SUPREME COURT NO. 97631-7

COURT OF APPEALS NO.77620-7-I

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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KREG KENDALL

Petitioner

v.

US BANK, NA, and

QUALITY LOAN SERVICE CORP. OF WASHINGTON

Respondents

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# PETITION FOR REVIEW

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### Cases

**State Statutes**

## I. IDENTITY OF PETITIONERS

Petitioner is Kreg Kendall ("Kendall"). Kendall stopped making monthly payments on a loan, secured by a deed of trust, in March 2009. Kendall received a bankruptcy discharge of his debts on January 14, 2010.

## II. CITATION TO COURT OF APPEALS DECISIONS

The Court of Appeals, Division 1, issued its unpublished opinion July 1, 2019, affirming and reversing summary judgment rulings. The appellate court ruled against Kendall on all issues. *See* Appendix A ("App. Op."). US Bank, N.A.'s ("US Bank") motion to publish, in which Quality Loan Service Corp of Washington ("QLS") joined, was denied on July 31, 2019. *See* Appendix B. On August 14, 2019, the appellate court denied Kendall's motion for reconsideration. *See* Appendix C.

## III. ISSUES PRESENTED FOR REVIEW

Numerous Washington homeowners were forced into bankruptcy due to the 2008-era financial crisis, and there have been multiple foreclosure cases, with varying results and rationales, which like this one have raised issues which this Court has not but needs to address relating to (1) should and does a private non-judicial sale proceeding under the Deed of Trust Act toll the statute of limitations on judicial foreclosure actions, and if so, may banks start and stop and then string together multiple private sale proceedings thereby extending the statute of limitations for a

judicial proceeding indefinitely; (2) when does the statute of limitations begin to run for foreclosing against a bankrupt consumer/borrower and can it be restarted solely as to the property; and (3) does the clear 60 day time limit for a bank to act set forth in RCW 61.24.110(3)(b) mean what it says? These key issues affect homeowners, title insurance companies, banks and other lenders, borrowers, and consumers and involve issues "of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). Rulings from this Court on these matters are badly needed.[1] This Court should provide clear answers to the following:

1. Whether a bank can stop the statute of limitations for a judicial foreclosure by starting a private non-judicial sale proceeding, and if so, whether multiple private non-judicial sale proceedings can be started and stopped and then strung together to toll the limitations period.

2. Whether a debtor, after having his debt discharged in bankruptcy, can unwittingly revive the debt and the statute of limitations for an *in rem*

[1] *See* Appendix B. In its motion for publication, US Bank explained that the appellate court determined two new questions of law. First, the appellate court was the **first** Washington state court to hold that a debt discharged in bankruptcy can later be acknowledged and restart the limitations period against a *property* even where the limitations period indisputably does not re-start against the *person.* Second, the appellate court was the **first** to find that a declaration of payment which stated what was required in RCW 61.24.110(3)(a) could be objected to long after the sixty day period prescribed in RCW 61.24.110(3)(b). US Bank also argued that the opinion should be published as it clarifies that non-judicial sales toll the limitations period (but no statute provides for any such tolling). Kendall agrees with US Bank that each and every one of these three issues needs clarity and that this Court should consider and rule on them now. Although unpublished, the appellate court's opinion is already being relied on as having precedential value. *See, e.g., Hernandez v. Franklin Credit Mgmt. Corp*., Case No. c19-0207-JCC, 2019 U.S. Dist. LEXIS 136543, *6 (W.D. Wash. Aug. 13, 2019).

*action* against a property where the debtor indisputably does not acknowledge the debt against herself/himself for an *in personam action*.

3. Whether courts can disregard the clear 60 day limitation period set forth in RCW 61.24.110(3)(b) and consider objections first made many months after that period.

## IV. STATEMENT OF THE CASE

### A. Kendall's Debt Was Discharged in Bankruptcy

In 2004, Kendall purchased a house in King County Washington (the "Property"). CP0664 (¶3). In February 2009, Kendall signed a loan modification (the "Loan") calling for payments on the first day of each month. CP1569-77. Kendall has not made any monthly payment on the Loan since March 2009. *See* CP0665 (¶7). On September 24, 2009, Kendall filed a personal bankruptcy proceeding under Chapter 7. CP0665 (¶8); CP1526 (¶19). On January 14, 2010, Kendall received a bankruptcy discharge of his debts, including any obligation under the Loan. CP0665 (¶8); CP0692-93.

