

69959-8

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CASE NO. 69959-8-1

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION I

GREGORY H. KIRSCH,

Appellant,

vs.

CRANBERRY FINANCIAL, LLC,

Respondent.

BRIEF OF DEFENDANT/COUNTER-CLAIMANT – RESPONDENT
CRANBERRY FINANCIAL, LLC

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STATE OF WASHINGTON

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I. INTRODUCTION

Channel Marine, Ltd. ("Channel") entered into a Promissory Note, and subsequent Modification of Promissory Note, for a loan in the amount of Seven Hundred Eighty Thousand Four Hundred Dollars (\$780,400.00). Under the terms of the Note, Channel agreed to make annual installment payments of Fifty-One Thousand Three Hundred & Ninety Dollars (\$51,394.00), with the first payment due on February 14, 2000, and successive payments due on the 14th day of February each year thereafter to the date of maturity – August 14, 2023.

Plaintiff/Counter-Defendant, Gregory H. Kirsch ("Kirsch"), President of Channel, as partial inducement to make the loan, entered into a Guaranty, and subsequent Amended Guaranty, guaranteeing the obligations of Channel under the Note. As Guarantor, Kirsch executed a Deed of Trust as security for the Guaranty. By successive assignment Defendant/Counter-Claimant, Cranberry Financial, LLC ("Cranberry Financial"), is the holder of the rights in the Note, Guaranty and Deed of Trust.

Channel failed to pay the annual installment payments for the years 2001 to the present. In 2004, Cranberry Financial's predecessor, filed suit against Channel, as maker of the Note, and Kirsch, as Guarantor, for breach of the Guaranty. There was an allegation of acceleration in the

2004 lawsuit, that was denied by Kirsch. In 2009, the lawsuit was dismissed, without prejudice, for want of prosecution.

Kirsch filed this lawsuit in January 2012. Cranberry Financial asserted a counterclaim in this action against Kirsch for breach of the Guaranty, securing the obligations of Channel under the Note.

Kirsch moved for summary judgment arguing Cranberry Financial was barred from enforcing the Note pursuant to R.C.W. § 4.16.040's six (6) year statute of limitations, and an order quieting title against the lien of the Deed of Trust by virtue of the same. The Court held that the statute of limitations runs separately for each annual payment, and thus, payments for the years 2001-2005 were barred by the statute of limitations, but not payments for the years 2006 to the present. Therefore, the Court denied Kirsch's attempt to quiet title against the lien of the Deed of Trust. The Court further ruled that the 2004 lawsuit, dismissed for want of prosecution, did not result in an acceleration of the Note.

Thereafter, Cranberry Financial moved for summary judgment against Kirsch for (a) judgment on breach of the Guaranty; (b) a determination that the Deed of Trust is enforceable; and (c) dismissal of Kirsch's claims as moot. The Court granted Cranberry Financial's Motion for Summary Judgment on all accounts.

Kirsch appealed. Cranberry Financial submits this brief in answer to Kirsch's appeal, and respectfully requests this Appellate Court affirm the Court's ruling in all respects.

II. STATEMENT OF ISSUES

1. Whether the trial court properly granted summary judgment for Cranberry Financial holding that R.C.W. § 4.16.040's six (6) year statute of limitations did not bar annual installment payments due under the Promissory Note for the years 2006 to the present, because the statute of limitations ran separately for each annual payment.

2. Whether the trial court correctly held that the allegation of acceleration made in the 2004 lawsuit, and denied by Kirsch, did not result in an acceleration of the Note, where the lawsuit was dismissed for want of prosecution and Kirsch failed to produce any documentation evidencing a demand of acceleration by Cranberry Financial.

3. Whether Kirsch's affirmative defenses of equitable estoppel and laches fail, where the statute of limitations ran separately for each annual payment and there was no acceleration in the 2004 lawsuit.

4. Whether Kirsch is entitled to a setoff for collateral that was neither seized nor sold by Cranberry Financial.

5. Whether the trial court erred in entering a judgment for Kirsch's breach of the Guaranty in an amount less than that actually owed

(at the behest of Cranberry Financial) and where Kirsch offered no evidence contradicting that amount.

III. STATEMENT OF THE CASE

A. The Promissory Note

On August 14, 1998, Channel, a Washington corporation, as borrower and for valuable consideration, made and delivered to the United States Small Business Administration ("SBA") a Promissory Note in the principal sum of \$387,800.00. (CP 20, 24, 46, 93, 108-109)

On October 7, 1999, in consideration of advancing additional funds to Channel, the Promissory Note was modified pursuant to a Modification of Promissory Note (the Promissory Note and Modification of Promissory Note are collectively referred to herein as the "Note"), which increased the principal sum to \$780,400.00. The maturity date of the Note is August 14, 2023. (CP 9-10, 21, 24, 46, 93, 125)

By successive assignment, Cranberry Financial succeeded to and is the owner and holder of all of the SBA's right, title and interest in the Note. (CP 25, 46, 94)

