

NO. 49478-7-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

KEVIN ERICKSON, as Personal Representative of the Estate of Ryan
Erickson,
Plaintiff-Appellant,

v.

AMERICA'S WHOLESALE LENDER, a New York corporation,
Defendant;

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC., an
inactive Washington corporation,
Defendant;

and

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR GSAA
HOME EQUITY TRUST 2006-1, QUALITY LOAN SERVICE CORP.
OF WASHINGTON
Defendant-Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Kevin Erickson asserted a quiet title claim in this action against U.S. Bank National Association as Trustee for GSAA Home Equity Trust 2006-1 (“US Bank”). Erickson sought to eliminate the lien of a deed of trust burdening real property located in Puyallup, Washington.¹ US Bank is the beneficiary of that deed of trust, and had begun a non-judicial foreclosure of the real property on June 25, 2015, before Erickson filed suit. Erickson’s claim to quiet title is based in the theory that the statute of limitation on the promissory note underlying the deed of trust expired before the foreclosure began. In fact, the statute of limitation had not expired, for four reasons.

First, as a matter of law, the statute of limitation has not expired. Erickson’s argument is premised in the idea that the loan was accelerated in 2008. This, it is argued, made the loan immediately due and payable in full so as to begin the six-year statute of limitation on the entire amount due under the loan. However, acceleration occurs under Washington law only upon an unequivocal affirmative action by a lender declaring that the entire loan is immediately due and payable, and that no further installments will be accepted. Here, US Bank’s predecessor in interest only sent pre-acceleration notices to the borrower, and never accelerated the loan.

¹ Erickson is not himself the borrower, who died in a tragic accident, but represents the borrower’s estate.

Second, the notices that were sent to the borrower are specifically described in the deed of trust as pre-acceleration notices. They are required as a prerequisite to acceleration, but do not constitute acceleration on their own.

Third, in a non-judicial foreclosure, the borrower has the right under Washington statute to cure a default by paying less than the full amount of the loan up to 11 days before a foreclosure sale. In this case, various non-judicial foreclosure proceedings were undertaken, but no foreclosure sale ever occurred. Because the 11-days-prior date accordingly never arrived, as a matter of law the loan could never have been immediately due and payable in full so as to trigger the statute of limitation.

Fourth, even if the loan had been accelerated as Erickson contends, the current foreclosure would nonetheless be timely, because the statute of limitation would have been tolled by the various other non-judicial foreclosure proceedings that occurred after the borrower's default.

Because the relevant facts of this matter were undisputed, Erickson and US Bank submitted cross-motions for summary judgment to determine the legal effect of those facts. The Superior Court, The Honorable Edmund Murphy, granted US Bank's motion, denied Erickson's motion, and dismissed Erickson's quiet title claim with prejudice. This appeal followed, in which Erickson has advanced the same positions he advanced in the trial

court. For the same reasons, Erickson's positions are not consistent with Washington law. The trial court's judgment should be affirmed in full.

II. RESPONSE TO ASSIGNMENTS OF ERROR

A. *Response.*

This case presented a question of law that the trial court correctly resolved. The trial court did not err in granting summary judgment in favor of US Bank; nor did it err in denying Erickson's cross-motion for summary judgment. The trial court's judgment should be affirmed in full.

B. *Issues Pertaining To Assignments Of Error.*

The issues pertaining to Erickson's assignments of error are as follows:

1. US Bank's predecessor in interest sent notices requesting that the borrower cure a default by a certain date, and threatening acceleration if the default remained uncured. Did these notices represent an unequivocal action requiring immediate payment in full with no right to cure, so as to accelerate the loan?

2. RCW 61.24.090 requires that a lender accept less than the full amount of the loan to cure a default until 11 days before a scheduled non-judicial foreclosure sale. May the lender require immediate payment in full of a loan so as to trigger the statute of limitation more than 11 days before a scheduled foreclosure sale?

3. US Bank's predecessor in interest initiated non-judicial foreclosure proceedings at various times after the borrower's default. Did these non-judicial foreclosures of the borrower's deed of trust toll the statute of limitation on the underlying promissory note?

III. STATEMENT OF THE CASE

The facts of this case are not in dispute, only their legal significance. US Bank accepts Appellant's Statement of the Case, as set forth in his Opening Brief on pp. 3–11, except for its argumentative statements to the effect that the Erickson mortgage loan was accelerated. *See* RAP 10.3(a)(5) (directing appellants to include in their briefs a “fair statement of the facts and procedure relevant to the issues presented for review, *without argument.*”) (emphasis added). US Bank accordingly accepts the Statement of the Case insofar as it properly states facts and procedure pursuant to RAP 10.3(a)(5), but objects to and rejects each and every argument or implication in the Statement of the Case that the Erickson mortgage loan was ever accelerated.

