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Case No. 53763-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

KENNETH AND VICTORIA ZIMMERMAN (husband and wife),

Appellants,

v.

WILMINGTON SAVINGS FUND SOCIETY FSB, AS TRUSTEE FOR
STANWICH MORTGAGE LOAN TRUST A,

Respondent.

Appeal from Pierce County Superior Court
Case No. 16-2-13145-5

**RESPONDENTS' BRIEF OF WILMINGTON SAVINGS FUND
SOCIETY FSB, AS TRUSTEE FOR STANWICH MORTGAGE
LOAN TRUST A**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants Kenneth P. Zimmerman, Jr., and Victoria L. Zimmerman (“Zimmerman”) stopped making payments on their mortgage loan as of July 1, 2010. Their complaint, filed November 29, 2016, sought a determination that their promissory note (“Note”) held by Wilmington Savings Fund Society FSB, as trustee for Stanwich Mortgage Loan Trust A (“Wilmington”), and secured by a deed of trust against their property, was no longer enforceable due to the lapse of the statute of limitations, because the last payment was made over six years prior, and the statute of limitations to enforce a written contract is six years.

The trial court entered a default judgment against Wilmington, finding the entire underlying debt, original principle of \$623,000, plus accrued interest, was now barred by the statute of limitations, and decreed the deed of trust was void and should be removed from title.

Wilmington appeared and moved to vacate its default and default judgment. After initially denying the motion, upon reconsideration the trial court vacated Wilmington’s default, and vacated the default judgment in part, to allow enforcement of installment payments within the statute of limitations (i.e., installment payments not barred by the statute of limitations).

There were two problems with the default Judgment – first; Zimmerman served Wilmington in Delaware, but failed to file a declaration or affidavit stating that service could not be made within the state of Washington, as required by RCW 4.28.185(4); which provides:

Personal service outside the state **shall** be valid only when an affidavit is made and filed to the effect that **service cannot be made within the state**.

RCW 4.28.185(4) (emphasis supplied).

Without the required affidavit, the default judgment was void for lack of jurisdiction.

Second, the default Judgment gave Zimmerman relief to which they were not entitled. Specifically, Zimmerman was relieved of the entire loan obligation. But Zimmerman's note is an installment note payable monthly over 30 years; until its maturity date in 2038. The statutory limitation period commences for each installment from the time it becomes due and is not paid. What Zimmerman failed to disclose, and the trial court overlooked, was that the Note was an obligation payable in installments, and for these, the statute of limitations runs upon each missed payment – and, the statute of limitations on the entire debt does not commence until the maturity date. Defaulted payments due within the past six years remain enforceable, as are payments not yet due. The six-year period to take an action related to the debt does not begin to run until the Note matures in 2038. Instead of getting relief for roughly two years of payments, Zimmerman obtained an unjustified windfall of having the entire loan barred, via the default Judgment.

Zimmerman concedes they did not comply with RCW 4.28.185(4) by filing the required affidavit. Instead, Zimmerman contends there was “substantial compliance,” via their process server's affidavit about service at a certain address in Delaware. The Court will observe this declaration lacked foundation and consisted solely of a hearsay statement of a

receptionist purportedly made to the process server. Neither the receptionist's statement, nor the process server's declaration, specifically address why service could not be made in Washington, as required by the statute. Two appellate court decisions refused to accept similar process server affidavits as "substantial compliance," as these ignored the statute requiring addressing why service could not be made in Washington. For the same reason, Zimmerman's process server affidavit fails here.

In addition, Zimmerman does not and cannot address the second element of the "substantial compliance" exception to RCW 4.28.185(4) – that there is no injury to the defendant. Plainly, Wilmington was injured by Zimmerman obtaining a judgment extinguishing the entire loan, where only some payments were time barred from recovery. Even accepting the process server's declaration, the injury from the default judgment to Wilmington prevents Zimmerman from meeting the "substantial compliance" exception to RCW 4.28.185(4).

For these reasons and others as detailed below, the Court should affirm the trial court's vacation of the default judgment, so Wilmington may enforce the installment payments due on its loan not barred by the statute of limitations.

