

FILED
Court of Appeals
Division II
State of Washington
9/27/2018 1:40 PM

Court of Appeals Cause No. 51479-6-II
Pierce County Superior Court Cause No. 17-2-05214-6

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

ROBERT C. TERHUNE, TARA TERHUNE, and
EQUITY GROUP NWEST LLC,

Plaintiffs/Appellants

v.

U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9 MASTER
PARTICIPATION TRUST, and CALIBER HOME LOANS, INC.

Defendants/Respondents

APPELLANTS' REPLY BRIEF

SKYLINE LAW GROUP PLLC
Michele K. McNeill, WSBA No. 32052
michele@skylinelaw.com
2155 112th Ave NE
Bellevue, WA 98004
Phone: (425) 455-4307
Fax: (800) 458-1184

Counsel for Plaintiffs/Appellants

TABLE OF CONTENTS

I.	INTRODUCTION.....	4
II.	REPLY ARGUMENT.....	4
	A. The Terhunes Object to Defamatory Comments	4
	B. Whether the Loan Accelerated is a Genuine Issue of Material Fact	5
	1. The Countrywide notice was not a warning.....	5
	2. The acceleration was not revoked.....	7
	C. A Lender Cannot Collect Payments Barred by the Statute of Limitations Even in Foreclosure	9
	D. Whether U.S. Bank Trust Holds the Note is a Genuine Issue of Material Fact.....	11
	1. The Beneficiary Declaration is Not Sufficient.....	11
	2. Mr. Mansi and Caliber Lack Personal Knowledge	13
	E. The Trial Court Abused Its Discretion Denying the Motion for Reconsideration.....	16
	F. U.S. Bank Trust Cannot Recover Attorneys' Fees Absent Acceleration Pursuant to the Note	16
III.	CONCLUSION	17

TABLE OF AUTHORITIES

Cases

Barkley v. GreenPoint Mortg. Funding, Inc., 190 Wn. App. 58 (2015) 14
Herzog v. Herzog, 23 Wn.2d 382 (1945)..... 9
Leahy v. Quality Loan Serv. Corp. of Washington, 190 Wn. App. 1
 (2015), as amended (2016) 10
Lyons v. U.S. Bank Nat. Ass'n, 181 Wn. 2d 775 (2014) 12
Progressive Animal Welfare Soc. v. Univ. of Washington,
 125 Wn.2d 243 (1994)..... 17

Statutes

RCW 4.16.230 10
RCW 5.45.020 14
RCW 61.24.030(7) 12
RCW 61.24.040(2)(d)..... 11
RCW 61.24.100(2)(a)..... 10
RCW 7.28.300 11

Rules

CR 56(e) 12, 13

I. INTRODUCTION

If Countrywide had intended to issue merely a warning with its notice of acceleration, then it would have used the phrase “may accelerate” instead of “will be accelerated”. The former does not invoke the lender’s right to recover attorneys’ fees pursuant the parties’ contract, whereas the latter does invoke this right because acceleration is required pursuant to the Note before the lender is entitled to recover its legal fees. Whether the Countrywide notice accelerated the Terhune loan is a material question of fact in dispute and precludes summary judgment in U.S. Bank Trust’s favor.

There is also a genuine issue of material facts as to whether U.S. Bank Trust and Caliber have standing to enforce the terms of the Terhunes’ contracts. The only evidence relied upon by the Respondents and the trial court as to who holds the Note is hearsay statements made by a Caliber employee who lacks the requisite personal knowledge.

II. REPLY ARGUMENT

A. The Terhunes Object to Defamatory Comments

The Terhunes have invested over \$450,000 of their own money into their home, and the failure of their multi-million dollar company as a result of the 2008 market crash was not their fault. (CP 476-477). The Terhunes had legitimate concerns regarding the 2010 attempt to foreclose on their home, and they have a legitimate reason

for the current action as well. Washington State recognizes that a homeowner has the legal right to quiet title in their home in circumstances such as those before this Court. RCW 7.28.300.

The Terhunes have never sought to obtain a free house. There is nothing free about the \$450,000 in cash they personally invested into building their home. (CP 477, ¶ 3). The Terhunes have a legal right to question what the Respondents are doing. Despite these facts, U.S. Bank Trust and Caliber repeatedly defame the Terhunes' character by accusing them of wanting a free home and gaming the system. (RB 2, 16, 18, 22, 23). This is unfair and prejudicial, and the Terhunes request the Court disregard these slanderous attacks against the Terhunes.

