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NO. 51556-3-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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

Plaintiff/Respondent,

vs.

JACK W. BAILEY, an individual, *et al*,

Defendants,

JASON HAGEN, an individual,

Defendant/Appellant.

APPEAL FROM THE SUPERIOR COURT

HONORABLE GREGORY GONZALES

REPLY BRIEF

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Table of Contents

Introduction.....1

Discussion1

The Baileys’ Obligation Was Accelerated by No Later Than
June 19, 2009.....1

The Notice of Default Was Sufficient for Acceleration in
Thirty Days1

The Recording of the Notice of Trustee’s Sale Shows That
Acceleration Occurred.6

There Can Be No Waiver of Acceleration to Thwart the
Accrual of Plaintiff’s Cause of Action.....10

The Limitation Period Was Not Extended by Non-Judicial
Foreclosure Proceedings.15

The Limitation Period Was Not Extended by the Baileys’ Filing for
Bankruptcy Protection.20

Conclusion23

Table of Authorities

Washington Cases:

4518 S. 256th LLC v. Karen L. Gibbons, P.S., 195 Wn.App. 423, 382 P.3d 1 (2016).....9

Bain v. Metropolitan Mortgage Group, 175 Wn.2d 83, 285 P.3d 34 (2012).....9

Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 220 (1990)... ..8

Bingham v. Lechner, 111 Wn.App. 118, 45 P.3d 562 (2002)15, 16, 17

Campanella v. Rainier National Bank, 26 Wn.App. 418, 612 P.2d 460 (1980).....19

Casey v. Chapman, 123 Wn.App. 670, 98 P.3d 1246 1246 (2004).....19

Edmundson v. Bank of America, N.A., 194 Wn.App. 920, 378 P.3d 272 (2016).....11, 15, 18

Erickson v. America’s Wholesale Lender, 3 Wn.App.2d 1023, 2018 Wash.App. Lexis 811 (2018).....16

First Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC, 178 Wn.App. 207, 314 P.3d 420 (2013)8

Heintz v. U.S. Bank Trust, N.A., 2 Wn.App.2d 1007, 2018 Wash.App. Lexis 97 (2018)16

Kirsch v. Cranberry Financial, LLC, 178 Wn.App. 1031, 2013 Wn.App. Lexis 2871 (2013) 10, 11

Merceri v. Deutsche Bank AG, 2 Wn.App.2d 143, 408 P.3d 1140 (2018).....20

Merceri v. Bank of New York Mellon, ___ Wn.App. ____, ___ P.3d ____, 2018 Wash. App. Lexis 1923 (2018).....2, 4, 5

Udall v. T.D. Escrow Service, Inc., 159 Wn.2d 903, 154 P.3d 882
(2007).....18

Washington Federal, N.A. v. Pacific Coast Construction, LLC,
___ Wn.App. ___, 2018 Wash.App. Lexis 1779 (July 31, 2018).....21

Weinberg v. Naher, 51 Wash. 591, 99 P. 736 (1909)....9

Federal Cases:

Fagerlie v. HSBC Bank, 2013 U.S. Dist. Lexis 65900
(W.D. Wash. 2013).....19

Fujita v. Quality Loan Service Corp. of Washington,
2016 U.S. Dist. Lexis 111756 (W.D. Wash. 2016)2, 4, 6

Hartley v. Bank of America, 2017 U.S. Dist. Lexis 32610 (W.D. Wash.
2017)19

Jarvis v. Fannie Mae, 2017 U.S. Dist. Lexis 62102 (W.D. Wash. 2017),
affirmed 726 Fed.Appx. 666 (9th Cir. 2018)12

Lake v. MTGLQ Investors, L.P., 2017 U.S. Dist. Lexis 142066 (W. D.
Wash. 2017)19

Mills v. Bank of America, 2014 U.S. Dist. Lexis, 117563 (W.D. Wash.
2014)19

Omouyo v. Bank of America, N.A., 2017 U.S. Dist. 65202 (W.D. Wash. 2017)
.....2, 4

Renfroe v. Quality Loan Service Corp., 2017 U.S. Dist. Lexis 213311
(E.D. Wash. 2017).....19

