FILED
8/7/2017 4:52 PM
Court of Appeals
Division II
State of Washington

NO. 50007-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

GEOFFREY A. PARKER, as an individual and on behalf of his marital community,

Respondent,

vs.

PARKVIEW TRAILS, LLC, a Washington limited liability company,

Appellant,

vs.

EDWARD B. GREER, as an individual and on behalf of his marital community, and PHUONG MINH PARKER, as an individual and on behalf of her marital community,

Third-Party Respondents.

BRIEF OF APPELLANT

Tara J. Schleicher, WASB No. 26884
Jason M. Ayres, WASB No. 39141
Farleigh Wada Witt
121 SW Morrison Street, Ste. 600
Portland, OR 97204
(503) 228-6044
tschleicher@fwwlaw.com
jayres@fwwlaw.com

TABLE OF CONTENTS

I. INTRODUCTION 1

II. IDENTITY OF THE PARTIES 3

III. ASSIGNMENTS OF ERROR 5

A. The Superior Court erred in its finding that a breach of contract action on the obligation secured by the Trust Deed had commenced to accrue in September of 2005 despite a genuine issue of material fact regarding whether Greer had breached the Agreement, and its conclusion that the statute of limitations had run on Parkview's judicial foreclosure action in 2011. CP 383 (¶¶4, 5 and 6)..... 5

B. The Superior Court erred in concluding that the statute of limitations began to run from Parkview's September 30, 2005 letter when there was no clear and unequivocal affirmative action on Parkview's part to accelerate. CP 383 (¶4). 5

C. The Superior Court erred in failing to grant Parkview's motion for reconsideration based on newly discovered evidence which demonstrated that under Washington law the statute of limitations commenced running after each failure of Greer to pay property taxes and other installment payments. 5

D. The Superior Court erred in denying Parkview's motion under CR 56(f) to obtain discovery responses from Parker prior to ruling on Parker's motion for summary judgment when Parkview served the discovery requests prior to the motion for summary judgment being filed and Parker failed and refused to provide any discovery sought, Parkview stated what evidence would be established through the additional discovery and the desired evidence would have raised a genuine issue of material fact regarding Parkview's affirmative defenses of waiver, equitable estoppel and unclean hands. CP 383–384. (¶7)..... 5

E. The Superior Court erred in denying Parkview's motion to compel production of documents and answers to interrogatories from Parker prior to ruling on Parker's motion for summary judgment when Parkview served the discovery requests prior to the motion for summary judgment being filed and Parker failed and refused to provide any discovery sought, when the discovery sought would have raised a genuine issue of material fact regarding the statute of limitations and Parkview's affirmative defenses of equitable estoppel, waiver and unclean hands. CP 396–397. 6

F. The Superior Court erred in dismissing Parkview's action against Third-Party Respondent Greer based upon the erroneous summary judgment ruling in favor of Parker that the statute of limitations had run on Parkview's judicial foreclosure action. CP 370–371. 6

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 6

V. STATEMENT OF THE CASE..... 8

A. Agreement Secured by Trust Deed, Event of Default and Remedies Upon Default. 8

B. Communications between Greer and Parkview Relative to Agreement. 11

C. Transfers and Other Recently Discovered Events. 14

D. Procedural Background. 16

VI. STANDARD OF REVIEW 20

A. Summary Judgment Order 20

B. Denial of Continuance of Summary Judgment Hearing under CR 56(f) 21

C. Denial of Motion to Compel 21

VII. ARGUMENT 22

A. *The Superior Court erred in its finding that a breach of contract action on the obligation secured by the Trust Deed had commenced to accrue in September of 2005 despite a genuine issue of material fact regarding whether Greer had breached the Agreement, and its conclusion that the statute of limitations had run on Parkview's judicial foreclosure action in 2011. CP 383 (¶¶4, 5 and 6).* 22

B. *The Superior Court erred when it found that the statute of limitations commenced running on September 30, 2005 when there was no clear and unequivocal affirmative action on Parkview's part to accelerate the obligations Greer owed.* ... 27

C. *The Superior Court erred in failing to grant Parkview's motion for reconsideration based on newly discovered evidence which demonstrated that under Washington law the statute of limitations commenced running after each failure of Greer to*

pay property taxes and other installment payments. 30

D. *The Superior Court erred in denying Parkview's motion under CR 56(f) to obtain discovery responses from Parker prior to ruling on Parker's motion for summary judgment when Parkview served the discovery requests prior to the motion for summary judgment being filed and Parker failed and refused to provide any discovery sought, Parkview stated what evidence would be established through the additional discovery and the desired evidence would have raised a genuine issue of material fact regarding Parkview's affirmative defenses of waiver, equitable estoppel and unclean hands.* 33

E. *The Superior Court erred in denying Parkview's motion to compel production of documents and answers to interrogatories from Parker prior to ruling on Parker's motion for summary judgment when Parkview served the discovery requests prior to the motion for summary judgment being filed and Parker failed and refused to provide any discovery sought, when the discovery sought would have raised a genuine issue of material fact regarding the statute of limitations and Parkview's affirmative defenses of equitable estoppel, waiver and unclean hands.* 39

F. *The Superior Court erred in dismissing Parkview's action against Greer based upon the erroneous summary judgment ruling in favor of Parker that the statute of limitations had run on Parkview's judicial foreclosure action.* 40

VIII. CONCLUSION..... 40

IX. APPENDIX..... 44

TABLE OF AUTHORITIES

Cases

4518 S. 256th, LLC v. Karen L. Gibbons, P.S., 195 Wn. App. 423, 435 (2016) 28

A.A.C. Corp. v. Reed, 73 Wn.2d 612, 615 (1968)..... 28

Bank of New York Mellon v. Stafne, 2016 WL 7118359 28

Barfield v. City of Seattle, 100 Wn.2nd 878, 883 (1984); 22

Butler v. Joy, 116 Wn. App. 291, 299, 65 P.3d 671 (2003)..... 33

Clanfied on denial of reconsid., 845 p.2d 1325 (1995) 38

Clanfied on denial of reconsid., 845 p.2d 1325 (1995). 33, 38

clarified on denial of reconsid., 845 p.2d 1325 (1995..... 38

clarified on denial of reconsider., 845 P 2nd 1325 (1993)..... 21

Demelash v. Ross Stores, Inc., 105 Wash. App. 508, 526, 20 P.3d 447, 457 (2001) 38

Edmundson v. Bank of Am., 194 Wn. App. 920, 927 (2016); 22

Edmundson v. Bank of Am., 194 Wn. App. 920, 927, 378 P.3d 272, 276 (2016) 22, 27, 32

Greenhalgh v. Dep't of Corr., 170 Wn .App. 137, 144, 282 P.3d 1175 (2012) 35

Herron v. McClanahan, 28 Wn. App. 552, 557, 625 P.2d 707, 710 (1981) 31

Herron v. Tribune Pub. Co., Inc., 108 Wn.2d 162, 169 (1987)..... 20

Herzog v. Herzog, 23 Wn.2d 382, 388, 161 P.2d 142, 144–45 (1945) 32

Hill v. L. W. Weidert Farms, Inc., 75 Wn.2d 871, 454 P.2d 220 (1969) .. 31

In re Parentage of J.M.K., 155 Wn.2d 374, 386 (2005)..... 21

Jarvis v. Deferal National Mortgage Assoc., 2017 WL 1438040 (W.D.

Wash., 2017). 22

Lang v. Dental Quality Assurance Comm'n, 138 Wn. App. 235, 254 (2007), *rev. denied*, 162 Wn.2d 1021 (2008) 21

Lewis v. Bell, 45 Wn. App. 192, 196, 724 P.2d 425, 427 (1986) 38

Logan v. NorthWest Ins. Co., 45 Wn. App. 95, 724 P.2d 1059, 1062 (Wash.Ct.App.1986) 35

Millay v. Cam, 135 Wn.2d 193, 955 P.2d 791, 797 (Wash.1998) 35

Ollie v. Highland School District No. 203, 50 Wn. App. 639, 642, fn2 (1988). 22

Reed v. Allstate Ins. Co., No. C11-0866JLR, 2012 WL 527422 35

Rouse v. U.S. Dep't of State, 567 F.3d 408 (9th Cir. 2009) 34

State v. Kerow, 192 Wn. App. 843, 847–48, 368 P.3d 260, 262, *rev. denied*, 186 Wn.2d 1007 (2016) 34

Tellevik v. Real Property Known as 31641 West Rutherford, 120 Wn.2d 68, 90 (1992) 21, 33, 38

Trotzer v. Vig, 149 Wn. App. 594, 203 P.3d 1056, 1062 (Wash.Ct.App.2009) 35

Turner v. Kohler, 54 Wn. App. 688, 693 (1989) 21

Weinberg v. Naher, 51 Wash. 591, 594 (1909) 28

Winston v. Dep't. of Corr., 130 Wn. App. 61, 64–65, 121 P.3d 1201 (2005) 33

Woods Wiew II, LLC v. Kitsap County, 188 Wn. App. 1, 19 (2015). 21

Statutes

RCW 4.16.040 22

RCW 84.56.020(11)(c) 31

Rules

CR 33 ..... 40, 42

CR 34 ..... 40, 42

CR 56(c) 20

CR 56(f) 3, 5, 17, 21, 33, 39

CR 59(a) 31

CR 59(a)(4) 30

I. INTRODUCTION

This appeal centers around an unexpected release of a trust deed by a title company in a transaction where the buyer paid $30,000 for property with a tax-assessed value of almost $400,000 in 2014. The consideration paid seemingly takes into account the fact that there was a significant amount owed on the trust deed encumbering the property, a fact that the buyer appeared to have considered when he offered to purchase the property for that amount. The purchase price was in an amount more in line with the property taxes that the seller had failed to pay since 2010.

The buyer then sought to sell the property a year later for about $465,000, but two title companies refused to convey the property free of the trust deed. The buyer went back to the original title company that had removed the trust deed upon his purchase of the property and asked it to handle the sale and release the trust deed as it had before. The title company refused, opining through its general counsel that the trust deed still encumbered the property. The buyer made a claim against the title company, who noted in the claim that it had no notes as to why the trust deed was released in the original sale in 2014. The buyer was paid the full amount of his purchase price by the title company, $30,000.

Meanwhile, the trust deed holder knew nothing about the removal of its trust deed in the 2014 sale or any of these circumstances until it was contacted by the title company in conjunction with the buyer's efforts to sell the property and get the trust deed removed in 2015.

The trust deed holder was then sued by the buyer to quiet title to the property free of the trust deed. The trust deed holder reviewed the amount of the purchase price and wondered why the buyer did not seek recovery from the title company (not knowing that the title company had paid the claim). The trust deed holder sought discovery from the buyer in the lawsuit, and filed discovery requests prior to the buyer filing a motion for summary judgment. A hearing was set on the summary judgment motion prior to the discovery responses being due. The trust deed holder asked for a continuance of the summary judgment briefing and hearing, which the trial court denied. The buyer refused to produce any discovery responses to the trust deed holder in response to the discovery requests stating that it would not provide responses unless its motion for summary judgment was denied. The trust deed holder files a motion to compel, which the trial court denied.

The trust deed holder issued subpoenas to the two tile companies and received the information set forth above, which was relevant to its affirmative defenses of equitable estoppel, waiver and unclean hands. It needed to depose the title company representatives, the buyer and the prior owner/obligor. In the meantime, the trial court granted summary judgment to the buyer and dismissed the trust deed holder's judicial foreclosure claim, citing a statute of limitations ruling that the trust deed holder believes is erroneous.

The trust deed holder contends that the trial court abused its

discretion in refusing to continue the summary judgment hearing to allow it to conduct discovery under CR 56(f) and denying its motion to compel production. The trust deed holder further believes the trial court erred in its conclusion regarding when the statute of limitations commenced to run on foreclosure of its trust deed, both (i) as a matter of law; and (ii) because there are genuine issues of material fact.

II. IDENTITY OF THE PARTIES

A. Appellant Parkview Trails, LLC ("Parkview") is a Washington limited liability company. CP 109 (¶ 2). Parkview Trails holds a first trust deed on the real property at issue in this case commonly identified as tax parcel number 228513-000, an undeveloped 2.57 acre piece of real property in Clark County, Washington (the "Property"). CP 110-111 (¶ 5); CP 137. Parkview's trust deed was recorded on September 19, 2001 in the real property records of Clark County, Washington (the "Trust Deed"). CP 110 (¶ 5). Parkview's Trust Deed was granted by the then-owner of the Property, Sharon Greer as Trustee of the 1991 Lee Edna Germain Trust (the "Trust"). *Id.*; CP 43-53.

On August 18, 2006, the Trust transferred the Property to Sharon Greer, as her separate estate. CP 112 (¶ 12) and 153-154. Immediately thereafter, Sharon Greer transferred the Property to Third Party Respondent, Edward Greer ("Greer") and herself, as husband and wife. CP 112 (¶ 12) and 155-156.

B. Respondent Geoffrey A. Parker ("Parker") is an individual residing in Clark County, Washington who purchased the Property from Greer in January of 2014 without the consent or knowledge of Parkview. CP 1 (¶ 1.1), 40-41 and 112 (¶11). Parker commenced the underlying action in Clark County Superior Court on March 9, 2016 seeking to quiet title to the Property to eliminate Parkview's trust deed and asserting claims of slander of title and tortious interference with business relations. CP 1–5.

C. Third-Party Respondent Greer is the obligor on the agreement secured by the Trust Deed that the Trust granted to Parkview on the Property. CP 109–112. Additionally, Greer, as set forth above, became an owner of the Property. CP 155–156. Without Parkview's consent, he and his wife, Sharon Greer, transferred the Property to Parker on or about January 24, 2014. CP 112 (¶ 11); CP 40–41. On May 27, 2016, Parkview filed an answer, asserting a counterclaim against Parker for judicial foreclosure of its trust deed and a third party claim against Greer for breach of contract. CP 7–53.

D. Third-Party Respondent, Phuong Minh Parker ("PMP") is Parker's spouse. CP 160 (¶ 2). Greer and Sharon Greer transferred the Property to "Geoffrey A. Parker, a married man." CP 40. Thus, PMP asserts some interest in the Property. CP 40. In Parkview's answer, Parkview asserted a judicial foreclosure claim against PMP to foreclose out whatever interest she may have in the Property along with that of

Parker. CP 13–15.