B. The Guaranty

As partial inducement to make the above-referenced loan to Channel, on August 14, 1998, Kirsch signed and delivered to the SBA a personal Guaranty, dated concurrently with the Note, making specific,

unconditional guarantees. (CP 26, 46, 93, 111-114) The Guaranty was amended on October 7, 1999 pursuant to an SBA Amended Guaranty, which was signed and delivered to the SBA by Kirsch (the Guaranty and the Amended Guaranty are collectively referred to herein as the "Guaranty"). The Guaranty was executed in favor of the SBA and guaranteed the obligations of Channel under the Note. (CP 26, 47, 94, 127-130)

On May 9, 2003, by successive assignment, Cranberry Financial succeeded to and is the holder of all of the SBA's right, title and interest in the Guaranty. (CP 26, 47, 94)

C. The Deed of Trust

As partial inducement to make the above-referenced loan to Channel, on August 19, 1998, Kirsch, as Guarantor for that loan, executed a Deed of Trust ("DOT") in favor of the SBA for the property located at 4365 Y Road, Bellingham, Washington 98225. (CP 8-9, 21, 47, 93, 116-123) On October 20, 1999, in accordance with the additional funds advanced under the Note, an Amendment to the DOT was recorded. (CP 9-10, 21, 47, 94, 132-134)

On September 29, 2008, by successive assignment, Cranberry Financial succeeded to and is the holder of all of the SBA's right, title and

interest in the DOT. (CP 8-9, 21, 47, 94-95, 136-138) Kirsch holds fee title in the property secured by the DOT. (CP 9, 21, 47, 95, 140-141)

D. Terms of the Note

Under the terms of the Note, Channel agreed to pay, for value received, annual installment payments of \$51,394.00, with the first payment due on February 14, 2000, and successive payments due on the 14th day of February each year thereafter to the date of maturity – August 14, 2023. (CP 9-10, 21, 24-25, 47-48, 95, 125)

E. Channel's Default Under the Terms of the Note

On February 14, 2000, Channel made its first and only payment under the Note. Thereafter, Channel failed to pay the annual installment payments for the years 2001 to the present. (CP 10, 21, 25, 48, 95)

F. The 2004 Lawsuit

On August 5, 2004, Cranberry Financial's predecessor, Capital Crossing Bank, filed suit against Channel, as maker of the Note, and Kirsch, as Guarantor, for breach of the Note, breach of the Guaranty and foreclosure of the DOT, under Whatcom County Superior Cause No. 04-2-01811-7. (CP 10, 21, 48)

On October 27, 2004, Kirsch answered the Complaint. In his Answer, Kirsch denied the allegation of acceleration under the Note. On

April 17, 2009, the 2004 lawsuit was dismissed, without prejudice, on the clerk's motion for want of prosecution. (CP 11, 22, 48-49)

G. Cranberry Financial Accelerated the Note Balance in This Lawsuit, Asserting a Counterclaim Against Kirsch for Breach of the Guaranty

Cranberry Financial elected to declare the entire principal sum and all accrued interest on the Note due and payable (other than those payments barred by the statute of limitations). In doing so, Cranberry Financial asserted a counterclaim in this action against Kirsch for breach of the Guaranty, securing the obligations of Channel under the Note. (CP 20-29, 96, 108-109, 125)

H. Kirsch Moves for Summary Judgment

On May 17, 2012, Kirsch moved for summary judgment arguing that Cranberry Financial was barred from enforcing the Note against the maker, Channel and/or against Kirsch, the guarantor, pursuant to R.C.W. § 4.16.040's six (6) year statute of limitations. Kirsch sought, by virtue of that alleged bar, an order quieting title against the lien of the DOT pursuant to R.C.W. § 7.28.300. (CP 30-37)

I. The Court Granted in Part and Denied in Part, Kirsch's Motion for Summary Judgment

On June 22, 2012, the Court ruled that annual installment payments under the Note for the years 2001-2005 were barred by R.C.W.

§ 4.16.040's six (6) year statute of limitations. (CP 70) Conversely, the Court ruled that annual installment payments under the Note for the years 2006 to the present were not barred by R.C.W. § 4.16.040's six (6) year statute of limitations. (CP 71) Consequently, because annual installment payments under the Note for the years 2006 forward were not barred by the statute of limitations, the Court denied Kirsch's attempt to quiet title against the lien of the DOT.

In reaching this conclusion, the Court held that the annual installment payments under the Note for the years 2006 forward were not barred because **the statute of limitations runs separately for each annual payment.**¹ Moreover, the Court ruled that the mere allegation of acceleration in the 2004 lawsuit, which was dismissed for want of prosecution, did not result in an acceleration of the Note. (CP 69-71)

J. Kirsch Moved For Reconsideration of the Court's Summary Judgment Order

Kirsch moved for reconsideration of that Summary Judgment Order, again arguing the Note had been accelerated. The Court upheld its prior ruling that the 2004 lawsuit, dismissed for want of prosecution, did not result in an acceleration of the Note. The Court further held that the

¹ Cranberry Financial acknowledged that the annual installment payments due under the Note for the years 2001-2005 were barred by R.C.W. § 4.16.040, as beyond the six (6) year statute of limitations.

acceleration clause was permissive and that it had not been exercised. (CP 86-88)

