

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

KEVIN ERICKSON,

Appellant,

vs.

AMERICA'S WHOLESALE
LENDER, et al.,

Respondent.

NO. **49478-7**

(Trial Ct # 15-2-12744-1
Pierce County Superior Court)

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in granting USBank's cross-motion for summary judgment and in dismissing the plaintiff Estate's claim with prejudice. (CP 206 - 208)
2. The trial court erred in denying the Estate's motion for summary judgment of quiet title. (CP 206 – 208)

II. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Is the nonjudicial foreclosure of the Deed of Trust brought by USBank time-barred by the six-year statute of limitations under RCW 4.16.040?
2. Is the nonjudicial foreclosure of the Deed of Trust brought by USBank time-barred by the six-year statute of limitations under RCW 62A.3-118(a)?
3. Is the language in the three identical notices of default and intent to accelerate given to the borrower/homeowner Ryan Erickson (deceased) sufficiently clear, unambiguous, and unequivocal to convey notice of intent to accelerate the due date of the entire loan?
4. Where a creditor is time-barred for being beyond the statute of limitations, is the Deed of Trust an outlawed deed of trust under RCW 7.28.300?

III. STANDARD OF REVIEW

This court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court, *Beaupre v. Pierce County*, 161 Wn.2d 568, 571, 166 P.3d 712 (2007), and reviews the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Fulton v. State, Dep't of Soc. & Health Servs.*, 169 Wn.App. 137, 147, 279 P.3d 500 (2012). Summary judgment is proper if there are no genuine issues of material fact. CR 56(c); *Lowman v. Wilbur*, 178 Wn.2d 165, 168-69, 309 P.3d 387 (2013). A material fact is one that affects the outcome of the litigation. *Janaszak v. State*, 173 Wn.App. 703, 711, 297 P.3d 723 (2013).

A [party] moving for summary judgment “has the initial burden to show the absence of an issue of material fact, or that the [other party] lacks competent evidence to support an essential element of [his] case.” *Seybold v. Neu*, 105 Wn.App. 666, 676, 19 P.3d 1068 (2001). If the [moving party] meets this initial showing, then the inquiry shifts to the [nonmoving party] to set forth evidence to support his case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). The evidence set forth must be specific and detailed. *Sanders v. Woods*, 121 Wn.App. 593, 600, 89 P.3d 312 (2004). The responding [party] may not rely on conclusory statements, mere allegations, or argumentative assertions. CR 56(e); *Vacova Co. v. Farrell*, 62 Wn.App. 386, 395, 814 P.2d 255 (1991). If the [nonmoving party] fails to establish the existence

of an essential element that he bears the burden of proving at trial, then summary judgment is warranted. *Young*, id. at 112 Wn.2d at 225.

IV. STATEMENT OF THE CASE

This is an appeal taken from an Order on Cross-Motions for Summary Judgment entered August 23, 2016 (CP 206-207). The order DENIES the motion for summary judgment of quiet title of appellant Kevin Erickson, Personal representative of the Estate of Ryan Erickson, (the “Estate”) and GRANTS the cross-motion for summary judgment of respondent U.S. Bank National Association as Trustee for GSAA Home Equity Trust 2006-1 (“USBank”).

Appellant Kevin Erickson is the Personal Representative of the Estate of his deceased brother Ryan Erickson. Kevin was appointed Personal Representative of Ryan’s estate on May 29, 2015, in Pierce County Superior Court Cause No. 14-4-01520-1.

On October 26, 2005, Ryan obtained a mortgage loan from America’s Wholesale Lender for which he signed a Fixed/Adjustable Rate Note in the principal sum of \$232,000.00 (CP 50 – 53). The obligation under the note was for a thirty-year installment payment plan with the debt maturing on November 1, 2035. However, as shown below, the maturity date of the loan was accelerated and became due and payable in full on or before October 17, 2008. As security for the loan, Ryan signed a Deed of Trust with an Adjustable Rate Rider on his real property commonly known as 9410 150th Street Ct E, Puyallup, WA 98375-8442

(CP 33 - 48; CP 91 – 105) under which the “Security Instrument” is said Deed of Trust; the “Borrower” is Ryan S. Erickson; the “Lender” is America’s Wholesale Lender, a corporation organized and existing under the laws of New York; the “Trustee” is Rainier Title Company; and Mortgage Electronic Registration Systems, Inc., (“MERS”) is named the “Beneficiary” as follows:

“ ‘MERS’ is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501 2026, tel. (888) 679-MERS.”