III. ASSIGNMENTS OF ERROR

A. The Superior Court erred in its finding that a breach of contract action on the obligation secured by the Trust Deed had commenced to accrue in September of 2005 despite a genuine issue of material fact regarding whether Greer had breached the Agreement, and its conclusion that the statute of limitations had run on Parkview's judicial foreclosure action in 2011. CP 383 (¶¶4, 5 and 6).

B. The Superior Court erred in concluding that the statute of limitations began to run from Parkview's September 30, 2005 letter when there was no clear and unequivocal affirmative action on Parkview's part to accelerate. CP 383 (¶4).

C. The Superior Court erred in failing to grant Parkview's motion for reconsideration based on newly discovered evidence which demonstrated that under Washington law the statute of limitations commenced running after each failure of Greer to pay property taxes and other installment payments.

D. The Superior Court erred in denying Parkview's motion under CR 56(f) to obtain discovery responses from Parker prior to ruling on Parker's motion for summary judgment when Parkview served the discovery requests prior to the motion for summary judgment being filed

and Parker failed and refused to provide any discovery sought, Parkview stated what evidence would be established through the additional discovery and the desired evidence would have raised a genuine issue of material fact regarding Parkview's affirmative defenses of waiver, equitable estoppel and unclean hands. CP 383–384. (¶7).

E. The Superior Court erred in denying Parkview's motion to compel production of documents and answers to interrogatories from Parker prior to ruling on Parker's motion for summary judgment when Parkview served the discovery requests prior to the motion for summary judgment being filed and Parker failed and refused to provide any discovery sought, when the discovery sought would have raised a genuine issue of material fact regarding the statute of limitations and Parkview's affirmative defenses of equitable estoppel, waiver and unclean hands. CP 396–397.

F. The Superior Court erred in dismissing Parkview's action against Third-Party Respondent Greer based upon the erroneous summary judgment ruling in favor of Parker that the statute of limitations had run on Parkview's judicial foreclosure action. CP 370–371.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. When viewing the evidence in a light most favorable to Parkview and against Parker, under the plain language of the Agreement is there a specific event that constitutes an "event of default," which allows

Parkview to pursue its remedies under the Trust Deed? (Assignment of Error A and F). Yes. That event of default is the failure of Greer to pay the costs and expenses incurred by Parkview for completing Greer's performance under the Agreement after Parkview provides a final accounting of those costs and expenses. CP 122–123 (¶¶1(B) and (2)).

B. Did the Superior Court ignore a genuine issue of material fact in its conclusion that the statute of limitations commenced to run in 2005 despite the fact that Greer testified that he did not breach the Agreement? (Assignment of Error A and F). Yes. CP 55 (¶7) (stating that Greer believed he "met his obligation under the Agreement").

C. When viewing the evidence in a light most favorable to Parkview and against Parker, did Parkview take a clear and unequivocal affirmative action evidencing its intent to accelerate the total amounts due from Greer when it listed costs "to date," inquired about Greer's remaining performance of obligations and specifically stated that Parkview was continuing to perform Greer's remaining obligations and costs were continuing to accrue? (Assignment of Error No. B and F). No. CP 66–67.

D. Did the Superior Court abuse its discretion in failing to compel Parker to provide responses to the Discovery Requests and failing to continue the summary judgment hearing to allow discovery to continue when Parkview served the Discovery Requests prior to Parker filing the

motion for summary judgment and when the evidence obtained was relevant to Parkview's equitable estoppel, wavier and unclean hands defenses? (Assignments of Error C, D and E). Yes. CP 370–371.

V. STATEMENT OF THE CASE

A. Agreement Secured by Trust Deed, Event of Default and Remedies Upon Default.

Parkview's predecessor in interest, Columbia Rim Construction, Inc. ("CRC"),[1] entered into an agreement for a land development transaction dated June 16, 2001, as amended by Addendum A dated July 4, 2001, and further amended by Addendum B dated August 30, 2001, and Addendum C dated September 12, 2001 (the "Agreement"). CP 109–110; 115–127. CRC agreed to purchase seven tax lots of real property with 166 buildable lots and one existing home (the "Transaction Property") from Greer for $2.9 million. CP 115–116 (¶¶3 and 5). Greer agreed to provide governmental consents, permits and other development work for the development of the Transaction Property. CP 119, 121–126.

The Transaction Property is not the subject of the Trust Deed that is at issue in this case. CP 121 (¶1) (stating that Greer agreed to provide collateral to CRC in the form of a first trust deed on Lot 1 Parkview Trails Planned Unit Development to secure performance of his obligations under the Agreement). Rather, Greer's wife, as trustee of the Trust, granted the

[1] The parties contemplated and agreed that CRC would transfer its rights under the Agreement to Parkview. CP 123.

Trust Deed on the Property to Parkview to secure Greer's obligations to (i) obtain certain governmental agency wetland fill permits; (ii) obtain written consents for construction of improvements; (iii) regrade certain portions of the development to allow the outfill to drain properly on the Transaction Property; and (iv) pay for Parkview's costs and fees incurred after Parkview completed performance of those obligations for him should he fail to complete those obligations. CP 109–110 ¶¶3 and 4); 115–127; 128–138.

In the event that Greer failed to complete his obligations set forth in the Agreement, Parkview (as the successor in interest to CRC) was expressly authorized to move forward with efforts to obtain consents and complete Greer's performance obligations. CP 110 (¶4); 122–123. Once the consents and all mitigation efforts and approvals were completed by Parkview, Parkview was to provide a formal accounting of all costs and fees to Greer, which Greer was obligated to pay. *Id.* If Greer failed to pay the final balance of the fees and costs, Greer would then be considered to be in default under the terms of the Agreement. *Id.* In establishing when a default is deemed to have occurred under the Agreement, the Agreement provided that after the submission of the accounting of costs and fee incurred by Parkview, "[i]f Greer fails to make such payment, Greer shall be in default of this agreement and [Parkview] may pursue its remedies under the [Trust Deed]." CP 122–123 (¶¶1(B) and 2).

Greer failed to abide by his performance obligations under the Agreement by the timelines set. CP 111 (¶6). However, in a declaration

of Greer submitted by Parker, Greer contends that he complied with the terms of the Agreement. CP 55 (¶7) (stating that Greer believed he "met his obligation under [the Agreement]"). Despite that conflict in material facts presented, the Superior Court ruled that there was no genuine issue of material fact that Parkview had a right to apply to the court for relief for breach of the Agreement in 2005. CP 411–412 (¶¶3 and 4).

Upon Greer's failure to perform his obligations by the timelines set forth in the Agreement, Parkview was then authorized to complete Greer's performance obligations, obtain consents and approvals, conduct re-engineering and fill work required, charge Greer for the fees/costs upon the rendering of a final accounting by Parkview to Parker, and, if not paid by Greer, pursue its remedies under the Trust Deed. CP 121 (¶1). Parkview incurred costs and fees to obtain approval for construction despite the lack of final consents and wetland mitigation approvals and incurred other costs such as re-engineering work, attorney fees and costs for fill work. CP 111 (¶¶6 and 7); CP 112 (¶10).

Parkview began incurring such fees and costs in 2002 with the most recently incurred costs and fees in August and October of 2010 associated with fill work and obtaining wetlands mitigation approvals, respectively, for which Greer was responsible but failed to perform. *Id.*; CP 146. There are still consents that are outstanding and additional fees and costs may be incurred based on reviews from the United States Army Corp of Engineers ("USACE"). CP 111 (¶7) Greer disputes that there are outstanding consents, instead asserting, without admissible authority, that

"USACE and the City of Battle Ground stopped pursuing [Parkview] about the violation(s)." CP 56 (¶11).

The Trust Deed states that it secures "performance and payment" of all obligations of Greer in the Agreement. CP 129 (¶2.1) (emphasis added). The Agreement states that the costs and fees associated with Parkview's performance of Greer's obligations under the Agreement are to be the subject of "an accounting" and that Greer's failure to pay those costs and fees is the "default" under the Agreement allowing Parkview to pursue its remedies under the Trust Deed. CP 122–123 (¶¶1(B) and (2)).

The Trust Deed additionally provides that the Grantor "will pay not later than when due all taxes, assessments, encumbrances, charges, and liens with interest, on the Property or any part, which at any time appear to be or are alleged to be prior and superior hereto." CP 130 (¶3.5).

The Trust Deed further provides that "Grantor will not, without the prior consent of [Parkview], sell, transfer or otherwise convey the [Trust Deed], the Property, or any interest therein . . ." CP 130 (¶3.7).

B. Communications between Greer and Parkview Relative to Agreement.

Parkview's attorney sent a letter dated October 14, 2002, apparently in response to a letter from Greer's attorney dated October 2, 2002, in which he states that (i) the date for Greer to obtain consents and approvals has passed; (ii) that "pursuant to the terms of [the Agreement], [Parkview] will take over responsibility for obtaining the remaining

agency consents within the next seven (7) days unless a satisfactory proposal is forthcoming within that time frame that provides an acceptable date certain that all permitting issues will be resolved. Nothing in this letter shall be construed as waiving or altering any rights that [Parkview] has under the [Agreement], including the right to immediately take over the permitting issues and charge Mr. Greer the costs of doing so." CP 64. Thus, pursuant to the terms of the Agreement, as of late 2002, Parkview commenced to take over obtaining the necessary permits and commenced incurring costs and fees under the Agreement which, once complete, it would charge to Greer. CP 111 (¶¶ 6 and 7); CP 122–123; CP 64. Once the costs were incurred to resolve the permitting issues, if Greer did not pay them, then an event of default was deemed to have occurred under the Agreement. CP 122–123 (defining a default as occurring "[i]f Greer fails to pay such payment" for the costs and fees incurred to complete the consents and fill work).

On August 25, 2005, Greer's counsel sent a letter to CRC asserting that he was entitled to a release of the Trust Deed and the balance of a holdback net of costs incurred for "environmental costs." CP 139. Greer's counsel asked for "documentation of these costs." *Id.*

In response, the principal of Parkview sent a letter to Greer's counsel dated September 30, 2005 attempting to address his questions and to inquire regarding the status of Greer's attempts and efforts to obtain the consents required under the Agreement. CP 66–67; 111–112. He states in that letter, "so far, the costs that [Parkview has] incurred to date for

consultants are attached hereto in the amount of $133,121.25." CP 66 (emphasis added). Nowhere in the September 30, 2005, letter is there an indication that this is the final accounting of costs and fees incurred to obtain the consents/approvals/etc. In fact, the letter from Parkview inquires of Greer's counsel the status of several outstanding issues relating to Greer's performance and clearly states that the costs and fees that Parkview is having to incur are ongoing and estimates costs associated with USACE violations that have been cited regarding overfill but not yet completed, ending with a "summary of the total costs incurred to date." CP 66–67 (emphasis added).

Parkview sent statements to the Trust each year for "Greer Parkview Trail Obligations" from 2006 to 2016 with the then-existing costs and fees associated with the consents, approvals and mitigation efforts. CP 112 (¶10); CP 142–152. On August 18, 2010, Parkview's principal, Michael DeFrees ("DeFrees") sent a letter to the USACE regarding the ongoing wetland fill violation at the Transaction Property. CP 112 (¶10); CP 140. In that letter, DeFrees explained that overfill occurred on the Transaction Property because of the civil engineering plans provided by Greer, but that Parkview paid for removal of the wetland filling at issue, finishing the restoration on August 11, 2010. CP 140. Parkview incurred costs of $4,986.40 to remove the fill as demonstrated by invoice dated August 12, 2010 (the "2010 Fill Invoice"). CP 141.

Parkview included that 2010 Fill Invoice amount on the December

2010 statement that it sent to the Trust. CP 146. Additionally, Parkview incurred approximately $3,000 in additional attorney fees to the Landerholm, Lansverk firm in October of 2010 for attempting to obtain wetland mitigation approvals. CP 111 (¶7); 146. The October 30, 2010, invoice from Landerholm, Lansverk is included on the December 2010 statement that Parkview sent to the Trust regarding the current costs and fees associated with obtaining the consents/approval and fill work pursuant to the Agreement. CP 146.

C. Transfers and Other Recently Discovered Events.

Until Parker attempted to sell the Property in 2015, Parkview was unaware that the Property had been sold to Parker. CP 112 (¶11). In fact, Parkview was unaware of any transfers of the Property since it had received the Trust Deed in 2001.

As set forth above in the Identity of Parties section, it turns out that on August 18, 2006, the Trust transferred the Property to Sharon Greer, as her separate estate and on that same date transferred the Property to herself and Greer as husband and wife. CP 112 (¶12); CP 153–154; CP 155–156. Parkview did not learn of these transfers of the Property until it ordered a foreclosure guaranty in 2016. *Id.* As previously stated, Parkview sent the annual statements of the current costs and fees associated with Parkview's performance of Greer's obligations to the Trust because it thought the Trust owned the Property. CP 142–152.

Additionally, Parkview did not know that the Property had been

sold to Parker in 2014 until a title company representative called DeFrees about a proposed sale of the Property by Parker and a release of the Trust Deed. CP 70 (¶¶3 and 4); CP (¶11). According to title records, Parker paid $30,000 for the Property even though it was tax assessed for $391,800. CP 157–158. Parkview was unaware until it obtained discovery via subpoena to First American Title Company ("FATCO") on October 31, 2016 (after the summary judgment motion had been heard and discovery by Parkview from Parker was not compelled by the Superior Court) that Parker had made a claim against FATCO based upon FATCO's prior "removal" of the Trust Deed and subsequent refusal to remove the Trust Deed as an encumbrance against the Property when Parker tried to sell it. CP 202 (letter from FATCO to Parker dated November 23, 2015); CP 204 (owner claim submittal form). In the claim form submitted for Parker's title insurance claim dated September 23, 2015, FATCO stated that "[w]e removed a Deed of Trust with a supplemental prior to closing. There are no notes in the file as to the reason it was removed. The prior owners [sic] policy has a liability of $30,000.00. We have a new transaction in which the owner is now selling for $465,000.00." CP 204.

Parker received the amount he paid for the Property from the title company -- $30,000. CP 202–203 (copy of check and letter noting that the $30,000 check had been endorsed by Parker). In reality, Parker has paid nothing for the Property.

In the November 25, 2015, letter from FATCO to Miller Nash

(Parker's counsel and the firm that represented FATCO in responding to Parkview's subpoena in this case), FATCO's counsel states that "[i]t is [his] opinion that the Parkview [Trust Deed] remains an encumbrance on title. While [he] appreciate[s] [her] arguments for why the Parkview [Trust Deed] may be unenforceable against the property, [he does] not think the beneficiary will concur." CP 202.