B. Whether the Loan Accelerated is a Genuine Issue of Material Fact

1. The Countrywide notice was not a warning

The Terhunes' Note in Section 7 does not authorize the Note Holder to recover its costs, including reasonable attorneys' fees, *unless* the Note Holder "has required [the Terhunes] to pay immediately in full as described above." (CP 490, ¶ 7 (E)). The description above that paragraph states that if the Terhunes fail to pay the full monthly payment on the date it is due, the lender may send the Terhunes written notice telling them "if [they] do not pay the overdue amount by a certain date, the Note Holder may require [them] to pay immediately the full amount of Principal that has not

been paid and all the interest that [they] owe on that amount.” (CP 490, ¶ 7 (C)). That “[certain] date must be at least 30 days after the date on which the notice is mailed . . .” Id.

Countrywide had two options: send a written warning of acceleration that they “may” accelerate the loan which would not invoke their right to recover fees and costs pursuant to Paragraph 7 (E), or they could invoke the right to recover fees and costs by sending a notice of acceleration, as they did in this case, where they make the loan immediately due and payable in full as the result of a failure to pay the overdue amount by a certain date. (CP 490, ¶ 7 (C)). Absent acceleration, Countrywide and its successors in interest have no authority or right pursuant to the Note to recover their attorneys’ fees. Countrywide had no incentive for issuing just a warning to its borrowers. But, it had a very good reason to accelerate its loans as an immediate consequence for the failure to pay as demanded. It is being faced with the actual acceleration of the loan that compels borrowers to pay the demand, not some idle threat that the loan might or may be accelerated.

The Deed of Trust contract also allows the lender to require immediate payment in full “without further demand.” (CP 503, § 22). If the Countrywide notice of acceleration was intended only as a warning then Countrywide would have had to issue a follow-up demand to invoke its right to recover attorneys’ fees pursuant to the

Note; Instead, they had a trustee issue a notice of trustee's sale. (CP 172-176). By making the loan "due and payable in full" upon failure to cure the default by the certain date set out in its notice, Countrywide preserved the right to recover its attorneys' fees and costs and could proceed to foreclosure without any further demand. The Countrywide notice of acceleration was not intended as a warning; It made the loan immediately due and payable without further demand as a result of the Terhunes' failure to pay by the certain date set out in the notice. (CP 520-521).

Whether Countrywide's written notice of acceleration was intended to make the loan immediately due and payable in full without further demand as contemplated by the parties' contracts is a material question of fact in dispute and the summary judgment was improperly granted.

2. The acceleration was not revoked.

Revocation of an acceleration requires "an affirmative act giving notice of a clear intent to revoke." *In re Western United Nurseries Inc.*, 338 Fed.Appx 706, 708 (9th Cir. 2009) (unpublished). There is nothing in the record that states unequivocally that acceleration of the Note was being revoked. Merely setting out the balance of the arrears as required by the parties' contract is simply not sufficient. The acceleration occurred on February 16, 2009. (AB

30, 39). Absent tolling, the statute of limitation expired six years later on February 16, 2015 (AB 39) and not the March 19, 2009 date alleged by U.S. Bank Trust and Caliber. (RB 26). This is long before Caliber's June 5, 2015 letter that the Respondents claim revoked the acceleration. (RB 26).

The July 1, 2011 letter from Bank of America sets out the entire loan balance (CP 537-540) because under 15 U.S.C. § 1692a this was the amount of the "obligation of [the Terhunes] to pay money arising out of a transaction. . ." (RB 21-22). If the loan had not been accelerated, making all payments due and payable in full, then the Terhunes would only have been obligated in July 2011 to pay the past due monthly installments and not the future payments as this letter obviously included.¹ The only logical explanation for seeking the entire loan balance before the loan's maturity date, instead of just the past due payments, is the loan had in fact been accelerated. And because Bank of America was Countrywide's direct successor in interest, it was in a better position to know if the loan had been accelerated than Caliber who merely serviced the loan.

¹ The Respondents claim the Terhunes had not paid their mortgage for ten years when the Bank of America's letter was issued in July 2011 (RB 22), but the record shows they made a payment in February 2009 for the December 2008 payment (CP 113, 478).

