

FILED
Court of Appeals
Division II
State of Washington
12/8/2017 1:34 PM

NO. 51197-5-II

COURT OF APPEALS FOR DIVISION II

STATE OF WASHINGTON

PACIFIC COAST CONSTRUCTION, L.L.C., a Washington limited liability company; DAVID M. FERDERER; GARY M. CLINE and REBECCA J. CLINE, individually and the marital community comprised thereof

Appellants

v.

**WASHINGTON FEDERAL, NATIONAL ASSOCIATION
Respondents**

BRIEF OF APPELLANTS

PACIFIC COAST CONSTRUCTION, L.L.C., A WASHINGTON LIMITED LIABILITY COMPANY; DAVID M. FERDERER; GARY M. CLINE AND REBECCA J. CLINE

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I. INTRODUCTION

PACIFIC COAST CONSTRUCTION, LLC (“Pacific Coast”), and three individuals, DAVID M. FERDERER, a single person and GARY M. CLINE and REBECCA J. CLINE, husband and wife, are appealing the June 16, 2017 Order of the Pierce County Superior Court granting Washington Federal’s Motion for Summary Judgment and Decree of Foreclosure, as well as a subsequent Order dated July 27, 2017 denying their request for reconsideration. Pacific Coast, Ferderer and Clines assert that Washington’s six (6) year statute of limitation – RCW 62A.3-118 - bars Washington Federal’s action to foreclose its Deed of Trust.

Washington Federal’s Motion for Summary Judgment alleged it is the holder of a Promissory Note signed by Pacific Coast on May 16, 2008 (“Note”) that is secured by a Deed of Trust of same date signed individually by Federer and Clines (“Deed of Trust”). The Note by its terms became due and payable in full on May 9, 2009. Washington Federal admits that neither Pacific Coast, nor Ferderer or Clines ever made any payments on the Note. Washington Federal claims it is entitled to foreclose the Deed of Trust as a result of the payment default on the Note.

Washington Federal commenced the present action to foreclose the Deed of Trust by filing a complaint to foreclose the Deed of Trust in Pierce County Superior Court on October 26, 2016 - over seven (7) years

and five (5) months after the Note became due and payable. Pacific Coast, Ferderer and Clines answered the Complaint denying Washington Federal's claims and raising affirmative defenses including that the statute of limitations – RCW 62A.3-118 barred judgment on the Note and foreclosure of the Deed of Trust.

Washington Federal brought a motion for an order on summary judgment foreclosing the Deed of Trust arguing, among other theories, that partial payments on the Note by the Chapter 7 Bankruptcy Trustee in Ferderer's and Clines' 2011 bankruptcy cases and a payment from a title insurance company in 2016, restarted the statute of limitations under RCW 4.16.270. Pacific Coast, Ferderer and Clines opposed the Motion for Summary Judgment, citing in their response and arguing at the Hearing, that the partial payments were not made or authorized by the Defendants and therefore were involuntary under Washington case authorities, including the Washington Supreme Court's ruling in *Easton v. Bigley*, 28 Wn.2d 674, 183 P.2d 780 (1947). These authorities limit application of the tolling provisions in RCW 4.16.270 to circumstances involving voluntary payments by the debtor.

The Washington case authorities applicable to RCW 4.16.270 clearly limit the statute's application to partial payments made, authorized or ratified by the debtor with the intention to acknowledge the debtor's

liability for the whole debt as of the date of payment. *Easton* at 673.

Washington Federal admits Pacific Coast, Ferderer and Clines never made any payments on the Note and Washington Federal presented no evidence in support of its Motion for Summary Judgment that the partial payments were authorized by Pacific Coast, Ferderer or the Clines, or that any of them acknowledged liability for the whole debt at the time of the payments, as required by the *Easton* line of case authorities.

Despite the clear Washington legal standard confirmed in *Easton*, the trial court granted Washington Federal's summary judgment on June 16, 2017, finding that partial payments were made on the Note and ruling that such payments extended the statute of limitations under RCW 4.16.270. *CP Judgement and Decree of Foreclosure*. The trial judge stated in her oral ruling that "...this Court believes [the partial payments] extended the statute of limitation time frame which would defeat the nonmoving party's argument that the statute of limitation ran in this case." *RP page 36 lines 1-14*. Pacific Coast, Ferderer and Clines timely filed a request for reconsideration of the Order on Summary Judgment which was denied on July 27, 2017. *CP Order Denying Motion for Reconsideration*.

Pacific Coast, Ferderer and Clines appeal the trial Judge's Orders granting summary judgment and denying reconsideration because the decisions are contrary to Washington law and are clearly plain error. They

request this Court reverse the Order on Summary Judgment and remand to the trial court with instructions to dismiss Plaintiff's Complaint because it is barred by the applicable six (6) year statute of limitation – RCW 62A.3-118.

II. ASSIGNMENT OF ERRORS

A. Assignments of Error Appellants assign errors to the following trial court actions:

Error No. 1 The trial court erred in entering the Order granting Washington Federal's Motion for Summary Judgment and Decree of Foreclosure dated June 16, 2017 and denying Defendants' Motion to Dismiss.

Error No. 2. The trial court erred in entering the Order Denying Defendants' Motion for Reconsideration dated July 27, 2017.

Error No. 3. The trial court erred in finding that a partial payment made by a Chapter 7 bankruptcy trustee was a voluntary payment by the Defendants.

Error No. 4. The trial court erred in finding that a partial payment on the Note made by a title insurance company for the benefit of an unrelated third party was a voluntary payment by the Defendants.

Error No. 5 The trial court erred in finding that partial payments on the Note by a Chapter 7 Bankruptcy Trustee and/or a title company were an

acknowledgment by the Defendants of liability for the debt evidenced by the Note.

B. Issues Pertaining to Assignments of Error

Issue No. 1. Does the six year statutory limitation period for a commercial promissory note under RCW 62A.3-118 bar the Plaintiff's action to obtain a judgement on the Note and a decree of foreclosure on the Deed of Trust, when Plaintiff failed to commence an action to foreclose the Note within six years of the Note's due date. Assignment of Errors 1, 2, 3, 4 and 5.

Issue No. 2. Does a partial payment on the Note by a Chapter 7 bankruptcy trustee toll the statute of limitations under RCW 4.16.270? Assignment of Errors 1, 2, 3, 4 and 5.

Issue No. 3. Does a partial payment on the Note made by a title insurance company or the benefit of an unrelated third party and under an insurance indemnity contract with that third party toll the statute of limitation under RCW 4.16.270? Assignment of Errors 1, 2, 3, 4 and 5.

III. STATEMENT OF THE CASE.

Pacific Coast was a licensed contractor from 2001 to 2011. During this time, Pacific Coast built dozens of homes. Its primary lender during this time period was Horizon Bank. Horizon Bank loaned Pacific Coast monies for the purchase of lots and construction of new homes with the

loans being repaid upon the sale of the new homes. When the real estate market crashed in 2008, Pacific Coast had millions of dollars of outstanding loans with Horizon Bank for lot purchases and home construction. The steep decline in lot and home prices in 2008 made Pacific Coast insolvent and unable to repay the Horizon Bank loans through the construction and sale of the homes as had been its practice for many prior years. *CP Declaration of Ferderer, Pages 1–2, Lines 23-24 and 1 – 8.*

Horizon Bank was also facing insolvency at this time because many of its construction borrowers were unable to repay their loans. In Pacific Coast's circumstances, Horizon Bank made a decision to loan Pacific Coast monies to pay interest on its dozens of lot and construction loans for the purpose of keeping the lot and construction loans current.