Parkview learned from the FATCO discovery responses after the summary judgment ruling that the grantor of the Trust Deed had breached payment and performance obligations under the Trust Deed by failing to pay property taxes due for 2010 to 2013. CP 333–342.

D. Procedural Background.

Parker filed the Complaint against Parkview to quiet title, for slander of title and for tortious interference with business relations on March 9, 2016. CP 1-6. Parkview filed an answer on May 27, 2016, asserting affirmative defenses, including waiver, equitable estoppel and unclean hands, and asserting a counterclaim for judicial foreclosure and asserting third party claims for judicial foreclosure (against Greer and PMP) and breach of contract (against Greer). CP 7–53.

On September 12, 2016, Parkview served Defendant Parkview Trails, LLC's First Discovery Requests to Plaintiff (the "Discovery Requests") on Parker. CP 95 (¶2); CP 98–108.

On September 13, 2016, Parker filed his motion for summary judgment on his quiet title claim based on his assertion that the statute of

limitations had run. CP 72–79. The court set a hearing on Parker's motion for summary judgment for October 14, 2016, a date prior to the response deadline for the Discovery Responses.

On October 5, 2016, Parkview filed its response to the motion for summary judgment and in that response moved the court under CR 56(f) for a continuance of the summary judgment hearing to allow Parkview time to obtain responses from Parker under the Discovery Requests. CP 90–92. Greer had not yet filed an answer to Parkview's judicial foreclosure and breach of contract claims and a default hearing was scheduled by Parkview against Greer. CP 90; CP 96. Parkview's counsel stated in a declaration filed with the summary judgment response/CR 56(f) motion that Parkview was "prepared to serve discovery requests on [Greer] after Greer is either defaulted in the case for failure to appear or after Greer files an answer to the pending third-party claims." CP 96 (¶3).

On October 11, 2016, PMP filed her answer to Parkview's third party claims. CP 159–162. On October 12, 2016, Greer filed his answer to Parkview's third party claims. CP 163–166.

On October 14, 2016, the Superior Court heard oral argument on Parker's motion for summary judgment and took the matter under advisement, stating that he would render his ruling on November 2, 2016. Transcript, October 14, 2016, p. 4 ll. 20–25; p. 5, ll. 1–12. At the hearing, Parkview's counsel argued that additional time was needed for discovery and that the hearing should be continued as set forth in the response pursuant to CR 56(f). Transcript, October 14, 2016, p. 19, ll. 18–25; pp.

20–21; p. 22, ll. 1–15; p. 26, ll. 3–25, p. 27, ll. 13–15.

On October 17, 2016, Parker objected to each and every discovery request in the Discovery Requests, refusing to produce any documents (other than those already filed with the motion for summary judgment) or answers to any interrogatories. CP 177–188. Parkview filed a motion to compel production of documents and responses to interrogatories from Parker on October 19, 2016. CP 167-188.

On October 18, 2016, Parkview issued a subpoena to FATCO, the title company that handled the closing of the transaction between Greer and Parker in 2014. CP 189–190 (¶2); CP 193–198. On October 31, 2016, FATCO produced thousands of pages of documents (also represented by Parker's counsel, Miller Nash). CP 190 (¶¶3–4). On November 2, 2016, before the hearing at which the court was to render its ruling on the summary judgment and the motion to compel production, Parkview filed a Supplemental Declaration in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Motion to Compel Plaintiff to Produce Documents (the "Supplemental Opposition"). CP 189–204. The Supplemental Opposition attached new evidence obtained from FATCO regarding the consideration paid by Parker of $30,000 for the Property, which was tax assessed at almost $400,000 in 2014, the claim Parker made against FATCO for releasing the Trust Deed when he purchased the Property and then FATCO's refusal to "remove" the Trust Deed based upon its counsel's opinion that it was still an encumbrance against the Property and the payment that Parker received from FATCO

for $30,000. *Id.* In the Supplemental Opposition, Parkview reiterated its need for discovery from Parker and Greer prior to the court ruling on the summary judgment motion. *Id*. at 191 (¶8).

In an oral ruling on November 2, 2016, the Superior Court denied Parkview's motion to compel responses from Parker to the Discovery Requests and granted Parker's motion for summary judgment. Transcript, November 2, 2016, p. 26, ll. 24–25; p. 27, ll. 1–12.

On November 23, 2016, Parker filed a Petition for Attorneys' Fees and Costs. CP 234–242; CP 222–233. Parkview objected to Parker's Petition for Attorneys' Fees and Costs based on Parker lacking contractual or statutory grounds to recover attorneys' fees and costs on his quiet title action and Parker's failure to address his purported claim for attorneys' fees and costs in the motion for summary judgment. CP 279–283; CP 268–278.

Greer filed a Motion for Order of Dismissal, Award of Attorneys' Fees and Costs and Entry of Judgment on November 28, 2016. CP 209–220; CP 205–208. Parkview objected to the Motion to Dismiss as untimely and improper based on the statute of limitations not having expired and based on Parkview's need to obtain discovery from Parker and Greer. CP 263–267.

Parkview filed a motion for reconsideration of the Superior Court's ruling on Parker's motion for summary judgment on December 13, 2016. CP 364–368. The Superior Court held a hearing on the entry of the summary judgment order on December 16, 2016. The Superior Court did

not rule on the motion for reconsideration (Transcript, December 16, 2016, p. 42, ll. 18–25; p. 43, ll. 1–12), but entered the order granting Parker and PMP summary judgment (CP 377–386), entered a judgment quieting title in favor of Parker (CP 387–391), entered an order reserving the issue of whether Parker was entitled to attorneys' fees, (CP 384–385), entered an order granting Greer's motion to dismiss Parkview's third party claims based upon his ruling on Parker's motion for summary judgment (CP 375–376) and entered an order denying Parkview's motion to compel responses from Parker to the Discovery Requests (CP 396–397).

On December 19, 2016, Parkview filed its Notice of Appeal in this case. (CP 392–393).

VI. STANDARD OF REVIEW

A. Summary Judgment Order

The standard of review on appeal of a summary judgment order is *de novo*. *Herron v. Tribune Pub. Co., Inc.*, 108 Wn.2d 162, 169 (1987). The appellate court performs the same inquiry as the trial court. *Id*.

A court shall grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). The nonmoving party is entitled to have the evidence viewed in a light most favorable to it and against the moving party. *Herron*, 108 Wn.2d at 170. The appellate court should affirm the grant of summary judgment only if, from all the evidence, it is clear that

reasonable persons could reach but one conclusion. *In re Parentage of J.M.K.*, 155 Wn.2d 374, 386 (2005). If reasonable minds can differ on facts controlling the outcome of the litigation, then there is a genuine issue of material fact and summary judgment is improper. *Woods Wiew II, LLC v. Kitsap County, 188 Wn. App. 1, 19 (2015).*

B. Denial of Continuance of Summary Judgment Hearing under CR 56(f)

The standard of review on appeal of a trial court's denial of a motion for continuance of a summary judgment hearing to allow discovery by the nonmoving party under CR 56(f) is the abuse of discretion standard. *Tellevik v. Real Property Known as 31641 West Rutherford*, 120 Wn.2d 68, 90 (1992), *clarified on denial of reconsider.*, 845 P 2nd 1325 (1993). A court may only deny a motion for continuance when (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact. *Id*. (*citing, Turner v. Kohler*, 54 Wn. App. 688, 693 (1989).

C. Denial of Motion to Compel

The standard of review for a trial court's denial of a motion to compel production of documents and answers to interrogatories is the abuse of discretion standard. *Lang v. Dental Quality Assurance Comm'n*, 138 Wn. App. 235, 254 (2007), *rev. denied*, 162 Wn.2d 1021 (2008). A

trial court abuses its discretion if its decision is "manifestly unreasonable exercised on untenable grounds or for untenable reasons." *Barfield v. City of Seattle, 100 Wn.2nd 878, 883 (1984); Ollie v. Highland School District No. 203, 50 Wn. App. 639, 642, fn2 (1988).*

VII. ARGUMENT

A. *The Superior Court erred in its finding that a breach of contract action on the obligation secured by the Trust Deed had commenced to accrue in September of 2005 despite a genuine issue of material fact regarding whether Greer had breached the Agreement, and its conclusion that the statute of limitations had run on Parkview's judicial foreclosure action in 2011. CP 383 (¶¶4, 5 and 6).*

Pursuant to Washington law, a deed of trust foreclosure remedy is subject to a six-year statute of limitations. *Edmundson v. Bank of Am., 194 Wn. App. 920, 927 (2016);* RCW 4.16.040. The statute of limitations begins to run when the plaintiff has a right to seek recovery in the courts when "every element of an action is susceptible of proof, including the occurrence of actual loss or damage." *Woods View II, LLC v. Kitsap Cty*., 188 Wn. App. 1, 20, *rev. denied*, 184 Wn.2d 1015, (2015). The last payment owed on an obligation secured by a trust deed commences the final six-year period to enforce a deed of trust securing a loan. *Jarvis v. Deferal National Mortgage Assoc., 2017 WL 1438040 (W.D. Wash., 2017).*

The Agreement contains a <u>defined event of default</u>, which must occur before a claim could be pursued against Greer. CP 122–123 (¶¶1(B) and 2). The Superior Court ignored the defined event of default agreed to

by the parties. Greer failed to abide by his initial performance obligations in the Agreement, but that failure was not a defined event of default. Rather, based on the express terms of the Agreement, Greer's failure to comply with his performance obligations triggered Parkview's authorization to incur costs and fees to pursue consents or, in the alternative, costs to re-engineer improvements and costs for construction of such re-engineered improvements. CP 121 (¶1). Pursuant to the terms of the Agreement, only after Parkview incurred all costs and fees, provided a final accounting and Greer failed to pay Parkview would Greer be deemed in default under the Agreement, at which time the statute of limitations would start to run. CP 122–123 (¶¶1(B) and 2).

More precisely, Section 1 to Addendum B to the Agreement required Greer to obtain written Consents for construction of the improvements for the Parkview Trails Planned Unit Development. CP 121. The Agreement provided Greer until May 1, 2002 (extended by Addendum to July 1, 2002) to obtain the Consents. *Id.* The Agreement goes on to provide:

> "[i]f Greer is unable to obtain the Consent(s) on or before May 1, 2001 [sic], [Parkview] may begin to incur expenses in pursuing the Consent(s) in its own right, and Greer shall cease efforts to obtain the Consent(s) unless Greer's assistance is requested by [Parkview]. From and after May 1, 2002, [Parkview] agrees to diligently pursue the Consent(s) from the Agencies and the costs and fees incurred by [Parkview] in pursuing such consents shall be credited first against the $320,000.00 Holdback, and then the $260,000.00 Greer Obligation secured by the Lot 1 Deed of Trust"

Section 1.B. of the Agreement then provides that Parkview shall provide an accounting of the costs and fees in pursuing the Consents to Greer at which time "Greer shall have fourteen (14) days to pay the amount that exceeds $320,000.00 up to a maximum of $260,000 to Columbia Rim in cash. <u>If Greer fails to make such payment, Greer shall be in default of this agreement and Columbia Rim may pursue its remedies under the Lot 1 Deed of Trust</u>." (CP 122, emphasis Added)

As explained, in response to a letter from Greer's attorney, on October 14, 2002, Parkview's attorney notified Greer of his failure to abide by the performance terms of the Agreement including the failure to provide the required Consents and other acceptable mitigation measures. CP 64. The letter from Parkview's counsel additionally notified Greer that Parkview would be taking over responsibility for acquiring the Consents as expressly authorized by the Agreement while adding that "[n]othing in this letter shall be construed as waiving or altering any rights that Mr. DeFrees has under the contract." *Id.* Due to Greer's failure and refusal to perform as required by the Agreement, Parkview was authorized to and selected to move forward to incur these costs to complete the project. CP 111 (¶¶6 and 7). The evidence in the record confirms that the work was performed and that costs and fees were incurred through at least October 30, 2010. *Id.*, CP 146. Based on the Agreement, only after Parkview incurred all costs and fees and provided a final accounting would Greer be deemed in default under the Agreement at which time the statute of limitations would start to run. CP 122–123.

On August 25, 2005, Greer's counsel sent another letter to Parkview requesting a release of the Trust Deed and the balance of a holdback net of costs incurred for "environmental costs." CP 139 Greer's counsel specifically asked for "documentation of these costs." *Id.* Parkview responded to that request with a letter dated September 30, 2005, which addressed the questions raised by Greer's counsel and provided costs and fees incurred "to date". CP 66–67. Despite the explicit terms of the Agreement, the court erred when it deemed the September 30, 2005 letter from DeFrees to Greer's counsel a notice of failure to perform, which started the running of the statute of limitations.

The September 30, 2005 letter was not a final accounting of the costs and fees nor did it indicate that Parkview had completed the process of obtaining the Consents and approvals for mitigation. CP 66–67. In fact, it stated that Parkview still had not completed obtaining the consents or conducting all final work. CP 67. Instead, the letter from DeFrees requested an explanation of the status of the Consents from Greer and whether any progress had been achieved in obtaining the mitigation requirements and associated approvals. CP 66–67. DeFrees additionally requested supporting documentation and the status of wetland mitigation and permits. *Id.* The letter provided Greer, as requested, with a summary of costs incurred "to date" and additional estimated future costs. *Id.* Although DeFrees made an offer to release the Trust Deed if total costs to date were paid, he did not agree to waive Greer's ongoing and accruing obligations under the Agreement and he did not provide a final accounting

since costs and fees were still being incurred to obtain the Consents and approvals described in the Agreement. *Id.*, CP 111–112 (¶9). In fact, the evidence in the record establishes that costs and fees continued to be incurred through at least through October 30, 2010 with yearly billing summaries issued to Greer through March 31, 2016. CP 141–152.

The court erred in failing to properly identify the actual default provision of the Agreement which was directly agreed upon by Parkview and Greer. The precise event of default under the Agreement did not occur until Greer failed to timely pay the final accounting of all costs and fees incurred by Parkview for the Consents and mitigation measures. The final accounting from Parkview was issued on March 31, 2016 and included costs and fees accrued on a yearly basis through October 2010. CP 152. Arguably, the earliest that the final accounting could be deemed rendered is December of 2010. CP 146.