K. The Court Granted Cranberry Financial's Summary Judgment Motion for Breach of the Guaranty

In January 2013, Cranberry Financial moved for summary judgment against Kirsch for (a) judgment on breach of the Guaranty; (b) a determination that the DOT is enforceable; and (c) dismissal of Kirsch's claims as moot. (CP 89-90) On February 8, 2013, the Court granted Cranberry Financial's Motion for Summary Judgment on all accounts. (CP 205-207)

At that time, Kirsch's causes of action to quiet title against the lien of the DOT, securing the Guaranty and loan to Channel, were dismissed as moot. (CP 205-207) Judgment was entered against Kirsch in the amount of \$785,900.42 for breach of the Guaranty. (CP 205-207)

IV. ARGUMENT

A. Standard of Review

A trial court's grant of summary judgment is reviewed *de novo*. Qwest Corp. v. City of Bellevue, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). 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). A material fact is one upon which the outcome of the

litigation depends. Eriks v. Denver, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

Once a moving party meets its initial burden of showing there is no dispute as to any genuine issue of material fact, the burden shifts to the non-moving party to set forth specific facts showing there is a genuine issue of material fact for trial. CR 56(e). The non-moving party must respond with more than opinions, conclusory allegations, argumentative assertions that material facts exist, or conclusory statements of fact. Hiatt v. Walker Chevrolet Co., 120 Wn.2d 57, 66, 837 P.2d 618 (1992); Higgins v. Stafford, 123 Wn.2d 160, 169, 866 P.2d 31 (1994) (mere speculation and unsupported assertions are insufficient to defeat summary judgment); Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-61, 753 P.2d 517 (1988) (conclusory statements of facts will not defeat summary judgment).

B. The Court Correctly Determined the Statute of Limitations Does Not Bar a Claim for Annual Payments Due on the Note for Years 2006 to the Present

In any action based upon a written contract, the action itself must be commenced within six (6) years after accrual. R.C.W. § 4.16.040(1); *see, also*, Harmony at Madrona Park Owners Ass'n v. Madison Harmony Development, Inc., 143 Wn.App. 345, 353, 177 P.3d 755 (Div. I 2008). A cause of action accrues when the party has a right to seek relief from the

court. Burns v. McClinton, 135 Wn.App. 285, 293, 143 P.3d 630 (Div. I 2006), *citing*, Janicki Logging v. Schwabe, Williamson, & Wyatt, P.C., 109 Wn.App. 655, 659, 37 P.3d 309 (Div. I 2001).

Where a contract calls for payment of an obligation by installments, the statute of limitations begins to run for each installment individually at the time such payment is due.

Stated another way, "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."² *See, e.g., In re Parentage of Fairbanks*, 142 Wn.App. 950, 960, 176 P.3d 611 (Div. III 2008), *quoting*, Herzog v. Herzog, 23 Wn.2d 382, 388, 161 P.2d 142 (1945) (*citing*, 82 A.L.R. 316); *see, also*, Graves v. Cascade Natural Gas Corp., 51 Wn.2d 233, 238, 316 P.2d 1096 (1957) ("[i]n holding that the period of limitations began to run from the date that each month's bill was payable, the court correctly applied the law. The statute runs from the time that the cause of action arises . . . And, of course, there is no cause of action on a debt until it becomes payable.") (internal citations omitted); Gray v.

² As evidenced by 82 A.L.R. 316, the principal that for installment contracts the statute of limitations begins to run for each installment individually at the time such payment is due, is uniform throughout the United States.

Tarbox, 14 Wn.2d 237, 127 P.2d 669 (1942); George v. Butler, 26 Wn. 456, 67 P. 263 (1901) (where a debt secured by a mortgage is evidenced by several notes, each note is the basis for a separate cause of action, and the statute of limitations will run against those first due, though the subsequent notes are not barred).

R.C.W. § 4.16.040(1), governing written contracts, imposes a six (6) year statute of limitations on promissory notes and deeds of trust as "[a]n action upon a contract in writing, or liability express or implied arising out of a written agreement." *See, also, Westar Funding, Inc. v. Sorrels*, 157 Wn.App. 777, 784-85, 239 P.3d 1109 (Div. II 2010).

In the present case, on August 14, 1998, Channel, through its President Kirsch, executed a Promissory Note for a loan of \$387,000.00.³ (CP 20, 24, 46, 93, 108-109) On October 7, 1999, Channel, through its President Kirsch, executed a Modification of Promissory Note (collectively "Note"), to increase the loan to \$780,400.00.⁴ (CP 9-10, 21, 24, 46, 93, 125)

³ Concurrently with the date of the Promissory Note, Kirsch executed, signed and delivered a personal Guaranty, guaranteeing the obligations of Channel under the Note. (CP 26, 46, 93, 111-114)

⁴ Concurrently with the date of the Modification of Promissory Note, Kirsch executed, signed and delivered an Amended Guaranty, guaranteeing the obligations of Channel under the Note. (CP 26, 47, 94, 127-130)

The Note provided that Channel would make annual installment payments of \$51,394.00, with the first payment due on February 14, 2000, and successive payments due on the 14th day of February each year thereafter to the date of maturity – August 14, 2023.⁵ (CP 9-10, 21, 24-25, 47-48, 95, 125) Channel made its first and only payment under the Note on February 14, 2000. Thereafter, Channel failed to pay the annual installment payments for the years 2001 to the present. (CP 10, 21, 25, 48, 95)

Based on the foregoing facts, Kirsch filed this quiet title action against the subject DOT under R.C.W. § 7.28.300, alleging that Cranberry Financial is prevented from enforcing the DOT by R.C.W. § 4.16.040's six (6) year statute of limitations for written contracts.

