FILED
9/6/2017 11:52 AM
Court of Appeals
Division II
State of Washington

NO. 50007-8-II

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

CLARK COUNTY SUPERIOR COURT NO. 16-2-05124-7

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

Respondent,

v.

PARKVIEW TRAILS, LLC, a dissolved limited liability company,

Appellant,

v.

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 THIRD PARTY RESPONDENT EDWARD B. GREER

Albert F. Schlotfeldt, WSBA# 19153
The Schlotfeldt Law Firm, PLLC
900 Washington Street, Suite 1020
Vancouver, WA 98666-0570
Telephone: (360) 699-1201

TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF THE ISSUES 2

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 9

A. Introduction 9

B. The statute of limitations for a breach of contract action for obligations secured by the Parkview Trails/Greer Deed of Trust started to accrue in September 2005 10

C. There was clear and unequivocal affirmative action by Parkview Trials to commence running of the statute of limitations in September 2005 14

D. Parkview Trails Motion for Reconsideration fails to meet the "newly discovered evidence" standard under CR 59 18

E. Additional discovery sought by Parkview Trails would fail to raise a genuine issue of material fact to support affirmative defenses 21

F. Greer was properly dismissed from the lawsuit 23

V. CONCLUSION 24

TABLE OF AUTHORITIES

CASES

1000 Virginia Ltd. P'ship v. Vertees Corp., 158 Wn.2d 566, 603, 146 P.3d 423, 442 (2006).....15

4518 S. 256th, LLC v. Karen L. Gibbons, P.S., 195 Wn. App. 423, 448, 382 P.3d 1, 13 (2016).....10

Algona v. Pac., 35 Wn. App. 517, 523, 667 P.2d 1124, 1127 (1983).....10

Bank of New York Mellon v. Stafne, 2016 WL 7118359.....15

Herzog v. Herzog, 23 Wn.2d 382, 388, 161 P.2d 142, 145 (1945).....19

Manteufel v. SAFECO Ins. Co. of Am., 117 Wn. App. 168, 178, 68 P.3d 1093, 1099 (2003).....21

Retired Pub. Employees Council of Washington v. State Dep't of Ret. Sys., 117 Wn. App. 1036 (2003).....14

Taylor v. Puget Sound Power & Light Co., 64 Wn.2d 534, 538, 392 P.2d 802,804 (1964).....14

Titla v. SFC Homes LLC, 193 Wn. App. 1038 (2016).....18

*Wagner Dev. v. Fid. & Deposit Co. of M*aryland, 95 Wn. App. 896, 910, 977 P.2d 639, 647 (1999).....18

Weinberg v. Naher, 51 Wash. 591, 599, 99 P. 736, 739 (1909).....15

STATUTES

RCW 4.16.005 10

RCW 4.16.040(1) 1,14

RCW 7.28.300 1

RULES

CR 56(f) 21

CR 59 18

CR 59(a)(4) 18

WEBSITES

www.gis.clark.wa.gov 19

I. Introduction.

The issues raised in this appeal center on the release of a Deed of Trust as a result of the expiration of the statute of limitations for obligations secured by that Deed of Trust. RCW 4.16.040(1) provides for the statute of limitations on contracts. RCW 7.28.300 provides relief for a quiet title action.

The current owner of the property properly set a summary judgment hearing. Appellant Parkview Trails, LLC sought a continuance of the summary judgment hearing in an effort to obtain additional time for discovery. The Trial Court did not abuse its discretion by not allowing a continuation of the summary judgment hearing and by denying the Appellant Parkview Trails LLC's motion to compel production.

The Trial Court held that the statute of limitations started to accrue no later than 2005, thereby extinguishing the obligations under the Deed of Trust. The Trial Court also dismissed Appellant Parkview Trails, LLC's counterclaims and third party claims to foreclose the Deed of Trust and for judicial foreclosure. This court should affirm. Third Party Respondent Edward B. Greer (hereinafter "Greer") submits the following Response to the Brief of Appellant.

//

//

II. Restatement of the Issues

A. Did the Superior Court err in finding that the statute of limitations for the obligations secured by the Deed of Trust started to accrue no later than 2005, when there was clear and unequivocal action by Parkview Trails in demanding payment from Greer?