Additionally, the court erred when it found that that the breach of contract action on the obligation secured by the Trust Deed had commenced to accrue in September of 2005. Based on Parker's own submissions, there is a genuine issue of material fact regarding whether Greer initially failed to perform his obligations under the Agreement. In support of the Motion for Summary Judgment, Parker submitted a declaration executed by Greer in which Greer testifies that he complied with the terms of the Agreement and "met his obligation under [the Agreement]." CP 55–56 (¶7). As discussed above, Parkview contends that Greer failed to perform his initial obligations and subsequently

defaulted by failing to pay the final balance of the costs and fees incurred by Parkview. Further and discussed below, evidence obtained through discovery from FATCO after the summary judgment hearing indicates that Greer defaulted under the terms of the Trust Deed by failing pay property tax due from 2010 through 2013. CP 333–344. Consequently, the court should have at a minimum found that there is a genuine issue of material fact as to when the default occurred under the Agreement and Trust Deed commencing the statute of limitations.

B. *The Superior Court erred when it found that the statute of limitations commenced running on September 30, 2005 when there was no clear and unequivocal affirmative action on Parkview's part to accelerate the obligations Greer owed.*

Pursuant to Washington law, a deed of trust foreclosure remedy is subject to a six-year statute of limitations. *Edmundson v. Bank of Am.*, 194 Wn. App. 920, 927, (2016). That statute of limitations begins to run when the party is entitled to enforce the <u>entire</u> obligation imposed by the note. *Id*., 194 Wn. App. at 930. This can occur when the obligation or note naturally matures or when the party accelerates performance. *Id*. As set forth in section A above, under the clear language of the Agreement, Parkview had the right to enforce the entire obligation of Greer imposed by the Agreement once he failed to timely perform, Parkview performed his obligations for him, rendered a final accounting to him for the costs and fees associated with performing his obligations and Greer did not pay. CP 122–123. To the extent that the Superior Court considered the September 30, 2005 letter from Parkview to Greer's counsel an

"acceleration," that was erroneous.

In order to accelerate obligations/payments owed that are secured by a deed of trust, the creditor must clearly and unequivocally indicate, by some affirmative action, that the option to accelerate has been exercised. *Weinberg v. Naher*, 51 Wash. 591, 594 (1909). A statement of potential future action does not constitute the affirmative action required to accelerate a debt. *Id*. Mere default alone does not accelerate the obligations/payments owed. *4518 S. 256th, LLC v. Karen L. Gibbons*, P.S., 195 Wn. App. 423, 435 (2016) (citing, *A.A.C. Corp. v. Reed*, 73 Wn.2d 612, 615 (1968)).

In a recent decision regarding when the statute of limitations commences to run on foreclosure of a trust deed, the federal district court in the Western District of Washington concluded that when the lender sent a letter entitled "Notice of Intent to Accelerate," that letter did not actually constitute an acceleration of the obligations due from the borrower because it was a statement of future intent. *Bank of New York Mellon v. Stafne*, 2016 WL 7118359 (Appendix, pp. 14- 17). The letter stated that it would accelerate the loan if the default was not cured. *Id*. at *3. However, the lender ultimately decided not to accelerate and instead, adjusted the borrower's payment. *Id*. Therefore, the court held that the letter was a statement of potential future action and was insufficient to trigger acceleration of the borrower's loan obligations. *Id*.

In *Weinberg*, the Washington Supreme Court held that letters which stated that "the loan will be called in" unless the debtor procured an

insurance policy payable to the creditor were insufficient to trigger acceleration because the letters simply threatened to exercise the option to accelerate. 194 Wash. at 594. In *4518 S. 256th LLC*, the court held that the lender's initiation of foreclosure proceedings under the deed of trust did not accelerate the maturity of the debt. 195 Wn. App. at 436–439.

In this case, the September 30, 2005, letter from Parkview to Greer's counsel does not clearly and unequivocally indicate, by some affirmative action, that the option to accelerate had been exercised. CP 66–67. Rather, it answers questions posed to it by Greer's counsel's letter dated August 5, 2005. CP 66 (stating that Parkview is in receipt of Greer's counsel's letter dated August 5, 2005, and providing answers to the questions raised in that letter). It asks for the status of Greer's performance of his outstanding obligations under the Agreement. CP 66 (stating, "[w]here is Mr. Greer with the above consents of the agencies involved? Has any progress been made with the mitigation requirements and the associated approvals? Please forward any information available"). It states the costs "so far" that Parkview's incurred in obtaining consents for which Greer was responsible under the Agreement because Greer had asked for that information. CP 66. It notes that mitigation of fill work in the wetlands is the subject of a "sited [sic] violation letter" and that mitigation of the fill is "being required by the [USACE] in phase 6 of the subdivision." CP 67. It notes that the mitigation is "not approved at this time, however if this is approved as submitted the cost for the unpaid (Land) and the plantings is estimated at $275,000." CP 67. It provides an

answer to Greer's counsel's questions and lists the "total costs incurred to date." Clearly, questions regarding the status of the obligor's performance under the Agreement, the costs "so far," the recitation regarding violations without approvals for mitigation, the estimated costs for mitigation and the "total costs incurred to date" are not affirmative actions that clearly and unequivocally exercise the option to accelerate to enforce obligation owed.

In 2005, the Agreement, by its own terms had not yet matured because the costs/fees incurred by Parkview to perform Greer's obligations were not yet complete and, had not been made the subject of a final accounting for which Greer had not paid. CP 122–123. Nor had Parkview accelerated the payments as a matter of Washington law as set forth above. Therefore, the Superior Court erred in its finding that the statute of limitations on Parkview's foreclosure of the Trust Deed commenced to run as of the September 30, 2005, letter. At the earliest, it commenced to run in December of 2010 when the statement was sent that included the last costs and fees that were incurred by Parkview in August and October of 2010. CP 146.

C. *The Superior Court erred in failing to grant Parkview's motion for reconsideration based on newly discovered evidence which demonstrated that under Washington law the statute of limitations commenced running after each failure of Greer to pay property taxes and other installment payments.*

Pursuant to Civil Rule 59, an order may be vacated and reconsideration granted if any one of nine listed causes is found to materially affect the substantial rights of a party. Pursuant to CR 59(a)(4),

grounds include "newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial." A party seeking reconsideration of a trial court decision on the basis of newly discovered evidence under CR 59(a) has the burden of showing that the result of the trial would probably have been different had such evidence been known. *Herron v. McClanahan*, 28 Wn. App. 552, 557 (1981) *citing Hill v. L. W. Weidert Farms, Inc.*, 75 Wn.2d 871 (1969).

After the Superior Court ruled on Parker's Motion for Summary Judgment, FATCO produced documents in response to Parkview's subpoena that included a commitment for title insurance listing unpaid and delinquent real property taxes for tax years 2010 through 2013. Pursuant to RCW 84.56.020(11)(c), all taxes for real property are due to the county treasurer on or before the 30th day of April each year with a second installment due on or before the 31st day of October each year. If payments are not made by these dates, the taxes are delinquent. Section 3.5 of the Trust Deed requires payment when due of all taxes on the property. CP 130. If the taxes are not paid, the Trust Deed is in default pursuant to Section 4.1(b). CP 130–131. Consequently, the new evidence obtained by Parkview after the Summary Judgment Hearing confirms that Greer defaulted under the terms of the Trust Deed by failing to make property tax payment installments due for tax years 2010 through 2013. This evidence was not available until FATCO responded to Parkview's subpoena. CP 333–344.

The Agreement and Trust Deed both impose payment and performance obligations on Greer, including Greer's obligation to timely pay property tax installments each year to the county. CP 130–131. A default under the Trust Deed triggers Parkview's right to commence foreclosure of the Deed of Trust. CP 131–132. In the matter of *Herzog v. Herzog*, 23 Wn.2d 382, 388, (1945), the Washington Supreme Court ruled that when "recovery is sought on an obligation payable by installments, the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it."

With regards to Greer, the statute of limitations accrued and reset for each unpaid tax installment payment from the time it became due. *Edmundson v. Bank of Am.*, 194 Wn. App. 920, 931, 378 P.3d 272, 278 (2016) (action to foreclose accrued, and six-year limitations period governing action began to run, each month in which borrowers' defaulted on installment note and deed of trust by failing to make monthly payment); Jarvis v. Federal National Mortgage Assoc., 2017 WL 1438040 at *2 (last payment owed commences six-year period to enforce trust deed). Accordingly, even if the statute of limitations initially commenced in 2005, each of the missed tax installment payments accrued within six years of the resort to the remedies under the Deeds of Trust Act. Based on these facts, the statute of limitations to foreclose on the Trust Deed did not commence earlier than November 1, 2013, which was the date of the last delinquent tax installment payment. The statute of limitations does not bar

enforcement of the Trust Deed for the missed payments or the additional obligations which remain due and owing.

D. *The Superior Court erred in denying Parkview's motion under CR 56(f) to obtain discovery responses from Parker prior to ruling on Parker's motion for summary judgment when Parkview served the discovery requests prior to the motion for summary judgment being filed and Parker failed and refused to provide any discovery sought, Parkview stated what evidence would be established through the additional discovery and the desired evidence would have raised a genuine issue of material fact regarding Parkview's affirmative defenses of waiver, equitable estoppel and unclean hands.*

A trial court may continue a summary judgment hearing if the nonmoving party shows a need for additional time to obtain affidavits, take depositions, or conduct discovery. CR 56(f); *Winston v. Dep't. of Corr.*, 130 Wn. App. 61, 64–65 (2005). "The trial court may deny a motion for a continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact." *Butler v. Joy*, 116 Wn. App. 291, 299 (2003) (citing *Tellevik v. Real Prop. Known as 31641 W. Rutherford St., 120 Wn.2d 68 (1992), Clanfied on denial of reconsid., 845 p.2d 1325 (1995).*

As described above, Parkview timely served discovery requests on Parker prior to the motion for summary judgment being filed. In addition, Parkview was prepared to serve discovery requests on Greer if Greer filed an answer and was not defaulted. CP 96 (¶ 3).

Parker's counsel submitted identical objections to each

interrogatory and request for production made by Parkview in the Discovery Requests. The objections made, and the express reason for not providing answers or documents, were based solely on the grounds that Parker did not want to answer the interrogatories or produce documents unless its motion for summary judgment was denied. CP 177-188. In an effort to obtain necessary discovery, Parkview issued the subpoenas to Fidelity Title and FATCO, which resulted in the production of evidence supporting Parkview's affirmative defenses that was not otherwise available prior to responding to and arguing in opposition to the Motion for Summary Judgment. CP 364-365. Yet, additional discovery from both Parker and Greer is still needed to further support Parkview's affirmative defenses.

Essentially, discovery from Parker and Greer will result in production of evidence raising additional material issues of fact in support of the affirmative defenses laches, waiver, equitable estoppel and unclean hands plead by Parkview. These affirmative defenses may apply to bar a claim based on the statute of limitations. *Rouse v. U.S. Dep't of State*, 567 F.3d 408 (9th Cir. 2009).

Pursuant to Washington law, a statute of limitations defense or claim is subject to principles of waiver and estoppel, including the doctrine of equitable tolling. *State v. Kerow*, 192 Wn. App. 843, 847–48, 368 P.3d 260, 262, *rev. denied*, 186 Wn.2d 1007 (2016). The doctrine of equitable tolling allows a claim to proceed when justice requires it, even though it would normally be barred by a statute of limitations. *Trotzer v.*

Vig, 149 Wn. App. 594.606, n.9 (2009). The usual predicates for equitable tolling are: (1) bad faith, deception, or false assurances by the defendant; and (2) the exercise of diligence by the plaintiff. *Reed v. Allstate Ins. Co*., No. C11-0866JLR, 2012 WL 527422, at 5 (W.D. Wash. Feb. 16, 2012) citing *Millay v. Cam*, 135 Wn.2d 193, 955 P.2d 791, 797 (Wash.1998).

A party can also waive a statute of limitations defense (1) by engaging in conduct that is inconsistent with that party's later assertion of the defense or (2) by being dilatory in asserting the defense. *Greenhalgh v. Dep't of Corr.*, 170 Wn. App. 137, 144, 282 P.3d 1175 (2012). In addition, a party can be estopped from asserting a statute of limitations defense where there is found to be (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party from allowing the first party to contradict or repudiate such admission, statement, or act. *Logan v. NorthWest Ins. Co*., 45 Wn. App. 95, 724 P.2d 1059, 1062 (Wash.Ct.App.1986).

Parkview raised the need for discovery in its Response to Plaintiff’s Motion for Summary Judgment based on the fact that Parker only paid Greer $30,000.00 to purchase property, which had a tax assessed value of $391,800.00. CP 90-92. Although Parker paid this reduced price, he also contended that the title company initially insured around the Trust Deed. CP 2. Yet, the title company then refused to remove the Trust Deed at the time of a proposed sale. *Id.* Parkview sought discovery on these

issues because the facts indicate that Parker either purchased the Property at a significantly reduced price subject to the Trust Deed or otherwise made representations or assurances at the time of the purchase which would bar his ability to now challenge the validity of the Trust Deed. CP 91-92. The limited discovery received subsequently from the title companies verifies the concerns raised by Parkview and validates its affirmative defenses. CP 189-204.

As explained above, the documents from FATCO (which Parker refused to produce) include a claim by Parker against FATCO based upon FATCO's prior "removal" of the Trust Deed and subsequent refusal to remove the Trust Deed as an encumbrance against the Property when Parker tried to sell it. *Id.* In the claim form submitted for Parker's title insurance claim dated September 23, 2015, FATCO stated that "[w]e removed a Deed of Trust with a supplemental prior to closing. There are no notes in the file as to the reason it was removed. The prior owners [sic] policy has a liability of $30,000.00." CP 204.

In the November 25, 2015 letter from FATCO to Parker's counsel, FATCO's counsel additionally states that "[i]t is [his] opinion that the Parkview [Trust Deed] remains an encumbrance on title. While [he] appreciate[s] [her] arguments for why the Parkview [Trust Deed] may be unenforceable against the property, [he does] not think the beneficiary will concur." CP 202.

Parker then elected his remedy by collecting on his claim against FATCO based on the existence of the Trust Deed and was compensated in

the amount he paid for the Property from the title company—$30,000. CP 203. Pursuant to Washington law, based on the admission and acts, Parker waived his right to bring a quiet title action and to raise a claim based on the statute of limitations. This is because Parker elected to engage in conduct that is entirely inconsistent with his later assertion of the statute of limitations defense. Likewise, Parker is estopped from asserting a claim based on the statute of limitations defense because of the existence of (1) his admission and acts associated with his election to collect on the claim which is inconsistent with the claim he subsequently asserted in the complaint; (2) the action by Parkview to pursue its rightful claim of foreclosure; and (3) the injury to Parkview which would result by allowing Parker to contradict or repudiate his admissions and actions. Parker has acted inequitably and in bad faith by demanding that he be compensated by the title company for the full amount he paid for the property based on the existence of the Trust Deed, while subsequently claiming that the Trust Deed is invalid. Parker's acts and admissions meet the basic elements of waiver and estoppel affirmative defenses under Washington law.