The loan was originated by Countrywide Home Loans, Inc. (“Countrywide”) and was later sold on the secondary mortgage market into a securitized trust. US Bank is the current trustee of the trust. (CP 71, lines 10 – 12)

Countrywide Home Loans Servicing LP (“Countrywide”) was the servicer for Ryan’s home loan on behalf of the holder of the promissory note. (CP 107, 110, 113)

In the fall of 2007, Ryan began falling behind on his mortgage payments. Countrywide served a "Notice of Default and Acceleration" on or about October 17, 2007 ("October 17, 2007 Notice") stating that the loan is in default for failure to pay the September 2007 monthly payment

(Janati Decl CP 86-88 at Exh B CP 107-108) and accelerating the loan with the following clear unequivocal and unambiguous language:

Dear Ryan S Erickson:

Countrywide Home Loans Servicing LP (hereinafter "Countrywide") services the home loan described above on behalf of the holder of the promissory note (the "Noteholder"). The loan is in serious default because the required payments have not been made. * * *

* * *

You have the right to cure the default. To cure the default, on or before November 16, 2007, Countrywide must receive the amount of \$3,500.99 plus any additional regular monthly payment or payments, late charges, fees and charges, which become due on or before November 16, 2007.

The default will not be considered cured unless Countrywide receives "good funds~ in the amount \$3,500.99 on or before November 16, 2007. * * *

If the default is not cured on or before November 16, 2007, the mortgage payments **will be accelerated** with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time. As such, the failure to cure the default may result in the foreclosure and sale of your property. If your property is foreclosed upon, the Noteholder may pursue a deficiency judgment against you to collect the balance of your loan, if permitted by law.

* * *

You may, if required by law or your loan documents, have the right to cure the default after the acceleration of the mortgage payments and prior to the foreclosure sale of your property if all amounts past due are paid within the time permitted by law.

* * *

* * * Failure to bring your loan current or to enter into a written agreement by November 16, 2007, as outlined above will result in the acceleration of your debt.

Time is of the essence. * * *

(emphasis in bold in original)

Ryan missed another installment payment soon after. Countrywide served another notice titled "Notice of Default and Acceleration" on December 17, 2007 ("December 17, 2007, Notice"), which stated that the loan was in default for failure to pay the November 2007 monthly payment. (Janati Decl CP 86-88 at Exh C, CP 110-111). This notice contains the same clear and unequivocal language of acceleration as that in the October 17, 2007, Notice (CP 107-108):

Dear Ryan S Erickson:

Countrywide Home Loans Servicing LP (hereinafter "Countrywide") services the home loan described above on behalf of the holder of the promissory note (the "Noteholder"). The loan is in serious default because the required payments have not been made. * * *

* * *

You have the right to cure the default. To cure the default, on or before January 16, 2008, Countrywide must receive the amount of \$3,515.99 plus any additional regular monthly payment or payments, late charges, fees and charges, which become due on or before January 16, 2008.

The default will not be considered cured unless Countrywide receives "good funds~ in the amount \$3,515.99 on or before January 16, 2008. * * *

If the default is not cured on or before January 16, 2008, the mortgage payments **will be accelerated** with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time. As such, the failure to cure the default may result in the foreclosure and sale of your property. If your property is foreclosed upon, the Noteholder may pursue a deficiency judgment against

you to collect the balance of your loan, if permitted by law.

* * *

You may, if required by law or your loan documents, have the right to cure the default after the acceleration of the mortgage payments and prior to the foreclosure sale of your property if all amounts past due are paid within the time permitted by law.

* * *

* * * Failure to bring your loan current or to enter into a written agreement by January 16, 2008, as outlined above will result in the acceleration of your debt.