In May 2008, Horizon Bank told Pacific Coast that it must sign a new loan agreement or Horizon Bank would commence foreclosure action on all of Pacific Coast's loans. *CP Declaration of Ferderer, Page 5, Lines 1-5.* At that time, Pacific Coast had outstanding loans with Horizon Bank of over 5 million dollars. Despite knowledge that Pacific Coast could not pay its existing debts, Horizon Bank forced Pacific Coast to sign a promissory note in the amount of \$850,000. Pacific Coast never received any monies from the execution of this promissory note. Horizon Bank,

without notice or accounting to Pacific Coast, drew funds from the promissory note to make payments on the other outstanding loans of Pacific Coast. By November of 2008, Horizon Bank had drawn approximately \$848,000 on the May 16, 2008 promissory note and again came to Pacific Coast demanding that Pacific Coast sign another promissory note in the amount of \$125,000 to allow Horizon Bank to pay additional interest on the many other outstanding lot and construction loans of Pacific Coast. Like the May 19, 2008 note, Pacific Coast never received any proceeds from this promissory note. *CP Declaration of Ferderer, Page 2, Lines 12-23.*

Pacific Coast never made any payments on the May 19, 2008 note or on the November 26, 2008 note. In addition to these notes, Horizon Bank also required Pacific Coast to sign a \$500,000 note in September 2008 which was secured against the personal residences of the Defendants Ferderer and Clines. Like the other two notes, Pacific Coast never received any monies from this note. Pacific Coast never made any payments on the \$500,000 note. *CP Declaration of Ferderer, Page 3, Lines 5-21.* In an e-mail from Horizon Bank Senior Vice President, James Young dated September 19, 2009, the bank confirmed that all of the notes described above had been in default since November of 2008.

The individual Defendants, David Ferderer and Mr. and Mrs.

Cline, were the owners of Pacific Coast Construction, LLC. Horizon Bank required these individuals to execute deeds of trust securing the Pacific Coast promissory notes including the Note at issue in this case with personally owned by Ferderer and Clines including their personal residences and various rental properties including the property being foreclosed by the Plaintiff in this case. The Deed of Trust being foreclosed in this case covered eleven different properties including the property in this case which is identified as Parcel J in the Deed of Trust. *CP Declaration of Ferderer, Pages 3-4, Lines 21-24 and 1-6.*

Horizon Bank, as a result of its many bad loans, was closed by the FDIC on January 8, 2010. On Saturday, January 9, 2010, the former Horizon Bank locations were reopened as branches of Washington Federal Savings and Loan Association. Subsequently, the Deed of Trust assigned by the Federal Deposit Insurance Corporation to Washington Federal by written assignment dated February 2, 2011. *CP Declaration of Ferderer, Page 5, Lines 6-11.*

In February 2010, the Plaintiff evaluated the Pacific Coast loans received from Horizon Bank. See e-mail from Mark Rasmussen to Ron McKenzie and Roy Kusner and others discussing the outstanding balances and values of the Pacific Coast loans. This evaluation identified that the current balance on the loan number ending 6571 was \$659,030. This

admission from the Plaintiff's agents is contrary to the allegations in their Motion for Summary Judgment that there was an outstanding principal balance due on the Note of \$848,000. *CP Declaration of Ferderer, Page 5, Lines 11-18.*

The Rasmussen e-mail also mentions Washington Federal's Lost Share Agreement with the Federal Deposit Insurance Company which provided Washington Federal with insurance payments on loan losses equal to 80 percent of the book value of loans assumed by Washington Federal from Horizon Bank. *CP Declaration of Ferderer, Page 5, Lines 19-22.* The partial payments Plaintiff claims tolled by the statute of limitations include a payment by First American Title Insurance in the amount of \$100,000 on June 27, 2016, a payment from the Chapter 7 trustee in the Ferderer bankruptcy of \$13,434.71 on May 1, 2014 and a payment from the Chapter 7 trustee in the Clines bankruptcy of \$963.61 on April 2, 2013. *CP Declaration of Ferderer, Page 6, Lines 6-15. CP Declaration of Roy Cuzner, Page 4, Lines 10-16.*

IV. LEGAL ARGUMENTS

A. REQUEST FOR RELIEF

Appellants request this Court reverse the trial court Order on Summary Judgment and remand to the trial court with instructions to dismiss Plaintiff's Complaint under CR 12(b) because it is barred by the

applicable six (6) year statute of limitation – RCW 62A.3-118.

B. STANDARD OF REVIEW

The Court of Appeals reviews a summary judgment decision by the trial court de novo and considers the facts and all reasonable inferences in the light most favorable to the nonmoving party. In this case the Appellants Pacific Coast, Ferderer and Clines and the nonmoving party and they are entitled to consideration of all facts and reasonable inferences in their favor. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005); *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 828; 256 P.3d 1150 (2011).

In this case the nonmoving parties, Pacific Coast, Ferderer and Clines are entitled to an order reversing the trial court's Order Granting Plaintiff's Motion for Summary Judgment because the evidence, when looked at in a light most favorable to the nonmoving party, establishes:

- The Plaintiff failed to file its action to enforce the Note and foreclose the Deed of Trust within six years following the due date of the Note – May 9, 2009.
- The Plaintiff's complaint was filed on October 26, 2017 over seven years and five months after the Note was due and payable.
- The Plaintiff admits Defendants never made any payments on the Note.

- The Plaintiff failed to present any evidence that payments made by the Chapter 7 bankruptcy trustees and the title company were made by the debtor, Pacific Coast, or upon the direction or authority of the debtor or any of the individual Defendants.
- The Plaintiff failed to present any evidence that the Defendants intended any of the partial payments to keep alive the debt obligation of the Note.

Based on the foregoing facts Pacific Coast, Ferderer and Clines are entitled by law, including RCW 62A.3-118 *Easton v. Bigley*, 28 Wn.2d 674, 183 P.2d 780 (1947) and CR 12(b) to an order dismissing the Plaintiff's action because the action is barred by the six year statute of limitations.

C. SUMMARY OF ARGUMENT

The trial courts Order Granting Motion for Summary Judgment and a Decree of Foreclosure and denying reconsideration are contrary the Washington law and legal authorities. Pacific Coast, Ferderer and Clines are entitled as a matter of law, to dismissal of the Plaintiff's Complaint based on the applicable six year statute of limitation under either RCW 4.16.040 or RCW 62A.3-118, and the case authority in support thereof including *Alpacas of America, LLC vs. Groome*, 179 Wn. App. 391, 395-96, 317 P.3d 1103 (2014) (citing RCW 62A.3-118).

Plaintiff's argument that the statute of limitations was extended under RCW 4.16.270 by partial payments made by a Chapter 7 bankruptcy trustee in the Ferderer and Cline bankruptcy cases and by a title insurance company on behalf of an unrelated party, is without merit and contrary to the Washington Supreme Court's interpretation of RCW 4.16.270 in *Easton v. Bigley*, 28 Wn.2d 674, 183 P.2d 780 (1947) citing other Washington case authorities including *Berteloot v. Remillard*, 130 Wash. 587, 228 P. 690, (1924); *J. M. Arthur & Co. v. Burke*, 83 Wash. 690, 145 Pac. 974 (1915); and *Abrahamson v. Paysse*, 159 Wash. 516, 293 Pac. 985(1930). The Plaintiff has completely failed to meet its burden of proving the partial payments were voluntary payments by the debtor, Pacific Coast, as required by Washington law, *J. M. Arthur & Co. v. Burke*, 83 Wash. 690, 145 P. 974, (1915); *Easton v. Bigley*, 28 Wn.2d 674, 183 P.2d 780 (1947).

There is no legal authority to support Plaintiff's argument that payments from a Chapter 7 bankruptcy trustee or a title insurance company paying on a title claim for the benefit of an unrelated third party, extend the statute of limitations in this case.

D. ARGUMENTS REGARDING ERRORS

1. Washington's six year Statute of Limitation - RCW 62A.3-118 - bars Plaintiff's action to enforce the Note and Deed of

Trust.