IV. ARGUMENT

The trial court correctly granted summary judgment in US Bank's favor. US Bank's non-judicial foreclosure was not time-barred, and Erickson was not entitled to quiet title, for the following reasons.

A. *Standard Of Review.*

The standard of review following summary judgment is de novo, with the appellate court engaging in the same inquiry as the trial court. *TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wn. App. 819, 825, 142 P. 3d 209 (2006). Summary judgment is proper where the record shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

B. *The Erickson Mortgage Loan Does Not Fully Mature Until 2035.*

An action on a promissory note must generally be commenced within six years. *See* RCW 4.16.040 (six-year limit for actions based on written contracts). But there is a distinction between promissory notes payable on demand and promissory notes payable in installments. Where a note is payable in installments, the statute of limitation only begins running against each installment from the time that particular installment becomes due, when an action could be brought to recover it. *Edmundson v. Bank of America*, 194 Wn. App. 920, 930–31, 378 P. 3d 272 (2016); *cf. Walcker v. Benson and McLaughlin P.S.*, 79 Wn. App. 739, 742, 904 P. 2d 1176 (1995) (holding that the statute of limitation begins running on a demand note on the date it is signed).

If a loan payable in installments is accelerated, such that the entire balance of the loan becomes immediately due and payable, then the statute

of limitation on the accelerated balance runs from the date of acceleration. *Washington Federal v. Azure Chelan LLC*, 195 Wn. App. 644, 663, 382 P. 3d 20 (2016); *see also* RCW 62A.3-118(a) (six-year limit for action to enforce note after acceleration). In *Puget Sound Mut. Sav. Bank v. Lillions*, the court described acceleration as meaning that “[t]he entire debt having matured, no further right exist[s] to make monthly payments, and [the creditor] is not required to accept them.” 50 Wn. 2d 799, 803, 314 P. 2d 935 (1957). Acceleration, if exercised, accordingly causes the entire remaining balance of the loan to become immediately due and payable with no right to cure the default, which in turn triggers the statute of limitation. *See Azure Chelan*, 195 Wn. App. at 663.

Where a promissory note states that it is payable in monthly installments and has a maturity date in the future, it is an installment note. *See Edmundson*, 194 Wn. App. at 929 (so holding). The Erickson promissory note calls for monthly installments and has a maturity date of November 1, 2035, when the full balance of the loan becomes due and payable. *See* CP, p. 50 (promissory note).

Because the Erickson promissory note is an installment note, an action on the promissory note would accordingly be timely² up to

² At least with respect to amounts falling due on the maturity date. In this case, none of the defaulted installments fall outside of the six-year limitation window prior to US Bank’s non-judicial foreclosure, as discussed below at pages 17–21.

November 1, 2041 (six years after the maturity date), unless the loan were accelerated. The same timeframe applies to foreclosure of the accompanying deed of trust. For example, in *Azure Chelan*, the Court of Appeals held, “[f]or a deed of trust, the six-year statute of limitations begins to run when the party is entitled to enforce the obligations of the note. This can occur either . . . when the note naturally matures, or when the party accelerates the note . . .” 195 Wn. App. at 663; *see also Walcker*, 79 Wn. App. at 742–46 (non-judicial foreclosure time-barred where action on promissory note would be time-barred). Foreclosure of the Erickson deed of trust would accordingly be timely up to November 1, 2041. As explained below, the Erickson mortgage loan was never accelerated, and US Bank’s foreclosure in 2015 was thus timely.

C. *The Erickson Mortgage Loan Was Never Accelerated.*

The Erickson Deed of Trust provides the lender with the unilateral option to accelerate the loan upon default. *See* CP, p. 100 (Deed of Trust, ¶ 22). Acceleration is not automatic upon default or upon any other event—the lender must affirmatively exercise the option. *See id.*

Under Washington law, a lender’s exercise of a right to accelerate “must be made in a clear and unequivocal manner which effectively apprises the maker that the holder has exercised his right to accelerate the payment date.” *Glassmaker v. Ricard*, 23 Wn. App. 35, 37, 593 P. 2d 179

(1979) (citing *Weinberg v. Naher*, 51 Wn. 591, 594, 99 P. 736 (1909)). Mere default of payments will not accelerate a loan even if the loan documents say that acceleration is automatic upon default—an affirmative election on the lender’s part is always required. *See Coman v. Peters*, 52 Wn. 574, 576–77, 100 P. 1002 (1909) (language providing that entire loan “shall immediately become due and payable” upon default could not itself accelerate the loan without action by the lender). Similarly, “[d]efault in payment alone does not work an acceleration.” *Edmundson*, 194 Wn. App. at 931. Nor does a non-judicial foreclosure in itself serve to accelerate a loan. *4518 S. 256th, LLC v. Karen L. Gibbon, P.S.*, 195 Wn. App. 423, 444, 382 P. 3d 1 (2016).