Silvers v. U.S. Bank, N.A., 2015 U.S. Dist. Lexis 112650 (W.D. Wash.
2015)12

Tran v. Bank of America, 2014 U.S. Dist Lexis 71464 (W.D. Wash. 2014) ..19

Cases from Other States:

Citimortgage Inc., v. Ramirez, 50 Misc.3d 1212(A), 2018 N.Y. Misc. Lexis 1250 (2018).....13

Lavin v. Elmakiss, 302 A.D. 638, 754 N.Y.S.2d 741 (2003).....13

Markle v. Columbia Union National Bank and Trust Co., 483 S.W.2d 682 (Mo. App. 1972).....13

Statutes:

RCW 4.16.04011

RCW 4.16.18021

RCW 4.16.23021

RCW 61.24.040(6).....17

Rules:

ER 4011

GR 14.1(a).....22

Rules of the United States Court of Appeals for the Ninth Circuit 36-3(a)...12

INTRODUCTION

This Reply Brief will concentrate on the points made in the Brief of Respondent submitted by Plaintiff/Respondent U.S. Bank Trust, N.A, as supplemented by the Statement of Additional Authorities filed on August 14, 2018. That brief chose not to deal with or attempt to refute many of the arguments made in the Brief of Appellant. Repetition of those points and other points made in the Brief of Appellant will be avoided although some limited reference to those arguments will be necessary.¹

DISCUSSION

I. The Baileys' Obligation Was Accelerated by No Later Than June 19, 2009.

a. The Notice of Default Was Sufficient for Acceleration in Thirty Days.

As discussed in Brief of Appellant, pps. 11-18, acceleration occurred when the Baileys did not cure the default within thirty days of the Notice of Default. This follows from the clear language of paragraph 5(c) of the Notice of Default which states that acceleration will occur if no

¹ For reasons that are unclear, Plaintiff has opted to refer to federal matters involving Mr. Hagen. These have no particular relevance since they do not make any fact that is of consequence in this litigation more or less probable. ER 401 Plaintiff does not even attempt to explain what the significance of these matters might be. Mr. Hagen objected to their consideration, and the trial court did not consider them. (CP 390-403; CP 414-15; CP 432, paragraph 13) The Court should not consider these matters either.

cure is made within that time. The critical language of the Notice of

Default is:

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 notes secured by the Deed of Trust. . . 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 173) A number of cases have so held. *Fujita v. Quality Loan Service Corp. of Washington*, 2016 U.S. Dist. Lexis 111756 (W.D. Wash. 2016); *Omouyo v. Bank of America, N.A.*, 2017 U.S. Dist. 65202 (W.D. Wash. 2017) See also cases from New York cited in Brief of Appellant, pps. 15-17

Plaintiff U.S. Bank, N.A. claims something additional is needed for acceleration. It has submitted the Court's recent opinion in *Merceri v. Bank of New York Mellon*, ___ Wn.App. ____, ___ P.3d ____, 2018 Wash. App. Lexis 1923 (2018) as a Supplemental Authority. That case does not help Plaintiff because it is readily distinguishable from our situation. In that case, Ms. Merceri stopped making payments on her loan

in early 2010. She received a Notice of Default that was close in content to the one sent in this case. It read:

If 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 this Security Instrument without further demand and may invoke the power of sale and/or any other remedies permitted by Applicable Law.

(Slip Opinion, p. 2) Ms. Merceri did not cure the default. But the lender did not record or serve a Notice of Trustee's Sale. Rather, it sent her letters "presenting options such as loan modification, repayment arrangements, short sale, and full reinstatement." Slip Opinion, p. 3. The loan was then assigned. The new holder sent other and further notices. Finally, in June of 2016, a Notice of Trustee's Sale was issued. Ms. Merceri claimed that nonjudicial foreclosure proceedings could not proceed because more than six years had expired between the date for cure in the notice and the date when the Notice of Trustee's Sale was recorded. On these facts, the Court ruled that the 2010 Notice of Default was not sufficient because it envisioned some future act on the part of the lender that never occurred and also because of the actions the lender did take that were inconsistent with acceleration—presenting her with a number of options to eliminate the problem which included loan modification and other unspecified repayment arrangements.