The statute of limitations for enforcing a written promissory note and a deed of trust securing a promissory note is six years from the date of default. Under Washington's Uniform Commercial Code "...an action to enforce a party's obligation to pay a note payable at a definite time that qualifies as a negotiable instrument must be commenced within six years after the due date stated on the instrument." *RCW 62A.3-118; Alpacas of America, LLC v. Groome*, 179 Wn.App. 391, 395–396, 317 P.3d 1103 (2014). Promissory notes are negotiable instruments if the holder of the note can determine his or her rights, duties, and obligations with respect to the payment on the notes without having to examine any other documents. *Alpacas of America* at 397–98. The Note at issue in this case has a stated maturity date of May 9, 2009. Therefore, the six year statutory limitation period prescribed in RCW 62A.3-118 applies and the statutory period for commencing an action on the Note and Deed of Trust expired on May 9, 2015. Plaintiff filed the present action of October 26, 2017 long after the expiration of the six-year limitation period.

Washington law further provides that the statute of limitations on a promissory note runs from the date of default. Default occurs either immediately following demand for payment on a demand note, or when the note matures by its terms, or when a party accelerates the note

following breach or some other clause in the note. *Wash. Fed., Nat'l Ass'n v. Azure Chelan LLC* 195 Wn. App. 644, 663; 382 P.3d 20 (2016) citing: *Hopper v. Hemphill*, 19 Wn. App. 334, 335-336, 575 P.2d 746 (1978); *Westar Funding, Inc. v. Sorrels*, 157 Wn. App. 777, 784-785, 239 P.3d 1109 (2010); 31 *Samuel Williston & Richard A. Lord, A TREATISE ON THE LAW OF CONTRACTS* § 79:17, at 338; § 79:18, at 347-50 (4th ed. 2004).

In this case Defendants presented evidence in response to Plaintiff's Motion for Summary Judgment, showing the original lender, Horizon Bank, declared the Note to be in default as early as September 17, 2009. *CP Declaration of Ferderer* – Exhibit 3. This exhibit is an email from Horizon Bank to Pacific Coast stating the Note had been in default for 10 months as of the date of the email – September 17, 2009. This email establishes that the default date for the Note is at least 10 months before the date of the email or November 17, 2008. In viewing these facts most favorably to the Defendants the applicable statutory limitation period commenced on November 17, 2008 and expired on November 17, 2014. The Plaintiff filed the present action on October 26, 2016, almost two years after the expiration of the statutory limitation period under these facts.

Alternatively, using the May 9, 2009 maturity date stated on the

face of the Note, the statutory period would commence on that date and expire on May 8, 2015. Plaintiff did not file its complaint until October 26, 2016 which is over a year and five months after the statutory limitation period expired. Under either of the forgoing factual scenarios the Plaintiff's action is barred by the six-year statutory limitation period.

2. Partial Payments by unrelated Third Parties do not extend the Statutory Limitation Period under RCW 4.16.270.

Washington Federal contends in its pleadings supporting its Motion for Summary Judgment that any partial payment on a promissory note, regardless of its source, tolls the statute of limitation and restarts the six year limitation period. Plaintiff cites RCW 4.16.270 and *Hamilton v. Pearce*, 15 Wn. App. 133 (1976) as authority for its argument. The trial court apparently accepted this legal argument in its ruling stating "...this Court believes [the partial payments] extended the statute of limitation time frame which would defeat the nonmoving party's argument that the statute of limitation ran in this case."

RCW 4.16.270 and Plaintiff's single case authority do not apply to the facts in the present case and are not a legal basis to toll the statute of limitations. In *Hamilton*, an equipment seller sued the equipment purchaser/debtor for default on an equipment purchase and sale contract for failure to pay the monthly payments schedule. The contract called for

monthly payments of \$457.15, to commence on January 15, 1968 and continue monthly thereafter. Between January 1968 and August 22, 1969, the purchaser made only four payments including shorting the first payment on January 15, 1968. The last payment was made on August 22, 1969. A four year statute of limitation applied to sales contracts under RCW 62A.2-725.

As a result of the purchaser's defaults, the seller in *Hamilton* commenced suit against the purchaser on June 6, 1972, 4 years and 5 months after the purchaser's first default at the time of its short first payment in January 1968, but less than 4 years after the purchaser made its last payment on August 22, 1969. The purchaser argued that the applicable 4-year statute of limitation commenced on its first default in January 1968 and therefore the seller's action was barred and should be dismissed. The seller argued the period started on the day of the purchaser's last payment and therefore the action was timely. The trial court ruled that the statute commenced on the date of the purchaser's last payment - August 22, 1969 citing RCW 4.16.270. The Court of Appeals confirmed stating the RCW 4.16.270 tolls the statutory limitation period when a *debtor* – in *Hamilton* it was the purchaser under the installment sale contract- makes a payment to the seller on a sales contract. It should be noted that the Court of Appeals in *Hamilton* confirmed the authority of

the *Easton* case that limits tolling of the statute of limitations to cases where payments are made by the debtor. *Hamilton*-footnote 5 at 139.

Hamilton is not authority for the facts in this case, which show payments by third parties acting without direction or authority from the debtor, Pacific Coast, and therefore fall outside of the *Hamilton* case and under the *Easton* case authorities. Washington Federal admits that the debtor, Pacific Coast, never made any payments of the Note. Washington Federal also admits that Ferderer and Clines never made any payments on the Note. The payments in this case were made by Chapter 7 bankruptcy trustees in Ferderer's and Clines' bankruptcy cases and by a title insurance company insuring the title of real property owned by an unrelated third party that is not part this action. Under the facts of this case RCW 4.16.270 does not apply because the debtor never made any payments.

There is no dispute in this case that the maker of the Note was Pacific Coast Construction, Inc. and that it never made any payments on the Note. Further, the Plaintiff makes no allegations that any of the individual Defendants made any payments on the Note. The payments made to Washington Federal on the Note were involuntary payments by persons not the debtor, who acted outside the authority of the debtor and without intent to confirm the obligations of the Note. The facts in this case clearly fall under the authority of the *Easton* line of cases cited above,

which establish that involuntary payments on a debt do not toll the statute of limitations under RCW 4.16.270.

A partial payment by a Chapter 7 trustee is not a payment "...made under such circumstances as to show an intentional acknowledgment by the debtor of his liability for the whole debt as of the date of payment" *Easton* at 783. The Chapter 7 trustee is not an agent or representative of the debtor. The Trustee is an impartial case trustee with authority to administer the case and liquidate the debtor's nonexempt assets. 11 U.S.C. §§ 701, 704. Payments made out of a Chapter 7 bankruptcy, which by definition is a case where the debtor is claiming the legal right to **discharge all of his liability** on their debts, cannot be construed to be an acknowledgment of the debt obligation. Trustees of an insolvent corporation cannot authorize a payment to remove the bar of a statute of limitations. *Hein v. Gravelle Farmers' Elevator Co.*, 164 Wash. 309, 2 P.2d 741 (1931).

Like the bankruptcy trustee payment, a payment from a title insurance company under an insurance contract without unrelated third party in settlement of Washington Federal's claim against the title of an insured third party purchaser, is not a voluntary payment by Pacific Coast or the individual Defendants. The payment was made by the title insurance company in satisfaction of its contract obligations to its insured,

the purchaser of the real property. The insurance payment was not for the benefit of any of the Defendants in this case. The Defendants in this case had no control over the title insurance company's decision to pay on a claim against the title company's insurance policy.

All the partial payments made on the Note fall outside the scope of RCW 4.16.270 and do not toll the statute of limitations. They are all involuntary payments on the Note and do not satisfy the long and consistent law of Washington that requires the debtor's payment be voluntary and made with the intent to confirm the debt obligation, to toll the statute of limitation under RCW 4.16.270.

