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No. 357911-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE ON BEHALF
OF THE HOLDERS OF ADJUSTABLE RATE MORTGAGE TRUST
2007-2 ADJUSTABLE RATE MORTGAGE BACKED PASS-
THROUGH CERTIFICATES, SERIES 2007-2,

Plaintiff/Respondent,

v.

ANGELA UKPOMA,

Defendant/Appellant.

RESPONDENT'S ANSWERING BRIEF

Amy Edwards, WSBA #37287
STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000
Portland, OR 97205
503.224.3380
Attorneys for Respondent

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I. INTRODUCTION

Less than a year after receiving her loan, Appellant Angela Ukpoma (“Ukpoma”) went into default for failure to make her monthly installment payments. Between 2008 and 2016 when this action was filed, Respondent U.S. Bank National Association, as Trustee on behalf of the Holders of Adjustable Rate Mortgage Trust 2007-2 Adjustable Rate Mortgage Backed Pass-Through Certificates, Series 2007-2 (the “Trust”), attempted to enforce the terms of the loan through numerous nonjudicial foreclosure proceedings. Also, during this period, Ukpoma filed four bankruptcies. The Trust filed the present action for foreclosure on May 13, 2016.

In this appeal, Ukpoma challenges the trial court’s order granting the Trust’s motion for summary judgment and its judgment and decree of foreclosure. Her only argument below and on appeal is that the Trust’s claim for foreclosure is barred by the statute of limitations. The trial court properly concluded, however, that the claim was not barred because the Trust had not accelerated the installment note in 2008, as alleged by Ukpoma, and, alternatively, the limitation period had been tolled by prior (uncompleted) nonjudicial foreclosures and Ukpoma’s bankruptcies. The trial court’s judgment should be affirmed.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Ukpoma's assignment of error is incomplete. While it states the legal issue on which Ukpoma seeks review, it omits the trial court decision in which that legal issue was decided—the Trust's motion for summary judgment.

III. RESPONSE TO ISSUES PRESENTED

The trial court properly granted the Trust's motion for summary judgment and entered a judgment and decree of foreclosure against Ukpoma because the Trust's claim for foreclosure due to Ukpoma's default was timely.

IV. STATEMENT OF CASE

On or about December 13, 2006, Ukpoma executed a promissory note (the "Note") in the amount of \$252,000. (Clerk's Papers ("CP") 159, 163-168.) The Note required Ukpoma to pay monthly installments on loan with a maturity date of January 1, 2037. (CP 163.) The Note was secured by a Deed of Trust, which was properly recorded in the real property records of Stevens County. (CP 159, 170-185; collectively, the Note and Deed of Trust are referred to as the Loan.) The Trust is the holder of the endorsed in blank Note and the assignee of the Deed of Trust. (CP 5, 37-38, 86, 159, 163-168.)

Under the terms of the Note, Ukpoma was required to make monthly installment payments beginning on February 1, 2007 and continuing until the Note's maturity date on January 1, 2037. (CP 163.) Ukpoma failed to make the monthly payment due on October 1, 2007 and for all subsequent months. (CP 101, 104-105, 159.) Between May 2008 and June 2014, the foreclosure trustee initiated a number of nonjudicial foreclosures and Ukpoma filed four bankruptcies. (CP 104-107, 116-149.)

On May 13, 2016, the Trust filed the present action to foreclose on the Deed of Trust. (CP 3.) Ukpoma answered and alleged, as an affirmative defense, that the statute of limitations had expired. (CP 42.) The Trust moved for summary judgment on its foreclosure claim. (CP 85-97.) In response, Ukpoma argued that summary judgment should be denied because the Trust had accelerated the Note in 2008, and, therefore, the six-year statute of limitations in RCW 4.16.040 had expired in 2014—two years before the Trust filed its Complaint. (CP 297-299.) More specifically, Ukpoma contended that the Trust had accelerated the Note when Quality Loan Service Corporation (“QLS”), the successor trustee under the Deed of Trust, sent a notice of default to Ukpoma on February 1, 2008. (CP 297-299, 305-307.)

