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Case No. 51556-3-II

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

U.S. BANK TRUST, N.A., AS TRUSTEE FOR
LSF8 MASTER PARTICIPATION TRUST,

Plaintiff/Respondent,

v.

JASON HAGEN

Defendant/Appellant

and

JACK W. BAILEY et al.

Defendants

BRIEF OF RESPONDENT
U.S. BANK TRUST, N.A., AS TRUSTEE FOR
LSF8 MASTER PARTICIPATION TRUST

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I. INTRODUCTION

A non-judicial foreclosure action was commenced in May 2009 because borrowers Jack and Sharon Bailey defaulted on a residential mortgage loan. The Baileys filed bankruptcy, which stopped the foreclosure process. After receiving a discharge in December 2009, the Baileys conveyed their encumbered property to Appellant Jason Hagen in September 2011.

The federal government indicted Hagen in December 2013 and threatened to seize the property in a criminal forfeiture. A February 2015 federal court order exempted the property from being forfeited.

Respondent U.S. Bank Trust, N.A. as Trustee for LSF8 Master Participation Trust (“U.S. Bank Trust”) initiated a judicial foreclosure action in September 2015, resulting in Hagen counterclaiming to quiet title free of the mortgage lien.

Hagen argued below that U.S. Bank Trust could not foreclose because the statute of limitations had run. U.S. Bank Trust responded that the loan was not accelerated, but regardless, the limitations period had been sufficiently tolled due to the commencement of foreclosure and/or an automatic bankruptcy stay. The trial court agreed with U.S. Bank Trust, rejecting Hagen’s argument and dismissing his counterclaim with prejudice. That decision should now be affirmed.

II. STATEMENT OF THE CASE

A. Factual History.

On or about July 11, 2002, in consideration for a mortgage loan, the Baileys executed a promissory note (the “Note”) for \$291,102.72 payable to Household Realty Corporation (“Household”). CP 268-270. The Note describes default conditions where the lender *may* require immediate payment in full of all amounts owed. CP 270.

The Baileys executed a security instrument (the “Deed of Trust”) securing the Note, and the same was recorded on July 15, 2002 with the Clark County Auditor. CP 272-277. The recorded Deed of Trust encumbers real property commonly known as 16203 N.E. 36th Ave., Ridgefield, WA 98642 (the “Property”). CP 268.

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

(1) the breach; (2) the action required to cure such breach, (3) a date, not less than 30 days from the date the notice is mailed to Borrower, by which such breach must be cured; and (4) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the sums secured by this Deed of Trust and sale of the Property at public auction at a date not less than 120 days in the future.

CP 275, ¶ 17.

As of August 2008, the Baileys defaulted on the loan by failing to make payments. CP 47, ¶ 16; CP 265, ¶ 5.

On or about May 18, 2009, a written Notice of Default was transmitted to the Baileys. CP 172-175. On June 19, 2009, Household appointed Regional Trustee Services (“Regional Trustee”) as successor trustee under the Deed of Trust. CP 55-56. That same date, Regional Trustee recorded a Notice of Trustee’s Sale, scheduling a sale of the Property for September 18, 2009. CP 58-61.

The trustee’s sale did not occur because on September 17, 2009, the Baileys filed a Chapter 7 bankruptcy petition. CP 63-118. The Baileys stated an intent to surrender the Property. CP 107. On December 16, 2009, the Bankruptcy Court granted the Baileys a standard discharge of their personal liability on certain debts. CP 120-121.

On or about June 2, 2011, Household sent the Baileys a letter advising them of the loan’s arrearage. CP 279. This letter stated, “it is our intent to declare your loan past due and payable immediately if the... breach is not remedied as outlined.... You have the right to reinstate after acceleration and to bring court action to assert the nonexistence of a default or any other defense you may have to acceleration and sale of your property.” *Id.*

On September 27, 2011, the Baileys conveyed the still-encumbered Property to Hagen via quit claim deed. CP 42.

On or about June 12, 2012 and January 4, 2013, Household sent additional letters to the Baileys advising them of the loan's arrearage. CP 281, 284 (respectively). Again, these letters stated, "it is our intent to declare your loan past due and payable immediately if the... breach is not remedied as outlined.... You have the right to reinstate after acceleration and to bring court action to assert the nonexistence of a default or any other defense you may have to acceleration and sale of your property." *Id.*

On December 13, 2013, a Grand Jury indicted Hagen in the United States District Court for the District of Oregon, making the Property subject to criminal forfeiture. CP 392.