E. REQUEST FOR COSTS OF APPEAL AND ATTORNEY FEES AND EXPENSES.

Appellants are entitled to an award of their costs and attorney fees and expenses on appeal and for their fees and costs in the trial court proceedings. RAP 14.2 and RAP 18.1 provide that the prevailing party is entitled to an award of its costs of appeal identified in RAP 14.3 and attorney fees and expenses as allowed by applicable law. In the event Appellants prevail on this appeal they are entitled to their costs under RAP 14.2 and 14.3. Further, they are entitled to their attorney fees and expenses under RAP 18.1 because the Loan Agreement, Note and Deed of Trust upon which Plaintiff's action is based include provisions for an

award of attorney fees and expenses to the Plaintiff. *CP - Exhibits A, B and C to Declaration of Roy Cuzner*. Under Washington law, when one party to a written contract is entitled to an award of attorney fees and expenses pursuant to the terms of the contract, the other party is also entitled to its attorney fees and expenses when it prevails against the claims of the other party. “When an agreement provides for the payment of attorney fees to one party, a prevailing party is entitled to reasonable fees and costs, including fees incurred at trial and on appeal. *Granite Equip. Leasing Corp. v. Hutton*, 84 Wn.2d 320, 327, 525 P.2d 223, 72 A.L.R.3d 1172 (1974); RCW 4.84.330. A contractual provision supporting an award of attorney fees at trial also supports an award of attorney fees on appeal. *W. Coast Stationary Eng'rs Welfare Fund v. City of Kennewick*, 39 Wn. App. 466, 477, 694 P.2d 1101 (1985); *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 771, 162 P.3d 1153 (2007). The Appellants request this Court award costs and their attorney fees and expenses on appeal, if they are the prevailing party. And further request that this court, upon reversing the trial court's Orders, to include in the remand of this case to the trial court, instructions that the trial court award the Defendants costs and attorney fees and expenses incurred in defending against Plaintiff's action in the trial court including,

without limitation, fees, expenses and costs for the defense of the summary judgment proceeding and request for reconsideration.

V. CONCLUSION

The Supreme Court's ruling in *Easton v. Bigley*, 28 Wn.2d 674, 183 P.2d 780 (1947), cites the long history of prior authorities that clearly state a statute of limitations is only tolled by partial payments "...made or authorized or ratified *by the party against whom the payment is invoked...*" *Easton* at 783 *emphasis added*. The *Easton* authorities and principals apply to the present case and make clear that only voluntary payments by the debtor will toll the statute of limitation in Washington under RCW 4.16.270. The payments alleged by Plaintiff in this case fail to meet the *Easton* standards because they are not voluntary payments by the debtor, Pacific Coast Construction, LLC or by any individual Defendants. Therefore, the trial court's orders granting summary judgement and denying reconsideration based on RCW 4.16.270 should be reversed and this case remanded with instructions to the trial court to dismiss the Plaintiff's complaint under CR 12(b) for failure to state a claim upon which relief may be granted because all of Plaintiff's claims are barred by the six year statute of limitations set by RCW 62A.3-118.

DATED this 9th day of December, 2017, at Puyallup, Washington.



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APPENDICES

Appendix 1. RCW 4.16.040

Appendix 2. RCW 4.16.270

Appendix 3. RCW 4.84.330

Appendix 4. RCW 62A.3-118

Appendix 5. 11 U.S.C.S. § 701-702

Appendix 6. 11 U.S.C.S. § 704

Appendix 7. CR 12(b)

Appendix 8 Williston & Richard A. Lord, A TREATISE ON THE LAW OF CONTRACTS
§ 79:17, at 338; § 79:18, at 347-50 (4th ed. 2004)

Appendix 1.

Rev. Code Wash. (ARCW) § 4.16.040

Statutes current with effective legislation through the 2017 Third Special Session

Annotated Revised Code of Washington > Title 4 Civil Procedure > Chapter 4.16 Limitation of Actions

4.16.040. Actions limited to six years.

The following actions shall be commenced within six years:

- (a) An action upon a contract in writing, or liability express or implied arising out of a written agreement, except as provided for in RCW 64.04.007(2).
- (b) An action upon an account receivable. For purposes of this section, an account receivable is any obligation for payment incurred in the ordinary course of the claimant's business or profession, whether arising from one or more transactions and whether or not earned by performance.
- (c) An action for the rents and profits or for the use and occupation of real estate.

History

2012 c 185 § 3; 2007 c 124 § 1; 1989 c 38 § 1; 1980 c 105 § 2; 1927 c 137 § 1; Code 1881 § 27; 1854 p 363 § 3; RRS § 157.

Annotations

Appendix 2.

Rev. Code Wash. (ARCW) § 4.16.270

Statutes current through 2017 Regular Session c 224

Annotated Revised Code of Washington > Title 4 Civil Procedure > Chapter 4.16 Limitation of Actions

4.16.270. Effect of partial payment.

When any payment of principal or interest has been or shall be made upon any existing contract, whether it be a bill of exchange, promissory note, bond or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made.

History

Code 1881 § 45; 1877 p 10 § 46; 1854 p 365 § 19; RRS § 177.

Annotations

Appendix 3.

Rev. Code Wash. (ARCW) § 4.84.330

Statutes current with effective legislation through the 2017 Third Special Session

Annotated Revised Code of Washington > Title 4 Civil Procedure > Chapter 4.84 Costs

4.84.330. Actions on contract or lease which provides that attorneys' fees and costs incurred to enforce provisions be awarded to one of parties — Prevailing party entitled to attorneys' fees — Waiver prohibited.

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

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

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

History

2011 c 336 § 131; 1977 ex.s. c 203 § 1.

Annotations

Appendix 4.

Rev. Code Wash. (ARCW) § 62A.3-118

Statutes current with effective legislation through the 2017 Third Special Session

*Annotated Revised Code of Washington > Title 62A Uniform Commercial Code > Article 3
Negotiable Instruments > Part 1 General Provisions and Definitions*

62A.3-118. Statute of limitations.

- (d) Except as provided in subsection (e), an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.
- (e) Except as provided in subsection (d) or (e), if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of ten years.
- (f) Except as provided in subsection (d), an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within six years after dishonor of the draft or ten years after the date of the draft, whichever period expires first.
- (g) An action to enforce the obligation of the acceptor of a certified check or the issuer of a teller's check, cashier's check, or traveler's check must be commenced within three years after demand for payment is made to the acceptor or issuer, as the case may be.
- (h) An action to enforce the obligation of a party to a certificate of deposit to pay the instrument must be commenced within six years after demand for payment is made to the maker, but if the instrument states a due date and the maker is not required to pay before that date, the six-year period begins when a demand for payment is in effect and the due date has passed.
- (i) An action to enforce the obligation of a party to pay an accepted draft, other than a certified check, must be commenced (i) within six years after the due date or dates stated in the draft or acceptance if the obligation of the acceptor is payable at a definite time, or (ii) within six years after the date of the acceptance if the obligation of the acceptor is payable on demand.
- (j) Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion, (ii) for breach of warranty, or (iii) to enforce an obligation, duty, or right arising under this Article and not governed by this section must be commenced within three years after the cause of action accrues.

History

1995 c 74 § 1; 1993 c 229 § 20; 1965 ex.s. c 157 § 3-118. Cf. former RCW sections: (i) RCW 62.01.017; 1955 c 35 § 62.01.017; prior: 1899 c 149 § 17; RRS § 3408. (ii) RCW 62.01.068; 1955 c 35 § 62.01.068; prior: 1899 c 149 § 68; RRS § 3459. (iii) RCW 62.01.130; 1955 c 35 § 62.01.130; prior: 1899 c 149 § 130; RRS § 3520.

