

No. 75365-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DOUGLAS S. TINGVALL and AUGUSTA REGO-BARROS, husband
and wife,

Appellants and Plaintiffs,

v.

U.S. BANK, successor trustee to Bank of America, NA, successor in
interest to LaSalle Bank NA, as trustee, on behalf of the holders of the
WaMu Mortgage Pass-Through Certificates, Series 2006-AR12,

Respondent and Defendant.

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

OPENING BRIEF OF APPELLANTS

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ASSIGNMENTS OF ERROR

Assignment of Error No. 1. The trial court erred in granting the Bank's motion for summary judgment and denying the Borrowers' motion for summary judgment.

Issue: Is enforcement of a note and deed of trust for a home loan barred by the applicable statute of limitations where the holder of the note and beneficiary of the deed of trust declared an acceleration of the note more than six years before commencing an action on the note or foreclosure of the deed of trust?

Issue: Does a counterclaim seeking affirmative relief filed after the statute of limitations has run relate back to the commencement of the action for purposes of CR 15(c) where the defendant did not file a pleading before the statute of limitations had run on the counterclaim?

Issue: Does a debtor's "surrender" of an asset in bankruptcy preclude the debtor from asserting the statute of limitations as a defense in a subsequent state court action to foreclose a security interest in the asset?

Issue: Does a debtor's bankruptcy constitute an acknowledgement of a debt for purposes of restarting the statute of limitations?

Issue: Does a debtor's bankruptcy toll the statute of limitations that would otherwise expire after discharge of the debt?

NATURE OF THE CASE

This is an action by a borrower of a home loan for declaratory judgment that enforcement of the note and deed of trust are barred by the statute of limitations.

STATEMENT OF THE CASE

On August 12, 2006, plaintiffs obtained a home loan and signed a promissory note ["Note"] (CP 3-60) from Washington Mutual Bank and purchased a home in Newcastle, Washington. The Note is secured by a Deed of Trust ["Deed of Trust"] (CP 3-60) on the home. U.S. Bank ["Bank"] claims that it is the current owner of the Note and beneficiary under the Deed of Trust.

On September 26, 2008, plaintiffs and Washington Mutual entered into a Loan Modification Agreement amending the terms of the Note. CP 3-60. In November of 2008, plaintiffs defaulted on the Note.

On April 22, 2009, the trustee issued a Notice of Default on behalf of the Bank clearly and expressly declaring an acceleration of the loan.

"6. ACCELERATION:

"You are hereby notified that the beneficiary has elected to accelerate the loan described herein, and has declared the entire principal balance of \$1,050,428.13, plus accrued costs, immediately due and payable. NOTWITHSTANDING SAID ACCELERATION, YOU HAVE THE RIGHT TO REINSTATE THE LOAN BY PAYING THE DELINQUENT PAYMENTS, LATE CHARGES, COSTS AND FEES ON OR BEFORE THE

ELEVENTH (11TH) DAY BEFORE THE DATE OF THE TRUSTEE'S SALE WHICH MAY BE SET BY A NOTICE OF TRUSTEE'S SALE, ALL AS EXPLAINED IN PARAGRAPHS 4 AND 5 ABOVE." (Emphasis added.)

CP 234.

Plaintiffs objected to procedural deficiencies in the trustee's attempts to foreclose nonjudicially and the trustee recorded a voluntary Notice of Discontinuance of Trustee's Sale without prejudice. CP 3-60. The Bank has never revoked its acceleration of the Note. CP 3-60.

In its most recent attempt to foreclose nonjudicially, the trustee issued a Notice of Sale on April 1, 2015, setting the trustee's sale for July 31, 2015. CP 3-60. Plaintiffs then commenced this action seeking a declaratory judgment that enforcement of the Note and Deed of Trust was barred by the applicable statute of limitations. CP 1-2. On April 10, 2015, the trustee voluntarily discontinued the trustee's sale. Plaintiffs filed an amended complaint on June 23, 2015. CP 207-08. On July 15, 2015, the Bank filed a counterclaim seeking to foreclose the Deed of Trust judicially and *alleging that no action was pending on the Note*. CP 267-72. The parties filed cross-motions for summary judgment. The trial court granted the Bank's motion and denied plaintiffs' motion.