On or about January 21, 2014, Household sent a fourth letter to the Baileys advising them of the loan's arrearage. CP 287. This letter also stated, "it is our intent to declare your loan past due and payable immediately if the... breach is not remedied as outlined.... You have the right to reinstate after acceleration and to bring court action to assert the nonexistence of a default or any other defense you may have to acceleration and sale of your property." *Id.*

On February 17, 2015, the District Court entered a final order of forfeiture as to Hagen, but did not include the Property. CP 395-399. The government later withdrew its recorded *lis pendens* against the Property. CP 401-403.

B. Procedural History.

On September 22, 2015, U.S. Bank Trust commenced a judicial foreclosure action. CP 1. On September 2, 2016, U.S. Bank Trust filed an Amended Complaint for judicial foreclosure. CP 23.

On January 12, 2017, Hagen answered the Amended Complaint and counterclaimed to quiet title free of U.S. Bank Trust's lien. CP 45-49.

U.S. Bank Trust moved for judgment on the pleadings with respect to Hagen's counterclaim, and Hagen sought summary judgment as to the same. CP 122-430. On February 15, 2017, the trial court granted an order in U.S. Bank Trust's favor and entered a CR 54(b) ruling to permit Hagen's appeal, which followed. CP 431-433.

III. RESPONSE TO ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

The trial court did not err in dismissing Hagen's quiet title counterclaim.

1. The Bailey's debt obligation was not accelerated in 2009.
2. Even if acceleration had occurred, the non-judicial foreclosure process tolled the statute of limitations.
3. Even if acceleration had occurred, the Baileys' bankruptcy tolled the statute of limitations.

IV. ARGUMENT

A. Standard of Review.

An order granting CR 12(c) dismissal is reviewed *de novo*. *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012).¹ The purpose of a CR 12(c) motion is “to determine if a plaintiff can prove any set of facts that would justify relief.” *Id.*

CR 12(c) motions are treated identically to those brought under CR 12(b)(6). *Id.* For purposes of the rule, while factual contentions in a claim are presumed true, “legal conclusions are not required to be accepted on appeal.” *Jackson v. Qual. Loan Serv. Corp.*, 186 Wn. App. 838, 347 P.3d 487 (2015), citing *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987); see also *West v. State, Wash. Ass’n of Cty. Officials*, 162 Wn. App. 120, 128, 252 P.3d 406 (2011).² If a claim is legally insufficient, dismissal should be the appropriate outcome. *Id.*, citing *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005).

¹ The denial of Hagen’s summary judgment motion is also reviewed *de novo*. See, e.g., *Robb v. City of Seattle*, 176 Wn.2d 427, 432, 295 P.3d 212 (2013).

² Although Hagen notes that CR 12(c) calls for “hypothetical facts... [to] be viewed in a light most favorable to the nonmoving party,” it is equally true that a summary judgment denial is reviewed based on “all reasonable inferences from the evidence in the light most favorable to the nonmoving party,” which here, was U.S. Bank with respect to Hagen’s failed motion. Compare *Robb*, 176 Wn.2d at 432-33 with Op. Brief (of Hagen) at 6. Hagen’s theories are not assumed valid simply because the trial court ruled against him.

Given the evidence presented to the trial court, Hagen's quiet title counterclaim could not be sustained as a matter of law.

B. U.S. Bank Trust is Not Time-Barred From Pursuing Judicial Foreclosure.

In Washington, 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); *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.”); *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 (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 (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).

Here, Hagen argues that the Baileys' secured debt obligation was accelerated in 2009, making it unenforceable through U.S. Bank Trust's later action seeking to foreclose on the Property. However, Hagen is both legally and factually incorrect.