Commentary

OFFICIAL COMMENT

1. Section 3-118 differs from former Section 3-122, which states when a cause of action accrues on an instrument. Section 3-118 does not define when a cause of action accrues. Accrual of a cause of action is stated in other sections of Article 3 such as those that state the various obligations of parties to an instrument. The only purpose of Section 3-118 is to define the time within which an action to enforce an obligation, duty, or right arising under Article 3 must be commenced. Section 3-118 does not attempt to state all rules with respect to a statute of limitations. For example, the circumstances under which the running of a limitations period may be tolled is left to other law pursuant to Section 1-103.

2. The first six subsections apply to actions to enforce an obligation of any party to an instrument to pay the instrument. This changes present law in that indorsers who may become liable on an instrument after issue are subject to a period of limitations running from the same date as that of the maker or drawer. Subsections (a) and (b) apply to notes. If the note is payable at a definite time, a six-year limitations period starts at the due date of the note, subject to prior acceleration. If the note is payable on demand, there are two limitations periods. Although a note payable on demand could theoretically be called a day after it was issued, the normal expectation of the parties is that the note will remain outstanding until there is some reason to call it. If the law provides that the limitations period does not start until demand is made, the cause of action to enforce it may never be barred. On the other hand, if the limitations period starts when demand for payment may be made, i.e. at any time after the note was issued, the payee of a note on which interest or portions of principle are being paid could lose the right to enforce the note even though it was treated as a continuing obligation by the parties. Some demand notes are not enforced because the payee has forgiven the debt. This is particularly true in family and other noncommercial transactions. A demand note found after death of the payee may be presented for payment many years after it was issued. The maker may be a relative and it may be difficult to determine whether the note represents a real or forgiven debt. Subsection (b) is designed to bar notes that no longer represent a claim to payment and to require reasonably prompt action to enforce notes on which there is default. If a demand for payment is made to the maker, a six-year limitations period starts to run when demand is made. The second sentence of subsection (b) bars an action to enforce a demand note if no demand has been made on the note and no payment of interest or principal has been made for a continuous period of 10 years. This covers the case of a note that does not bear interest or a case in which interest due on the note has not been paid. This kind of case is likely to be a family transaction in which a failure to demand payment may indicate that the holder did not intend to enforce the obligation but neglected to destroy the note. A limitation period that bars stale claims in this kind of case is appropriate if the period is relatively long.

3. Subsection (c) applies primarily to personal uncertified checks. Checks are payment instruments rather than credit instruments. The limitations period expires three [six] years after the date of dishonor or 10 years after the date of the check, whichever is earlier. Teller's checks, cashier's checks, certified checks, and traveler's checks are treated differently under subsection (d) because they are commonly treated as cash equivalents. A great delay in presenting a cashier's check for payment in most cases will occur because the check was mislaid during that period. The person to whom traveler's checks are issued may hold them indefinitely as a safe form of cash for use in an emergency. There is no compelling reason for barring the claim of the owner of the cashier's check or traveler's check. Under subsection (d) the claim is never barred because the three-year limitations period does not start to run until demand for payment is made. The limitations period in subsection (d) in effect applies only to cases in which there is a dispute about the legitimacy of the claim of the person demanding payment.

4. Subsection (e) covers certificates of deposit. The limitations period of six years doesn't start to run until the depositor demands payment. Most certificates of deposit are payable on demand even if they state a due date. The effect of a demand for payment before maturity is usually that the bank will pay, but that a penalty will be assessed against the depositor in the form of a reduction in the amount of interest that is paid. Subsection (e) also provides for cases in which the bank has no obligation to pay until the due date. In that case the limitations period doesn't start to run until there is a demand for payment in effect and the due date has passed.

5. Subsection (f) applies to accepted drafts other than certified checks. When a draft is accepted it is in effect turned into a note of the acceptor. In almost all cases the acceptor will agree to pay at a definite time. Subsection (f) states that in that case the six-year limitations periods starts to run on the due date. In the rare case in which the obligation of the acceptor is payable on demand, the six-year limitations period starts to run at the date of the acceptance.

6. Subsection (g) covers warranty and conversion cases and other actions to enforce obligations or rights arising under Article 3. A three-year period is stated and subsection (g) follows general law in stating that the period runs from the time the cause of action accrues. Since the traditional term "cause of action" may have been replaced in some states by "claim for relief" or some equivalent term, the words "cause of action" have been bracketed to indicate that the words may be replaced by an appropriate substitute to conform to local practice.

Appendix 5.

11 USCS § 701

Current through PL 115-89, approved 11/21/17

United States Code Service - Titles 1 through 54 > TITLE 11. BANKRUPTCY > CHAPTER 7. LIQUIDATION > SUBCHAPTER I. OFFICERS AND ADMINISTRATION

§ 701. Interim trustee

(k)

(1) Promptly after the order for relief under this chapter, the United States trustee shall appoint one disinterested person that is a member of the panel of private trustees established under section 586(a)(1) of title 28 [28 USCS § 586(a)(1)] or that is serving as trustee in the case immediately before the order for relief under this chapter to serve as interim trustee in the case.

(2) If none of the members of such panel is willing to serve as interim trustee in the case, then the United States trustee may serve as interim trustee in the case.

(l) The service of an interim trustee under this section terminates when a trustee elected or designated under section 702 of this *title [11 USCS § 702]* to serve as trustee in the case qualifies under section 322 of this *title [11 USCS § 322]*.

(m) An interim trustee serving under this section is a trustee in a case under this *title [11 USCS §§ 101 et seq.]*.

History

(Nov. 6, 1978, *P.L. 95-598*, Title I, § 101, *92 Stat. 2604*; Oct. 27, 1986, *P.L. 99-554*, Title II, Subtitle A, § 215, *100 Stat. 3100*.)

Prior law and revision:

Legislative Statements

The House amendment deletes section 701(d) of the Senate amendment. It is anticipated that the Rules of Bankruptcy Procedure will require the appointment of an interim trustee at the earliest practical moment in commodity broker bankruptcies, but no later than noon of the day after the date of the filing of the petition, due to the volatility of such cases.

Senate Report No. 95-989

This section requires the court to appoint an interim trustee. The appointment must be made from the panel of private trustees established and maintained by the Director of the Administrative Office under proposed 28 U.S.C. 604(e) [28 USCS § 604(f)].

Subsection (a) requires the appointment of an interim trustee to be made promptly after the order for relief, unless a trustee is already serving in the case, such as before a conversion from a reorganization to a liquidation case.

Subsection (b) specifies that the appointment of an interim trustee expires when the permanent trustee is elected or designated under section 702.

Subsection (c) makes clear that an interim trustee is a trustee in a case under the bankruptcy code.

Subsection (d) [deleted] provides that in a commodity broker case where speed is essential the interim trustee must be appointed by noon of the business day immediately following the order for relief.

Annotations

Notes

Effective date of section:

This section became effective on October 1, 1979, pursuant to § 402(a) of Act Nov. 6, 1978, *P.L. 95-598*, which appears as *11 USCS prec § 101* note.

Amendments:

1986 . Act Oct. 27, 1986 (effective and applicable as provided by § 302 of such Act, which appears as *28 USCS § 581* note) substituted subsec. (a) for one which read: "Promptly after the order for relief under this chapter, the court shall appoint one disinterested person that is a member of the panel of private trustees established under section 604(f) of title 28 or that was serving as trustee in the case immediately before the order for relief under this chapter to serve as interim trustee in the case."

