

FILED

DEC 19 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COA NO. 34618-8-III

SUPERIOR CT NO. 2015-02-00538-8

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

SHERYL C. MOORE

Plaintiff

v.

SELECT PORTFOLIO SERVICING INC., QUALITY LOAN SERVICE
CORP OF WA., US BANK NATIONAL ASSOCIATION, MORTGAGE
ELECTRONIC REGISTRATIONS SYSTEM INC.,

Defendants.

BRIEF OF PLAINTIFF

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31 Richard A. Lord, *Williston on Contracts* § 79:17, at 338 (4th ed.2004)8

I. Introduction

This case is about promoting the stability of land titles, debt collection practices, and consumer protection in Washington State. The legislature has specified the importance of promoting that goal by adopting the Deed of Trust Act and the Consumer Protection Act RCW 19.86 and by laying out specific Statute of Limitations for debt collections.

Ms. Moore is contending that there are very clear discrepancies in ownership of the Deed of Trust and Note of her home and what the Deed and Note secured, and that in any event the Statute of Limitations to collect on that debt has ran. To allow the Defendants their summary judgment does not allow the Courts to hear this case that has questions of law and fact that are ripe for a trial.

II. Statement of the Case

On December 6, 2006, Ms. Moore signed a promissory note in favor of First Franklin, a division of Nation City Bank. Contemporaneously she signed a deed of trust wherein Mortgage Electronic Registration Systems, Inc., (hereinafter "MERS") was identified as beneficiary.

Ms. Moore continues to assert that the original of the promissory note is not in existence, or further that said promissory note has never been endorsed or assigned to Defendants.

Ms. Moore's last payment paid to First Franklin was made on February 1, 2008, in the amount of \$1,856.10. Ms. Moore has made no further payments continuing to question the terms of her loan and true ownership thereof. On or about June of 2008 Ms. Moore was issued a notice of default with an acceleration clause accelerating the debt in its entirety. Exhibit A.

III. Assignments of Error

The Summons and Compliant was filed on or about February 13, 2015. On or about March 1, 2016, Defendants filed for Summary Judgment motion and a hearing was held on April 1, 2016. The trial court granted the Summary Judgment motion in favor of defendants on or about June 29, 2016. Plaintiff appeals from that order.

IV. Argument

A. THE COURT SHOULD RECOGNIZE THAT THE STATUTE OF LIMITATIONS APPLIES UNDER THE DEED OF TRUST.

1. The Legislature Adopted the Deed of Trust Act to Promote Stability of Land Titles.

In enacting the Deed of Trust Act, Ch 61.24 RCW, the Washington Legislature sought to promote three primary goals: "(1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent

wrongful foreclosure; and (3) that the process should promote stability of land titles.” *Vawter v. Quality Loan Serv. Corp of Washington*, 707 F. Supp. 2d 1115, 1121 (W.D. Wash. 2010)(quoting *Plein v. Lackey*, 149 Wash.2d 214, 67 P.3d 1061, 1065 (2003)).

2. The Deed of Trust Act and the Deed of Trust Itself Must be Strictly Construed in Favor of the Borrower.

Under the Deed of Trust, the Trustee holds a power of sale permitting him to sell the property out of court with no necessity of judicial action. The Deed of Trust statutes thus strip borrowers of many of the protections available under a mortgage. Therefore, lenders must strictly comply with the Deed of Trust Statutes, and the Deed of Trust must be strictly construed in favor of the borrowers. *Koegal v. Prudential Mut. Sav. Band*, 51 Wash. App. 108, 111, 752 P.2d 385, 387 (1988).

3. Once an Installment Loan is Accelerated the Statute of Limitations begins to Run.

The six-year statute of limitations began to run when the notice of default was issued and the debt was accelerated after the first missed payment in 2008. That notice was dated June, 11, 2008. Defendant had the right to exercise its power of sale under the deed of trust for six years. The Statute of Limitations expired on or about June 11, 2014. Generally, actions based on written contracts must be commenced within six years after

breach. RCW 4.16.040, which includes “[A]n action upon a contract in writing, or liability express or implied arising out of a written agreement . . .”

“The record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations, and, upon proof sufficient to satisfy the court, may have judgement quieting title against such lien.”

RCW 7.280.300

A deed of trust encumbering real property is unenforceable as a matter of law if the foreclosure of the deed of trust is barred by the six-year statute of limitations. *Jordan v. Bergsma*, 63 Wn. App. 825, 830, 833 P.2d 319 (1991).