C. A Lender Cannot Collect Payments Barred by the Statute of Limitations Even in Foreclosure

U.S. Bank Trust argues that even if some of the installment payments are barred by the statute of limitations, they may nevertheless collect these sums as part of a foreclosure action. This is not supported by case law and there is nothing in the Terhunes' Deed of Trust that authorizes the lender to collect installment payments that are barred by the statute of limitations. (CP 495-507).

The entire indebtedness in this case should not include installment payments that are barred by Washington's statute of limitations. Just because a lender can proceed with a non-judicial foreclosure sale does not mean it can collect anything it wants from the proceeds of that sale. The sums due are still constrained by the parties' contracts and state law. In Washington, "the statute of limitations runs against *each installment* from the time it becomes due . . ." *Herzog v. Herzog*, 23 Wn.2d 382, 388 (1945) (emphasis added).

The Terhunes last payment on the Note brought the loan current up through December 2008. (CP 113, 478). Assuming that a defective notice of trustee's sale can toll the statute of limitations, and Terhunes argue that it does not, the statutory window for each unpaid installment payment would have started on the date of default with a maximum possible tolling of only 220 days from the 2010

notice of trustee's sale. Washington's statute of limitations is tolled when the commencement of an action to enforce the contract is "stayed by injunction or a statutory prohibition." RCW 4.16.230. Washington's DTA only recognizes a notice of trustee's sale as being a statutory prohibition on the commencement of an action involving a deed of trust lien. RCW 61.24.100(2)(a). If our legislature had intended to include a notice of default as a statutory prohibition against an action on the loan it would have done so. Unlike a notice of trustee's sale, a notice of default never expires. See *Leahy v. Quality Loan Serv. Corp. of Washington*, 190 Wn. App. 1, 6-7, 359 P.3d 805 (2015), as amended (2016) Because a notice of default never expires it has the potential of suspending the statute of limitations period indefinitely and render the limitations statute superfluous.

Because the last mortgage payment only brought the loan current through December of 2008, on January 1, 2015 the statutory window to collect on each missed monthly installment payment began to expire. Thus, on January 1, 2015, the statutory period to collect the January 2009 installment payment expired. On February 1, 2015, the statutory period to collect the February 2009 installment payment expired, and so on for a total of 22 months between January 1, 2015 and October 11, 2016 when the notice of trustee's sale was recorded.

A 220-day tolling period represents a little over 7 months. This leaves at a minimum 15 months of installment payments that cannot be enforced pursuant to the six-year statute of limitations. Even if U.S. Bank Trust is ultimately authorized to sell the Terhunes' home at auction, they are not authorized to collect all sums owed under the Note as the October 2010 notice of trustees' sale shows they are attempting to do. (CP 286-289). There is no mechanism for a borrower to prevent a lender from collecting installment payments that are barred by the statute of limitations other than commencing a legal action such as the Terhunes have done here. This is not "playing" the system; this is a husband and wife, whose only source of income was destroyed by the 2008 housing crisis, seeking to enforce their legal rights as authorized by RCW 7.28.300 and RCW 61.24.040(2)(d)(IX) ("Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale . . .").

D. Whether U.S. Bank Trust Holds the Note is a Genuine Issue of Material Fact

The record is not conclusive as to who holds the Terhune Note which raises a genuine issue of material fact.

1. The Beneficiary Declaration is Not Sufficient

The Declaration of Beneficiary in this case was signed by Caliber as attorney in fact for U.S. Bank Trust. (CP 559). An attorney

in fact is “one who is designated to transact business for another; a legal agent.” Black's Law Dictionary (10th ed. 2014). The DTA requires a “declaration *by the beneficiary* made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note . . .” RCW 61.24.030(7) (Emphasis added). RCW 61.24.005(2) defines the “beneficiary” as “the holder of the instrument . . .” CR 56(e) requires a declaration be made on personal knowledge.

Caliber was not the holder of the Note when it signed the Declaration of Beneficiary. (CP 559). There is nothing in this Declaration that shows how the “authorized signatory” from Caliber could possibly have personal knowledge of what U.S. Bank Trust, a separate and distinct entity, did or did not have in its possession. The DTA also requires a declaration signed by the holder of the instrument under penalty of perjury and not the holder's agent.

Even if the DTA did authorize an agent to execute a beneficiary declaration, Caliber's Declaration of Beneficiary does not definitively state that U.S. Bank Trust holds the Note. The use of the term “or” in the declaration presents the same problem raised in *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn. 2d 775 (2014). U.S. Bank Trust cannot claim to be the holder of the Note based only on a declaration signed by a third party that that does not unequivocally

state that U.S. Bank Trust holds the Note or how that third party has personal knowledge that U.S. Bank Trust holds the Note.

