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Case No. 51425-7-II

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

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE
FOR SAXON ASSET SECURITIES TRUST 2007-2 MORTGAGE
LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-2

Appellant,
v.

GEORGE BECK et al.

Respondents

**OPENING BRIEF OF APPELLANT
DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR SAXON ASSET SECURITIES TRUST 2007-2
MORTGAGE LOAN ASSET BACKED CERTIFICATES,
SERIES 2007-2**

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I. INTRODUCTION

A non-judicial foreclosure action was commenced because borrower George P. Beck defaulted on his mortgage loan. The foreclosure trustee issued a Notice of Default to Beck which contained language suggesting Deutsche Bank's future intent to accelerate the obligation if it remained unpaid. Beck did not make any further payments, and he was eventually sent another notice informing him of a reinstatement amount that was less than the total loan debt.

Deutsche Bank later converted its proceeding to a judicial action and obtained orders foreclosing the interests of all parties except Beck. When Deutsche Bank moved for summary judgment against Beck, he cross-moved for the same relief and prevailed.¹ As a result of this decision, Beck's loan debt was eviscerated. However, there are multiple grounds why the trial court erred in granting summary judgment to Beck.

First, the warning of a future intent to accelerate in the Notice of Default was not a clear, unequivocal act necessary to make the loan immediately due in full. *See, e.g., Erickson v. America's Wholesale Lender et al.*, Slip Opin. No. 77742-4-I (Apr. 16, 2018) (unpublished).

¹ In addition, the trial court awarded \$6,187.75 to Beck in attorneys' fees and costs, with a 12% interest rate on the judgment. CP 221-222.

Second, acceleration had either not occurred or was abandoned because Beck was later advised he did not owe the total balance due.

Third, even if the Notice of Default did invoke acceleration, the Deed of Trust Act (“DTA”) constrained the parties’ rights, and the DTA does not make the exercise of an acceleration clause inchoate during a non-judicial foreclosure until after 11 days prior to a trustee’s sale.

Fourth, regardless of the Notice of Default’s language, its issuance commences a foreclosure action and stops the applicable statute of limitations from running.

Fifth, at a minimum, remand would be appropriate because there are genuine issues of material fact as to whether Beck reaffirmed that he owed monthly installments, or whether the trustee had authority to include language concerning acceleration in the Notice of Default that differed from the Deed of Trust.

For these reasons, this Court should reverse the summary judgment ruling below, and vacate the fees and costs awarded to Beck.

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II. STATEMENT OF THE CASE

A. Factual History.

On or about February 14, 2007, in consideration for a loan, borrower Beck executed a promissory note (the “Note”) for \$433,000.00. CP 16-20.² Beck agreed that the loan’s interest rate would become adjustable starting in March 2009. CP 17, ¶ 4(a). In addition, the Note references that a security instrument describes conditions where the lender may require immediate payment in full of all amounts owed. CP 19, ¶ 11.

Beck executed that security instrument, *i.e.* Deed of Trust, and the same was recorded on February 21, 2007 with the Lewis County Auditor. CP 23-40. The recorded Deed of Trust encumbers real property commonly known as 620 Winlock Vader Road, Winlock, WA 98596 (the “Property”). CP 25.

The Deed of Trust specifies that, prior to acceleration of the loan debt owed, the lender must provide notice explaining:

(a) the default; (b) the action required to cure the default, (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property at public auction at a date not less than 120 days in the future.

² The original lender specially-indorsed the Note to Appellant, *i.e.* Deutsche Bank National Trust Company, as Trustee for Saxon Asset Securities Trust 2007-2 Mortgage Loan Asset Backed Certificates, Series 2007-2 (“Deutsche Bank”). CP 20.

CP 33, ¶ 22.

In June 2008, before the Note's interest rate adjusted, Beck made his last loan repayment. CP 180. Consequently, Beck defaulted on the loan. CP 18, ¶ 7(B).

On or about October 17, 2008, Regional Trustee Services Corporation ("Regional Trustee") commenced a non-judicial foreclosure action by issuing a Notice of Default to Beck. CP 182-186. The Notice of Default contained a sub-paragraph informing Beck:

If the default(s) described above is (are) not cured within thirty days of the mailing of this notice, the lender hereby gives notice that the entire principal balance owing on the note secured by the Deed of Trust described in paragraph 1 above, and all accrued and unpaid interest, as well as costs of foreclosure, shall immediately become due and payable. Notwithstanding acceleration, the grantor or the holder of any junior lien or encumbrance shall have the right after acceleration to reinstate by curing all defaults and paying all costs, fees and advances, if any, made pursuant to the terms of the obligation and/or deed of trust on or before 11 days prior to a Trustee's sale.

CP 183, ¶ 5(c).³

On October 31, 2008 and October 10, 2011, assignments of the Deed of Trust were recorded with the Lewis County Auditor, the latter of which was in favor of Deutsche Bank. CP 42-43, 45-46.

³ No trustee's sale was ever scheduled during the non-judicial process.

On May 10, 2012, Beck's ex-wife quitclaimed her interest in the Property to him pursuant to a dissolution decree. CP 48-50.