II. STATEMENT OF ISSUES

The trial court did not err in vacating the default judgment against Wilmington to allow them to collect loan installment payments not barred by the statute of limitations. Wilmington offers this statement of issues under RAP 10.3(b) only to properly frame the issues presented in this case.

1. Whether the Order of Default and default Judgment styled as Final Order to Quiet Title as to Wilmington is void for lack of personal jurisdiction, due to failing to file the affidavit required by RCW 4.28.185(4); or

2. Whether there was “substantial compliance” with RCW 4.28.185(4), with the two-part test articulated in *Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96 Wash. 2d 692, 696, 649 P.2d 827, 827 (1982); and

3. Whether the trial court properly vacated the default Judgment against Wilmington to allow them to collect loan installment payments not barred by the statute of limitations.

III. STATEMENT OF THE CASE

A. Facts Underlying the Zimmerman Claim.¹

In December 2007, Zimmerman purchased a residence in Puyallup, WA 98374, obtaining a home loan of \$623,250.00 from Countrywide Bank, FSB, evidenced by a Fixed/Adjustable Rate Note (“Note”). Clerk’s Papers (“CP) 2, ¶¶ 7 and 8. To secure the Note, Zimmerman signed a deed of trust encumbering their Puyallup property. CP 3, ¶ 9. Wilmington is the present owner/holder of the Note. CP 3, ¶ 10.

B. The Zimmerman Sues and Obtains a Default Judgment

In July 2010, Zimmerman defaulted on the Note for reason of non-payment, and Zimmerman has not made a payment since, and has continuously been in default since July 2020. CP 3, ¶ 12. Zimmerman filed their complaint to quiet title on the deed of trust on November 29,

¹ Much of the facts recited by Zimmerman in Appellants Opening Brief (“AOB”) pg. 2- 3, contain no citation to the record – these facts are not in the record.

2016. CP 1. The complaint alleged the Note had been in default for over six continuous years and is now barred from enforcement by the statute of limitations. CP 4, ¶¶ 21-22. Zimmerman alleged the statute of limitations made the deed of trust no longer enforceable. Zimmerman sought to quiet title over the deed of trust and have the deed of trust declared null and void. CP 5, ¶¶ 23-24.

Zimmerman initially attempted to serve Wilmington at 500 Delaware Avenue, Wilmington, Delaware. CP 15. Per the process server's affidavit of attempted service, on December 2, 2016 at 4:26 p.m., process server, Ms. Newcomb, states she was told by a Ms. Green, they could not accept service at this location. All documents related to a trust must be served on their trust division as 501 Carr Road, Wilmington, DE 19808. CP 15. A second affidavit of process server indicates that on December 2, 2016 at 2:10 p.m.,² Wilmington was served at the Carr Road address. CP 16.

On February 3, 2017, Zimmerman filed their Motion and Declaration for Final Order of Default, to Quash Debt, and to Quiet Title. CP 18. The motion recites Wilmington was served out of state and references the Affidavit of Service. CP 19. The Affidavit of Attempted Service (CP 15) was not mentioned. *Id.* The motion recited Plaintiffs had been in default for over six continuous years so the debt “now violates the Statute of Limitations per RCW 4.16.040, and the debt is now legally unenforceable.” CP 19-20. Notably, no copy of the Note was provided to

² Earlier the same day.

the Court.³ Nor did Zimmerman indicate that service on Wilmington could not be made within the state of Washington. On February 17, 2017, an Order of Default was entered against Wilmington. CP 36-37.

On February 22, 2017, Zimmerman filed a Motion and Memorandum of Authorities for a “Final Quiet Title Order.” CP 38-60. The Note was not attached to the motion and no there was no mention this was an installment note. There was no declaration or affidavit filed in support of the motion. There was no discussion that service on Wilmington could not be made within the state of Washington. *Id.*

On March 3, 2017, a default Judgment styled as Final Order to Quiet Title was entered against Wilmington. CP 63-64. The order recites:

2. That the underlying debt secured by the deed of trust was defaulted on July 1, 2010, and would now be barred by the statute of limitations.
3. That Plaintiffs are entitled to quiet title over the deed of trust pursuant to RCW 7.28.300.

. . .