Washington case law has consistently emphasized the requirement of a clear and affirmative action on a lender’s part, finding acceleration only in instances where a lender states clearly and unequivocally that the entire debt is *immediately* due. *See, e.g., Meyers Way Development Ltd. Partnership v. University Savings Bank*, 80 Wn. App. 655, 660–61, 910 P. 2d 1308 (1996), (bank exercised option to accelerate defaulted loan when bank sent a letter to borrowers notifying them that it had elected to accelerate the loan and that the full debt was immediately due and owing); *Rodgers v. Rainer Nat. Bank*, 111 Wn. 2d 232, 235, 757 P. 2d 976 (1988) (trustee accelerated loan when it rejected partial payment and demanded

principal and interest in full); *Jacobson v. McClanahan*, 43 Wn. 2d 751, 752–53, 264 P. 2d 253 (1953) (loan accelerated when notice stated that there was a default and that no further installments would be accepted, and partial payments were rejected).

Here, Erickson contends that three notices sent by US Bank’s predecessor on October 17, 2007; December 17, 2007; and September 17, 2008 accelerated the loan.³ However, those notices did not accelerate the loan because they did not cause the entire remaining balance of the loan to become immediately due and payable. Rather, each of the notices advises of the borrower’s default, states the amount required to cure the default, and provides that payments will be accelerated at a date in the future if the default is not cured. *See, e.g.*, CP, pp. 113–15 (correspondence to Ryan S. Erickson dated September 17, 2008).⁴ Erickson does not discuss the parts of the notices discussing cure of the default and acceptance of partial payments, but instead relies on the following language:

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,

³ Erickson focuses on the September 17, 2008 notice in his Opening Brief. US Bank agrees that the earlier notices are not relevant, because the borrower did make payments after each of them, and ultimately entered into a repayment plan on March 27, 2008 acknowledging the debt in writing and agreeing to cure the default. *See* CP, pp. 117–127. The borrower’s final default—and the basis for the current foreclosure—did not occur until July, 2008. *See* CP, p. 87 (Declaration of Fay Janati, so noting).

⁴ The other notices contain the same language, but identify a different date by which to cure the default. *See* CP, pp. 107–08 (correspondence to Ryan S. Erickson dated October 17, 2007); CP, pp. 110–11 (correspondence to Ryan S. Erickson dated December 17, 2007).

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.

Id.

As a matter of law, this language and the notice in which it was expressed could not have accelerated the loan. At most, it notified the borrower that the loan would be accelerated in the future if he did not cure the default. The seminal *Weinberg* case is particularly instructive on this point. In *Weinberg*, the noteholder had sent two letters to the borrower stating that if the borrower did not meet the terms of the note, the noteholder would call the loan due on a certain date. The *Weinberg* court reviewed these letters and held, “the language of the first is that the loan will be called in if the mortgagor does not before the end of the week make the insurance policy payable to the mortgagee; and the second is that the mortgagee will insist on an insurance policy or call in the loan. These letters but threaten an exercise of the option . . . They do not amount to an actual call of the loan or to an exercise of the option.” 51 Wn. at 597.

The Supreme Court’s holding in *Weinberg* continues to be applied to situations involving potential future acceleration. In *Bank of New York Mellon v. Stafne*, the district court considered a “Notice of Intent to Accelerate,” which had been sent to the borrower stating that the borrower’s

loan would be accelerated if a default were not cured. 2016 WL 7118359 at *3 (W.D. Wa. 2016). The *Stafne* court held that this notice had not accelerated the loan, noting that “[a] statement of potential future action does not constitute the affirmative action required to accelerate a debt . . . [lender’s] statement that it would accelerate the loan if the default was not cured is a statement of potential future action and thus, was insufficient to trigger acceleration of [borrower’s] debt.” *Id.* (citing *Weinberg*, 51 Wn. at 594).

The same analysis applies here. The notices sent to the borrower in this case identified a default, requested that it be cured, and threatened acceleration in the future if the default remained uncured on a particular date. But the notices did not state that the loan actually had been accelerated or that the entire debt was immediately due and payable, with no right to cure and no right to continue making installment payments. Indeed, the fact that the same notice was sent at three different times—each time demanding a cure of the default through a partial payment—only highlights that the loan was never made immediately due and payable in full. There was accordingly no acceleration of the Erickson mortgage loan in this case, as a matter of law.