Time is of the essence. * * *

(emphasis in bold in original)

On March 17, 2008, Countrywide served and recorded a Notice of Trustee's Sale with a scheduled sale date of June 20, 2008. (Janati Decl CP 86-88 at Exh G CP 131-137) Ryan entered into a repayment plan on March 28, 2008, to cure his delinquent payments based on a five-month repayment schedule. (Janati Decl CP 86-88 at Exh E CP 117-126)

Ryan again defaulted on his payments, making his last full mortgage payment in July 2008. (Janati Decl CP 86-88 at Exh F, CP 128). Following the default on Ryan's August 2008 payment, Countrywide served a "Notice of Intent to Accelerate" on September 17, 2008 ("September 17, 2008, Notice") (Janati Decl CP 86-88 at Exh D, CP 113-114). This notice contains the same clear and unequivocal language of acceleration as that in the October 17, 2007, Notice (CP 107-108):

Dear Ryan S Erickson:

Countrywide Home Loans Servicing LP (hereinafter "Countrywide") services the home loan described above on behalf of the holder of the promissory note (the "Noteholder"). The loan is in serious default because the required payments have not been made. * * *

* * *

You have the right to cure the default. To cure the default, on or before October 17, 2008, Countrywide must receive the amount of \$4,505.82 plus any additional regular monthly payment or payments, late charges, fees and charges, which become due on or before October 17, 2008.

The default will not be considered cured unless Countrywide receives "good funds~ in the amount \$4,505.82 on or before October 17, 2008. * * *

If the default is not cured on or before October 17, 2008, the mortgage payments **will be accelerated** with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time. As such, the failure to cure the default may result in the foreclosure and sale of your property. If your property is foreclosed upon, the Noteholder may pursue a deficiency judgment against you to collect the balance of your loan, if permitted by law.

* * *

You may, if required by law or your loan documents, have the right to cure the default after the acceleration of the mortgage payments and prior to the foreclosure sale of your property if all amounts past due are paid within the time permitted by law.

* * *

* * * Failure to bring your loan current or to enter into a written agreement by October 17, 2008 as outlined above will result in the acceleration of your debt.

Time is of the essence. * * *

(emphasis in bold in original)

Ryan failed to cure the default by October 17, 2008. (Janati Decl CP 86-88 at Exh F, CP 129) Subsequently, three more notices of trustee's sale were recorded against the property as follows:

- Notice of Trustee's Sale recorded on January 5, 2009, with an original sale date of April 3, 2009, and related postponement notices. (Janati Decl CP 86-88 at Exhibit H, CP 140-151)
- Notice of Trustee's Sale recorded on July 14, 2010, with an original sale date of October 15, 2010, and related postponement notices. (Janati Decl CP 86-88 at Exhibit I, CP 153-159)
- Notice of Trustee's Sale recorded on June 25, 2015, and the Notice of Continuance of Trustee's Sale, continuing the sale date to December 4, 2015. (Janati Decl CP 86-88 at Exhibit J, CP 161-166)

The trustee's sale originally set for June 25, 2015, which was continued to December 4, 2015, was postponed pursuant to the injunction staying the foreclosure on the property that is the subject of Estate's quiet title action. (CP 15-16; CP 168-169)

PR Kevin Erickson filed a motion for summary judgment to quiet title on March 31, 2016 (CP 20-21) together with his supporting Legal Memorandum (CP 60 – 68) and the Declaration of David C.

Hammermaster (CP 22-56) and the Declaration of Personal Representative Kevin Erickson (CP 57-59).

USBank filed its Opposition to Plaintiff Kevin Erickson's Motion for Summary Judgment and Notice of Cross-Motion for Summary Judgment on April 21, 2016, (CP 69 – 85) supported by the Declaration of Fay Janati (CP 86 – 169).

PR Kevin Erickson filed his Reply and Response to USBank's Response and Counter-Motion for Summary Judgment (CP 170 – 177) and the Supplemental Declaration of David C. Hammermaster (CP 178 – 190) on May 23, 2016.

USBank filed its Response in Support of Summary Judgment on May 31, 2016. (CP 191 – 199)

The hearing on the parties' summary judgment motions was held on August 19, 2016, before the Honorable Edmund Murphy, Judge, Pierce County Superior Court. (CP 200 – 201; CP 202 – 203; RP August 19, 2016).