ARGUMENT

1. The Note and Deed of Trust are barred by the applicable statute of limitations.

Generally, actions based on written contracts must be commenced within six years after breach. RCW 4.16.040. The general rule for debts payable by installment provides, “A separate cause of action arises on each installment, and the statute of limitations runs separately against each.” 31 Richard A. Lord, WILLISTON ON CONTRACTS §79:17, at 338 (4th ed. 2004); *see also* 25 David K. Dewolf, Keller W. Allen & Darlene Barrier Caruso, WASHINGTON PRACTICE: CONTRACT LAW AND PRACTICE §16:20, at 196 (2012-13 Supp.) (“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”); *Hassler v. Account Brokers of Larimer County, Inc.*, 274 P.3d 547, 553 (Colo. 2012) (same); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 208-09, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997) (same). But if an obligation that is to be repaid in installments is accelerated – either automatically by the terms of the agreement or by the election of the creditor pursuant to an optional acceleration clause – the entire remaining balance of the loan becomes due immediately and the statute of limitations is triggered for all installments that had not previously become due. 31

Richard A. Lord, *supra*, § 79:17, at 338; §79:18, at 347-50; 12 AM.JUR.2d, Bills & Notes § 581 (same); *Bay Area*, 522 U.S. at 208-09 (same).

“[W]hen the promissory note secured by a mortgage contains an optional acceleration clause, the foreclosure cause of action accrues, and the statute of limitations begins to run, on the date the acceleration clause is invoked.” *Monte v. Tipton*, 612 So.2d 714 (Fla. 2d DCA 1993); *Smith v. F.D.I.C.*, 61 F.3d 1552, 1561 (11th Cir. 1995). “[I]f an obligation that is to be repaid in installments is accelerated, either automatically by the terms in the parties’ agreement or by the election of the creditor pursuant to an optional acceleration clause, the entire remaining balance of the loan becomes due immediately, and the statute of limitations is triggered for all installments that had not previously become due.” *Castle Rock Bank v. Team Transit, LLC*, 292 P.3d 1077, 2012 COA 125 (2012); *see also, Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 44 Tex.Sup.Ct. J. 605 (2001).

In most states, the running of the statute of limitations on enforcement of the note bars an action on the note, but does not bar foreclosure of a mortgage or deed of trust securing the note. However, in Washington, there is a statute that makes the mortgage or deed of trust also unenforceable, if the underlying obligation is barred by the statute of limitations. RCW 7.28.300 provides as follows:

“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, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien.”

RCW 7.28.300 is a defense to a trustee’s sale where the underlying debt is barred by the six-year statute of limitations. *Walcker v. Benson and McLaughlin, P.S.*, 79 Wn.App. 739, 904 P.2d 1176 (1995). In other words, the Note is barred by RCW 4.16.040 and the Deed of Trust is barred by RCW 7.28.300. In addition, because both the note and deed of trust are barred by the statute of limitations, the owner of the property is entitled to have the title quieted as against the beneficiary. “When an action for foreclosure on a deed of trust is barred by the statute of limitations, RCW 7.28.300 authorizes an action to quiet title.” *Westar Funding, Inc. v. Sorrels*, 157 Wn.App. 777, 785, 239 P.3d 1109(2010).

Here, the then-beneficiary accelerated the loan as of April 22, 2009. The six-year statute of limitations began to run on the entire loan balance as of that date and the Bank had to commence an action on the Note or foreclosure of the Deed of Trust by April 22, 2015. It failed to do so. The Bank’s predecessor started a nonjudicial foreclosure, but discontinued it voluntarily, due to defects in the process. Commencing an action does not toll the statute of limitations, if that action is dismissed.

The statute of limitations continues to run as though the first action had never been brought.

“Where an original action is dismissed, a statute of limitations is deemed to continue to run as though the action had never been brought.” *Logan v. North-West Insurance Co.*, 45 Wn.App. 95, 99, 724 P.2d 1059 (1986). “The time limit for refiling is computed as if the first case had never been filed and is not tolled by the commencement of the first action.” *Fittro v. Alcombrack*, 23 Wn.App. 178, 180, 596 P.2d 665 (1979).

The fact that the Bank voluntarily discontinued the trustee’s sale after declaring an acceleration of the Note on April 22, 2009, does not toll the statute of limitations or decelerate the Note.