Our case is different, of course. Plaintiff's predecessor sent the Notice of Default on May 18, 2009; presented the Baileys with no options for modification or repayment; and recorded a Notice of Trustee's Sale on June 19, 2009, as soon as the period for cure expired. As a result, the Baileys were forced to file for bankruptcy protection. In other words, the Notice of Default justified the Baileys to conclude that acceleration had occurred when they didn't cure and when a Notice of Trustee's Sale appeared.

The opinions of the respective Courts in *Fujita v. Quality Loan Service Corp. of Washington, supra*, *Omouyo v. Bank of America, N.A., supra*—where acceleration was found based on similarly worded notices, mirror our facts and not those in *Merceri v. Bank of New York Mellon, supra*. In each case, the notice was followed up with a Notice of Trustee's Sale although not immediately as here. The Notice of Trustee's Sale came more than five years after the notice in *Fujita v. Quality Loan Service Corp. of Washington, supra*, and approximately eight months after the notice in *Omouyo v. Bank of America, N.A., supra*. There is also nothing in either opinion suggesting that the lender offered the borrower the same options Ms. Merceri was offered in *Merceri v. Bank of New York Mellon, supra*. If acceleration was found in both cases where recordation

of the Notice of Trustee's Sale was delayed, it must be found here when recordation was immediate.

In any event, *Merceri v. Bank of New York Mellon, supra*, cannot be divorced from its facts. A conclusion that no acceleration has occurred may be warranted when the lender acts as if the obligation has not been accelerated and does not record a Notice of Trustee's Sale. But when the lender takes immediate enforcement action, as here, and when, as discussed in more detail below, acceleration is necessary for foreclosure, acceleration must have occurred.

One other matter indicates that there had been acceleration.

Attached to the Notice of Default is a Notice Required by the Fair Debt Collection Practice Act. It states:

2. As of the date of this letter, you owe \$311,221.42. Because of interest, late charges, and other charges that may vary from day to day, or may apply only upon payoff, the amount due on the day you pay may be greater. Hence if you pay the amount shown above, an adjustment may be necessary after we receive your check in which event we will inform you before depositing the check for collection. .

4. The debt will be assumed to be valid by (the Trustee) unless WITHIN THIRTY DAYS AFTER THE RECEIPT OF THIS NOTICE, you dispute the validity of the debt or some portion thereof.

(Capitalization in the original) (CP 175) The original amount borrowed was \$269,997.77. This language suggests that acceleration may have

already occurred. Anyone reading paragraph 5(c) of the Notice of Default and these two provisions would conclude that acceleration would certainly take place if no cure was made in thirty days if it had already not occurred. In short the language in the Notice of Default was sufficient to alert the borrower to acceleration if no cure was made within the time given.

It is submitted, in any event, that the cases ruling that this notice is sufficient to accelerate if no payment is made have the better of the argument. A borrower has the absolute right to conclude that the notice means exactly what it says—that the failure to cure means acceleration. Brief of Appellant, pps. 15-17 This is especially true, as noted by the Court in *Fujita v. Quality Loan Service Corp. of Washington*, *supra*, when the deed of trust—as here—allows for acceleration “without further demand” after an initial notice is given.

b. The Recording of the Notice of Trustee’s Sale Shows That Acceleration Occurred.

The Deed of Trust makes clear that foreclosure cannot occur unless the borrower’s obligation has been accelerated. The recording of the Notice of Trustee’s Sale therefore removed any doubt that acceleration occurred.

The Deed of Trust in our case discusses foreclosure and acceleration in paragraph 17:

. . .(U)pon Borrowers' breach of any covenant or agreement of Borrower in this Deed of Trust, including the covenants to pay when due any sums secured by this Deed of Trust, Lender, prior to acceleration, shall give notice to Borrower...specifying (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. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the nonexistence of a default or any other defense of Borrower to acceleration and sale. If the breach is not cured on or before the date specified in the notice, Lender, at lender's option may declare all of the sums secured by this Deed of Trust to be immediately due and payable without further demand and may invoke the power of sale and any other remedies permitted by applicable law. . .