2. Mr. Mansi and Caliber Lack Personal Knowledge

U.S. Bank Trust and Caliber cannot rely upon Mr. Mansi's declaration either because his declaration does not satisfy the personal knowledge requirements of CR 56(e). Mr. Mansi's knowledge is limited to Caliber's business records; He never states that he reviewed U.S. Bank Trust's business records. He states: "I make this declaration on behalf of *Caliber* . . . based on my personal knowledge and my review of *Caliber's* business records . . ." (Emphasis added) (CP 86, ¶ 1). The Declaration of Beneficiary signed by Caliber is not attached to Mr. Mansi's declaration nor is it even mentioned in his declaration. (CP 85 – 309). And while the Note is attached to his declaration he still lacks personal knowledge as to whether U.S. Bank Trust has or had possession because he did not review U.S. Bank Trust's business records. He states that he "relies on the accuracy" of business records created by third parties, which is not the same as saying he has personal knowledge of where the original Note is located. (CP 87, lines 3-7).

"To be considered on summary judgment, CR 56(e) requires a declaration be made on personal knowledge and describe facts admissible in evidence." *Barkley v. GreenPoint Mortg. Funding, Inc.*,

190 Wn. App. 58, 66–67, 358 P.3d 1204 (2015). A statement in a declaration based on a review of business records will satisfy the personal knowledge requirement of CR 56(e) if the declaration satisfies the business records statute, RCW 5.45.020. *Barkley*, 190 Wn. App. at 67 (citation omitted). A business record is admissible as competent evidence if:

the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Id., citing RCW 5.45.020.

Mr. Mansi is not qualified to attest to U.S. Bank Trust's business records. He does work for U.S. Bank Trust, he is not a U.S. Bank Trust custodian, and he does not testify as to the mode of the Note's preparation or whether it was made in the regular course of U.S. Bank Trust's business, at or near the time of the act, condition or event. He only speaks to what he knows about Caliber's business records. (CP 86, ¶ 1 and ¶ 3). He claims U.S. Bank Trust is the holder of the Note, but he does not say how he can possibly know this. *Id.* Therefore, the business record exception does not apply to either the Note or the Declaration of Beneficiary.

Mr. Mansi's reliance on a series of defective assignments is also not sufficient to establish that U.S. Bank Trust has possession

of the Note. In late 2009, BAC Home Loans was a servicing agent acting "on behalf of the holder" of the Note. (CP 524-526). The Deed of Trust was purportedly assigned to BAC Home Loans by MERS in 2010. (CP 167). On July 1, 2011, the holder of the Note was identified in a Bank of America letter as being "BANA CWB CIG HFI 1ST LIENS". (CP 539). In 2015, the Terhunes received a letter informing them that Caliber was taking over the servicing of their loan. Caliber, despite the absence of any authority of record, executed an appointment of trustee on October 13, 2015 allegedly on U.S. Bank Trust's behalf. (CP 553-554). U.S. Bank Trust was not the beneficiary of record on that date. (CP 556-557).

The December 8, 2015 Assignment of Deed of Trust was executed by Caliber on September 15, 2015 purportedly as an attorney in fact for Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, LP, F/K/A Countrywide Home Loans Servicing, LP. (CP 556-557). There is nothing in the record that shows Caliber was in fact an attorney in fact for Bank of America, N.A. when this Assignment was executed, and the assignment does not identify the actual holder of the Note. On October 11, 2016, the trustee appointed by Caliber on October 13, 2015, before the Deed of Trust was purportedly assigned to U.S. Bank Trust, issued a Notice of Trustee's Sale with a nonjudicial foreclosure sale date of February 17, 2017. (CP 286-289).

There is a genuine issue of material fact as to whether U.S. Bank Trust has ever had possession of the Note. There is a genuine issue of material fact as to whether Caliber was an attorney in fact for U.S. Bank Trust and Bank of America, N.A. The Terhunes have a legitimate basis for enjoining the Respondents from any attempts to sell their home at auction absent proof they are legally entitled to do so. The trial court's summary judgment in favor of U.S. Bank Trust and Caliber was in error and should be reversed.

