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NO. 51197-5-II

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

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

Appellant,

v.

WASHINGTON FEDERAL NATIONAL ASSOCIATION,

Respondent.

Appeal from the Superior Court for Pierce County
The Honorable Helen G. Whitener

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The Respondent, Washington Federal National Association (Washington Federal) spends the majority of its response arguing that Washington's statutes of limitation should be tolled for the duration of any Federal Bankruptcy proceeding—from the filing of the bankruptcy case through the date the case is discharged. This argument is contrary to the primary purpose of statutes of limitation because it results in statutes of limitation being imposed without regard to the agreed statutory time periods and instead be dictated by the uncertain duration of any particular case. This point was not the basis for the trial court's grant of summary judgment against the Appellants and, accordingly, was not raised as an assignment of error in Appellants' brief.

The basis for the trial court's grant of summary judgment—that payments by a bankruptcy trustee are sufficient to reset the statute of limitations for actions on that debt against the debtor—was clear and obvious legal error based on Washington case authority. Payments from bankruptcy trustees are not voluntary payments by the debtor in acknowledgment of the debt and, therefore, do not reset the statute of limitations for actions on the debt. Washington Federal's perfunctory defense of the trial court's decision bears that out; it relies solely on a statutory-language argument, ignoring the bankruptcy cases cited by the appellants which directly repudiate its argument.

Instead, Washington Federal defends the trial court's grant of summary judgment on a legal proposition which has not been adopted in Washington, relying on the decisions of courts in Utah, Alaska, Kansas, and Iowa. Washington does not have to adopt the position of those states; chiefly, that a statute of limitations can be extended for years after the end of a bankruptcy without regard to how many years have passed since the claim against the debtor actually accrued. The better position is that adopted by Colorado, that if the limitation runs during the bankruptcy case, the creditor has 30 days after the stay is lifted to commence its claim against the debtor. Not only is that position consistent with a reasonable reading of the provision of the Bankruptcy Code, but it preserves the policy concerns which led to statutes of limitation in the first place. Accordingly, the appellants respectfully request that this Court reverse the trial court's grant of summary judgment, affirm that payments made a bankruptcy trustee are not voluntary payments by the debtor sufficient to reset the statute of limitations, and reject Washington Federal's interpretation of 11 U.S.C. § 108(c) and hold that a claimant has 30 days from the end of the automatic stay to commence a claims against the debtor if the statute of limitations for that claim expired during the stay.

ARGUMENT

A. Summary judgment should be reversed because a reasonable reading of Section 108(c) only requires that a claimant have 30 days from the end of the stay to bring a claim if the limitations period expired during the stay.

As pointed out by Washington Federal, Section 108(c) of the Bankruptcy Code (“the Code”), provides as follows:

[I]f applicable nonbankruptcy law ... fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor ... and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of –

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title [11 USCS § 362, 922, 1201 or 1301], as the case may be, with respect to such claim.

That section, however, is ambiguous because federal courts have split on whether it mandates a suspension of a limitations period when the limitations period expires after the automatic stay has been lifted. *See Rogers v. Corrosion Prods.*, 42 F.3d 292, 296–97 (5th Cir. 1995). Washington Federal also acknowledges that no Washington court has specifically considered the issue of whether the automatic stay tolls the limitations period in cases where the limitations period

does not expire until long after the stay has been lifted. (See Brief of Respondent, 4, fn. 3.)

Accordingly, this Court should adopt the position of the Colorado Supreme Court, as expressed in *Thurman v. Tafoya*, 895 P.2d 1050, 1054–58 (Colo. 1995), that there is no reason under Section 108(c) to toll a limitations period because of the debtor’s bankruptcy when the automatic stay is lifted long before the expiration of the limitations period. There, the court declined to interpret Section 108(c) as providing for near limitless tolling of a limitations period as the result of bankruptcy because to do so would frustrate the policy concerns underpinning the Bankruptcy Code and statutes of limitation. *Id.* at 1057. That is, a bankruptcy system designed to provide a “fair and expeditious administration of a bankrupt’s estate” would be undermined by a reading of Section 108(c) that suspends limitations periods, causing “uncertainty as to when claims will expire as well as to when a debtor’s estate will be settled.” *Id.* at 1057. Moreover, such a construction of Section 108(c) would not burden creditors who would still be “able to move a bankruptcy court to lift the stay, file after the bankruptcy proceedings are ended if there is still time to run on the applicable statute of limitations period, or file within thirty days after the stay is lifted.” *Id.* at 1057.

