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Court of Appeals No. 69959-8-1
Skagit County Superior Court No. 12 2 00142 8

IN THE COURT OF APPEALS - STATE OF WASHINGTON
DIVISION I

GREGORY H. KIRSCH,
Plaintiff-Appellant,

v.

CRANBERRY FINANCIAL, LLC,
a Delaware Limited Liability Company

Defendant/Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

In 2001, Channel Marine, Ltd. (Channel Marine), a small squid handling business, defaulted on a 1996 Small Business Administration (“SBA”) Economic Injury Disaster Loan. In 2004 Capital Crossing, an assignee of the SBA, sued Channel Marine and Gregory Kirsch, the personal guarantor of the note. The 2004 lawsuit was dismissed for lack of prosecution.

In 2012 Gregory Kirsch sued Capital Crossing because it refused to release a Deed of Trust on the Kirsch residence that had been given to secure the 1996 SBA note. Kirsch asserted that the cause of action accrued in 2001 when Channel Marine defaulted, that the six year statute of limitation had run years before, and asked for declaratory relief clearing title to the house. He also argued that if the statute of limitation did not bar suit, he should be able to assert the claims of Channel Marine against the note holder.

The trial court denied Kirsch declaratory relief. Instead it granted summary judgment against Kirsch for the missed payments in the six years prior to filing the lawsuit, and for the remaining note balance, after crediting all payments that should have been made more than six years before the 2012 suit was filed.

II. ASSIGNMENTS OF ERROR

1. It was error to grant judgment on a claim that was barred by the applicable statute of limitation.
2. It was error to refuse to allow a guarantor to present the defenses of the debtor.
3. It was error to grant summary judgment when material issues of fact were untried.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When a note was breached by nonpayment in 2001, and the note holder then accelerated the debt as allowed by the terms of the note, may the note holder enforce the note by filing a counterclaim in the guarantor's 2012 action seeking to clear title to real property? Or is such an action barred by the six year statute of limitation?
2. When a note was breached by nonpayment in 2001, the note holder filed a lawsuit against the guarantor claiming the entire balance was immediately due but then allowed the suit to be dismissed for lack of prosecution, may the note holder obtain judgment on the

note by filing a counterclaim in the guarantor's 2012 action seeking to clear title to real property? Or is such an action barred by the six year statute of limitation?

3. When a note was breached by nonpayment in 2001, and the note holder filed a collection suit in 2004, but then allowed the suit to be dismissed, is the note holder barred by the equitable doctrine of laches from attempting to enforce the note in 2012?
4. When a note holder sues a personal guarantor of a note, is the guarantor entitled to bring the same claims and defenses that the original obligor could bring?
5. When issues of material fact exists as to defenses, the disposition of collateral, and the amount of the alleged debt, should a court grant summary judgment to the note holder?

IV. STATEMENT OF THE CASE

A. Economic Disaster Loan to Channel Marine

In 1996 an El Nino event devastated squid fishing in California. Channel Marine, a small family owned squid handling business faced a prolonged period without earnings. However, the industry and the United

States Government were confident the squid would return when ocean conditions changed. CP 172-173.

The Small Business Administration pushed Economic Injury Disaster Loans to affected fishermen and businesses. The SBA promised to provide an amount sufficient for a business to stay current on debt service during the injury period, and then to restore working capital to the level prior to the economic injury. CP 173.

Channel Marine sought a loan of a little more than one million dollars based on an anticipated injury period of two years. But the SBA disagreed, initially concluding the injury period would be one year. The SBA promised, that should the injury period prove longer, additional funds would be available. CP 173.

After protracted analysis, the SBA eventually determined Channel Marine was eligible for a loan of \$513,500 given a one year injury period. However, prior to funding that sum, the SBA mistakenly reduced the amount to \$387,000. In response to protests, the SBA representatives assured Channel Marine that it would be more practical to accept the already approved sum while the the SBA mistakes were corrected than to postpone any funding until the same had been accomplished. Relying on that advice, Chanel Marine accepted the loan. CP 173-174.

required that it be made both the Trustee and the Beneficiary of a Deed of Trust on the Kirsch home. CP 116. The Deed of Trust was security for both the note and the personal guarantee. CP 117.

C. Channel Marine Defaults – Security Seized

The SBA responded to the missed February of 2001 annual loan payment by declaring a default and accelerating the debt in accordance with the terms of the note. Extensive correspondence between the parties, both before and after acceleration, discussed the reasons for the inability of Channel Marine to make the payment, and outlined Channel Marine's claims against the SBA. The claims of Channel Marine exceeded the claims of the SBA. After months of discussion the SBA sold the note into the collections market. CP 175.