The court took the matter under advisement and issued its decision and entered its Order on Cross Motions for Summary Judgment on August 23, 2016, GRANTING USBank's cross-motion for summary judgment and DENYING PR Kevin Erickson's motion for summary judgment and dismissing his claim against defendant. (CP 204 – 205; CP 206 – 208)

The Order on Cross Motions for Summary Judgment recites that the trial reviewed and considered the pleadings, documents, and evidence in the record, including:

1. Plaintiffs Motion for Summary Judgment and Legal Memorandum in Support Thereof [CP 20 – 21];
2. Declaration of David C. Hammermaster dated March 31, 2016 [CP 22 – 56];
3. Declaration of Kevin Erickson dated March 31, 2016 [CP 57 – 59];
4. Defendant's Opposition to Plaintiffs Summary Judgment Motion and Cross-Motion for Summary Judgment and Legal Memorandum in Support Thereof [CP 69 – 85];
5. Declaration of Fay Janati dated April 20, 2016 [CP 86 - 169];
6. Plaintiffs Reply and Response to Defendant's Response and Counter-Motion for Summary Judgment [CP 170 – 177];
7. Supplemental Declaration of David C. Hammermaster in Support of Motion for Summary Judgment [CP 178 – 190]; and
8. Defendant's Response and Reply in Support of Cross-Motion for Summary Judgment [CP 191 – 199].

The Notice of Appeal was filed September 22, 2016. (CP 209 –

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V. ARGUMENT AND AUTHORITIES

(Argument applicable to
all assignments of error)

The following are the relevant dates for the statute of limitations
analysis:

DATE	EVENT	CITATION
October 17, 2007	Notice of Default and Acceleration accelerating note in full effective November 16, 2007	CP 107 - 108
December 17, 2007	Notice of Default and Acceleration accelerating note in full effective January 16, 2007	CP 110 - 111
March 18, 2008	Notice of Trustee's Sale with a sale date of June 20, 2008; Abandoned or discontinued.	CP131-137
March 28, 2008	5-month repayment plan agreement	CP 117-126
July 2008	Last full mortgage payment made. Note has remained in default thereafter.	CP 128
September 17, 2008	Notice of Default and Acceleration accelerating note in full effective October 17, 2008	CP 113-114
January 5, 2009	Notice of Trustee's Sale with a sale date of April 3, 2009; Abandoned or discontinued.	CP 140-151
July 14, 2010	Notice of Trustee's Sale with a sale date of October 15, 2010; Abandoned or discontinued.	CP 153-159

September 17, 2014	Six years from last default date of September 17, 2008	
October 17, 2014	Six years from acceleration date of October 17, 2008	
June 25, 2015	Notice of Nonjudicial Trustee's Foreclosure Sale recorded in Pierce County, more than eight months after the statute of limitations has run on the accelerated loan.	CP 161-166

USBank waited more than six years to bring its foreclosure proceeding. These facts are not in dispute.

Where a nonjudicial foreclosure is brought more than six years after the default and acceleration of the Note, the creditor is time-barred. USBank is now forever barred from pursuing claims arising from the Note and Deed of Trust. USBank waited too long to bring any proceeding against the borrower.

In Washington, courts strictly construe statutes of limitations.

Janicki Logging and Constr. Co, Inc. v. Schwabe, Williamson & Wyatt, P.C., 109 Wash.App. 655, 662, 37 P.3d 309 (2001). A claim by USBank arising out of the Note and Deed of Trust on the Erickson home is time-barred by the statute of limitations set forth in RCW 4.16.040 which states in part that

Actions limited to six years.

The following actions shall be commenced within six years:

- (1) An action upon a contract in writing or liability express or implied arising out of a written agreement . . .

It is clear that an action arising out of the Note and Deed of Trust is "an action upon a contract in writing, or liability express or implied arising out of a written agreement." RCW 4.16.040(1), and is subject to the six-year statute of limitations time bar. *See also e.g. Walcker v. Benson and McLaughlin, P.S.*, 79 Wn.App. 739, 904 P.2d 1176 (Div. 3 1995).