Cranberry Financial did not dispute that the Note is a written contract subject to R.C.W. § 4.16.040's six (6) year statute of limitations. However, where, as here, the Note calls for annual installment payments – **the statute of limitations runs separately for each annual payment when it becomes due.** *See, e.g., In re Parentage of Fairbanks*, 142

⁵ Notably, the Note contained a waiver provision that gave Cranberry Financial the option to pursue an annual payment when missed, but did not require it to do so, without waiving its right to collection. (CP 108)

Wn.App. at 960, *quoting*, Herzog, 23 Wn.2d at 388; *see, also*, Graves, 51 Wn.2d 233; Gray, 14 Wn.2d 237; George, 26 Wn. 456.

Based on the foregoing, the Court correctly held that R.C.W. § 4.16.040's six (6) year statute of limitations did not bar annual installment payments for the years 2006 to the present, because **the statute of limitations ran separately for each annual payment.**⁶ The Court stated, in pertinent part:

Each installment is due when it's due, and there's no cause of action until the installment is due and unpaid, and that applies to any note. It applies to a mortgage note. It applies to any installment note . . .

(RP, June 22, 2012 Hearing, at pp. 16-17)

To hold otherwise would presume that future installment payments, not yet breached or even due, were barred. The Court emphasized this point during oral argument on Kirsch's Motion for Reconsideration of its Summary Judgment Motion, stating, in pertinent part:

[T]he Defendant could not even enforce an annual payment until the date at which it becomes due. So the payment for 2007, they couldn't do anything about it until the due date for that payment for 2007 came about. They can't enforce it. There's no obligation to pay that until the time comes.

⁶ As indicated above, Cranberry Financial acknowledged, and the Court agreed, annual installment payments under the Note for the years 2001-2005 were barred by R.C.W. § 4.16.040's six (6) year statute of limitations. (CP 70-71)

When that happens, then that payment becomes due, and then the statute of limitations would begin to run.

(RP, August 27, 2012 Hearing, at p. 11)

Consequently, the Court held that Kirsch was prevented from quieting title under R.C.W. § 7.28.300, where Cranberry Financial could, and did, bring suit via counterclaim for Kirsch's breach of the Guaranty, securing the obligations of Channel under the Note. The Court held that Channel breached the Note by failing to make annual installment payments for the years 2006 to the present, payments due within the applicable six (6) year statute of limitations. (CP 69-71)

C. **The Trial Court Correctly Concluded the Permissive Acceleration Clause Was Not Exercised in the 2004 Lawsuit**

The Note contains a permissive acceleration clause that was not exercised until the current lawsuit. The acceleration clause in the Note states, in pertinent part:

Holder is authorized to declare all or any part of the Indebtedness immediately due and payable upon the happening of any of the following events: (1) Failure to pay any part of the Indebtedness when due; (2) nonperformance by the undersigned of any agreement, or any condition imposed by, Holder . . . with respect to the Indebtedness; (3) Holder's discovery of the undersigned's failure in any application of the undersigned to Holder or SBA to disclose any fact deemed by Holder to be material or of the making therein or in any of said agreements, or in any affidavit or other documents submitted in connection with said application or the Indebtedness, of any misrepresentation

by, on behalf of, or for the benefit of the undersigned; (4) the reorganization . . . or merger or consolidation of the undersigned . . . without the prior written consent of Holder; (5) the undersigned's failure duly to account, to Holder's satisfaction, at such time or times as Holder may require, for any of the Collateral, or proceeds thereof, coming into the control of the undersigned; or (6) the institution of any suit affecting the undersigned deemed by Holder to affect adversely its interest hereunder in the Collateral or otherwise. **Holder's failure to exercise its rights under this paragraph shall not constitute a waiver thereof.**

(CP 108-109) (emphasis added)⁷

The express terms of the acceleration clause contained within the Note gives Cranberry Financial the sole option to accelerate the Note if one of the six enumerated scenarios occurred – *i.e.*, the acceleration clause is permissive, not mandatory. Furthermore, under the terms of the acceleration clause, Cranberry Financial does not waive that right if it decides to forgo acceleration after one of those six events. (CP 108-109)

Notably, Kirsch acknowledges that the acceleration clause is permissive in his pleadings, stating, in his Motion for Reconsideration, that "[t]he promissory note clearly provides that the holder **may** call the note due upon failure to pay any part of the indebtedness when due." (CP

⁷ The permissive nature of the acceleration clause is further highlighted by the sentences that precede this quoted language, rendering acceleration mandatory through the word "shall" upon the appointment of a receiver, bankruptcy or assignment for the benefit of creditors. (CP 108-109) The term "shall" is not used in the acceleration clause language.

76) (emphasis added) Kirsch further acknowledged that the acceleration clause is permissive in oral argument on that Motion, stating, in pertinent part:

The fact that the note has an acceleration clause certainly is significant, but that acceleration clause is permissive to the extent that it's the holder's decision as to whether or not to accelerate . . .