11 USCS § 702

Current through PL 115-89, approved 11/21/17

United States Code Service - Titles 1 through 54 > TITLE 11. BANKRUPTCY > CHAPTER 7. LIQUIDATION > SUBCHAPTER I. OFFICERS AND ADMINISTRATION

§ 702. Election of trustee

- (n) A creditor may vote for a candidate for trustee only if such creditor--
- (3) holds an allowable, undisputed, fixed, liquidated, unsecured claim of a kind entitled to distribution under section 726(a)(2), 726(a)(3), 726(a)(4), 752(a), 766(h), or 766(i) of this *title [11 USCS § 726(a)(2), 726(a)(3), 726(a)(4), 752(a), 766(h), or 766(i)]*;

- (4) does not have an interest materially adverse, other than an equity interest that is not substantial in relation to such creditor's interest as a creditor, to the interest of creditors entitled to such distribution; and
- (5) is not an insider.
- (o) At the meeting of creditors held under section 341 of this *title [11 USCS § 341]*, creditors may elect one person to serve as trustee in the case if election of a trustee is requested by creditors that may vote under subsection (a) of this section, and that hold at least 20 percent in amount of the claims specified in subsection (a)(1) of this section that are held by creditors that may vote under subsection (a) of this section.
- (p) A candidate for trustee is elected trustee if--
 - (10) creditors holding at least 20 percent in amount of the claims of a kind specified in subsection (a)(1) of this section that are held by creditors that may vote under subsection (a) of this section vote; and
 - (10) such candidate receives the votes of creditors holding a majority in amount of claims specified in subsection (a)(1) of this section that are held by creditors that vote for a trustee.
- (q) If a trustee is not elected under this section, then the interim trustee shall serve as trustee in the case.

History

(Nov. 6, 1978, *P.L. 95-598*, Title I, § 101, *92 Stat. 2604*; July 27, 1982, *P.L. 97-222*, § 7, *96 Stat. 237*; July 10, 1984, *P.L. 98-353*, Title III, Subtitle H, § 472, *98 Stat. 380*.)

Prior law and revision:

Legislative Statements

The House amendment adopts section 702(a)(2) of the Senate amendment. An insubstantial equity interest does not disqualify a creditor from voting for a candidate for trustee.

Senate Report No. 95-989

Subsection (a) of this section specifies which creditors may vote for a trustee. Only a creditor that holds an allowable, undisputed, fixed, liquidated, unsecured claim that is not entitled to priority, that does not have an interest materially adverse to the interest of general unsecured creditors, and that is not an insider may vote for a trustee. The phrase "materially adverse" is currently used in the Rules of Bankruptcy Procedure, rule 207(d) [now Rules 2003, X-1006] The application of the standard requires a balancing of various factors, such as the nature of the adversity. A creditor with a very small equity position would not be excluded from voting solely because he holds a small equity in the debtor. The Rules of Bankruptcy Procedure also currently provide for temporary allowance of claims, and will continue to do so for the purposes of determining who is eligible to vote under this provision.

Subsection (b) permits creditors at the meeting of creditors to elect one person to serve as trustee in the case. Creditors holding at least 20 percent in amount of the claims specified in the preceding paragraph must request election before creditors may elect a trustee. Subsection (c) specifies that a candidate for trustee is elected trustee if creditors holding at least 20 percent in amount of those claims actually vote, and if the candidate receives a majority in amount of votes actually cast.

Subsection (d) specifies that if a trustee is not elected, then the interim trustee becomes the permanent trustee and serves in the case permanently.

Annotations

Appendix 6.

11 USCS § 704

Current through PL 115-89, approved 11/21/17

United States Code Service - Titles 1 through 54 > TITLE 11. BANKRUPTCY > CHAPTER 7. LIQUIDATION > SUBCHAPTER I. OFFICERS AND ADMINISTRATION

§ 704. Duties of trustee

- (r) The trustee shall--
- (6) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;
 - (7) be accountable for all property received;
 - (8) ensure that the debtor shall perform his intention as specified in section 521(a)(2)(B) of this *title [11 USCS § 521(a)(2)(B)]*;
 - (9) investigate the financial affairs of the debtor;
 - (10) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;
 - (11) if advisable, oppose the discharge of the debtor;
 - (12) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;
 - (13) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires;
 - (14) make a final report and file a final account of the administration of the estate with the court and with the United States trustee;
 - (10) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c);
 - (11) if, at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974 [*29 USCS § 1002*]) of an employee benefit plan, continue to perform the obligations required of the administrator; and
 - (12) use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business that--
 - (A) is in the vicinity of the health care business that is closing;

(iv) the name of each creditor that holds a claim that--

- (I) is not discharged under paragraph (2), (4), or (14A) of section 523(a) [11 USCS § 523(a)]; or
- (II) was reaffirmed by the debtor under section 524(c) [11 USCS § 524(c)].

- (2) (A) The holder of a claim described in subsection (a)(10) or the State child support enforcement agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.
- (B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under subparagraph (A) shall not be liable by reason of making such disclosure.

History

(Nov. 6, 1978, *P.L. 95-598*, Title I, § 101, *92 Stat. 2605*; July 10, 1984, *P.L. 98-353*, Title III, Subtitle A, § 311(a), Subtitle H, § 474, *98 Stat. 355*, 381; Oct. 27, 1986, *P.L. 99-554*, Title II, Subtitle A, § 217, *100 Stat. 3100*; April 20, 2005, *P.L. 109-8*, Title I, § 102(c), Title II, Subtitle B, § 219(a), Title IV, Subtitle B, § 446(b), Title XI, § 1105(a), *119 Stat. 32*, 55, 118, 192; May 7, 2009, *P.L. 111-16*, § 2(7), *123 Stat. 1607*; Dec. 22, 2010, *P.L. 111-327*, § 2(a)(24), *124 Stat. 3560*.)

Prior law and revision:

Legislative Statements

Section 704(8) of the Senate amendment is deleted in the House amendment. Trustees should give constructive notice of the commencement of the case in the manner specified under section 549(c) of title 11.

Senate Report No. 95-989

The essential duties of the trustee are enumerated in this section. Others, or elaborations on these, may be prescribed by the Rules of Bankruptcy Procedure to the extent not inconsistent with those prescribed by this section. The duties are derived from section 47a of the Bankruptcy Act [section 75(a) of former title 11].

The trustee's principal duty is to collect and reduce to money the property of the estate for which he serves, and to close up the estate as expeditiously as is compatible with the best interests of parties in interest. He must be accountable for all property received, and must investigate the financial affairs of the debtor. If a purpose would be served (such as if there are assets that will be distributed), the trustee is required to examine proofs of claims and object to the allowance of any claim that is improper. If advisable, the trustee must oppose the discharge of the debtor, which is for the benefit of general unsecured creditors whom the trustee represents.

The trustee is responsible to furnish such information concerning the estate and its administration as is requested by a party in interest. If the business of the debtor is authorized to be operated, then the trustee is required to file with governmental units charged with the responsibility for collection or determination of any tax arising out of the operation of the business periodic reports and summaries of the operation, including a statement of receipts and disbursements, and such other information as the court requires. He is required to give constructive notice of the commencement of the case in the manner specified under section 342(b).

Annotations

Appendix 7.
CIVIL RULE 12

DEFENSES AND OBJECTIONS

(a) When Presented. A defendant shall serve an answer within the following periods:

(1) Within 20 days, exclusive of the day of service, after the service of the summons and complaint upon the defendant pursuant to rule 4;

(2) Within 60 days from the date of the first publication of the summons if the summons is served by publication in accordance with rule 4(d)(3);

(3) Within 60 days after the service of the summons upon the defendant if the summons is served upon the defendant personally out of the state in accordance with RCW 4.28.180 and 4.28.185 or on the Secretary of State as provided by RCW 46.64.040.

(4) Within the period fixed by any other applicable statutes or rules. A party served with a pleading stating a cross claim against another party shall serve an answer thereto within 20 days after the service upon that other party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court.

(A) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive

pleading shall be served within 10 days after notice of the courts action.

(B) If the court grants a motion for a more definite statement, the responsive pleading shall be served

within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

- (1) lack of jurisdiction over the subject matter;
- (2) lack of jurisdiction over the person;
- (3) improper venue;
- (4) insufficiency of process;
- (5) insufficiency of service of process;
- (6) failure to state a claim upon which relief can be granted;

(7) failure to join a party under rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the pleader may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in section (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in section (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, or if more particularity in that pleading will further the efficient economical disposition of the action, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after the notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the courts own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived;

(A) if omitted from a motion in the circumstances described in section (g); or

(B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(i) Nonparty at Fault. Whenever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. The identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded.

