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

FIBIA AND RADU BAHNEAN,

Appellant

v.

HSBC BANK USA NA,

Respondents

BRIEF OF APPELLANTS

Appeal from Kittitas County Superior Court
Case No: 15-2-00062-7
The Honorable Judge

/s/ Jason E Anderson
Jason E Anderson, WSBA 32232
Law Office of Jason E. Anderson
5355 Tallman Ave NW Ste 207
Seattle, WA 98107
(206) 706-2882
Jason@jasonandersonlaw.com
Attorney for Defendant/
Appellants.

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RULES

I. INTRODUCTION

This case raises the question of when the statute of limitations on a note begins to run against an installment note if (1) the installment note incorporates other writings, and (2) if the installment note provides that the borrower is in default if the borrower fails to make an installment payment.

The Appellants recognize that it is asking this court to distinguish this case from a decision from Division One of the Court of Appeals or to outright disagree with that court. Specifically, *Edmundson v. Bank of Am.*, which held that the statute of limitations on a note providing for monthly payments of principal and interest only expires with respect to each payment as it comes due. *Edmundson v. Bank of Am., NA*, 194 Wn. App. 920, 378 P.3d 272 (2016).

II. ASSIGNMENTS OF ERROR

A. The Appellant asserts the following assignments of error:

1. The trial court erred when it granted an order for summary judgment when after construing all inferences in favor of Appellant, there was a genuine issue of material fact whether the note Respondent sought to enforce was ever transferred to Respondent.

2. The trial court erred when it denied the Defendant's request for a continuance so it could conduct some discovery.

3. The trial court erred when it denied the Appellant's motion for reconsideration of the summary judgment order.

B. Issues Pertaining to Assignments of Error:

1. When a Plaintiff seeks to enforce a lost note Under RCW 62A.3-309, does it have to prove that it had possession of the note in question?

Assignment of Error 1.

2. When a Plaintiff seeks to enforce a lost note that has been endorsed in blank, does it have to prove it had possession of the note to seek to enforce the note? Assignment of Error 1.

3. If the copy of the note produced by the Plaintiff show that it was a copy generated by a third party, does that fact support an inference that Plaintiff never obtained possession of the original note? Assignment of Error 1.

III. STATEMENT OF THE CASE

A. The Appellant Obtains a Loan Secured by their Real Property and Defaults on the Loan.

Radu and Fibia Bahnean ("the Bahneans") are husband and wife. They are the record title owners of real property and the single-family residence situated thereon ("the Property") located in Snoqualmie Pass,

Kittitas County, Washington.

The Bahneans executed a Promissory Note and/or an Adjustable Rate Rider in favor of GreenPoint Mortgage Funding, Inc., a California corporation. ("GreenPoint"). On or about October 27, 2006, the Bahneans granted a Note and Deed of Trust to Greenpoint, which was recorded on October 31, 2006 under Kittitas County Recording No. 200610310062 ("the DOT"). CP 00102-00134.

The last payment the Bahneans made to Greenpoint, or any successor in interest, occurred on June 23, 2008. On July 23, 2008, the Bahneans became delinquent on this debt. The debt at issue was subsequently assigned to Defendant HSBC Bank USA, NA as Trustee for Deutsche Alt-A Securities Inc. Mortgage Loan Trust, Mortgage Pass-through Certificates Series 2006-AR, ("HSBC"). Ocwen Loan Services LLC became the new servicer of the loan.

B. Essential Provisions of the Note and Deed of Trust

The note and deed of trust contain several specific provisions that will be referred to repeatedly in the argument below. These provisions are as follows:

Note

3. PAYMENTS (A) Time and Place of Payments I will make a payment on the first day of every month, beginning on December 1, 2006 . Before the First Principal and

Interest Payment Due Date as described in Section 4 of this Note, my payment will consist only of the interest due on the unpaid principal balance of this Note. Thereafter, I will pay principal and interest by making a payment every month as provided below.

I will make my monthly payments of principal and interest beginning on the First Principal and Interest Payment Due Date as described in Section 4 of this Note. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date, and if the payment includes both principal and interest, it will be applied to interest before Principal. If, on November 1, 2036, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at P.O. Box 79363, City of Industry, CA 91716-9363 or at a different place if required by the Note Holder.

CP 00102

7. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charges for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.000 % of my overdue payment of interest, during the period when my payment is interest only, and of principal and interest thereafter. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal that has not

been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

CP 00104.

Deed of Trust

22, Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument 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, the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale, and any other matters required to be included in the notice by Applicable Law. 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 by this Security Instrument without further demand and may

invoke the power of sale and/or any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

CP 00060.