1. The Baileys' Loan Was Not Accelerated.

It is well-settled in Washington that acceleration is not self-executing after a borrower's default. *See Kenworth Sales Co. v. Salantino*, 154 Wash. 236, 238, 281 P. 996 (1929) (language purporting to accelerate after default "gives no more than the option" of such outcome). Rather, a lender must overtly act to effectuate acceleration. *Heintz, supra.* at *5, *citing* 4518 S. 256th, *supra.* at 435; *see also* *Erickson v. America's Wholesale Lender et al.*, 3 Wn.App.2d 1023 at *3 (2018) (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 appries 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). 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).

For example, in *Wash. Fed. v. Azure Chelan LLC*, a notice to the borrower explained that “[t]he entire unpaid balance of the Promissory Note... plus all accrued interest and all other amounts that may be owing thereunder *are* immediately due and payable.” 195 Wn. App. 644, 650, 382 P.3d 20 (2016) (emphasis added). Division Three found this present-tense statement constituted an unequivocal acceleration. *Accord* Black’s Law Dictionary (10th ed. 2014) (the plain meaning of “acceleration” is, in the present tense, “[t]he advancing of a loan agreement’s maturity date so that payment of the entire debt is due immediately....”).

By contrast, notices in *Erickson v. America’s Wholesale Lender*, *supra.*, warned the borrower:

[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....

(unpublished; emphasis added). Division One held that this verbiage merely “informed... [the borrower] of a future contingent event,” and was

therefore insufficient to accelerate the obligation.

Likewise, in *Bank of New York Mellon v. Stafne*, a notice to the borrower contained language stating the lender “would accelerate the loan if the default was not cured.” 2016 WL 7118359, *3 (W.D. Wash. Dec. 7, 2016). The Federal District Court found this warning was insufficient to accelerate the installments owed, holding: “[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.” *Id.*

Another instructive decision is *4518 S. 256th, LLC*, wherein Division One reviewed a Notice of Default itemized the default based on the borrower’s failure to pay past due monthly installments; the Court observed that the arrearage asserted was far less than the loan’s unpaid balance. 195 Wn. App. at 428-29.

In this case, Hagen misconstrues both the Deed of Trust and later Notice of Default issued to the Baileys. First, acceleration was *not* a “prerequisite” to non-judicial foreclosure under the Deed of Trust. CP 275, ¶ 17. This security instrument describes what form of notice must be given to the borrower “prior to acceleration,” while also explaining that it

is “at Lender’s option” whether to subsequently declare all sums immediately due and payable. *Id.*

Second, the Notice of Default did not unequivocally accelerate the Note as Hagen contends. This notice, like the one reviewed in *4518 S. 256th, LLC*, itemized delinquent payments and costs with a cure amount of \$42,320.11—far less than the total \$311,221.42 debt owed at that time. *Compare* CP 173 (cure amount) *with* CP 175 (total debt in FDCPA notice). The Baileys were not told they must pay an accelerated debt in full.

Moreover, the Notice of Default provided a warning to the Baileys in accordance with Paragraph 17 of the Deed of Trust, but it did not actually effectuate acceleration. The Deed’s paragraph stated:

[i]f the default described above is (are) not cured within thirty days of 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 173, ¶ 5(c) (emphasis added). This statement describes a future contingent event, and there is no evidence in the record that the “Lender’s option” to accelerate described in the Deed of Trust was ever subsequently exercised. CP 275, ¶ 17.

Hagen’s interpretation of the Notice of Default would turn a required warning, found in the Deed of Trust provision governing acceleration, into a self-executing election to accelerate. But this has never been the law in Washington. *Cf.* Op. Brief at 16-17 (citing New York cases).³ The Court should find that acceleration was not unequivocally invoked during the non-judicial foreclosure process.

2. Even If Acceleration Did Occur, Then Such Remedy Was Later Abandoned.

Acceleration “may be waived by inconsistent actions.” 27 Wash. Prac., Creditors’ Remedies - Debtors’ Relief § 3.119. *cf.* Op. Brief at 21 (claiming there is no Washington authority to “retract the acceleration”).

