No. 96924-8

SUPREME COURT OF THE STATE OF WASHINGTON

No.: 76812-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CEDAR WEST OWNERS ASSOCIATION,
a Washington nonprofit corporation,

Appellant,

vs.

QUALITY LOAN SERVICE CORPORATION OF WASHINGTON,
a Washington corporation,

Respondent,

and

NATIONSTAR MORTGAGE LLC, a Delaware limited liability company,

Respondent,

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Cedar West Owners Association ("Cedar West") is a Washington nonprofit corporation organized pursuant to the Washington Condominium Act, Ch. 64.34 RCW. Petitioner was the Appellant in the case before the Court of Appeals and the Plaintiff before the trial court.

B. COURT OF APPEALS DECISION

Cedar West seeks review of the Court of Appeals decision ("Published Opinion") filed February 5, 2019. The Court of Appeals decided that a deed of trust granted by a third party securing an obligation that had been in default for more than six years, remains an encumbrance on the real property owned by Cedar West, and that the deed of trust can be foreclosed by nonjudicial trustee's sale, to extinguish Cedar West's ownership of the real property.

C. ISSUES PRESENTED FOR REVIEW

(1) Does it continue to remain the public policy of this state requiring claims be timely brought before the courts, that a mortgage lender is subject to a *six year* statute of limitations (and not in substance a 36 or 46 year period for a 30 or 40 year term loan) in which to file a judicial foreclosure lawsuit or *complete* a nonjudicial foreclosure (trustee's

sale) proceeding, following a default on the loan? RCW 4.16.005; RCW 4.16.040(1); RCW 4.16.170. **Yes.**

(2) When more than six years has elapsed since a default on a deed of trust installment note, does the expiration of the six year statute of limitations nonetheless permit nonjudicial foreclosure of the deed of trust, with only those particular monthly loan payments due more than six years prior barred from foreclosure? RCW 4.16.005; RCW 4.16.040(1). **No.**

(3) Rather than filing a lawsuit to toll the statute of limitations, can a mortgage lender mail an unrecorded notice of default to only its third party borrower (not Cedar West), to toll the statute of limitations, unlike every other class of claimant in Washington? RCW 4.16.170; RCW 61.24.030; RCW 61.24.040. **No.**

(4) Can the Court of Appeals introduce, by way of its decision in this case, a new, judicially-created rule of law that provides that whether a notice of default tolls the statute of limitations requires a factual inquiry into whether "too much time" elapsed between mailing of the notice of default and any subsequent notice of trustee's sale - and if "too much time" did elapse, then the statute of limitations is only tolled upon the mailing of a subsequent notice of trustee's sale? RCW 4.16.170; RCW 61.24.030; RCW 61.24.040. **No.**

D. STATEMENT OF THE CASE

Appellant Cedar West Owners Association ("Cedar West") is a Washington nonprofit corporation duly organized pursuant to the Washington Condominium Act, Ch. 64.34 RCW for the administration of Cedar West, a condominium. (CP 244-5).

Under RCW 64.34.364(1) and the Declaration of Condominium, Cedar West has a continuing statutory lien against the condominium units, to secure the payment of all statutory assessments levied against the Unit by Cedar West. (CP 249). RCW 64.34.364(9) and the Declaration of Condominium provides that Cedar West may foreclose its statutory lien for assessments in like manner as any deed of trust, *i.e.,* judicially under Ch. 61.12 RCW, or nonjudicially under Ch. 61.24 RCW. (CP 249-50).

Judith J. Allen was the prior owner of the condominium unit commonly known as 1910 West Casino Road, Unit 111, Everett, Washington 98204 ("Unit"). (CP 245, 249). Allen is not a party to this appeal. Allen defaulted on her statutory assessment obligation to Cedar West. (CP 250). Cedar West commenced nonjudicial foreclosure proceedings to foreclose its lien, which resulted in a trustee's sale under which it was the winning bidder and was granted a Trustee's Deed. (CP 249-51). Pursuant to RCW 64.34.364(5), by electing to foreclose nonjudicially rather than judicially, Cedar West's foreclosure would not, by such trustee's sale, extinguish any *otherwise valid* deed of trust liens.

As owner of the Unit, Cedar West is renting the Unit to a third party tenant. (CP 246).

Almost two years later, Respondent Quality Loan Service Corporation Of Washington, as successor trustee under a purported deed of trust ("Foreclosure Trustee"), recorded a nonjudicial foreclosure Notice of Trustee's Sale ("Notice of Trustee's Sale"), mailed a copy to Cedar West, and posted a copy on the Unit door being occupied by Cedar West's tenants. (CP 245, 253-5, 257-8).

The Notice of Trustee's Sale asserted that the former owner, Allen, had granted a deed of trust to Mortgage Electronic Registrations Systems, Inc. ("MERS") as original beneficiary, recorded under Snohomish County Auditor's No. 200807100120. ("Deed of Trust"). (CP 253, 260-70). The Notice of Trustee's Sale failed to state the number of monthly payments that remained unpaid, nor stated the date of default on the loan; it simply stated that there was $97,163.75 past due. (CP 253-4). However, the Notice of Trustee's Sale stated that unpaid interest had accrued since May 1, 2010, which revealed that the monthly payments on the debt obligation had been in default since at least June 1, 2010. (CP 253-4). As more than six years had elapsed since the date of default without any trustee's sale having been conducted or any judicial foreclosure lawsuit having been filed, the debt obligation was barred from enforcement by the six year statute of limitations. RCW 4.16.040(1).

Later, in response to the trial court litigation that resulted in this appeal, Respondents produced to the trial court the notice of default that it had mailed only to its borrower Allen ("Notice of Default"). (CP 12-9). The Notice of Default confirmed that the debt obligation was to be paid by 30 years of monthly payments. (CP 13-4). The Notice of Default confirmed that Allen had defaulted on the debt obligation June 1, 2010, more than six years prior, with no trustee's sale having been completed and no judicial foreclosure lawsuit having been filed. (CP 13-4). Cedar West made demand on the Foreclosure Trustee to strike the threatened trustee's sale, as the Deed of Trust was time-barred from enforcement by the six year statute of limitations. (CP 276-9). The foreclosure trustee refused to strike the scheduled trustee's sale. (CP 274, 281-2).