B. Did the Superior Court err in denying Parkview Trails Motion for Reconsideration when (1) the "newly discovered evidence" was available before and during the ongoing litigation; (2) the Deed of Trust was not an installment note; and (3) the property taxes were brought current when the Property was sold?

C. Did the Superior Court abuse its discretion in denying Parkview Trails Motion for a continuance in order to complete discovery on both Parker and Greer when (1) Parkview Trails never served discovery requests on Greer; and (2) the statute of limitations for the obligations secured by the Deed of Trust started to accrue no later than 2005 when Parkview Trails made a demand on Greer?

D. Did the Superior Court abuse its discretion in dismissing Greer from the lawsuit when the Superior Court granted Parker's Summary Judgment finding that the statute of limitations expired no later than 2011, thereby properly dismissing Greer?

III. Statement of the Case

A. The Agreement, Addendums and Deed of Trust

On or about June 16, 2001, Columbia Rim Construction, Inc. (hereinafter "Columbia Rim"), as predecessor in interest to Parkview Trails, LLC (hereinafter "Parkview Trails"), entered into an Agreement for a land development transaction with Greer (the "Agreement"). CP 54,

¶2. As part of that transaction, Greer sold land (the land that is subject to the Greer/Parkview Trails transaction is hereinafter referred to as the "Transaction Property") to Parkview Trails. CP 54-55, ¶2. The land that was the subject of the sale, and that includes the Transaction Property is commonly known as tax parcel number 228513-000 (hereinafter the "Property"). *Id.* On July 4, 2001, Parkview Trails and Greer executed Addendum A to the Agreement. CP 2, ¶3.3.

Greer purchased the Transaction Property with the intent to sell to a real estate developer. CP 55, ¶3. As such, Greer obtained preliminary subdivision approval and then sold the Transaction Property to two builders, who would then build the actual subdivision. *Id.* One of the builders who purchased the Transaction Property was Parkview Trails. *Id.*

On August 30, 2011, Parkview Trails and Greer executed Addendum B to the Agreement. CP 55, ¶5. Under Addendum B, Greer was responsible, at his sole cost and expense, for obtaining "written consent(s) for construction of the improvements for Parkview Trails . . . as presently approved by the City of Battle Ground." CP 55, ¶5. Also, per Addendum B, Greer would obtain the consents on or before May 1, 2002. CP 55, ¶6.

Furthermore, under Addendum B, Parkview Trails was required to provide Greer with "an <u>accounting</u> of its fees and costs" for any amounts

that they claimed were owed by Greer, beyond any held back sum, with regards to obtaining consents. CP 58-59. Nowhere in Addendum B, is there language specifying a final accounting. CP 443, ll. 6-7. In approximately May 2002, an Amendment to Addendum B was executed that extended the deadline to obtain consents from May 1, 2002 to July 1, 2002. CP 55, ¶6. On September 13, 2001, Parkview Trails and Greer executed Addendum C to the Agreement. CP 2, ¶3.3.

On September 13, 2001, Greer acting through the 1991 Lee Edna Germain Trust, executed a Deed of Trust on the Property, in favor of Parkview Trails in order to secure the obligations under the June 16, 2001 Agreement, and amendments thereto. CP 2, ¶3.1, 3.2. The Deed of Trust was recorded September 19, 2001. CP 2, ¶3.2.

B. Obligations under the Agreement, Addendums, and Deed of Trust.

At the time of the land sale transaction, both Greer and Parkview Trails knew that there were wetlands on the Transaction Property. CP 55, ¶4. Due to Parkview Trails concern over obtaining wetland permits, a deal was negotiated with Greer, whereby Greer would obtain required wetland permits. *Id.* As such, Greer obtained initial approval from the United States Army Corp. of Engineers ("USACE") to fill up to 1.58 acres of wetlands, and such approval by USACE was later amended to authorize a

fill up to .88 acres of wetlands. *Id.* Greer also obtained verbal approval of "no-effect" from National Marine Fisheries Services and US Fish and Wildlife. CP 62. Finally, it was determined that a 401 certification was not necessary for the Department of Ecology. *Id.*

On April 8, 2002, having believed that he met his obligations under Addendum B of the Agreement, Greer sent a memorandum to Mike DeFrees (hereinafter "DeFrees"), the principal of Parkview Trails, requesting a release of the Deed of Trust. CP 62.

