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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

REPLY 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. REPLY ARGUMENT

A. The Notice Sent to Beck is More Like the Evidence in *Erickson* and *Stafne* Than *Washington Federal.*

Beck contends that the holding in *Wash. Fed. v. Azure Chelan LLC*, 195 Wn. App. 644, 382 P.3d 20 (2016), should control this case. However, Beck is mistaken about the applicability of *Wash. Fed.* because its facts involved a present-tense debt acceleration, while the subject Notice of Default did not contain the same language.

The specific wording analyzed in *Wash. Fed.* and other decisions involving a claimed acceleration is instructive when considering the information provided to Beck.

The *Wash. Fed.* notice explained a consequence of default was that:

> [t]he entire unpaid balance of the Promissory Note executed February 14, 2007, with the principal amount of $5,500,000.00, plus all accrued interest and all other amounts that may be owing thereunder *are* immediately due and payable.

195 Wn. App. at 650 (emphasis added). Division Three found this present-tense statement was sufficient to demonstrate unequivocal acceleration.

By contrast, the notices in *Erickson v. America's Wholesale Lender* stated:

> *[i]f the default is not cured on or before [date]*, the mortgage payments *will be accelerated* with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at this time.

2018 WL 1792382 (2018) (unpublished; emphasis added). Division One held that this verbiage "simply informed… [the borrower] of a future contingent event," and was insufficient to accelerate the obligation.

Similarly, a "Notice of Intent to Accelerate" in *Bank of New York Mellon v. Stafne* contained a statement that the lender "*would accelerate* the loan *if the default was not cured*;" this was deemed "a statement of potential future action… [and] insufficient to trigger acceleration." 2016 WL 7118359, *3 (W.D. Wash. Dec. 7, 2016) (emphasis added).

On the other end of a spectrum concerning acceleration language, Division One observed in *4518 S. 256th, LLC v. Karen L. Gibbon, P.S.* that "nowhere in the notice of default is there any statement that… [the lender] declared due the entire unpaid balance of the loan." 195 Wn. App. 423, 436, 382 P.3d 1 (2016), *review denied*, 187 Wn.2d 1003, 386 P.3d 1084 (2017).

The notice sent to Beck did not state the sums owed "are" presently due in full like the notice in *Wash. Fed.*; to the contrary, it matched those considered in *Erickson* and *Stafne*, *i.e.*:

> *[i]f 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.

CP 108, ¶ 5(c) (emphasis added).

Like in *Erickson* and *Stafne*, the notice sent to Beck warned of a future event that did not come to pass. It was also consistent with Deutsche Bank's Deed of Trust, requiring "notice prior to acceleration" that describes the default, action to cure, a date after 30 days from the notice, and a warning that failing to cure may result in acceleration. CP 33, ¶ 22. The Deed of Trust explains that:

> *[i]f the default is not cured on or before the date specified in the notice*, Lender at its option, *may require* immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and/or any other remedied permitted by Applicable Law.

Id. (emphasis added).[1]

It does not make sense to read giving notice pursuant to the Deed of Trust's contractual language as taking away the lender's *subsequent*

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[1] Beck argues the *Erickson* Court ignores distinct remedies between a note and deed of trust. Resp. at 12, *citing 4518 S. 256th, LLC*, 195 Wn. App. at 436. But *4518 S. 256th, LLC* merely restates a lender's possible options after default, *e.g.*: accelerate the debt and sue on the note, pursue nonjudicial foreclosure of the property securing the debt, or both. 195 Wn. App. at 445. *Erickson* does not "misunderstand all of this," as Beck believes. Resp. at 13. Rather, the opinion recognizes that the deed of trust "signed as security for the loan requires the lender to provide notice before exercising its right to accelerate the loan." 2018 WL 1792382 at *3 (unpublished). That is the same requirement found in this case. CP 33, ¶ 22.

option to require immediate payment in full. Here, there is no evidence Deutsche Bank acted to exercise that acceleration option when Beck refused to heed the Notice of Default's warning and pay his debt.