(Emphasis added) (CP 218) Under the clear language, foreclosure cannot proceed without acceleration. The recording of the Deed of Trust was therefore a sufficient act to show that acceleration had occurred even if the Notice of Default was not.

Apparently, Plaintiff must be claiming that this language allows the lender to accelerate, invoke nonjudicial foreclosure, do one without doing the other, or do both. In other words, it is seeking a disjunctive interpretation of the phrases "declare all sums secured by this Deed of Trust to be immediately due and payable..." and "may invoke the

power of sale. . .” But the conjunctive “and” unites those two phrases, not the disjunctive “or.”

At worst, there is ambiguity about whether acceleration is required for foreclosure to continue. That ambiguity must be construed against Plaintiff since it stands in the shoes of the drafter of the deed of trust. *First Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC*, 178 Wn.App. 207, 214 fn. 8, 314 P.3d 420 (2013)

The parties’ conduct reinforces the notion that the Deed of Trust be interpreted to require acceleration to institute nonjudicial foreclosure. *Berg v. Hudesman*, 115 Wn.2d 657, 661, 801 P.2d 220 (1990) The Notice of Default was sent by the Successor Trustee, an entity clearly and obviously engaged to proceed with nonjudicial foreclosure. Any Notice of Default that it would send would have to be sufficient to proceed with nonjudicial foreclosure both under RCW 61.24 and the terms of the Deed of Trust. There is nothing in RCW 61.24 that makes acceleration a requirement of nonjudicial foreclosure. Brief of Appellant, pps. 13-14 Therefore, an acceleration notice was placed in the Notice of Default only because it was required by paragraph 17 of the Deed of Trust.

Acceleration in a vacuum also makes no sense. There is no apparent reason for a lender to want to accelerate unless the lender plans

on taking some other collection action such as nonjudicial foreclosure or judicial foreclosure. And deeds of trust should not be given absurd interpretations. *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 101, 285 P.3d 34 (2012)²

Acceleration can take many forms. It may be exercised by giving the payors formal notice to the effect that the whole debt is declared to be due, or by the commencement of an action to recover the debt, or by any means by which it is clearly brought home to the payors of the note that the option is exercised. *Weinberg v. Naher*, 51 Wash. 591, 594, 99 P. 736 (1909) Given the language in the Deed of Trust linking acceleration and foreclosure, together with the clear notice in the Notice of Default that acceleration “will” occur if there is no cure, it is clear that acceleration occurred at the latest when the Notice of Trustee’s Sale was recorded.

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² The Court in *4518 S. 256th LLC v. Karen L. Gibbons, P.S.*, 195 Wn.App. 423, 382 P.3d 1 (2016), came to the contrary conclusion on the facts presented in that case. As the opinion took great pains to point out, the Notice of Default that preceded recording of the Notice of Trustee’s Sale made no mention of acceleration. Had acceleration been included in the Notice of Default, the parties’ conduct would have required that the Deed of Trust be interpreted to make acceleration a requirement for non-judicial foreclosure.

c. There Can Be No Waiver of Acceleration to Thwart the Accrual of Plaintiff's Cause of Action.

Plaintiff goes on to argue that if there was acceleration, it was later waived or, as is stated in some cases, the obligation was “decelerated.” That argument has no merit.

In *Kirsch v. Cranberry Financial, LLC*, 178 Wn.App. 1031, 2013 Wn.App. Lexis 2871 (2013),³ the Court rejected the notion that “deceleration” can occur to avoid the running of the period of limitation. In that case, Mr. Kirsch personally guaranteed a promissory note given by his corporation and also executed a deed of trust pledging his residence as security for the loan. The last installment on the loan was due in 2003. Only one payment was made. The holder of the obligation sued to judicially foreclose the deed of trust in 2004. In its complaint, it stated that all sums due under the note were accelerated. The action was dismissed for want of prosecution in 2009. In 2012, Mr. Kirsch sued to quiet title on the basis that the limitation period to enforce the deed of trust had expired. The Court ruled that the obligation was accelerated in 2004 and that the acceleration had not been waived or otherwise canceled by the dismissal of the action in 2009 for want of prosecution. It noted that the

³ This is an unpublished decision of the Court of Appeals.

dismissal of the action had no effect on the notice given in 2004. In that regard it noted that “Once rung, the bell is not unring.” Paragraph 26. It held that the six year statute of limitations in RCW 4.16.040 barred all collection actions.