[T]hat the deed of trust under Pierce County Auditor Number 200712210201 (i.e. Wilmington’s deed of trust) is void and should be removed from the Auditor’s Record.

CP 63-64.

³ Wilmington later provided the Court with a copy of the Note. CP 109-112. The Court will observe this is an installment note, i.e. payments are due every month beginning February 1, 2008, for the next 30 years until January 1, 2038. *See*, Note, CP 109-112, ¶ 3.

Plaintiff never filed an out of state service declaration as required by RCW 4.28.185(4) stating why service could not be made on Wilmington in-state.

C. Pertinent Procedural History

On December 21, 2018, Wilmington filed a motion for order to show cause why the order of default and default judgment against Wilmington should not be set aside and vacated. CP 65-75. Due to difficulty in serving Zimmerman, the OSC was refiled on January 25, 2019. CP 78-88.

Zimmerman filed a written response and declaration (*see* CP 89-99), and Wilmington replied, including declarations and a copy of the Note. CP 101-114. Following a hearing, on March 15, 2019 the court entered an order denying Wilmington's motion.

Wilmington filed a motion for reconsideration. CP 115-132. On April 12, 2019, the Court entered its Order on Reconsideration Vacating Default and Default Judgment Against Wilmington, holding that the default and default judgment against Wilmington were void for lack of jurisdiction and are vacated only with respect to installment payments not within the six year statute of limitations period as of the date of plaintiff's complaint. CP 133.

Zimmerman moved for an order to show cause why the order on reconsideration vacating the default and default judgment against Wilmington should not be set aside and vacated, to allow them to file a written response to the motion. CP 134-138. Wilmington responded. CP

141-142. The Court granted Zimmerman's motion to vacate the April 12, 2019 Order and directed Wilmington to renote its motion for reconsideration and set a briefing schedule. CP 150-151.

Zimmerman filed a Response to Wilmington's Motion for Reconsideration (CP 152-164), and Wilmington filed a Reply (CP 165-172), with declarations in support. CP 176-178, CP 181-185.

Following a hearing on August 2, 2019, the Court entered its Order on Reconsideration Vacating Default and Default Judgment Against Wilmington. CP 186-187. The Order, as entered, contained a misstatement of the Court's oral ruling and Wilmington moved to correct a clerical mistake in the order. CP 188-202. The motion to correct was granted. CP 203. An Amended Order On Reconsideration Vacating Default and Default Judgment against Wilmington was entered September 6, 2019. CP 204-207.

IV. STANDARD OF REVIEW

This Court reviews a decision to vacate a default judgment for abuse of discretion. *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007). The trial court abuses its discretion only when it bases its order on untenable grounds or untenable reasons. *Morin v. Burris*, 160 Wn.2d at 753.

The Supreme Court has stated: “. . . we do not favor default judgments. We prefer to give parties their day in court and have controversies determined on their merits. A proceeding to vacate or set aside a default judgment is equitable in its character, and the relief sought

or afforded is to be administered in accordance with equitable principles and terms. Thus, for more than a century, it has been the policy of this court to set aside default judgments liberally.” *Morin v. Burris*, 160 Wn.2d at 754 (Citations omitted). *See, Griggs v. Averbek Realty, Inc.*, 92 Wash.2d 576, 581, 599 P.2d 1289 (1979) (Courts prefer to determine cases on their merits rather than by default. *Id.* In reviewing an entry of default, the court's principal inquiry should be whether the default judgment is just and equitable. *Id.* at 581–82, 599 P.2d 1289). A default and default judgment may be set aside under CR 55 and CR 60(b).

The party asserting jurisdiction under the long-arm statute has the burden of establishing its requirements by “prima facie evidence.” *John Does v. CompCare, Inc.*, 52 Wash.App. 688, 693, 763 P.2d 1237 (1988); *Oytan v. David-Oytan*, 171 Wash. App. 781, 798, 288 P.3d 57, 66 (2012).