On or about June 5, 2013, loan servicer Ocwen Loan Servicing, LLC ("Ocwen") sent Beck a letter stating that he owed a total of \$217,858.78 in past due amounts on the loan. CP 53. This sum was significantly less than the *total* amount owed on the loan in October 2008. CP 172 (Fair Debt notice showing a total debt of \$455,806.95).⁴

B. Procedural History.

On July 6, 2016, Deutsche Bank converted its foreclosure of the Property to a judicial action against Beck and other interested parties, under Case No. 16-2-00695-21 (Lewis Cnty. Supr. Ct.). CP 4.

On September 21, 2016, the interest of Defendant United States Internal Revenue Service in the Property was foreclosed by stipulation. CP 77-81.

On November 29, 2017, Deutsche Bank moved for summary judgment. CP 86-111. Appellant supported its motion with a declaration and business records. CP 112-154.

On December 1, 2017, Deutsche Bank obtained an order of default as to all remaining defendants except Beck. CP 155-156.

⁴ Beck admits also receiving "several Notices of Default" after this date in connection with the non-judicial foreclosure process. CP 84, ¶ 12.

On December 6, 2017, Beck cross-moved for summary judgment, contending Deutsche Bank’s foreclosure was time-barred, and Deutsche Bank was not actually the proper party to foreclose. CP 157-178. Beck submitted a declaration in which he unabashedly stated, “I have not made any payments on the loan since June 2008.” CP 180.

On January 5, 2018, the trial court granted Beck’s cross-motion for summary judgment, finding no issues of material fact. CP 196-197. The trial court, however, did not articulate a basis for its decision. *Id.* This appeal timely followed. CP 198-199.

III. ASSIGNMENT OF ERROR

1. The trial court erred in denying Deutsche Bank’s motion for summary judgment, and instead granting Beck’s cross-motion for summary judgment with an award of attorneys’ fees and costs; this ruling allows Beck to avoid repayment of his loan debt.

IV. ARGUMENT

A. Standard of Review.

An order granting summary judgment is reviewed *de novo*, with the Court of Appeals engaging “in the same inquiry as the trial court.” *Beaupre v. Pierce Cnty.*, 161 Wn.2d 568, 571, 166 P.3d 712 (2007).

Summary judgment is only proper if the pleadings, depositions, answers to discovery, together with affidavits, show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* CR 56(c); *see also Knox v. Microsoft Corp.*, 92 Wn. App. 204, 962 P.2d 839 (1998), *review denied*, 137 Wn.2d 1022, 980 P.2d 1280 (1999); *Vacova Co. v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (1991).

Summary judgment is appropriate if, after considering the evidence, reasonable persons could reach only one conclusion. *See Hansen v. Friend*, 118 Wn.2d 476, 824 P.2d 483 (1992); *see also Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989) (if the moving party demonstrates that an issue of material fact is absent, then the non-moving party must articulate specific facts establishing a genuine issue).

Here, the summary judgment evidence showed that Beck's debt was not accelerated and that Deutsche Bank was the proper beneficiary entitled to foreclose because of Beck's unequivocal default. Even if acceleration had occurred, however, foreclosure commenced prior to expiration of the statute of limitations.

As such, the trial court's order should be reversed for the reasons set forth below, and the case remanded for either the entry of a judgment in Deutsche Bank's favor, or at a minimum, further proceedings to resolve genuine issues of material fact.

B. Deutsche Bank Could Enforce Beck’s Debt Obligation in a Timely Manner.

Under Washington law, the statute of limitations on enforcement of a contract such as a promissory note or deed of trust is six years.

Edmundson v. Bank of Am., N.A., 194 Wn. App. 920, 927, 378 P.3d 273 (2016); *Bingham v. Lechner*, 111 Wn. App. 118, 126, 45 P.3d 462 (2002); *see also* RCW 4.16.040(1). When a promissory note provides for repayment of the debt in installments, “the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it.” *Edmundson*, 194 Wn. App. at 930, *citing Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142 (1945); *see also Heintz v. U.S. Bank Trust, N.A. et al.*, 2 Wn.App.2d 1007 (Jan. 16, 2018) (unpublished).

The statute of limitations on an installment note may be triggered for all payments that have not yet become due if the loan is accelerated, *i.e.*, all amounts owing under the note are declared immediately due and payable on a certain date. *Kirsch v. Cranberry Fin., LLC*, 178 Wn. App. 1031, at *4 (Dec. 23, 2013) (unpublished), *citing* RCW 62A.3-118; *see*

also *4518 S. 256th, LLC v. Karen L. Gibbon, P.S.*, 195 Wn. App. 423, 434-35, 382 P.3d 1 (2016).⁵

In this case, the evidence does not support the trial court’s decision for several reasons.

1. The Warning of a Future Act Did Not Constitute Acceleration.

First, a lender must act to effectuate acceleration—a borrower’s default by itself is not sufficient. *Heintz, supra.* at *5, citing *4518 S. 256th, supra.* at 435; see also *Erickson v. America’s Wholesale Lender et al., supra.* at *6 (unpublished), citing *A.A.C. Corp. v. Reed*, 73 Wn.2d 612, 615, 440 P.2d 465 (1968).