Our case is no different from *Kirsch v. Cranberry Financial, LLC, supra*. Acceleration occurred at the latest on June 19, 2009, when the Notice of Trustee’s Sale was recorded. That nonjudicial foreclosure proceeding was later discontinued. That discontinuance had no effect on the acceleration. As the Court stated in *Kirsch v. Cranberry Financial, LLC, supra*, once the bell of acceleration is rung, it cannot be unring.

Nonetheless, Plaintiff relies on a series of letters or notices dated beginning in 2011 and purportedly addressed to the Baileys to show that acceleration was somehow waived. This argument fails for a number of reasons.

First of all, there could be no “deceleration” because the bankruptcy discharge granted to the Baileys on December 16, 2009, eliminated their personal obligation to pay the underlying obligation. *Edmundson v. Bank of America, N.A.*, 194 Wn.App. 920, 931, 378 P.3d 272 (2016) Acceleration renders all sums due and payable notwithstanding the terms of an obligation that allows for installment payments. Any

waiver of acceleration or “deceleration” would reinstitute the obligation to repay in installments. But after the discharge, the borrowers—in this case, the Baileys—had no obligation to repay. Reinstating a debt that the debtor has no obligation to pay is illogical. Therefore, there could be no “deceleration.” In fact, had there been no acceleration in June of 2009, the period of limitations would have begun on December 1, 2009, the date the last installment before the discharge was due. *Silvers v. U.S. Bank, N.A.*, 2015 U.S. Dist. Lexis 112650 (W.D. Wash. 2015); *Jarvis v. Fannie Mae*, 2017 U.S. Dist. Lexis 62102 (W.D. Wash. 2017)⁴, affirmed 726 Fed.Appx. 666 (9th Cir. 2018). This result could not be changed by communication after the discharge was granted.

Secondly, the letters are not sufficient to waive the discharge or to allow for “deceleration.” Where “deceleration” has been allowed, 1) the revocation of the acceleration must be evidenced by an affirmative act; (2) the affirmative act must be clear and unequivocal; 3) the affirmative act must give actual notice to the borrower that the acceleration has been revoked; 4) the affirmative act must occur before the expiration of the applicable statute of limitations period; and 5) the

⁴ The Court’s decision in *Jarvis v. Fannie Mae, supra*, was affirmed in *Jarvis v. Fannie Mae*, 726 Fed.Appx. 666 (9th Cir. 2018). The Memorandum Opinion the Court issued may not be considered as precedent. Rules of the United States Court of Appeals for the Ninth Circuit 36-3(a)

borrower must not have changed his or her position in reliance on the acceleration. such an explicit statement has been required. *Citimortgage Inc., v. Ramirez*, 50 Misc.3d 1212(A), 2018 N.Y. Misc. Lexis 1250 (2018) citing *Lavin v. Elmakiss*, 302 A.D. 638, 639, 754 N.Y.S.2d 741 (2003) The letters upon which Plaintiff relies make no mention of the earlier acceleration.

As noted above, “deceleration” must be clearly communicated. See also, *Markle v. Columbia Union National Bank and Trust Co.*, 483 S.W.2d 682, 685 (Mo. App. 1972)—“The and words relied on to constitute a waiver must be such as to justify the maker in believing and acting on the belief that the right will not be exercised without granting him an opportunity to protect himself by payment from the penalties incident to acceleration.” There is no competent evidence that these notices were actually sent to the Baileys. Brief of Appellant, pps. 20-21 Plaintiff claims that there was sufficient evidence to identify the letters because they were found in the file of Plaintiff’s servicer. Brief of Respondent, p. 14, fn. 4 The issue is not, as Plaintiff appears to claim, that the letters exist. The issue is their content and their actual delivery to the Baileys.