Although, the initial documents from the title companies raise sufficient genuine issues of material facts to deny summary judgment, the documents were not available for Parkview when it filed its response or argued in opposition to the Motion for Summary Judgment. Therefore, Parkview needs and is entitled to obtain additional documents and discovery responses from Parker and Greer as well as depositions of FATCO representative(s) to determine (1) why Parkview's Trust Deed

was "removed" from the title report at the closing of the sale of the Property from Greer to Parkview; (2) the facts and representations surrounding Parker's acceptance of the $30,000 from FATCO; and (3) why the FATCO officer determined that it was his opinion the Parkview Deed of Trust remains an encumbrance of title as of November 25, 2015. CP 202.

The evidence Parkview seeks through discovery and the reasonable inferences obtained therefrom, viewed in the light most favorable to Parkview, would at a minimum raise additional genuine issues of material fact regarding Parkview's affirmative defenses as well as the commencement date of the statute of limitations. As a matter of law, if the discovery sought by Parkview may result in evidence supporting an affirmative defense which can bar reliance on the statute of limitation, a ruling on summary judgment is simply premature and should be denied or continued. *See, Demelash v. Ross Stores, Inc.*, 105 Wash. App. 508, 526, 20 P.3d 447, 457 (2001) (summary judgment premature where discovery may have resulted in evidence sufficient to permit the plaintiff to establish a prima facie case); *see also, Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425, 427 (1986) (the court has a duty to accord the parties a reasonable opportunity to make the record complete before ruling on a motion for summary judgment). *In Tellevik v. Real Property Known as 31641 West Rutherford Street*, 120 Wn.2d 68, 91 (1992), *clarified on denial of reconsid.*, 845 p.2d 1325 (1995) (the court reversed a trial court's summary judgment for abuse of discretion in not granting a continuance

under CR 56(f), holding that the plaintiff in that case should have been allowed to complete discovery prior to a ruling on the summary judgment motion of defendant).

E. *The Superior Court erred in denying Parkview's motion to compel production of documents and answers to interrogatories from Parker prior to ruling on Parker's motion for summary judgment when Parkview served the discovery requests prior to the motion for summary judgment being filed and Parker failed and refused to provide any discovery sought, when the discovery sought would have raised a genuine issue of material fact regarding the statute of limitations and Parkview's affirmative defenses of equitable estoppel, waiver and unclean hands.*

The Superior Court additionally erred in failing to compel production of discovery from Parker for the same reasons the Superior Court erred in failing to allow Parkview to obtain discovery prior to ruling on the Motion for Summary Judgment. As discussed above, Parkview has already established that discovery from Parker, Greer and FATCO will result in production of evidence raising genuine issues of material fact in support of the affirmative defenses. The documents produced by FACTO after the summary judgment hearing specifically support Parkview's affirmative defenses of waiver and equitable estoppel. Additional discovery will further support those affirmative defenses as well as the additional affirmative defenses plead by Parkview.

Parker filed the lawsuit against Parkview seeking to deprive Parkview of its interest in property. Yet, Parker completely refused to produce discovery necessary for Parkview to support its affirmative defenses. As indicated, Parker refused to answer the interrogatories or produce documents unless its motion for summary judgment was denied.

CP 178-186. Parker's position is wholly improper and directly conflicts with the timelines required under CR 33 and 34.

F. *The Superior Court erred in dismissing Parkview's action against Greer based upon the erroneous summary judgment ruling in favor of Parker that the statute of limitations had run on Parkview's judicial foreclosure action.*

The Superior Court dismissed Parkview's action against Greer solely based on its ruling on Parker's Motion for Summary Judgment. For the reasons set forth herein, the Superior Court erred in granting summary judgment in favor of Parker. Specifically, the Superior Court's ruling was in error because (1) there are genuine issues of material fact as to whether the statute of limitations expired; (2) Parker's act and admissions resulted in waiver of any claim based on the statute of limitations and Parker is additionally equitably estopped from relying on the statute of limitations; and (3) Parkview is entitled to obtain complete discovery from Parker, Greer and FATCO in support of Parkview's affirmative defenses.

VIII. CONCLUSION

A. The Superior Court erred in granting Parker's Motion for Summary Judgment because there are genuine issues of material fact regarding the date upon which the statute of limitations began to run. Specifically, submissions by both Parker and Parkview raise genuine issues of material fact concerning the timing of Greer's defaults under the Agreement and Trust Deed. Moreover, the Superior Court erred as a

matter of law in its ruling that the September 30, 2005 letter commenced the statute of limitations based upon the defined event of default into the parties' agreement. Therefore, the Court of Appeals should reverse the Superior Court's ruling granting summary judgment in favor of Parker and remand this action back to the Superior Court to require such further proceedings as may be just under the circumstances.

B. The Superior Court erred by failing to apply the standard under Washington law for the commencement of the statute of limitations, which requires clear and unequivocal affirmative action by Parkview that the obligation was accelerated. Parkview took no such clear and unequivocal affirmative action in September 2005. Therefore, the Court of Appeals should reverse the Superior Court's ruling granting summary judgment in favor of Parker and remand this action back to the Superior Court to require such further proceedings as may be just under the circumstances.

C. The Superior Court erred in failing to grant Parkview's Motion for Reconsideration when it was presented with newly discovered evidence in support of Parkview's affirmative defenses. Therefore, the Court of Appeals should reverse the Superior Court's ruling granting summary judgment in favor of Parker and remand this action back to the Superior Court to require such further proceedings as may be just under the circumstances.

D. The Superior Court erred in failing to continue the briefing and hearing on the Motion for Summary Judgment to allow Parkview to obtain complete discovery from Parker, Greer and FATCO. Therefore, the Court of Appeals should reverse the Superior Court's ruling granting summary judgment in favor of Parker and remand this action back to the Superior Court to require discovery to be conducted and completed and to require such further proceedings as may be just under the circumstances.

E. The Superior Court erred in failing to grant Parkview's Motion to Compel Production of Discovery when Parker failed and refused to provide any discovery required under CR 33 and 34. Therefore, the Court of Appeals should reverse the Superior Court's ruling granting summary judgment in favor of Parker and remand this action back to the Superior Court to require discovery to be conducted and completed and to require such further proceedings as may be just under the circumstances.

F. The Superior Court erred in dismissing Parkview's action against Third-Party Respondent Greer based upon the erroneous summary judgment ruling in favor of Parker that the statute of limitations had run on Parkview's judicial foreclosure action. Therefore, the Court of Appeals should reverse the Superior Court's ruling granting Greer's Motion to Dismiss and remand this action back to the Superior Court to require such further proceedings as may be just under the circumstances.

DATED: July 25, 2017.

FARLEIGH WADA WITT

By: /s/ Tara J. Schleicher

Tara J. Schleicher, WSBA #26884
Jason M. Ayres, WSBA #39141
(503) 228-6044
tschleicher@fwwlaw.com
jayres@fwwlaw.com
Attorneys for Appellant
Parkview Trails, LLC

IX. APPENDIX

Agreement A-1

Bank of New York Mellon v. Scott A-14

Jarvis v. Federal National Mortgage Association A-18

PROOF OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLANT'S OPENING BRIEF AND PROOF OF SERVICE** with the State Court Administrator by using the Washington Appellate eFiling system on August 7, 2017.

I further certify that I electronically-served the foregoing **APPELLANT'S OPENING BRIEF AND PROOF OF SERVICE** upon the persons listed below by using the Washington Appellate eFiling system on August 7, 2017.

LeAnne M. Bremer, P.C.
Joseph Vance, P.C.
Miller Nash Graham & Dunn
500 Broadway St., Ste. 400
Vancouver, WA 98660
Attorneys for Respondent

Albert F. Schlotfeldt
Duggan Schlotfeldt & Welch LLC
900 Washington Street, Suite 1020
Vancouver, WA 98660
Attorneys for Third-Party Respondents

DATED: August 7, 2017.

FARLEIGH WADA WITT

By: /s/ Tara J. Schleicher
Tara J. Schleicher, WSBA #26884
Jason M. Ayres, WSBA #39141
(503) 228-6044
tschleicher@fwwlaw.com
jayres@fwwlaw.com
Attorneys for Appellant
Parkview Trails, LLC

AGREEMENT

1. EFFECTIVE DATE

The effective date is the date upon which both parties have executed this Agreement.

2. PARTIES

Columbia Rim Construction, Inc., hereinafter known as Columbia Rim; and Ed Greer, hereinafter known as Greer.

3. EXISTING PURCHASE AND SALE AGREEMENTS

Greer is the purchaser under six Purchase and Sale Agreements (collectively the "Purchase Agreements") as follows:

Purchase Agreement No.	Tax Parcel Serial No.	Property Owner
103148	228513 228514	Vernon Cresap
81306	228548	Robert Fund
36744	228536	Mary Wolff
103146	228540	Brooks Owen
088763	228544	Roy Carmack
073832	228498	Burl Landis

The real estate, which is the subject of the Purchase Agreements, is hereinafter referred to as the "property." Greer hereby agrees to sell, and Columbia Rim agrees to buy, upon the terms and conditions set forth herein, an assignment of Greer's right to receive Warranty Deeds under the Purchase Agreements. Greer warrants that the Purchase Agreements are valid and enforceable agreements, with closing dates within the time schedule established in this Agreement.

4. TERMS AND CONDITIONS

If any terms and conditions of this Agreement conflict with terms and conditions of the Purchase Agreements, the provisions of this Agreement shall prevail.

5. PURCHASE PRICE

The total purchase price is Two Million Nine Hundred Thousand dollars ($2,900,000), payable as follows: Down payment at close of escrow is $2,600,000 and the proceeds shall be used to pay off all underline Purchase Sale Agreements, commissions etc. and deliver Statuttory Warranty Deeds free of encumbrances except as any approved by Columbia Rim. Greer shall carry a Note and 2nd Trust Deed behind the lender for the remaining balance of $300,000 secured by the undeveloped property payable by Columbia Rim as follows: Columbia Rim shall pay Greer a sum of $2,000 for each home or lot sold. Payments shall be from the individual escrow at the time of closing of each said home or lot for the first 150 homes or lots.

The consideration for the purchase price shall be the assignment by Greer of his rights to receive warranty deeds under the Purchase Agreements, and the execution and recording of said deeds.

The purchase price includes a portion of the City approved Parkview Trails Preliminary Plat containing 166 buildable lots and one existing home on a large lot. Greer warrants and represents that the Preliminary Plat approval is valid, binding and enforceable.

Lot 1, consisting of approximately 2.5 acres and Tract "C" as shown on the survey plat prepared by Hagedorn, Inc., are not included in the purchase of said existing land parcels and will be deeded to Greer or his assignee upon close of escrow.

6. ADVANCE PAYMENT

Earnest Money receipt: Undersigned acknowledges receipt from Purchaser of $20,000.00, in the form of ____cash, __ Business check, __cashier's check, _X_ Promissory Note as earnest money in partial payment of the purchase price. The promissory note shall be converted 14 days after Buyers full satisfaction and sole Discretion of the Development and Construction Feasibility study period. If Buyer, in Buyers, sole discretion for any reason, does not give written approval and acceptance of The Development and Construction feasibility study within the 14 day period than all earnest money hereunder shall be returned to Buyer, and this agreement shall be null and void and no further force and effect.

Columbia Rim shall convert said promissory note and deposit the sum of $20,000 Cashier's check upon contingencies being satisfied as set forth. The advance payment shall be deposited to the escrow officer, Linda Comley, of Fidelity National Title Company on or before June 29, 2001. Said advance payment shall be immediately released to Greer, shall be non-refundable and shall be applied to the purchase price. Greer has previously deposited a total of $19,500

into escrow as earnest money for the six Purchase Agreements. Greer shall receive credit or a reimbursement of said $19,500 from funds deposited by Columbia Rim at close of escrow.

7. ESCROW

Escrow closing shall occur at Fidelity National Title Company, Battle Ground branch, Linda Comley escrow office. Greer agrees to pay all closing costs that are not the responsibility of the Sellers of the Purchase Agreements. Columbia Rim is not responsible for any closing costs.

8. CONDITION OF TITLE: SELLER REPRESENTS AND WARRANTS TO THE BUYER THE FOLLOWING:

A. Title to the property is to be free of all encumbrances or defects, except as noted in paragraph 8 below, and except for: Free and Clear Rights reserved in federal patents or state deeds; building or use restrictions general to the area, other than platting and subdivision requirements; utility easements; other easements not inconsistent with Purchaser's intended use; and reserved oil and/or mineral rights; shall not be deemed encumbrances or defects. Encumbrances to be discharged by Seller shall be paid from the purchase money at the date of closing, including any lienable association or condominium dues, charges or assessments.

B. Seller has received no written notice of any liens to be assessed against said properties.
Seller has received no written notice from any governmental agency of any violation of any statute, law, ordinance or deed restriction, rule or regulation with respect to the said properties.
The properties have not been used for the storage or disposal of any hazardous material or waste. There are no environmentally hazardous materials or waste contained on or under the said properties and the properties has not been identified by any government agency as a site upon which environmentally hazardous materials or waste have been located or deposited.
Seller does not know of any encroachment, adverse possession claims or other possible boundary questions or problems.

C.Title shall be conveyed to Columbia Rim by Statutory Warranty Deeds from the Sellers under the Purchase Agreements, free of encumbrances or defaults, except any approved by Columbia Rim in writing prior to close of escrow.

8. TITLE INSURANCE

A standard form policy of title insurance shall be provided by Fidelity National Title Company for each of the six properties being purchased, at the expense of

the Sellers. If Columbia Rim desires any extended coverage, Columbia Rim shall pay any costs incurred to receive such extended coverage.