“[O]nce [the] Bank accelerated the debt under the terms of the mortgage and note, and in the absence of a contractual reinstatement, modification by the parties, or an adjudication on the merits, the accelerated debt was not ‘decelerated’ by an involuntary dismissal without prejudice. The accelerated payment of the debt continued to be due and the statute of limitations on the action on the accelerated debt continued to run. Because there were no ‘new’ payments due, there could be no ‘new’ default upon which a ‘new’ cause of action (and newly-commenced statute of limitations) could be based. The statute of limitations expired before the filing of the subsequent action and was thus barred.”

Deutsche Bank Trust Co. Americas v. Beauvais, No. 3D14-575, 2014 WL 7156961 (Fla. 3d DCA, Dec. 17, 2014). *See also, Cadle Co. II, Inc. v. Fountain*, 281 P.3d 1158 (Nev. 2009).

Likewise, the fact that the borrower has a statutory right to reinstate the loan prior to the eleventh day before the trustee's sale does not negate the beneficiary's declaration of acceleration.

“Nothing in [RCW 61.24.090(1)(a)] prohibits the acceleration of a loan RCW 61.24.090(1)(a) simply precludes the creditor from enforcing the election prior to the eleventh day before the date of the trustee's sale, and allows the debtor to reinstate the loan prior to that time by paying the amount which would have been due under the terms of the deed of trust if no default had occurred. RCW 61.24 . . . should not be interpreted as precluding an acceleration clause in a loan agreement, or making such a clause a nullity in a deed of trust foreclosure.”

Meyers Way Development Ltd. Partnership v. University Sav. Bank, 80 Wn.App. 655, 669-70, 910 P.2d 1308, *review denied*, 130 Wn.2d 1015, 928 P.2d 416 (1996).

The Bank is correct that the Loan Modification on September 26, 2008 constituted an acknowledgement of the debt that restarted the statute of limitations. However, once the defendants declared an acceleration of the loan on April 22, 2009, the statute of limitations began to run on the entire loan balance.

“[O]nce [the] Bank accelerated the debt under the terms of the mortgage and note. and in the absence of a contractual reinstatement, *modification* by the parties, or an adjudication on the merits, the accelerated debt was not ‘decelerated’ by an involuntary dismissal without prejudice. The accelerated payment of the debt continued to be due and the statute of limitations on the action on the accelerated debt continued to run. Because there were no

‘new’ payments due, there could be no ‘new’ default upon which a ‘new’ cause of action (and newly-commenced statute of limitations) could be based. The statute of limitations expired before the filing of the subsequent action and was thus barred.” (Emphasis added.)

Deutsche Bank Trust Co. Americas v. Beauvais, No. 3D14-575, 2014 WL 7156961 (Fla. 3d DCA, Dec. 17, 2014). *See also, Cadle Co. II, Inc. v. Fountain*, 281 P.3d 1158 (Nev. 2009).

Although the Bank commenced a nonjudicial foreclosure by serving a Notice of Trustee’s Sale on April 2, 2015 (20 days before the expiration of the six-year statute of limitations), it voluntarily discontinued the sale. The Bank may have had an argument that its most recent attempt to foreclose nonjudicially was timely, but now that it has voluntarily discontinued the sale, any subsequent action was barred by the statute of limitations.

The Bank cites *Jewell v. Long*, 74 Wn. App. 854, 876 P.2d 473 (1994) for the proposition that “a statute of limitations is restarted by a written acknowledgement or promise by the debtor to pay the debt.” In *Jewell*, the debtor granted a deed of trust on substitute collateral in exchange for the creditor releasing the original collateral. In affirming that the statute of limitations was restarted when the substitution of collateral was agreed upon, the court held that “An acknowledgment or promise made before the statute [of limitations] has run vitalizes the old debt for

another statutory period dating from the time of the acknowledgment or promise, while an acknowledgment made after the statute has run gives a new cause of action, for which the old debt is a consideration. . . . Generally, an acknowledgment must be in writing; recognize the existence of the debt; be communicated to the creditor or to another person with intent that it be communicated to the creditor; and not indicate an intent not to pay.” 74 Wn. App. At 856-57 (quoting *Cannavina v. Poston*, 13 Wn.2d 182, 195, 124 P.2d 787 (1942)).