C. Quiet Title Case.

The Bahneans filed an action on March 9, 2015 in Kittitas County Superior Court seeking a judgment for quieting title against HSBC and any other claimants to an interest in the property. CP 00001. HSBC appeared in this case and subsequently filed a counterclaim against the Bahneans seeking judicial foreclosure on May 19, 2015. CP 00011-00024.

The plaintiff filed a motion for summary judgment on August 12, 2015. CP 00034-00042. The court partially granted and partially denied the Plaintiff's motion on November 10, 2015. CP 199-203. It held that all payments that came due prior to February 15, 2009 were barred by the statute of limitations but that any payments that came due after that date were not barred by the statute of limitations. Id.

The court further found that the Greenpoint Note had not been accelerated. Id.

Armed with these findings, HSBC filed a motion for summary

judgment on March 30, 2017. CP 0204. This motion was granted on June 2, 2017 and a Judgment was entered. CP 326-336. The Appellants subsequently appealed from this judgment. CP 337.

IV. ARGUMENT

The Appellants contend the trial court erred below by applying RCW 62A.3-118(a), which only applies to negotiable notes instead of RCW 4.16.040 which governs written contracts regarding land. Further, even if RCW 62A.3-118(a), was the correct standard, that the court failed to apply the statute correctly because the plain language of the note established that the defendants were in default the first time they failed to make a payment as to the entire note. This case is distinguishable from common law cases providing that the statute of limitations only applies to each installment as it comes due because the plain language of the note places the Bahneans in default as to the whole note when a monthly payment is note due. The fact that the Respondent's had steps to take to enforce the note does not change the fact that the Respondent's cause of action accrued when the Bahneans were in default as to the entire note.

(A) The Washington Legislature Intended that Claim Arising from a Mortgage Secured by Real Property be Governed by RCW 4.16.040.

The applicable statute of limitations is set forth in RCW 4.16.040. It provides that a lawsuit must be commenced within six years when it is

"[a]n action upon a contract in writing, or liability express or implied arising out of a written agreement except as provided for in RCW 64.04.007(2)." RCW 4.16.040(1) (emphasis added).

When analyzing a statute, courts assume that the legislature understands Washington law as it existed prior to passing new legislation. *See Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 888 P.2d 147 (1995). The 2012 session of the Washington Legislature passed the "Homeowners in Crisis - Assistance" bill, Chapter 185, Laws of 2012. This bill made a number of changes to Washington statutes to provide additional protections for homeowners. The changes included the addition of RCW 64.04.007. Subsection (2) of this statute provides that the statute of limitations for an assignee of debt secured by "owner-occupied real property" have three years to file an action on debt following the release of the beneficiaries security on real property. RCW 4.16.040(1) was amended to specifically incorporate this provision.

The trial court below applied RCW 62A.3-118(a) when interpreting the appropriate statute of limitations on the Note. The Washington legislature did not provide for a similar exception to RCW 62A.3-118(a) when it modified the statute of limitations on notes secured by a mortgage on residential real property if the beneficiary of the mortgage released its interest in the security. We must conclude from this

move that the Washington legislature intends RCW 4.16.040 to apply to mortgages secured by residential real property.

B. The Note at Issue is not a Negotiable Instrument.

The note at issue is not a negotiable instrument. A negotiable instrument is defined as:

[A]n unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

...

(2) is payable on demand or at a definite time; and

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

RCW 62A.3-104.

The note in question fails to meet this definition for two reasons.

First, the note is subject to an additional writing, the "Adjustable Rate Rider" dated 10/23/2006; (CP 00125-00129) and second, the security agreements incorporated into the note require the Bahneans to take specific actions in addition to the payment of money, including the requirement that the Bahneans maintain the property as their second home along with other requirements. (CP 00133-00134).

1. Note is Subject to Additional Writings.

The note in question provides that a "Security Instrument. . . . describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note." CP 00105. Thus, the note references these additional "Security Instruments."

However, a close look at the Note some of these Security Instruments securing the note show that they are not just intended to provide security to the Lender, but that they impose new obligations on the Borrower in addition to the requirement that the Bahneans pay the note.

a. Non-Transfer Provisions Impose an Undertaking on the Bahneans.

For example, paragraph 11(A) and 11(B) of the Note provide that if any interest in the Property securing the Note is sold without prior consent, that the Lender may require immediate payment in full of all sums. CP 00105. This condition imposes a requirement on the Bahneans that they may not transfer their property and any transfer of the property is a breach of their agreement with the Lender. The Respondent is likely to argue that this provision falls under the exemption for "an undertaking or power to give, maintain, or protect collateral to secure payment." RCW 62A.3-104(a)(3)(i). However, the requirement that the Bahneans not be

permitted to transfer the property is not related to a requirement to maintain the value of the collateral. Thus, this requirement is an undertaking imposed on the Bahneans that eliminate the negotiability of the note.