9. CONTINGENCIES

The close of escrow is subject to Columbia Rim's sole satisfaction of the following Contingencies:

- Buyer's approval of the conclusions derived from the development and construction feasibility study within 14 days of the mutual acceptance of this Agreement. Such study shall be done at the Buyer's expense and discretion to determine the feasibility of developing and constructing the said properties into single family residential housing project.
- Seller shall promptly supply to Buyer all materials in his control relating to the said property. Buyer shall keep all such materials in strict confidence.
- Buyer and / or his agents shall have full access to the said properties for the purpose of completing the Development and Construction Feasibility Study.
- If Buyer, in Buyer's, SOLE DISCRETION and for any reason, does NOT give written approval and acceptance of the Development and Construction Feasibility Study's conclusions within the 14 day period, then all earnest money hereunder shall be returned to the Buyer, and this agreement shall thereupon be null and void and with NO further force and effect. Upon written approval if Buyer provides acceptance after the 14 day Development and Construction Feasibility study period, the earnest money shall than be non-refundable to buyer, and will be applicable to the purchase price at closing.
- Upon completing and Buyer's acceptance of the Development and Construction Feasibility Study's conclusions; and at BUYER'S SOLE OPTION said promissory note shall be converted into cash and held in escrow until closing. The $20,000.00 Earnest Money Deposit shall be credit towards the Purchase Price at closing.
- Seller shall supply Buyer a boundary and certification survey of said properties and locate all external boundary line corners. Buyer shall be responsible for internal lot boundary corners
- Approval of a land/construction loan
- Purchasers review and sole satisfaction of all underline Purchase and sale agreements
- Core of engineer permit approval if required

10. ESCROW CLOSING

Escrow shall close on or before July 31, 2001. Both parties shall deposit with the escrow officer, all funds, instruments and other documents required to complete the closing of the transaction in accordance with the terms and conditions of this Agreement.

11. POSSESSION

Possession shall be upon close of escrow. The owner/occupants of the existing homes located on tax serial nos. 228536 and 228548 may continue to occupy their respective homes for up to 60 days after close of escrow providing they maintain adequate liability insurance and pay utilities on their homes until said homes are vacated, and execute a hold harmless waiver, however both occupants have indicated they would probably vacate within two weeks after close of escrow.

12. GREER'S OBLIGATIONS

Greer shall be responsible for the coordination and City approval of civil engineering plans and Final Plats for two phases of development of the property. Said engineering plans for Phase 1 are completed and approved by the City. The subsequent phase will be prepared and approved in accordance with Columbia Rim's requested time schedule. Greer will bear costs for boundary and topographic surveys, and the preparation of said civil engineer plans and Final Plats for both phases of development.

13. COLUMBIA RIM'S OBLIGATIONS

If Columbia Rim elects to downsize phase one, then Columbia Rim shall pay Hagedorn, Inc., for the changes to the engineering plans necessary to revise Phases 1 and 2 to be able to construct them separately.

Columbia Rim shall be responsible for paying the City of Battle Ground fees required for Final Plat review and for engineering review and field inspection.

Columbia Rim shall be responsible for all construction staking and lot/plat monumentation.

Columbia Rim shall construct or install all infrastructure or improvements as indicated on the City approved sets of Civil Engineering and Landscape Plans and at no cost to Greer.

14. MISCELLANEOUS

Greer is responsible for payment of all real estate sales commissions owed on this property. Columbia Rim is not responsible for any real estate sales commission regarding the closing of this transaction.

Time is of the essence in this Agreement.

In the event litigation arises out of this Agreement, the losing party agrees to pay the prevailing party's attorney fees incident to said litigation, together with all costs incurred in connection with such action.

Both parties each agree that this Agreement constitutes the entire Agreement between the parties. Any amendment to this Agreement must be in writing and signed by both parties to become effective.

15. ACCEPTANCE

By executing their signatures below, Columbia Rim and Greer hereby agree to the terms and conditions of this Agreement.

Columbia Rim Construction, Inc.

By: _____ Date: 6-16-01
Mike DeFrees, President

_____ Date: 6-16-01
Ed Greer

ADDENDUM B TO AGREEMENT

To be attached and made a part of the Agreement between Columbia Rim Construction, Inc. And Ed Greer, dated June 16, 2001, as amended by Addendum A to Agreement dated July 4, 2001.

For and in consideration of Columbia Rim agreeing to proceed to close on the acquisition of the real property which is the subject of the Agreement, the parties agree as follows:

1. At Closing, the parties agree to a holdback from the purchase price of $320,000.00 (the "Holdback"). In addition, at Closing Greer agrees to provide collateral to Columbia Rim in the form of a first deed of trust on Lot 1 Parkview Trails Planned Unit Development (the "Lot 1 Deed of Trust"). The Lot 1 Deed of Trust shall secure Greer's obligation to reimburse Columbia Rim up to an amount of $260,000.00 (the "Greer Obligation") under the terms set forth below, as well as secure Greer's obligations under Section 3 of this Addendum B. The Holdback shall not be deposited with escrow, but instead shall be held by Columbia Rim pursuant to the conditions herein, and shall be held without interest accrual.

Columbia Rim and Greer have discussed the apparent need to get United States Army Corps of Engineers, United States Department of Fish and Wildlife, National Marine Fisheries Service, and/or Department of Ecology 401 Water Quality Certification (collectively referred to herein as the "Agencies") written consent(s) for construction of the improvements for the Parkview Trails Planned Unit Development (referred to herein as "Parkview") as presently approved by the City of Battle Ground (the "Consent(s)"). The process for for obtaining the Consent(s) from the Agencies could take as long as 24 months and cost Columbia Rim as much as $100,000.00 in fees and costs and $480,000.00 in interest carry costs, if Greer is unable to obtain such Consent(s) as set forth below. The $320,000.00 Holdback, and $260,000.00 Greer Obligation secured by the Lot 1 Deed of Trust represents $20,000.00 per month "interest carry cost" to Columbia Rim for a maximum of 24 months, as well as a maximum of $100,000.00 in fees and costs.

Greer shall have until May 1, 2002 to obtain the Consent(s) at Greer's sole cost and expense. If Greer is unable to obtain the Consent(s) on or before May 1, 2001, Columbia Rim may begin to incur expenses in pursuing the Consent(s) in its own right, and Greer shall cease efforts to obtain the Consent(s) unless Greer's assistance is requested by Columbia Rim. From and after May 1, 2002, Columbia Rim agrees to diligently pursue the Consent(s) from the Agencies and the costs and fees incurred by Columbia Rim in pursuing such consents shall be credited first against the $320,000.00 Holdback, and then the $260,000.00 Greer Obligation secured by the Lot 1 Deed of Trust,

Greer shall be entitled to a disbursement from the Holdback and/or a credit against the $260,000.00 Greer Obligation only under the following conditions:

A. Upon the date of obtaining the final Consent from the Agencies if Columbia Rim

takes control of obtaining such consent(s) after May 1, 2002, Columbia Rim shall account to Greer for its costs and fees incurred in obtaining such Consent(s). If the total of such costs and fees is less than $100,000.00, Columbia Rim shall credit the Greer Obligation with the difference between the actual fees and costs incurred and $100,000.00. For example, if Columbia Rim's actual costs and fees total $80,000.00, Greer shall be entitled to a $20,000.00 credit against the Greer Obligation. If Columbia Rim's costs and fees exceed $100,000.00, Greer shall receive no disbursement from the Holdback and Columbia Rim shall bear such additional costs and fees itself.

B. Upon the date of obtaining the final Consent from the Agencies, Greer shall be entitled to a credit against the Greer Obligation up to any remaining balance still owed from the Greer Obligation after deduction of Columbia Rim's costs and fees described in A above, and then a disbursement from the Holdback for any remainder owed to Greer equal to $20,000.00 per month for any months remaining less than 24 total months from the Closing Date. For example, if the final Consent comes in the 18th month after the Closing Date, Greer shall be entitled to a disbursement of $120,000.00 (6 months remaining x $20,000.00 per month), first as a credit against the Greer Obligation and then as a disbursement from the Holdback. Any disbursement due Greer from the Holdback shall occur only after Columbia Rim has sold and closed on 100 lots in Parkview Trails. Any such disbursement due Greer shall be paid to Greer at the rate of $5,000.00 per lot and shall be disbursed from the escrow closing of each lot sale in Parkview Trails commencing with the sale of the 101st lot. If the final Consent is received after 24 months from the Closing Date, Greer shall be entitled to no disbursement from the Holdback. If the final Consent is obtained by Greer after the Closing Date but before May 1, 2002, Greer shall be entitled to a disbursement from the Holdback after deducting $20,000.00 per month for each month after closing but before May 1, 2002, which amount shall be retained by Columbia Rim, and the Note shall be canceled and the Lot 1 Deed of Trust reconveyed.

In the event the interest carry total of $20,000.00 per month and Columbia Rim's costs and fees exceed the $320,000.00 holdback, Columbia Rim shall provide an accounting of the number of months needed to obtain the final Consent(s) and its costs and fees in pursuing the same to Greer. Greer shall have fourteen (14) days to pay the amount that exceeds $320,000.00 up to a maximum of $260,000.00 to Columbia Rim in cash. If Greer fails to make such payment, Greer shall be in default of this agreement and Columbia Rim may pursue its remedies under the Lot 1 Deed of Trust.

2. As an alternative to Columbia Rim pursuing the Agencies' Consent(s) after May 1, 2002, Columbia Rim may instead, in its sole discretion, chose to re-engineer those certain improvements for Parkview to obviate the need for the Agencies' Consent(s). In such event, the $320,000.00 Holdback and the $260,000.00 Greer Obligation may be used by Columbia Rim for the costs of re-engineering the improvements and the cost of construction for such re-engineered improvements. To the extent the total cost of such re-engineered improvements is less than $580,000.00, Greer shall be entitled to first, a credit against the Greer Obligation, and second, a disbursement from the Holdback, equal to the difference between the actual costs incurred by

Columbia Rim and $580,000.00. Such disbursement shall be made upon approval and/or acceptance of such improvements to Parkview by the City of Battle Ground. Any disbursement due Greer from the Holdback shall occur only after Columbia Rim has sold and closed on 100 lots in Parkview Trails. Any such disbursement due Greer shall be paid to Greer at the rate of $5,000.00 per lot and shall be disbursed from the escrow closing of each lot sale in Parkview Trails commencing with the sale of the 101st lot.

If Columbia Rim's costs and fees exceed $320,000.00 but are less than $580,000.00 Columbia Rim shall provide an accounting of its costs and fees to Greer. Greer shall have ten (10) days to pay the amount that exceeds $320,000.00 up to a maximum of $260,000.00 to Columbia Rim in cash. If Greer fails to make such payment, Greer shall be in default of this agreement and Columbia Rim may pursue its remedies under the Lot 1 Deed of Trust.

If Columbia Rim's costs and fees exceed $580,000.00, Greer shall receive no disbursement from the Holdback or credit against the Greer Obligation and Columbia Rim shall bear such additional costs above $580,000.00 itself.

3. The preliminary plat approval conditions for Parkview require that the applicant pay fees for off site improvements for traffic mitigation in an as yet undetermined amount. Columbia Rim has agreed to pay an amount up to $300.00 per dwelling unit to the City of Battle Ground if the City requires payment for, or construction of, such mitigation improvements. Greer has agreed to pay all costs that exceed $300.00 per dwelling unit for such mitigation improvements. Greer's agreement shall survive the Closing Date and Greer's payment of such costs shall be secured by the Lot 1 Deed of Trust. Upon final determination by the City of Battle Ground of the cost of such mitigation improvements, Greer shall pay to Columbia Rim any amount which exceeds $300.00 per dwelling unit upon ten (10) days written demand from Columbia Rim. In the event Greer fails to make such payment to Columbia Rim, Greer shall be in default of this obligation and Columbia Rim may proceed with its remedies under the Lot 1 Deed of Trust.

4. Columbia Rim may assign its interest in the Agreement to Parkview Trails, LLC, a Washington limited liability company.

//
//
//
//
//
//
//
//
//
//
//
//

5. Except as amended herein, all other terms and conditions of the Agreement and Addendum A shall continue in full force and effect, and all terms and conditions of the Agreement, Addendum A and this Addendum B shall survive the Closing Date.

Columbia Rim Construction, Inc.

By: Mike DeFrees, President

Date: 8-30-01

Ed Greer

Date: 8-30-01

APR 22 2002 01:29AM COLUMBIA RIM CONSTRUCTION 360-66 P.1
SENT BY: LANDERHOLM LAW FIRM; 360 6962122 ; APR-29-02 8:13AM; PAGE 4/4
SENT BY: COLUMBIA RIM CONSTRUCTION INC.; 360 571 6055; APR-24-02 4:02PM; PAGE 3/3

AMENDMENT TO ADDENDUM B TO AGREEMENT

To be attached and made a part of the Agreement between Columbia Rim Construction, Inc. and Ed Green, dated June 15, 2001, as amended by Addendum A to Agreement dated July 4, 2001 and as amended by Addendum B to Agreement dated 8-30-01.

Addendum B entered into between Columbia Rim Construction, Inc. and Ed Green dated 8-30-01 shall be amended by this Amendment as follows: Each reference to May 1, 2002 in Addendum B shall be stricken and replaced in its entirety with "July 1, 2002". Any right or obligation set forth in Addendum B or any document incorporated by reference in Addendum B, which accrues on May 1, 2002 shall instead accrue on July 1, 2002. Except as otherwise modified by this Amendment, all of the terms and conditions of Addendum B shall be in full force and effect. In the event of any conflict between Addendum B, or any document incorporated by referenced into Addendum B, and this Amendment, the terms of this Amendment shall control.

Columbia Rim Construction, Inc.

By: Mike DeFreese, President

Date: 5/2/02

Ed Green

Date: 4-24-02

4-24-2002 10:31AM FROM-360-6962122 P.2

ADDENDUM C TO AGREEMENT

To be attached and made a part of the Agreement between Columbia Rim Construction, Inc. And Ed Greer, dated June 16, 2001, as amended by Addendum A to Agreement dated July 4, 2001.

For and in consideration of Columbia Rim agreeing to proceed to close on the acquisition of the real property which is the subject of the Agreement, the parties agree as follows:

1. Greer shall be responsible to satisfy the City of Battle Ground for necessary plans and park improvements as required in the ParkView Trails Subdivision Planned Unit Development conditions of approval (see attached exhibit "A" conditions of approval) prior to Phase 1 plat recording. Columbia Rim shall be responsible for building the required trails within the property being purchased.

2. Greer hereby assigns his interest in the "Hagedorn" Civil Engineering plans for phase 1 to Columbia Rim at no cost, after close of escrow.

