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MAY 15 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 357911-III

**COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON**

U.S. BANK NATIONAL ASSOCIATION, ET AL

RESPONDENT

VS.

ANGELA UKPOMA

APPELLANT

APPELLANT'S OPENING BRIEF

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I. Assignment of Error:

The trial court erred as a matter of law by failing to dismiss, with prejudice, the Respondent's lawsuit because the relevant six-year statute of limitations had expired.

II. Issue:

After acceleration of the entire debt on February 1, 2008, and no collection action was commenced which proceeded to final resolution, and the six-year statute of limitations expired, can the trial court judicially extend the six-year statute of limitations by excluding those periods of times when incomplete nonjudicial foreclosure actions occurred (similar to computations for the criminal speedy trial rule, for computation of excludable time)?

(It is the Appellant's contention that there is no statutory authority to extend the six-year statute of limitations for the facts in this case, the trial court was engaging in unconstitutional political activism, and that this court should

reverse the trial court's orders and judgment, and dismiss the Respondent's lawsuit with prejudice.)

III. Statement of the Case:

This is an action for judicial foreclosure of Appellant Angela Ukpoma's personal residence, located at 1123 Highway 395 North, Kettle Falls, Washington 99141¹. According to the Appellant, and the records in this case, any deed of trust secured debt claimed in this action was first accelerated on February 1, 2008². Appellant Ukpoma correctly pleaded the affirmative defense of statute of limitations³, and since more than six years had elapsed since the deed of trust secured debt obligation was accelerated, without commencement of a collection lawsuit, the Respondent's claims were barred⁴.

¹ *Complaint*, at 2:5-12; CP 4 (note: reference to the page and line numbers is cited as (*page number*):(*line numbers*)).

² Notice of Default, Exhibit "A" to J.J. Sandlin declaration; CP 307.

³ *Answer and Affirmative Defenses*, at 3:19-21; CP 42-43.

⁴ CP 297-298; R.C.W. 4.16.040.

Respondent claims a debt is owed by Appellant Angela Ukpoma, based upon a promissory note payable to Credit Suisse Financial Corporation, secured by a deed of trust. Both instruments were apparently signed on December 13, 2006⁵.

Respondent asserts Appellant Ukpoma ceased making monthly payments upon the alleged debt on October 1, 2007, and has failed to make any payments since that date⁶. Appellant Ukpoma claims she does not owe a debt secured by her personal residence, and that the deed of trust is null and void⁷.

On February 1, 2008 the acceleration of the alleged deed of trust-secured debt occurred:

“You are hereby notified that the beneficiary has elected to accelerate the loan described herein, and has declared the entire balance of \$252,000.00, plus accrued costs, immediately due and payable.”⁸

⁵ *Complaint*, at 2:13-21; CP 4.

⁶ *Complaint*, 3:6-9; CP 5.

⁷ *Answer*, 3:4-11, 14, 19-21; CP 42.

⁸ *Notice of Default*, ¶ 6, dated 2/1/2008 (emphasis added); Exhibit “A” to declaration of J.J. Sandlin, 10/18/2017; CP 307; (the Notice of Default was signed by the agent of the beneficiary, with authority of the beneficiary).

The Notice of Default was then followed by a Notice of Trustee's Sale, dated March 3, 2008, recorded in Stevens County under auditor's file number 2008 0002128⁹. No record of a trustee's sale exists. No evidence exists that Appellant Ukpoma validated or reaffirmed the alleged debt or deed of trust obligations. No evidence of a loan modification exists. By mere inspection of the acceleration notice, the acceleration of the debt on February 1, 2008 was clear, specific, unequivocal, and unambiguous¹⁰.

IV. **Argument:**

Statute of Limitations:

4.1 For a deed of trust, the six-year statute of limitations begins to run when the party is entitled to enforce the obligations of the note¹¹. This can occur either immediately for a demand note, when the note naturally matures, or when the

⁹ Exhibit "B" to declaration of J.J. Sandlin, 10/18/2017; CP 308-312.

¹⁰ See fn. 8, *supra*.

¹¹ RCW 4.16.040; see *Westar Funding*, 157 Wn. App. at 784.

party accelerates the note through breach or some other clause in the note¹². If the lender elects to accelerate the debt after a breach, the acceleration must be clearly and unequivocally expressed to the debtor¹³.

Acceleration of the Entire Debt Occurred on February 1, 2008:

4.2 On February 1, 2008 Respondent clearly, unequivocally elected to accelerate the alleged debt due to its claim that the Appellant had breached the terms of the DOT and promissory note¹⁴. Appellant failed to make payments upon the note and DOT, which prompted the demand for payment of all accrued monthly arrearages and acceleration of the entire debt, including accrued and accumulated interest¹⁵. The DOT

¹² *Hopper v. Hemphill*, 19 Wn. App. 334, 335-336, 575 P.2d 746 (1978); *Westar Funding*, 157 Wn. App. at 784; 31 *Richard A. Lord, Williston On Contracts* § 79:17, at 338; § 79:18 at 347-350 (4th ed. 2004).