D. *The October 17, 2007, December 17, 2007, And September 17, 2008 Notices Were Pre-Acceleration Notices Of Default Required By The Deed Of Trust.*

The three notices sent to the borrower by US Bank's predecessor in interest did not accelerate the loan, as explained above. That conclusion is driven home by considering what the notices actually are—namely, pre-acceleration notices that are specifically required by the Erickson deed of trust.

The Erickson deed of trust provides in paragraph 22 that the lender must give notice before exercising its right to accelerate the loan. Specifically, the deed of trust provides,

Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise).⁵ The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property at public auction at a date not less than 120 days in the future. The notice shall further inform Borrower of the right to reinstate after acceleration, the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale, and any other matters required to be included in the notice by Applicable Law. If the default is not cured on or before the date specified in the notice, Lender at its option, may require immediate payment in full of all sums secured by this Security Instrument without further demand and may

⁵ Section 18 is a due on sale clause that is not at issue in this case.

invoke the power of sale and/or any other remedies permitted by Applicable Law.

CP, p. 100 (Deed of Trust, ¶ 22).

The Erickson deed of trust thus requires a two-step process for acceleration. First, the lender must send notice of default and potential acceleration. Second, at least 30 days later, the lender “at its option, may require immediate payment in full . . .” *Id.* The lender accordingly retains the option to accelerate or not accelerate after the pre-acceleration notice.

The notices sent to the borrower in this case track precisely the requirements of the deed of trust for pre-acceleration notices, as illustrated in the following chart.

Requirement of Deed of Trust for Pre-acceleration Notice	Language of Notice Sent to Borrower
“The Notice shall specify: (a) the default.”	“The loan is in serious default because the required payments have not been made.”
“The Notice shall specify: . . . (b) the action required 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 Notice shall specify: . . . (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured.”	“The default will <u>not</u> be considered cured unless Countrywide receives ‘good funds’ in the amount of \$4,505.82 on or before October 17, 2008.”

The Notice shall specify: . . . (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property at public auction not less than 120 days in the future.”	“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.”
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CP 113–15 (correspondence to Ryan S. Erickson dated September 17, 2008).⁶ Each notice further contained the required provisions informing the borrower of the right to reinstate and to bring a court action to assert the non-existence of a default or a defense to acceleration and foreclosure. *See id.*

Thus, by the plain terms of the deed of trust, the notices at issue in this case did not and could not have accelerated the Erickson mortgage loan. Rather, they were pre-acceleration notices of default, which were specifically required by the deed of trust, and which are separate from the lender’s ultimate option to accelerate.

E. *Acceleration Cannot Occur For Purposes Of Starting The Statute Of Limitation Until Eleven Days Before A Non-judicial Foreclosure Sale.*

Non-judicial foreclosures are regulated by the Deeds of Trust Act, RCW 61.24.005 *et seq.* Under the Deeds of Trust Act, “[a]t any time prior

⁶ The other notices are identical except for the date and the amount required to cure the default.

to the eleventh day before the date set by the trustee for the sale in the recorded notice of sale, or in the event the trustee continues the sale . . . at any time prior to the eleventh day before the actual sale, the borrower [and certain other interested parties] shall be entitled to cause a discontinuance of the sale proceedings by curing the default or defaults set forth in the notice . . .”). RCW 61.24.090(1). The necessary result is that a mortgage loan in non-judicial foreclosure cannot become immediately due and payable in full until eleven days before the foreclosure sale, because the borrower retains the unilateral right to cure until that time.

Erickson cites *Meyers Way Development Ltd. Partnership v. University Savings Bank*, 80 Wn. App. 655, 910 P. 2d 1308 (1996), to argue that a lender can accelerate a loan in non-judicial foreclosure despite RCW 61.24.090. That argument misunderstands and misapplies the *Meyers Way* case. The case actually holds that a lender is permitted to “accelerate” a loan in non-judicial foreclosure, only for the purpose of charging default interest on the full amount of the loan, as authorized in the relevant loan documents. *See id.* at 699. The *Meyers Way* court noted that “[n]othing in [RCW 61.24.090] prohibits the acceleration of a loan *in order to charge default interest on the amount owing.*” *Id.* (emphasis added). But the court also held that RCW 61.24.090 “precludes the creditor from enforcing the election prior to the eleventh day before 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.” *Id.*

Thus, while a lender may “accelerate” a loan in non-judicial foreclosure for purposes other than making the loan immediately due and payable in full (such as charging default interest on the entire amount of the loan), RCW 61.24.090 nonetheless prevents the lender from enforcing immediate payment of the full amount of the loan. *Meyers Way*, 80 Wn. App. at 699. It follows that any such “acceleration” in non-judicial foreclosure cannot trigger the statute of limitation on the deed of trust, which “begins to run when the [lender] is entitled to *enforce* the obligations of the note.” *Azure Chelan*, 195 Wn. App. at 663 (emphasis added).