(RP, August 27, 2012 Hearing, at p. 6)

The Court concluded that there was no evidence in the record that Cranberry Financial accelerated the Note following any of the missed annual payments under the Note, including the first missed payment in February 2001, until the current lawsuit was completed to judgment.

To that end, the Court correctly ruled there was no acceleration in the 2004 lawsuit, which was dismissed for want of prosecution. The Court determined that the allegation of acceleration made in the 2004 lawsuit, and denied by Kirsch, did not result in an acceleration where the lawsuit was dismissed for want of prosecution. Specifically, the Court stated, in pertinent part:

The previous lawsuit [2004 lawsuit] doesn't toll the statute of limitations, but it also once dismissed doesn't stand for the proposition, I don't think, that the, that the previous determination to call the note due still stands, because once it is dismissed, then nothing that happened in that lawsuit has any validity.

...

The more I looked at the cases and the more I thought about it, the initial lawsuit [2004 lawsuit] once dismissed is of no force and effect . . .

(RP, June 22, 2012 Hearing, at pp. 15 and 18).

The Court affirmed its decision that the 2004 lawsuit did not result in an acceleration of the Note in two subsequent ruling. First, during oral argument on Kirsch's Motion for Reconsideration, the Court stated, in pertinent part:

My recollection is that there was some case law that I read at the time of the initial hearing that indicated to me that if you, that bringing a lawsuit and then not following through with that lawsuit, if it gets dismissed, then whatever that lawsuit may have done with regards to accelerating the note becomes a non-issue, didn't happen, and that was the case law on which I was relying, and I still think that that is probably the case here.

. . .

When the lawsuit went away, then all of the provisions of that lawsuit, I think, ended.

. . .

I think that the initial lawsuit did not effectively accelerate the note, because the lawsuit was dismissed and not pursued.

(RP, August 27, 2012 Hearing, at pp. 10-12)

Second, during oral argument on Cranberry Financial's Motion for Summary Judgment, the Court stated, in pertinent part:

Cases were cited to this Court, and the Court determined that the abandonment of that first case [2004 lawsuit] meant that that acceleration, that was wiped out at that point in time, and there was a finding in the Court's order on reconsideration that says Cranberry Financial has not accelerated the debt under the permissive acceleration clause contained within the note.

...

It's an order by the Court. It's an expression of the law. They have not accelerated the debt under the permissive acceleration clause in the note.

...

There was case law that said if you start an action, and if you abandon it, then all of the claims under that action are void. So any acceleration that occurred as a result of that cause of action evaporated when the cause of action ended.

(RP, February 8, 2013 Hearing, at pp. 16-17, 22)

Moreover, the Court noted that Kirsch had not produced any documentation evidencing a demand of acceleration by Cranberry Financial. As the Court recognized, "[t]here's no evidence that they sent a special notice to the Plaintiff in this case and said we're accelerating your note. You've got to pay it all. It's all due." (RP, August 27, 2012 Hearing, at p. 11)

Consistent with the Court's holding, Washington law provides that where an action is dismissed without prejudice for want of prosecution, it is as if the action had never been commenced. *See, e.g., Logan v. North-*

West Ins. Co., 45 Wn.App. 95, 99, 724 P.2d 1059 (Div. II 1986) ("[w]here an original action is dismissed, a statute of limitations is deemed to continue to run as though the action had never been brought"); Fittro v. Alcombrack, 23 Wn.App. 178, 180, 596 P.2d 665 (Div. I 1979), *rev. den.*, 92 Wn.2d 1029 (1979); Gould v. Bird & Sons, Inc., 5 Wn.App. 59, 65, 485 P.2d 458 (Div. I 1979), *rev. den.*, 79 Wn.2d 1009 (1971); Steinberg v. Seattle-First Nat. Bank, 66 Wn.App. 402, 406, 832 P.2d 124 (Div. I 1992).

To that end, "voluntary dismissal or withdrawal of action renders the proceeding a nullity and leaves the parties in the same position as if the action had never occurred." Spice v. Pierce County, 149 Wn.App. 461, 467, 204 P.3d 254 (Div. II 2009); Wachovia SBA Lending v. Kraft, 138 Wn.App. 854, 861-62, 158 P.3d 1271 (Div. II 2007); Cork Insulation Sales Co., Inc. v. Torgeson, 54 Wn.App. 702, 706, 775 P.2d 970 (Div. III 1989); Beckman v. Wilcox, 96 Wn.App. 355, 359, 979 P.2d 890 (Div. II 1999).

Thus, the Court correctly held that the annual installment payments under the Note for the years 2006 to the present were not barred by the statute of limitations, and that the permissive acceleration clause was not exercised through an allegation of acceleration in the 2004 lawsuit, where that action was dismissed for want of prosecution.