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

³ Hagen cites to one local federal court case—*Fujita v. Qual. Loan Serv. Corp. of Wash.*, 2016 WL 4430464 (W.D. Wash. Aug. 22, 2016)—that seemingly agrees with his acceleration argument. Op. Brief at 18. However, a ruling from the Hon. Judge Jones of the Western District of Washington recognizes that *Bank of New York Mellon v. Stafne* reached the opposite conclusion as *Fujita*, *i.e.*, the later holding in *Stafne* favors U.S. Bank’s position here. *See Umouyo v. Bank of Am., N.A.*, 2017 WL 1532664, *4 (W.D. Wash. Apr. 28, 2017), *reconsideration denied*, 2017 WL 7053743 (W.D. Wash. Sept. 18, 2017). As mentioned above, the analysis in *Stafne* is more like Division One’s *Erickson* decision.

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); *Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, 52 Wn. App. 497, 502, 761 P.2d 77 (1988) (resuming monthly installment billing showed a waiver of acceleration).

Here, Hagen asserts that “the recording of the Notice of Trustee’s Sale [in June 2009] removed any doubt that the Lender had opted to accelerate the obligation.” Op. Brief at 15; *but see* RCW 61.24.090(3) (the right to reinstatement in a sale notice results in the obligation being treated “as though no acceleration had taken place.”).

However, Hagen ignores the sale notice’s plain language:

[t]he sale will be discontinued and terminated if at any time on or before September 7, 2009 (11 days before the sale date) the default(s) set forth in paragraph III is/are cured and the Trustee's fees and costs are paid.

CP 325, ¶ V. The sale notice specified the total reinstatement amount was \$46,208.58—not the full \$270,336.87 owing on the obligation. CP 325, ¶¶ III, IV; *see also* RCW 61.24.090(1). Only when U.S. Bank Trust initiated its judicial foreclosure action did it exercise a specific election “to declare the whole balance of both the principal and interest... due and payable” under the Note. CP 4, ¶ 17.

Additionally, U.S. Bank Trust's loan servicer Household sent the Baileys multiple letters between June 2011 and January 2014 stating that a failure to cure the loan's default “may result in acceleration...” CP 279-288.⁴ These admonitions are certainly not meaningless or superfluous.⁵

⁴ Hagen argues that Caliber's corporate representative could not testify to the letters' contents. Op. Brief at 20-21. However, case law broadly interprets the terms “custodian” and “other qualified witness” under RCW 5.45.020, the business records statute. *See, e.g., State v. Ben-Neth*, 34 Wn. App. 600, 663 P.2d 156 (1983). Indeed, the person who created a record need not be the same individual identifying it. *See, e.g., Bavand v. OneWest Bank*, 196 Wn. App. 813, 830, 385 P.3d 233 (2016), *as modified* (Dec. 15, 2016); *Cantrill v. Am. Mail Line, Ltd.*, 42 Wn.2d 590, 257 P.2d 179 (1953). The representative in this case testified that all documents attached to his declaration were found in Caliber's business records, who “maintains records for the Loan in its capacity as [U.S. Bank's] servicer.” CP 242, ¶ 2. The letters were properly considered below.

⁵ Hagen suggests, without citation to authority, that he can raise a bankruptcy discharge violation on behalf of another party for the first time in a state court appeal. Op. Brief at 22. The Court should disregard Hagen's comments regarding “forbidden” notices which were only sent to the Baileys and not to him. *Id.*

Even if the Deed of Trust itself somehow self-executed acceleration, or the Notice of Default and/or Notice of Trustee's Sale triggered the same, then Household's letters established that the loan was still due in monthly installments and acceleration had been waived.⁶

3. Even If Acceleration Did Occur, Then the Statute of Limitations Was Tolloed.

a. Nonjudicial Foreclosure Commenced.

Hagen alleges that U.S. Bank Trust could not show that "an effective non-judicial foreclosure proceeding was in fact commenced...."

Op. Brief at 34.

Commencement occurs "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); *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; "[i]ssuing a notice of default is the first step toward non-judicial foreclosure and constitutes the commencement of an action to enforce the obligation."); *Lake v. MTGLQ Inv'rs, L.P.*, 2017 WL 3839590, *4 (W.D. Wash. Sept. 1, 2017) ("Quality commenced foreclosure proceedings by

⁶ Or as proof it had not even had not yet occurred.

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.”).