In this case, it is undisputed that no foreclosure sale ever took place. It follows that the eleven-day point of no return was never reached, and that the borrower’s estate was and is free at any time to cure the default and reinstate the loan, as though the default had not occurred. The Erickson mortgage loan accordingly has never been immediately due and payable in full so as to trigger the statute of limitation on the entire loan balance. *See Azure Chelan*, 195 Wn. App. at 663. For this reason, in addition to the reasons outlined above, the trial court correctly granted summary judgment in US Bank’s favor.

F. *Non-judicial Foreclosure Proceedings Toll The Statute Of Limitation.*

U.S. Bank is entitled to recover all payments that are due and owing under the Erickson deed of trust. Although more than six years have elapsed since the borrower stopped making payments, the statutory period was tolled and would not have expired as to any of the installments due when U.S. Bank initiated non-judicial foreclosure proceedings.

Non-judicial foreclosure proceedings under a deed of trust toll the statute of limitation for an action on the underlying obligation. *Bingham v. Lechner*, 111 Wn. App. 118, 131, 45 P. 3d 562 (2002). The tolling period does not continue indefinitely, however. In *Albice v. Premier Mortgage Services of Washington, Inc.*, the Court of Appeals held, “[t]he [*Bingham*] court . . . held that the trustee was entitled to continue the initial sale for 120 days, during which time the statute of limitations tolled.” 157 Wn. App. 912, 927–28, 239 P. 3d 1148 (2010); *see also* RCW 61.24.040(6) (setting 120-day outside limit for continuance of scheduled trustee’s sale).

Erickson contends in his Opening Brief that because lawsuits do not toll the relevant statutes of limitation if they are later dismissed, neither should non-judicial foreclosure proceedings. *See* Opening Brief, p. 18. But the analogy is flawed. A lawsuit does not “toll” a limitation period, although other authority may make a lawsuit relevant to a tolling analysis in limited circumstances. For example, CR 15(c) allows newly-asserted claims to

relate back to the date an action was filed. *See Perrin v. Stensland*, 158 Wn. App. 185, 194, 240 P. 3d 1189 (2010). And in the case Erickson cites, *Fittro v. Alcombrack*, 23 Wn. App. 178, 596 P. 2d 665 (1979), the court addressed the effect of RCW 4.16.170, which deems an action commenced for purposes of the statute of limitation on the date of filing the complaint, if the plaintiff accomplishes service within 90 days. But these limited situations in which tolling becomes an issue in a lawsuit do not apply to a non-judicial foreclosure.

The argument that non-judicial foreclosure does not toll the limitation period if it does not result in a sale is also nonsensical. If a timely foreclosure does result in a sale, no tolling analysis is necessary because the foreclosure sale itself precludes any further claim on the underlying obligation. It is only when the foreclosure sale does not actually occur within 120 days of the original sale date that tolling could be relevant. To hold otherwise would obviate the holding of *Bingham* that a non-judicial foreclosure tolls the statute of limitation until 120 days after the scheduled sale date.

Moreover, Erickson's contention that the holding in *Bingham* is dicta is not well taken. The *Bingham* court could not have held—as it did—that non-judicial foreclosure proceedings do not toll the statute of limitation indefinitely, without the predicate holding that they do toll the underlying

limitation period for a limited time, in this case until 120 days after the date set for the foreclosure sale. *See Bingham*, 111 Wn. App. at 131. The holding is thus a necessary part of the *Bingham* court’s decision, and has been followed and applied by other Washington courts. *See Albice*, 157 Wn. App. at 927–28.

The current non-judicial foreclosure in this case began on June 25, 2015, when the operative notice of trustee’s sale was recorded. *See CP*, pp. 161–66. The borrower had stopped making payments on the loan as of the payment due July 1, 2008. *See CP*, pp. 87, 128– (Declaration of Fay Janati, so noting; and accompanying exhibit). In the time between July 1, 2008 and June 25, 2015, non-judicial foreclosure proceedings occurred three times, although a foreclosure sale never occurred. The date of the various notices of trustee’s sale, the initial sale date, the date 120 days from the initial sale date, and the number of tolling days are as follows:

Notice of Trustee’s Sale Recorded	Initial Sale Date	120 Days From Initial Sale Date	Tolling Days
1/5/2009	4/3/2009	8/1/2009	208
7/14/2010	10/15/2010	2/12/2011	213
12/10/2014	4/10/2015	8/8/2015	241

See CP, pp. 140–51 (Notice of Trustee’s sale recorded 1/5/2009); CP, pp. 153–57 (Notice of Trustee’s sale recorded 7/14/2010).⁷

The number of days between the borrower’s default as of July 1, 2008, and commencement of the operative non-judicial foreclosure on June 25, 2015 is 2,550, or approximately 7 years. However, because the statute of limitation was tolled for a total of 662 days as outlined above, the amount of time that elapsed between default and foreclosure for purposes of the statute of limitation was 1,888 days, or approximately 5.2 years.