Given the above, Cranberry Financial was within its rights when it elected to pursue recovery of annual installment payments not barred by the six (6) year statute of limitations (2006 forward), and to accelerate the remaining payments under the Note via the counterclaim in this lawsuit. Channel's failure to pay the annual installment payments and interest due under the Note for those years is in breach of Kirsch's Guaranty. (CP 127-130)

In February 2013, the Court granted Cranberry Financial's Motion for Summary Judgment against Kirsch for (a) judgment on breach of the Guaranty; (b) a determination that its DOT is enforceable; and (c) dismissal of Kirsch's claims as moot.⁸ (CP 205-207) At that time, Kirsch's causes of action to quiet title against the lien of the DOT, securing the Guaranty and loan to Channel, were dismissed as moot. (CP 205-207) Judgment was entered against Kirsch in the amount of \$785,900.42 for breach of the Guaranty. (CP 205-207) In reaching this conclusion and entering Judgment against Kirsch, the Court did not err. Its decision, therefore, should be affirmed.

⁸ Kirsch did not challenge the enforceability of the DOT as a valid and enforceable lien on the Property at issue, securing the amount due under the Note and Guaranty. (CP 192) The Court entered an Order declaring the DOT a valid and enforceable lien in the property securing amounts due under the Note. (CP 205-207)

D. Kirsch's Remaining Arguments Are Dependent Upon the Faulty Assumption that the Note Was Accelerated by the 2004 Lawsuit

a. *The Note Was Not Accelerated by the 2004 Lawsuit, and Thus, Payment Under the Guaranty Was Not Triggered*

On October 7, 1999, Channel, through its President Kirsch, executed a Note, increasing its loan amount to \$780,400.00. (CP 9-10, 21, 24, 46, 93, 125) Concurrently with the date of that Note, Kirsch executed, a Guaranty, guaranteeing the obligations of Channel under the Note. (CP 26, 47, 94, 127-130) The portion of the Guaranty referring to the payment obligation of Kirsch, as Guarantor, states, in pertinent part:

In case the Debtor shall fail to pay all or any part of the Liabilities when due, whether by acceleration or otherwise, according to the terms of said note, the Undersigned, immediately upon the written demand of Lender, will pay to Lender the amount due and unpaid by the Debtor as aforesaid, in like manner as if such amount constituted the direct and primary obligation of the Undersigned. Lender shall not be required, prior to any such demand on, or payment by, the Undersigned, to make any demand upon or pursue or exhaust any of its rights or remedies against the Debtor or others with respect to the payment of any of the Liabilities . . .

(CP 127)

Kirsch claims Cranberry Financial is barred from enforcing the Guaranty by R.C.W. § 4.16.040's six (6) year statute of limitations. Kirsch alleges that the 2004 Lawsuit resulted in an acceleration and

demand for payment under the payment provision of the Guaranty. (Appellant's Brief, at pp. 13-14)

Initially, consistent with the Note, the express terms of the Guaranty gives Cranberry Financial the sole option to call the Guaranty due – *i.e.*, the Guaranty is permissive, not mandatory. Under the terms of the Guaranty, Cranberry Financial had the option to forego collection of missed payments under the Note. (CP 127)

Thus, Kirsch's argument is dependent upon the faulty assumption that the Note was accelerated by the 2004 lawsuit, which the Court correctly concluded it was not. As indicated above, the Court ruled there was no acceleration in the 2004 lawsuit, dismissed for want of prosecution.⁹ Instead, the annual payments due under the Note on the 14th day of February each year until the date of maturity, August 14, 2023, continued. (RP, June 22, 2012 Hearing, at pp. 15 and 18; RP, August 27, 2012 Hearing, at pp. 10-12; RP, August 8, 2013 Hearing, at pp. 16-17, 22)

⁹ The Court relied on a long history of Washington case law holding that where an action is dismissed for want of prosecution, it is as if the action had never been brought and "renders the proceeding a nullity and leaves the parties in the same position as if the action had never occurred." *See, e.g., Logan*, 45 Wn.App. at 99; *Fittro*, 23 Wn.App. at 180, *rev. den.*, 92 Wn.2d 1029; *Gould*, 5 Wn.App. at 65, *rev. den.*, 79 Wn.2d 1009; *Steinberg*, 66 Wn.App. at 406; *Spice*, 149 Wn.App. at 467; *Wachovia SBA Lending*, 138 Wn.App. at 861-62; *Cork Insulation Sales Co., Inc.*, 54 Wn.App. at 706; *Beckman*, 96 Wn.App. at 359.

Moreover, as emphasized by the Court, Kirsch has not produced any independent documentation evidencing a demand of acceleration by Cranberry Financial, stating, in pertinent part, "[t]here's no evidence that they sent a special notice to the Plaintiff in this case and said we're accelerating your note. You've got to pay it all. It's all due." (RP, August 27, 2012 Hearing, at p. 11)

Thus, the payment obligation under the Guaranty is not barred by the statute of limitations because it is permissive, not mandatory, and was not triggered by the 2004 lawsuit.

b. *Equitable Estoppel is Not Available Where the Note Was Not Accelerated and Kirsch's Actions Following the 2004 Lawsuit Were Unreasonable*

Equitable estoppel is not favored in the law and requires that every element be proved with clear, cogent and convincing evidence. Mercer v. State, 48 Wn.App. 496, 500, 739 P.2d 703 (Div. II 1987). "[W]here the representations allegedly relied upon are matters of law, rather than fact, equitable estoppel will not be applied." Laymon v. Wash. State Dept. of Nat. Resources, 99 Wn.App. 518, 526, 994 P.2d 232 (Div. II 2000); Concerned Land Owners of Union Hill v. King County, 64 Wn.App. 768, 778, 827 P.2d 1017 (Div. I 1992); Schoonover v. State, 116 Wn.App. 171, 180, 64 P.3d 677 (Div. II 2003).

