

ORIGINAL

NO. 74016-4-I

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

KEVIN E. EDMUNDSON AND MECHE D. EDMUNDSON, HUSBAND AND WIFE,
Respondents,

v.

CARRINGTON MORTGAGE SERVICING, LLC,
Appellant.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This case is about promoting the stability of land titles in Washington. The legislature pinned importance on promoting that goal by adopting the Deed of Trust Act. Carrington mistakenly characterizes this case as one of unfairness to it. Not at all. If a commercial lender were allowed to ignore the deed of trust's own statute of limitation – separate from the statute of limitation in the promissory note it secures – and wait up to twenty-four years after the first default on a thirty year loan (the consequence of Carrington's reasoning) before finally commencing foreclosure, the land title affected by that deed of trust would be unpredictable, if not utterly volatile.

The Edmundsons do not claim that their bankruptcy discharged the lien of the deed of trust. That is a red herring argument. The Edmundsons ask this court to recognize that a deed of trust, like a mortgage that it replaces, has its own statute of limitation separate from the statute of limitation in the note it secures. They ask this court to elucidate that the remedy of using the power of sale in the deed of trust – a power that must be strictly construed in the favor of the borrower - may be lost without regard to whether remedies may still exist on the note itself. The Edmundsons urge the court to adopt a construction that gives effect to

both statutes of limitation - the goal of contractual interpretation - rather than a construction that renders one of them superfluous.

II. COUNTERSTATEMENT OF THE CASE

The Edmundsons own real property in Tukwila, Washington. On July 12, 2007, the Edmundsons borrowed \$313,381.00 (the “Loan”) from Countrywide Home Loans, Inc. (“Countrywide”). They gave Countrywide a thirty year installment promissory note (the “Note”) in that amount secured by a deed of trust recorded against the real property (the “Deed of Trust”). *CP 52-53*. Both the Note and the Deed of Trust were on forms supplied by Countrywide. *CP 56-63*.

The Edmundsons made monthly payments on the Loan through the payment due October, 2008. No payment has been made since. They first defaulted on November 1, 2008 by failing to make the payment that month. That missed payment was a default under both the Note and the Deed of Trust. Countrywide took no action on the Note or the Deed of Trust.

On June 12, 2009, the Edmundsons filed a Chapter 13 bankruptcy petition. By that time, Countrywide had still taken no action on the Note or the Deed of Trust. The Edmundsons filed an Amended Plan on August 17, 2009 (the “Plan”). *CP 3*. In the Plan, the Edmundsons surrendered the real property to Bank of America. The Plan stated that

upon confirmation of the Plan, Bank of America would be granted relief from the automatic stay to enforce its deed of trust against the property. *CP 154*. On October 22, 2009, the bankruptcy court confirmed the Plan. On that same day, *more than 5 years* ago, Bank of America was granted relief from stay. On December 31, 2013 the Edmundsons were discharged of their obligations under the Loan after fully performing their Plan obligations. *CP 4, 159*.

In 2011, Bank of America acquired the assets of Countrywide after it failed, including the Loan. *CP 3*.

Bank of America, through its subsidiary and loan servicing agent BAC Home Loan Servicing, LP, f/k/a Countrywide Home Loan Servicing, LP, had actual knowledge of the Edmundsons' bankruptcy, as is evidenced by the Entry of Appearance and Request for Special Notice filed by BAC Home Loan Servicing, LP on July 9, 2009. *CP 4; 36-37*.¹

Bank of America and Carrington, its loan servicer, took no action on the Note or the Deed of Trust until Carrington mailed a Notice of Default to the Edmundsons October 22, 2014. *CP 140*. On January 16, 2015, more than 6 years after the Edmundsons' default under the Deed of

¹ *Appellant's Opening Brief, pg. 3, fn. 2.*

Trust, the Edmundsons received a Notice of Trustee's Sale. *CP141; 173-176*.

III. ARGUMENT

A. THIS COURT SHOULD RECOGNIZE THAT THE STATUTE OF LIMITATION APPLIES SEPARATELY TO THE REMEDIES UNDER DEED OF TRUST FROM ITS APPLICATION TO THE REMEDIES ON THE NOTE.

1. THE LEGISLATURE ADOPTED THE DEED OF TRUST ACT TO PROMOTE STABILITY OF LAND TITLES.

In enacting the Deed of Trust Act, Ch. 61.24 RCW, the Washington legislature sought to promote three primary goals: “(1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles.” *Vawter v. Quality Loan Serv. Corp. of Washington*, 707 F. Supp. 2d 1115, 1121 (W.D. Wash. 2010)(quoting *Plein v. Lackey*, 149 Wash.2d 214, 67 P.3d 1061, 1065 (2003)).