The relevant limitation period is six years. See RCW 4.16.040. US Bank’s foreclosure was accordingly timely with respect to all outstanding payments due under the Erickson mortgage loan. The same conclusion would apply even if the loan had been accelerated on November 16, 2007,⁸ as Erickson contends. Using that date as a starting point, the number of days

⁷ Note that the final Notice of Trustee’s sale recorded 12/10/2014 does not appear in the trial court’s record, although it is discussed in the briefing presented to the trial court. See CP, p. 197 (US Bank’s Response and Reply in Support of Cross-Motion for Summary Judgment, noting initiating initiation of foreclosure proceedings by Notice of Trustee’s Sale on December 10, 2014). However, the document is publicly recorded in the official records of Pierce County, and is thus a document of which the Court may properly take judicial notice. See ER 201; *Jackson v. Quality Loan Service Corp.*, 186 Wn. App. 838, 844–45, 347 P. 3d 487 (2015) (noting appropriateness of judicial notice of publicly recorded documents in foreclosure action). A true and correct copy is attached to this brief as **Exhibit A**.

Moreover, even if this Court limits its review strictly to the materials in the trial court’s record, the conclusion is the same. If the limitation period had been tolled for only 421 days (using only the first two non-judicial foreclosures), rather than 662 days as described below (using all three), the number of days between default and foreclosure for purposes of the statute of limitation would be 2,219, or approximately 5.8 years. US Bank’s foreclosure would thus fall within the six-year mark under either analysis.

⁸ The date specified in the earliest of the three notices to which Erickson points.

that would have elapsed for purposes of the statute of limitation, taking tolling into account, would have been 1,902, or approximately 5.2 years.

Finally, even if Erickson were correct that the limitation period had expired on some of the payments due under the loan, he would still not be entitled to quiet title against the lien of the deed of trust. Because the statute of limitation runs separately with respect to each payment due under the loan, *see Edmundson*, 194 Wn. App. at 930–31, US Bank would thus retain the right to foreclose because of all the defaulted installments still within the limitation period, even if the period had expired on some of the other installments. In *McClanahan*, 43 Wn. 2d at 754, the Washington Supreme Court held, “[n]or does the fact that a mortgage is not foreclosed on the first default in payment, prevent a foreclosure for a subsequent default, since such indulgence cannot affect a right not yet accrued.” Erickson would thus not have been entitled to summary judgment quieting title even if the statute of limitation had run as to some installments due under the Erickson mortgage loan. But for all the reasons described above, US Bank’s foreclosure was timely as to all the borrower’s defaulted payments.

G. *Erickson Is Not Entitled To Attorney Fees.*

Erickson’s Opening Brief includes a section requesting an award of attorney fees under the terms of the loan documents, and RCW 4.84.330, which requires that contractual attorney fee provisions be applied

reciprocally. US Bank takes no issue with the legal point that contractual attorney fee provisions must be applied reciprocally under Washington law. But for the reasons outlined above, Erickson should not prevail on appeal and is thus not entitled to an award of attorney fees. To the contrary, US Bank should be awarded its fees on appeal under the terms of the deed of trust.

V. CONCLUSION

The trial court correctly ruled that Erickson was not entitled to quiet title, and correctly granted summary judgment in US Bank's favor. The trial court's judgment should be affirmed.

Respectfully submitted this 12th day of July, 2017.

HOLLAND & KNIGHT, LLP

s/Garrett S. Garfield

David J. Elkanich, WSBA No. 13704
Garrett S. Garfield, WSBA No. 48375
111 SW 5th Ave., Ste 2300
Portland, OR 97204-3626

*Attorneys for Respondent U.S. Bank
National Association as Trustee for
GSAA Home Equity Trust 2006-1*

EXHIBIT A

201412100250

Electronically Recorded

Pierce County, WA

12/10/2014 11:43 AM

Pages: 4 Fee: \$75.00

WHEN RECORDED MAIL TO:
Quality Loan Service Corp. of Washington
C/O Quality Loan Service Corporation
411 Ivy Street
San Diego, CA 92101

TS No.: WA-14-629846-SW
APN No.: 6023700240
Title Order No.: 02-14029663
Grantor(s): RYAN S ERICKSON
Grantee(s): MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR AMERICA'S WHOLESALE LENDER
Deed of Trust Instrument/Reference No.: 200510310440

SPACE ABOVE THIS LINE FOR RECORDER'S USE

NOTICE OF TRUSTEE'S SALE

Pursuant to the Revised Code of Washington 61.24, et seq.