One seeking to invoke equitable estoppel must, at a minimum, make a showing of blamelessness or reasonable conduct under the circumstances or they are without standing to assert estoppel. Stohr v. Randle, 81 Wn.2d 881, 885, 505 P.2d 1281 (1973).

Kirsch's equitable estoppel argument is premised upon the faulty assumption that the Note was accelerated by the allegation of acceleration made in the 2004 lawsuit. (Appellant's Brief, at pp. 14-15) However, as discussed above, the Court correctly ruled that because the 2004 lawsuit was dismissed for want of prosecution, Washington law renders the action a nullity and leaves the parties in the same position as if the action had never occurred – *i.e.*, there was no acceleration. (RP, June 22, 2012 Hearing, at pp. 15 and 18; RP, August 27, 2012 Hearing, at pp. 10-12; RP, August 8, 2013 Hearing, at pp. 16-17, 22) Simply stated, Kirsch's misunderstanding of the law is not grounds for equitable estoppel, nor can he assert equitable estoppel based on an acceleration that never occurred.

Moreover, because the Court ruled, as a matter of law, the 2004 lawsuit did not accelerate the Note, the defense of equitable estoppel is not available to Kirsch. *See*, Laymon, 99 Wn.App. at 526; Concerned Land Owners of Union Hill, 64 Wn.App. at 778; Schoonover, 116 Wn.App. at 180. In that regard, the Court stated, in pertinent part, "[i]t's an order by the Court. It's an expression of the law. They have not accelerated the

debt under the permissive acceleration clause in the note." (RP, February 8, 2013 Hearing, at p. 17)

Finally, the affirmative defense of equitable estoppel cannot be proven by clear, cogent and convincing evidence because Kirsch cannot demonstrate blamelessness or that his conduct was reasonable under the circumstances. *See, Stohr*, 81 Wn.2d at 885. As noted by the Court, it could equally be argued that Kirsch's actions are inequitable:

[I]t's also not equitable to allow the Plaintiff to necessarily not be forced to come to court and demonstrate why he doesn't owe money, you know, he didn't have to pay it all. There's a windfall to him if he prevails here, which is that he borrowed money, and he waits a long enough time, and he doesn't end up paying it back, and I don't think that's necessarily an equity in favor of him.

(RP, August 27, 2012 Hearing, at pp. 16-17) Thus, it is both unreasonable and inequitable to allow Kirsch to borrow almost \$800,000 dollars, fail to make annual payments and then argue Cranberry Financial is not entitled to enforce its contractual right to annual payments due under the Note.

Given the above, Kirsch's affirmative defense of equitable estoppel fails where the Note was not accelerated, as a matter of law, and his actions were unreasonable.

c. ***Kirsch's Laches Defense Fails Where Cranberry Financial Sought Recovery of Annual Payments Within the Statute of Limitations and His Defense is Dependent on an Acceleration That Never Occurred***

Absent highly unusual circumstances, courts are bound by the period defined by the statute of limitations, and will not impose a shorter period under the doctrine of laches. Brost v. L.A.N.D., Inc., 37 Wn.App. 372, 375, 680 P.2d 453 (Div. II 1984); *see, also*, Auve v. Wenzlaff, 162 Wn. 368, 374, 298 P. 686 (1931).

Similar to Kirsch's arguments regarding the Guaranty and equitable estoppel, his laches argument is entirely dependent upon the existence of an acceleration that did not occur. (Appellant's Brief, at pp. 16-17) As stated above, the Court determined that there was no acceleration in the 2004 lawsuit, where that action was dismissed for want of prosecution. Moreover, contrary to Kirsch's repeated claim that the statute of limitations accrued after the first missed payment, the statute of limitations runs separately for each annual payment due under the Note.¹⁰ (CP 125)

¹⁰ Kirsch's claim that there was a "twelve year" delay in bringing suit ignores the fact that the statute of limitations ran separately for each annual payment. (Appellant's Brief, at p. 16) Under Kirsch's line of reasoning, Cranberry Financial should have sought recovery of payments not yet due, or even breached.

Thus, Cranberry Financial timely commenced this proceeding via the counterclaim for Kirsch's breach of the Guaranty (securing payment under the Note) to recover annual payments due under the Note for the years 2006 to the present, and to accelerate the Note as to those annual payments that would come due through the date of maturity – August 14, 2023.¹¹ Cranberry Financial did not pursue annual payments for the years 2001-2005, acknowledging that those annual payments were barred by the statute of limitations. These actions are entirely consistent with the terms of the Note and Guaranty, giving Cranberry Financial the sole option on whether or not to pursue an annual payment when missed. (CP 108, 127)

Therefore, Kirsch's laches defense fails as a matter of law. Cranberry Financial commenced its counterclaims within the statute of limitations for those annual payments upon which it seeks recovery. This is particularly true where laches is not favored by the law and Kirsch's defense is entirely dependent upon an acceleration that never occurred.