V. ARGUMENT

A. **The Trial Court Correctly Vacated the Default and Default Judgment Against Wilmington Because Zimmerman failed to comply with the requirements of Washington’s long-arm statute, RCW 4.28.185(4).**

The default and default judgment against Wilmington are void for lack of personal jurisdiction due to non-compliance with Washington's long-arm statute, RCW 4.28.185(4), requiring a plaintiff who effects personal service on an out-of-state defendant to file an affidavit stating that service could not be made within the state. Where the affidavit requirement is not met, personal service outside the state is not valid and the trial court does not acquire personal jurisdiction. *See, Meeker Court*

Condo. Owners Ass'n v. Gonzalez, No. 77735-1-I, 2018 WL 1907812, at *1 (Wash. Ct. App. Apr. 23, 2018).⁴

Civil Rules 55(c) and 60(b) permit the court to set aside defaults and default judgments where they are void, among other grounds.

In relevant part, RCW 4.28.185(4) states that personal service on an out-of-state defendant is valid only when an affidavit stating that the defendant cannot be served within the state is filed:

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state...

...

(4) Personal service outside the state **shall** be valid only when an affidavit is made and filed to the effect that **service cannot be made within the state.**

RCW 4.28.185(2)(4) (emphasis supplied).

Statutes allowing service outside the state are in “derogation of common law” and must be “strictly construed.” *see Ralph's Concrete Pumping, Inc. v. Concord Concrete Pumps*, 154 Wn.App. 581, 585, 225 P.3d 1035 (2010). Unless clear contrary legislative intent exists, the word “shall” in a statute is a mandatory directive. *Kabbae v. Dep't of Social & Health Servs.*, 144 Wash.App. 432, 441, 192 P.3d 903 (2008). And, “within the state” plainly means within the state of Washington. *Morris v.*

⁴ GR 14.1 (a) provides unpublished opinions of the Court of Appeals, filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. GR 14.1 (a).

Palouse River & Coulee City R.R., 149 Wash. App. 366, 371, 203 P.3d 1069, 1072 (2009).

“If a plaintiff has not complied with RCW 4.28.185(4), then there is no personal jurisdiction and the judgment is void.” *Sharebuilder Sec., Corp. v. Hoang*, 137 Wash.App. 330, 335, 153 P.3d 222 (2007).

(i) **Zimmerman Failed to File an Affidavit stating that Service Could not be made within Washington.**

This is not disputed. The affidavit is mandatory; without it, the court has no personal jurisdiction over the defendant. *Sharebuilder Securities, Corp. v. Hoang*, 137 Wash. App. 330. The affidavit must show that service by plaintiff within the state was not possible. *Sharebuilder, Id.*; *See*, § 4:20. Long-arm jurisdiction—Affidavit of nonresidence, 14 Wash. Prac., Civil Procedure § 4:20 (3d ed.).

In *Sharebuilder*, the court vacated a default judgment when the affidavit filed did not describe the circumstances that prevented in-state service, and discussed the requirements of an affidavit:

In addition to incorporating the language of RCW 4.28.185(4), **the affidavit should describe the circumstances that prevent in-state service.**⁵ Substantial, rather than strict, compliance with RCW 4.28.185(4) is permitted. However, **substantial compliance means that, viewing all affidavits filed prior to judgment, the logical conclusion must be that service could not be had within the state.**⁶

Sharebuilder Sec., Id. at 137 Wash. App. 334-335. (emphasis added).

⁵ citing, 27 Marjorie Dick Rombauer, Washington Practice: Creditors' Remedies—Debtors' Relief § 5.4 at 484 (1998).

⁶ citing, *Barr v. Interbay Citizens Bank*, 96 Wash.2d 692, 696, 635 P.2d 441, 649 P.2d 827 (1981), discussed, *infra*.

If the defendant is an out-of-state business and the normal statutory procedure would be to serve a registered agent in Washington, the plaintiff should first attempt service upon the agent in Washington. If the plaintiff cannot accomplish service in Washington, the plaintiff's affidavit would explain why the plaintiff's efforts to serve in Washington were unsuccessful before resorting to service outside the state. *See*, 14 Wash. Prac., Civil Procedure § 4:20 (3d ed.) (*citing Morris v. Palouse River and Coulee City R.R., Inc.*, 149 Wash. App. 366, 203 P.3d 1069 (Div. 3 2009).