Cedar West filed its Complaint, as amended, in Snohomish County Superior Court to protect its ownership of the Unit and preserve its corporate rental income from the threatened foreclosure under the Notice of Trustee' Sale. (CP 214-20, 301-7). The Amended Complaint asserted claims to restrain the Foreclosure Trustee from conducting the threatened trustee's sale, and claims against the Foreclosure Trustee and MERS' assignee Novastar to obtain declaratory relief (quiet title) that foreclosure of the Deed of Trust was time-barred by the applicable statute of limitations. (CP 214-19, 272). Cedar West filed its motion for restraining order to restrain the sale. (CP 284-300).

The trial court, and subsequently the Court of Appeals, decided that the deed of trust remains an encumbrance on the Unit, and that the deed of trust can be foreclosed by nonjudicial trustee's sale, to extinguish Cedar West's ownership of the Unit. (CP 129-30, 308-9).

E. ARGUMENTS WHY REVIEW SHOULD BE GRANTED.

1. The Supreme Court Should, for the First Time, Provide Direction Regarding the Applicability of the Statute of Limitations to Nonjudicial Foreclosures of Deeds of Trust.

The Supreme Court has never decided a case regarding the application of the statute of limitations to nonjudicial foreclosures of deeds of trust. Considering the risk of nonjudicial foreclosures that may be based on time-barred debt (as trustee sales are conducted without judicial oversight), this issue is of substantial public interest that should be determined by the Supreme Court under RAP 13.4(b)(4). ([Because the Deed of Trust Act] "dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor"). *Albice v. Premier Mortg. Servs. Of Wash. Inc.*, 174 Wn.2d 560, 567 (2012). This case illustrates a pressing need for the Supreme Court to finally give Washington deed of trust beneficiaries (mortgage lenders) and

Washington landowners clear directions regarding the applicability of the statute of limitations to nonjudicial foreclosures of deeds of trust.

Only very recently, under *Edmundson v. Bank of America, N.A.,* 194 Wn. App. 920 (2016), did the Court of Appeals issue, for the first time, a holding as to the application of the six year statute of limitations to nonjudicial foreclosure of a deed of trust securing an installment loan that had been in default (*with no acceleration*) for more than six years. The *Edmundson* Court's opinion did not examine the applicable statute of limitations, RCW 4.16.005, RCW 4.16.040(1). Instead, the *Edumundson* court resorted to the Supreme Court's *dicta* in the 1945 family law case *Herzog v. Herzog,* 23 Wn.2d 382 (1945) (regarding a judgment enforcement forbearance agreement), to conclude that when more than six years has elapsed since a default on an installment note, only those particular monthly loan payments due more than six years prior are barred from foreclosure (referred to here as the "Partial Bar Doctrine").

2. *Herzog* Does Not Address The Statute of Limitations For Causes of Action for Foreclosure In Washington.

The Court of Appeals holding that the Partial Bar Doctrine applies is based on the 72 year old family law case *Herzog v. Herzog,* 23 Wn.2d 382, 388 (1945). Nothing in *Herzog* addressed a deed of trust beneficiary's *cause of action for foreclosure*. The *Herzog* court only had

before it an agreement to *forbear* from *in personam* enforcement of a money judgment, stating 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." *Herzog,* 23 Wn.3d at 388 (*i.e.,* the Partial Bar Doctrine). The Doctrine is premised on the following, as Williston comments, without citation: "If, by its terms, the money is payable in installments, then no breach, however serious, as to earlier installments can resolve the creditor's right into a single claim for damages on the entire contract." Richard A. Lord, *Williston on Contracts* § 79:17 at 338 (4th ed. 2004).

Herzog involved the examination of a court's money judgment, which, but for an agreement to forbear, would have been enforceable immediately, and could have been enforced at any time up to the (then) six year lifespan of the judgment (but which had actually then expired). *Herzog,* 23 Wn.2d at 383-5. An agreement to forbear from enforcement of a judgment does not somehow take a judgment creditor's rights to enforce a judgment (and statutory time limitations on same) out of those statutory requirements, as was observed by the *Herzog* Court ("The obligation of respondent for future support of his minor child continued to arise from the decree; and the general rules of law pertaining to duration of that liability should be applied."). *Herzog,* 23 Wn.2d at 385. The time

permitted to enforce a judgment is wholly inopposite to the time permitted to nonjudicially foreclose on a deed of trust. The *Herzog* Court did not have before it examination of the applicable statute of limitations for a cause of action for nonjudicial foreclosure (which were not authorized until passage of the Deed of Trust Act, Ch. 61.24 RCW, many years later).

All of the above begs the question of the difference between the time under which a judgment may be enforced when there is a forbearance agreement (*Herzog*), versus the statute of limitations for a *cause of action for foreclosure.* Washington's six year statute of limitations, enacted *after Herzog,* mandates:

> Except as otherwise provided in this chapter, and except when in special cases a different limitation is prescribed by a statute not contained in this chapter, actions can only be commenced within the periods provided in this chapter after the *cause of action* has accrued.

RCW 4.16.005; and:

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

RCW 4.16.040(1) (emphasis added) (collectively, "Statute of Limitations"). In turn, "a cause of action accrues when every element of an action is susceptible to proof." *EPIC v. CliftonLarsonAllen LLP,* 199 Wn. App. 257, 274 (2017); *Woods View II, LLC v. Kitsap Co.,* 188 Wn. App. 1, 20, *rev. denied*, 184 Wn.2d 1015 (2015). In the context of foreclosure of a deed of trust in particular, the six year statute of

limitations accrues "when the party is entitled to enforce the obligations of the note." *Wash. Fed. Nat'l Ass'n v. Azure Chelan LLC,* 195 Wn. App. 644, 663 (2016). A *cause of action for foreclosure* accrues on the date of a default on an obligation *secured by a valid security interest in specific property that can be foreclosed. See, e.g., Fix v. Goetjen,* 83 Wash. 355, 357 (1915). A claim for foreclosure *is a cause of action*, and not simply an enforcement remedy, like a receivership or garnishment. *Umpqua Bank v. Shasta Apts., LLC,* 194 Wn. App. 685, 697-8 (2016) ("[In a] judicial [foreclosure] action or nonjudicial foreclosure action. . . a receivership is secondary to the main cause of action and is not itself an independent remedy").