After approximately three years of silence by Parkview Trails, on August 25, 2005, counsel for Greer sent Columbia Rim a letter requesting disbursement of the balance of funds owed to Greer, less the environmental costs, as well as documentation for the environmental costs. CP 139.

On September 30, 2005, DeFrees, as principal of Parkview Trails, sent a letter to counsel for Greer explicitly alleging that Parkview Trail's total costs were in excess of $1 million dollars and to "provide reimbursement as soon as possible and [he] will make arrangements to release the subject deed of Trust." CP 66-67.

Greer and Parkview Trails never reached an agreement on the parameters of Greer's obligation under Addendum B. CP 56, ¶8. As

such, Parkview Trails recorded final plats for several houses and started building houses in the subdivision. CP 56, ¶9. During construction in the subdivision, Parkview Trails filled more wetlands than allowed under the permit obtained by Greer. CP 56, ¶10. As a result, USACE and the City of Battle Ground contacted Parkview Trails about the violation. CP 56, ¶11. Parkview Trails never rectified the violation and USACE and the City of Battle Ground eventually stopped pursuing Parkview Trails on the violation. *Id.* Without obtaining any additional permits, consents, or remedying any violations, Parkview Trails was able to complete the subdivision. CP 56, ¶12.

C. Sale of the Transaction Property to Parker.

On January 14, 2014, Greer sold the Property to Geoffrey A. Parker (hereinafter "Parker"). CP 2, ¶3.6. At the time of the sale, the title company removed the Parkview Trails/Greer Deed of Trust on Parker's title policy and insured over it. *Id.* In 2015, Parker attempted to sell the Property, but the Parkview Trails/Greer Deed of Trust resurfaced and as such, the title company would not insure over it, as it had previously done. CP 2, ¶3.7

//

//

D. Procedural History.

On March 9, 2016, Parker filed a Complaint against Parkview Trails for slander of title, quiet title, and tortious interference with business relations. CP 1-6.

On May 27, 2016, Parkview Trails filed an answer asserting affirmative defenses, a counterclaim for judicial foreclosure, and a third party claim for breach of contract against Greer. CP 7-53.

On September 13, 2016, Parker filed a motion for summary judgment to quiet title to the Property, asserting that the statute of limitations had expired to foreclose under the Parkview Trails/Greer Deed of Trust. CP 440-449.

On October 5, 2016, Parkview Trails filed a response to Parker's summary judgment motion arguing for a continuance in order to complete discovery on both Parker and Greer. CP 81-94.

On October 11, 2016, Phuong Minh Parker filed an answer to Parkview Trail's third party claims. CP 159-162. On October 12, 2016, Greer filed an answer asserting affirmative defenses and counterclaims to Parkview Trail's third party claims. CP 163-166.

On October 14, 2016, at the Parker summary judgment hearing, after hearing oral arguments from counsel for Parkview Trails, Parker, and

Greer, the Trial Court Judge stated that he would render a ruling on November 2, 2016. CP 450. On October 19, 2016, Parkview Trails filed a motion to compel production of documents and responses to interrogatories from Parker. CP 167-188.

On November 2, 2016, the Trial Court orally granted Parker's motion for summary judgment to quiet title to the Property, and dismissed Parkview Trail's counterclaims to foreclose the Deed of Trust and for judicial foreclosure of the Property. CP 451-452. The Trial Court denied Parkview's motion to compel. *Id.* On November 23, 2016, Parker filed a petition for attorneys' fees and costs. CP 234-240.

On November 28, 2016, Greer filed a motion for order of dismissal, award of attorneys' fees and costs, and entry of judgment against Parkview Trails. CP 209-214.

