes of limitation serve a valuable purpose by promoting certainty and finality, and protecting against stale claims." *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn. 2d 525, 540, 199 P.3d 393, 400 (2009). Here, however, the Bahneans' Note did not mature until November 2036 (CP 270, § 3), and they therefore had no reasonable expectation of avoiding disputes on the Note prior to that date. The limitations period does not exist to short-circuit a borrower's promise to make payments twenty or more years into the future, or to provide a windfall to the borrower for breaching his obligations.

V. ENTITLEMENT TO ATTORNEY FEES

The Trust respectfully requests an award of costs and attorneys' fees as the prevailing party pursuant to RAP 14, RAP 18.1, and RCW 4.84.330 and RAP 18.1. It is undisputed that the Deed of Trust and Note provide for an award of attorney fees to the prevailing party who is required to litigate to enforce or interpret the provisions of the contract. (CP 00057 § 14, CP 00060 § 22, CP 00061 § 26, CP 00104 §7(E), CP 00116 § 9.) The Trust's defense of this appeal has been necessary to enforce its right to foreclose under the Deed of Trust and an award of fees and costs is therefore appropriate. *Deere Credit, Inc. v. Cervantes Nurseries, LLC*, 172 Wn. App. 1 (2012).

VI. CONCLUSION

For the reasons set forth above, the Trust requests that this Court deny the Bahneans' Petition for Review.

DATED this 3rd day of June, 2019.

HOUSER & ALLISON, APC

By: *s/ Emilie K. Edling*
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Of Attorneys for HSBC Bank USA, N.A., as Trustee for the Deutsche Alt-A Securities Inc. Mortgage Loan Trust, Mortgage Pass-through Certificates Series 2006-AR

CERTIFICATE OF SERVICE

I certify that on the 3rd day of June, 2019, I caused a true and correct copy of this ANSWERING BRIEF OF RESPONDENT HSBC BANK USA AS TRUSTEE to be served on the following via first class U. S. Mail, postage prepaid:

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Dated: June 3, 2019

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By: *s/ Shawn K. Williams*
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