### B. QLS Initiated and Abandoned Numerous Non-Judicial Sales

QLS instituted four separate non-judicial sales on the Property. A brief chronology of QLS's abandoned sales follows:

2010. On March 30, 2010, respondent QLS issued a notice of default stating that US Bank was the beneficiary. *See* CP0695. On May

5, 2010, QLS recorded a Notice of Trustee Sale listing US Bank as the beneficiary. CP0715. The sale was set for August 6, 2010. *Id.* After being questioned by Kendall, CP0736-38, QLS determined that US Bank was in fact not the "holder" of the Loan and that the non-judicial sale it had instigated was improper, CP0726-29. On October 14, 2010, QLS discontinued the trustee sale. CP0773-74.

2012. On September 25, 2012, QLS issued a notice of default to Kendall purportedly on behalf of US Bank. *See* CP0585-99. Kendall responded stating that he believed QLS again had the wrong beneficiary. CP1103-04. QLS did not advance the sale any further.

2014. On August 22, 2014, QLS issued another notice of default and on October 23, 2014 recorded a Notice of Trustee Sale. CP809-12. On January 8, 2015, Kendall, through counsel, explained numerous reasons why such a sale was invalid. CP0923-29. Shortly thereafter, this sale was discontinued with a recording on February 6, 2015. CP0814-15.

2015. On November 19, 2015, QLS issued another Notice of Trustee Sale which was recorded, setting a sale for March 18, 2016. CP0817-20. This sale was discontinued after Kendall informed QLS that a declaration of payment was recorded on December 22, 2015, to which no objection was made within 60 days. CP0822-25. After being so informed, QLS discontinued the sale. CP0827-28.

### C. In 2013 US Bank Agreed to a Short-Sale on the Property

In 2013, Kendall arranged for a short-sale of the Property. Through its agent JP Morgan, US Bank approved of the short-sale. CP0830-32. JP Morgan's approval letter explicitly stated – that for any debtor that had gone through a personal bankruptcy (as Kendall did) – no personal liability was meant to be inferred or otherwise acknowledged through the letter. The letter stated

> To the extent your original obligation was discharged…this **notice is for compliance and/or informational purposes only and does not constitute an attempt to collect a debt or impose personal liability on such obligation**.[2]

In the letter, JPMorgan agreed that the subject deed of trust and entire account associated with it could be re-conveyed and cleared without residual deficiency for $623,634.29. CP0830; CP0667 (¶16). Pursuant to this sale, payment was tendered by the closing agent, Stewart Title and Escrow, to US Bank. *Id.* The full $623,634.29 was placed into escrow with instruction to pay to US Bank and/or its agents per the agreement in a form approved and designated by JPMorgan. *Id.*; *see also* CP0839.

The title company and buyer recognized major concerns with the sale and stated that at a minimum US Bank, and/or its agent, should prove

[2] CP0831 (emphasis added). Despite this plain language in the document, US Bank initially argued to the trial court that Kendall acknowledged the debt against himself. After Kendall dispelled that contention, US Bank then argued that the acknowledgment was against the property. In its recent motion, US Bank admits this is a novel question of law. *See* Appendix B.

that it had possession of and was the holder in due course of the original note and the ownership of the original deed of trust. CP0841-45; CP0847. Although the express provisions of the deed of trust required the holder seeking payment to surrender the loan documents, *see* CP1551 (¶23), US Bank refused to do so and left the funds in escrow.

QLS was subsequently informed of the sale and the amount placed in escrow. *See* CP0855-96. However, after receiving that information QLS was unwilling to reconvey the deed of trust to Kendall. *Cf.* CP0014 (¶104) to CP0030 (¶104); *see also* CP1280 (¶7).