An *in rem* cause of action *for foreclosure* does not require also bringing an *in personam* cause of action for breach of contract on the underlying obligation, *i.e.,* a claim of personal liability of the obligor on the secured obligation; rather, a foreclosure cause of action may proceed *in rem* against the collateral identified in the mortgage - and in the case of nonjudicial foreclosure, must be *in rem.* RCW 61.24.100(1) (nonjudicial foreclosure); *see also* RCW 61.12.050 (judicial foreclosure); *see, e.g., Robert Morton Organ Co. v. Armour,* 179 Wash. 392, 399-400 (1934).

Under RCW 61.24.090(1)(a), any borrower, landowner or third party lienholder has the right to pay only the past due amounts up to 11 days before trustee's sale, but thereafter the creditor may, *by right granted*

by this statute, require payment of and conduct a trustee's sale *for all amounts secured by the deed of trust, not just past due monthly payments*). Once a mortgage lender actually has its trustee conduct a trustee's sale, the creditor has the right to cry an opening bid for the *full debt due it*, and not just for those monthly payments that happen to be past due: No Washington case holds that a trustee's sale can be held only for the amounts that are then past due as of the date of such foreclosure sale.

Accordingly, the cause of action *for foreclosure* accrues on the date of default of the obligation, and because the mortgage lender can ultimately foreclose (cry a sale) for the *entire secured debt*, not just those monthly payments that are past due, the cause of action *for foreclosure based on default on the underlying obligation* begins to run on that date of default. And thus the premise for the Partial Bar Doctrine stated by Williston *supra* does *not* apply: A "breach, however serious, as to earlier installments" *can and does* "resolve the creditor's right into a single claim" for nonjudicial foreclosure (as opposed to "for damages on the entire contract") Richard A. Lord, *Williston on Contracts* § 79:17 at 338 (4th ed. 2004).

Logically, to apply the Partial Bar Doctrine to causes of action for foreclosures in Washington, a mortgage creditor would then need to be *prohibited* from crying a trustee's sale for any amounts that are not yet due as of the date of the foreclosure sale. But Washington foreclosure laws do

not so require, and indeed expressly authorize the mortgage lender's opening bid for the full debt it is owed, including monthly payments not yet due. RCW 61.24.090(1)(a).

Even legal commentary on those jurisdictions that have adopted the Partial Bar Doctrine note that foreclosure statutes in some states could effectively prevent application of the Doctrine: "[I]n any case *where not inconsistent* with the terms of mortgage *or statute*. . . the assumption upon which many cases have proceeded is that the statute of limitations. . . will run as to any instalment of principal from its due date." Annotation, *Statute of Limitations as Affecting Suit to Enforce Mortgage or Lien Securing Debt Payable in Instalments,* 153 A.L.R. 785, 786 (1944) (emphasis added). And, "obviously such a conclusion (application of the Doctrine) may rest in part upon the peculiarities of local law with reference to foreclosures, including provisions governing instalment foreclosures." 153 A.L.R. 785, 787 (1944). And also, "It is possible to hold that a statute of limitations applicable to the foreclosure of any lien expressly granted by contract and securing instalments of principle, commences to run at the time of the first default in payment of principle." 153 A.L.R. 785, 790 (1944).

3. Statute of Limitations Prohibits Creating a Special Judicial Exception for Deed of Trust Foreclosures.

In referencing the Partial Bar Doctrine, the *Herzog* Court acknowledged that it is a case law doctrine created by courts in other states addressing statutes of limitations on simple installment contracts. *Herzog,* 23 Wn.3d at 388 (citing Annotation, *When Statute of Limitations Begins to Run Against Action to Recover Upon Contract Payable in Instalments,* 82 A.L.R. 316, 317 (1933)). However, after *Herzog,* the statutes of limitations that have been subsequently enacted in Washington prohibit judicially-made exceptions to the statute of limitations. RCW 4.16.005, RCW 4.16.040(1)) (collectively, "Statute of Limitations"). The Statute of Limitations mandates, clearly and without any room for conditions, that a lawsuit must be *filed within six years of default on that obligation, i.e., within six years after a monthly mortgage loan payment goes unpaid.* The Statute of Limitations expressly prohibits any judicially created qualifications to its statutory mandate to effectively extend that six year limitations period; indeed to the contrary, our Legislature expressly provided that *only* "except when in *special cases* a different limitation is prescribed *by a statute"* can this mandate be modified. RCW 4.16.005. And here, there is no statute anywhere modifying the six year mandate of the Statute of Limitations. Indeed, RCW 4.16.005 was passed in 1989, and to the extent that *Herzog's* judgment forbearance analysis from 1945

could arguably be stretched so thin as to apply to the Statute of Limitations applicable to a *cause of action for foreclosure,* the passage of this statute in 1989 effectively seals the door on any such attempt to create a judicial exception now.

4. Foreclosure of a Deed of Trust Securing Time-Barred Debt is Prohibited.

As addressed *supra*, enforcement of the deed of trust is now time-barred by the statute of limitations. As the deed of trust does not secure any enforceable obligation, it is not a valid encumbrance on the Unit. *Walcker v. Benson and McLaughlin, P.S.,* 79 Wn. App. 739, 746 (1995). A decree quieting title as against any purported lien of the Deed of Trust should be entered. RCW 7.28.300; *Walcker,* 79 Wn. App. At 746. Any action taken by the foreclosure trustee to foreclose on the time-barred Deed of Trust would violate its trustee obligations under RCW 61.24.030(3) (default on valid obligation) and Ch. 19.86 RCW (Consumer Protection Act). The foreclosure trustee is subject to the Deed of Trust Act, Ch. 61.24 RCW, and is charged with an obligation to adequately inform itself regarding the purported beneficiary's right to foreclose. *Lyons v. U.S. Bank National Ass'n,* 181 Wn.2d 775, 787 (2014). If the Deed of Trust is time-barred, under the foregoing authorities, the

Foreclosure Trustee must be ordered permanently restrained from conducting any foreclosure of that time-barred Deed of Trust.