E. Kirsch is Not Entitled to a Setoff for Collateral that Was Neither Seized nor Sold by Cranberry Financial

Kirsch claims that he is entitled to a "setoff" for proceeds allegedly received by Cranberry Financial for the sale of Channel's fishing vessel

¹¹ It is notable that laches requires unreasonable delay by the party commencing the lawsuit. Here, Kirsch originally filed this lawsuit against Cranberry Financial.

known as the "F/V D.M. Fleming" ("Vessel"). (Appellant's Brief, at pp. 17-19) The Vessel was identified as collateral for the Note. (CP 195) Cranberry Financial had an assignment of preferred mortgage for the Vessel. (CP 185)

Under the terms of the Note and Guaranty, Cranberry Financial had the option, but was not required, to exercise its rights to the collateral (*i.e.*, vessel) prior to seeking payment from Kirsch on the Guaranty. (CP 108-109, 127-128) More importantly, Cranberry Financial never seized the vessel. (CP 195-196) The Vessel was in very poor condition and was therefore not repossessed nor foreclosed upon. (CP 195-196) Consequently, neither Cranberry Financial (nor its predecessors) received any proceeds for the Vessel to credit against Kirsch's balance under the Note nor was it required to do so.

As stated by the Court, when noting that Cranberry Financial had the option to exercise its right to the collateral (the vessel), but was not required to do so:

[T]hat document [assignment of preferred mortgage for the vessel], it is an assignment of the mortgage, and that is, that isn't assigned to the title of the vehicle or anything else to the vessel. They can ignore that if they want to.

...

Yes, they had the right to foreclose on the mortgage on the vessel. They have stated that they didn't. . .

(RP, February 8, 2013 Hearing, at p. 35)

Accordingly, Kirsch's unsubstantiated speculation about the seizure of the vessel (which did not, in fact, occur) is insufficient to defeat summary judgment. Kirsch is not entitled to a "setoff" for proceeds never received. Higgins, 123 Wn.2d at 169 (mere speculation and unsupported assertions are insufficient to defeat summary judgment); Grimwood, 110 Wn.2d at 359-61 (conclusory statements of facts will not defeat summary judgment).

F. Cranberry Financial Established the Amount Owed

The Court entered Judgment against Kirsch on Cranberry Financial's counterclaim for breach of the Guaranty in the amount of \$785,900.42. (CP 205-207) As permitted by the Note and Guaranty, Cranberry Financial declared the entire principal sum and all accrued interest on the Note due and payable. In doing so, Cranberry Financial credited the payment made in 2000 and annual payments due in the years 2001 through 2005 (including interest), reflecting that they were barred by the statute of limitations. The final amount included the principal balance, interest and a per diem interest rate. (CP 103-105)

During oral argument, counsel for Cranberry Financial indicated that an accounting error had been made, and the true balance was \$826,864, but that Cranberry Financial would accept the lesser amount

reflected in its pleadings. (RP, February 8, 2013 Hearing, at pp. 6-7) The Court noted that the amount is easily calculated, the interest rate is in the Note, Kirsch had not offered any accounting of his own on the amount owed, and Cranberry Financial was requesting less than it was actually owed. Specifically, the Court stated, in pertinent part:

Well, they've set forth the amount that's due and owing based upon the Court's previously ruling. The interest rate is in the note and easily calculated.

...

The number of payments are there. They're easily calculated.

...

Well, you know, I didn't see any factual evidence that indicated that their calculations were wrong. They're admitting that they made an error, and they're correcting the error, and that error is in your client's favor. I see no other evidence that indicate somehow they did somebody else wrong. So I think I have to accept that. I don't have any counter affidavits that say they did it wrong.

...

Yes, they told you how they got to the amount.

(RP, February 8, 2013 Hearing, at pp. 34-35)

Therefore, Cranberry Financial established the amount owed by Kirsch for breach of the Guaranty and Kirsch's unsupported assertion that amount is incorrect fails. (Appellant's Brief, at p. 17) In fact, judgment

was entered in an amount less than what was actually owed. To date, Kirsch has offered no evidence contradicting that amount.¹²

V. ATTORNEY'S FEES

Cranberry Financial requests an award of attorney's fees and costs on appeal pursuant to RAP 18.1 and the attorney's fees and costs provision in the Note. (CP 108-109)

VI. CONCLUSION

For the above-stated reasons, Defendant/Counter-Claimant Cranberry Financial, LLC, respectfully requests that this Appellate Court affirm the Court's ruling in every respect and deny Kirsch's request for fees and costs on appeal.

RESPECTFULLY Submitted this 13th day of June, 2013.


BROOK CUNNINGHAM, WSBA # 39270
Attorney for Defendant/Counter Claimant –
Respondent

¹² Kirsch states that he has "significant claims against the SBA." (Appellant's Brief, at p. 19) The SBA is not a party to this lawsuit and those claims against the SBA do not affect Cranberry Financial's right to relief.

CERTIFICATE OF SERVICE

I do hereby certify that on this 13 day of June, 2013, I caused to be served a true and correct copy of the foregoing BRIEF OF DEFENDANT/COUNTER-CLAIMANT – RESPONDENT CRANBERRY FINANCIAL, LLC, on the following:

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