**D. <u>No Timely Objection to the Declaration of Payment was Made</u>**

On December 18, 2015, after reviewing the details of the short-sale in 2013, *see* CP1279-84 (¶¶6, 11, 14, 15, 20), a senior account manager with First American Title and Escrow executed a declaration of payment which was notarized and which was recorded on or around December 22, 2015 (the "Declaration of Payment"). CP0898-99. The declarant met all the requirements of the statute, representing that he was an "escrow agent licensed by the Washington State Department of Financial Institutions, a title insurance company representative or title insurance agent licensed by the Washington State Office of the Insurance Commissioner." He further declared that the payment tendered was sufficient to meet the beneficiary's demand and no written objections have been received. *See id.* The

Declaration of Payment detailed the following information:

> Beneficiary: (Abbreviated) US Bank-Trustee for WMALT Series 2007-OA3 (via Chase)
> Date Payment Tendered: May 8th, 2013
> Payment Tendered by: Stewart Title and Escrow (Bellevue Branch) on behalf of grantor
> Payment Amount demanded: $623,634.29
> Payment Amount Tendered: $623,634.29

CP0898-99. The Declaration of Payment was recorded on December 22, 2015. *See id.* A copy of the recorded Declaration of Payment was sent via certified mail to US Bank, QLS, and US Bank's acting attorney-in-fact, on or around December 23, 2015. CP0901-05; CP1283 (¶17).

Although it is arguable whether the tender of payment refused in this case is a "payment," neither US Bank, nor QLS, nor any other party, recorded any objection to the Declaration of Payment within sixty days of the Declaration of Payment being recorded. CP0668 (¶20).

### E. US Bank Did Not Seek Judicial Foreclosure Until October 2016

On October 3, 2016, US Bank filed this judicial foreclosure proceeding. CP1522-1577. US Bank did not address the declaration of payment in its complaint, nor did it explain why it could take action on a lien that "cease[d] to exist." RCW 61.24.110(3)(b).

## V. ARGUMENT

It has long been the law in Washington that the legislature sets limitations periods and articulates when such limitations periods should be

tolled.[3] However, though the DTA prescribes no tolling period, appellate courts have started to toll periods of time for non-judicial sales. This judicially created tolling is ill defined. If courts of this state are going to usurp the legislative prerogative (which they should not), at the very least, the scope of such tolling should be clearly defined so that it can be applied consistently. This Court should clarify this law for the lower courts.

In this case, besides tolling numerous improperly brought sales, the appellate court went so far as to create new law by (1) providing that a party could acknowledge a debt against a property (without acknowledging it against their person) and by (2) ignoring a plainly articulated limitation period in the DTA. It is time for this Court to corral the lower courts of this state and remind them that it is not their duty to create laws relating to tolling, but instead it is their duty to follow laws as they are articulated by the legislature.

### A. The Statute of Limitations Lapsed Prior to US Bank Filing Suit

A six-year statute of limitations applies to actions arising out of written contracts. RCW 4.16.040. RCW 7.28.300 specifically makes the statute of limitations a defense to an action to foreclose on a mortgage or

[3] *E.g.*, RCW 4.16, *et seq.*; *see also Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 330, 815 P.2d 781 (1991) (this Court explaining that "[t]he purpose of the statute of limitations is to compel actions to be commenced within what the ***legislature deemed*** to be a reasonable time, and not postponed indefinitely. However, the statute's operation could be tolled for what the ***legislature regarded*** as good reason.") (emphasis added).

deed of trust. *See, e.g., Walcker v. Benson and McLaughlin, P.S.,* 79 Wn.App. 739, 746, 904 P.2d 1176 (1995) (barring foreclosure because plaintiff "failed to initiate its foreclosure within the applicable six-year limitation period"). The statute begins to run when the amount becomes due. *See Westar Funding, Inc. v. Sorrels,* 157 Wn.App. 777, 785, 239 P.3d 1109 (2010). Payments are no longer due if a borrower's personal liability is discharged in bankruptcy. *See Edmundson v. Bank of America*, 194 Wn.App 920, 931, 378 P.3d 272 (2016). When a homeowner has his debts in bankruptcy discharged the statute of limitations begins when the last payment was due. *See, e.g., Silvers v. US Bank, N.A., et. al.,* 2015 WL 5024173 *4 (W.D. Wash. Aug. 25, 2015) (because party received a Chapter 7 discharge on January 25, 2010, the last payment it was obligated to pay was on January 1, 2010).

In this case it is undisputed that Kendall's last payment was due on January 1, 2010 and US Bank did not file suit until October 3. 2016.