On December 1, 2016, Parkview Trails filed an objection to Greer's motion for order of dismissal. CP 263-267. On December 13, 2016, Parkview Trail's filed a motion for reconsideration of ruling on Parker's motion for summary judgment. CP 364-369.

On December 16, 2016, the Trial Court entered the written order granting Parker's summary judgment, thereby quieting title to the Property, and granted Greer's order of dismissal. CP 453.

On December 19, 2016, Parkview Trails filed a Notice of Appeal. CP 392-417.

IV. Argument

A. Introduction.

The Trial Court granted Parker's Motion for Summary Judgment. First, the Trial Court found that the statute of limitations on the breach of contract cause of action had expired. Second, the Trial Court found that the statute of limitations for the breach of contract cause of action started to accrue in September 2005. Third, since the statute of limitations for the breach of contract cause of action had expired, the Trial Court quieted title in favor of Parker. Fourth, since the statute of limitations for the breach of contract cause of action had expired, the Trial Court dismissed Parkview Trails counterclaims and third party claims to foreclose the Deed of Trust and for judicial foreclosure.

This Court should deny Parkview Trail's Appeal because (1) the Trial Court did not err in finding that the statute of limitations on the breach of contract cause of action had expired; (2) the Trial Court did not err in finding that the statute of limitations on the breach of contract cause of action started to accrue in September 2005; (3) the Trial Court did not err in denying Parkview Trails Motion for Reconsideration; (4) the Trial

Court did not err in denying Parkview Trails Motion for discovery under CR 56(f); and (5) the Trial Court did not err in dismissing Parkview Trails action against Greer.

B. The statute of limitations for a breach of contract cause of action for obligations secured by the Parkview Trails/Greer Deed of Trust started to accrue in September 2005.

Under RCW 4.16.005, the statute of limitations begins to run after a cause of action has accrued. In a contract cause of action, the statute of limitations starts to run at the time of breach. *Algona v. Pac.*, 35 Wn. App. 521 (1983). Washington case law has made it clear that, "a cause of action accrues when the party has the right to apply to a court for relief." *1000 Virginia Ltd. P'ship v. Vertees Corp.,* 158 Wn.2d 566, 575 (2006), as corrected (Nov 15, 2006) (internal citations omitted).

Per Addendum B of the Agreement, Greer was responsible for obtaining "written consent(s) for construction of the improvements for the Parkview Trails Planned Unit Development . . . as presently approved by the City of Battleground (the 'Consent(s)')." CP 55, ¶5. The deadline to obtain such Consent(s) was May 1, 2002, and by an Addendum, extended to July 1, 2002. CP 55, ¶6. Greer never reached an agreement with Parkview Trails on the parameters of his obligations under Addendum B.

CP 56, 8. As such, Greer believed he met his obligations as set out in Addendum B of the Agreement. CP 55-56, ¶7.

Parkview Trails asserts that based on the Agreement, default actually occurs when Greer fails to pay costs and fees incurred as provided by a final accounting. CP 87, ll. 12-15. However, there is no such requirement in the Agreement that references a final accounting. CP 443, ll. 5-7. In fact, the two default clauses in the Agreement are essentially the same, and read as follows:

> 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.

> If Columbia Rim's costs and fees exceed the $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. CP 58-59, 443, ll. 8-17.

Neither default clause imposes a final accounting requirement before Greer is obligated to pay. CP 443, ll. 19-20. Both default clauses clearly state that "an accounting of its fees and costs" will be provided to Greer. CP 443, ll. 21-22. Parkview Trails even concedes to the fact that the language used in Section 1B of the Agreement only provides for "an accounting of the fees and costs." CP 86, ll. 12-13. Furthermore, in the Agreement, there is no procedure designated for issuing such an accounting. CP 443, ll. 20-21.

Having believed he had met his obligations under Addendum B of the Agreement, on August 25, 2005, counsel for Greer sent a letter to Columbia Rim requesting the balance of funds owed to Greer, less

environmental costs, as well as documentation of the environmental costs to determine accuracy. CP 139.