A foreclosure is initiated by sending a notice of trustee’s sale no less than 30 days following a proper notice of default. RCW 61.24.030. See also *Vawter v. Quality Loan Service Corp. of Washington*, 707 F. Supp.2d 1115, 1121-22 (2010). Defendants did not exercise the power of sale within the permitted six-year statute of limitations.

Defendants argue that because this is an installment loan that the Statute of Limitations begins to run after each installment is missed, thus in effect having a thirty-six-year statute of limitation on a thirty-year note. The general rule for debts payable by installment provides, “A separate cause of

action arises on each installment, and the statute of limitations runs separately against each....” 31 Richard A. Lord, *Williston on Contracts* § 79:17, at 338 (4th ed.2004). *Kirsch v. Cranberry Fin., LLC*, 178 Wash. App. 1031 (2013).

But if an obligation that is to be repaid in installments is accelerated—either automatically by the terms of the agreement or by the election of the creditor pursuant to an optional acceleration clause—the entire remaining balance of the loan becomes due immediately and the statute of limitations is triggered for all installments that had not previously become due. *Kirsch v. Cranberry Fin., LLC*, 178 Wash. App. 1031 (2013).

Paragraph 6(B) of the promissory notes states in part “If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.” Further, there was clear acceleration of the loan as shown on Exhibit A. Therefore, the Statute of Limitations began to run both because of the terms of the note and because of the acceleration provided to the Plaintiff.

The acceleration clause provided in June of 2008 was a valid acceleration of the debt regardless of whether the foreclosure continued or not. This Court has previously held that not prosecuting or continuing with a case, or in this case a foreclosure action, does not dismiss the acceleration notice given from one party to another when it stated “no authority for its

argument that a mere administrative dismissal disestablishes the fact of notice conveyed from one party to another.” *Kirsch v. Cranberry Fin., LLC*, 178 Wash. App. 1031 (2013).

Further, the trial court erred in not reaching the statute of limitations question since this case was brought in part to quiet title. This is not only an affirmative defense option for a foreclosure, this is the cause of action from the initial filing of the Summons and Complaint. An affirmative defense does not quiet title and the trial court erred in saying that this argument should be presented as an affirmative defense to a foreclosure because the cause of action in the complaint included quieting title.

B. THERE IS NO CLEAR CHAIN OF TITLE FOR OWNERSHIP OF THE NOTE AND ENDORSEMENT IS CHALLENGED.

1. The validity and assignment of the note remains in question.

Ms. Moore disputes that Select Portfolio Services, or U.S. Bank National Association possess the original Note, or that it was properly endorsed in blank. Despite assertions that these documents are self-authenticating, the defendants have the burden of proof regarding its ownership of these documents. The dispute of whether the note is original or not should be heard in trial since Defendants have yet to provide any true copy of any original and ownership remains in question.

The promissory notes endorsements are challenged and should be heard. The promissory note having the endorsement was allegedly executed by First Franklin, A Division of National City Bank and First Franklin Financial Corporation. Both assignments are allegedly signed by Christanna Steiger. Ms. Steiger on both endorsements is identifies as a funder or senior funder and there is no indication she ever had the authority to make any assignments. If she never had the authority to assign the note the Defendant cannot be the true owner of the note and does not have the authority to foreclose on the home.

2. Washington Law Requires Specific Authority to Foreclose on a Deed of Trust.

A person entitled to enforce an instrument is determined from Article 9 of the Uniform Commercial Code. RCW 62A.9A-203.

A person entitled to enforce the instrument must satisfy three conditions: “(1) It gave value for the note; (2) must have the rights to the note; and (3) the seller of note must either authenticate the “security agreement” that describes the note or delivering possession of the note to purchaser.” *Brown v. Dep’t of Commerce*, 184 Wn.2d 509 (2015).

If Defendants do not possess the note they have no ownership interest therein to foreclosure on the note.

The Deed of Trust identifies MERS as the beneficiary of the Deed of Trust. MERS never possessed or owned the Promissory Note, nor even assigned such. A defect in the legal title to the beneficial interest of the deed of trust exists.

3. The Mortgage Obligation is Not Securitized.

The loan is not properly securitized. U. S. Bank, as Trust, is governed under a Pooling and Servicing Agreement. This is a matter of New York law. That trust as a legal impossibility, as the loan is sought to be assigned to the Trust, after funding thereof and its closing date of February 28, 2007. The Moore Promissory Note is dated December 6, 2006. The obligation was not in the Trust when it closed on or about February 28, 2007. The transfer of the Deed of Trust occurred more than one year later.