**1. Non-Judicial Foreclosures Should Not Toll the Limitations Period**

There is nothing in the DTA that states non-judicial sales toll the limitations period for judicial foreclosure actions. Nothing.[4] The legislature has not articulated when such tolling should begin or when it

[4] *But see* RCW 4.16.230 (providing only that **judicial** proceedings toll the limitations period). Non judicial sales under the DTA are started, stopped and managed by private parties in the financial business entirely without judicial supervision.

should end. The published opinions from Divisions 1 & 3 rely on dicta in a case where the parties agreed that the non-judicial sale tolled the limitations period.

In numerous unpublished opinions, Division 1 has repeatedly cited to its published decision *Bingham v. Lechner*, for the proposition that a non-judicial sale tolls the limitations period. 111 Wn.App. 118, 45 P.3d 562 (2002). However, in *Bingham*, the parties agreed to such tolling (as it did not change the outcome). The *Bingham* court never directly ruled on the issue. Its comments are clearly only dicta. The only published opinion by Division 1 finding such tolling to be appropriate (relying on *Bingham*) is *Cedar W. Owners Ass'n v. Nationstar Mortg. LLC*, which astoundingly held that whether or "[w]hen the nonjudicial foreclosure action tolls the statute of limitations is a factual inquiry." 7 Wn.App.2d 473, 488, 434 P.3d 554 (2019). So rather than a set period of time articulated by the legislature, Division 1 has determined that tolling is a matter of broad discretion by the judiciary to be determined by the facts of each case. Subsequently, Division 3 issued a **split** opinion in *U.S. Bank NA v. Ukpoma,* where the majority opinion found that non-judicial sales **do not** toll the statute of limitations period, but the dissent and concurring opinion found *Bingham* should be followed. 8 Wn.App.2d 254, 256, 436 P.3d 141 (2019) (the majority opinion recognizing "further debate of this

important issue" is warranted). It is stunning that the lower courts of this state are usurping the legislature to protect sophisticated banks that fail to timely act on such thin law.

If the Court determines that the judiciary should legislate such tolling, a number of questions should be clarified by this Court. First, when does tolling begin? Is it when a notice of default is provided? Is it when a trustee sale is recorded? Is it a matter of "factual inquiry" as Division 1 has held? What factors should courts assess in this "factual inquiry"? Second, when does tolling end? Is it when the party is notified of the discontinuance of the sale? Is it when the discontinuance is recorded? Third, can the time taken for numerous sales merely be tacked together as the appellate court did in this instance? Fourth, in order for tolling to be allowed, does there need to be proof that the non-judicial sale was properly brought in the first place? Whose burden should it be to prove the sale was brought properly? These are all questions which the legislature would undoubtedly address in creating a statute of limitations. The courts of our state should be no less diligent if they wish to take the legislative mantle on this issue.

**2. Acknowledging a Debt against a Property is Pure Fiction**

RCW 4.16.280 provides that "[n]o acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to

take the case out of the operation of this chapter, unless it is contained in some writing signed by the party to be charged thereby." (emphasis added). Kendall is aware of no Washington authority where property has ever been considered to be a "party." Moreover, the Property never executed anything. Nor can the Property owe, or pay the bank, anything.

In this case, it is undisputed that Kendall did not intend to, nor did he acknowledge the debt against himself. The last date the debt was "due" remained January 1, 2010. Indeed the document signed by Kendall, by its own language, was meant to be only a "notice" and specifically stated that it did "not constitute an attempt to collect a debt or impose personal liability on such obligation." CP831. The appellate court never addressed the plain terms of the statute, nor did it have any authority for its unsupported holding that a debtor could somehow acknowledge a debt against a property when the debtor is not to "be charged thereby." This Court should erase the fiction created by the appellate court that a party can somehow acknowledge a debt against a property where the party does not intend to pay or take on the underlying debt. Indeed, in this case the amount stated in the letter was not even the amount of a debt, but rather was an agreed price for a short-sale. *Cf. Liberman v. Gurensky*, 27 Wn. 410, 416, 67 P. 998 (1902) ("[T]here must be a clear and definite acknowledgment of the debt … and an unequivocal promise to pay.").

If an acknowledgment can be against a property where the person still is not required to pay a debt, the Court should articulate all that is necessary for such an acknowledgment.