At some point Capital Crossing Bank (Capital Crossing) purchased the heavily discounted note. It then seized Channel Marine's fishing tender, the F/V D.M. Fleming. Seizure was made under a preferred marine mortgage that Channel Marine had granted to the SBA as security for the note. The vessel had a surveyed value of approximately \$425,000 at the time of the original loan, and \$468,682 as a cost of construction for tax purposes. Capital Crossing has never accounted for the vessel or its proceeds. CP 175-176.

D. 2004 Collections Suit

In 2004 Capital Crossing filed suit against Channel Marine and Guarantor Kirsch in Whatcom County Superior Court.¹ Capital Crossing alleged that it had elected to accelerate the note and “to declare the entire principal sum and all accrued interest on the note due and payable.” CP 159. This statement of acceleration was, of course, redundant since the SBA had already accelerated the note and Capital Crossing had earlier advised Kirsch of the same in a demand letter. CP 176.

Channel Marine defended against the attempt to collect the accelerated note by filing a counterclaim for the damages caused by the SBA, specifically alleging that damage caused by the SBA exceeded the amount Channel Marine would owe the SBA. CP 152-153.

The parties engaged in discovery, litigated, and discussed the issues from before the filing in August of 2004 until Capital Crossing chose not to pursue the collection. Counsel for Capital Crossing withdrew in February of 2008. A dismissal for want of prosecution was entered in April of 2009.

¹ Capital Crossing named Channel Marine Guarantor, Gregory H. Kirsch, Susan Kirsch, the Kirsch marital community, Buchanan & Paule, P.S., The Money Source, Port of Bellingham and the Internal Revenue Service as defendants. CP 157.

E. Kirsch Attempts to Clear Title to Residence

The marriage of Gregory and Susan Kirsch was dissolved in February of 2011. The old SBA Deed of Trust on the couple's Y Road home still showed in the public record. As part of the dissolution Mr. Kirsch was obligated to "make a good faith effort to remove the liens" from the Y Road property. CP 177. Mr. Kirsch hired counsel, and unable to resolve the issues, filed suit in January of 2012. The suit sought a declaratory judgment quieting title to the house against the Deed of Trust given to the SBA as allowed by RCW 7.28.300.² CP 11-13. Capital Crossing was served with the summons and complaint.

After service Capital Crossing claimed that Cranberry Financial was the beneficiary of the Deed of Trust and holder of the note. Cranberry was then substituted as defendant by stipulation. CP 3-6. Cranberry then filed a counterclaim alleging that collection of the note and foreclosure of the Deed of Trust could be pursued against Kirsch as guarantor 12 years after the default. CP 20-29.

The trial court granted summary judgment against Cranberry based

² 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 limitation, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien. RCW 7.28.300.

statute of limitations to commence anew as to that payment.

V. ARGUMENT

A. Standard of Review

Appellate review of summary judgment is de novo; the reviewing court engages in the same inquiry as the trial court and views the facts and the reasonable inferences from those facts in the light most favorable to the nonmoving party. A motion for summary judgment is properly granted where "there is no genuine issue as to any material fact and... the moving party is entitled to a judgment as a matter of law." CR 56(c). *Michak v. Transnation Title Ins. Co.*, 148 Wn. 2d 788, 64 P.3d 22 (2003).

Where there are no contested issues of material fact the appellate court may reverse a grant of summary judgment and enter judgment for the opposing party. RAP 12.2.

B. Statute of Limitation

The trial court recognized that the statute of limitation on a note and deed of trust is six years from the time the collection cause of action accrued. RCW 4.16.040, *Westar Funding, Inc. v. Sorrels*, 157 Wn.App. 777 (2010). It however failed to recognize when a cause of action accrues. A cause of action accrues when "the holder thereof has the right

to apply to a court for relief.” (citing cases) *Lybecker v. United Pac. Ins. Co.*, 67 Wn.2d 11, 15, 406 P.2d 945 (1965). This is a basic legal premise *Colwell v. Eising*, 118 Wn.2d 861, 868, 827 P.2d 1005 (1992).

The note holder had the right to apply to the court for relief when the annual payment was missed in 2001. The last payment on the note was made February 14, 2000. The note holder in fact filed suit on the note and guarantee in 2004, well within the six year limitation period, but then allowed the suit to be dismissed for want of prosecution when faced with substantial counterclaims. A suit that is filed but then dismissed does not toll or otherwise affect the running of the limitation period. *Logan v. North-West Insurance Co.*, 45 Wn. App. 95, 724 P.2d 1059 (1986).

Note allowed suit upon breach. The third paragraph of the note defines “Indebtedness” as the amount “now due or hereafter to become due under the note”. CP 108. The next paragraph of the note provides:

Holder is authorized to declare all or any part of the Indebtedness immediately due and payable upon the happening of any of the following events: (1) Failure to pay any part of the indebtedness when due, (2) ...