Here, the loan modification in 2008 satisfied the requirements for an acknowledgement or new promise to pay the Loan and restarted the statute of limitations. However, *proposing* another Loan modification that was *not accepted* by the Bank is not an acknowledgement of or promise to pay the debt. First, an offer not accepted by the offeree has no legal effect whatsoever. Plaintiffs have attempted negotiating with the Bank several times, but the parties have reached no agreement since the 2008 loan modification. Settlement negotiations alone are not sufficient to toll the statute of limitations. *Miss. Dep't of Pub. Safety v. Stringer*, 748 So.2d 662, 667 (Miss. 1999); *Black v. Lexington School Distr. No. 2*, 327 S.C. 55, 488 S.E.2d 327, 330 (1997). To restart the statute of limitations, there would have had to have been a contractual reinstatement or loan modification by the parties. *Deutsche Bank Trust Co. Americas v.*

Beauvais, No. 3D14-575, 2014 WL 7156961 (Fla. 3d DCA, Dec. 17, 2014).

The Bank has argued without citation to any authorities that plaintiffs filing a lawsuit to declare the Note unenforceable and to quiet title somehow revived the Note. The Bank's position that the debt is revived by the debtor bringing an action to declare the debt unenforceable would render RCW 7.28.300 (which authorizes a quiet title action when the underlying debt is barred by the statute of limitations) completely meaningless. The court will not interpret a statute in a way that renders it meaningless. *G-P Gypsum Corp. v. State, Dept. of Revenue*, 169 Wn.2d 304, 237 P.3d 256 (2010).

To summarize, the loan was modified and new Note was executed on September 26, 2008. Plaintiffs defaulted on November 1, 2008. The beneficiary declared an acceleration on April 22, 2009. The Bank commenced an action to foreclose the Deed of Trust on July 15, 2015 -- more than six years *after* the declaration of acceleration. Enforcement of the Note and Deed of Trust is now barred by the statute of limitations. Plaintiffs are entitled to summary judgment as a matter of law.

2. A counterclaim seeking affirmative relief filed after the statute of limitations has run does not relate back to the commencement of the action.

In denying plaintiffs' motion for summary judgment, the trial court relied upon CR 15(c) and *Logan v. North-West Ins. Co.*, 45 Wn.App. 95, 724 P.2d 1059 (1986). However, neither of these authorities apply to this case.

By its clear and express terms, CR 15(c) applies only to an *amendment* to an original pleading and not to an original pleading. CR 15(c) provides in relevant part as follows:

“Relation Back of Amendments. Whenever the claim or defense asserted in the *amended* pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the *original* pleading, the amendment relates back to the date of the original pleading.”

Here, the Bank did not answer the complaint or assert a counterclaim until July 15, 2015 – well after the statute of limitations on the debt had run. Thus, there was no original pleading by the Bank upon which CR 15(c) could operate.¹ “Rule 15(c) applies to an amended pleading, not a cross-claim filed for the first time.” *State ex rel. Egeland v. City Council of Cut Bank, Mont.*, 245 Mont. 484, 490, 803 P.2d 609 (1990).

¹ Even if the Notice of Trustee's Sale served on April 2, 2015, could be regarded as a “pleading,” the trustee's sale was voluntarily discontinued by the Bank and is a nullity.

Likewise, *Logan v. North-West Ins. Co.*, 45 Wn.App. 95, 724 P.2d 1059 (1986) does not apply to this case because subsequent cases have distinguished between “counterclaims for affirmative relief, versus matters pled as an affirmative defense, such as recoupment to offset the amount of a plaintiff’s recovery.” *City of Saint Paul, Alaska v. Evans*, 344 F.3d 1029 (9th Cir. 2003).

“The issue that inevitably arises is whether a particular claim or defense asserted by a defendant relates back to the date the plaintiff’s complaint is filed for purposes of determining whether the claim or defense is barred by a statute of limitations. See *e.g. Egeland v. City Council of Cut Bank*, 245 Mont. 484, 803 P.2d 609 (1991). The courts have emphasized a statute of limitations is intended as a shield against stale claims of liability, but it is not intended as a sword to bar valid defensive matters. . . . Therefore, courts generally allow defendants to raise defenses that, if raised as claims, would be time-barred.”

Strickland v. Truckers Express, Inc., CV 95-62-M-JCL (United States District Court, D. Montana, Missoula Division, 2006) (quoting *City of Saint Paul, Alaska v. Evans*, 344 F.3d 1029, 1033 (9th Cir. 2003)). Note that *Evans* is a Ninth Circuit opinion.