In *Morris*, an action arising out of a railroad accident in Washington, the railroad company was located in Idaho, but the applicable statute governing service upon railroad companies required service upon an agent within the State of Washington. *Morris* attempted to locate the registered agent (RA) for the railroad company (D), but was told that RA had moved to Idaho. *Morris* went to Idaho but was told that RA was no longer employed by D. *Morris* left the papers with D's representative in Idaho, though the representative was not D's registered agent for service of process. The *Morris* court held that service upon D was not sufficient and vacated a default judgment entered against D.

The *Morris* court rejected plaintiff's argument that the long-arm statute allowed service outside the state. The court stated the long-arm statute applies only if the plaintiff files an affidavit explaining why the papers could not be served within the State of Washington and that plaintiff had not done so.

(ii) The “Substantial Compliance” Exception to RCW 4.28.185.

The Supreme Court in *Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96 Wash. 2d 692, 696, 649 P.2d 827, 827 (1982), recognized a two-part test for substantial compliance; one, the affidavits must provide facts in the language of the statute, “to the effect that service cannot be made within the state; and two, no injury occurred to defendant.” *Id.* The “injury” prong is also mentioned in *Schell v. Tri-State Irrigation*, 22 Wash. App. 788, 791, 591 P.2d 1222 (1979) (“The Schells contend that the required showing of injury to the defendant ‘must, common sense tells us, be something other than the taking of the judgment.’ We disagree.”). Zimmerman cites to *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wash. 2d 469, 472, 403 P.2d 351, 354 (1965), a 55 year old case holding that substantial compliance with out-of-state service requirements has been recognized only where the defect in service involved a late filing of nonresidency affidavits as required by RCW 4.28.185(4). Zimmerman filed no affidavit explaining why Wilmington could not be served in Washington.

(iii) Zimmerman’s Process Server’s Declaration Does not Meet the Legal Threshold for the “Substantial Compliance” Exception to RCW 4.28.185(4).

Zimmerman argues that the process server’s Affidavit of Attempted Service (CP 15) indicates that Wilmington needed to be served outside Washington. It says no such thing.

As *Barr* explained; the affidavit must provide facts in the language of the statute, “to the effect that service cannot be made within the state.” 96 Wash. 2d at 696.

As explained in *Sharebuilder, supra*, the affidavit must show that service by plaintiff within the state was not possible. *Sharebuilder, Id.* at 137 Wash. App. 334-335.

In *Sharebuilder.*, the plaintiff, like Zimmerman here, filed no affidavit under RCW 4.28.185(4), but instead relied on a process server's affidavit of service stating that service was accomplished at Hoang's California residence. The *Sharebuilder* court observed:

“the above language does not substantially comply with RCW 4.28.185(4). The mere statement that Hoang was served at her California residence does not lead to the logical conclusion that she could not be served within the state. She might also have a residence in Washington, or frequent Washington for business purposes.

Sharebuilder, Id. at 335. Zimmerman similarly relies on a process servers' affidavit.

In *Meeker Court, supra*, the only prejudgment affidavit states that Meeker Court effected personal service on the manager of a Deutsche Bank branch in Santa Ana, California. This Court held:

“The affidavit does not address whether the Deutsche Bank National Trust Company could be served within the state and thus does not substantially comply with RCW 4.28.185(4).”

*Meeker Court, Id.*⁷

The Plaintiff in *Barr v. Interbay, supra*, filed no affidavit, but affidavits were filed by the defendant, stating that defendant was not licensed to do business in Washington, had no officers, agents or employees in Washington, transacts no business in Washington of any sort

⁷ *Meeker Court Condo. Owners Ass'n v. Gonzalez*, No. 77735-1-I, 2018 WL 1907812, at *1 (Wash. Ct. App. Apr. 23, 2018)

and that all of its employees are citizens of Florida. *Id.* at 96 Wash. 2d 692, 696. This was held to be substantial compliance.

The declaration filed in support of Zimmerman's Motion for Default (CP 18-23; 19: 1-4) states that Wilmington was served out of state, and it references the Affidavit of Service filed (showing Wilmington served in Delaware). Notably, there was no reference to the Affidavit of Attempted Service which Zimmerman now asserts is the basis for their substantial compliance with the statute.