### B. The Legislature Has Determined that Objections to a Declaration of Payment Must Be Made Timely or the Lien is Extinguished

In adopting RCW 61.24.110(3), the legislature articulated a clear process for a party to extinguish a lien on their property where a trustee of record is "unable or unwilling to reconvey the deed of trust." RCW 61.24.110(3)(a). The statute provides that a particular set of individuals (including a "title insurance company or title insurance agent…a licensed escrow agent…or an attorney admitted to practice law") may record a "declaration of payment" which must "(i) Identify the deed of trust, including original grantor, beneficiary, trustee, loan number if available, the auditor's recording number and recording date; (ii) state the amount, date, and name of the beneficiary and means of payment; (iii) include a declaration that the payment tendered was sufficient to meet the demand and that no written objections have been received, and (iv) be titled "declaration of payment." RCW 61.24.110(3)(a) (emphasis added). The statute requires the declarant to explain the "means of payment" and how it meets the "demand" of the beneficiary. In this case, there is no dispute QLS, the trustee of record, was unwilling to reconvey the deed of trust.

*Cf.* CP0013(¶104) to CP0030 (¶104); *see also* CP1280 (¶7). There is also no dispute that the Declaration of Payment, recorded on December 22, 2015, stated each of these specified requirements. *See* CP00898-99.

The statute also provides that a "copy of the recorded declaration of payment must be sent by certified mail to the last known address of the beneficiary and the trustee of record not later than two business days following the date of recording of the notarized declaration." RCW 61.24.110(3)(b). There is no dispute that a copy of the recorded Declaration of Payment was sent to US Bank (the beneficiary), to QLS (the trustee of record), and also to Select Portfolio Servicing Inc. (US Bank's "attorney"). *See* CP 000668 (¶20) & CP000900-905. These parties all received the Declaration of Payment. *See* CP000900-905.

The statute provides that "the beneficiary or trustee of record has sixty days from the date of recording of the notarized declaration of record to record an objection." RCW 61.24.110(3)(b). If either the beneficiary or trustee believes the declaration of payment is improper in any way, it requires them to take an affirmative action to record an objection. *See id.* There is no dispute that no objection was recorded within sixty days of the Declaration of Payment being recorded. Indeed, there is no evidence that US Bank or QLS has ever recorded, to this day, any objection to the Declaration of Payment. *See* CP0791-96.

The statute provides that "**[i]f no objection is recorded within sixty days following recording of the notarized declaration**, ***any*** **lien** of the deed of trust against the real property encumbered ***must*** cease to exist." RCW 61.24.110(3)(b) (emphasis added). The statute does not provide for certain objections to be allowed after the sixty day period. The statute could not be clearer.

This appellate court committed plain error by failing to abide by the statute. Rather than follow the plain terms set by the legislature, the appellate court considered objections made by US Bank that were not only untimely, but also were never recorded. The Court opined that

> However, in this case, Kendall failed to comply with the prerequisite for a declaration of payment. Specifically, the statute allows for recording of a declaration if the trustee fails to reconvey the deed of trust "following payment to the beneficiary as prescribed in the beneficiary's demand statement." RCW 61.24.110(3)(a). But U.S. Bank never received payment as demanded.
>
> In April 2013, JP Morgan Chase notified Kendall it had approved his short sale request. The notice specified completion of certain paperwork and certified funds paid by wire transfer or overnight mail by May 15, 2013, or the offer became null and void. Instead of acting in accordance with these terms, Kendall placed the funds in escrow with Stewart Title and Escrow and requested U.S. Bank provide the promissory note to prove its status as holder of the note. U.S. Bank did not accept the funds or accede to the request for the promissory note. Therefore, Kendall did not comply with the beneficiary's demands and U.S. Bank did not receive payment in satisfaction of the Note. The

> Declaration was improperly filed without completion of the statutory requirements.

App. Op. at 7-8. The above facts relied on by the appellate court in its opinion were not recorded with an objection, but were from US Bank's arguments made in this litigation. The first time these objections to the declaration of payment were made by US Bank was in its briefing before the trial court which was filed on August 14, 2017. *See* CP 0968-72. These objections – besides not being recorded as required by the legislature – were nearly 18 months too late.[5] However, the appellate court plainly assessed these untimely objections in reaching its decision.

The appellate court makes no effort to explain why US Bank could not have objected to the declaration of payment as the legislature requires. US Bank (or QLS) could have easily recorded a statement that it did not believe tender into escrow of the short sale amount (and its refusal to produce the promissory note) entitled it to say that payment was not made.[6] Nor does the appellate court make any effort to opine why the sixty day period should be ignored in this instance (or in any instance moving forward). Nor does the appellate court explain how it could reach

[5] Pursuant to the statute, US Bank and/or QLS were required to act by February 22, 2016.