As Division Three held in *Glassmaker v. Ricard*, “acceleration must be made in a clear and unequivocal manner which effectively apprises the maker that the holder has exercised his right to accelerate the payment date.” 23 Wn. App. 35, 38, 593 P.2d 179 (1979); see also *Weinberg v. Naher*, 51 Wash. 591, 594, 99 P. 736 (1909) (letters stating that the loan “will be called in” unless the borrower obtained an insurance policy did not constitute acceleration because this merely threatened exercising a future option); *Bank of New York Mellon v. Stafne*, 2016 WL

⁵ The maturity date of a note can only be accelerated through a clause contained in a separate security agreement, such as a deed of trust. See 8 Wash. Prac., UCC Forms 9:6005, citing *Wilson v. Kirchan*, 143 Wash. 342, 255 P. 368 (1927).

7118359, *3 (W.D. Wash. Dec. 7, 2016) (“[t]o trigger acceleration ... a creditor must clearly and unequivocally indicate, by some affirmative action, that the option to accelerate has been exercised. A statement of potential future action does not constitute the affirmative action required to accelerate a debt.”). A clear, unequivocal action is necessary even where loan documents provide that acceleration can transpire “without notice.” *See, e.g., In re Holiday Mart, Inc.*, 9 B.R. 99, 106 (Bankr. D. Haw. 1981).

Asserting a debt “will be accelerated” is fundamentally different than “has been accelerated” in the past tense, or “is now accelerated” in the present tense. *Accord* Black’s Law Dictionary (10th ed. 2014) (the plain meaning of “acceleration” is “[t]he advancing of a loan agreement’s maturity date so that payment of the entire debt is *due immediately*....”) (Emphasis added).

For example, Division One recently rejected a statute of limitations defense where a notice threatened that “if the default is not cured on before [date], the mortgage payments *will be accelerated* with the full amount remaining accelerated and becoming due and payable in full....” *Erickson v. America’s Wholesale Lender et al.*, *supra.* at *6 (unpublished) (emphasis in original). The Court found this notice “simply informed [the

borrower] of a future contingent event,” and there was no acceleration of the debt. *Id.* at *7.

By contrast, in *Wash. Fed. v. Azure Chelan LLC*, Division Three analyzed a notice that informed the borrower of an “accelerated balance due,” and commanded that “all accrued interest and all other amounts that may be owing thereunder *are immediately* due and payable.” 195 Wn. App. 644, 382 P.3d 20 (2016) (emphasis added). Division Three found this language demonstrated clear, unequivocal acceleration. *Id.* at 664; *see also Jackson v. Wells Fargo Bank, N.A.*, 90 So.3d 168 (Ala. 2012) (notice stating the lender “hereby accelerates to maturity the remaining unpaid balance of the debt.”); *but see Beal Bank v. Crystal Props., Ltd.*, 268 F.3d 743, 752 (9th Cir. 2001) (holding that conflicting statements failed to “clearly invoke the option to accelerate....”).

Unlike the *Wash. Fed.* notice, the Notice of Default in this case did not specify an “accelerated balance due” and did not command that the loan was “immediately due and payable.” CP 168-170.⁶ Moreover, the

⁶ The “Notice Required by the Fair Debt Collection Practice Act” (FDCPA) accompanying the Notice of Default contained an outstanding balance of \$455,806.95. CP 172. But the FDCPA requires providing a borrower with the total amount owed. *See, e.g., Laak v. Quick Collect, Inc.*, 2017 WL 6559909, *1 (E.D. Wash. Dec. 22, 2017), *citing* 15 U.S.C. § 1692g(a). Compliance with federal law cannot cause acceleration, just as compliance with state foreclosure law cannot automatically give rise to a FDCPA violation. *See, e.g., Amador v. Cent. Mortg. Co.*, 2012 WL 405175, *2 (W.D. Wash. Feb. 8, 2012).

Notice of Default presented information referencing Beck's ability to pay less than the total debt and reinstate "before recording of the Notice of Trustee's Sale," an event which never occurred. CP 168, ¶ 3; CP 169, ¶ 4.

Therefore, the Notice of Default was more like the notice in *Erickson*; it merely contained a warning to Beck of future intent, and not an unequivocal acceleration. As a result, the trial court should not have absolved Beck of his repayment obligation when it invalidated Deutsche Bank's foreclosure through summary judgment.

2. The Record Shows Deutsche Bank Had Not Accelerated the Debt or Else Had Abandoned That Remedy.

Second, the summary judgment record indicates that acceleration had either not occurred or was later abandoned.

Under Washington law, once notice of acceleration is given to a borrower, it nonetheless "may be waived by inconsistent actions." 27 Wash. Prac., Creditors' Remedies - Debtors' Relief § 3.119. At common law, a waiver of acceleration is left to the lender's discretion. *See* 46 Am. Jur. 2d Bills and Notes § 170 (Sept. 2016) ("The exercise of an option to accelerate is not irrevocable, and the holder of a note who has exercised the option of considering the whole amount due, may subsequently waive this right and permit the obligation to continue in force under its original terms for all purposes."); *see also Mitchell v. Fed. Land Bank of St. Louis*,

206 Ark. 253, 174 S.W.2d 671 (Ark. 1943), *citing* Jones on Mortgages, 8th Ed., Sec. 1513 (concerning acceleration, “[t]he mortgagee may waive such option at any time, even after taking steps to exercise it.”).