I. NOTICE IS HEREBY GIVEN that Quality Loan Service Corp. of Washington, the undersigned Trustee, will on 4/10/2015, at 10:00 AM The 2ND floor entry plaza outside the County Courthouse, 930 Tacoma Avenue South, Tacoma, WA 98402 sell at public auction to the highest and best bidder, payable in the form of credit bid or cash bid in the form of cashier's check or certified checks from federally or State chartered banks, at the time of sale the following described real property, situated in the County of PIERCE, State of Washington, to-wit:

PARCEL A: LOT 24 OF BUCKINGHAM ESTATES, PHASE ONE, AS PER PLAT RECORDED JULY 11, 2001 UNDER RECORDING NO. 200107115007, RECORDS OF PIERCE COUNTY AUDITOR; SITUATE IN THE COUNTY OF PIERCE, STATE OF WASHINGTON. PARCEL B: A NON-EXCLUSIVE EASEMENT FOR INGRESS AND EGRESS AS DELINEATED ON BUCKINGHAM ESTATES, PHASE ONE, AS PER PLAT RECORDED JULY 11, 2001 UNDER RECORDING NO. 200107115007, IN PIERCE COUNTY, WASHINGTON; SITUATE IN THE COUNTY OF PIERCE, STATE OF WASHINGTON.

More commonly known as:
9410 150TH STREET CT E, PUYALLUP, WA 98375 8442

which is subject to that certain Deed of Trust dated 10/26/2005, recorded 10/31/2005, under 200510310440 records of PIERCE County, Washington, from RYAN S ERICKSON, AN UNMARRIED MAN, as Grantor(s), to RAINIER TITLE COMPANY, as Trustee, to secure an obligation in favor of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR AMERICA'S WHOLESALE LENDER, as Beneficiary, the beneficial interest in which was assigned by MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR AMERICA'S WHOLESALE LENDER (or by its successors-in-interest and/or assigns, if any), to GSAA Home Equity Trust 2006-1, Asset-Backed Certificates, Series 2006-1, U.S. Bank National Association, as Trustee.

II. No action commenced by the Beneficiary of the Deed of Trust is now pending to seek satisfaction of the obligation in any Court by reason of the Borrower's or Grantor's default on the obligation secured by the Deed of Trust/Mortgage.

III. The default(s) for which this foreclosure is made is/are as follows:
Failure to pay when due the following amounts which are now in arrears: \$123,808.30

IV. The sum owing on the obligation secured by the Deed of Trust is: The principal sum of \$222,317.82, together with interest as provided in the Note from the 8/1/2008, and such other costs and fees as are provided by statute.

V. The above-described real property will be sold to satisfy the expense of sale and the obligation secured by the Deed of Trust as provided by statute. Said sale will be made without warranty, expressed or implied, regarding title, possession or encumbrances on 4/10/2015. The defaults referred to in Paragraph III must be cured by 3/30/2015 (11 days before the sale date) to cause a discontinuance of the sale. The sale will be discontinued and terminated if at any time before 3/30/2015 (11 days before the sale) the default as set forth in Paragraph III is cured and the Trustee's fees and costs are paid. Payment must be in cash or with cashiers or certified checks from a State or federally chartered bank. The sale may be terminated any time after the 3/30/2015 (11 days before the sale date) and before the sale, by the Borrower or Grantor or the holder of any recorded junior lien or encumbrance by paying the principal and interest, plus costs, fees and advances, if any, made pursuant to the terms of the obligation and/or Deed of Trust, and curing all other defaults.

VI. A written Notice of Default was transmitted by the Beneficiary or Trustee to the Borrower and Grantor at the following address(es):

NAME
RYAN S ERICKSON, AN UNMARRIED MAN
ADDRESS
9410 150TH STREET CT E, PUYALLUP, WA 98375 8442

by both first class and certified mail, proof of which is in the possession of the Trustee; and the Borrower and Grantor were personally served, if applicable, with said written Notice of Default or the written Notice of Default was posted in a conspicuous place on the real property described in Paragraph I above, and the Trustee has possession of proof of such service or posting. These requirements were completed as of 10/30/2014.

VII. The Trustee whose name and address are set forth below will provide in writing to anyone requesting it, a statement of all costs and fees due at any time prior to the sale.

VIII. The effect of the sale will be to deprive the Grantor and all those who hold by, through or under the Grantor of all their interest in the above-described property.