[6] There is not one scintilla of evidence in the record offering any excuse or explaining why US Bank and/or QLS could not have timely made an objection in this instance.

its conclusion without considering the belated objections.[7]

At best, the appellate court opines that a "prerequisite" to the statute was not met. But is that not why the legislature gave persons knowledgeable of the facts relating to the alleged payment the opportunity to object to the declaration of payment? Is this not precisely the information that the legislature required the declarant to provide in the declaration of payment?[8] The appellate court does not explain why US Bank or QLS should be relieved from the obligations the legislature required under RCW 61.24.110(3)(b).[9]

Indeed, two out of the four specified requirements of the declaration of payment are for the individual executing the document to "state the amount, date, and name of the beneficiary and means of

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[7] *See Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 926, 185 P.2d 113 (1947) (ruling that to "permit the department to consider meritorious claims filed [untimely]…would be a dangerous path to follow. Such a rule could only be in disregard of the universal maxim that ignorance of the law excuses no one. What is more important, it would substitute for a positive rule established by the legislature a variable rule of decision based upon individual ideas of justice conceived by administrative officers as well as by the courts.").

[8] The declaration by its plain name is about "payment." To find that a dispute over how and whether payment was made is not an objection that must be made within 60 days is nonsensical. Whether and how the payment was made is at the core of a declaration of payment and timely objection regarding non-payment is precisely what the statute requires to be made within sixty days.

[9] Under the appellate court's opinion, no party can now rely on a declaration of payment to extinguish a lien. Instead of being able to review the declaration of payment, as recorded, and determine that more than sixty days has passed with no objection being made, parties and title remain vulnerable to much belated arguments about whether and how payment was made to meet the appellate court's "prerequisite." In defiance of logic and the plain words of the statute, the appellate court errored by taking what is clearly an untimely objection and relabeling it as a "prerequisite" that can be asserted at any time.

payment," and to "include a declaration that the payment tendered was sufficient to meet the demand and that no written objections have been received." RCW 61.24.110(3)(a)(ii-iii) (emphasis added). Are these not precisely the same requirements that the appellate court deemed a prerequisite? When are objections required to be made and when are they to be unnecessary as they can be termed as prerequisites? The appellate court offers no analysis as to when to delineate between objections which are needed to be made within the sixty day period and those that the Court is willing to entertain years later. Why is not the absence of a prerequisite an objection that must be timely made? The statute certainly makes no such distinction. Instead, the legislature determined that "if no objection is recorded … **any lien** … **must cease to exist**." RCW 61.24.110(3)(b) (emphasis added). It provides courts no wiggle room to determine that ***any*** belated objection can be considered. Yet, the appellate court wrongly considered the untimely objections.

The Court failed to address what the legislature required from the bank and the trustee – *i.e.* an affirmative action to record an objection timely. This was plain error.

In Washington, legislatively prescribed limitations periods matter. Indeed, the appellate court had no jurisdiction to consider arguments not made within the prescribed time in RCW 61.24.110(b). The courts in this

state have explained this principle repeatedly and have applied it against parties with much less legal acumen than US Bank and/or QLS.

For example, this Court determined that failing to timely contest a will makes the merits of any potential objection irrelevant.

> Where the statute authorizes the contest of a will, and specifies the time within which such contest may be initiated, **the court has no jurisdiction to hear and determine a contest begun after the expiration of the time fixed in the statute … The four-month period is absolute. There are no exceptions to the rule and no equitable doctrines afford any flexibility. If the Will contest is not filed prior to the expiration of the four-month period, the contest will be absolutely barred.**

*In re Estate of Toth*, 138 Wn.2d 650, 656, 981 P.2d 439 (1999) (emphasis added, citations and quotations omitted). This Court further that it was

> not unmindful of the inequities of this case. However, **factual inequities do not justify circumventing a clear rule articulated by the Legislature**.

*Id*. at 657 (emphasis added).