¹³ *Weinberg v. Naher*, 51 Wash. 591, 594, 99 P. 736 (1909); *Glassmaker v. Ricard*, 23 Wn. App. 35, 38, 593 P.2d 179 (1979).

¹⁴ See fn. 8, *supra*.

¹⁵ See fn. 8, *supra*.

beneficiary, through its authorized agent, had issued its Notice of Default and announced the entire debt was accelerated¹⁶. No payments had been made upon the alleged debt, since September, 2008¹⁷. The six-year statute of limitations is a bar to enforcement of the Respondent's DOT, and the promissory note is uncollectible¹⁸.

Respondent Should Be Judicially Estopped From Asserting Acceleration Occurred After February 1, 2008:

4.3 Judicial estoppel is an equitable doctrine invoked by the court at its discretion and intended to protect the integrity of the judicial process¹⁹. The inapposite argument does not apply here, which would have allowed the Respondent to urge a later acceleration date was appropriate: "Judicial estoppel seeks to prevent the deliberate manipulation of the courts; it is

¹⁶ See fn. 8, *supra*.

¹⁷ *Complaint*, 3:6-9; CP 5.

¹⁸ R.C.W. 4.16.040.

¹⁹ *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)(quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)(quoting *Religious Tech. Ctr. V. Scott*, 869 F.2d 1306, 1311 (9th Cir. 1989)(Hall, J., dissenting))).

inappropriate, therefore, when a party's prior position is based on inadvertence or mistake."²⁰ In precedent that predates *New Hampshire*, the court held the doctrine of judicial estoppel applies "when a party's position is tantamount to a knowing misrepresentation to or even fraud on the court."²¹ Clearly, the Respondent is estopped from urging a later date should be considered as the acceleration date for this contested DOT obligation.

The February 1, 2008 debt/DOT acceleration notice was clear, unequivocal, and unambiguous:

4.4 Here, the Respondent declared the "whole of the balance of both the principal and interest thereon*** due and payable."²² However, the Respondent now seeks an inference that the entire

²⁰ *Helfand v. Gerson*, 105 F.3d 530, 536 (9th Cir. 1997); accord *United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008).

²¹ *Wylar Summitt P'ship v. Turner Broad. Sys.*, 235 F.3d 1184, 1190 (9th Cir. 2000)(quoting *Johnson*, 141 F.3d at 1369 (quoting *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362-63 (3d Cir. 1996))).

²² *Complaint*, 3:6-9; CP 5; *Notice of Default*, ¶ 6, dated 2/1/2008 (emphasis added); Exhibit "A" to declaration of J.J. Sandlin, 10/18/2017; CP 307.

debt was accelerated on May 13, 2016, the date of filing its complaint in this action. This inference is untenable. The Respondent's clear, unequivocal, unambiguous notice of acceleration was mailed to Appellant Ukpoma on February 1, 2008, found in the text of the Respondent's Notice of Default at ¶ 6²³.

V. Conclusion:

Respondent sought judicial foreclosure of Appellant Angela Ukpoma's personal residence located in Kettle Falls, Stevens County, Washington, by filing an *in rem* judicial foreclosure action on May 13, 2016. The Respondent accelerated the claimed debt, secured by a deed of trust, on February 1, 2008. The Respondent seeks to enforce an *in rem* right to judicially foreclose Ms. Ukpoma's personal residence based upon a deed of trust that expired and has no further force and effect, since more than six years elapsed since acceleration of the debt secured by the DOT.

²³ See fn. 8.

This court should REVERSE the trial court's decision regarding the Respondent's motion for summary judgment and find the six-year statute of limitations for enforcement of the deed of trust, and its power of sale clause, has *expired*. The Appellant requests this court REVERSE the trial court's JUDGMENT AND ORDER and REMAND this action for dismissal with prejudice.

Respectfully submitted this 10th day of May, 2018.

SANDLIN LAW FIRM



J.J. Sandlin, WSBA #7392, for Appellant Ukpoma

CERTIFICATE OF SERVICE

J.J. SANDLIN declares under penalty of perjury of the laws of the State of Washington as follows:

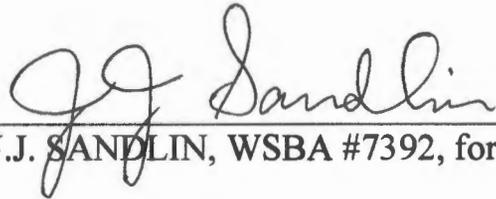
1. I mailed the Appellant's Opening Brief to the Clerk of the Court, Washington State Court of Appeals, Division III, 500 N Cedar St., Spokane, WA 99201 on May 10, 2018;
2. On May 10, 2018 I mailed, and emailed, a copy of the

above Opening Brief to opposing counsel for Respondent as

listed below:

Attorney Amy Edwards
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760 SW 9th Ave., Ste. 3000
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Respectfully submitted this 10th day of May, 2018.

A handwritten signature in cursive script, appearing to read "J.J. Sandlin". The signature is written in black ink and is positioned above a horizontal line.

J.J. SANDLIN, WSBA #7392, for Appellant Ukpoma