A waiver of contractual remedies can be unilateral and without consideration. *See, e.g., Panorama Residential Protective Ass’n v. Panorama Corp. of Wash.*, 97 Wn.2d 23, 28, 640 P.2d 1057 (1982) (finding a voluntary waiver of lease charges). Waiver may also be inferred from circumstances indicating such intent. *See, e.g., Jones v. Best*, 134 Wn.2d 232, 242, 950 P.2d 1 (1998), *as corrected* (Feb. 20, 1998).

In *Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, a creditor accelerated lease payments, but then continued monthly installment billing. 52 Wn. App. 497, 502, 761 P.2d 77 (1988). Division One found that this type of activity, along with the acceptance of funds and a statement disclaiming a repossession remedy, “are inconsistent with acceleration” and the creditor had waived that election. *Id.* at 502.

Here, the loan servicer’s June 2013 letter to Beck stated that his “mortgage payments are past due,” with a total of \$217,858.78 owed in arrearages. CP 149-150. This amount was far less than the \$455,806.95 quoted in the October 2008 FDCPA notice; since Beck did not “make any further payments on the loan” after that date, the June 2013 letter suggests

that either no acceleration previously occurred or Deutsche Bank waived its acceleration remedy. CP 111, 180.

Additionally, the servicer's letter notified Beck: "failure to bring your account current may result in our election to exercise our right to foreclose on your property. Upon acceleration, your total obligation will be immediately due and payable without further demand." CP 150; *see also* CP 113, ¶ 9 (testimony regarding the letter). This assertion likewise evidences that the loan had either not been accelerated, or else Deutsche Bank abandoned acceleration and the loan remained payable in monthly installments. A clear, unequivocal acceleration was not invoked until Deutsche Bank filed its complaint. CP 7-8, ¶ 6.⁷

3. The DTA Restricts When an Election to Accelerate Becomes Inchoate.

Third, even if the Notice of Default clearly and unequivocally accelerated Beck's debt, and such remedy was not waived, a non-judicial foreclosure process must strictly occur in the manner provided for and subject to the rights given to a borrower under the DTA. *See Jordan v. Nationstar Mortg., LLC*, 185 Wn.2d 876, 890-91, 374 P.3d 1195 (2016)

⁷ When receiving a post-remand judgment, Deutsche Bank concedes it would not be entitled to recover the installments owed outside six years prior to the complaint's filing. *See, e.g., Edmundson, supra.*; *see also* CP 93 (briefing to trial court).

(“We have held that the deed of trust act in chapter 61.24 RCW cannot be contracted around....”), citing *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 107, 297 P.3d 677 (2013); *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 107, 285 P.3d 34 (2012).

When the Legislature created non-judicial foreclosure proceedings through the DTA, it abrogated common law rules governing acceleration of secured notes. As the State Supreme Court observed in *Rustad Heating & Plumbing Co. v. Waldt*:

An examination of the legislation creating the statutory deed of trust provided for in RCW 61.24 reveals the act created a security instrument allowing for quicker realization of the security interest. In exchange, *the remedies available in conventional mortgages allowing acceleration of the entire debt and deficiency judgments were taken away.*

91 Wn.2d 372, 375, 588 P.2d 1153 (1979) (emphasis added).

The DTA authorizes a borrower to reinstate a defaulted loan by paying the amount owed in arrears “other than such portion of the principal as would not then be due had no default occurred,” *i.e.* by paying less than the total debt obligation, up to 11 days prior to a trustee’s sale. RCW 61.24.090(1).⁸ Such reinstatement results in the obligation being treated “as though no acceleration had taken place.” RCW 61.24.090(3).

⁸ Reinstatement of a loan brings it back to good standing, while a payoff completely terminates the debt. *See, e.g.*, 27 Wash. Prac., Creditors’ Remedies - Debtors’ Relief § 3.56.

In *Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank*, Division One found that RCW 61.24.090 “should not be interpreted as precluding an acceleration clause in a loan agreement, or making such a clause a nullity in a deed of trust foreclosure.” 80 Wn. App. 655, 670, 910 P.2d 1308 (1996). But Deutsche Bank does not contend that the Deed of Trust’s acceleration clause was precluded, or made a nullity during non-judicial foreclosure. Rather, the clause simply could not become effective until Beck’s right to reinstate first lapsed by operation of law; otherwise the DTA would create an absurdity where borrowers can be contractually compelled to pay an accelerated loan balance yet simultaneously possess the statutory right to reinstatement by paying only delinquent amounts.⁹

Thus, although the Deed of Trust contained a valid acceleration clause, it only became inchoate: 1) after 11 days prior to a trustee’s sale, or 2) in the event of a judicial foreclosure as the parties could not contract around the DTA’s time-limitation on enforcing that remedy. *See, e.g., Jordan, supra.* (prohibiting a contractual modification to the DTA’s mandate that agricultural properties must be foreclosed judicially).

⁹ When enacting state law, the Legislature is presumed to avoid intending absurd results. *City of Yakima v. Godoy*, 175 Wn. App. 233, 236, 305 P.3d 1100, *review denied*, 178 Wn.2d 1019, 312 P.3d 650 (2013).

The judicial foreclosure complaint in this case expressly invoked acceleration: “plaintiff has elected to and does exercise the option granted to it in the Note and Deed of Trust to declare the whole of the balance of both principal and interest due and payable as provided in the Note and Deed of Trust.” CP 7-8.