In sum, when comparing differing scenarios under case law, three distinct situations have arisen in the acceleration context:

> 1) a notice informing the borrower, in the present tense, all sums owed *are* immediately due and payable (*Wash. Fed.*);
>
> 2) a notice informing the borrower of a future contingent event, that all sums owed would be subject to acceleration *if* the loan remains in default (*Erickson* and *Stafne*);
>
> 3) a notice not declaring the loan's unpaid balance is due at all (*4518 S. 256th, LLC*).

The trial court erred in essentially determining that the Notice of Default to Beck was like the first scenario, when it is actually like the second, *i.e.* cases that did not find unequivocal acceleration. Beck should not have obtained summary judgment.

B. Deutsche Bank's Remaining Arguments are Properly Before the Court.

Beck asserts that Deutsche Bank presents additional arguments "for the first time on appeal." Resp. at 13, 16, 17, 18. This contention is not accurate, however, as each argument in Deutsche Bank's Opening Brief relates to the issue of whether Beck's debt was accelerated - a matter

squarely raised below, and which led to Beck prevailing while Deutsche Bank's summary judgment motion was denied.

Moreover, on appeal, the Court has broad discretion to consider any issues "arguably related" to those points raised below. See 2A Wash. Prac., Rules Practice RAP 2.5 (8th ed.), *citing In re Estate of McKiddy*, 47 Wn. App. 774, 737 P.2d 317 (1987), *abrogated on other grounds by Matter of Estate of Hansen*, 128 Wn.2d 605, 910 P.2d 1281 (1996). The Court can also address all questions affecting a party's "right to maintain the action," which is central to Deutsche Bank's ability to obtain a foreclosure judgment. *Id*., citing *Morales v. Westinghouse Hanford Co.*, 73 Wn. App. 367, 869 P.2d 120 (1994) (addressing statute of limitations question for the first time).

Because Beck's debt was not unequivocally accelerated, the trial court's decision is subject to reversal for this reason alone. Nonetheless, there are other legal bases supporting Deutsche Bank's position that the statute of limitations had not expired and foreclosure of Beck's property was appropriate to satisfy his obligation.

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1. Even if Acceleration Occurred, There Was an Abandonment.

Deutsche Bank does not argue that the loan servicer's June 2013 letter to Beck "implied" anything. Resp. at 15. Indeed, the letter is clear that Beck's payments were past due, and he owed $217,858.78 at that time. CP 149-150. This amount is far less than the total debt owed five years earlier. CP 172 (FDCPA notice listing the debt as $455,806.95).

The letter also provides that a failure to bring the loan current "*may result* in our election to exercise our right to foreclose on your property," and that "*upon acceleration*, your total obligation *will be* immediately due and payable without further demand." CP 150 (emphasis added).

There is no equivocation in these statements of what could have transpired *in the future*. It means either Deutsche Bank had not accelerated the debt in 2008, or otherwise, it was abandoning acceleration and affording Beck an opportunity to reinstate the loan for a lesser sum.[2] Each result should have precluded summary judgment in Beck's favor.

[2] Beck argues that the 2013 letter was unclear because he would have needed to "read this multi-page, single spaced notice" and compare it to the earlier Notice of Default. Resp. at 15. Yet, Beck incongruously claims the Notice of Default's single-spaced Paragraph 5(c) was completely clear despite no indication he compared it to Paragraph 22 of the earlier Deed of Trust.

2. Beck Misapprehends the Effect of RCW 61.24.090.

Wash. Fed. does not address when a lender's acceleration right becomes inchoate. Because a borrower can always reinstate a defaulted loan up to 11 days before a trustee's sale, an invoked acceleration clause is not legally effective until that deadline passes. *See* RCW 61.24.090(1); *cf. Westar Funding, Inc. v. Sorrels*, 157 Wn. App. 777, 239 P.3d 1109 (2010), *as amended on denial of reconsideration* (Nov. 9, 2010) (note matured and reinstatement for a lesser sum was therefore impossible); *Hopper v. Hemphill*, 19 Wn. App. 334, 336, 575 P.2d 746 (1978) (statute of limitations on demand loan commences from date on which loan is made).