In *Bingham v. Lechner*, 111 Wn.App. 118, 45 P.3d 562 (2002), *rev. denied*, 149 Wn.2d 1018, 72 P.3d 761 (2003), Division One of the Court of Appeals noted “the settled rule that statutes of limitations do not run against *defenses* arising out of the transaction sued upon. Accordingly, even though the debtors’ counterclaim for breach of an oral promise was

time barred, the debtors were not barred on the basis of the statute of limitations from raising it as an affirmative defense.” (emphasis added) 111 Wn.App. at 132. *See also, Seattle First National Bank, N.A. v. Siebol*, 64 Wn.App. 401, 824 P.2d 1252 (1992) (defense of recoupment not barred by statute of limitations because main action was timely, but counterclaim for affirmative relief barred); *Warren v. Washington Trust Bank*, 19 Wn.App. 348, 575 P.2d 1077 (1978), *modified on other grounds and affirmed*, 92 Wn.2d 381, 598 P.2d 701 (1979) (defendant could not assert counterclaim or cross claim for damages for conversion; commencement of main lawsuit tolled statute of limitations only as to defenses).

Bennett v. Dalton, 120 Wn.App. 74, 84 P.3d 265 (2004), also cited by the Bank, supports plaintiffs’ position, rather than the Bank’s. In *Bennett*, the court distinguished *J.R. Simplot Co. v. Vogt*, 93 Wn.2d 122, 605 P.2d 1267 (1980), a case involving cross-claims between defendants claiming competing security interests in the same collateral. Citing a dozen cases from other jurisdictions, the *Bennett* court concluded that “cross claims between defendants for affirmative relief that are independent and unrelated to the plaintiff’s complaint must be filed within the statute of limitations.” 120 Wn.App. at 82. “[A] counterclaim or cross-claim seeking affirmative relief must be brought before the statute of limitations expires; the statute is not tolled by the commencement of the

plaintiff's action." 120 Wn.App. at 84 (citing *Bednar v. Bednar*, 455 Pa.Super. 487, 688 A.2d 1200 (1997)). The rule in Washington is clear: *defenses* are not barred by statute of limitations, but counterclaims for *affirmative relief* do not relate back to the complaint and are barred if not commenced within the applicable statute of limitations.

In *Bennett v. Dalton*, 120 Wn.App. 74, 84 P.3d 265 (2004),

Division One summarized the cases from other jurisdictions as follows:

"Noble v. C.E.D.O., Inc., 374 N.W.2d 734 (Minn.App.1985) (defensive claims relate back to the commencement of the lawsuit, but counterclaims and cross-claims seeking affirmative relief must be filed before the statute of limitations has run); *State ex rel. Egeland v. City Council of Cut Bank, Montana*, 245 Mont. 484, 803 P.2d 609 (1990) (counterclaim or cross-claim for affirmative relief does not relate back to the commencement of the plaintiff's action); *Ho v. Rubin*, 333 N.J.Super. 599, 756 A.2d 643 (1999) (claim for defamation is not a claim for 'recoupment' and therefore must be asserted as counterclaim or cross-claim before the statute of limitation expires); *Bednar v. Bednar*, 455 Pa.Super. 487, 688 A.2d 1200 (1997) (a counterclaim or cross-claim seeking affirmative relief must be brought before the statute of limitations expires; the statute is not tolled by the commencement of the plaintiff's action); *Brown v. Hipshire*, 553 S.W.2d 570, 572 (Tenn.1977) (holding that a cross-claim or counterclaim for affirmative relief must be filed before the statute of limitations expires because a claim 'is not stripped of its character as an independent action by acquiring the label 'counterclaim''); *Hawkeye-Security Insurance Co. v. Apodaca*, 524 P.2d 874 (Wyo.1974) (state rule governing counterclaims and cross claims is merely a pleading rule and does not address the statute of limitations; the general rule in virtually all jurisdictions is that defensive claims relate back to the

filing of the plaintiff's action, as the statute of limitations is not intended to suppress or deny matters of defense, but the statute is not tolled as to claims for affirmative relief).”

120 Wn.App. at 83-84. Both *Bingham* and *Bennett* were Division One cases, while *Logan* was a Division Two case, the Supreme Court denied review of *Bingham* and thereby approved it, and neither *Bingham* nor *Bennett* cited *Logan*. The Supreme Court has never approved the *dicta* in *Logan* cited by the Bank.