By comparison, earlier language in the Notice of Default, commencing non-judicial foreclosure pursuant to the DTA¹⁰, could not accelerate the debt *at that point in time* because of the statutory reinstatement right, *i.e.* paying less than the total debt owed, afforded to borrowers in default like Beck. *See Erickson, supra.* at *9 (unpublished) (holding that RCW 61.24.090(1) precluded the debt from being accelerated at the time of the mailing of the notices at issue.”); CP 183, at ¶ 5(c) (Notice of Default).

Indeed, a sale was not even scheduled after non-judicial foreclosure commenced in accordance with the DTA; the statutory deadline that would have given effect to acceleration was nothing more than a shadow on the horizon.

In sum, Deutsche Bank could not enforce the acceleration of Beck’s debt during an incomplete non-judicial process as reinstatement

¹⁰ *See* Sect. 4, *infra*.

was still an available statutory option. A lender's contractual right to acceleration does not become inchoate until the deadline under RCW 61.24.090 passes. Here, that did not occur.

4. The Notice of Default Stopped the Statute of Limitations From Running.

Fourth, regardless of the Notice of Default's language, that document itself commenced an action tolling expiration of the statute of limitations.

Case law recognizes that nonjudicial foreclosure commences "by the giving of a notice of default." *Campanella v. Rainier Nat. Bank*, 26 Wn. App. 418, 420, 612 P.2d 460 (1980); *see also Casey v. Chapman*, 123 Wn. App. 670, 675, 98 P.3d 1246 (2004), *as amended* (Oct. 25, 2004) (same); *Lake v. MTGLQ Inv'rs, L.P.*, 2017 WL 3839590, *4 (W.D. Wash. Sept. 1, 2017) ("Quality commenced foreclosure proceedings by issuing a notice of default on January 29, 2016, before the expiration of the statute of limitations..."); *Mills v. Bank of Am.*, 2014 WL 4202465, *1 (W.D. Wash. Aug. 22, 2014) ("BWMW initiated the foreclosure process, sending a Notice of Default to Mills and posting it to Mills' addresses on record."); *Tran v. Bank of Am.*, 2014 WL 2170294, *1 (W.D. Wash. May 23, 2014) ("BANA sent Tran a notice of default and re-initiated the foreclosure process."); *Fagerlie v. HSBC Bank*, 2013 WL 1914395, *1 (W.D. Wash.

May 8, 2013) (“HSBC Bank, pursuant to RCW 61.24, et seq., commenced the non-judicial foreclosure process... by issuing the Plaintiff a Notice of Default.”); accord RCW 61.24.031(1)(c), (1)(f) (discussing the right to a meeting to avoid foreclosure prior to a Notice of Default’s issuance).

As Division One states in *Heintz, supra.*:

Serving a written notice of default constitutes commencement of an action to enforce an obligation under a promissory note. Service of the written notice of default tolls the statute of limitations until 120 days after the date scheduled for nonjudicial foreclosure of the deed of trust.

2 Wn.App.2d 1007 at *3 (unpublished), citing *Edmundson, supra.* at 930 (serving a written notice of default before the statute of limitations ran tolls the statute); *Bingham v. Lechner, supra.* at 127-31; RCW 61.24.040(6).

This Court recently noted that, under RCW 4.16.170, “for the purpose of tolling any statute of limitations an action commences when a complaint is filed or summons is served.” *English v. Buss*, 199 Wn. App. 1019 (2017) (unpublished); see also *Glassmaker, supra.* at 38. The equivalency between issuing a notice of default and commencing a legal action is apparent because the DTA was created to “supplement the existing foreclosure procedure of the trust deed.” *Brown v. Wash. State Dep’t of Commerce*, 184 Wn.2d 509, 515, 359 P.3d 771 (2015), quoting Gose, *The Trust Deed Act in Washington*, 41 Wash. L. Rev. 94 (1966).

Since either a non-judicial or judicial foreclosure must commence before expiration of a six-year statute of limitations on the debt owed, it follows that issuing a Notice of Default or filing a complaint commences the respective type of action. *See Walcker v. Benson & McLaughlin, P.S.*, 79 Wn. App. 739, 745, 904 P.2d 1176 (1995), *citing* RCW 61.24.020 (“the limitation period for foreclosure of mortgages should apply.”). In other words, if the limitation period under RCW 4.16.040(1) applies to deeds of trust (which it clearly does), then there must be a legal mechanism to stop or toll that period, *i.e.* RCW 4.16.170 (commencing an action).¹¹

Consequently, regardless of the Notice of Default’s language concerning Beck’s default, its issuance on or about October 17, 2008 commenced a non-judicial foreclosure action. *See, e.g., Heintz, supra.; Campanella, supra.* This event stopped the statute of limitations from running as to Beck’s June 2008 default, whether accelerated or not. CP 180 (admitting default date); *see also Renfroe v. Quality Loan Serv. Corp. of Wash.*, 2017 WL 6733968, *6 (E.D. Wash. Dec. 29, 2017), *citing Edmundson, supra.* (analyzing an accelerated obligation; “[a] foreclosure is timely if the notice of default is issued within six years of the expired

¹¹ Other events can toll the statute of limitations as well. *See, e.g., Merceri v. Deutsche Bank AG*, 2 Wn.App.2d 143, 408 P.3d 1140 (2018), *citing* RCW 4.16.230 (bankruptcy stay tolls period).

statute of limitations.... issuance of the notice of default renders the non-judicial foreclosure timely.”).