2. THE DEED OF TRUST ACT AND THE DEED OF TRUST ITSELF MUST BE STRICTLY CONSTRUED IN FAVOR OF THE BORROWER.

Under a Deed of Trust, the trustee holds a power of sale permitting him to sell the property out of court with no necessity of judicial action.

The Deed of Trust statutes thus strip borrowers of many of the protections available under a mortgage. Therefore, lenders must strictly comply with the Deed of Trust statutes, and the statutes and Deeds of Trust must be strictly construed in favor of the borrower. *Koegel v. Prudential Mut. Sav. Bank*, 51 Wash. App. 108, 111, 752 P.2d 385, 387 (1988).

3. THE DEED OF TRUST IS A SEPARATE AND DISTINCT CONTRACT FROM THE NOTE.

A Deed of Trust is a written contract with its own separate and bargained for provisions. *Vawter v. Quality Loan Service Corp. of WA*, 707 F.Supp. 2d 1115, 1121 (2010).

4. THIS COURT SHOULD RECOGNIZE THAT A DEED OF TRUST, LIKE A MORTGAGE THAT IT REPLACES, HAS ITS OWN STATUTE OF LIMITATION.

While the Deed of Trust Act does not explicitly refer to any limitation period for nonjudicial foreclosures, the court in *Walcker v. Benson and McLaughlin, P.S.*, 79 Wn. App. 739, 743 (1995) stated: “. . . under the plain language of RCW 61.24.020, the [6 year] limitation period for foreclosure of mortgages should apply.”

**5. RECOGNIZING A STATUTE OF LIMITATION IN A DEED OF TRUST
SEPARATE FROM THE STATUTE OF LIMITATION IN THE NOTE IT SECURES
PROMOTE STABILITY OF LAND TITLES.**

Title to real property is far from “certain” or “stable” if a lender can delay a foreclosure following a default for more than 24 years following an initial breach on a 30-year note. Carrington’s position is unreasonable, and would result in instability and uncertainty.

The moment a lender has the *right* to foreclose a deed of trust, the statute of limitations begins to run. Stated differently, a breach of any obligation required by the deed of trust triggers the six years within which a claim can be brought. It defies all logic, and runs contrary to the purpose of a statute of limitations to provide lenders with an avenue to sit on their rights for decades following non-payment or a breach of another provision of a deed of trust. It is simply insufficient for a lender to assert that it would have simply waived its right to the missed payments that occurred more than six years prior to its foreclosure action – such a position requires a defaulting borrower to remain on title to real property, liable therefore, until the lender decides that it wishes to initiate foreclosure, if ever..

Here, the underlying obligation is unenforceable against the Plaintiffs, and the breach of the terms of the Deed of Trust occurred more

than 6 years prior to Carrington taking any action. Here, the inquiry is *not* the Note, it is the entirely separate Deed of Trust, the terms of which provided Defendants with the ability to foreclose upon Plaintiffs' breach. The only inquiry is the Deed of Trust, its separate obligations, and the statute of limitations governing a lender's foreclosure thereunder. The protection of stability of land titles requires strict adherence to the statute of limitations applicable to all written contracts.

B. BANK OF AMERICA FAILED TO EXERCISE THE POWER OF SALE UNDER THE DEED OF TRUST WITHIN THE STATUTE OF LIMITATION.

The six year statute of limitation began to run when the November 1, 2008 payment was missed. Bank of America had the right to exercise its power of sale under the Deed of Trust for six years. The statute of limitation expired on November 1, 2014.

A foreclosure is initiated by sending a notice of trustee's sale no less than 30 days following a proper notice of default. RCW 61.24.030. *See also Vawter v. Quality Loan Service Corp. of Washington*, 707 F. Supp.2d 1115, 1121-22 (2010). Carrington did not exercise the power of sale until January 21, 2015, more than two months after the expiration of the statute of limitation. (*See CP 140*).

Carrington argues that its power of sale was exercised when it sent the Notice of Default, not when it sent the Notice of Trustee's Sale.

None of its cited cases address when the power of sale is initiated for purposes of complying with the statute of limitation.