In response, the Trust argued that QLS's notice of default could not be construed as an acceleration by the Trust and, therefore, the Note

had not been accelerated until no earlier than the filing of the Complaint in the present action. (CP 91-94, 320-321.) Alternatively, it argued that, even if the Note had been accelerated in 2008, the claim was still timely because the statute of limitations had been tolled by Ukpoma's bankruptcies and the prior nonjudicial foreclosures. (CP 94-96, 320-321.)

On October 31, 2017, the trial court granted the Trust's motion for summary judgment, concluding that, under either of the Trust's arguments, the statute of limitations had not yet expired. (Report of Proceedings 14:1-3, 17:1-5; CP 382-383.) The trial court denied Ukpoma's motion for reconsideration and entered a judgment and decree of foreclosure on December 11, 2017. (CP 378-379, 384-388.)

V. ARGUMENT

A. Standard of Review

Summary judgment rulings are reviewed de novo, with the appellate court engaging in the same inquiry as the trial court. *Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 281, 313 P.3d 395 (2013). Whether a statute of limitations bars an action is also reviewed de novo. *4518 S. 256th, LLC v. Gibbon*, 195 Wn. App. 423, 435, 382 P.3d 1 (2016). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *4518 S. 256th, LLC*, 195 Wn. App. at 435.

Unsupported conclusory allegations or argumentative assertions are insufficient to defeat summary judgment. *See Vacova Co. v. Farrell*, 62 Wn. App. 386, 395, 814 P.2d 255 (1991).

B. The Trust’s Claim Was Not Barred by the Statute of Limitations.

The trial court properly concluded that the Trust’s claim for foreclosure was not barred by the statute of limitations. A claim for foreclosure of a deed of trust is subject to a six-year statute of limitations. RCW 4.16.040; *Edmundson v. Bank of Am.*, 194 Wn. App. 920, 927, 378 P.3d 272 (2016). For an installment note, like the one at issue in this case, the limitation period ““runs against each installment from the time it becomes due”” or when the note is accelerated. 194 Wn. App. at 930 (quoting *Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142 (1945)).

Ukpoma’s sole argument below and on appeal is that the Trust accelerated the Loan on February 1, 2008, when the foreclosure trustee, QLS, sent Ukpoma a notice of default. (Appellant’s Opening Brief (“Op. Br.”) at 2-3, 5 (citing CP 305-307).) Ukpoma contends that the current action to foreclose on the Deed of Trust was untimely because it was filed on May 13, 2016—more than six years after QLS’s notice of default. (Op. Br. at 5-6.) As the trial court concluded, the Loan was not accelerated by the 2008 notice of default and, alternatively, even if it had been, the statute

of limitations was tolled by the prior nonjudicial foreclosure proceedings and Ukpoma's bankruptcies.

1. The Note Was Not Accelerated in 2008.

QLS's 2008 notice of default did not accelerate the Loan under Washington law. "To accelerate the maturity date of a promissory note, "[s]ome 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 Wn. App. at 435 (citation omitted; brackets in original). "[M]ere default alone will not accelerate the note," nor does acceleration occur by simply invoking the power of sale. *Id.* at 435, 445 (citation omitted; brackets in original).

Whether a lender has elected to accelerate a loan must be determined based on the language of the deed of trust. *See id.* at 441-42 (relying on requirements in deed of trust to determine whether lender had accelerated note); *see, e.g., Erickson v. America's Wholesale Lender*, No 77742-4-1, 2018 WL 1792382, at *3 (Wash. Ct. App. Apr. 16, 2018) (unpublished) (relying on deed of trust to determine whether loan had been accelerated). Moreover, "[a]cceleration [of the maturity of the debt] must be made in a clear and unequivocal manner which effectively appries the maker that the holder has exercised his right to accelerate the payment date.'" *4518 S. 256th, LLC*, 195 Wn. App. at 435 (first brackets

added) (quoting *Glassmaker v. Ricard*, 23 Wn. App. 35, 38, 593 P.2d 179 (1979)).

In this case, in order to accelerate the Loan, the Deed of Trust required the *Trust* to give notice to Ukpoma of “(a) the default; (b) the action required to cure the default; (c) a date, not less than thirty (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 the Security Instrument, and of sale of the Property at public auction at a date not less than 120 days in the future.” (CP 180.)