Likewise, an individual that has suffered a personal injury may have great equitable reasons for failing to act timely in a fee dispute with their attorney. However, courts in this state have ruled that the legislatively prescribed period of time to affirmatively act (only 45 days) under RCW 4.24.005 must be followed. For example, in addressing this statute, Division 1 affirmed a trial court's ruling that when "claims under RCW 4.24.005 …[are] not timely filed … but rather were filed nearly a

year late. The Court has no jurisdiction to determine the reasonableness of those fees under this statute." *Barrett v. Freise*, 119 Wn.App. 823, 847, 82 P.3d 1179 (2003). Certainly, individuals that have grown to trust and rely upon their legal counsel have more equitable reason to fail to timely act than US Bank did in this instance, yet courts have determined that timely action as prescribed by the legislature is required to even be able to consider any meritorious objection.

The appellate court was incorrect in determining a lien existed on which US Bank could foreclose. The legislature required ***any*** objection to be made and recorded within sixty days of the recording of the declaration of payment. Here, no objection was timely made or (ever) recorded by US Bank. The legislature made plain that where no objection is recorded within the appropriate time period, the lien "must cease to exist." RCW 61.24.110(3)(b). This Court should correct the appellate court's error and make plain that legislatively prescribed periods to act must be followed.

## VI. CONCLUSION

Limitations periods matter. It is the legislature's responsibility to create limitations periods and the courts' duty to apply them. The Court should grant the petition and provide clear precedent on the above issues.

Dated this 9th day of September 2019.

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## DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

On September 9, 2019, I electronically filed the forgoing with the Washington Supreme Court via the Appellate Court's Portal which will send notification and a copy of such filing to the following:

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Executed at Seattle, Washington, on September 9, 2019.

E. Birch Frost

# Appendix – A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

U.S. BANK NA, Successor Trustee to BANK OF AMERICA, NA, Successor in Interest to LASALLE BANK NA, as Trustee, on Behalf of the holders of the WASHINGTON MUTUAL MORTGAGE PASS-THROUGH CERTIFICATES, WMALT SERIES 2007-OA3,

Respondent/Cross-Appellant,

v.

KREG KENDALL, aka KREG L. KENDALL, aka KREG L. HARDING-KENDALL,

Appellant/Cross-Respondent,

QUALITY LOAN SERVICE CORP. OF WASHINGTON, a Washington Corporation,

Other Party,

NATIONAL CITY BANK; YAKIMA VALLEY CREDIT UNION; STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES; DOES 1-10 inclusive; UNKNOWN OCCUPANTS of the Subject Real Property; PARTIES in possession of the Subject Real Property; PARTIES claiming a right to possession of the Subject Real Property; ALL OTHER UNKNOWN PERSONS OR PARTIES claiming any right, title, estate, lien or interest in the Real Estate described in the complaint herein,

Defendants.

No. 77620-7-I
(consolidated with No. 77621-5, No. 77786-6, and No. 77820-0)

DIVISION ONE

UNPUBLISHED OPINION

FILED: July 1, 2019

CHUN, J. — After several attempts at nonjudicial foreclosure by its trustee, Quality Loan Service Corporation of Washington (QLS), U.S. Bank filed a claim for judicial foreclosure against Kreg Kendall's house. Kendall filed counterclaims for declaratory judgment, breach of contract, intentional infliction of emotional distress (outrage[1]), and violation of the Consumer Protection Act (CPA) against U.S. Bank. He filed cross claims against QLS for outrage and violation of the CPA. The trial court dismissed on summary judgment all claims against QLS. We affirm that decision. We also affirm the order of judicial foreclosure against Kendall and dismissal of the outrage claim against U.S. Bank. However, we conclude Kendall's breach of contract and CPA claims against U.S. Bank fail as a matter of law, and reverse the trial court's decision to deny summary judgment on those claims.

## BACKGROUND

In 2004, Kendall, a real estate professional, purchased a home in Bellevue, Washington. He refinanced his home in 2006 with an adjustable rate note secured by a deed of trust on his property. Ultimately, U.S. Bank became the holder of the note with JP Morgan Chase as the loan servicer.[2]

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[1] Intentional infliction of emotional distress and outrage are synonyms for the same tort. Kloepfel v. Bokor, 149 Wn.2d 192, 193 n.1, 66 P.3d 630 (2003).

