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Division II
State of Washington
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Case No. 532417

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

DAVID DEVIN

Petitioner,

v.

MTC FINANCIAL, ET. AL.

Respondent.

RESPONDENT BANK OF NEW YORK MELLON NA'S
RESPONSE TO OPENING BRIEF

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I. INTRODUCTION

Appellant David Devin's ("Mr. Devin") Opening Brief is a quagmire of irrelevant arguments that fail to show a triable question of fact exists regarding his claims against the Bank of New York Mellon, NA ("BONYM"). Moreover, Mr. Devin's Notice of Appeal seeks to appeal the Superior Court's ruling on Mr. Devin's Motion for Reconsideration of a prior Motion for Reconsideration, which is not reviewable by this court. This alone should be fatal to Mr. Devin's appeal.

However, even if this Court decides to review the Superior Court's ruling on BONYM's Motion for Summary Judgment ("BONYM MSJ"), Mr. Devin's appeal still fails. In response to the BONYM MSJ, Mr. Devin, as required by CR 56(e), failed to put forth any admissible evidence that his loan was accelerated thereby triggering the applicable statute of limitations. Mr. Devin's other claims against BONYM directly flow from his erroneous assertion that RCW 4.16.040(1) bars the foreclosure of the Deed of Trust recorded against his property. As such, the trial court properly granted BONYM's MSJ.

This Court should affirm the trial court's ruling and find that summary judgment was proper because Mr. Devin failed to put

forth any admissible evidence showing his loan was accelerated thereby triggering the applicable statute of limitations or any other admissible evidence in support of his claims against BONYM.

II. ASSIGNMENT OF ERROR

None. The trial court correctly granted BONYM's MSJ, and the trial court's ruling should be affirmed. Mr. Devin presented no genuine material issue of fact to establish that his loan balance was accelerated thereby triggering the applicable statute of limitations set forth in RCW 4.16.040(1).

Mr. Devin's "Issues Pertaining to Assignments of Error No. 1" on page 2 of his Amended Opening Brief identifies the only issue before this court. Mr. Devin's other Assignments of Error and Issues Pertaining to Assignments of Error should be disregarded because Mr. Devin erroneously seeks review of claims against entities that are not parties to the lawsuit (*i.e.* Bank of America and Ditech) and review of claims not alleged in Mr. Devin's Amended Complaint (and therefore not addressed in the BONYM MSJ).

III. FACTS

Mr. Devin borrowed \$153,750.00 to purchase a home located at 1710 Wheaton Way, Bremerton, Washington (the "Property"). CP 46, ¶¶ 5, 6. The loan was evidenced by an

installment promissory note with a maturity date of 2035 (the “Note”) that was secured by a Deed of Trust (“DOT”) recorded against the Property. CP 46 & 52-66; CP 283-285, ¶ 9(a) & CP 286-288. MTC Financial, Inc. (“MTC”), the trustee, initiated a foreclosure of the DOT in the summer of 2016. CP 47, ¶¶ 12-14.

Mr. Devin filed suit to enjoin the trustee’s sale, claiming MTC did not properly notice the sale and that the foreclosure was time barred because he had not made a payment toward the Note since 2007. CP 46-48, ¶¶ 5-18. Most of the allegations in the Amended Complaint relate to MTC’s handling of the foreclosure. Mr. Devin’s allegations against BONYM, the beneficiary of the DOT, are limited, and hinge on Mr. Devin’s assertion that the 2016 foreclosure is time barred. CP 46 ¶ 8, 9; CP 48, ¶21. Indeed, paragraph 21 of Mr. Devin’s Amended Complaint (the operative pleading) alleges in relevant part: “STATUTE OF LIMITATIONS”. All or a portion of the Note and DOT are time barred by the statute of limitations (RCW 4.16.040), and thus not enforceable.” CP 48, ¶ 21. Because there are no other allegations of “fact” made against BONYM, Mr. Devin’s other claims against BONYM necessarily arise or flow from his erroneous position regarding statute of limitations. CP 48-49, ¶¶ 22-24. Notably, there are absolutely no allegations in the Amended

Complaint challenging the validity of the Note or Deed of Trust and the Amended Complaint does not assert Bank of America “gave” the house at issue to Mr. Devin. CP 45-50.