QLS’s 2008 notice of default does not comply with these requirements. First, it was issued by *QLS*, not the Trust. Under the Deed of Trust, the “Trustee” and the “Lender” are two separately defined entities and Section 22 of the Deed of Trust is clear that *the Lender—i.e., the Trust—*must provide the required notice. In *Edmundson*, the court rejected a similar argument to the one advocated by Ukpoma in this case. There, the trial court concluded that the loan had been accelerated based on some event during the bankruptcy proceeding. 194 Wn. App. at 932. In rejecting that argument, the court stated that “[u]nder the plain terms of the deed of trust, [acceleration] is an option to be exercised *by the lender*,

not something triggered by events in bankruptcy proceedings.” *Id.* (emphasis added).

Second, QLS’s 2008 notice of default did not provide Ukpoma with notice and opportunity to cure *before* the purported acceleration and notice that, if the default was not cured, the Trust could accelerate the debt, as required by Section 22(c)-(d) of the Deed of Trust. Finally, QLS’s notice of default allowed Ukpoma to reinstate the Loan if she made the required payments. *See, e.g., Erickson*, 2018 WL 1792382, at *3 (noting cases in which court found acceleration to have occurred because lender refused to accept subsequent payments from borrower and citing *Rodgers v. Rainier Nat’l Bank*, 111 Wn.2d 232, 757 P.2d 976 (1988); *Jacobson v. McClanahan*, 43 Wn.2d 751, 264 P.2d 523 (1953)).

Ukpoma also contends that the Trust should be judicially estopped from arguing in this proceeding that the Loan was not accelerated until the filing of the Complaint on May 13, 2016, because its position is inconsistent with the language in QLS’s 2008 notice of default. (Op. Br. at 6-7.) As an initial matter, as discussed above, the Trust and QLS are not the same entities. Moreover, the doctrine of judicial estoppel applies when there is a prior *judicial* proceeding in which a party successfully relied on an inconsistent position. *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 581, 291 P.3d 906 (2012). Even if the notice of default had

been sent by the Trust, and not QLS, it is not a prior judicial proceeding. *See id.* (holding that licensing proceeding before state agency was not judicial proceeding to which judicial estoppel could apply); *cf. Taylor v. Bell*, 185 Wn. App. 270, 283-84, 340 P.3d 951 (2014) (holding that judicial estoppel applies only if inconsistent position was both presented to and accepted by court in prior proceeding). Ukpoma's contention is without merit.

Because the Trust did not accelerate the Loan in 2008, the statute of limitations began to run against each installment from the time it becomes due and, therefore, the Trust's claim for foreclosure was timely.

2. The Statute of Limitations Was Tolloed by Prior Nonjudicial Foreclosures and Ukpoma's Bankruptcies.

Even if the Trust had accelerated the Loan in 2008, which it did not, the trial court properly concluded that the statute of limitations had been tolled by the prior nonjudicial foreclosure proceedings and Ukpoma's four bankruptcies. First, it is well established that initiating a nonjudicial foreclosure proceeding by serving a notice of default or a notice of sale tolls the statute of limitations for a period of up to 120 days after the initial scheduled sale date. *See, e.g., Bingham v. Lechner*, 111 Wn. App. 118, 129-31, 45 P.3d 562 (2002); *Erickson*, 2018 WL 1792382, at *4 ("We have held that the statutory limitation period applicable to

enforcing payment of a loan is tolled during the duration of a foreclosure proceeding up to 120 days after the original sale date.”); *Heintz v. U.S. Bank Tr., N.A. for LSF9 Master Participation Tr.*, No. 76297-4-I, 2018 WL 418915, at *3 (Wash. Ct. App. Jan. 16, 2018) (unpublished) (same); RCW 61.24.040(6) (permitting trustee to continue trustee sale for period not exceeding 120 days).

Second, this court recently held that the tolling provision in RCW 4.16.230 applies to bankruptcy proceedings. *Merceri v. Deutsche Bank AG*, 2 Wn. App. 2d 143, 151, 408 P.3d 1140 (2018). RCW 4.16.230 states that the statute of limitations is tolled “[w]hen the commencement of an action is stayed by injunction or a statutory prohibition.” In *Merceri*, the court held that because the bankruptcy stay prohibits any “exercise [of] control over property of the bankruptcy estate” including foreclosures, it is a statutory prohibition that tolls the statute of limitations in RCW 4.16.040 for the duration of the bankruptcy stay. 2 Wn. App. 2d at 151.