5. Public Policy On Nonjudicial Foreclosures Prohibits A Judicially-Created Extension of the Statute of Limitations.

With 30 (or 40) year fixed-term loans now being the norm, if the Partial Bar Doctrine applies to nonjudicial foreclosures, mortgage lenders will enjoy a statute of limitations no other class of claimant has in Washington: In substance, up to 36 or 46 years to commence a nonjudicial foreclosure. The Doctrine would be an effective end-run around the very purpose of statutes of limitation. In the context of nonjudicial foreclosures in particular, the Court of Appeals has observed:

> 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 "contesting the alleged default on any proper ground." RCW 61.24.030(6)(j); *see* RCW

> 61.24.130. Any such action certainly would expend judicial resources as this case has demonstrated.

Walcker v. Benson and McLaughlin, P.S., 79 Wn. App. 739, 745-6 (1995) (case citations omitted). Under the Statute of Limitations, mortgage lenders, just like every other class of lien claimant in Washington, must finally make a decision before the statutory time expires: *file* a judicial foreclosure lawsuit, *complete* a nonjudicial foreclosure, or forever abandon the claim. Every other class of lien claimant has a well-defined, definite time period (ranging from 8 months to 10 years) in which it must make this election to foreclose or charge off the debt: Federal tax liens, state tax warrants, condominium assessment liens, homeowner association liens, mechanics liens, etc. Our Legislature has in turn established a 6 year statute of limitations for nonjudicial foreclosures, a period that should not be extended up to 36 or 46 years by a judicially created exception.

6. A Notice of Default Is Not the Equivalent of Filing a Lawsuit to Toll the Statute of Limitations.

Edmundson examined whether the statute of limitations could be tolled by starting a nonjudicial foreclosure proceeding under Ch. 61.24 RCW, holding that the mailing of a nonjudicial foreclosure notice of default (to the borrower only) under RCW 61.24.030 tolls the statute of limitations. The Court did not examine the statute that mandates that a lawsuit must be filed to toll the statute of limitations, which requires:

> For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first.

RCW 4.16.170. It is well settled that only lawsuits toll statutes of limitations. *See, BP America Production Company v. Burton*, 549 U.S. 84, 91, 127 S. Ct. 638, 166 L. Ed. 2d 494 (2006). By way of comparison, California has specifically addressed this issue by statute, to the same effect, requiring that a nonjudicial foreclosure be conducted and a trustee's deed recorded before the expiration of their applicable statute of limitations. Cal. Civ. Cd. Sec. 882.020(b).

Although timely commencement of a judicial foreclosure would have tolled the statute, that did not occur here. RCW 4.16.170 is clear: Nonjudicial foreclosures aren't "actions" that are "commenced" by complaint and summons and thus do not toll the statute. Nonjudicial foreclosures must be *completed* within six years of default to avoid expiration of the statute of limitations.

Edmundson disregarded the statutory law that there is no time limit under which the next step in the nonjudicial foreclosure process must be taken, to wit, mailing a notice of trustee's sale that sets the public auction. RCW 61.24.030, RCW 61.24.040. As a result, under *Edmundson,* a mortgage lender need only issue a notice of default to toll the statute of limitations indefinitely, with no need to take further steps in the nonjudicial foreclosure process. This flaw has been subsequently

noted by lower courts: "Defendants are essentially arguing that a lender can sleep on its contractual rights indefinitely as long as it issues a notice of default before the statute runs. . . . Simply sending a notice through the mail does not satisfy the statute of limitations, however. . . . [T]hey are not a substitute for timely judicial action if an order of the court is ultimately needed." *Hartley v. Bank of America, N.A.,* 2017 U.S. Dist. LEXIS 32610 (D.C. W.D. Wash. 2017). In contrast, every lawsuit properly filed before the running of a statute of limitations will have time deadlines to prosecute those claims: Statutory deadlines to serve parties under RCW 4.16.170; deadlines imposed under court rule or case schedule orders; *see, e.g.,* Spokane Sup. Local R. 0.4.1; King Sup. Local R. 4; court clerk authority to dismiss for want of prosecution under CR 41(b)(2); and the like.

Further, under RCW 61.24.030(8), a notice of default is required to be provided (by mail) to no one but a mortgage lender's borrower and, if different, the grantor of the deed of trust: Third parties who become vested in title to the property following another creditor's foreclosure sale, such as Cedar West, have no statutory right to be mailed a notice of default. A notice of default is a private notice to a borrower, that cannot be found in any records of any county auditor nor of any court, that would give notice to anyone that an action has commenced prior to running of the statute of limitations.

Addressing the *Edmundson* flaw that the statute of limitations is indefinitely tolled upon mailing a notice of default, the Court of Appeals in this case introduced a new, judicially-created rule of law: To determine whether a notice of default tolls the statute of limitations now requires a trial court factual inquiry into whether "too much time" elapsed between mailing of the notice of default and any subsequent notice of trustee's sale ("the lender must act diligently," Op. at 14) - and if "too much time" did elapse, then the statute of limitations is only tolled upon the mailing of a subsequent notice of trustee's sale. This new "too much time" test is not supported by any statute, is unworkable in practice, and creates unacceptable uncertainty in determining exactly when the statute of limitations has expired: How is any landowner under threat of nonjudicial foreclosure (who, if not the borrower, has no right to receive a statutory notice of default under RCW 61.24.030) supposed to determine if the statute of limitations has expired, if the six year anniversary of an installment loan payment default falls *before* the mailing of a notice of trustee's sale? File a restraint lawsuit, post the RCW 61.24.130 bond, force the mortgage lender to produce the notice of default and have the trial court review the dates of mailings of the statutory notice of default and the notice of trustee's sale, wait for some explanation from the mortgage lender as to why that much time elapsed, and then see if the trier of fact (under this new test) determines that "too much time" indeed

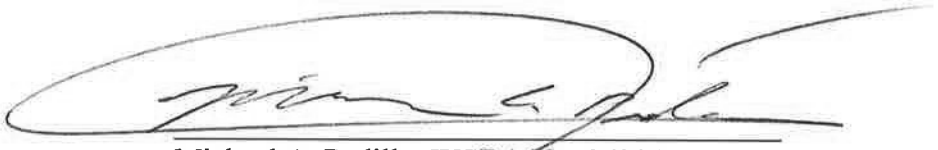
elapsed? This is not how nonjudicial foreclosures, which have no judicial oversight, are supposed to work: The Deed of Trust Act, Ch. 61.24 RCW, must further three objectives: An efficient and inexpensive nonjudicial foreclosure process, adequate opportunity to prevent wrongful foreclosure, and promotion of stability of land titles. *Cox v. Helenius,* 103 Wn.2d 383, 387 (1985). This new test accomplishes none of that. Direction from the Supreme Court is desperately needed on what the applicable statute of limitations is, and how it is to be applied to nonjudicial foreclosures. The Briefs filed before the Court of Appeals detail at length the long list of U.S. District Court cases struggling to apply the *Edmundson* holdings.