[Adopted effective March 1, 1974; amended effective January 1, 1972; January 1, 1980; September 18, 1992; April 28, 2015.]

Appendix 8

**Williston & Richard A. Lord, A TREATISE ON THE LAW OF CONTRACTS § 79:17,
at 338; § 79:18, at 347-50 (4th ed. 2004)**

same is true.

This is doubtless because the law cannot give the injured party exactly what it was promised, but an obligation to pay money, originally unilateral, or becoming so by performance on the part of the creditor, remains after breach an obligation to pay that sum of money.¹⁶

If, by its terms, the money is payable in installments, then no breach, however serious, as to earlier installments can resolve the creditor's right into a single claim for damages on the entire contract. A separate cause of action arises on each installment, and the statute of limitations runs separately against each, except where the creditor has a right to accelerate payments on default and does so.¹⁷

Thus, a county brought a breach of contract action against the

with each underpayment constituting a continuing breach).

16. Alaska: *Silvers v. Silvers*, 999 P.2d 786 (Alaska 2000) (an adult son's promise to repay funds loaned him by his mother when he became financially able to do so was a legally enforceable conditional promise, and thus, the six-year statute of limitations applicable to contract actions began to run when the adult son achieved the ability to repay the mother the funds that she had loaned him).

17. Federal: *Berezin v. Regency Sav. Bank*, 234 F.3d 68 (1st Cir. 2000) (when the statute of limitations for a breach of contract begins to run depends on whether the contract is entire or divisible; if an obligation is payable in installments, the statute of limitations begins to run against the recovery of each installment from the time it becomes due, even where one contract provides all the terms of the agreement between the parties, so long as the contract requires that the payments be made in installments; thus, a promissory note, which provided that interest and principal were to be payable on a monthly basis, qualified as an installment contract, and therefore, the statute of limitations for

the recovery of each installment under the note ran from the time it became due, for purposes of the borrower's claim seeking recovery of alleged interest overpayments).

Lang v. Aetna Life Ins. Co., 196 F.3d 1102 (10th Cir. 1999) (a participant's disability policy was not an installment contract, such that a separate statute of limitations on a claim for benefits would run against each unpaid monthly benefit; such a characterization would cause her claim to have an indefinite lifespan and undermine the overriding purpose of a statute of limitation).

Elephant Butte Irr. Dist. of New Mexico v. Department of Interior, 160 F.3d 602 (10th Cir. 1998) (under the continuing claim doctrine, when a party is to make periodic payments, each successive failure to make a proper payment gives rise to a new claim on which suit can be brought, even when the grounds for refusing to pay occurred outside the statutory period).

Alaska: *Madden v. Alaska Mortg. Group*, 54 P.3d 265, 2002 WL 31012220 (Alaska 2002) (Alaska's six-year statute of limitations applied to a note given in connection with a deed of trust, and thus,

Analogous in principle is a promise to render a certain performance on each occasion when a contingency shall happen. A promise by a surety company to indemnify the obligee of a bond whenever loss occurs from a specified cause gives a separate right for each such occasion.³⁵

Where installments are paid on an existing debt, the statute of limitations is tolled on the payment of the last installment. The statute begins to run again from the date of the last payment.³⁶

§ 79:18. Acceleration of maturity

Research References:

West's Key Number Digest: Limitation of Actions ◊51(2)

Contracts frequently provide that on the failure to pay one of several installments at maturity the whole performance then

payment of dividends made under a financial security plan, a cause of action accrued with each payment made, rather than only on the effective date of the plan, for purposes of statute of limitations [Alaska Stat. § 09.10.070]; claims relating to payments made more than six years before suit was filed were barred by the statute of limitations; continuing payments prevented the running of the statute of limitations, but did not apply to time-barred claims).

Tex: *Palmer v. Palmer*, 831 S.W.2d 479 (Tex. App. Texarkana 1992) (payments on an installment note were not barred by the four-year statute of limitations where, after the real property purchaser stopped making yearly payments on an installment note secured by a deed of trust, the seller's guardian sought to recover the balance due on the note and foreclosure and sale of the property, but the purchaser contended that four of the payments were barred by the statute of limitations for debt because where an obligation is secured by a lien on real property, the statute of limitations under Tex. Civ. Prac. & Rem. Code Ann. § 16.035(e) does not begin to run until the maturity date of the last note, obligation, or installment).

Utah: *State v. Huntington-Cleveland Irrigation Co.*, 2002 UT 75, 52 P.3d 1257 (Utah 2002).

As to when breach of one installment of a divisible contract operates as a breach of the entire contract, see §§ 43:5 to 43:7.

35. UK: *Sanders v. Coward*, [1845] 13 M & W (Eng) 65.

Ky: *Deposit Bank of Midway's Assignee v. Hearne*, 104 Ky. 819, 20 Ky. L. Rptr. 1019, 48 S.W. 160 (1898).

Md: *Thruston v. Blackiston*, 36 Md. 501, 1872 WL 5697 (1872).

Mass: *McKim v. Glover*, 161 Mass. 418, 37 N.E. 443 (1894).

NY: *Green v. Peterson*, 218 N.Y. 280, 112 N.E. 746 (1916).

36. Federal: *M. Bender & Son, Inc. v. West 16th St. Realty Corp.*, 458 F.2d 1316 (7th Cir. 1972) (where the court stated, "In view of the district court's finding that West 16th was the contracting party, the payments to Bender made on West 16th's behalf by Bay City on December 1 and 28, 1962, tolled the statute (as the court found), so that the complaint filed on September 30, 1968, was well within the six-year period").

becomes due.³⁷

It seems, however, a fairer construction of such a provision—clearly intended as it is solely for the advantage and security of the creditor—to hold that the acceleration of maturity does not occur unless the creditor so elects, even though in terms the provision is absolute.³⁸

Often, the contract expressly gives the creditor an election.

37. English courts have interpreted this literally and, therefore, have held that after lapse of the statutory period from the first failure no recovery can be had even for a breach of a subsequent installment:

UK: *McFadden v. Brandon*, [1904] 8 Ont LR 610.

Manitoba Mortgage & Investment Co. v. Daly, [1895] 10 Manitoba LR 425.

Hemp v. Garland, 4 QB 519; *Reeves v. Butcher* [1891] 2 QB 509.

The same rule has been applied in some cases in the United States:

Idaho: *Perkins v. Swain*, 35 Idaho 485, 207 P. 585, 34 A.L.R. 894 (1922).

Kan: *Van Arsdale-Osborne Brokerage Co. v. Martin*, 81 Kan. 499, 106 P. 42 (1910).

Snyder v. Miller, 71 Kan. 410, 80 P. 970 (1905).

Ky: *Ryan v. Caldwell*, 106 Ky. 543, 20 Ky. L. Rptr. 2030, 50 S.W. 966 (1899).

Miss: *Central Trust Co. v. Meridian Light & Ry. Co.*, 106 Miss. 431, 63 So. 575 (1913).

Neb: *National Bank of Commerce Trust & Savings Ass'n v. Ham*, 256 Neb. 679, 592 N.W.2d 477 (1999).

NM: *Buss v. Kemp Lumber Co.*, 23 N.M. 567, 170 P. 54 (1918).

SD: *Green v. Frick*, 25 S.D. 342, 126 N.W. 579 (1910).

Tex: *San Antonio Real Estate Bldg. & Loan Ass'n v. Stewart*, 94 Tex. 441, 61 S.W. 386 (1901).

Utah: *Kelly v. Kershaw*, 5 Utah 295, 14 P. 804 (1887).

Wis: *Pierce v. Shaw*, 51 Wis. 316, 8 N.W. 209 (1881).