The statute of limitations remained tolled after the Notice of Default’s issuance, as no sale date was scheduled. *Heintz, supra.* at *3 (“the written notice of default tolls the statute of limitations until 120 days after the date scheduled for nonjudicial foreclosure of the deed of trust.”).¹² Then, Deutsche Bank ultimately commenced a new, judicial foreclosure action with acceleration language in its complaint.

The trial court erred in granting summary judgment to Beck, which barred Deutsche Bank from prevailing on a timely foreclosure.

5. At a Minimum, There Are Unresolved Issues of Material Fact that Necessitate Remand.

Fifth, although Deutsche Bank maintains that the record supports a determination that it had either: 1) not accelerated Beck’s debt, 2) abandoned acceleration if it occurred, 3) could not accelerate until after 11

¹² It is true that, while a Notice of Default does not expire under the DTA, foreclosure also cannot “remain pending indefinitely in the face of years of inaction by the trustee.” *Bingham v. Lechner, supra.* at 131 (finding over six years between the commencement of two different foreclosure proceedings was “too late”). In this case, however, Beck’s default was not simply ignored. Rather, the record reveals: 1) “several notices of default” issued to Beck over a period of multiple years, and 2) a June 2013 letter - sent within six years after default - calling for Beck to pay the arrearages owed or otherwise seek loan modification assistance from the servicer. CP 84, ¶ 12; CP 149-154 (respectively). At a minimum, remand is appropriate to further adduce material facts outside the appellate record evidencing Deutsche Bank did not sleep on its right to enforce Beck’s obligation.

days prior to sale, or 4) tolled the statute of limitations through issuance of a Notice of Default, remand is an equally reasonable outcome based on the existence of unresolved factual issues.

When reasonable minds might reach different factual conclusions, summary judgment is improper and a case must proceed to trial. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 616 P.2d 644 (1980); *see also Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 850 P.2d 1298 (1993) (a material fact is one on which the litigation's outcome depends).

Because Beck obtained summary judgment, all inferences on appeal should be construed in Deutsche Bank's favor. *See, e.g., Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 594, 305 P.3d 230 (2013), *citing Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002) ("We construe the facts and draw all factual inferences in the light most favorable to the nonmoving party. Therefore, in reviewing the trial court's grant of summary judgment to Kofmehl, we construe the facts in Baseline's favor.").

In this case, there is an undeveloped record concerning whether Beck reaffirmed that he owed monthly installments, and whether the foreclosure trustee had authority to include acceleration language in the Notice of Default differing from the lender's rights in the Deed of Trust.

**a. A Reaffirmation of Monthly Installments
Supersedes a Time-Bar to Collecting the
Original Debt.**

Claims subject to a statute of limitations can be revived by a borrower's acknowledgment of the debt owed. RCW 4.16.280; *see also Griffin v. Lear*, 123 Wash. 191, 212 P. 271 (1923). To this end, “[g]enerally, an acknowledgment must be in writing; recognize the existence of the debt; be communicated to the creditor or to another person with intent that it be communicated to the creditor; and not indicate an intent not to pay.” *Jewell v. Long*, 74 Wn. App. 854, 857, 876 P.2d 473 (1994).

Examples of reaffirmations that revive expired debts include *Hall v. Bangasser*, 2 Wn.App.2d 1006 (2018) (unpublished) (e-mail promising to pay was sufficient to satisfy RCW 4.16.280); *Fetty v. Wenger*, 110 Wn. App. 598, 36 P.3d 1123 (2001), *as amended on denial of reconsideration* (2002) (letter requesting itemized billing satisfied RCW 4.16.280), *Lombardo v. Mottola*, 18 Wn. App. 227, 566 P.2d 1273 (1977) (letter directing creditor to third party for payment “takes the case out of the statute of limitations.”).

In this case, Beck was not entitled to summary judgment given a need to develop facts concerning whether he reaffirmed the loan debt. For instance, a Quit Claim Deed in favor of Beck recorded in 2012 references

a dissolution proceeding that involved the Property; remand would determine if Beck admitted the existence of monthly mortgage installments due and owing as part of that proceeding. CP 48.

b. Only the Lender Can Exercise Acceleration After a Specified Date.

There is also a material issue of fact as to whether Regional Trustee could unilaterally invoke acceleration of Beck's debt in the Notice of Default when: 1) it is strictly the lender's contractual right to exercise that remedy, and 2) the purported "acceleration" language does not comport with the Deed of Trust.

It is well-established that "[a] court may not create a contract for the parties which they did not make themselves. It may neither impose obligations which never before existed, nor expunge lawful provisions agreed to and negotiated by the parties." *Pritchett v. Picnic Point Homeowners Ass'n*, -- Wn.App.2d --, 413 P.3d 604, 611 (2018), quoting *Agnew v. Lacey Co-Ply*, 33 Wn. App. 283, 288, 654 P.2d 712 (1982); see also *Redding v. Rowe*, 36 Wn. App. 822, 825-26, 678 P.2d 337 (1984) ("The Reddings did not contract for acceleration upon the transfer of collateral. Thus, they are not entitled to that remedy. 'Neither this court nor a trial court may make a new contract for the parties.'") (citation omitted).