F. CONCLUSION

The petition seeks reversal of the Court of Appeals' Opinion, and (a) hold that the statute of limitations bars enforcement of the deed of trust through nonjudicial foreclosure, and thus the deed of trust is an invalid lien, and (b) hold that only the timely filing of a lawsuit tolls the statute of limitations, not the mailing of a notice of default or notice of trustee's sale.

Dated this 6 day of March, 2019.

STRICHARTZ ASPAAS PLLC



Michael A. Padilla, WSBA No. 26284
Attorneys for Petitioner Cedar West Owners Association, a Washington nonprofit corporation

CERTIFICATE OF SERVICE

MONICA AGUIRE declares and states as follows:

1. I am a paralegal at the law firm Strichartz Aspaas PLLC, am over the age of 18, and am otherwise competent to testify.

2. This is to certify that on the 6 day of March, 2019, I did cause to be served a true and correct copy of the foregoing Petition for Review and this Certificate of Service by the method indicated below and addressed to the following parties:

Michael J. Kapaum Steven J. Dixson Witherspoon Kelley 422 West Riverside Ave. Suite 1100 Spokane, WA 99201	☐ via US First Class Mail X Delivery via ABC Messenger Service X via Electronic Mail X via Email to mjk@witherspoonkelley.com X via Email to sjd@witherspoonkelley.com
Robert McDonald Quality Loan Service Corp Corp of WA 108 1st Avenue South, Suite 202 Seattle, WA 98104	☐ via US First Class Mail X Delivery via ABC Messenger Service X via Electronic Mail X via Email to rockymcdonald@gmail.com X via Email to rmcdonald@qualityloan.com

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct:

Dated this 6 day of March, 2019 at Seattle, Washington

Monica Aguire, Paralegal

APPENDIX A

Court of Appeals Opinion - *Cedar West Owners Association v. Quality Loan Service Corporation of Washington, et al.*

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CEDAR WEST OWNERS ASSOCIATION, a Washington nonprofit corporation, Appellant, v. NATIONSTAR MORTGAGE, LLC, a Delaware Limited Liability Company, Respondent, QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation, Defendant.	)	No. 76812-3-I DIVISION ONE PUBLISHED OPINION FILED: February 5, 2019

SCHINDLER, J. — Cedar West Owners Association appeals dismissal of the quiet title action against Nationstar Mortgage LLC. Cedar West asserts the nonjudicial foreclosure on a deed of trust that secures an installment payment promissory note is barred by the six-year statute of limitations. We reject the argument that the first missed payment on an installment promissory note triggers the six-year statute of limitations to foreclose on the deed of trust. We adhere to our decision in Edmundson v. Bank of America, N.A., 194 Wn. App. 920, 378 P.3d 272 (2016), and hold the six-year statute of

limitations on an installment promissory note is triggered by each missed monthly installment payment at the time it is due. We also hold that when a nonjudicial foreclosure action tolls the statute of limitations involves a factual inquiry. In this case, the undisputed record establishes the notice of trustee's sale tolled the statute of limitations and Nationstar Mortgage is entitled to foreclose on the installment payments due on and after November 1, 2010. We affirm dismissal of the quiet title lawsuit against Nationstar Mortgage and the order allowing the trustee to schedule a nonjudicial foreclosure sale.

FACTS

The material facts are not in dispute. In June 2008, Countrywide Bank FSB loaned Judith Allen $158,847 to purchase a condominium unit located at 1910 West Casino Road, Apartment 111, in Everett. Allen agreed to a 30-year mortgage and monthly payments.

On June 16, 2008, Allen signed a promissory note for the loan amount. The promissory note requires Allen to make monthly payments until July 1, 2038. Allen executed a "Deed of Trust" on the condominium unit to secure the promissory note. The Deed of Trust states:

> Borrower owes Lender the principal sum of ONE HUNDRED FIFTY EIGHT THOUSAND EIGHT HUNDRED FORTY SEVEN and 00/100 Dollars (U.S. $158,847.00). This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which provides for monthly payments, with the full debt, if not paid earlier, due and payable on JULY 01, 2038. This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys

to the Trustee, in trust, with power of sale, the following described property located [at] . . . 1910 W CASINO RD APT 111, EVERETT Washington 98204-2114 ("Property Address").

If Allen defaults on the monthly payments, the Deed of Trust gives the lender the discretion to accelerate the debt and gives the borrower the right to reinstate.

> **9. Grounds for Acceleration of Debt.**
> **(a) Default.** Lender may, except as limited by regulations issued by the Secretary, in the case of payment defaults, require immediate payment in full of all sums secured by this Security Instrument if:
> (i) Borrower defaults by failing to pay in full any monthly payment required by this Security Instrument prior to or on the due date of the next monthly payment, or
> (ii) Borrower defaults by failing, for a period of thirty days, to perform any other obligations contained in this Security Instrument.
>
> . . . .
>
> **10. Reinstatement.** Borrower has a right to be reinstated if Lender has required immediate payment in full because of Borrower's failure to pay an amount due under the Note or this Security Instrument. This right applies even after foreclosure proceedings are instituted. To reinstate the Security Instrument, Borrower shall tender in a lump sum all amounts required to bring Borrower's account current including, to the extent they are obligations of Borrower under this Security Instrument, foreclosure costs and reasonable and customary attorneys' fees and expenses properly associated with the foreclosure proceeding. Upon reinstatement by Borrower, this Security Instrument and the obligations that it secures shall remain in effect as if Lender had not required immediate payment in full. However, Lender is not required to permit reinstatement if: (i) Lender has accepted reinstatement after the commencement of foreclosure proceedings within two years immediately preceding the commencement of a current foreclosure proceeding, (ii) reinstatement will preclude foreclosure on different grounds in the future, or (iii) reinstatement will adversely affect the priority of the lien created by this Security Instrument.[1]

The Deed of Trust designates LS Title of Washington as the "Trustee" and Mortgage Electronic Registration Systems Inc. as the beneficiary "solely as nominee for Lender."