Third, sending the notices to the Baileys violated the terms of their bankruptcy discharge. Brief of Appellant, pps. 21-22 Plaintiff asserts without any authority that Mr. Hagen cannot raise this issue. Brief

of Respondent, p. 14, fn. 5 Counsel knows of no reason why he cannot, and Plaintiff gives none. Critically, however, none of these notices were ever addressed to Mr. Hagen although the property had been conveyed to him in 2011. Any notice indicating that acceleration had been waived should be addressed to the person with an interest in the property and who would be harmed by foreclosure. Plaintiff has not responded to either of these arguments.

Finally, the Deed of Trust in our case allowed “deceleration” to occur only when the borrower brings the obligation current. As paragraph 18 states:

Notwithstanding Lender’s acceleration of the sums secured by this Deed of Trust due to Borrower’s breach, Borrower shall have the right have any proceedings begun by Lender to enforce this Deed of Trust discontinued...if (a) Borrower pays Lender all sums which would then be due under this Deed of Trust and the Note had no acceleration occurred. . .(c) Borrower pays all reasonable expenses incurred by Lender and Trustee in enforcing the covenants and agreement of borrower contained in this Deed of Trust, and in enforcing Lender’s and Trustee’s remedies. . .including by not limited to, reasonable attorneys’ fees. . .Upon such payment and cure by Borrower, the Deed of Trust and the obligations secured hereby shall remain in full force and effect as if no acceleration had occurred. . .

(CP 219) That has not occurred here.

In short, there is nothing in the record that sufficiently shows any waiver or “deceleration” of the June 2009 acceleration.

II. The Limitation Period Was Not Extended by Non-Judicial Foreclosure Proceedings.

In the Brief of Appellant, Mr. Hagen argued that the six year limitation period began at the latest on June 19, 2009. He further contended that this six year period was not extended by the time between the recording of the Notice of Trustee’s Sale on June 19, 2009, and the Baileys’ bankruptcy filing on September 17, 2009. His argument was based on the following points:

1. Relevant statutes do not support such an extension;
2. If the limitation period is not extended for the time a dismissed court case is pending, there is no reason why it should be extended for the time that a discontinued nonjudicial foreclosure proceeding is pending.
3. The cases on which Plaintiff relies for such extension, *Bingham v. Lechner*, 111 Wn.App. 118, 45 P.3d 562 (2002), and *Edmundson v. Bank of America, supra*, do not support extension of the limitation period.
4. There can be no extension of the time period or, for that matter, any tolling of the limitation period, because there is no

evidence that all the procedural steps required in connection with a nonjudicial foreclosure proceeding were followed;

5. An extension of the limitation period flies in the face of the policies underlying statutes of limitations.

(Brief of Appellant, pps. 23-37)

In response, Plaintiff contends that the period of limitation is extended from the time that the Notice of Default is sent to 120 days after the date of sale contained in the Notice of Trustee's sale. It cites two unpublished opinions of the Court of Appeals in support of this argument. These are *Heintz v. U.S. Bank Trust, N.A.*, 2 Wn.App.2d 1007, 2018 Wash.App. Lexis 97 (2018)—where the statement was made but not particularly applied—and *Erickson v. America's Wholesale Lender*, 3 Wn.App.2d 1023, 2018 Wash.App. Lexis 811 (2018)—where the Court ruled that the limitation period was extended by a total of 421 days based on two uncompleted nonjudicial foreclosure attempts. Neither opinion mentions a continuance of the trustee's sale. Both opinions rely on *Bingham v. Lechner, supra*, for this rule. That case simply does not support the asserted proposition. In *Bingham v. Lechner, supra*, the Court ruled that Mr. Demopolis' filing of an amended notice of trustee's sale in 1999 could not be seen as a continuance of a trustee's sale initially scheduled in 1993 and discontinued because a sale could be continued for

only 120 days as stated in RCW 61.24.040(6) as it read at that time. It discussed times of tolling only to show that, under any circumstances, and assuming that some continuance of the sale had occurred, recommencing the sale in 1999 was too late to avoid the bar of the statute of limitations. 111 Wn.App. at 127-31 As pointed out in the Brief of Appellant, pps. 29-33, the Court in *Bingham v. Lechner, supra*, never decided whether the period of limitation was extended by issuing a Notice of Default or a Notice of Trustee's Sale.