E. The Trial Court Abused Its Discretion Denying the Motion for Reconsideration

The Declaration of Beneficiary is not signed by the alleged beneficiary, and Mr. Mansi only presented information he obtained from Caliber's business records. For reasons stated above and in the Appellants' Brief, the trial court abused its discretion when it denied the Terhunes' Motion for Reconsideration.

F. U.S. Bank Trust Cannot Recover Attorneys' Fees Absent Acceleration Pursuant to the Note

U.S. Bank Trust cannot recover its attorneys' fees unless they or their predecessor accelerated the loan in accordance with Paragraphs 7(C) and 7 (E) of the Note. The only notice of acceleration that complies with these paragraphs is the 2009 Countrywide notice. If Countrywide's notice of acceleration did not require the Terhunes to pay immediately the full balance of the loan

(i.e., accelerated the maturity date) for failing to pay the overdue amount by a certain date that is at least 30 days after the date on which the notice was mailed, then U.S. Bank Trust is not authorized per the contract to recover attorneys' fees. (CP 490, ¶ 7 (C)). The bank cannot have it both ways. Either the loan accelerated becoming due and payable in full as the Countrywide notice said it would upon failure to pay the past due sum by a certain date, or there was no acceleration and under the express unambiguous terms of Paragraph 7(C) of the parties' contract the bank does not have the right to collect its attorneys' fees.

III. CONCLUSION

There are genuine issues of material fact in dispute as to whether U.S. Bank Trust and Caliber have standing to enforce the contracts, whether Countrywide accelerated the loan, and if there was no acceleration, whether there are now installment payments that the actual holder of the Note is no longer authorized to collect. Since resolution of these issues of fact require more than what the current record will allow, "the appropriate course under summary judgment rules is to remand this case for resolution of that factual question." *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 252–53, 884 P.2d 592 (1994).

The Terhunes respectfully request the Court reverse the trial court Orders and award the Terhunes attorney's fees on appeal.

RESPECTFULLY SUBMITTED this 28th day of September
2018.

SKYLINE LAW GROUP PLLC

By: *s/ Michele K. McNeill*

Michele K. McNeill, WSBA No. 32052

michele@skylinelaw.com

2155 112th Ave NE

Bellevue, WA 98004

Phone: (425) 455-4307

Fax: (800) 458-1184

Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2018 I caused to be served a copy of the foregoing REPLY BRIEF on the following person(s) in the manner indicated below at the following address(es):

<p>Thomas Abbott Perkins Coie LLP 505 Howard Street, Suite 1000 San Francisco CA 94105-3204 Phone: <u>415-344-7099</u> Email: <u>tabbott@perkinscoie.com</u></p> <p>Attorney for U.S. Bank Trust, N.A. and Caliber Home Loans, Inc.</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-filing system <input checked="" type="checkbox"/> Email <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail</p>
<p>Kristine Kruger Perkins Coie LLP 1201 Third Ave., Ste. 4900 Seattle, WA 98101 Phone: <u>206-359-3111</u> Email: <u>KKruger@perkinscoie.com</u></p> <p>Attorney for U.S. Bank Trust, N.A. and Caliber Home Loans, Inc.</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-filing system <input checked="" type="checkbox"/> Email <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail</p>

I am over the age of 18, competent as a witness, and make the foregoing statements based on my personal knowledge. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Bellevue, Washington on September 27th, 2018.



Julia Bryan
Legal Assistant

SKYLINE LAW GROUP PLLC

September 27, 2018 - 1:40 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51479-6
Appellate Court Case Title: Robert Terhune, Appellant v North Cascase Trustee Services Inc., Respondent
Superior Court Case Number: 17-2-05214-6

The following documents have been uploaded:

- 514796_Answer_Reply_to_Motion_20180927133743D2486547_3870.pdf
This File Contains:
Answer/Reply to Motion - Reply to Response
The Original File Name was Appellants' Reply Brief_executed.pdf

A copy of the uploaded files will be sent to:

- KKruger@perkinscoie.com
- brenner@perkinscoie.com
- syoungquist@perkinscoie.com
- tabbott@perkinscoie.com

Comments:

Sender Name: Julia Bryan - Email: julia@skylinelaw.com

Filing on Behalf of: Michele K Mcneill - Email: michele@skylinelaw.com (Alternate Email: julia@skylinelaw.com)

Address:
2155 112th Ave NE
Bellevue, WA, 98004
Phone: (425) 455-4307 EXT 101

Note: The Filing Id is 20180927133743D2486547