The Washington Deed of Trust Act confirms this reasoning as well; borrowers facing nonjudicial foreclosure possess the right to a pre-foreclosure meeting, which must occur prior to a Notice of Default’s issuance. *See* RCW 61.24.031(1)(c), (1)(f). Notably with respect to U.S. Bank Trust and the Baileys, this type of mandatory pre-foreclosure outreach did not exist under state law until July 2011. *See, e.g., Watson v. Nw. Tr. Servs. Inc.*, 180 Wn. App. 8, 11, 321 P.3d 262 (2014).

The record below reveals that on or about May 18, 2009, a Notice of Default was issued to the Baileys. CP 172-175. As recognized in the numerous decisions cited above, that step commenced a nonjudicial foreclosure process. The mailing requirements found in RCW

61.24.040(1) and “Notice of Foreclosure” found in RCW 61.24.040(4) are immaterial to such determination. *Cf.* Op. Brief at 35.

Contrary to Hagen’s suppositions, there is certainly evidence that a “non-judicial foreclosure proceeding was properly commenced.” *Cf.* Op. Brief at 36.

b. Tolling Through Nonjudicial Foreclosure.

The commencement of a nonjudicial foreclosure through a Notice of Default tolls the statute of limitations. *Bingham v. Lechner, supra.* at 127.⁷ Tolling continues for up to 120 days after “the date scheduled for the foreclosure.” *Bingham, supra.* at 131; *see also* RCW 61.24.040(6).

As Division One states in *Heintz*:

[s]erving 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 expires tolls the statute); *see also Fujita, supra.* at *2, *citing Bingham* at 127; *cf.* Op. Brief at 25, 30 (Hagen erroneously argues the opposite).

⁷ Hagen comments that if procedural steps are “not properly completed, the limitation period continues to run.” Op. Brief at 34. The corollary is that properly-completed steps, like issuing a Notice of Default, cause the limitation period to *stop*.

The standard for restarting the statute of limitations is whether nonjudicial foreclosure has remained “pending indefinitely in the face of years of inaction by the trustee.” *Bingham, supra.* at 131 (finding over six years between the commencement of two different foreclosure proceedings was “too late”). But a delay in the process does not nullify tolling that already occurred, as Hagen suggests. Op. Brief at 27.

Here, the Baileys defaulted in August 2008. CP 47, ¶ 16; CP 265, ¶ 5. A Notice of Default was issued to them on or about May 18, 2009, commencing nonjudicial foreclosure. CP 172-175.⁸ Then, on June 19, 2009, a Notice of Trustee’s Sale scheduled the Property’s auction for September 18, 2009. CP 58-61. The maximum available sale date, *i.e.* 120 days later, was on Friday, January 15, 2010.⁹ This calculation results in a difference of 243 days between the Notice of Default and last possible sale opportunity.

Even adopting Hagen’s assumption that the Notice of Default gave rise to acceleration, six years from its May 18, 2009 issuance was May 18,

⁸ Hagen’s counterclaim instead references June 15, 2009 as the loan’s acceleration date, which is incongruous with Hagen’s contention that the Notice of Default’s language constituted an acceleration. *See* CP 47, ¶ 26; *see also* Op. Brief at 46 (arguing a different acceleration date of June 19, 2009 based on the sale notice).

⁹ Trustee’s sales must occur on a Friday except when it is a legal holiday. RCW 61.24.040(9).

2015. However, applying the reasoning of *Bingham*, *Heintz*, and related decisions, 243 days of tolling must be added. The result is a statute of limitations expiration on January 16, 2016, or technically Tuesday, January 19, 2016 because of a weekend and holiday. *See* CR 6(a).

Hagen’s argument that “the limitation period is tolled only while the non-judicial foreclosure proceeding is ongoing” in fact supports U.S. Bank Trust, because it means the judicial foreclosure filing on September 22, 2015 was timely. Op. Brief at 33.¹⁰

c. Tolling Through Bankruptcy.

Removing any doubt that U.S. Bank Trust filed its action within the statute of limitations is the additional fact that the Baileys filed for bankruptcy protection—another tolling event.

Under RCW 4.16.230, “[w]hen 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.” A bankruptcy petition operates as a stay of the commencement of any process to recover a claim against the debtor. 11 U.S.C. § 362; *see also In re Jacobson*, 402 B.R. 359, 362

¹⁰ If the loan had *not* been accelerated, then U.S. Bank Trust’s judicial foreclosure action could proceed as to all installments due and owing within 6 years prior to filing on September 22, 2015, even without consideration for tolling. *See Edmundson, supra*.