Attached to the original Complaint is a securitization report prepared by Michael Carrigan, in affidavit form. Said report concluded that the Moore mortgage is not properly securitized and ownership thereof is disputed. There have always been questions regarding the validity of the note and the loan it secured and those questions remain in effect.

V. Conclusion

For the foregoing reasons, this Court should reverse the decision of the trial court and remand and reinstate Plaintiff's action and Attorney's fees should be awarded under RAP 18.1.

Dated this 18 day of December, 2016.

Respectfully,

A handwritten signature in black ink, appearing to read "Emily S. Brooks", is written over a horizontal line.

Emily S. Brooks

Attorney for Plaintiff

WSBA No. 49013

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CERTIFICATE OF SERVICE

I, EMILY S. BROOKS hereby certify under penalty of perjury of the laws of the State of Washington, that on the 19th day of December, 2016 I cause to be served a copy of the attached document to the following person in the manner indicated below:

- Brief of Plaintiff

VANESSA SORIANO POWER
Stoel Rivers LLP
600 University St. Ste 3600
Seattle, WA 98101-3197
Vanessa.power@stoel.com

By:

- Electronic Mail; and
- First Class Mail



Emily S. Brooks

EXHIBIT A

LAW OFFICES OF KAREN L. GIBBON, P.S.
3409 MCDUGALL AVENUE, SUITE 202
EVERETT, WA 98201
(425) 212-3277

THIS NOTICE IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

The total amount due on the debt as of the date of this notice is \$256,116.09. Unless you notify this office in writing within 30 days after receiving this notice that you dispute the validity of the debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within 30 days from receiving this notice that you dispute the validity of the debt or any portion thereof, this office will obtain a verification of debt and mail you a copy of the verification. If you request this office in writing within 30 days from receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.

NOTICE OF DEFAULT

PURSUANT TO THE REVISED CODE OF WASHINGTON
CHAPTER 61.24, *ET. SEQ.*

TO: Sheryl C Moore
John Doe Moore

1. DEFAULT:

You are hereby notified that the beneficiary has declared you in default on the obligation secured by a deed of trust dated December 5, 2006, recorded under Auditor's/Recorder's No. 5471603, records of Spokane County, Washington, from Sheryl C Moore, an unmarried woman, as Grantor(s), to Commonwealth Land Title, as Trustee, to secure an obligation in favor of Mortgage Electronic Registration Systems, Inc., as beneficiary; the beneficial interest of said deed of trust has since been assigned to LaSalle Bank National Association, as Trustee for First Franklin Mortgage Loan Trust 2007-FF2, Mortgage Loan Asset-Backed Certificates, Series 2007-FF2. The description of the real property which said deed of trust affects and to which this Notice pertains, is as follows:

LOT 4, BLOCK 1, UPRIVER TERRACE FIRST ADDITION, AS PER PLAT RECORDED IN VOLUME 8 OF PLATS, PAGE 8, RECORDS OF SPOKANE COUNTY, EXCEPT THE SOUTHEASTERLY 3 FEET THEREOF, SITUATE IN THE COUNTY OF SPOKANE, STATE OF WASHINGTON (TAX PARCEL ID NO. 450621217).

the postal address of which is more commonly known as:

4710 N Ella Rd, Spokane, WA 99212

2. STATEMENT OF DEFAULT AND ITEMIZED ACCOUNT OF AMOUNTS IN ARREARS:

The beneficiary alleges that you are in default for the following reasons:

a. Failure to pay the following past due amounts, which are in arrears:

Monthly payments:

4 monthly payments at \$2,276.80,
(March 1, 2006 - June 1, 2008): \$9,107.20

Late charges:

0 late charge at \$0.00 for each monthly payment not made
within 15 days of its due date: \$0.00

Accrued late charges: \$0.00

Less suspense or rents received: \$1,435.40

TOTAL MONTHLY PAYMENTS AND LATE CHARGES: \$7,671.80

b. Default other than failure to make monthly payments:
None

3. OTHER CHARGES, COSTS AND FEES:

In addition to the amounts in arrears as specified above, you are obliged to pay the following charges, costs and fees to reinstate the deed of trust if reinstatement is made before recording of the Notice of Trustee's Sale:

a. Title Report	\$827.64
b. Recording fees	\$35.00
c. Posting of Notices (Estimated)	\$50.00
d. Photocopying Expenses (Estimated)	\$20.00
e. Postage Expenses (Estimated)	\$20.00
f. Trustee Fee	\$0.00
g. Attorney Fee	\$450.00
h. Telephone Charges	\$0.00
i. Total Advances	\$0.00
j. NSF Fee	\$0.00
TOTAL CHARGES, COSTS AND FEES:	\$1,402.64