However, DeFreees, as principal for Parkview Trails, having believed that Greer had not met his obligations under Addendum B of the Agreement, sent a letter to counsel for Greer on September 30, 2005. CP 66-67. The September 30, 2005 letter demanded reimbursement for costs and expenses incurred and also stated that "[DeFrees] will make arrangements to release the subject Deed of Trust." Parkview Trails also notes that DeFrees offered to release the Trust Deed if the total amount owing was paid. *Id.*

Parkview Trails alleges that the September 30, 2005 letter from DeFrees was merely a letter in response to a letter received from counsel for Greer. CP 83, ll. 21-23. In the August 25, 2005 letter from counsel for Greer to DeFrees, a request was made for the balance of funds owed to Greer, along with documentation of any environmental costs that were offset. CP 139. In the September 30, 2005 letter from DeFrees, as principal of Parkview Trails, to counsel for Greer, DeFrees detailed the costs allegedly incurred to date, concluding with the total amount of costs to release the Deed of Trust, and failed to provide any documentation as requested. CP 66-67. Even if the September 30, 2005 letter from DeFrees

was a response to a letter received from counsel for Greer, the letter was a demand for payment under the Deed of Trust.

The September 30, 2005 letter from DeFrees expressly demanded payment, with the alleged breach occurring in 2005, at which time Parkview Trails failed to act, eventually acting after more than 10 years had passed. CP 447, ll. 19-21. Therefore the Trial Court was correct in finding that the statute of limitations had started to accrue no later than September 2005.

C. <u>There was clear and unequivocal affirmative action by Parkview Trails to commence running of the statute of limitations in September 2005</u>.

Under RCW 4.16.040(1), an action on a contract must be commenced within six years of when it began to accrue. The statute of limitations for breach "starts to run when the breach occurs and 'is not postponed by the fact that the actual or substantial damages did not occur until a later date.'" *Retired Pub. Employees Council of Washington v. State Dep't of Ret. Sys.*, 117 Wn. App. 1036 (2003) (*quoting Taylor v. Puget Sound Power & Light Co.*, 64 Wn.2d. 534, 538 (1964)).

When a creditor accelerates the obligations secured under a Deed of Trust, there must be some affirmative action on their part to show an

intent to declare the total amount due and owing. *Weinberg v. Naher*, 51 Wash. 594 (1909). Such acceleration by a creditor must be given in a clear and unequivocal manner. *4518 S. 256th, LLC v. Karen L. Gibbons, P.S.*, 195 Wn. App. 428-29 (2016).

First, Parkview Trails cites *Bank of New York Mellon v. Stafne*, 2016 WL 7118359 (Appendix, pp. 14-17), in support of their argument that the September 30, 2005 letter was not an acceleration of an alleged default by Greer. However, such reliance is misplaced. In the *Bank of New York Mellon* case, the court found that Countrywide's letter to the homeowner stating that "it would accelerate the loan if the default was not cured [was] a statement of potential future action." *Id.* at 3.

Unlike the *Bank of New York Mellon* case, here, the September 30, 2005 letter from DeFrees, as principal of Parkview Trails, to counsel for Greer was a clear demand for reimbursement of the costs and expenses incurred as a result of Greer's alleged breach of the obligations under the Agreement. The letter from DeFrees clearly states "In summary the total costs incurred to date is in the amount of $1,047,744.70 Please provide reimbursement as soon as possible and I will make arrangements to release the subject deed of Trust." CP 66-67. Nowhere in the September 30, 2005 letter, was there a statement of future acceleration by Parkview

Trails. The language used by DeFrees in the September 30, 2005 letter was an unequivocal demand for reimbursement of total costs, which upon satisfaction of, the Deed of Trust would be released.

Second, Parkview Trails cites the *Weinberg v. Naher*, 51 Wash. 594 (1909) case in further support of their argument that the September 30, 2005 letter was not an acceleration of an alleged default by Greer. However, such reliance is misplaced. In *Weinberg*, the court found that letters sent by the mortgagee stating that "the loan will be called in" if the mortgagor fails to procure an insurance policy on property, only "threaten an exercise of the option." *Id.* at 597.