After the February 2001 payment was missed the SBA chose to accelerate the note and demanded immediate payment in full.³ At that

³ Payments were due monthly under the note, but the parties later agreed to annual payments.

point the cause of action had accrued and the six year statute of limitation had begun to run.

2004 Collection Suit. In 2004 Capital Crossing filed a complaint against Channel Marine and Kirsch alleging that it had elected to accelerate the note and “to declare the entire principal sum and all accrued interest on the note due and payable.” CP 159. CP 41-44. Thus Cranberry cannot deny that the debt was accelerated and a demand for payment in full was made more than six years before the filing of the 2012 counterclaim. The 2004 complaint itself constitutes acceleration and a demand for payment in full. No matter which of the serial accelerations is treated as the accrual date, the six year period ran long before the Cranberry counterclaim was filed.

Uniform Commercial Code. Under the Uniform Commercial Code a cause of action for collection of the entire balance of a note accrues immediately upon acceleration. The Code provides:

Statute of limitations.

(a) Except as provided in subsection (e), 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 supplied.*

The cause of action for collection of the entire note accrued upon breach. This is how the SBA understood it, and what Capital Crossing alleged in its prior collection suit (and Cranberry in its 2012 counterclaim). Indeed the UCC defines a note as overdue the day after acceleration occurs. RCW 62A.3-304.

Cranberry introduced no evidence to counter the facts establishing the 2001 accrual of its cause of action or acceleration of the debt. Collection of the note is entirely barred by the six year statute of limitation.

C. Statute of Limitation Protects Guarantor

Although Kirsch, as guarantor, can assert the same defenses as Channel Marine, the statute of limitation provides him with an additional and separate defense. This is because the cause of action against the guarantor accrues when there is a breach of the guaranty. As Cranberry stated at page 8 of its motion for summary judgment, “Failure to make payments as required by a guaranty is a material breach, citing Vacova Co. v. Farrell, 62 Wn.App. 386, 407, 814 P.2d 255 (1991).” CP 99.

In its first paragraph the guaranty obligates the guarantor to “the due and punctual payment when due, whether by acceleration or otherwise” of the sums due under the note. CP 111. The fourth paragraph

is emphatic in declaring that the right of the holder, to collection of the entire amount, accrues immediately upon any missed payment:

In case the Debtor shall fail to pay all or any part of the Liabilities when due, whether by acceleration or otherwise, according to the terms of said note, the Undersigned, immediately upon the written demand of Lender, will pay to Lender the amount due and unpaid by Debtor as aforesaid in like manner as if such amount constituted the direct and primary obligation of the Undersigned.

Emphasis supplied.

The cause of action against Kirsch as Guarantor arose long before the prior lawsuit was filed, but even if service upon him of the 2004 lawsuit is treated as the written demand for payment, the Capital Crossing case against Kirsch is entirely barred by the six year statute of limitation.

D. Equitable Estoppel Bars Cranberry from Denying Acceleration

Cranberry introduced no evidence denying that payment of the note was accelerated, or denying that a demand for immediate payment of the entire balance was made more than six years before the counterclaim was filed. Indeed the record is clear that acceleration and demand were made as set forth in Capital Crossing's prior pleadings. Cranberry is estopped from denying these prior statements and acts. But still, it misled the trial court as to when its cause of action accrued, and whether or not the debt was accelerated.

The elements of equitable estoppel are: (1) an admission, statement, or act inconsistent with a claim afterward asserted, (2) action by another in reasonable reliance upon that act, statement or admission, and (3) injury which would result to the relying party if the first party were allowed to contradict or repudiate the prior act, statement or admission. *Colonial Imports, Inc. v. Carlton Northwest, Inc.* 121 Wn.2d 726, 731, 853 P.2d 913 (1993).

Here Kirsch relied on the statements in the prior suit that acceleration had occurred, and demand for full payment had been made, and he counted the statute of limitation period based on those statements. Because of his reliance on those statements he no longer has records and files related to the guarantee, made assurances in his dissolution based on the belief that the statute of limitation had ran, and filed a quiet title action in reliance on the representations of the SBA and Capital Crossing. CP 177.

The elements of equitable estoppel are met, Cranberry is estopped from denying that its cause of action accrued when the debt was accelerated and demand for full payment made. This unquestionably occurred by the time the 2004 suit was filed; well over six years before filing of its cause of action here.

E. Cranberry is Barred by Laches

Cranberry offers no explanation for waiting over 12 years to pursue collection. Nor does it explain why it filed suit within the statute of limitation period, and then allowed that suit to be dismissed for lack of prosecution. That it “slept on its rights” could not be more clear. (It does however claim \$175,000 in interest was earned during its delay.)