3. The feasibility period is hereby extended to September 14, 2001. The $20,000 earnest money promissory note shall be converted into cash upon Purchaser acceptance of the feasibility period.

4. Except as amended herein, all other terms and conditions of the Agreement and Addendum A shall continue in full force and effect, and all terms and conditions of the Agreement, Addendum A and B and this Addendum C shall survive the Closing Date.

Greer shall be responsible to regrade the storm "ditch" Facility retention Pond tract "B" from the outfall location IE 271.00 access the "Smith and Wey" property to allow the outfall of this facility to drain properly as designed. This regrading of the ditch shall be done within 4 weeks.

Columbia Rim Construction, Inc.

By: Mike DeFrees, President

Date: 9-12-01

Ed Greer

Date: 9-13-01

Exhibit "A"

three feet Fireplaces, structures, greenhouse windows, bay windows and planting boxes into a required yard a maximum of two feet (already authorized by BGMC 17.129.030)	Maximum density for multi-family attached residential
20 dwelling units per net acre	Allowability of Self-Storage Facility
Allowed because of planned unit development nature of proposed project	

B. Other

1. Prior to building permit issuance, demonstrate conformance with BGMC 17.106.020 for any uses to be constructed on the created lots.

2. At time of building permit application submit plot plans for each individual lot that indicate compliance with the setback requirements of the R1-7.5 and R1-6 zoning district except as alternatively approved through the preliminary plat approval process.

3. At time of building permit application, the applicant or person or organization submitting the building permit application shall demonstrate conformity with the architectural variety requirements specified in BGMC 17.106.040.D.

4. Prior to building permit issuance demonstrate conformity with the accepted alternative development regulations and standards in subsection A of this section. All other regulations in effect at the time of approval pertaining to development within the R1-7.5 and R1-6 zoning districts shall apply to the proposed project unless specifically noted in the above table.

BGMC 17.128

A. Prior to final plat approval the applicant shall:

1. Submit a final plat that indicates the provision of a minimum of five (5) acres of on-site parkland.

2. Demonstrate conformity with BGMC 17.128.040.A.2.a.i

3. Construct required and approved park improvements from the parks improvement plan approved by the City of Battle Ground Planning and Engineering Departments.

4. Required land area shall be dedicated and required improvements shall be installed in order for the applicant to receive park impact fee credits.

KeyCite Blue Flag – Appeal Notification
Appeal Filed by BANK OF NEW YORK MELLON v. SCOTT STAFNE, ET AL, 9th Cir., December 14, 2016
2016 WL 7118359
Only the Westlaw citation is currently available.
United States District Court,
W.D. Washington,
at Seattle.

Bank of New York Mellon, Plaintiff,
v.
Scott Stafne, et al., Defendants.

C16-77 TSZ
|
Signed 12/07/2016

Attorneys and Law Firms

Fred B. Burnside, Zana Bugaighis, Davis Wright Tremaine, Seattle, WA, for Plaintiff.

Scott E. Stafne, Stafne Trumbull LLC, Arlington, WA, Jocelynne Rose Fallgatter, Fallgatter Law Group PLLC, Sultan, WA, for Defendants.

ORDER

Thomas S. Zilly, United States District Judge

*1 THIS MATTER comes before the Court on plaintiff's motions for summary judgment against Scott Stafne, docket no. 63, for summary judgment against Todd Stafne, docket no. 81, for attorneys' fees in connection with its successful motion to compel, docket no. 73, and for relief from deadline, docket no. 110. The Court will address each motion in turn.

Background

The facts of this case are simple and essentially undisputed. On March 9, 2005, Defendant Scott Stafne borrowed $800,000 from Countrywide Home Loan, Inc. ("Countrywide") to refinance his purchase of residential property in Arlington, Washington. Decl. of Fay Janati, Ex. B, docket no. 39-2. In connection with this loan, Scott Stafne executed a promissory note ("Note") and deed of trust. *See id.* at ¶ 1 (Note); *see also* Janati Decl, Ex. C, docket no. 39-3 (Deed of Trust). Under the terms of the Note, Scott Stafne agreed to repay the principal and annual interest over a thirty year period ending on April 1, 2035. Janati Decl., Ex. B at ¶ 2 & 3.

After the loan closed, Countrywide transferred the Note to JP Morgan Chase Bank, N.A. ("JPMorgan") who deposited Scott Stafne's loan in an investment portfolio known as the Structured Asset Mortgage Investments II Trust, Mortgage Pass-Through Certificates Series 2005-AR2 ("SAMI Trust"). Plaintiff Bank of New York Mellon ("BONY") became the holder of the Note, as trustee for the SAMI Trust, when it acquired the trustee operations of JPMorgan in 2006.[1] *See* Decl. of Fred Burnside, Ex. F, docket no. 64-6 at 34-35 (Purchase and Assumption Agreement § 2.1); Janati Decl., Ex. F, docket no. 39-6 (Agreement of Resignation and Assumption). On August 31, 2007, Scott Stafne recorded an executed quitclaim deed granting Todd Stafne a portion of the property encumbered by the deed of trust.[2] *See* Declaration of Jocelynne Fallgatter, Ex. L, docket no. 98-12.

Scott Stafne was current on his loan payments through December of 2008, but stopped payments in January of 2009, and has made no payments since that time. Second Decl. of Fay Janati, docket no. 65 at ¶ 4. On February 17, 2009, Countrywide, as loan servicer, issued a "Notice of Intent to Accelerate," but later opted not to accelerate Scott Stafne's debt and instead adjusted his minimum monthly payment. Second Janati Decl., Ex. F, docket no. 65-6 (Adjustable Rate Mortgage Payment Adjustment Notice). Scott Stafne was sent five additional notices of default during the period between October 2012 and September 2015. Second Janati Decl., Ex. B, docket no. 65-2. Having received no further payments, BONY elected to accelerate the entire debt and bring this suit for judicial foreclosure on January 19, 2016. Complaint, docket no. 1 at ¶ 3.15. In response, both Scott Stafne and Todd Stafne filed answers alleging counterclaims to quiet title. *See* docket nos. 24 (Scott Stafne) and 25 (Todd Stafne).

Discussion

I. BONY's Motions for Summary Judgment

*2 The Court shall grant summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). The moving party bears the initial burden of

demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A fact is material if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To survive a motion for summary judgment, the adverse party must present affirmative evidence, which "is to be believed" and from which all "justifiable inferences" are to be favorably drawn. Id. at 255, 257. When the record, however, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, summary judgment is warranted. See Beard v. Banks, 548 U.S. 521, 529 (2006) ("Rule 56(c) 'mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.' " (quoting Celotex, 477 U.S. at 322)).

A. BONY's Motion for Summary Judgment against Scott Stafne

BONY argues that it is entitled to summary judgment against Scott Stafne because the undisputed facts show that it is the holder of a promissory note secured by a valid deed of trust and that Scott Stafne breached the terms of the note by failing to make the required monthly payments.[3] Judicial foreclosure is appropriate where the lender can show a breach of the terms of the promissory note and deed of trust, notice, and failure to cure. *ING Bank v. Korn*, 2011 WL 5326146, at *3 (W.D. Wash. Nov. 4, 2011) (citing RCW 61.12.040). Here, it is undisputed that Scott Stafne breached the terms of the Note by failing to make the required monthly payments, that BONY provided notice of default and its intent to accelerate, and that Scott Stafne failed to cure prior to acceleration of the debt. The Note defines default as the failure to "pay the full amount of each monthly payment on the date it is due," Janati Decl., Ex B, docket no. 39-2 at ¶ 7, and Scott Stafne has not made any payments since December of 2008, Second Janati Decl., docket no. 39 at ¶ 4. Among other notices, Scott Stafne was issued a Notice of Default and Intent to Accelerate in September of 2015, Second Janati Decl., Ex. B, docket no. 65-2 at 19-21, and BONY accelerated Scott Stafne's debt by filing this suit in January of 2016 seeking payment of the entire debt. *See* Complaint, docket no. 1 at ¶ 3.15. Scott Stafne has not contested that he is in default on the Note or the amount owed thereunder.

Scott Stafne has, however, alleged counterclaims against plaintiff to quiet title to the property based on the theory that the debt is time barred. *See* Answer, docket no. 24 at 7-11. Contrary to the allegations in his complaint, the statute of limitations does not bar foreclosure. For a deed of trust, the six-year statute of limitations only begins to run when the party is entitled to enforce the entire obligation imposed by the note, which, for an installment note, occurs either when the note naturally matures or when the note is accelerated. *See Edmundson v. Bank of America*, 194 Wn. App. 920, 930 (2016); *see also Washington Federal v. Azure Chelan LLC*, 195 Wn. App. 644, 663 (2016) ("For 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....").

***3** Scott Stafne's counterclaim to quiet title alleges that the statute of limitations began to accrue on February 17, 2009, when Countrywide sent its Notice of Intent to Accelerate.[4] To trigger acceleration, however, a creditor must clearly and unequivocally indicate, by some affirmative action, that the option to accelerate has been exercised. *See Glassmaker v. Ricard*, 23 Wn. App. 35, 37 (1979) (quoting *Weinberg v. Naher*, 51 Wash. 591, 594 (1909)). A statement of potential future action does not constitute the affirmative action required to accelerate a debt. *See Weinberg*, 51 Wash. at 594 (holding that letters which stated that "the loan will be called in" unless the debtor procured an insurance policy payable to the creditor were insufficient to trigger acceleration because the letters simply threatened to exercise the option to accelerate). Like the creditor in *Weinberg*, Countrywide'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 Stafne's debt. In fact, Countrywide ultimately decided not to accelerate Scott Stafne's loan in 2009, and instead opted to adjust Scott Stafne's minimum payment. *See* Second Janati Decl., Ex. F, docket no. 65-6. It was not until BONY filed suit in January of 2016 that BONY unequivocally accelerated Scott Stafne's debt. Accordingly, BONY's action for judicial foreclosure is timely and its motion for summary judgment is GRANTED in part. Scott Stafne's counterclaim to quiet title is DISMISSED with prejudice.

In addition to judicial foreclosure, BONY's motion also seeks (1) a deficiency judgment to recover any deficit between the proceeds of the sheriff's sale and the amount due under the Note; and (2) to recover expenses incurred in protecting its interests under the Note and deed of trust, including reasonable attorney's fees and costs. Although BONY may be entitled to both, its requests are premature. The Court cannot determine whether BONY is entitled to a deficiency judgment or the amount of that judgment without knowing the sale price of the property and the

total remaining debt after the sale proceeds are applied. *See* RCW 61.12.070. Similarly, although both the note and the deed of trust provide that BONY is entitled to recover expenses, including attorneys' fees and costs, incurred in protecting its interests, *see* Janati Decl., Ex. B, docket no. 39-2 at ¶ 7(E) (Note); Janati Decl., Ex. C, docket no. 39-3 at ¶ 9 (deed of trust), the total amount of such expenses is uncertain at this time because BONY will likely incur additional expenses in connection with executing the foreclosure sale. Accordingly, BONY's requests for a deficiency judgment and an award of attorneys' fees and costs under the Note and deed of trust are DENIED without prejudice. BONY may renew these requests within fourteen (14) days of the date of the foreclosure sale.

B. BONY's Motion for Summary Judgment Against Todd Stafne

BONY also moves for summary judgment against Todd Stafne seeking dismissal of his counterclaim to quiet title because, among other things, Todd Stafne took title to the property granted to him by the 2007 quitclaim deed subject to the deed of trust. Washington has adopted a "race-notice statute" that gives priority to those interests which are recorded first. *BAC Home Loans Servicing, LP v. Fulbright*, 180 Wn.2d 754, 759 (2014). Interests acquired by quitclaim deed are subject to any encumbrances then existing on the property and all rights which had been previously granted respecting it. *See Corning v. Aldo*, 185 Wash. 570, 577 (1936). Here, the quitclaim deed granting Todd Stafne a portion of the property encumbered by the deed of trust was recorded in 2007, well after the deed of trust was recorded in 2005. Because BONY's deed of trust was recorded prior to the quitclaim deed, Todd Stafne took title subject to BONY's existing lien on the property.

*4 Todd Stafne offers two meritless arguments in opposition to BONY's motion for summary judgment against him. First, Todd Stafne argues that Scott Stafne's transfer of a portion of the property by quitclaim deed in 2007 breached the terms of the deed of trust and thus, BONY's foreclosure action as to property owned by Todd Stafne is barred by the statute of limitations. However, the relevant terms of the deed of trust provide that breach of the covenant restricting transfer of the property simply results in an option to accelerate the debt. *See* Janati Decl., Ex. C, docket no. 39-3 at ¶ 18. Moreover, the six-year statute of limitations on a deed of trust does not begin to run until the installment note naturally matures or the note is accelerated. *See Washington Federal*, 195 Wn. App. at 663. As discussed above, BONY did not unequivocally exercise its option to accelerate the debt until this action was filed in January of 2016. Thus, the statute of limitations on the deed of trust did not begin to accrue until January of 2016. BONY's judicial foreclosure action is therefore timely.

Todd Stafne's final argument is that he adversely possessed the property quitclaimed to him by Scott Stafne. But in Washington, "adverse possession does not extinguish a mortgage that pre-dates the adverse possession." *See* 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASH. PRAC. REAL ESTATE AND PROPERTY LAW 8.6 (2d ed. 2004) (citing *Thornely v. Andrews*, 40 Wash. 580 (1905)). Here, the promissory note and deed of trust were executed and recorded prior to Todd Stafne's occupation of the encumbered property and thus, his possession of that property cannot extinguish BONY's entitlement to foreclose under the deed of trust. Accordingly, BONY's motion for summary judgment against Todd Stafne is GRANTED and Todd Stafne's counterclaims are DISMISSED with prejudice. Finding no just reason for delay, *see* Fed. R. Civ. P. 54(b), the clerk is DIRECTED to enter partial judgment foreclosing the property encumbered by the deed of trust.

In light of the Court's rulings on BONY's motions for summary judgment, the trial date and all remaining deadlines are hereby STRICKEN. BONY's motion for relief from deadline, docket no. 110, is therefore DENIED as moot.

II. BONY's Motion for Attorneys' Fees

BONY moves for attorneys' fees and costs incurred in connection with its successful motion to compel. *See* Plaintiff's Motion for Attorneys' Fees, docket no. 73. As discussed above, BONY also claims it is entitled to expenses incurred in enforcing the debt (which would likely include any fees incurred in connection with discovery motions) under the terms of the promissory note and deed of trust. *See* Plaintiff's Motion for Summary Judgment, docket no. 63 at 29-30. For the sake of efficiency and consistency, the Court declines to award fees piecemeal. Accordingly, Bank of New York Mellon's motion for attorney's fees, docket no. 73, is DENIED without prejudice.