That construction is in accord with Washington’s longstanding caselaw on suspensions of statutes of limitation. In *McDermott v. Tolt Land Co.*, the Washington Supreme Court held that a plaintiff

who failed to commence an action to foreclose a lien was barred from doing so despite the fact that the period for the commencement of a foreclosure action expired while the defendant was in bankruptcy. 101 Wn. 114, 172 P. 207 (1918). Although *McDermott* was decided prior to the creation of the automatic stay, it is still good case law because it interpreted the predecessor to RCW 4.16.230, both of which contain the exact same language:

When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action

See id. at 118. The Court held that because no injunction had been issued and there was no statutory prohibition against bringing a foreclosure action after the commencement of bankruptcy, the plaintiff could not complain that he was not given extra time after the close of the bankruptcy to bring his foreclosure action. *Id.* at 119. The Court's reasoning in *McDermott* is not inconsistent with the state of Washington law since the creation of the automatic stay. The automatic stay is not an absolute bar to actions against a debtor during the pendency of a bankruptcy; it is an interruption of the pursuit of actions, which can be lifted by a debtor who petitions the bankruptcy court to lift the stay. *See* 11 U.S.C. § 362 (d)–(f). Thus, Washington Federal was in no different position than the plaintiff in *McDermott*, it had the ability, which it chose not to exercise, to petition the bankruptcy court to lift the stay so that it could proceed with its

foreclosure action. If it had done so and had been denied by the bankruptcy court, then it would be able to say that its ability to commence its foreclosure action had been stayed by an “injunction.” But it did not take any action with respect to its foreclosure action, waiting, instead, until a year and six months after the Ferderer Chapter 7 was dismissed and two and one-half years after the Clines’ Chapter 7 was dismissed. This sort of dilatory practice should not be condoned by allowing creditors use RCW 4.16.230 to tack indeterminate amounts of time onto the statute of limitations, waiting years after the close of a bankruptcy, and, then, when the price of real estate has improved, bring their action.

This case is a perfect example of the indefinite extensions that will result from the Washington Federals argument. The Clines statutory period will be extended for the twenty-month duration of their Chapter 7 case, but Ferderer’s would be extended thirty-three months on the same debt. This certainly is contrary to the purpose of statutes of limitation and to the debt relief intended by the bankruptcy code.

Here, Washington Federal, like the creditor in *Thurman*, waited 27 months from the dismissal of Gary Ferderer’s bankruptcy and 40 months from the end of the Clines’ bankruptcy to bring their claim. Essentially, Washington Federal slept on its rights, choosing to delay action so that the real-estate encumbered by its deed of trust could appreciate in value. This is the sort of behavior, addressed by

the *Thurman* court, which undermines the “fair and expeditious administration of the bankrupt’s estate” and adds “uncertainty as to when claims will expire as well as to when a debtor’s estate will be settled.” *See Thurman*, 895 P.2d at 1057. This Court should not condone such conduct and, should adopt the position of the Colorado Supreme Court by holding that Section 108(c) does not require the suspension of a limitations period during an automatic stay when the limitations period for a claim against the debtor expires more than 30 days after the stay has been lifted. In such situations, a claimant has more than enough time to bring its claim within the original limitations period without the need for any tolling. In this case they waited years to bring their foreclosure.

Lastly, Washington Federal’s response brief ignores the basic principles that justify statutes of limitation in the first place. “The purpose of statutes of limitations is to shield defendants and the judicial system from stale claims [because] [w]hen plaintiffs sleep on their rights, evidence may be lost and memories may fade.” *Burns v. Clinton*, 135 Wn.App. 285, 293, 143 P.3d 630 (2006) (citing *Crisman v. Crisman*, 85 Wn.App. 15, 19, 931 P.2d 163 (1997)). Washington Federal’s use of RCW 4.16.230, which suspends statutes of limitations if an injunction or statute prevents the commencement of an action, would eviscerate the entire purpose behind statutes of limitations in similar situations.

The statute of limitations exists to protect the defendants, the appellants, not the plaintiff, Washington Federal, a large bank who waited years after the defendants' bankruptcies had been dismissed to commence its foreclosure action and a year and one half after the six year statutory limitation expired in May of 2015. If banks can add as much time as a bankruptcy is pendent to the statute of limitations, a period that can last years (and in some cases more than a decade), then banks will be encouraged to sit on their rights, waiting as long as possible, without regard to when their cause of action accrued, to bring foreclosure actions so as to maximize their return on the real property foreclosed.

B. Payments from a bankruptcy trustee are not voluntary payments by the debtor in acknowledgment of a debt.

With regard to the actual basis for the trial court's grant of summary judgment, Washington Federal fails to provide relevant caselaw. The case on which it relies, *U.S. v. Quinones*, 36 B.R. 77, 79 (D.P.R. 1983), is from the District Court of Puerto Rico and is based on a federal statute having no application to this case. Specifically, the *Quinones* court held that for purposes of determining the start of a limitations period under 28 U.S.C. § 2415(a) a payment from a bankruptcy trustee can restart the limitations period. Washington Federal omits this point and elides relevant Washington caselaw indicating that payments from bankruptcy trustees are not

voluntary payments in acknowledgment of debts sufficient to restart state statutes of limitation. *See* Brief of Respondent, 12–13.