Alternately, if this Court determines that the six-year statute of limitations in the Uniform Commercial Code, Negotiable Instruments, pertains to the Note, the October 17, 2008 acceleration is the accrual date for the statute of limitations. RCW 62A.3-118(a). The six-year statute of limitations had already expired by October 17, 2014, more than eight months *before* recordation of the Notice of Trustee's Sale on June 25, 2015.

Whether the Court uses the default date of September 17, 2008, as the accrual date for the statute of limitations analysis or whether it uses the acceleration date of October 17, 2008, both lead to the same conclusion: In accordance with RCW 4.16.040(1), *Walcker*, and *Janicki*, an action by USBank or its servicer arising from the Note and Deed of Trust is time-barred by the six-year statute of limitations, which ran out in October 2014.

The Court should declare that USBank or its servicer is barred from bringing any action on the October 2006 Note and Deed of Trust

after October 17, 2014, as a matter of law. RCW 4.16.040(1); RCW 62A.3-118(a).

As shown above, the loan was fully accelerated at the latest on October 17, 2008. If an obligation that is to be paid in installments is accelerated, the entire remaining balance becomes due and the statute of limitations is triggered for all installments that had not previously become due. RCW 62A.3-118(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

See also 31 Richard A. Lord, Williston on Contracts § 79:17 at 338; § 79:18, at 347-50; accord 12 Am.Jur.2d, Bills & Notes § 581.

Where there is an acceleration provision exercisable at the option of the creditor, to accelerate the maturity date of a promissory note, “ ‘[s]ome affirmative action is required, some action by which the holder of the note makes known to the payors that he **intends** to declare the whole debt due.’ ” *Glassmaker v. Ricard*, 23 Wn.App. 35, 37, 593 P.2d 179 (1979) (emphasis in bold added), (quoting *Weinberg v. Naher*, 51 Wash. 591, 594, 99 P. 736 (1909)). It is long-standing black letter law that the assignee takes on the burdens of the assignor. *Dahlhjelm Garages v. Mercantile Ins. Co. of Am.*, 149 Wash. 184, 189, 270 P. 434 (1928); *McGill v. Baker*, 147 Wash. 394, 400, 266 P. 138 (1928).

In Washington, courts strictly construe statutes of limitations. *Janicki Logging and Constr. Co, Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wash.App. 655, 662, 37 P.3d 309 (2001). Our Supreme Court has addressed the irreversible effect of acceleration in the context of a nonjudicial foreclosure. *See e.g. Rodgers v. Rainier Nat. Bank*, 111 Wn.2d 232, 757 P.2d 976 (1988), internal citation omitted (the lender loses its right to a prepayment (penalty) premium when it elects to accelerate the debt). “This is so because acceleration, by definition, advances the maturity date of the debt so that payment thereafter is not prepayment but instead is payment made after maturity.” *Id.* at 236-37. Notably, the instrument accelerated was a deed of trust, foreclosed nonjudicially. Our Supreme Court held the creditor to the acceleration.

In another case directly on point, Division 1 determined that once a notice of acceleration is conveyed to the borrower, evoking a positive rule of law, an acceleration is not nullified by a later act. *Kirsch v. Cranberry Fin., LLC*, 73108-4-1, 2013 WL 6835195, at *7 (Div. 1, Dec. 23, 2013).⁶ “Once rung, the bell is not unrung.” *Id.*, *citing Lunsford v. Saberhaqen Holdings. Inc.*, 139 Wn.App. 334, 343, 160 P.3d 1089 (2007).

As our Supreme Court made clear in 1917 in *Hensen v. Peter*:

If the plaintiff voluntarily omitted to prosecute his remedy until the bar of the statute attached, it is his misfortune, and the debtor is at liberty

to set up the [statute of limitations] defense, as in any other case.

Hensen v. Peter, 95 Wash. 628, 633, 164 P. 512 (1917). In *U.S. Oil*, our Supreme Court explained this longstanding rationale that the plaintiff would be able to "suspend indefinitely the running of the statute of limitations by delaying the performance of the preliminary act ..." *U.S. Oil & Refining Co. v. State Dept. of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981) citing *Edison Oyster Co. v. Pioneer Oyster Co.*, 22 Wn.2d 616, 626, 157 P.2d 302 (1945). Permitting the creditor to decelerate at will, especially via unclear and equivocal acts, would allow it to suspend indefinitely the running of the statute of limitations. Such would defeat the purpose of the statute of limitations, which is strictly construed in Washington.