Mr. Devin’s loan does not mature until 2035. CP 286. Mr. Devin’s statute of limitations allegations in paragraph 21 of his Amended Complaint are erroneously based on the date of his last payment toward the loan. CP 46, ¶ 9; CP 48, ¶ 21. However, in order to prevail on his claims, Mr. Devin had to allege and prove that his loan was accelerated. *4518 S. 256th, LLC v. Karen L. Gibbon, infra*.

On or about October 10, 2018, BONYM filed a motion for summary judgment based on the grounds that Mr. Devin could not put forth admissible evidence that the nonjudicial foreclosure at issue was time-barred. CP 277-282. In support of its motion, BONYM submitted the declaration of Patrick Riqueime that was accompanied by two exhibits - the promissory note executed by Mr. Devin and the Assignment of the Deed of Trust to BONYM. CP 283-290. In response to BONYM’s motion, Mr. Devin filed a two paragraph Motion to Stay Review of Defendant’s Bad Faith Motion for Summary Judgment (CP 332); a Motion to Compel (CP 91-94); and a tardy, three page Summary Judgment Response Brief (CP

295-297). Despite having filed a Sworn Statement of Plaintiff (CP 143-150), Mr. Devin's Summary Judgment Response Brief did not attach, incorporate or refer to this statement, any exhibits, or any other evidence. CP 295-297.

In an abundance of caution, BONYM's Summary Judgment Reply Brief objected to and sought to strike numerous statements in the Sworn Statement of Plaintiff on the grounds they were not based on Mr. Devin's personal knowledge and contained inadmissible hearsay. CP 304-306. BONYM raised similar objections to statements in the "sworn" Amended Complaint and Summary Judgment Response. *Id.* The court properly granted BONYM's Motions to Strike the improper testimony and its summary judgment motion. CP 326-328.

IV. ARGUMENT

A. Standard of Review

Summary judgment is proper "only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." "A genuine issue of material fact exists if 'reasonable minds could differ on the facts controlling the outcome of the litigation.'" Summary judgment is subject to a burden-shifting scheme. The moving party is entitled to summary

judgment by submitting affidavits establishing that it is entitled to judgment as a matter of law. The nonmoving party avoids summary judgment by setting forth “specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue” of material fact. To accomplish this, the nonmoving party may not rely on argumentative assertions that unresolved factual issues remain or on speculation.

This court reviews *de novo* a trial court's grant of summary judgment and may affirm on any basis supported by the record.

B. Mr. Devin Failed to Appeal the Superior Court's Summary Judgment Ruling

A party may include in a brief “a motion which, if granted, would preclude hearing the case on the merits.”¹ Accordingly, BONYM moves this Court (and joins Respondent MTC's motion) to dismiss Mr. Devin's appeal because his Notice of Appeal fails to properly bring up the Omnibus Order granting BONYM's motion for summary judgment (“Summary Judgment Order”; CP 326-328), and the time to appeal the Summary Judgment Order has long since passed.

Mr. Devin filed his Notice of Appeal on February 1, 2019. CP 254. It states that Mr. Devin seeks review by Washington State

¹ With MTC's permission, BONYM re-asserts much of MTC's well-drafted argument on this issue.

Appellate Court Division II, District 2 of the **ORDER** entered on January 3, 2019 denying his Motion for Rule 59 Relief in this matter. Id., emphasis added. The Notice of Appeal also states that “[a] copy of the decision is attached to this notice.” Id. The only Order attached to the Notice of Appeal is the Order on Reconsideration dated January 3, 2019. CP 257. The Notice of Appeal filed by Mr. Devin makes no reference to the Summary Judgment Order. CP 254.

The scope of this Court's review of a trial court's decisions is governed by RAP 2.4. The pertinent parts of that rule state as follows:

(a) Generally. The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal or, subject to RAP 2.3(e), in the notice for discretionary review, and other decisions in the case as provided in sections (b), (c), (d), and (e).

(b) Order or Ruling Not Designated in Notice. The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

(c) Final Judgment Not Designated in Notice. Except as provided in rule 2.4(b), the appellate court will review a final judgment not designated in the notice only if the notice designates an order deciding a timely motion based on (1) CR 50(a) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of judgments), (4) CrR 7.4 (arrest of judgment), or (5) CR 7.5 (new trial).