Beck's argument that the "lender's rights under the promissory note are not restricted by the DTA" is pure fiction. Resp. at 16. Deutsche Bank was foreclosing non-judicially and firmly subject to the DTA. *See, e.g.*, *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 108, 285 P.3d 34 (2012) ("The legislature has set forth in great detail how nonjudicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract.").[3]

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[3] Beck argues it is "not true" the Legislature abrogated common law rules on acceleration when it created the DTA, but the State Supreme Court recognized otherwise in *Rustad Heating & Plumbing Co. v. Waldt*, 91 Wn.2d 372, 375, 588 P.2d 1153 (1979). This fact does not eliminate the right to acceleration, as noted in *Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank*, 80 Wn. App. 655, 670, 910 P.2d 1308 (1996), but the DTA limits when the right becomes inchoate.

Because a trustee's sale was not scheduled during the non-judicial process, and there was consequently no 11-day deadline established in accordance with RCW 61.24.090, Beck continued to always have a right to reinstate the loan. Thus, even if acceleration had been invoked, the exercise of that contractual remedy in a warning notice alone failed to become inchoate under governing law.

3. A Notice of Default Does Not Create an "Exception" to the Statute of Limitations.

Beck next asserts that Deutsche Bank seeks to "deny borrowers the defense of the Statute of Limitations." Resp. at 18. Like Beck's previous argument ignoring the effect of RCW 61.24.090, he again relies on *Wash. Fed.*, but that decision did not analyze the role of a Notice of Default in commencing the non-judicial foreclosure process.

Beck does not appear to dispute that a Notice of Default is the key event commencing foreclosure pursuant to the DTA. *See*, *e.g.*, *Edmundson v. Bank of Am., N.A.*, 194 Wn. App. 920, 378 P.3d 272 (2016); *Campanella v. Rainier Nat. Bank*, 26 Wn. App. 418, 420, 612 P.2d 460 (1980). In *Edmundson*, the Notice of Default "preceded the running of the six-year statute of limitations" as it constituted a "resort to remedies under the [DTA]." 194 Wn. App. at 930.

Beck's position is that the Notice of Default issued to him not only commenced foreclosure - which would toll the statute of limitations[4] - but simultaneously accelerated the debt and caused the statute of limitations to start running. This contradictory result is nonsensical.

Instead, given the nature and effect of a Notice of Default, that statutory document tolled the statute of limitations upon its issuance regardless of whether it also initiated acceleration of the secured Note.[5] Consequently, the trial court should not have granted summary judgment to Beck and made his debt unenforceable.

4. At a Minimum, Remand is Proper.

Beck does not refute the *de novo* standard of review in this appeal, and he does not deny that "[w]hen determining whether a genuine issue of material fact exists, [the court will] consider all facts and reasonable inferences in the light most favorable to the nonmoving party." *Thun v. City of Bonney Lake*, -- Wn.App.2d --, 416 P.3d 743 (2018). Beck also

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[4] *See*, *e.g.*, *Heintz v. U.S. Bank Tr., N.A. for LSF9 Master Participation Tr.*, 2018 WL 418915, *3 (2018) (unpublished), *review denied*, 415 P.3d 1194 (2018) (notice of default commences action and tolls statute of limitations until 120 days after scheduled sale date); *Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142 (1945) (statute of limitations runs "from the time when an action might be brought to recover… [on the obligation];" such enforcement through foreclosure was brought against Beck via the Notice of Default).

[5] It is significant that the Note is an installment contract, not a demand note or matured note. Absent an unequivocal acceleration, the statute of limitations runs from each installment due and owing. *See Edmundson*, *supra*.

fails to respond to the issue of whether he reaffirmed the existence of an installment contract. Op. Brief at 23-24.

Rather, Beck focuses on the question of Regional Trustee's authority to act on Deutsche Bank's behalf. Beck discusses "many tens of thousands of notices of acceleration" that are not germane to this action; there is a genuine issue of material fact concerning Regional Trustee's invocation of a contractual acceleration clause in the specific Notice of Default issued to Beck alone. Resp. at 18.[6]

While the evidence supports reversal because acceleration had not occurred, and the statute of limitations had not run, remand is another reasonable alternative because of disputed facts that should have precluded a grant of summary judgment to Beck. *See*, *e.g.*, *Baker v. Dep't of Corr.*, 2017 WL 2815271 (2017) (unpublished), *citing Kilcullen v. Calbom & Schwab, PSC*, 177 Wn. App. 195, 202, 312 P.3d 60 (2013) ("When, because of unanswered factual questions, this court cannot determine whether genuine issues of material fact require a trial, this court