“The following states have noted they do not allow counterclaims seeking affirmative relief if the statute of limitations had run before pleading the counterclaim. *Duhammel v. Star*, 133 Ariz. 558, 653 P.2d 15 (Ariz.Ct.App.1982) (holding that compulsory counterclaim was barred as an action for affirmative relief but would be available for recoupment), *overruled on other grounds by Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 783 P.2d 781 (1989); *Brown v. Missouri Pac. Trans. Co.*, 75 S.W.2d 804 (Ark.1934) (same); *Di Norscia v. Tibbett*, 124 A.2d 715, 715-17 (Del.Super.Ct.1956) (noting the statute of limitations is clear and includes no exceptions for counterclaims); *Freiberger v. Am. Triticale, Inc.*, 120 Idaho 239, 815 P.2d 437, 439-40 (1991) (‘Where the claim of the defendant is an affirmative independent cause of action not in the nature of a defensive claim, the defendant must comply with the applicable statute of limitations.’); *Noble v. C.E.D.O., Inc.*, 374 N.W.2d 734 (Minn.Ct.App.1985) (noting that counterclaims for affirmative relief do not relate back); *State ex rel. Egeland v. City Council of Cut Bank, Mont.*, 245 Mont. 484, 803 P.2d 609, 613 (1990) (counterclaims seeking affirmative relief must comply with statute of limitations); *Nev. State Bank v. Jamison Family P’ship*, 106 Nev. 792, 798-99, 801 P.2d 1377, 1382 (1990) (holding that a timely action does not toll the running of statute of limitations for compulsory counterclaims); *Pharmaresearch Corp. v. Mash*, 163 N.C.App. 419, 426,

594 S.E.2d 148, 153 (N.C.Ct.App.2004) (same); *Harmer v. Hulsey*, 321 Pa.Super. 11, 467 A.2d 867 (1983) (compulsory counterclaim seeking affirmative relief is subject to statute of limitations); *Brown v. Hipshire*, 553 S.W.2d 570, 571-72 (Tenn.1977) (same; but see Tenn. Code Ann. 28-1-114 providing that a counterclaim is not barred by statutes of limitations if it was not barred at the time the claims asserted in the complaint were interposed); *Hawkeye-Sec. Ins. Co. v. Apodaca*, 524 P.2d 874, 879-80 (Wyo.1974) (counterclaims seeking affirmative relief are barred after running of statute of limitations); cf. *Biddle v. Biddle*, 163 N.J.Super. 455, 395 A.2d 218 (1978) (commencement of action does not toll statute of limitations for cross-claims).”

Murray v. Mansheim, 779 N.W.2d 379, 2010 SD 18 (S.D. 2010).

Alternatively, even under *Logan*, if the Notice of Trustee’s Sale issued on April 2, 2015 can be regarded as a pleading commencing an action, the Bank discontinued the trustee’s sale (dismissed the action) on April 10, 2015. Therefore, when the Bank filed its counterclaim on July 15, 2015, there was no original pleading to which the counterclaim could relate back.

“Logan’s counterclaim was not effective because it was filed after the dismissal of North-West’s declaratory judgment action. Hence, Logan’s counterclaim could not attach to the original action.”

45 Wn.App. at 98-99.

Here, the Bank’s counterclaim seeks affirmative relief (judicial foreclosure) and was filed after the statute of limitations had run (April 22, 2015). Under the overwhelming weight of authority both in Washington

and other states, the Bank's counterclaim seeking affirmative relief does not relate back to the commencement of the action. The Bank's counterclaim is barred by the statute of limitations and Plaintiffs' Motion for Summary Judgment should be granted.

3. Plaintiff Tingvall's bankruptcy does not affect the statute of limitations.

First, the Bank has argued that plaintiff Tingvall's bankruptcy plan² required him to surrender his home to the secured lender. This is inaccurate. The plan states that "the debtor shall surrender the home under this Plan. The claim shall be limited to its security and no further claim shall be made in these proceedings." To "surrender" an asset under a plan of reorganization means that the asset is not being retained and no payment on the secured claim(s) thereon is being proposed. It does not mean that the debtor must vacate the premises and give the keys to the creditor. *In re Kasper*, 309 B.R. 82 (Bkrcty. D.D.C. 2004).