Unlike the *Weinberg* case, here, the September 30, 2005 letter from DeFrees to counsel for Greer was not a future threat to accelerate the alleged default of the obligations under the Deed of Trust. The letter clearly demands reimbursement of the total amount of costs owed, payable "as soon as possible" and provides for release of the Deed of Trust upon payment in full. CP 66-67.

Third, Parkview Trails claims that the September 30, 2005 letter from DeFrees was not a <u>final accounting</u> of the costs and fees, as required under the Agreement. CP 87, ll. 21-23. However, there is no such requirement for a <u>final accounting</u> anywhere in the Agreement or

amendments thereto. CP 443, ll. 6-7. The only requirement related to any type of accounting in the Agreement or amendments thereto was for "an accounting" to Greer. CP 443, ll. 18-19.

Lastly, Parkview Trails asserts that the September 30, 2005 letter from DeFrees was sent in response to the August 25, 2005 letter from counsel for Greer. CP 83, ll. 21-23. Parkview Trails claims that DeFrees was merely providing responses to questions posited by counsel for Greer. *Id.* If that were correct, then DeFrees would have provided documentation for the environmental costs as requested by counsel for Greer in the August 25, 2005 letter.

Instead, the September 30, 2005 letter from DeFrees was an affirmative act by Parkview Trails to accelerate any amount allegedly due from Greer. By utilizing concise language in the September 30, 2005 letter, demanding reimbursement of the total costs payable "as soon as possible," DeFrees was clearly and unequivocally accelerating any alleged amounts owing for obligations under the Deed of Trust. Therefore, the Trial Court did not err in finding that the statute of limitations started to accrue in September 2005 for any obligations allegedly due under the Deed of Trust.

//

D. Parkview Trails Motion for Reconsideration fails to meet the "newly discovered evidence" standard under CR 59.

CR 59 sets forth grounds for which an order can be vacated and/or reconsideration granted. CR 59(a)(4) allows for an order to be vacated and/or a reconsideration granted upon "newly discovered evidence . . . which the party could not with reasonable diligence have discovered and produced at the trial." Furthermore, Washington Courts recognize that at a summary judgment hearing, "if the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence." *Titla v. SFC Homes LLC*, 193 Wn. App. 1038 (2016) *citing Wagner Dev. v. Fid. & Deposit Co. of Maryland*, 95 Wn. App. 896, 907, 907 P.2d 639 (1999).

Parkview Trails contends that after entry of Parker's Summary Judgment, it received documents from First American Title Company (hereinafter "FATCO") in response to a subpoena, that showed Greer breached obligations under the Deed of Trust for failure to pay property taxes from 2010 to 2013. CP 365, ll. 13-16.

For evidence to be "newly discovered evidence," under CR 59, it needs to be evidence that the party could not have discovered with reasonable diligence. Property taxes are available to anyone online at the

Clark County Property Information Center at www.gis.clark.wa.gov. CP 423, ll. 11-12 465, ll. 5-6. The Clark County Property Information Center lists historical status of the property taxes. CP 465, ll. 6-7. Parkview Trails had access to the property tax information for this property throughout the years, and could have easily accessed such information at any time. *Id.*, ll. 7-8.

Even assuming that the property taxes were delinquent for the period alleged by Parkview Trails, those taxes were brought current when Greer sold the property to Parker and continue to remain current. *Id.*, ll. 10-12. As such, there is no uncured default under the Deed of Trust. *Id.*, ll. 12-13.

Furthermore, Parkview Trails failed to issue the subpoena to FATCO until October 18, 2016, which was more than one month after Parker had filed his Motion for Summary Judgment.

Parkview Trails also claims that the Deed of Trust is an installment note, relying on *Herzog v. Herzog*, 23 Wash. 2d. 382, 388, 161 P.2d 142, 144-45 (1945). However, such reliance is misplaced. In the *Herzog* case, the dispute was centered on the statute of limitations when paying child support installment payments per an agreement. *Id.*

Unlike the *Herzog* case, the Deed of Trust was not an installment note, and the installment payments that Parkview Trails alleges are owed for property taxes. CP 423, ll. 20-22. First, the property taxes were not due to Parkview Trails, but to the local government. *Id.* Under Paragraph 4.2 of the Deed of Trust, if Greer failed to pay taxes, then Parkview Trails would be allowed to pay the taxes owed and after doing so, make a demand on Greer for repayment. CP 424, ll. 10-12. Parkview Trails never made a payment to the local government for the property taxes due by Greer, and failed to make a demand on Greer for repayment. *Id.*, ll. 13-15.