The Zimmerman affidavit of attempted Service contains the process server's statement she was told service could not be accepted at 500 Delaware Ave., Wilmington, Delaware. The process server writes she was told that all documents related to a trust must be served at the trust division at 501 Carr Road, Wilmington, Delaware. From this, Zimmerman argues that Wilmington needed to be served outside Washington, despite nary a mention of Washington. The hearsay statement⁸ repeated by the process server indicates the Delaware Ave. address was wrong and instead service needed to be made at the Carr Road address. There is no foundation supplied as to what was discussed about service in Washington, or whether the receptionist even knew anything about serving Wilmington in Washington. As the Declaration of Yulia Davydovitch indicates (CP: 113-114):

⁸ The process servers statement as to what she was told by the receptionist is inadmissible hearsay. ER 802. Even if an exception applied, there was no foundation supplied as to what was discussed about service in Washington - service in Washington was not mentioned.

It is a misstatement to describe Ms. Green's position as a "legal administrator." Ms. Green worked at the front desk of a corporate center and greeted visitors and answered the telephone. Ms. Green did not work for the trust division of the bank. It is unknown what Ms. Green knew about how to serve the Trust division of the bank and she did not have access to the Trustee's legal documents to know with certainty how the Trustee should be served with process for a case filed in Washington State.

Significantly, Zimmerman's affidavits do not address whether Wilmington could be served within Washington State, as the statute requires. It is pure conjecture to assert the affidavit supports the fact that Wilmington could not be served in Washington. The process server's affidavit does not substantially comply with RCW 4.28.185(4).

Zimmerman's process server's affidavit is more like the deficient ones found in *Sharebuilder, supra*, and in *Meeker Court, supra*, where substantial compliance was not found because the affidavits failed to address the requirement of RCW 4.28.185(4), to explain why service cannot be made within the state, or mention the impossibility of service within the state of Washington.

- (iv) Wilmington was injured because the Zimmerman default judgment awarded them a free loan to which they were not entitled – on these facts the statute of limitations bars only roughly two years of delinquent installment payments – not the entire loan, nor payments delinquent less than six years nor payments not yet due on the 30 year loan.**

Unlike, the defendants in *Barr*, who obtained a trial on the merits, Wilmington suffered a default judgment that extinguished their \$623,000 loan, despite the complete lack of a legal basis for this result. A finding of default, alone, does not necessarily mean that the defendant is liable as a matter of law. The trial judge must still determine whether the

unchallenged facts alleged in the complaint would support a conclusion of liability and a resulting judgment. *Kaye v. Lowe's HIW, Inc.*, 158 Wash. App. 320, 323, 242 P.3d 27, 29 (2010).

Zimmerman states they defaulted on their note on July 1, 2010. CP 41, 42: 9- 11. Zimmerman argues that because the statute of limitations to enforce a contract is limited to six years under RCW 4.16.040, future enforcement of the note and deed of trust is barred by the statute of limitations. CP 43: 1-8.

Notably, Zimmerman failed to provide the Court with a copy of their Fixed/Adjustable Rate Note. Wilmington supplied a copy when it moved to vacate the judgment. CP 109-112. The Court will observe this is an installment note, i.e. payments are due every month beginning February 1, 2008 for the next 30 years until January 1, 2038. *See*, Note, ¶ 3. Payments.

Zimmerman's basis for the judgment: that the six-year statute of limitations on the Note started to run on the date of the first missed payment, June 1, 2010, and thus foreclosure or enforcement of the Deed of Trust was barred after six years of default; was considered and rejected in *Edmundson v. Bank of Am., N.A.*, 194 Wash. App. 920, 927, 378 P.3d 272 (2016).

Edmundson relied on the Washington Supreme Court decision in *Herzog v. Herzog*, 23 Wash.2d 382, 161 P.2d 142 (1945), and concluded that unlike a demand note, the six-year statute of limitations on an installment promissory note accrues for each monthly installment from the time it becomes due. *Edmundson*, 194 Wash. App. at 930, 378 P.3d 272

(citing *Herzog*, 23 Wash.2d at 388, 161 P.2d 142). “When recovery is sought on an obligation payable by 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 Wash. App. at 930 (quoting *Herzog*, 23 Wash.2d at 388, 161 P.2d 142). *See, also*, 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Transactions* § 20.10, at 61 (2d ed. Supp. 2018) (“Where there has been no explicit acceleration of the note, the statute of limitations does not run on the entire amount due and non-judicial foreclosure can be begun within six years of any particular installment default and the amount due can be the then principal amount owing.”).