Countrywide's October 17, 2007 (CP 107-108), December 17, 2007 (CP 110-111), and September 17, 2008 (CP 113-114) notices of default and intent to accelerate were clear, unambiguous, and unequivocal affirmative acts that gave notice by which the then-holder or its servicer made known to the borrower Ryan Rickson (deceased) that it intended to declare the whole debt immediately due and payable. USBank is bound by Countrywide's acceleration. Any act by USBank or its servicer arising out of the October 2006 Note and Deed of Trust brought after October 17, 2014 is time-barred as a matter of law.

Incomplete and abandoned or discontinued nonjudicial foreclosure proceedings do not toll the statute of limitations any more than a dismissed lawsuit tolls the limitations period for filing an action. In the case of *Fittro v. Alcombrack*, 23 Wn. App. 178, 596 P.2d 665 (1979), the Plaintiff who was injured in an automobile accident brought an action against the defendant (the defendant was deceased at the time) and properly served that defendant about a year and a half after the accident. The accident occurred on February 25, 1974, and the at-fault party (his estate) was served on November 5, 1975. State Farm was also a named co-defendant and it was not served until March 14, 1977, which was approximately three years and one month after the original date of the accident (beyond the three-year statute of limitations without considering the tolling effect of filing the lawsuit). State Farm, however, was served after the lawsuit against the first defendant had been dismissed. State Farm was granted a summary judgment on the grounds that the action was barred by the statute of limitations. The plaintiff argued that the filing of the complaint tolled the statute of limitations as to the unserved defendant. The court disagreed and stated as follows:

When an action is dismissed, the statute of limitations continues to run as though the action had never been brought. *Humphreys v. United States*, 272 F.2d 411 (9th Cir. 1959); see also *Vance v. Seattle*, 18 Wn. App. 418, 424 n.4, 569 P.2d 1194 (1977); *Gould v. Bird & Sons, Inc.*, 5 Wn. App. 59, 485 P.2d 458 (1971). Because the action against Alcombrack was dismissed before State Farm was served, the action against Alcombrack no longer tolled the statute of limitations either as to

Alcombrack or as to State Farm. Fittro's failure to serve State Farm within the 3-year statutory period bars her claim. *Fox v. Groff*, 16 Wn.App. 893, 559 P.2d 1376 (1977).

Fittro v. Alcombrack, 23 Wn. App. 178, 180, 596 P.2d 665, 666 (1979).

The court in *Logan v. N.W. Ins. Co.*, 45 Wn. App. 95, 99, 724 P.2d 1059, (1986) states it even better when the court said as follows: “Where an original action is dismissed, a statute of limitations is deemed to continue to run as though the action had never been brought.”

USBank relies on and cites *Bingham v. Lechner*, 111 Wn. App. 118, 45 P.3d 562 (Div. 1, 2002) for the proposition that the statute of limitations is tolled during the entire time a non-judicial foreclosure was pending even where the nonjudicial foreclosure was never completed, no trustee’s sale was held, and the nonjudicial foreclosure was abandoned or discontinued. Such is not the law nor is it the holding of *Bingham*. In dicta, the *Bingham* court sounds as though there was a pause in the counting of the days during the non-judicial foreclosure. But it is not immediately clear that such was the court’s ruling as it was not necessary for that particular decision as the date the creditor attempted to enforce the note was well beyond the statute of limitations under any definition or interpretation. In other words, if the *Bingham* case says what USBank would purport it to say, it is ambiguous and dicta at best and not a binding authority for that proposition.

In the case at bar, USBank or its predecessor had commenced more than one nonjudicial foreclosure. During the times of these events, the statute of limitations could not expire. In effect, it had tolled temporarily, just as in a properly commenced lawsuit. However, once each event was abandoned, dismissed, canceled, or discontinued, it was if the event had never occurred and the original timeline on the statute of limitations continued to run as though the nonjudicial foreclosures had never been initiated. In short, there is no such thing as a “tolling deduction” as USBank contends in its response and cross-motion for summary judgment.