Second, under the terms of the Deed of Trust, Greer had the opportunity to cure any default. *Id.*, ll. 23-24. Paragraph 4.3 of the Deed of Trust provides that Parkview Trails could foreclose their interest only "after twenty (20) days written notice and opportunity to pursue a cure of a nonpayment default." CP 425, ll. 14-15. Parkview Trails never gave Greer the required written notice and opportunity to cure the default. *Id.*, ll. 21-23. In any event, the property taxes were paid at the time of the Greer/Parker sale of the Property, curing any alleged default under the Deed of Trust long before Parkview Trails attempted to foreclose any interest. *Id.*, ll. 23-25.

E. Additional Discovery sought by Parkview Trails would fail to raise a genuine issue of material fact to support affirmative defenses.

A trial court's denial of a CR 56(f) motion for continuance is reviewed under a manifest abuse of discretion standard. *Manteufel v. SAFECO Ins. Co. of Am.*, 117 Wn. App. 175 (2003). "Such discretion is not abused if (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.*

First, Parkview Trails asserts that the additional discovery sought from Greer would raise material issues of fact in support of affirmative defenses. CP 170, ll. 3-4. Parkview Trails has claimed that discovery requests would have been served on Greer either as a party, or by subpoena, when he either filed an answer or if default judgment is entered. CP 90, ll. 24-26. On October 13, 2016, Greer filed an Answer, Affirmative Defenses and Counterclaims with the court. CP 163-166. On December 16, 2016, the Court granted an Order dismissing Greer. CP 453. At no time since Greer filed an answer to the date he was dismissed

from the lawsuit, has Parkview Trails attempted to serve discovery or served discovery on him.

Second, Parkview Trails believes that additional discovery from Greer will show that he was aware that the statute of limitations had not started to accrue. CP 92, ll. 11-13. Yet, the September 30, 2005 letter from DeFrees to counsel for Greer was a clear demand, accelerating any alleged obligations under the Deed of Trust. CP 447, ll. 17-18. Washington law has made it clear that the statute of limitations starts to run when there is a breach of a contract. CP 77, ll. 9-10. As such, no further evidence could be gained by Parkview Trails in seeking additional discovery from Greer that has not already been established.

Third, Parkview Trails claims that the documents produced by FATCO to support its affirmative defenses were not available before oral argument at the Summary Judgment hearing. CP 365, ll. 16-17. On or about October 18, 2016, Parkview Trails issued a subpoena to FATCO (which was after Parker filed his Motion for Summary Judgment). *Id.*, ll. 4-6. On Monday, October 31, 2016, which was before the Parker Summary Judgment hearing, Parkview received the requested documents from FATCO. *Id.*, ll. 8-9. On November 2, 2017, at the Parker Summary Judgment hearing, counsel for Parkview Trails argued for additional

discovery and for an equitable estoppel defense. CP 451-452. Accordingly, Parkview Trails did have the documents produced by FATCO in their possession before oral argument at the Summary Judgment hearing.

F. Greer was properly dismissed from the lawsuit.

On May 27, 2016, Parkview Trails filed a third party claim against Greer. CP 7-53. On September 13, 2016, Parker filed a Motion for Summary Judgment against Parkview based on the statute of limitations having expired. CP 72-80. On November 2, 2016, the court orally granted Parker's summary judgment at the hearing, and dismissed Parkview Trials counterclaim to foreclose the Deed of Trust and for judicial foreclosure of the Property. CP 451-452. The Trial Court found that the statute of limitations for breach of the Agreement expired no later than 2005. CP 387-391. On December 16, 2016, the Trial Court entered a written order granting Parker's summary judgment and also granted Greer's Order dismissing him from the lawsuit, based on the court's findings at the Parker summary judgment hearing. CP 453. Therefore, the Trial Court properly dismissed Greer from the lawsuit.