Tingvall determined that he could not afford to keep the house, so he excluded it from being reorganized/modified under the plan of reorganization, meaning that the lender would be entitled to proceed with foreclosure. However, the creditor still has to comply with state law foreclosure procedures. In other words, a plan of reorganization does not

² Only plaintiff Tingvall filed for bankruptcy; plaintiff Rego-Barros did not join in the petition and was not a party to the Plan.

eliminate the requirement for the creditor to execute/foreclose on its lien in order to obtain title and possession of the property.

Tingvall's bankruptcy does not preclude plaintiffs from contesting the foreclosure or asserting the statute of limitations as a defense to the foreclosure. Admittedly, there is a split of authority among the bankruptcy courts as to whether the "surrender" of a debtor's home means (a) merely that the home is excluded from the debtor's estate and the protections afforded a debtor in bankruptcy, such that lienholders may proceed to foreclose on the home under state law as though the debtor had not filed for bankruptcy protection, or (b) that the debtor is prohibited from contesting a foreclosure on the home. The former view is better-reasoned. It would be anomalous and contrary to the public policy of giving bankrupt debtors a "fresh start" for a debtor who files for bankruptcy protection to give up rights under state law to contest an improper foreclosure. No court has gone so far as to hold that the debtor must vacate the home and deliver the keys to the lienholder without the lienholder foreclosing on the home. When a debtor cannot afford to keep his home and "surrenders" it in bankruptcy, lienholders may proceed to foreclose on the home without having to seek relief from the automatic stay, but lienholders must still go through the foreclosure process under state law. The foreclosure process is designed to assure due process, which requires

reasonable notice and a meaningful opportunity for a hearing to contest an improper foreclosure. No purpose would be served by requiring foreclosure following filing for bankruptcy, if the debtor is not permitted to contest an improper foreclosure. Here, as discussed above, the statute of limitations is an absolute bar to foreclosure. Surely, a homeowner is not precluded from asserting the affirmative defense of the statute of limitations merely because the homeowner has filed for bankruptcy.

With respect to the Bank's argument that opposing the foreclosure violates the bankruptcy court's order approving the Plan of Reorganization, note that even under the line of cases cited by the Bank, the consequence of resisting foreclosure in state court is that the debtor's discharge in bankruptcy court may be "in jeopardy" – not that the state court has jurisdiction to enforce the bankruptcy court order. *In re Failla*, 529 B.R. 786, 793 (Bankr. S.D. Fla. 2014). Here, plaintiffs would happily trade Tingvall's discharge for the Bank loan.

The Bank argues at length that plaintiffs are bound by the Plan of Reorganization as a contract or court order. But, the Bank's argument begs the question of what does it mean to "surrender" the home? Tingvall is not seeking to avoid his obligations under the Plan. He has not asserted that the Bank must first obtain relief from the automatic stay before proceeding with foreclosure. The "surrender" of the home alleviates the need for

obtaining relief from the stay. It does not mean that plaintiffs may not keep the home, if the Note and Deed of Trust are barred by the statute of limitations, such that the Bank cannot foreclose.

Second, the Bank erroneously has argued that the bankruptcy plan constituted an acknowledgement by Tingvall of the debt. Tingvall was required by the Bankruptcy Code to list all claims, whether disputed or admitted. As stated above, Tingvall's plan of reorganization contemplated that his home loan would not be part of the plan, such that the bank could proceed with a foreclosure. This provision is not an acknowledgement or affirmation of the debt, but rather the antithesis of acknowledgement. Tingvall did not dispute the debt, but nor did he agree to pay it.

Third, the Bank has mischaracterized its counterclaim as an action to enforce an order of the bankruptcy court. As discussed above, the bankruptcy court did not order Tingvall to vacate the premises; it simply confirmed that the home loan was not being treated in the Plan via the normal provisions for payment, cure, interest, etc., and, instead, was being surrendered. A creditor whose claim is not provided for in a plan of reorganization is then entitled to proceed under state law to enforce their rights against their collateral; the discharge granted in the Chapter 11 discharges the underlying Note obligation, so that Tingvall has no further [deficiency] liability on the Note, but does not discharge the lien on the

home, so the bank then needs to foreclose on that lien to obtain title to the property.

Finally, the Bank has argued that Tingvall's bankruptcy constituted an acknowledgement of the debt and restarted the statute of limitations. To the contrary, the filing for bankruptcy expresses an intent *not* to pay the debt. Intent to pay is an essential element of an acknowledgement of the debt to restart the statute of limitations. *In re Tragopan Properties, LLC*, 164 Wn.App. 268, 263 P.3d 613 (2011) is directly on point.