The elements of laches are: (1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; (3) damage to defendant resulting from the unreasonable delay. None of these elements alone raises the defense of laches. Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them. *Lopp v. Peninsula School District No. 401*, 90 Wn.2d 754, 761, 585 P.2d 801 (1978).

The SBA, Capital Crossing, and Cranberry passed the note, guarantee, and Deed of Trust around, attempted collection, and even filed a collections lawsuit against the principal and guarantor. They had knowledge of the cause of action. That twelve years is an unreasonable delay in bringing suit is self-evident. Kirsch, the guarantor is damaged.

The principal, Channel Marine was dissolved and liquidated years ago. Records no longer exist, including records related to the counterclaim, the Kirsch marital estate has been divided by divorce. It is simply far too late to revive a cause of action that accrued over a decade ago.

F. Factual Issues Preventing Summary Judgment

Cranberry failed to establish the amount it claims to be owed by even a rudimentary accounting. All that was provided in writing was a conclusory statement at the end of Mr. Stratford's declaration asking for \$800,000.⁴ No records were produced, interest calculations were not shown, nothing was produced to establish that Mr. Stratford was competent to make such an accounting, and no credit was given for amounts recovered on the sale of the F/V D.M. Fleming. In fact Cranberry did not even have confidence in the amount, and proposed a different amount in oral argument, and the court chose to accept that amount.⁵

The F/V D.M. Fleming was taken from Channel Marine, seized, and foreclosed upon. Capital Crossing claimed that it held the preferred

4 Despite arguing that a cause of action as to the entire balance did not accrue upon the breach in 2001, Cranberry requested the entire balance in 2013.

5 Compare the amount claimed in the Declaration of Denis B. Stratford, CP 105, to the order granting summary judgment, CP 205.

marine mortgage under an assignment from the SBA, and Cranberry claimed to be an assignee of Capital Crossing. The surveyed value of the F/V D.M. Fleming was \$425,000. CP 175. Yet the trial court entered summary judgment without requiring Cranberry to account for the D.M. Fleming.

There is no evidence that Capital Crossing/Cranberry followed the Uniform Commercial Code (UCC) provisions for the sale of the F/V D.M. Fleming. Such security must be auctioned or otherwise disposed of in a commercially reasonable manner. RCW 62A.9A.610, 627. There is, for instance, no evidence that the notices required under the UCC 62A.9A.-611 were given. Kirsch does not recall receiving any. CP 175-176. Whether a bank disposed of collateral in a commercially reasonable manner is generally a question of fact. The requirement of commercial reasonableness cannot be waived. *Security State Bank, v. Burk* 100 Wn.App. 94, 995 P.2d 1272 (2000).

Noncompliance with the UCC creates the presumption that the sale of the F/V D.M. Fleming fully satisfied the debt and all costs and expenses. RCW 62A.9A.626. Any commercially reasonable sale of a \$425,000 vessel would have to generate revenue to pay toward the secured debt. The fact Cranberry shows no recovery establishes lack of

commercial reasonableness ipso facto.

G. Damage to Channel Marine Exceeded the Note Balance

Channel Marine held significant claims against the SBA. Kirsch is entitled to present these claims as a defense to payment, to the same extent Channel Marine could. *Security State Bank, v. Burk* 100 Wn.App. 94, 995 P.2d 1272 (2000). Those claims are outlined in the Answer and Counterclaim filed in the previous suit. CP 152-153. The claims were not filed below because it was believed that they, like the collections claim, were barred by the six year statute of limitation. However, if any part of the note collection claim remains alive, Kirsch must be permitted to present the defenses and claims of Channel Marine. The trial court decision prevents Kirsch from asserting these claims.

H. Kirsch is Entitled to Attorney Fees and Costs

The note includes an attorney fee and cost provisions. CP 108-109. Kirsch should be awarded attorney fees and costs in this action.

VI. CONCLUSION

The trial court should be reversed in all respects. The causes of action for collection of the note, enforcement of the guarantee, and

forfeiture of the Deed of Trust all accrued in 2001 when the second note payment was missed. Cranberry's counterclaim is barred by the statute of limitation, and should be dismissed.

As there are no disputed facts as to the statute of limitation, the Court of Appeals should grant declaratory relief clearing title to the Y Road property, and should award Kirsch attorney fees and costs.

RESPECTFULLY SUBMITTED this _____ day of March, 2013.

K. GARL LONG, WSBA #13569
Attorney for Plaintiff/Appellant

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RESPECTFULLY SUBMITTED this 22nd day of March, 2013.


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