(Bankr. W.D. Wash. 2009), *as modified* (Mar. 10, 2009) (“The Debtors’ filing automatically stayed the foreclosure.”).

This precise issue was recently analyzed in a case involving an accelerated note, bankruptcy stay, nonjudicial foreclosure, and subsequent judicial foreclosure action. *Merceri v. Deutsche Bank AG*, 2 Wn.App.2d 143, 408 P.3d 1140 (2018), *review denied sub nom. Merceri v. Deutsche Bank Nat’l Tr. Co.* (2018).

Merceri observes that the statute of limitations is tolled “[w]hen the commencement of an action is stayed by injunction or a statutory prohibition” *Id.* at 149, *citing* RCW 4.16.230. Rejecting the borrower’s position that “tolling applies only where the plaintiff exercises diligence,” *Merceri* holds, “[u]nder the plain language of RCW 4.16.230, the statute of limitations is tolled during the bankruptcy stay.” *Id.* at 151; 153, n. 5; *cf.* Op. Brief at 38-46 (essentially presenting the failed “due diligence” argument).

Recently, this Court agreed with *Merceri*’s holding. *Wash. Fed., N.A. v. Pac. Coast Construc., LLC*, 2018 WL 3640905 (2018) (unpublished). This Court found that during lengthy bankruptcy periods, the foreclosing creditor was prevented “from taking action against the property.” *Id.*, * 4. This Court also rejected the notion—also argued by

Hagen—that the creditor “could have filed petitions in the bankruptcy proceedings to lift the stays and foreclose on the deed of trust.” *Id.* at *3.

Here, the Baileys filed bankruptcy one day before the trustee’s sale, *i.e.*, on September 17, 2009. CP 63-118. The automatic bankruptcy stay remained in effect, and foreclosure could not move ahead, until after the Baileys’ discharge on December 16, 2009. CP 120-121. This 91-day period is tolled from the statute of limitations.

Thus, even if the statute of limitations started running immediately post-discharge instead of on the latest possible sale date pursuant to *Bingham, supra.*, the result would be a 31-day difference—with a necessity for U.S. Bank Trust to have filed its action before December 21, 2015 instead of January 19, 2016. *Accord Jarvis v. Fed. Nat’l Mortg. Ass’n*, 726 F. App’x 666, 667 (9th Cir. 2018) (statute of limitations ran from last installment owed before discharge).¹¹ The judicial foreclosure filing on September 22, 2015 was still timely.

¹¹ Hagen alleges that prior loan servicer Household should have sought to lift the stay within 30 days of the bankruptcy filing, which would have been on October 19, 2009 accounting for a weekend. Op. Brief at 40-46. Applying a mere 30 days of tolling using Hagen’s incorrect “due diligence” approach results in a filing bar date of October 19, 2015, yet the judicial foreclosure action was filed one month in advance of even *that* deadline.

V. CONCLUSION

After the Baileys defaulted on their mortgage, nonjudicial foreclosure commenced with a Notice of Default. That notice itemized delinquent payments necessary to reinstate the loan and provided the requisite warning set forth in the Deed of Trust. However, U.S. Bank Trust did not subsequently exercise its option to accelerate the loan.

Even if Hagen was correct though, and unequivocal acceleration had occurred, the record shows such remedy was abandoned.

And even if there was no abandonment, both issuance of the Notice of Default and the Baileys' bankruptcy created tolling events that rendered U.S. Bank Trust's judicial foreclosure filing timely and proper.

No matter how the evidence is viewed, Hagen's arguments on appeal must fail. Consequently, the trial court's dismissal of Hagen's quiet title counterclaim should be affirmed.

DATED this 9th day of August, 2018.

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Participation Trust

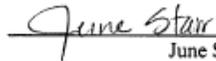
CERTIFICATE OF SERVICE

I, June Starr, certify that on August 9, 2018, a copy of the above **BRIEF OF RESPONDENT U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF8 MASTER PARTICIPATION TRUST** was served via COA Division II Efiling Portal system on the following parties and counsel of record:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington, on August 9, 2018.


June Starr

PERKINS COIE LLP

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