Because the Summary Judgment Order is not designated in the Notice of Appeal (CP 254), review cannot be based directly on RAP 2.4(a). Indeed review could only be proper here under RAP 2.4(b) or RAP 2.4(c). However, neither RAP 2.4(b) nor RAP 2.4(c) supports review in this case.

RAP 2.4(b) does not support review because the final judgment entered on January 3, 2019 (CP 326-328) cannot plausibly be held to have “prejudicially affect[ed]” the Order on Reconsideration (CP 257) entered that same day. Importantly, Mr. Devin’s Motion for Reconsideration (CP 237-243) (his third) only sought a reconsideration of his previously denied Motion for Reconsideration relating to motions stay, compel, and to amend his complaint. CP 184-187 and 235. Mr. Devin’s motions for reconsideration did not seek review of the Summary Judgment Order.

Thus, the Order on Reconsideration (CP 257) was only tied to Mr. Devin's denial of his motions stay and compel, (CP 152-153, 154-155) and to file a Revised Complaint. Even under the State Supreme Court's "exceedingly liberal approach" to the scope of review, there is no plausible argument that the order Mr. Devin appeals from—denial of reconsideration of a prior order on reconsideration refusing revision of the trial court's adverse decisions on Mr. Devin's motions to stay, compel, and amend—"would not have happened but for" the final judgment.²

RAP 2.4(c) also does not support review. This rule cannot be reasonably interpreted to hold that any motion for reconsideration—regardless of the order for which reconsideration is sought—brings up for review a final judgment not designated in the Notice of Appeal. Instead, "RAP 2.4(c) provides for review of a final judgment not designated in the notice of appeal where the appeal is taken from an order deciding a timely post-trial motion to amend the judgment pursuant to CR 59." Mr. Devin has not appealed from any motion to amend the judgment, but instead has only attempted to appeal from an order on reconsideration regarding the trial court's prior denial of his motions to compel, stay, and amend.

² 15A Wash. Prac., Handbook Civil Procedure § 86.2 (2018-2019 ed.) (citing to *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn.2d 370, 46 P.3d 789 (2002)).

Because Appellant's Notice of Appeal does not properly seek review of the Summary Judgment Order, and because the time to seek such review has passed, the Court should dismiss Mr. Devin's appeal with prejudice. *Goodman v. Goodman*, 191 Wash. App. 1042 (2015) ("While RAP 2.4(b)(2) allows a party to timely appeal a trial court's attorney fee decision, it 'does not bring up for review a decision previously entered in the action that is otherwise appealable under 2.2(a) unless a timely notice of appeal has been filed to seek review of the previous decision.'"))

C. Mr. Devin Failed to Meet His Burden Under CR 56(e)

The Superior Court properly granted the BONYM MSJ because Mr. Devin failed to put forth any admissible evidence that his loan was clearly and unequivocally accelerated.³ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986); See *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216 (1989) (following Celotex summary judgment standard); *4518 S. 256th, LLC v. Karen L. Gibbon, PS*, 195 Wash. App. 423, 434-435 (2016) (proof required regarding acceleration).

³ Mr. Devin did not put forth any evidence in support of any of his claims alleged in his Amended Complaint.

Mr. Devin's Amended Complaint alleged that the expiration of the six-year statute of limitations on actions to enforce written obligations in RCW 4.16.040(1) barred enforcement of the Note and, therefore, the foreclosure of the DOT. CP 48, ¶ 21. The deed of trust foreclosure remedy is, indeed, subject to a six-year statute of limitations under RCW 4.16.040(1). *4518 S. 256th, LLC*, 195 Wash. App. at 434; RCW 4.16.040(1). Generally, on an installment note, the six-year period to take an action on the entire debt does not begin to run until the debt has fully matured. *Merceri v. The Bank of New York Mellon*, 4 Wash. App. 2d 755, 759-760 (2018); *Erickson v. America's Wholesale Lender*, 2018 Wash. App. Lexis 811 at * 5, ¶ 13 (Div. 1 April 16, 2018) (unpublished).