The relevant case on this issue, which Washington Federal essentially concedes with its perfunctory treatment of the topic, is *Easton v. Bigley*, 28 Wn.2d 674, 183 P.2d 780 (1947). In *Easton*, the Washington Supreme Court held that in order for a partial payment to restart the statute of limitations for actions on a debt, “the payment must be 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....” *Id.* at 680. And courts, understandably, have been reluctant to use payments made by bankruptcy trustees as grounds for reviving statutes of limitation because such payments are not voluntary. *See United States v. Lorince*, 773 F. Supp. 1082, 1092–93 (N.D. Ill. 1991).

For instance, in *United States v. Lorince*, the District Court for the North District of Illinois reviewed the caselaw regarding the “voluntariness” of payments made by a bankruptcy trustee and rejected the reasoning of the Puerto Rico District Court, noting that for that reason other courts have rejected the notion that payments made by bankruptcy trustees revive statutes of limitations against the debtor. *Id.* at 1092–93 (citing *Am. Woolen Co. v. Samuelsohn*, 226 N.Y. 61, 67, 123 N.E. 154 (1919); *Simpson v. Tootle, Wheeler & Motter Mercantile Co.*, 141 P. 448, 449 (Okla. 1914)). The *Lorince* court also pointed out that subsequent courts have rejected the

notion set forth *Quinones* that “the debtor’s mere acceptance of a reduction in the debt from application of the collateral proceeds [in a bankruptcy proceeding] reflects a “promise” by the debtor renewing the statute of limitations....” *Id.* at 1092–93 (citing *United States ex rel Small Bus. Admin. v. Richardson*, Civil Action No. 88-4158, 1990 U.S. Dist. LEXIS 2753, at *5–6 (E.D. Pa. Mar. 12, 1990)). Based on its review of the authorities, the *Lorince* court held that a creditor’s receipt of a payment from the bankruptcy trustee following the auction of the debtor’s assets did not constitute a voluntary payment sufficient to revive the statute of limitations on actions by the creditor against the debtor on the underlying debt. *Id.* at 1095.

Lastly, Washington Federal’s complaint that *Easton* pre-dates the passage of RCW 4.16.270 is misplaced because that statute “is substantially a codification of the common-law rule” that a partial payment by a debtor restarts the statute of limitation on the underlying debt. *Hamilton v. Pearce*, 15 Wn.App. 133, 137–38, 547 P.2d 866 (1976). The Supreme Court’s holding in *Easton*—that the statute of limitations for actions on a debt is not revived by a partial payment unless the payment was a voluntary acknowledgement of the debt by the debtor—was not affected by the subsequent passage of RCW 4.16.270 because that statute simply codified the common-law rule being addressed by the Court.

In sum, the majority of the authorities on the subject do not conclude, as suggested by Washington Federal, that a payment made

by a bankruptcy trustee to a creditor constitutes the debtor's voluntary acknowledgement of the underlying debt and, therefore, revives the statute of limitations. The opposite is true; such payments are not voluntarily made by debtors and, therefore, have no effect on the statute of limitations. Accordingly, the trial court's grant of summary judgment on the basis that payments made to Washington Federal by the trustees in the Clines' and Ferderer's bankruptcies were voluntary payments in acknowledgment of the underlying debt which restarted the statute of limitations was plain and obvious error and this Court should reverse the trial court's decision.

CONCLUSION

Based on the foregoing, this Court should reverse the trial court's grant of summary judgment in favor of Washington Federal. The trial court based its grant of summary judgment on plain error of law because payments made by bankruptcy trustees are not voluntary payments made by the debtor and, therefore, are insufficient to revive the statute of limitations under Washington law. Secondly, Washington Federal's argument that the trial court's grant of summary judgment be sustained on the basis that the statute of limitations was tolled during the Clines' and Ferderer's bankruptcies should be rejected because the statute of limitations on its claims ran on May 9, 2015, 12 months after the automatic stay was lifted as to Ferderer and 25 months as to the Clines. Washington Federal slept

on its rights and should not be able to benefit from an interpretation of Section 108(c) of the Bankruptcy Code which, as illustrated in the Colorado Supreme Court's decision in *Thurman v. Tafoya*, has no application when the applicable statute of limitations does not expire during the automatic stay.

Respectfully Submitted this 20th day of February, 2018.

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CERTIFICATE OF SERVICE

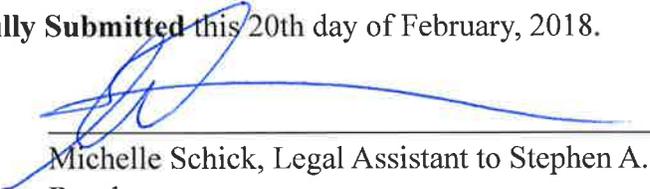
I, Michelle Schick, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed by Campbell, Dille, Barnett & Smith, PLLC, and that on today's date, February 20, 2018, I served **Appellant's Reply Brief** in the manner indicated by directing delivery to the following individuals:

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