The Deed of Trust grants the lender an exclusive right to invoke acceleration “following Borrower’s breach of any covenant or agreement” therein. CP 33, ¶ 22; *see also 4518 S. 256th, LLC, supra.* at 436 (“Some affirmative action is required, some action by which *the holder of the note makes known* to the payors that he intends to declare the whole debt due.”) (Emphasis added). To initiate acceleration pursuant to the Deed of Trust, the lender must provide notice to the borrower, which shall specify:

(a) the default; (b) the action required to cure the default, (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property at public auction at a date not less than 120 days in the future.

Id. Further, the notice must mention “the right to reinstate after acceleration, the right to bring a court action assert the non-existence of a default or any other defense of Applicable Law.” *Id.*¹³

If a default is not cured “on or before the date specified in the notice,” the lender “*may* require immediate payment in full of all sums secured by [the Deed of Trust] without further demand and may invoke the power of sale and/or other remedies permitted by Applicable Law.”

Id. (emphasis added).

¹³ These rights are consistent with RCW 61.24.090 and RCW 61.24.040(1)(f)(IX), respectively.

In the Notice of Default at issue here, Regional Trustee stated,

If the default(s) described above is (are) not cured within thirty days of the mailing of this notice, *the lender hereby gives notice* that the entire principal balance owing on the note secured by the Deed of Trust described in paragraph 1 above, and all accrued and unpaid interest, as well as costs of foreclosure, *shall* immediately become due and payable. Notwithstanding acceleration, the grantor or the holder of any junior lien or encumbrance shall have the right after acceleration to reinstate by curing all defaults and paying all costs, fees and advances, if any, made pursuant to the terms of the obligation and/or deed of trust on or before 11 days prior to a Trustee's sale.

CP 183, ¶ 5(c) (emphasis added).

It is a genuine factual question whether: 1) Regional Trustee could unilaterally exercise Deutsche Bank's acceleration remedy, and 2) the Notice of Default's language was effective given the use of "shall" when the Deed of Trust instead afforded Deutsche Bank a discretionary option (*i.e.*, "may") to require immediate payment after a specified date. Having legal authority to issue a statutory Notice of Default does not necessarily mean all information Regional Trustee conveyed in the notice was sanctioned. *See, e.g., Bain, supra.* at 93 ("a trustee is not merely an agent for the lender or the lender's successors.").

By granting summary judgment to Beck, the trial court compelled Deutsche Bank to accept Regional Trustee's representation in the Notice of Default which differed from the contractual terms. At a minimum,

remand is necessary to address the scope of Regional Trustee’s authority, which is a factual question.

C. Deutsche Bank is the Proper Party to Foreclose.

Besides asserting a statute of limitations defense, Beck argued below that Deutsche Bank was “not the legal holder of the Deed of Trust.” CP 163.¹⁴ Beck based this contention on recorded Assignments of the Deed of Trust. CP 164. Beck’s reliance on those instruments, however, was misplaced.

“Washington courts have long recognized that the security instrument follows the note that it secures.” *Deutsche Bank Nat. Tr. Co. v. Slotke*, 192 Wn. App. 166, 177, 367 P.3d 600, *review denied*, 185 Wn.2d 1037, 377 P.3d 746 (2016). The authority to prosecute foreclosure arises by operation of law due to the lender’s status with respect to a note, not the trust deed securing it. *See, e.g., Bavand v. OneWest Bank*, 196 Wn. App. 813, 843, 385 P.3d 233 (2016), *as modified* (Dec. 15, 2016) (“The purported assignment of a nonexistent beneficial interest in Bavand’s deed of trust is immaterial.”); *Pelzel v. Nationstar Mortg., LLC*, 186 Wash. App. 1034 (2015) (unpublished) (“the deed of trust... followed the note.... This is true regardless of whether the deed of trust was assigned properly

¹⁴ The trial court’s order does not indicate which argument resulted in Beck obtaining summary judgment. CP 201-202.

or at all.”); *In re Butler*, 512 B.R. 643, 656 (Bankr. W.D. Wash. 2014), *aff’d*, 550 B.R. 860 (W.D. Wash. 2015) (“any assignment of the Deed of Trust... had no legal effect on the ownership or possession of the Note and was irrelevant.”).¹⁵

A special indorsement makes a negotiable instrument, such as the Note, “payable to the identified person and may be negotiated only by the indorsement of that person.” RCW 62A.3-305.¹⁶ An entity taking possession of a Note specially-indorsed to it becomes the Note’s “holder.” *See, e.g., Djigal v. Quality Loan Serv. Corp. of Wash., Inc.*, 196 Wash. App. 1038 (2016) (unpublished).

Here, Deutsche Bank’s evidence established that it possessed the Note when seeking to judicially foreclose. CP 113, ¶ 4; *see also Deutsche Bank Nat’l Tr. Co. for Long Beach Mortg. Loan Tr. 2006-4 v. Erickson*, 197 Wn. App. 1068 (2017) (unpublished), *review denied*, 188 Wn.2d 1021, 398 P.3d 1139 (2017) (“The promissory note was self-authenticating....”); *Slotke, supra*. The Note was specially-indorsed to

¹⁵ While only a note “holder” can initiate non-judicial foreclosure under the DTA, any “person entitled to enforce” a negotiable instrument can pursue judicial foreclosure. *See, e.g., JPMorgan Chase Bank, N.A. v. Stehrenberger*, 180 Wn. App. 1047 (2014) (unpublished), *citing* RCW 62A.3-301.