[6] As noted above, this question directly bears on Deutsche Bank's ability to foreclose within the statute of limitations, and is therefore subject to consideration on appeal. Moreover, "evidence of this claim" is apparent in the record since the Deed of Trust contractually controls what notice(s) a borrower is given. Resp. at 18; *cf.* CP 33, ¶ 22; CP 169, ¶ 5(c).

will vacate any summary judgment order and remand for further proceedings.”).[7]

C. Beck Erroneously Contends an Assignment of Deed of Trust Determines Beneficiary Status.

Beck’s Response conspicuously omits the correct standard for determining who is entitled to foreclose in Washington. Resp. at 19-20. Beck’s belief that deed of trust assignments confer a beneficial interest for this purpose is completely wrong as a matter of law. *See*, *e.g.*, *Beck v. U.S. Bank, N.A.*, 2017 WL 6389330, at *4 (W.D. Wash. Dec. 14, 2017), *quoting Blake v. U.S. Bank, N.A.*, 2013 WL 6199213, *2 (W.D. Wash. Nov. 27, 2013) (“the power to initiate foreclosure lies with the holder of the promissory note ‘regardless of any assignment of the deed of trust.’ ”); *Hurney v. HSBC Bank, USA, N.A. for Merrill Lynch Alternative Note Asset Tr., Series 2007-0AR2*, 2017 WL 2423180 (2017) (unpublished) (“MERS’s assignment of its ‘beneficial interest’ in the deed of trust is irrelevant to the authority of OneWest to commence foreclosure….”); *Hermosillo v. Quality Loan Serv. Corp. of Wash.*, 2017 WL 1487679 (2017) (unpublished), *review denied*, 189 Wn.2d 1011, 403 P.3d 44 (2017) (“NYCB possessed the note. It did not need an assignment of an interest

[7] Beck also raises an argument that certain sums owed prior to July 2010 must be excluded from a judgment award to Deutsche Beck; this is yet another factual inquiry best resolved on remand. Resp. at 20-21.

in the deed of trust. Thus, the assignment's invalidity did not affect NYCB's authority to foreclose.").

Here, Deutsche Bank produced documentation demonstrating *possession* of the *specially-indorsed* Note. CP 113, ¶ 4 (summary judgment declaration); CP 117-121 (Note). Beck did not present anything calling this fact into doubt; his briefing filed with the trial court solely attacked the deed of trust assignments. CP 174-178.

Beck's conclusion that "the beneficial interest remains with the original beneficiary, Saxon Mortgage" is wholly unfounded. Resp. at 20. Only Deutsche Bank is currently entitled to foreclose because of Beck's default.

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II. CONCLUSION

The Notice of Default issued to Beck did not accelerate his debt obligation. Its wording mirrors the *Erickson* and *Stafne* notices describing a future contingent event, while *Wash. Fed.*'s notice was phrased in the present-tense.

Further, the Deed of Trust clearly articulates that a lender could elect acceleration at least 30 days *after* the very type of warning found in the Notice of Default. Beck's *ex post facto* attempt to avoid repayment does not supersede that contract.

Even if this Court finds the Notice of Default constituted an unequivocal acceleration, there are other reasons why the statute of limitations was not exceeded: 1) Deutsche Bank abandoned its alleged effort to collect the total debt from Beck, 2) acceleration does not become inchoate until 11 days prior to a trustee's sale under RCW 61.24.090 and no sale was scheduled, and 3) the Notice of Default itself tolls the limitation period from running because that document commences a non-judicial foreclosure action.

At a minimum, remand would permit the development of a factual record concerning whether Beck reaffirmed the loan installments owed, and whether Regional Trustee had authority to invoke Deutsche Bank's

contractual remedies. There is no genuine dispute, however, that Deutsche Bank is the secured Note holder.

Deutsche Bank respectfully reiterates its request for reversal of the trial court's ruling, and a commensurate fee award. R.A.P. 18.1(a); CP 134, ¶ 26.

DATED this 31st day of May, 2018.

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CERTIFICATE OF SERVICE

I, June Starr, certify that on May 31, 2018, a copy of **REPLY 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** was served through the COA Division II Efiling Portal system on the following counsel of record:

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