Allowing the limitation period to be extended by 120 days even when there has been no extension of the sale date makes no sense. If a sale is discontinued without any extension or continuance, the lender is free to foreclose judicially if it desires to do so. There can be no reason to toll or extend the limitation period when the plaintiff is free to seek judicial relief.

In any event, there is nothing in the record to suggest that the sale was ever continued after the Baileys filed for bankruptcy protection. Therefore, if there is any extension of the limitation period by institution of nonjudicial foreclosure proceedings—which there should not be, it would not include any time related to an extension of the date of sale.

Plaintiff also claims that compliance with the various procedural requirements is not necessary to any tolling of the period of limitation.

Brief of Respondent, p. 16-17. But compliance with procedural requirements is necessary. The failure to comply voids any trustee's sale. *Udall v. T.D. Escrow Service, Inc.*, 159 Wn.2d 903, 914-915, 154 P.3d 882 (2007) If a trustee's sale cannot stand if procedural requirements are not followed, then a purported extension of the limitation period cannot be based on the pendency of a nonjudicial foreclosure proceeding when all procedural requirements are not followed. Furthermore, when the Court in *Edmundson v. Bank of America, supra*, stated that "resort to remedies" available under RCW 61.24 would toll the limitation period to allow completion of a nonjudicial foreclosure proceeding when the notice of default was sent before the end of the limitation period, it took pains to note that the "resort to remedies" consisted of a properly served Notice of Default—"a written notice of default . . . transmitted by first class and certified mail." 194 Wn.App. at 930.

There is support in the record that the Notice of Default was sent. (CP 59) Plaintiff then argues that this is all that is needed to commence the extension of the limitation period. Brief of Respondent, pps. 15-16. It bases its argument on a number of opinions containing offhand comments in the opinion about how a non-judicial foreclosure proceeding is commenced, initiated, or reinitiated by the sending of a Notice of Default. The issue of tolling or extending the limitation period was not raised in

any of them.⁵ Plaintiff also relies on *Lake v. MTGLQ Investors, L.P.*, 2017 U.S. Dist. Lexis 142066 (W. D. Wash. 2017). In that case, the parties agreed that nonjudicial foreclosure had been commenced by a notice of default sent prior to the expiration of the limitation period. The opinion did not discuss whether the correct procedures were followed for the Notice of Default or any Notice of Trustee's Sale. In short, nothing in these opinions supports Plaintiff's position.

The notion that the sending of a Notice of Default without more extends the limitation period is also nonsensical. What happens if a Notice of Default is sent but no Notice of Trustee's Sale is ever recorded? Would the limitation period be extended then? If so, for how long? Merely asking these questions shows that the rule Plaintiff urges has no support.

This point requires us to return to the comments made by the Court in *Hartley v. Bank of America*, 2017 U.S. Dist. Lexis 32610 (W.D. Wash. 2017), to the effect that merely sending a Notice of Default does not toll or extend the period of limitation in and of itself, and more importantly,

⁵ See, *Campanella v. Rainier National Bank*, 26 Wn.App. 418, 612 P.2d 460 (1980); *Casey v. Chapman*, 123 Wn.App. 670, 98 P.3d 1246 1246 (2004); *Fagerlie v. HSBC Bank*, 2013 U.S. Dist. Lexis 65900 (W.D. Wash. 2013); *Tran v. Bank of America*, 2014 U.S. Dist Lexis 71464 (W.D. Wash. 2014); *Mills v. Bank of America*, 2014 U.S. Dist. Lexis, 117563 (W.D. Wash. 2014); *Renfroe v. Quality Loan Service Corp.*, 2017 U.S. Dist. Lexis 213311 (E.D. Wash. 2017)

initiation of nonjudicial foreclosure proceedings tolls the limitation period only while they are ongoing. Brief of Appellant, pps. 32-33. This means that any argument that the limitation period is somehow extended must be rejected.

Otherwise, and since Plaintiff has not refuted Mr. Hagen's arguments in this area, he will stand on his discussion in the Brief of Appellant.