38. Federal: *Moline Plow Co. v. Webb*, 141 U.S. 616, 12 S. Ct. 100, 35 L. Ed. 879 (1891).

Keene Five Cent Sav. Bank v. Reid, 123 F. 221 (C.C.A. 8th Cir. 1903).

Wheeler & Wilson Mfg. Co. v. Howard, 28 F. 741 (C.C.E.D. Mo. 1886).

Ala: *Summers v. Wright*, 231 Ala. 372, 165 So. 87 (1935).

Cal: *Richards v. Daley*, 116 Cal. 336, 48 P. 220 (1897).

Trigg v. Arnott, 22 Cal. App. 2d 455, 71 P.2d 330 (4th Dist. 1937).

Colo: *Lovell v. Goss*, 45 Colo. 304, 101 P. 72 (1909).

Ill: *Watts v. Hoffman*, 77 Ill. App. 411, 1898 WL 2448 (4th Dist. 1898).

Iowa: *Watts v. Creighton*, 85 Iowa 154, 52 N.W. 12 (1892).

La: *Dassau v. Seary*, 158 So. 2d 243 (La. Ct. App. 4th Cir. 1963).

Md: *Kleiman v. Kolker*, 189 Md. 647, 57 A.2d 297 (1948) (quoting text).

Neb: *Lowenstein v. Phelan*, 17 Neb. 429, 22 N.W. 561 (1885).

NJ: *Cox v. Kille*, 50 N.J. Eq. 176, 24 A. 1032 (Ch. 1892).

NY: *Wurzler v. Clifford*, 36 N.Y.S.2d 516 (Sup 1942) (quoting text).

In re Steinway's Estate, 174 Misc. 554, 21 N.Y.S.2d 31 (Sur. Ct. 1940) (quoting text; in line with the general weight of authority that the statute of limitations does not commence to run until the speci-

There can then be no question that the statute does not run on the entire obligation from the first default unless the creditor has manifested an intent that maturity of the later installments shall be accelerated.³⁹

However, when the election is manifested, the statute will generally run from the date of the default on which the election is based, not from the date of the election itself,⁴⁰ although some courts have held that, under those circumstances, the cause of action will be deemed to have accrued as of the date of the election

fied maturity date unless the creditor takes some affirmative action to mature the claim earlier).

NC: *Sanders v. Hamilton*, 229 N.C. 43, 47 S.E.2d 472 (1948) (a deed of trust to secure a series of notes had an acceleration clause but the notes did not; on default of interest, foreclosure proceedings were brought for the whole debt, but it could not be collected; the present action was brought on one of the notes, which if accelerated would have been barred by the statute of limitations; the court held that the notes were not accelerated, stating, however, that decisions in other states were "inharmonious").

E. H. & J. A. Meadows Co. v. Bryan, 195 N.C. 398, 142 S.E. 487 (1928).

Anton A. Vreede, M.D., P.C. v. Koch, 94 N.C. App. 524, 380 S.E.2d 615 (1989) (citing *Williston*; where the court stated that acceleration does not occur automatically on default, even if the contract does not expressly provide for acceleration at the option of the obligee).

Okla: *Damel v. Aetna Life Ins. Co.*, 1919 OK 71, 72 Okla. 122, 179 P. 760, 5 A.L.R. 434 (1919).

Ore: *Federal Recovery of Washington, Inc. v. Wingfield*, 162 Or. App. 150, 986 P.2d 67, 39 U.C.C. Rep. Serv. 2d 125 (1999) (citing *Williston*).

Tenn: *Batey v. Walter*, 46 S.W. 1024 (Tenn. Ch. App. 1897).

Wash: *White v. McMillan*, 37 Wash. 34, 79 P. 495 (1905).

39. Federal: *Continental Illinois Nat. Bank & Trust Co. of Chicago v. Best*, 20 F. Supp. 80 (S.D. N.Y. 1937).

Ark: *Hodges v. Taft*, 194 Ark. 259, 106 S.W.2d 605 (1937).

Ill: *Blakeslee v. Hoit*, 116 Ill. App. 83, 1904 WL 1956 (4th Dist. 1904).

Ind: *Insurance Co. of North America v. Martin*, 151 Ind. 209, 51 N.E. 361 (1898).

Kan: *Fisher v. Spillman*, 85 Kan. 552, 118 P. 65 (1911).

Neb: *National Bank of Commerce Trust & Savings Ass'n v. Ham*, 256 Neb. 679, 592 N.W.2d 477 (1999).

NY: *Quackenbush v. Mapes*, 123 A.D. 242, 107 N.Y.S. 1047 (1st Dep't 1908).

Heburn v. Reynolds, 73 Misc. 73, 132 N.Y.S. 460 (County Ct. 1911).

ND: *McCarty v. Goodsman*, 39 N.D. 389, 167 N.W. 503 (1918).

Tex: *Bowman v. Rutter*, 47 S.W. 52 (Tex. Civ. App. 1898).

Wyo: *Clause v. Columbia Savings & Loan Ass'n*, 16 Wyo. 450, 95 P. 54 (1908).

40. Colo: *Lovell v. Goss*, 45 Colo. 304, 101 P. 72 (1909).

NC: *Shoenterprise Corp. v. Willingham*, 258 N.C. 36, 127 S.E.2d 767 (1962) (a cause of action may accrue on the date of election by the terms of the contract, or because of a statutory provision; where an installment note with three joint and

to accelerate.⁴¹

In one case,⁴² the defendant owed the plaintiff bank under several different transactions he (and his wife, with respect to some of them) had entered into with the plaintiff. Thus, the defendant entered into a personal money reserve plan (PMRP) agreement with the plaintiff bank on July 5, 1989, borrowing \$1,000 under the agreement and making several payments. However, he failed to make several subsequent payments that became due. On or about August 15, 1989, the plaintiff delivered a letter to the defendant informing him that the bank was exercising its option to demand immediate payment of the outstanding balance of that loan.

On July 26, 1989, the defendant executed and delivered to the plaintiff a security agreement and a level payment note. The defendant failed to pay the installment due on March 17, 1990, and all subsequent installments. The plaintiff accelerated the balance due and exercised its right to repossess the collateral set forth in the security agreement. The plaintiff sold the collateral, but the defendant did not pay the deficiency balance owed. On September 26, 1989, a third transaction took place; the defendant and his wife executed a promissory note to the plaintiff. The note was due and payable on November 30, 1989, but the defendant defaulted on the note. The defendant thereafter filed two petitions in bankruptcy, during which the plaintiff was subject to automatic stays of 774 days.

several comakers gives the holder an option to accelerate without notice on default, the statute of limitation runs as to all comakers from the date of institution of an action against one of them).

Ore: Federal Recovery of Washington, Inc. v. Wingfield, 162 Or. App. 150, 986 P.2d 67, 39 U.C.C. Rep. Serv. 2d 125 (1999) (the principle, that a default on a single monthly installment does not cause the plaintiff's action for the balance of the lease to accrue, but the cause of action accrues when the plaintiff sends a notice of election to accelerate the balance due, is contrary to that suggested by the rule fol-

lowed by several courts that a cause of action accrues from the date of the default).

Tex: Hammann v. H.J. McMullen & Co., 122 Tex. 476, 62 S.W.2d 59 (1933).

41. Neb: National Bank of Commerce Trust & Savings Ass'n v. Ham, 256 Neb. 679, 592 N.W.2d 477 (1999).

Ore: Federal Recovery of Washington, Inc. v. Wingfield, 162 Or. App. 150, 986 P.2d 67, 39 U.C.C. Rep. Serv. 2d 125 (1999) (citing Williston).

42. Neb: National Bank of Commerce Trust & Savings Ass'n v. Ham, 256 Neb. 679, 592 N.W.2d 477 (1999).

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December 08, 2017 - 1:34 PM

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