Under RCW 7.28.300, Washington’s legislature has provided the homeowner with the right to quiet title against a time-barred deed of trust.

Because USBank waited more than six years, in violation of RCW 4.16.040 and RCW 62A.3-118(a), and is time-barred as a matter of law, the Washington Legislature instructs the Court to declare the Deed of Trust as being an outlawed deed of trust under RCW 7.28.300. The Estate of Ryan Erickson is entitled to quiet title removing the lien of the outlawed Deed of Trust from the property.

The case of *Walcker v. Benson and McLaughlin, P.S.* is instructive. There, the court reversed the order of foreclosure because it was time barred:

The plain language of RCW 61.24.020, states that "[e]xcept as provided" in the deed of trust act, mortgage law applies to foreclosure of deeds of trust. The act

does not address the applicability of statutes of limitations. Therefore, RCW 7.28.300, which expressly makes the statute of limitations a defense in mortgage foreclosure proceedings, applies to foreclosure of trust deeds as well. Because Benson and McLaughlin failed to initiate its foreclosure within the applicable six-year limitation period, the foreclosure should be barred.

Id. at 746.

In 1998, in response to *Walcker*, the legislature amended RCW 7.28.300 to expressly permit borrowers to quiet title to outlawed deeds of trust:

RCW 7.28.300
Quieting title against outlawed mortgage or deed of trust.

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.

VI. ATTORNEY FEES

The Estate requests an award of its costs, disbursements, and reasonable attorney fees under the attorney fee provision of the promissory Note (CP 50 – 53) at paragraph 7(E) and also under the attorney fee provision of the deed of trust (CP 33 - 48) at paragraph 26. This request for an award of costs, disbursements, and attorney fees is based upon RCW 4.84.330 which provides as follows:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such

contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

VII. CONCLUSION

The Estate of Ryan Erickson provided proof sufficient to establish that an action to foreclose on the deed of trust after October 17, 2014, is barred by the statute of limitations. The Estate has shown that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, notwithstanding USBank's arguments to the contrary. The Estate is entitled to quiet title against USBank's outlawed Deed of Trust.

The Estate respectfully requests that this Court reverse the trial court's order denying its motion for summary judgment of quiet title and its order granting USBank's cross-motion for summary judgment, and remanding this case to the trial court with instructions to enter an order and judgment of quiet title as to the outlawed Deed of Trust and that USBank and/or its servicer and/or any of its successors and assigns reconvey the property to the Estate of Ryan Erickson, free and clear of the lien of the outlawed Deed of Trust.

Appellant respectfully ask this Court to:

1. Reverse the Order Denying the Estate's Motion for Summary Judgment of Quiet Title;
2. Reverse the Order Granting USBank's Cross-Motion for Summary Judgment;
3. Remand this case to the trial court with instructions to enter an order and judgment of quiet title as to the outlawed Deed of Trust;
4. Require USBank and/or its servicer and/or any of its successors and assigns to reconvey the Property to the Estate of Ryan Erickson, free and clear of the lien of the outlawed Deed of Trust
5. Award the Estate its costs, disbursements and reasonable attorney fees on this appeal and in the trial court.
6. Such other relief as is just and proper.

Respectfully submitted this 15th day of May 2017.

A handwritten signature in black ink, appearing to be 'Helmut Kah', written in a cursive, somewhat stylized script.

Helmut Kah, WSBA # 18541
Attorney for Appellant

PROOF OF SERVICE BY MAIL and EMAIL

I hereby certify that on May 15, 2017, I mailed a true and complete copy of this APPELLANTS' OPENING BRIEF, together with any attachments, with priority mail postage prepaid, addressed to:

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and also via email on May 15, 2017, sent to the following email addresses:

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DATED this 15th day of May 2017.

A handwritten signature in black ink, appearing to be 'Helmut Kah', written over a horizontal line.

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Attorney for Appellant

HELMUT KAH, ATTORNEY AT LAW

May 15, 2017 - 5:08 PM

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Comments:

This is Appellants Opening Brief with a number of minor typographical and grammar errors corrected. No substantive changes have been made. Page count is unchanged. Please replace the Appellant's Opening Brief filed this morning Monday, May 15, 2017, with the attached corrected version.

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