III. The Limitation Period Was Not Extended by the Baileys' Filing for Bankruptcy Protection.

As expected, Plaintiff has relied on RCW 4.16.230 and the Court's decision in *Merceri v. Deutsche Bank AG*, 2 Wn.App.2d 143, 408 P.3d 1140 (2018), to assert that the limitation period should be extended based on the Baileys' bankruptcy filing by an additional ninety-one days. Brief of Respondent, p. 21. The Court in that case ruled that RCW 4.16.230 requires extending the limitation period for foreclosing the Deed of Trust while an automatic stay in bankruptcy is pending, and that this rule applies regardless of whether the creditor can seek or obtain relief from the automatic stay.

In the Brief of Appellant Mr. Hagen discussed in detail why the ruling in that case should not be followed and pointed out how the Court in that case did not discuss these reasons. Brief of Appellant, pps. 37-46

To reiterate briefly, RCW 4.16.230 provides for tolling of time during which an action is stayed or prohibited by injunction or statute. That tolling should not be allowed when a party can end the injunction or prohibition. The Supreme Court adopted that notion when it ruled that the limitation period would not be tolled under RCW 4.16.180 during the time that the defendant is out of state. In our case, Plaintiff's predecessor would certainly have obtained relief from the automatic stay if it had made such a motion because there was no equity in the property at issue and the Baileys had surrendered it. Once again, Plaintiff has not even attempted to refute Mr. Hagen's arguments.

Plaintiff does refer to the Court's unpublished decision in *Washington Federal, N.A. v. Pacific Coast Construction, LLC*, ___ Wn.App. ___, 2018 Wash.App. Lexis 1779 (July 31, 2018), which relies on the Court's decision in *Merceri v. Deutsche Bank AG, supra*. The Court's opinion in *Washington Federal, N.A. v. Pacific Coast Construction, LLC, supra*, also does not discuss the arguments that Mr. Hagen made in the Brief of Appellant. Critically, the Court's opinion also does not tell us whether the debtors, Mr. Ferderer and Mr. and Ms. Cline, had surrendered any of the properties at issue, and whether a motion to lift the stay would have been successful, as it would have been in our case. It is assumed that these matters were not discussed in the opinion because

they were not sufficiently developed in the record and the parties' briefing. For these reasons, the case should not be considered persuasive. GR 14.1(a)

Plaintiff will also not be helped by the ninety-one days it claims should be added to the period of limitation. Brief of Respondent, p. 21 There can be no extension of the limitation period based on the discontinued nonjudicial foreclosure proceeding. In the absence of extension of the limitation period, Plaintiff's action would have had to have been filed by June 19, 2015, at the latest. If an additional ninety-one days is added to the limitation period, the action should have been filed by Friday, September 18, 2015. Plaintiff actually filed suit on September 22, 2015.

Since Plaintiff has chosen not to respond to Mr. Hagen's arguments, he will simply stand on what is contained in the Brief of Appellant.

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CONCLUSION

Plaintiff has not refuted the arguments Mr. Hagen made in the Brief of Appellant. Therefore, the Court should reverse the trial court's decision with directions to enter an order quieting title in the property at issue in Mr. Hagen free of any claims of Plaintiff.

DATED this 4 day of September, 2018.



BEN SHAFTON WSB#6280
Of Attorneys for Jason Hagen

FILED
Court of Appeals
Division II
State of Washington
9/4/2018 1:29 PM

NO. 51556-3-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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

Plaintiff/Respondent,

vs.

JACK W. BAILEY, an individual, *et al*,

Defendants,

JASON HAGEN, an individual,

Defendant/Appellant.

APPEAL FROM THE SUPERIOR COURT

HONORABLE GREGORY GONZALES

DECLARATION OF MAILING

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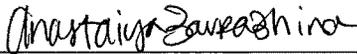
COMES NOW Anastasiya Zavrazhina and declares under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of her knowledge, information, and belief:

1. My name is Anastasiya Zavrazhina. I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, and not a party to this action.

2. On September 4, 2018, I placed a copy of this declaration and the Reply Brief in the mails of the United States, first class postage prepaid, and addressed as follows:

Joshua Schaer, Attorney at Law
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579

DATED at Vancouver, Washington, this 4 day of September, 2018.


ANASTASIYA ZAVRAZHINA

CARON, COLVEN, ROBISON & SHAFTON PS

September 04, 2018 - 1:29 PM

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Superior Court Case Number: 15-2-02626-1

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