IX. Anyone having any objections to this sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

NOTICE TO OCCUPANTS OR TENANTS – The purchaser at the Trustee's Sale is entitled to possession of the property on the 20th day following the sale, as against the Grantor under the deed of trust (the owner) and anyone having an interest junior to the deed of trust, including occupants who are not tenants. After the 20th day following the sale the purchaser has the right to evict occupants who are not tenants by summary proceedings under Chapter 59.12 RCW. For tenant-occupied property, the purchaser shall provide a tenant with written notice in accordance with RCW 61.24.060.

THIS NOTICE IS THE FINAL STEP BEFORE THE FORECLOSURE SALE OF YOUR HOME.

You have only 20 DAYS from the recording date of this notice to pursue mediation.

DO NOT DELAY. CONTACT A HOUSING COUNSELOR OR AN ATTORNEY LICENSED IN

WASHINGTON NOW to assess your situation and refer you to mediation if you are eligible and it may help you save your home. See below for safe sources of help.

SEEKING ASSISTANCE

Housing counselors and legal assistance may be available at little or no cost to you. If you would like assistance in determining your rights and opportunities to keep your house, you may contact the following:

The statewide foreclosure hotline for assistance and referral to housing counselors recommended by the Housing Finance Commission: Toll-free: **1-877-894-HOME (1-877-894-4663)** or Web site: http://www.dfi.wa.gov/consumers/homeownership/post_purchase_counselors_foreclosure.htm.

The United States Department of Housing and Urban Development: Toll-free: **1-800-569-4287** or National Web Site: <http://portal.hud.gov/hudportal/HUD> or for Local counseling agencies in Washington: <http://www.hud.gov/offices/hsg/sfh/hcc/fo/index.cfm?webListAction=search&searchstate=WA&filterSvc=dfc>

The statewide civil legal aid hotline for assistance and referrals to other housing counselors and attorneys: Telephone: **1-800-606-4819** or Web site: <http://nwjustice.org/what-clear>.

If the sale is set aside for any reason, including if the Trustee is unable to convey title, the Purchaser at the sale shall be entitled only to a return of the monies paid to the Trustee. This shall be the Purchaser's sole and exclusive remedy. The purchaser shall have no further recourse against the Trustor, the Trustee, the Beneficiary, the Beneficiary's Agent, or the Beneficiary's Attorney.

If you have previously been discharged through bankruptcy, you may have been released of personal liability for this loan in which case this letter is intended to exercise the note holders right's against the real property only.

QUALITY MAY BE CONSIDERED A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE

As required by law, you are hereby notified that a negative credit report reflecting on your credit record may be submitted to a credit report agency if you fail to fulfill the terms of your credit obligations.

Dated: DEC 08 2014

Mauricio Flores
Quality Loan Service Corp. of Washington, as Trustee
By: Mauricio Flores, Assistant Secretary

Trustee's Mailing Address:
Quality Loan Service Corp. of Washington
C/O Quality Loan Service Corp.
411 Ivy Street, San Diego, CA 92101
(866) 645-7711

Trustee's Physical Address:
Quality Loan Service Corp. of Washington
108 1st Ave South, Suite 202
Seattle, WA 98104
(866) 925-0241

Sale Line: 714-730-2727
Or Login to: <http://wa.qualityloan.com>
TS No.: WA-14-629846-SW

State of: California
County of: San Diego

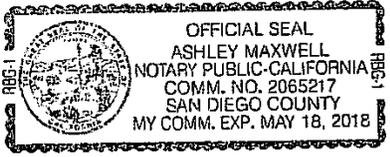
Ashley Maxwell

On DEC 08 2014 before me, _____ a notary public, personally appeared Mauricio Flores, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/~~she~~ they executed the same in his/~~her~~ their authorized capacity (~~ies~~), and that by his/~~her~~ their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under *PENALTY OF PERJURY* under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Ashley Maxwell (Seal)
Ashley Maxwell



CERTIFICATE OF SERVICE

I hereby certify that on the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

- Email and first-class United States mail, postage prepaid, to the following:

Helmut Kah, WSBA No. 18541
Attorney at Law
17924 140th Ave NE, Suite 204
Woodinville, WA 98072-4315
Phone: 206-234-7798
Email: helmutkah@outlook.com
Of Attorneys for Appellant Kevin Erickson

DATED this 12th day of July, 2017.

s/Garrett S. Garfield

Garrett S. Garfield

HOLLAND AND KNIGHT LLP

July 12, 2017 - 1:52 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49478-7
Appellate Court Case Title: Kevin Erickson, Appellant v. America's Wholesale Lender, et al., Respondents
Superior Court Case Number: 15-2-12744-1

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- helmut_kah@yahoo.com

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