[1] Boldface in original.

The Deed of Trust incorporates a "Condominium Rider." Allen executed the Condominium Rider on June 16, 2008 and agreed to "pay all dues and assessments imposed pursuant to the legal instruments creating and governing" Cedar West Condominiums. The Deed of Trust and Condominium Rider were recorded on July 10, 2008.

Allen made monthly payments on the promissory note through May 2010. Allen did not make the June 1, 2010 payment or any of the following monthly payments. Allen also stopped paying condominium dues and assessments.

Cedar West Owners Association (Cedar West) foreclosed its lien for unpaid dues and assessments Allen owed in the amount of $17,371.34. Cedar West bid the amount owed at the foreclosure. As the highest bidder, Cedar West acquired title to the condominium unit. Cedar West recorded a "Trustee's Deed" on April 24, 2015. Cedar West rents the condominium unit.

In September 2015, the lender appointed Quality Loan Service Corporation of Washington (Quality Loan) as the successor Trustee under the Deed of Trust. On October 7, 2015, Quality Loan sent a notice of default to Allen. The notice of default states Allen is in default on the obligation secured by the promissory note and Deed of Trust. The notice states Allen is in arrears and had not paid principal and interest from June 1, 2010 through October 15, 2015 in the amount of $71,460.38; advances and late charges of $567.90; and "other charges, costs and fees" of $960.64.

The notice of default states the failure to either reinstate or cure the default within 30 days by paying $72,988.92 "may lead to recordation, transmittal and publication of a

Notice of Sale" and sale of the condominium unit "at public auction."

> **REINSTATEMENT: IMPORTANT! PLEASE READ!**
> UNTIL SUCH TIME AS A NOTICE OF TRUSTEE'S SALE IS RECORDED, THE ESTIMATED TOTAL AMOUNT NECESSARY TO REINSTATE YOUR NOTE AND DEED OF TRUST IS THE SUM OF PARAGRAPHS 2 AND 3 IN THE AMOUNT OF **$72,988.92**, PLUS ANY MONTHLY PAYMENTS, LATE CHARGES, OR BENEFICIARY COSTS WHICH HAVE BECOME DUE SINCE THE DATE OF THIS NOTICE OF DEFAULT. Any new defaults not involving payment of money that occur after the date of this notice must also be cured in order to effect reinstatement. **In addition, because some of the charges can only be estimated at this time, and because the amount necessary to reinstate may include presently unknown expenditures required to preserve the property or to comply with state or local law, it will be necessary for you to contact the trustee before the time you tender reinstatement so that you may be advised of the exact amount you will be required to pay.**[2]

In July 2016, the lender assigned the promissory note and the Deed of Trust to Nationstar Mortgage LLC (Nationstar).

On October 18, 2016, Quality Loan recorded the "Notice of Trustee's Sale." The notice states condominium unit 111 located at 1910 West Casino Road is subject to a Deed of Trust recorded on June 16, 2008 and the amount in arrears is $97,163.75. The notice states the sale will be discontinued if the amount in default is paid 11 days before the sale date of February 24, 2017.

NOTICE OF TRUSTEE'S SALE

. . . .

. . . .

III. The default(s) for which this foreclosure is made is/are as follows: Failure to pay when due the following amounts which are now in arrears: **$97,163.75**.

IV. The sum owing on the obligation secured by the Deed of Trust is: The principal sum of **$155,048.43**, together with interest as provided in the Note from **5/1/2010** on, and such other costs and fees as are provided by statute.

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[2] Emphasis in original; boldface in original.

> V. The above-described real property will be sold to satisfy the expense of sale and the obligation secured by the Deed of Trust as provided by statute. Said sale will be made without warranty, expressed or implied, regarding title, possession or encumbrances on **2/24/2017**. The defaults referred to in Paragraph III must be cured by **2/13/2017** (11 days before the sale date), or by other date as permitted in the Note or Deed of Trust, to cause a discontinuance of the sale. The sale will be discontinued and terminated if at any time before **2/13/2017** (11 days before the sale), or by other date as permitted in the Note or Deed of Trust, the default as set forth in Paragraph III is cured and the Trustee's fees and costs are paid.
>
> . . . .
>
> **THIS NOTICE IS THE FINAL STEP BEFORE THE FORECLOSURE OF YOUR HOME.**
>
> You have only 20 DAYS from the recording date of this notice to pursue mediation.[3]

On February 10, 2017, Cedar West filed a lawsuit against Quality Loan and Nationstar to quiet title to the property and enjoin the trustee's sale. Cedar West alleged the six-year statute of limitations barred the nonjudicial foreclosure. The court entered an order enjoining the foreclosure.

Cedar West stipulated Quality Loan would not participate in the litigation but "shall be bound by whatever order or judgment is issued in the Action by the Court regarding the Property and Deed of Trust."

Nationstar filed a CR 12(b)(6) motion to dismiss the lawsuit. Nationstar argued the six-year statute of limitations does not bar the nonjudicial foreclosure action. Nationstar asserted the six-year statute of limitations on an installment promissory note begins to run when the borrower does not pay the amount due for each monthly installment payment.

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[3] Emphasis in original; boldface in original.

Cedar West argued there is no dispute Allen defaulted on her obligation under the promissory note. Cedar West claimed the six-year statute of limitations is triggered when Allen did not make the first missed installment payment on June 1, 2010. Cedar West asserted that because the Trustee did not record the Notice of Trustee's Sale until October 18, 2016, the six-year statute of limitations barred the nonjudicial foreclosure action.

The court dismissed the lawsuit against Nationstar with prejudice, dissolved the injunction restraining the trustee's sale, and entered an order allowing a trustee's sale on the property.

ANALYSIS

Cedar West contends the court erred in dismissing the lawsuit against Nationstar to quiet title and restrain foreclosure and the trustee's sale.