This Court should hold that the statute of limitation is only met when the Notice of Trustee's Sale is sent. The Notice of Trustee's Sale – not the Notice of Default – affords the only notice to the borrower of the statutory remedy the borrower has to restrain the sale before it has been held. RCW 61.24.040. The sole method to contest and enjoin a foreclosure sale is to file an action to enjoin or restrain the sale in accordance with RCW 61.24.130. *In re: Marriage of Kaseburg*, 126 Wash.App. 546, 558, 108 P.3d 1278 (Div. 2 2005). Failure of a borrower to restrain the sale does not result in a waiver of some of borrower's claims, but the language of RCW 61.24.127(1)(c) refers only to “[f]ailure of the trustee to materially comply with the provisions of this chapter.” *Walker v. Quality Loan Serv. Corp.*, 176 Wash. App. 294, 313, 308 P.3d 716, 724 (2013), as modified (Aug. 26, 2013). Since the Notice of Default does not need to be sent by the trustee, but may be sent to the borrower directly by the lender, it is inconsistent to hold that the Notice of Default is the *alpha* to the statute of limitation's *omega*, if there is no requirement at that stage by the lender to notify the borrower of his rights to restrain the sale, nor any remedy afforded to the borrower for inappropriate actions at that stage. The Deed of Trust Act must be

strictly construed in favor of the borrower. *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 137, 157 P.3d 415, 417 (2007). The trustee is required to provide the Notice of Trustee's sale to comply with the statute of limitation.

Because Carrington did not provide the Notice of Trustee's Sale to the Edmundsons within six years of the default, they no longer may exercise their previous remedies under the deed of trust.

C. THE EDMUNDSONS' BANKRUPTCY DID NOT TOLL THE STATUTE OF LIMITATION.

Appellant argues that the statute of limitation was tolled during the Edmundsons' bankruptcy. That is incorrect.

In 1978, Congress passed 11 U.S.C. § 108(c) to address the tolling of statutes of limitation during the pendency of a bankruptcy filing. This federal statute preempts RCW 4.16.230.² U.S. Constitution, Art. VI, cl. 2; *In re Walker*, 77 F.3d 322 (9th Cir. 1996). "A general statutory provision must yield to a more specific statutory provision." *Waste Mgmt. of Seattle*, 123 Wn.2d 621, 629-30, 869 P.2d 1034 (1994), *see also Kustura v. Dep't of Labor & Indus.*, 169 Wn.2d 81, 88, 233 P.3d 853 (2010) (general statutory provisions inapplicable in light of statutory

² Notably, the most recent interpretation of RCW 4.16.230 in the context of a bankruptcy is 1923, more than 50 years prior to the enactment of 11 U.S.C. §108(c).

provision that “specifically addresses and definitively establishes” the question before the court).

In 1998, the Washington Supreme Court, in *Hazel v. Van Beek*, 135 Wn.2d 45, was asked to determine whether bankruptcy’s automatic stay extended the applicable statute of limitations by the duration of the automatic stay. The *Hazel* Court ruled that it does not and stated:

Section 108(c)(1) does not itself provide for tolling of a statute of limitation – it merely incorporates suspensions of deadlines that are expressly provided in *other* federal or state statutes. Otherwise, section 108 merely “tolls” a statute of limitation by allowing the creditor 30 days to act after the bankruptcy stay is lifted in those cases where the limitation period expires during the bankruptcy stay.

Id. at 65. (Internal quotations and citations omitted).

Appellant relies on *In re Hunters Run*³ to support its assertion that the statute of limitations was tolled during Plaintiffs’ bankruptcy. Appellant fails to articulate that *Hazel v. Van Beek*, cited above, was decided nearly nine years after *Hunters Run*, and the *Hazel* court openly disagrees with the “minority holding” in *Hunters Run*, stating:

The Ninth Circuit has stepped back from its broad language in *Hunters Run* as well. . . . The court did not “toll” the state statute of limitation for an equal amount of time as the bankruptcy stay prevented the creditor from enforcing the lien.

Hazel v. Van Beek, 135 Wn.2d 45, 65, 954 P.2d 1301 (1998).

³ *In re Hunters Run Limited Partnership v. Hunters Run Limited Partnership*, 875 F.2d 1425 (1989).

The statute of limitations was not tolled during the Edmundsons' bankruptcy.

Appellant is not entitled to equitable tolling under *Young v. United States*, 535 U.S. 43, 49, 122 S.Ct. 1036, 152 L.Ed.2d 79 (2002). *The Young* court states: "limitations periods are customarily subject to equitable tolling, *unless tolling would be inconsistent with the test of the relevant statute.* (emphasis added). Appellant is not entitled to equitable tolling.