The six-year limitation set forth in RCW 4.16.040(1) can begin to run earlier if the entire balance owed on the Note is unequivocally accelerated. *4518 S. 256th, LLC v. Karen L. Gibbon*, 195 Wash. App. 423, 434-435 (2016); see *Edmundson v. Bank of America*, 194 Wn. App. 920, 930 (2016). In that instance, the salient date is the date the debt is accelerated, not the date of the last payment towards a loan. *Id.*; *4518 S. 256th, LLC*, 195 Wash. App. at 434-435. Only if the obligation is accelerated does the

entire remaining balance become due, thereby triggering the statute of limitations. *Edmundson*, 194 Wn. App. at 930.

To accelerate the maturity date of a promissory note, “some affirmative action is required, some action by which the holder of the note makes known to the payors that he intends to declare the whole debt due.” *4518 S. 256th, LLC*, 195 Wash. App. at 435 (internal quotations and brackets omitted). Acceleration must be made in a clear and unequivocal manner. *Id.* (Emphasis added.) The initiation of a nonjudicial foreclosure of a deed of trust does not constitute (or require) the acceleration of the underlying debt. *Id.* at 440-445, emphasis added. A notice stating that “if the default is not cured on or before [a set date], the mortgage payments will be accelerated with the full amount remaining becoming due and payable in full...” does not accelerate the debt for the purposes of triggering the statute of limitations. *Merceri*, 4 Wash. App. 2d at 760-761; *Erickson*, 2018 Wash. App. Lexis 811 at *6-*7 (unpublished). Such a notice simply informs the borrower of a contingent future event. *Id.* at *7.

Based on the above, the date of Mr. Devin’s last payment toward the Note is irrelevant and does not trigger the running of the statute of limitations. *4518 S. 256th, LLC*, 195 Wash. App. at 434-

435. The maturity date of the Note is 2035. CP 286. Therefore, absent proof of acceleration of the debt owed under the Note, an action on the Note (and to foreclose the Deed of Trust) is not time barred until 2041. *Merceri, supra.*; RCW 4.16.040(1).

In response to the BONYM MSJ, Mr. Devin filed a three page Response Brief. CP 295-297. He did not submit any admissible evidence to oppose the BONYM MSJ. Mr. Devin could have submitted recorded Notices of Sale or other foreclosure-related documents into the court record. He did not. More importantly, Mr. Devin failed to put forth any evidence that BONYM (or anyone else) accelerated his loan. Mr. Devin did not submit any default or demand letters from lenders or loan servicers, or any other foreclosure notices. Indeed, Mr. Devin did not put forth *any* admissible evidence that the balance due under the Note was accelerated, never mind the required clear and unequivocal evidence. Not surprisingly, the appellate court record is also devoid of this necessary evidence.

Mr. Devin's allegations fact against BONYM are limited to BONYM's ownership of the loan, the date of his last payment, and that the foreclosure of his property is barred by the statute of limitations. CP 46 ¶ 8, 9; CP 48, ¶21. Mr. Devin's other Causes of

Action against BONYM, Breach of Contract, CPA and Quiet Title, make no other allegations of fact and, therefore, necessarily flow from his erroneous statute of limitations allegations. CP 48-49, ¶¶ 22-24. Mr. Devin did not submit evidence necessary to support these claims. See *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 322 (2013), abrogated in part on other grounds by *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412 (2014) (requirements regarding Quiet Title); *Evans v. BAC Home Loans Servicing LP*, 2010 U.S. Dist. LEXIS 136282, *8-11 (W.D. Wash. Dec. 10, 2010) (person asserting quiet title claim must show satisfied obligation); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780 (1986)(setting forth five elements that must be proven to establish CPA claim).

Consequently, Mr. Devin failed to meet his burden of proof under CR 56(e) regarding his claims against BONYM and the Superior Court properly dismissed his claims against BONYM. Nothing in Mr. Devin's Opening Brief warrants a different result. BONYM respectfully requests this court affirm the Superior Court's decision.