We review the decision to dismiss under CR 12(b)(6) de novo as a question of law. FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 180 Wn.2d 954, 962, 331 P.3d 29 (2014). Where, as here, a party submits evidence that was not in the original complaint, such submissions convert a motion to dismiss to a motion for summary judgment. McAfee v. Select Portfolio Servicing, 193 Wn. App. 220, 226, 370 P.3d 25 (2016).

We review summary judgment dismissal de novo. Kofmehl v. Baseline Lake, LLC, 177 Wn.2d 584, 594, 305 P.3d 230 (2013). Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Kofmehl, 177 Wn.2d at 594.

Cedar West claims it is entitled to quiet title to the condominium because the six-year statute of limitations bars foreclosure of the Deed of Trust that secures the promissory note. RCW 7.28.300 provides:

> The record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations.

An action on a contract or agreement in writing "shall be commenced within six years." RCW 4.16.040(1). The promissory note and the deed of trust are written contracts subject to the six-year statute of limitations under RCW 4.16.040(1). Edmundson v. Bank of Am., N.A., 194 Wn. App. 920, 927, 378 P.3d 272 (2016); Merceri v. Bank of N.Y. Mellon, 4 Wn. App. 2d 755, 759, ___ P.3d ___ (2018); Westar Funding, Inc. v. Sorrels, 157 Wn. App. 777, 784, 239 P.3d 1109 (2010).

An action "can only be commenced" within six years "after the cause of action has accrued." RCW 4.16.005. The six-year statute of limitations on a deed of trust accrues "when the party is entitled to enforce the obligations of the note." Wash. Fed., Nat'l Ass'n v. Azure Chelan LLC, 195 Wn. App. 644, 663, 382 P.3d 20 (2016).

Cedar West contends the six-year statute of limitations on the promissory note begins to run on the date of the first missed payment on June 1, 2010 and bars foreclosure on the Deed of Trust that secured the promissory note. We considered and rejected the same argument in Edmundson.

In Edmundson, we considered when the six-year statute of limitations period begins on a deed of trust payable in installments. The borrowers argued the statute of limitations for all sums owed on an installment note accrued on the date of the first missed payment. Edmundson, 194 Wn. App. at 929.

We addressed the dispositive distinction between a demand promissory note and an installment promissory note. Edmundson, 194 Wn. App. at 927-32. A demand promissory note is payable on the date of execution. Edmundson, 194 Wn. App. at 929.

> "An instrument is payable immediately if no time is fixed and no contingency specified upon which payment is to be made. A demand note is payable immediately on the date of its execution—that is, it is due upon delivery thereof; and, unless a statute declares otherwise, or a contrary intention appears expressly or impliedly upon the face of the instrument, a right of action against the maker of a demand note arises immediately upon delivery and no express demand is required to mature the note or as a prerequisite to such right to action, commencement of a suit being sufficient demand for enforcement purposes."

Edmundson, 194 Wn. App. at 929[4] (quoting GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 135, 317 P.3d 1074, review denied, 181 Wn.2d 1008, 335 P.3d 941 (2014)).

Relying on the Washington Supreme Court decision in Herzog v. Herzog, 23 Wn.2d 382, 161 P.2d 142 (1945), we concluded that unlike a demand note, the six-year statute of limitations on an installment promissory note accrues for each monthly installment from the time it becomes due. Edmundson, 194 Wn. App. at 930 (citing Herzog, 23 Wn.2d at 388).

> In Herzog v. Herzog, the supreme court addressed when the six-year statute of limitations on a written agreement accrues. The court first distinguished a demand note from an installment note. The court stated that the statute of limitation accrues on a demand note when it is executed.
>
> But the obligation before the supreme court in that case was not a demand note. The note before the court provided for installment payments. Accordingly, the court held 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."

Edmundson, 194 Wn. App. at 930[5] (quoting Herzog, 23 Wn.2d at 388).

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[4] Internal quotation marks omitted.

[5] Footnote omitted.

We adhere to the decision in Edmundson and hold the statute of limitations accrues for each monthly installment from the time it becomes due.[6] See also Merceri, 4 Wn. App. 2d at 759; accord 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."); 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."); 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."). Because Allen did not pay the monthly installment amount due on June 1, 2010 or thereafter, the statute of limitations for each missed payment accrued and the six-year statute of limitations began to run on the date the payment was due.

Cedar West cites RCW 4.16.170 to argue a nonjudicial foreclosure action does not toll the statute of limitations. RCW 4.16.170 states, in pertinent part, "For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first." Cedar West asserts that because a nonjudicial foreclosure action is not commenced by filing a complaint or

[6] Contrary to the assertion of Cedar West, Herzog and Edmundson did not adopt an exception to the six-year statute of limitations for nonjudicial foreclosure on a deed of trust.

serving a summons, a nonjudicial foreclosure action does not toll the statute of limitations. We disagree.

The Deeds of Trust Act (Act), chapter 61.24 RCW, governs actions to enforce a promissory note or other debt instrument that is secured by a deed of trust. Walker v. Quality Loan Serv. Corp. of Wash., 176 Wn. App. 294, 305, 308 P.3d 716 (2013). The Act furthers three basic objectives: an efficient and inexpensive nonjudicial foreclosure process, adequate opportunity to prevent wrongful foreclosure, and promotion of the stability of land titles. Cox v. Helenius, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). Because the Act "dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor." Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).

Even if commencement of the nonjudicial foreclosure action tolled the running of the six-year statute of limitations, Cedar West argues the October 18, 2016 Notice of Trustee's Sale and not the October 7, 2015 notice of default tolled the statute of limitations.