“[The debtor’s] acknowledgment must be coupled with circumstances implying an intent to pay in order to avoid the bar of the statute of limitations. But there can be no such implication where, as here, the very purpose of listing the debt in his schedules under the Bankruptcy Code is to obtain relief from that debt.

...

“[B]ankruptcy proceedings, by definition, are proceedings in which debtors indicate that they are not going to pay their debts. Thus, listing debts on schedules in such a proceeding is not the type of acknowledgment that avoids the bar to collection by a statute of limitations.”

164 Wn.App. at 278-80. Accordingly, Tingvall's bankruptcy did not restart the statute of limitations.

The Bank also argues without citation to any authority that the statute of limitations begins to run from the date of the Plan. The fatal flaw in the Bank's argument is that the Plan did not contain a promise to pay the loan. To the contrary, the filing of bankruptcy is not construed as an

acknowledgement of a debt, but an avoidance of the debt. *In re Tragopan Properties, LLC*, 164 Wn.App. 268, 263 P.3d 613 (2011). There are volumes of cases discussing the tolling of the statute of limitations when a debt files for bankruptcy. A creditor “may not take advantage of [a debtor’s] bankruptcy to extend the statute of limitations beyond its legal life.” *Kiehn v. Nelsen's Tire Co.*, 45 Wn.App. 291, 299, 724 P.2d 434 (1986).

Contrary to the Bank’s contention, plaintiff Tingvall’s bankruptcy did not extend the statute of limitations.

“11 U.S.C. §108(c) provides:

“[I]f applicable nonbankruptcy law . . . fixes a period for commencing or continuing a civil action . . . on a claim against the debtor, . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of--

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) 30 days after notice of the termination or expiration of the stay . . . with respect to such claim.

“The majority of jurisdictions have interpreted section 108(c)(1) as not tolling a state statute of limitation in the normal fashion. *See Rogers v. Corrosion Prods., Inc.*, 42 F.3d 292, 296 (5th Cir.1995); *Thurman v. Tafoya*, 895 P.2d 1050, 1055 (Colo.1995); *Don Huddleston Constr. Co. v. United Bank & Trust Co.*, 933 P.2d 944, 947 (Okla.Civ.App.1996). *Thurman’s* analysis is noteworthy:

By its terms, section 108(c) does not toll any applicable statute of limitations period. Instead, the statute of limitations period continues to run. If the limitations period expires while the bankruptcy stay is in effect, then section 108(c) provides creditors with an extra thirty days to pursue a claim once the creditor receives notice that the bankruptcy stay has been lifted. See 11 U.S.C. § 108(c)(2). The phrase ‘suspension of such period’ in section 108(c)(1) does not operate to stay the running of statute of limitations periods. Instead, this section incorporates suspension provisions that are expressly prescribed by other federal or state statutes.

Thurman, 895 P.2d at 1055 (footnote omitted); *accord Huddleston*, 933 P.2d at 947; *Rogers*, 42 F.3d at 297.”

Hazel v. Van Beek, 135 Wn.2d 45, 64-65, 954 P.2d 1301 (1998).

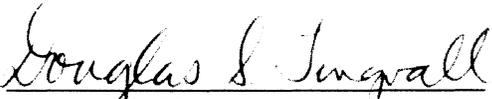
In short, if the statute of limitations had expired during the pendency of Tingvall’s bankruptcy, then the Bank would have 30 days after expiration or termination of the stay to commence a foreclosure of the Deed of Trust. Here, however, the statute of limitations did not expire while Tingvall’s bankruptcy was pending, but two years later. Thus, Tingvall’s bankruptcy has no effect on the statute of limitations.

CONCLUSION

Plaintiffs are entitled to a judgment (a) declaring that enforcement of the Note and Deed of Trust are barred by the applicable statute of limitations, (b) quieting title in plaintiffs as against the Bank and anyone

claiming through it, and (c) awarding attorney's fees and costs to plaintiffs.

Respectfully submitted on August 29, 2016.


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Attorney for Appellants

DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that I successfully emailed a copy of this document to respondent's attorney of record on August 29, 2016, at Newcastle, Washington, pursuant to agreement between counsel under CR 5(b)(7).