(b). *Requirement that Bahneans Maintain Property as Second Home is an Additional Undertaking.*

One of the "Security Documents" is the "Second Home Rider." CP 00133-00134. This security document imposes a requirement on the Bahneans that they may only use the Property as the Borrower's second home. This includes the requirement that "Borrower shall keep the Property available for Borrower's exclusive use and enjoyment at all times. . ." This requirement imposes an undertaking on the Bahneans to always keep the property available for their exclusive use and enjoyment. This undertaking is in addition to the requirement that the Bahneans make payments pursuant to the Note and establishes that the Note is not a negotiable instrument.

C. The Statute of Limitations Expired on the Lender's Claims pursuant to RCW 4.16.040.

RCW 4.16.040 provides that an action must be commenced within six years based on "an action upon a contract in writing, or liability express or implied arising out of a written agreement." The Note provides

that "If I do not pay the full amount of each monthly payment on the date it is due, I will be in default." CP 00104 ¶7(B). The phrase "I will be in default" clearly means - default as to the entire note. If the drafter of the note (the drafter was Respondent's predecessor) had meant that the Bahneans would only be in default as to that installment, the drafter could have drafted the note that way. To the extent that the language is ambiguous, the language should be construed in favor of the Bahneans who did not draft the note.

The six year statute of limitations begins to run at the time a "cause of action has accrued." RCW 4.16.005. The language "cause of action has accrued" means that the statute begins to run when a party has the right to pursue an action. The Lender in this case, had the right to pursue an action on the note at the time the Bahneans failed to make a principal and interest payment in September of 2008.

The fact that the Lender is required to provide a Notice of Default prior to commencing an action does not change this analysis. There are many causes of action in Washington that require a party to make a pre-filing demand before filing an action. Examples include the requirement that a party make a tort claim to a municipality before filing a lawsuit, the requirement that a demand be made before filing a medical malpractice claim and others. The Bahneans were in default as to their Note in

September of 2008 because the plain language of the Note provides that the failure to make a payment places the Borrower in default. Thus, pursuant to RCW 4.16.040, the statute of limitations on the entire note began to run in September of 2008 when they failed to make their payment. Since more than six years passed since that time, the statute of limitations had expired on the Lender's claims.

D. Even if RCW 62A.3-118(a) Applies, the Statute of Limitations Expired.

In the event this court disagrees with the Appellant and holds that the Statute of Limitations is governed by RCW 62A.3-118(a) the statute of limitations expired under that statute as well.

RCW 62A.3-118(a) provides: "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note, or if a due date is accelerated, within six years after the accelerated due date." RCW 62A.3-118(a).

In this case, the fact that the Bahneans were in default after failing to make the September 2008 payment, meant that the Bahneans were in default as to the entire contract at that time. Thus, the appropriate date for the statute of limitations to start running is after that first default.

E. The Common Law Cases Regarding Installment Contracts Fail

to Analyze the Statute.

The Appellant pointed out previously that it would be asking this court to distinguish or disagree with the Court in Edmundson. The court in Edmundson stated that the note it was analyzing was an installment note. Thus, the statute of limitations would only begin to accrue against each installment as it came due. 194 Wn. App. 920, 378 P.3d 272 (2016). It cited for authority, *A.A.C. Corp. v. Reed*, 73 Wn.2d 612, 616, 440 P.2d 465 (1968) stating: "Default in payment alone does not work an acceleration."

This case and other cases the Respondent will cite fail to account for RCW 4.16.005 that provides an action to enforce a claim must be filed within a set period of time after the cause of action accrues. This statute, passed in 1989, trumps contrary case law prior to that date, or case law that fails to consider the statute. See Washington Laws 1989 Chapter 14 § 1. The Respondent had the right to pursue a cause of action against the Bahneans on the entire note after they defaulted on the September 2008 payment. The Respondent failed to take action to enforce its note. The Appellant asks this court to reverse the trial court.

V. CONCLUSION

In conclusion, the court should reverse the trial court's denial of the Bahnean's motion for summary judgment. .

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Jason Anderson, WSBA # 32232
Attorney for Appellants
5355 Tallman Avenue NW #207
Seattle, WA 98107
(206) 706-2882
Jason@jasonandersonlaw.com

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Address:

5355 TALLMAN AVE NW STE 207

SEATTLE, WA, 98107

Phone: 206-706-2882

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