IT IS SO ORDERED.

All Citations

Slip Copy, 2016 WL 7118359

Footnotes

1 The Note was initially acquired by BONY's predecessor, the Bank of New York. In 2008, the Bank of New York was involved in a merger with Mellon Financial, and as a result the Bank of New York changed its name to Bank of New York Mellon. Janati Decl., Ex. E, docket no. 39-5 (corporate name-change documents).

2 Apparently, Scott Stafne and Todd Stafne executed a "virtually identical" quitclaim deed in April of 2010, *see* Pl.'s Mot. for Summ. J. Against Todd Stafne, docket no. 81 at 5, but this second quitclaim deed has not been provided to the Court.

3 Rather than oppose the motion, Scott Stafne invites the entry of "final judgment based on [his] failure to respond to [plaintiff's] motion for summary judgment," docket no. 71 at ¶ 4. Scott Stafne erroneously believes that responding to the merits of plaintiff's motion will waive any challenges to the Court's subject-matter jurisdiction. *Id.* at ¶ 5. However, whether the Court has subject-matter jurisdiction over this case is not an issue Scott Stafne can waive. *See In re Kieslich*, 258 F.3d 968, 970 (9th Cir. 2001). Scott Stafne also argues in a surreply, docket no. 78, that his Notice of Appeal, docket no. 72, divests the Court of the authority to rule on the pending motions. Setting aside Scott Stafne's misunderstanding of the relevant doctrine, the Ninth Circuit has dismissed his interlocutory appeal, docket no. 100.

4 Scott Stafne also alleges that the 2007 "Suspended Payment Agreement" accelerated his loan, but the document does nothing of the sort. Instead, the document provides "[i]f we previously notified you that your loan is (or will be) accelerated and/or due in full, it remains accelerated and/or due in full...." Second Janati Decl., Ex. D, docket no. 65-4 at 4. Scott Stafne has provided no evidence, and indeed there likely is none, that the debt was accelerated prior to the Suspended Payment Agreement.

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Blue Flag – Appeal Notification
Appeal Filed by ROBERT JARVIS, ET AL v. FNMA/FANNIE MAE, 9th Cir., May 18, 2017

2017 WL 1438040
Only the Westlaw citation is currently available.
United States District Court,
W.D. Washington,
at Tacoma.

Robert C. JARVIS, Plaintiff,
v.
FEDERAL NATIONAL MORTGAGE ASSOCIATION, Defendant.

CASE NO. C16-5194-RBL
|
Signed 04/24/2017

Attorneys and Law Firms

F. Hunter MacDonald, Gregory Francis Amann, VSI Law Group PLLC, Tacoma, WA, for Plaintiff.

Joseph W. McIntosh, McCarthy & Holthus LLP, Abraham K. Lorber, Andrew Gordon Yates, Lane Powell PC, Seattle, WA, for Defendant.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S

DKT. ##36, 40

Ronald B. Leighton, United States District Judge

***1** THIS MATTER is before the Court on the parties' cross-motions for summary judgment. [Dkt. ##36, 40]. Plaintiffs Robert and Retha Jarvis seek quiet title to their Yelm property, arguing the Defendant Federal National Mortgage Association (Fannie Mae) failed to enforce its deed of trust on their property within Washington's six-year limitations period. They rely on *Silvers v. U.S. Bank Nat. Ass'n*, No. 15-5480 RJB, 2015 WL 5024173 (W.D. Wash. Aug. 25, 2015), and *Edmundson v. Bank of Am.*, 194 Wn. App. 920, 378 P.3d 272 (2016), for the proposition that their last payment owed—the installment payment immediately prior to their discharge of personal liability—commenced RCW 4.16.040's limitations period. Fannie Mae argues the discharge of the Jarvises' personal liability did not affect its ability to take *in rem* action against their property, which it may continue to do until six years after "the last secured installment comes due in 2036." Dkt. #39 (Fannie Mae's Response) at 9.

In February 2006, the Jarvises obtained a loan for $164,000, documented by a promissory note. The note was payable in monthly installments and set to mature in 2036. As security for their loan, the Jarvises conveyed a deed of trust encumbering their Yelm property to Mortgage Electronic Registration Systems, Inc. Fannie Mae now holds that deed of trust.

The Jarvises stopped making loan repayments, and in November 2008, filed for Chapter 7 bankruptcy. *See* No. 08-45840-PHB. The Bankruptcy Court discharged their personal liability on the note on February 23, 2009. Since, the Jarvises have not reaffirmed their debt or made additional payments on it. Fannie Mae did not accelerate the note's maturation date.

On February 11, 2016, the Jarvises sued for quiet title in Thurston County Superior Court. Fannie Mae removed the suit here. The Jarvises argue the discharge of their personal liability designated their last missed payment as the accrual date of the Bank's six-year period to bring a foreclosure action. They argue because no more installments could become due on their loan, no future event could extend Fannie Mae's time to enforce the deed of trust. Fannie Mae argues installments will continue to accrue *in rem* against the Jarvises' property until 2036, and unless it accelerates those payments, it has until six years after the last 2036 installment to foreclose. It argues adopting the Jarvises' position would eliminate "ride-through agreements"—a post-bankruptcy option allowing a borrower to continue making payments to keep his home—by forcing secured creditors to accelerate payments or foreclose within six years of a borrower's discharge of personal liability.

I. **DISCUSSION**

A. Standard of Review.

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact which would preclude summary judgment as a matter of law. Once the moving

party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to present, by affidavits, depositions, answers to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). Factual disputes whose resolution would not affect the outcome are irrelevant to the consideration of a motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In other words, "summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable [fact finder] could return a [decision] in its favor." *Triton Energy*, 68 F.3d at 1220.

***2** As a federal court sitting in diversity, the Court is bound to apply state law. *See State Farm Fire and Casualty Co. v. Smith*, 907 F.2d 900, 901 (9th Cir. 1990). The Court must apply Washington law as it believes the Washington Supreme Court would apply it. *See Gravquick A/S v. Trimble Navigation Intern. Ltd.*, 323 F.3d 1219, 1222 (9th Cir. 2003). "[W]here there is no convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state's intermediate appellate courts." *Vestar Dev. 11, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001) (quoting *Lewis v. Tel. Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir. 1996)).

B. The Accrual Date for the Limitations Period on a Deed of Trust.

The facts are not in dispute. At issue is whether the Jarvises' last missed payment, before the discharge of their personal liability, triggered Washington's six-year limitations period for enforcing a deed of trust, or whether Fannie Mae has until 2042 to foreclose on their property.

The discharge of a borrower's personal liability on a note does not also discharge a deed of trust given as security. *See Johnson v. Home State Bank*, 501 U.S. 78, 82–83, 111 S. Ct. 2150, 115 L.Ed. 66 (1991); *see also Edmundson*, 194 Wn. App. at 922. As a lien and a separate installment contract, the deed of trust remains enforceable *in rem*. *See id.* at 922, 926. The discharge does, however, alert the lender that the limitations period to foreclose on a property held as security has commenced.

The deed of trust encumbering the Jarvises' property is a written installment contract. *See* Dkt. #37 (Jarvis Dec.) at Ex. 2. Written contracts are subject to a six-year limitations period in Washington. *See* RCW 4.16.040 (2012) (governing deeds of trust). For installment contracts, each installment triggers the limitations period for that missed payment: "[W]hen recovery is sought on an obligation payable by installments[,] the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it." *Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142, 144–45 (1945); *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.").

The last payment owed commences the final six-year period to enforce a deed of trust securing a loan. This situation occurs when the final payment becomes due, such as when the note matures or a lender unequivocally accelerates the note's maturation. *See 4518 S. 256th, LLC v. Karen L. Gibbon, P.S.*, 195 Wn. App. 423, 434–35, 382 P.3d 1 (2016), *review denied sub nom. 4518 S. 256th, LLC v. Gibbon*, 187 Wn.2d 1003, 386 P.3d 1084 (2017); *see also Westar Funding, Inc. v. Sorrels*, 157 Wn. App. 777, 784, 239 P.3d 1109 (Wash. App. Div. 2, 2010). It also occurs at the payment owed immediately prior to the discharge of a borrower's personal liability in bankruptcy, because after discharge, a borrower no longer has forthcoming installments that he must pay. *See Edmundson*, 194 Wn. App. at 931; *see also Silvers v. U.S. Bank Nat. Ass'n*, 2015 WL 5024173, at *4.

Fannie Mae asserts the courts deciding *Silvers* and *Edmundson* wrongly announce, in dicta, that the last installment payment a borrower owes before discharge triggers the final limitations period on a deed of trust. It argues both courts conflate a discharge of personal liability on a note with discharge of obligations separately secured by a deed of trust. It argues a deed of trust is a separate contract, and tying the discharge of a borrower's personal liability to a lender's right to enforce a deed of trust would automatically accelerate future installments secured by the deed of trust without the lender's consent and to the borrower's detriment.

***3** The Court disagrees with Fannie Mae's rendering of *Silvers* and *Edmundson* and with its forecast of their effects on mortgage lending and bankruptcy. "The sole question in" *Silvers* was "when the [Washington] six year statute of limitation began to run on enforcing a deed of trust." 2015 WL 5024173, at *1. The Silvers borrowed money to purchase a home. Their note was secured against the property by a deed of trust, payable in installments. *See id.* They eventually stopped making loan

repayments and received a Chapter 11 bankruptcy discharge, relieving them of their personal liability on the note. *See id.* at *1–2. Because no future payments were owed, no installments capable of triggering the limitations period remained. *See id.* at *4 (applying *Herzog*, 23 Wn.2d at 388). The court reasoned Washington's six-year limitations period on installment contracts therefore accrued at the Silvers' last missed payment, at the payment just preceding their discharge of personal liability. *See id.* at *4 ("The statute of limitation on the right to enforce the Deed of Trust began running the last time any payment on the Note was due."). The court applied settled Washington law in determining when the limitation period on a deed of trust commences. This determination was not dicta but rather the case's holding that squarely addressed the sole issue facing the court.

Edmundson is nearly identical in fact and decision. The Washington Court of Appeals considered when the six-year limitations period on a deed of trust, payable in installments, begins. *See* 194 Wn. App. 920. The Edmundsons obtained a loan to purchase a home. *See id.* at 923. A deed of trust secured their promissory note. *See id.* They stopped repaying their loan and filed for bankruptcy. The bankruptcy court discharged their personal liability. Applying *Herzog* too, the court reasoned "the statute of limitations accrued for each installment from the time it became due." *Id.* at 930 (citing 23 Wn.2d 382). Because the Edmundsons owed no future payments after the discharge of their liability, the date of their last-owed payment kickstarted the deed of trust's final limitations period. *See id.* at 931. The holder of the deed of trust had six years from that date to foreclose on the Edmundsons' home. *See id.* The court's conclusion was not dicta here either; it was necessary to deciding whether the creditor could foreclose on the Edmundsons' home, or whether they could sustain an action for quiet title.

Silvers and *Edmundson* do not misunderstand the bankruptcy process or present public policy concerns, as Fannie Mae contends. They do not conflate a discharge of personal liability on a note with a discharge of a lender's right to enforce a deed of trust *in rem*. If they did, they would declare a secured creditor's lien no longer enforceable as of the discharge date. Instead, both announce that a secured creditor has six years from the last-missed payment preceding discharge to purse an *in rem* action. They also do not demand that acceleration automatically accompany discharge because acceleration occurs at the creditor's option when certain conditions are met. A bankruptcy court could not concurrently prohibit a creditor from collecting on a borrower's discharged debt and demand the creditor to require him to pay in full immediately. Discharge does not eliminate a borrower's potential to retain his collateral either, as a borrower and a lender may agree to reaffirm or renegotiate the borrower's dischargeable debt.

The Court agrees with *Silvers'* and *Edmundson's* holdings. The discharge of a borrower's personal liability on his loan—the cessation of his installment obligations—is the analog to a note's maturation. In both cases, no more payments could become due that could trigger RCW 4.16.040's limitations period. The last-owed payment before the discharge of a borrower's personal liability on a loan is the date from which a secured creditor has six years to enforce a deed of trust securing the loan.

The Jarvises stopped repaying their loan, Fannie Mae did not accelerate their obligation, and the Bankruptcy Court discharged their debts on February 23, 2009. They did not reaffirm. Their last installment payment owed, therefore, was the one immediately prior to their discharge. Over six years passed between that date and the date they filed for quiet title, February 11, 2016. RCW 4.16.040 forecloses Fannie Mae's right to enforce the deed of trust against them.

***4** As the record owners, the Jarvises properly filed for quiet title after the limitations period on their deed of trust terminated: A "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." RCW 7.28.300 (1998). So, the Court GRANTS the Jarvises' claim for quiet title on their Yelm property as against Fannie Mae.

II. **CONCLUSION**

The Jarvises' Motion for Summary Judgment [Dkt. #36] is GRANTED. Fannie Mae's Cross-Motion for Summary Judgment [Dkt. #40] is DENIED. The case is dismissed.

IT IS SO ORDERED.

All Citations

Slip Copy, 2017 WL 1438040

End of Document © 2017 Thomson Reuters. No claim to original U.S. Government Works.

FARLEIGH WADA WITT

August 07, 2017 - 4:52 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50007-8
Appellate Court Case Title:	Geoffrey Parker, et al Respondents v Parkview Trails, LLC, Appellant
Superior Court Case Number:	16-2-05124-7

The following documents have been uploaded:

- 4-500078_Briefs_Plus_20170807164239D2256644_4636.pdf
  This File Contains:
  Affidavit/Declaration - Service
  Briefs - Appellants - Modifier: Amended
  The Original File Name was Brief.pdf

A copy of the uploaded files will be sent to:

- aschlotfeldt@schlotfeldtlaw.com
- jayres@fwwlaw.com
- joe.vance@millernash.com
- leanne.bremer@millernash.com

Comments:

Sender Name: Kylee Muir - Email: kmuir@fwwlaw.com
Filing on Behalf of: Tara J Schleicher - Email: tschleicher@fwwlaw.com (Alternate Email: kmuir@fwwlaw.com)

Address:
121 SW Morrison Street
Suite 600
Portland, OR, 97204
Phone: (503) 228-6044

Note: The Filing Id is 20170807164239D2256644