RCW 61.24.030 sets forth the mandatory requirements for nonjudicial foreclosure. As a prerequisite to a trustee's sale, the plain language of RCW 61.24.030(8) states the lender or trustee shall transmit a written notice of default to the borrower and grantor at least 30 days before a notice of trustee's sale is recorded. Former RCW 61.24.030 (2012) states, in pertinent part:

> It shall be requisite to a trustee's sale:
>
> . . . .
>
> (8) That at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default shall be transmitted by the

> beneficiary or trustee to the borrower and grantor at their last known addresses by both first-class and either registered or certified mail, return receipt requested, and the beneficiary or trustee shall cause to be posted in a conspicuous place on the premises, a copy of the notice, or personally served on the borrower and grantor. This notice shall contain the following information:
>
> (a) A description of the property which is then subject to the deed of trust;
>
> (b) A statement identifying each county in which the deed of trust is recorded and the document number given to the deed of trust upon recording by each county auditor or recording officer;
>
> (c) A statement that the beneficiary has declared the borrower or grantor to be in default, and a concise statement of the default alleged;
>
> (d) An itemized account of the amount or amounts in arrears if the default alleged is failure to make payments;
>
> (e) An itemized account of all other specific charges, costs, or fees that the borrower, grantor, or any guarantor is or may be obliged to pay to reinstate the deed of trust before the recording of the notice of sale;
>
> (f) A statement showing the total of (d) and (e) of this subsection, designated clearly and conspicuously as the amount necessary to reinstate the note and deed of trust before the recording of the notice of sale;
>
> (g) A statement that failure to cure the alleged default within thirty days of the date of mailing of the notice, or if personally served, within thirty days of the date of personal service thereof, may lead to recordation, transmittal, and publication of a notice of sale, and that the property described in (a) of this subsection may be sold at public auction at a date no less than one hundred twenty days in the future, or no less than one hundred fifty days in the future if the borrower received a letter under RCW 61.24.031;
>
> (h) A statement that the effect of the recordation, transmittal, and publication of a notice of sale will be to (i) increase the costs and fees and (ii) publicize the default and advertise the grantor's property for sale;
>
> (i) A statement that the effect of the sale of the grantor's property by the trustee will be to deprive the grantor of all their interest in the property described in (a) of this subsection;
>
> (j) A statement that the borrower, grantor, and any guarantor has recourse to the courts pursuant to RCW 61.24.130 to contest the alleged default on any proper ground.

The purpose of the notice of default is to notify the debtor that the amount owed is in default and there is a statutory right to cure the default before recording a notice of trustee's sale. Koegel v. Prudential Mut. Sav. Bank, 51 Wn. App. 108, 112, 752 P.2d

385 (1988); Leahy v. Quality Loan Serv. Corp. of Wash., 190 Wn. App. 1, 7, 359 P.3d 805 (2015). The written notice of default must provide pertinent information, including "[a]n itemized account of the amount or amounts in arrears" and the right to cure. RCW 61.24.030(8)(a)-(l). The Act does not require the lender or the trustee to record the notice of default.

The notice of trustee's sale "must be recorded to give notice to the world that a foreclosure sale is scheduled for a specific date." Leahy, 190 Wn. App. at 7. In contrast to the notice of default, the notice of trustee's sale must include the amount in arrears; the right to cure; and the date, time, and location of the trustee's sale. RCW 61.24.040(2)(d).

The trustee may postpone the foreclosure sale for up to 120 days but not beyond the 120-day period. RCW 61.24.040(10). After the 120-day period expires, a new trustee's sale must be scheduled and a new notice of trustee's sale issued and recorded to ensure potential buyers are informed of the new sale date. Leahy, 190 Wn. App. at 7; Albice, 174 Wn.2d at 568. The Act does not require the lender to transmit a new notice of default before each new notice of trustee's sale. Leahy, 190 Wn. App. at 5.

The commencement of a nonjudicial foreclosure proceeding tolls the six-year statute of limitations period. Bingham v. Lechner, 111 Wn. App. 118, 131, 45 P.3d 562 (2002); Edmundson, 194 Wn. App. at 930. The Act requires that at least 30 days elapse after transmitting the notice of default before recording a notice of trustee's sale.

But the Act does not establish a deadline for recording the notice of trustee's sale.[7] When the nonjudicial foreclosure action tolls the statute of limitations is a factual inquiry.

Edmundson has been interpreted too broadly to mean filing a notice of default definitively tolls the statute of limitations. In Edmundson, we concluded that transmitting the notice of default shortly before the expiration of the six-year statute of limitations followed by timely recording a notice of trustee's sale "is all that is required under the circumstances of this case." Edmundson, 194 Wn. App. at 930.[8]

> [T]his notice [of default] is evidence of resort to the remedies of the Deeds of Trust Act for the defaults of the Edmundsons under this deed of trust. This preceded the running of the six-year period of the statute of limitations. That is all that is required under the circumstances of this case.

Edmundson, 194 Wn. App. at 930 (citing RCW 61.24.030(8)).

In Bingham, we held that recording the notice of trustee's sale tolled the statute of limitations but not indefinitely. Bingham, 111 Wn. App. at 131. In Bingham, the trustee recorded a notice of trustee's sale but did not hold the trustee's sale. Bingham, 111 Wn. App. at 131. Because the trustee did not continue the sale, we concluded the statute of limitations restarted either on the date scheduled for the foreclosure or the last day to which it could have been continued, 120 days later. Bingham, 111 Wn. App. at 131.

We hold that after filing a notice of default, the lender must act diligently to pursue and perfect nonjudicial foreclosure remedies under the Act. Here, the record shows the lender transmitted the notice of default to the borrower on October 7, 2015. The notice states the amount in arrears is $72,988.92. On October 18, 2016, the

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[7] We recognize the legislative prerogative to establish a deadline.

[8] Emphasis added.

Trustee recorded the Notice of Trustee's Sale. The Notice of Trustee's Sale states the amount in arrears is $97,163.75. Nationstar concedes nothing in the record shows Nationstar took any steps to pursue nonjudicial foreclosure for over a year after the notice of default was transmitted to the borrower. Because of this unexplained delay and consistent with the statutory right to notice of the amount in default and the right to reinstate and cure, 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. Because the statute of limitations begins to run on each installment payment from the date it is due, Nationstar is entitled to foreclosure on installment payments due on and after November 1, 2010.

We affirm dismissal of the quiet title action and the order allowing the Trustee to schedule the nonjudicial foreclosure sale.

Schindler, J.

WE CONCUR:

Andrus, J.

Leach, J.

STRICHARTZ ASPAAS PLLC

March 06, 2019 - 11:14 AM

Transmittal Information

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Appellate Court Case Number:	76812-3
Appellate Court Case Title:	Cedar West Owners Assoc., App. v. Quality Loan Service Corp. of WA., Res.
Superior Court Case Number:	17-2-01147-7

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