¹⁶ There is no legal requirement for an indorsement to be dated. RCW 62A.3-204; *accord Travelers Cas. & Sur. Co. v. Wash. Tr. Bank*, 186 Wn.2d 921, 935, 383 P.3d 512 (2016) (“The UCC exhibits a strong presumption in favor of the legitimacy of indorsements, which protect the transfer of negotiable instruments by giving force to the information presented on the face of the instrument.”).

Deutsche Bank, meaning *only* Deutsche Bank could enforce it. CP 121. And significantly, as noted above, Beck did not raise a challenge to Deutsche Bank's holder status; rather, he argued against the validity of irrelevant Deed of Trust assignments. CP 163-164.¹⁷

Regardless, the 2011 Deed of Trust Assignment—pre-dating the judicial foreclosure action—identified “Deutsche Bank National Trust Company, as Trustee for Saxon Asset Securities Trust 2007-2 Mortgage Loan Asset Backed Certificates, Series 2007-2” (the plaintiff below) as the recipient of beneficial interest in the Deed of Trust. CP 45. Beck lacked evidence to refute Deutsche Bank's authority to foreclose, and his conclusory arguments below were insufficient for him to have received summary judgment.

D. The Trial Court Should Not Have Awarded \$6,187.75 to Beck.

When determining reasonable attorneys' fees and costs, a trial court is supposed to consider 12 different factors, including the labor required, the difficulty of questions presented, the customary fee for

¹⁷ The trial court also implicitly recognized Deutsche Bank's authority as the proper Plaintiff when it granted a stipulated default in Deutsche Bank's favor against the IRS (CP 81), and when it granted an Order of Default with respect to multiple defendants (CP 155-156).

similar work, and awards in other relevant cases. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

As explained above, Beck was not entitled to prevail on summary judgment, and therefore it was error for the trial court to have awarded him fees and costs. But the trial court also did not adhere to case law when it granted Beck a \$6,187.75 judgment in addition to making his loan debt unenforceable.

Beck's counsel supported his fee and cost motion with invoices containing vague entries, no explanation of customary rates, and even a *prospective* amount for attending a motion hearing that had not occurred. CP 208-214. When Deutsche Bank responded with its objections, Beck's counsel filed a "supplemental declaration" in reply, which still did not satisfy the reasonableness standard under case law. CP 219-220.

Nonetheless, the trial court improperly granted Beck's requested award in full. CP 221-222. In reversing the decision below, this Court should vacate that judgment.

E. Deutsche Bank is Entitled to Fees and Costs on Appeal.

Under R.A.P. 18.1(a), "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the

request is to be directed to the trial court.” See also R.A.P. 18.1(b) (requiring that a “party must devote a section of its opening brief to the request for the fees or expenses.”).

Additionally, under R.A.P. 14.2, “[a] commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.” Under R.A.P. 14.3(a), certain expenses are allowed as awardable costs.

The Deed of Trust permits the recovery of reasonable attorneys’ fees and costs in “any action or proceeding to construe or enforce any term of this Security Instrument;” this provision includes fees incurred on appeal. CP 134, ¶ 26; *see also* CP 134, ¶ 22 (terms of acceleration).

Because this matter relates to whether Deutsche Bank contractually accelerated Beck’s debt, Deutsche Bank respectfully requests that it be awarded attorneys’ fees based on the Deed of Trust, and upon an application submitted in accordance with the appellate rules. *Id.* Deutsche Bank should also be awarded costs for those items specified in R.A.P. 14.3(a) upon the presentation of a cost bill pursuant to R.A.P. 14.4.

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V. CONCLUSION

Decades ago, the State Supreme Court articulated that “[it] is the long-standing rule in this state that the statute of limitations, although not an unconscionable defense, is not such a meritorious defense that either the law or the facts should be strained in aid of it.” *Wickwire v. Reard*, 37 Wn.2d 748, 759, 226 P.2d 192 (1951) (citations omitted).

The trial court in this case erred when it denied summary judgment to Deutsche Bank and instead overstrained to grant Beck’s cross-motion. The outcome in Beck’s favor, allowing him to escape both repayment of his secured debt and foreclosure, needs to be set aside because: 1) like in the *Erickson* case, the Notice of Default did not contain an unequivocal acceleration of the debt, 2) acceleration had either not occurred or was abandoned because Beck was informed he owed less than the total loan balance, 3) even if there had been acceleration, the DTA does not make the exercise of such remedy inchoate until after 11 days prior to a trustee’s sale, and 4) the Notice of Default commenced foreclosure and tolled the statute of limitations. Deutsche Bank should have prevailed below.

At a minimum, remand is necessary to address factual questions relating to whether Beck reaffirmed owing monthly loan installments and whether Regional Trustee could unilaterally invoke an acceleration clause that differed from the Deed of Trust.

Based on the foregoing reasons, reversal is warranted.

DATED this 18th day of April, 2018.

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Series 2007-2

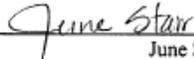
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I, June Starr, certify that on April 18, 2018, a copy of **OPENING BRIEF
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