D. The Superior Court Properly Struck Mr. Devin's Inadmissible Statements

The Superior Court properly struck certain statements from Mr. Devin's October 10, 2017 declaration (CP 143-150) (the "Declaration") because they were not based on Mr. Devin's personal knowledge and/or were inadmissible hearsay. ER 602, 801, 802 and CR 56(e). In its Summary Judgment Reply Brief (CP 304-306), BONYM challenged the following statements by Mr. Devin:

- (1) CP 143 - Mr. Devin's statements regarding the alleged foreclosure sales. Mr. Devin did not establish his personal knowledge of the alleged sales, nor were there any documents evidencing the alleged sale documents. ER 602.
- (2) CP 144 – statements allegedly made to Mr. Devin or his tenant by Bank of America or statements made by his tenant are inadmissible hearsay. ER 801, 802.
- (3) CP 145 – the statements regarding the banking industry are irrelevant, unsupported, and Mr. Devin lacks personal knowledge. ER 401, 602, & 801/802.
- (4) CP 145-150 – the statements set forth on these pages are irrelevant, unsupported opinion for which Mr. Devin lacks personal knowledge. ER 401, 602, 701. What Mr. Devin was told by third parties is also inadmissible hearsay. ER 801/802.

BONYM also moved to strike the same or similar statements in the Sworn Summary Judgment Response (CP 295-297) and the original verified Complaint (CP 1-44). CP 304-306.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Powell*, 126 Wash.2d 244, 258 (1995); See also, *State v. Darden*, 145 Wash.2d 612 (2002). Mr. Devin has put forth no evidence that the Superior Court abused its discretion in ruling on BONYM's evidentiary objections. Indeed, the Superior Court properly ruled on BONYM's evidentiary objections and the sound rulings of the trial court should not be overturned.

Like his response to the BONYM MSJ, Mr. Devin's appeal almost exclusively relies on these same inadmissible statements, which, because they were properly excluded from the summary judgment record, should not be considered by this court in reviewing Mr. Devin's appeal.

E. The Original Note and Counsel's Alleged Statements Regarding the Note Are Irrelevant to Mr. Devin's Statute of Limitations Claim

Even though not alleged in his Amended Complaint (CP 45-50), Mr. Devin is fixated on the original note and various lender-

conspiracy theories. CP 143-150 and Opening Brief, pp. 12-13, 16. Mr. Devin erroneously argues summary judgment is not proper because BONYM did not produce the original note and Deed of Trust for his inspection. BONYM's counsel agreed to produce these documents once they were in counsel's possession (See CP 122, ¶ 5; CP 306). However, the court dismissed Mr. Devin's claims before the original note and Deed of Trust were obtained by counsel.⁴ Mr. Devin's arguments about the Note and BONYM's objections to his improper discovery requests are trial court discovery matters that were properly resolved by the Superior Court judge.

Regardless, these documents *are completely irrelevant* to Mr. Devin's statute of limitations claim and his defense of the BONYM MSJ, which required Mr. Devin to "prove up" his claims against BONYM. Mr. Devin did not dispute the maturity date of his loan. Neither of the Note nor the DOT have any bearing regarding whether the debt evidenced by the Note and secured by the DOT was accelerated. Indeed, evidence of acceleration of the debt would necessarily be documents other than the Note and DOT. Thus, the original Note and DOT were not necessary for the

⁴ BONYM counsel disputes Mr. Devin's unsupported recantations of counsel's alleged statements to the court and adamantly denies Mr. Devin's allegations of perjury. Counsel repeatedly told Mr. Devin (and the court) that he had requested the original documents, was told that they existed, and that they would be produced for Mr. Devin's inspection when they were received by counsel. See CP 122, ¶ 5; CP 306.

Superior Court to rule on the BONYM MSJ and the court properly considered and granted the motion.

For whatever reason, Mr. Devin clearly dislikes BONYM's counsel. This Court should disregard Mr. Devin's arguments about alleged statements made in the trial court by BONYM's counsel. Such statements are wholly irrelevant to Mr. Devin's arguments about the statute of limitations and thus to the trial court's decision to grant the BONYM MSJ.

V. CONCLUSION

Based on the above, BONYM request this Court affirm the trial court's ruling.

Dated this 30th day of September, 2019.

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Case No. 53241-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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DAVID DEVIN

Petitioner,

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, Joanna M. Bolstad, state that on the 30th day of September, 2019, I caused the original **RESPONDENT BANK OF NEW YORK MELLON NA'S RESPONSE TO OPENING BRIEF** to be filed in the **Court of Appeals – Division Two** and a true copy of the same to be served on the following in the manner indicated below:

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SIGNED in Portland, Oregon, this 30th day of September, 2019.

s/ Joanna M. Bolstad

Joanna M. Bolstad, Legal Assistant

SUSSMAN SHANK LLP

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