A demand note is payable immediately on the date of its execution. *Edmundson*, 194 Wash. App. at 929. A note payable in monthly installments over 30 years is an installment note. *Edmundson, Id.*

Zimmermans’ Note is an installment note payable in monthly installments over a period of 30 years. The Note maturity date is in 2038. Thus, the statutory limitation period commenced for each installment from the time it became due and was not paid. Defaulted payments within the past six years remain enforceable and the final six-year period to take an action on the debt does not begin to run until it matures in 2038. *See, Edmundson, supra, Merceri v. Bank of New York Mellon*, 434 P.3d 84, 87, review denied, 192 Wash. 2d 1008, 430 P.3d 244 (2018).

Zimmerman did not pay the monthly installment amount due on June 1, 2010 or thereafter. At best they might be relieved of roughly 2 years of payments, subject to tolling limitations. But enforcement of the

deed of trust for all payments coming due within the last six years and those payments not yet due through the Note maturity date in 2038, are not barred by the statute of limitations. *Edmundson, Id.*, 194 Wash. App. at 931.

The Court's default judgment barring enforcement of the Zimmerman Note and Deed of Trust was contrary to the law, and gave Zimmerman a free \$623,000 loan, on an improper legal basis.

The default judgment and improper remedy injured Wilmington, and thus precludes application of the substantial compliance exception articulated by *Barr*.

Zimmerman's AOB does not dispute the problem with the Judgment and the improper relief given to Zimmerman. Instead, they argue this court should not consider the merits of Wilmington's defense to the action until after the default and default judgment are vacated. AOB 12-15. This view is contrary to CR 60 which requires the moving party to provide "the facts constituting a defense to the action or proceeding" (CR 60(e)(1)). The *White v. Holm* case⁹ cited by Zimmerman did not involve RCW 4.28.185(4). There, the appellate court reversed the denial of a motion to vacate default judgment upon the defendants showing of a prima facie defense, mistake and inadvertence, and the prompt moving for vacation of default judgment, and that there was no showing that plaintiff would suffer undue hardship by setting aside the default.

⁹ *White v. Holm*, 73 Wash. 2d 348, 438 P.2d 581 (1968)

Wilmington has demonstrated the 1st and 4th elements, while the second and third elements are not applicable.¹⁰

Zimmerman’s citation to *In Re Marriage of Brown*,¹¹ is not applicable here, as that case involved a collateral attack on a judgment entered in a contested action; not a motion to set aside a default judgment. Neither does *Baker v. Nw. Tr. Servs., Inc.*,¹² aide them. In *Baker*, plaintiffs filed a CR 60(b) motion, five years after the court granted summary judgment of dismissal. The Bakers did not appeal the summary dismissal of their suit; they belatedly asked the court for relief from the final judgment based on a purported subsequent change in the law. Baker’s motion was denied because they failed to meet the threshold requirement to show that the judgment at issue had prospective application. *Id.*

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¹⁰ Zimmerman will not suffer undue hardship by setting aside the default Judgment as Wilmington concedes it is not entitled to collect installment payments that are delinquent by more than six years, after considering any tolling that applies.

¹¹ 98 Wn. 2d 46, 49, 653 P.2d 602 (1982).

¹² 193 Wash. App. 1051 (2016).

VI. CONCLUSION

For the reasons stated, the Court should affirm the trial court's vacation of the default judgment, so Wilmington may enforce the installment payments due on its loan that are not barred by the statute of limitations.

RESPECTFULLY SUBMITTED this 26th day of May, 2020.

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CERTIFICATE OF SERVICE

I certify that on the date stated below, I served a copy of the foregoing document, described as **Respondent's Brief**, on the following persons by U.S. First Class Mail:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this Certificate was executed in Seattle, Washington.

Dated: May 26, 2020.



Karina Khamidullina
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