//

//

V. Conclusion

The Trial Court properly granted Parker's Motion for Summary Judgment as there were no genuine issues of material fact as to when the statute of limitations started to accrue for obligations under the Deed of Trust. The Trial Court properly found that the statute of limitations had expired for the obligations under the Deed of Trust, thereby quieting title to the Property in favor of Parker. The statute of limitations started to accrue in September 2005, when DeFrees, as principal of Parkview Trails sent a letter to counsel for Greer clearly demanding reimbursement for costs and expenses, thereby accelerating the alleged default for obligations under the Deed of Trust.

The Trial Court properly dismissed Parkview Trails motion for reconsideration for additional discovery in that the "newly discovered evidence" asserted failed to meet the standards under CR 59. The delinquent taxes on the Property were of public record, and as such were discoverable at any time by Parkview Trails.

The Trial Court properly dismissed Parkview Trails motion for continuance in that any additional discovery would fail to raise a genuine issue of material fact in that the statute of limitations had started to accrue in September 2005; Greer was never served with discovery requests; and

the FATCO documents were provided before the Parker summary judgment hearing.

The Trial Court properly dismissed Greer in that based on the Court's findings at the Parker summary judgment hearing, the statute of limitations had started to accrue no later than 2005.

As set forth above, the Trial Court's decisions were based on a full evidentiary record and leave no genuine issue of material fact for trial. Based on the foregoing, Greer respectfully requests that the Court deny this Appeal.

Respectfully submitted this 6 day of September, 2017.

THE SCHLOTFELDT LAW FIRM, PLLC

ALBERT F. SCHOTFELDT, WSBA# 19153
Of Attorneys for Respondents

NO. 50007-8-II

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

CLARK COUNTY SUPERIOR COURT NO. 16-2-05124-7

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

Respondent,

v.

PARKVIEW TRAILS, LLC, a dissolved limited liability company,

Appellant,

v.

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.

AFFIDAVIT OF SERVICE

Albert F. Schlotfeldt, WSBA# 19153
The Schlotfeldt Law Firm, PLLC
900 Washington Street, Suite 1020
Vancouver, WA 98666-0570
Telephone: (360) 699-1201

I, ALBERT F. SCHLOTFELDT, being first duly sworn upon oath, hereby deposes and says:

1. I am one of Third Party Respondent Edward B. Greer's attorneys, I am competent to testify herein, and I base the following on my own, personal knowledge.

2. On September 6, 2017, I caused true and correct copies of the Brief of Third Party Respondent Edward B. Greer and this Affidavit of Service to be served on the following by depositing in the United States Mail, postage prepaid as shown:

Tara J. Schleicher
Jason M. Ayres
FARLEIGH WADA WITT
121 SW Morrison Street, Suite 600
Portland, OR 97204

LeAnne M. Bremer
Joseph Vance
MILLER NASH GRAHAM & DUNN LLP
500 Broadway Street, Suite 400
Vancouver, WA 98660-3324

ALBERT F. SCHLOTFELDT, WSBA# 19153

SUBSCRIBED AND SWORN to before me this 6th day of September, 2017.

JEANETTE P. STROHECKER
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
MAY 15, 2019

Notary Public in and for the State of Washington, residing at Vancouver
Commission expires: 5/15/19

THE SCHLOTFELDT LAW FIRM

September 06, 2017 - 11:52 AM

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:

- 6-500078_Briefs_20170906114843D2923783_0687.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was Brief of Third Party Respondent.pdf

A copy of the uploaded files will be sent to:

- heather.harmon@millernash.com
- jayres@fwwlaw.com
- joe.vance@millernash.com
- kmuir@fwwlaw.com
- leanne.bremer@millernash.com
- tschleicher@fwwlaw.com

Comments:

Brief of Third Party Respondent Edward B. Greer

Sender Name: Albert Schlotfeldt - Email: aschlotfeldt@schlotfeldtlaw.com
Address:
900 WASHINGTON ST STE 1020
VANCOUVER, WA, 98660-3455
Phone: 360-699-1201

Note: The Filing Id is 20170906114843D2923783