In this case, as detailed below, the statute of limitations was tolled for over 1400 days—or nearly four years—due to Ukpoma’s four bankruptcies and by the initiation of numerous nonjudicial foreclosure sales.

DATES	EVENT	DAYS TOLLED	CP
5/14/2008 - 10/21/2008 ¹	Bankruptcy Stay	160	116
11/7/2008 - 6/9/2009	Notice of Trustee Sale	214	118
6/18/2009 - 1/18/2010	Notice of Trustee Sale	214	122
2/23/2010 - 6/11/2010	Notice of Trustee Sale	108	126, 139
5/14/2010 - 6/11/2010	Notice of Trustee Sale	—	130
6/11/2010 - 12/8/2010 ²	Notice of Trustee Sale	180	134
12/8/2010 - 7/5/2011 ³	Bankruptcy Stay	209	116
8/22/2011 - 4/2/2012	Notice of Trustee Sale	223	141
3/13/2014 - 5/16/2014	Notice of Trustee Sale	64	145, 149
5/22/2014 - 6/21/2014	Notice of Default	30	104-107
	TOTAL	1402	

¹ Ukpoma filed two bankruptcies during this period—Case Nos. 2:08-bk-02814 and 2:08-bk-01899. (CP 116.) The summary judgment briefing referenced the date the bankruptcy case was closed (February 2, 2009) rather than the date the bankruptcy was dismissed (October 21, 2008). (CP 95, 116.) Because the bankruptcy stay is lifted upon the earlier of dismissal or closure, the dismissal date is included in the summary. *See* 11 U.S.C. § 362(c)(2).

² The summary judgment briefing indicated that the June 11, 2010 Notice of Sale was discontinued on June 15, 2010. (CP 95.) However, the Notice of Discontinuance of Trustee’s Sale recorded on June 15, 2010, discontinued the sale that had been noticed on February 23, 2010, not the June 11, 2010, Notice of Sale. (CP 139.) Therefore, the tolling period for the June 11, 2010, Notice of Sale extended to 120 days after the sale date in the Notice, which was September 17, 2010. (CP 135.)

³ Ukpoma filed two bankruptcies during this period—Case Nos. 2:10-bk-06815 and 3:11-bk-42038. (CP 116.)

Thus, even if the Trust had accelerated the Loan on February 1, 2008, because the statute of limitations had been tolled by 1402 days,⁴ the trial court properly concluded that the Trust's filing of this action on May 13, 2016, was timely.⁵

VI. CONCLUSION

For the reasons set forth above, the trial court's order granting the Trust's motion for summary judgment and its judgment and decree of foreclosure should be affirmed.

DATED: July 5, 2018.

STOEL RIVES LLP

/s/ Amy Edwards

Amy Edwards, WSBA #37287
Email: amy.edwards@stoel.com
Attorneys for Respondent

⁴ Based on the adjustments noted in footnotes 1-2 above, the total days tolled is greater than the 1227 days listed in the Trust's summary judgment briefing. Whether the limitations period was tolled by 1227 days or 1402 days, however, the Trust's Complaint was timely filed.

⁵ Ukpoma did not even respond to the Trust's tolling analysis before the trial court, nor did she address this issue in her Opening Brief. Therefore, she has waived any opposition she may have to the trial court's decision on this issue. *See, e.g.*, RAP 2.5(a); *Sullins v. Sullins*, 65 Wn.2d 283, 285, 396 P.2d 886 (1964) (finding that appellant waived right to have court review assignment of error when he neither briefed nor argued issue); *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243 (1991) ("Contentions not made to the trial court in its consideration of a summary judgment motion need not be considered on appeal.").

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **Respondent's Answering Brief** to be served on the following named persons on the date and in the manner indicated below:

J.J. Sandlin
Email: jj@sandlinlawfirm.com
Sandlin Law Firm
105 B. Fletcher Lane
PO Box 228
Zillah, WA 98953-0228

- mailing with postage prepaid
- copy via email
- hand delivery via messenger

Attorney for Appellant

DATED: July 5, 2018 at Portland, OR.

s/ Janice Myev
Janice Myev, Practice Assistant
STOEL RIVES LLP

STOEL RIVES LLP

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Address:

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