4. REINSTATEMENT:

a. UNTIL SUCH TIME AS A NOTICE OF TRUSTEE'S SALE IS RECORDED, THE TOTAL AMOUNT NECESSARY TO REINSTATE YOUR NOTE AND DEED OF TRUST IS THE SUM OF PARAGRAPHS 2 AND 3 IN THE AMOUNT OF \$9,074.44, PLUS ANY MONTHLY PAYMENTS, LATE CHARGES, OR INSPECTION FEES WHICH HAVE BECOME DUE SINCE THE DATE OF THIS NOTICE OF DEFAULT. ANY NEW DEFAULTS NOT INVOLVING PAYMENT OF MONEY THAT OCCUR AFTER THE DATE OF THIS NOTICE MUST ALSO BE CURED IN ORDER TO EFFECT REINSTATEMENT. IN ADDITION, BECAUSE SOME OF THE CHARGES CAN ONLY BE ESTIMATED AT THIS TIME, AND BECAUSE THE AMOUNT NECESSARY TO REINSTATE MAY INCLUDE PRESENTLY UNKNOWN EXPENDITURES REQUIRED TO PRESERVE THE PROPERTY OR TO COMPLY WITH STATE OR LOCAL LAW, IT WILL BE NECESSARY FOR YOU TO CONTACT THE UNDERSIGNED ATTORNEY BEFORE THE TIME YOU TENDER REINSTATEMENT SO THAT YOU MAY BE ADVISED OF THE EXACT AMOUNT YOU WILL BE REQUIRED TO PAY.

Reinstatement monies should be tendered to the undersigned Attorney in cash, certified check or money order.

b. If your default includes a default other than failure to pay payments when due, then in order to reinstate the Note and Deed of Trust before the Notice of Trustee's Sale is recorded, you must cure such other default(s).

5. CONSEQUENCES OF DEFAULT:

a. Failure to cure said alleged default by paying the amount specified in paragraph 4 within thirty (30) days of:

- 1) posting of this notice on the property; or
- 2) mailing of the notice,

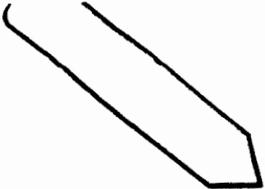
whichever occurs latest, may result in the recordation, transmittal and publication of a Notice of Trustee's Sale, and sale of the property at public auction not less than 120 days from the date this notice was mailed or posted.

b. The effect of the recordation, transmittal and publication of a Notice of Trustee's Sale will be to:

- 1) increase the costs and fees of foreclosure, which will have to be paid upon reinstatement; and
- 2) publicize the default and advertise the property described herein for sale.

c. Notwithstanding a future recordation of a Notice of Trustee's Sale, you may reinstate the deed of trust, and cure the defaults described above on or before the eleventh (11) day before the Trustee's Sale of the property at public auction.

d. The effect of a Trustee's Sale of the above-described property by the Trustee will be to deprive you, or your successor in interest, and all of those who hold by, through or under you of all



interest in the above-described property and satisfy the obligation secured by the above deed of trust.

6. ACCELERATION:

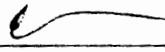
You are hereby notified that the beneficiary has elected to accelerate the loan described herein, and has declared the entire principal balance of \$242,006.48, plus accrued and unpaid interest, escrow advances, accrued late charges, fees and costs, immediately due and payable. NOTWITHSTANDING SAID ACCELERATION, YOU HAVE THE RIGHT TO REINSTATE THE LOAN BY PAYING THE DELINQUENT PAYMENTS, LATE CHARGES, COSTS AND FEES ON OR BEFORE THE ELEVENTH (11) DAY BEFORE THE DATE OF THE TRUSTEE'S SALE WHICH MAY BE SET BY A NOTICE OF TRUSTEE'S SALE, ALL AS EXPLAINED IN PARAGRAPHS 4 AND 5 ABOVE.

7. RECOURSE TO COURTS:

You or your successor(s) in interest have recourse to the courts to contest the alleged default on any proper ground.

DATED: June 11, 2008

Karen L. Gibbon, P.S.,
Attorneys for Beneficiary

By: 
Karen L. Gibbon
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EVERETT, WA 98201
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