Where a party seeking to extend a statute of limitations fails to exercise due diligence in pursuing its rights, equitable tolling cannot afford relief. *Douchette v. Bethel Sch. Dist.* 403, 117 Wn.2d 805, 811, 818 P.2d 1362 (1991). On October 22, 2009, Appellant was "granted relief from the automatic stay to enforce [its] security interest against the property including taking possession and sale." *CP 154*. Appellant waited nearly *5 years and 9 months* after the Bankruptcy Court's explicit relief from the automatic stay to enforce the Deed of Trust. Nothing prevented Appellant from timely enforcing the Deed of Trust, and it is barred from raising equitable tolling to extend an expired statute of limitations.

D. COLLATERAL ESTOPPEL AND EQUITABLE ESTOPPEL DO NOT APPLY.

Appellants have failed to prove collateral estoppel by clear, cogent, and convincing evidence. The issues present in this lawsuit are not identical to the issues adjudicated during the Edmundsons' Chapter 13 bankruptcy. Collateral estoppel operates only as to issues that were actually litigated and determined in the prior lawsuit. *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 57 P.3d 300 (2002). The party asserting collateral estoppel bears the burden of persuading the court that the issue decided in the prior action was identical to the issue presented in the second action, and thus should not be relitigated. *Bradley v. State*, 73 Wn.2d 914 (1968); *King v. City of Seattle*, 84 Wn.2d 239 (1974). Carrington argues that collateral estoppel bars the Edmundsons' lawsuit because the confirmation of the Edmundsons' Chapter 13 plan effectively adjudicated the issue of the ownership of the Property, requiring no further action by the Defendants.

The Edmundsons claims in this lawsuit were created by Appellants' inaction – they were not available to the Edmundsons at the time of the bankruptcy. The issue in this matter is the expiration of the statute of limitations for Appellants' to foreclose the deed of trust, not whether Appellants were given that *right* following the Edmundsons'

surrender. Following a surrender, a creditor must take, or fail to take, some affirmative action to cause a conveyance of title to the property or to take possession of the property pursuant to the terms of the creditor's security instrument. *In re Cormier*, 434 B.R. 222, 232 (Bankr. D. Mass. 2010).

Appellants' failure to take timely action following the surrender has resulted in the Edmundsons remaining on title to real property that Appellants assert has been *fully* adjudicated. "The doctrine of estoppel is for the protection of innocent persons, and only the innocent may invoke it. A person may not base a claim of estoppel on conduct, omissions, or representations induced by his own conduct, concealment, or representations, especially when fraudulent." *Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 757 P.2d 499; *Christman v. General Constr. Co.*, 2 Wn. App. 364, 467 P.2d 867, *petition for review denied*, 78 Wn.2d 994 (1970). Equitable estoppel is not favored and requires every element be proved with clear, cogent and convincing evidence. *Mercer v. State*, 48 Wn. App. 496, 500, 739 P.2d 703, 706 (1987). Defendants' own inaction caused their injury. Collateral estoppel and equitable estoppel do not apply.

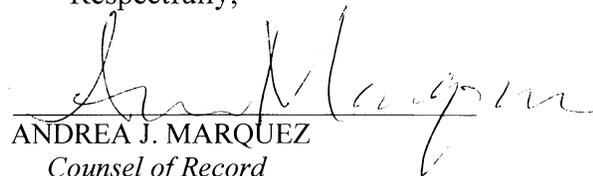
E. APPELLANTS REQUEST FOR ATTORNEY FEES SHOULD BE DENIED.

Carrington argues that it should be awarded its attorney fees in this matter, pursuant to the terms of the Deed of Trust. Carrington is not the holder of the Deed of Trust – it is simply the servicer of the loan. Carrington did not prevail at the trial court level. The Edmundsons did. Despite the language in the Deed of Trust awarding attorney fees to the prevailing party, the trial court denied the Edmundsons’ request for attorney fees. That ruling was not appealed. Carrington is not entitled to an award of the attorney fees it incurred at the trial court level, and this court should deny its request for fees on appeal.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the trial court below quieting title in the Edmundsons.

Respectfully,


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Counsel of Record

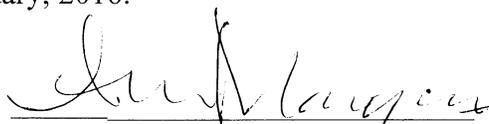
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I hereby certify that on February 22, 2016, I caused the foregoing document to be served on the following counsel of record:

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