[2] The Deed of Trust listed Mortgage Electronic Registration Systems, Inc. (MERS) as the grantee and beneficiary and First Independent Mortgage Company as the lender. Kendall's loan was subsequently securitized and sold to the Washington Mutual Mortgage Pass-Through Certificates Series 2007-OA3 Trust (WaMU Trust) in September 2008. At that time, MERS assigned the Deed of Trust to LaSalle Bank as trustee for the WaMu Trust. WaMu was the loan servicer. LaSalle appointed QLS as successor trustee in September 2008. La Salle merged with Bank of America on October 17, 2008. U.S. Bank purchased Bank of America's mortgage backed transactions and succeeded Bank of America as the trustee on Kendall's loan in May 2009. JP Morgan Chase acquired WaMu's loan servicing rights and became the loan servicer.

Kendall stopped making payments on the loan in summer 2008. He entered into a loan modification agreement with JP Morgan Chase on February 9, 2009. He has not made a mortgage payment since March 2009.

Kendall filed for personal bankruptcy in September 2009 and received a discharge of his debts on January 14, 2010. On January 22, 2010, the bankruptcy court terminated the automatic bankruptcy stay, allowing U.S. Bank to pursue actions "necessary to obtain complete possession of the Property free and clear of claims of the bankruptcy estate."

To pursue nonjudicial foreclosure, U.S. Bank appointed QLS as the successor trustee in April 2010. QLS issued a notice of trustee sale on May 5, 2010 with a sale date of August 6, 2010. QLS did not hold the sale as scheduled, and issued a notice of discontinuation on October 18, 2010. U.S. Bank appointed QLS as successor trustee once more in August 2012.

Kendall attempted to arrange a short sale of the property. JP Morgan Chase, on behalf of U.S. Bank, agreed to a short sale in April 2013. Payment was placed in escrow with Stewart Title and Escrow. U.S. Bank did not accept this payment when tendered. The short sale was never completed.

On December 18, 2015, licensed escrow agent Kevin Pedersen of First American Title signed a Declaration of Payment on Kendall's behalf. The Declaration was notarized and subsequently recorded. The Declaration stated that payment was tendered to U.S. Bank on May 8, 2013 by Stewart Title and Escrow by certified check. However, First American Title subsequently filed an Affidavit of Wrongful Recording, stating that the "recordation of the Declaration of

Payment was improper and such recording of the Declaration of Payment . . . is void, null and of no legal effect." Pedersen provided a declaration attesting that he did not prepare the Declaration, was unaware it would be recorded, and was not authorized by his employer to sign it. Text messages appear to show Pedersen, Kendall's personal acquaintance, would not have signed the Declaration without permission from his supervisor had he known Kendall intended to record it.

QLS issued another notice of trustee sale on October 23, 2014, setting the sale date of February 20, 2015. The sale was discontinued on February 4, 2015. QLS issued yet another notice of trustee sale on November 19, 2015, setting the sale date of March 18, 2016. QLS did not hold the sale as scheduled, finally discontinuing it on June 2, 2016.

After these failed attempts at nonjudicial foreclosure, U.S. Bank filed for judicial foreclosure on October 3, 2016. Kendall counterclaimed against U.S. Bank, claiming violation of the CPA, outrage, and breach of contract. Kendall also requested declaratory relief that the loan ceased to exist after recording of the Declaration of Payment under RCW 61.24.110(3)(b). Additionally, Kendall raised cross claims of outrage and CPA violation against QLS.

U.S. Bank, QLS, and Kendall all filed motions for summary judgment. U.S. Bank and QLS sought dismissal of all claims brought by Kendall. U.S. Bank also sought a decree of foreclosure and dismissal of Kendall's request for declaratory judgment on the existence of the lien. Kendall requested dismissal of

the foreclosure action.

The trial court granted QLS's motions, dismissing all claims against it with prejudice. The trial court granted U.S. Bank's motion to dismiss Kendall's claim for outrage, but denied its motion for decree of foreclosure and its motions to dismiss the CPA and breach of contract claims. The trial court also denied Kendall's motion for summary judgment.

U.S. Bank and Kendall filed motions for reconsideration. On reconsideration, the trial court granted U.S. Bank's motion in part, granting a decree of judicial foreclosure and dismissing Kendall's claim for declaratory judgment on the existence of his lien. However, the trial court denied reconsideration of its rulings on the CPA and breach of contract claims. The trial court denied Kendall's motion for reconsideration.

U.S. Bank and Kendall jointly moved for entry of judgment under CR 54(b) and certification for review under RAP 2.3(b)(4). The trial court granted the motion and stayed the proceedings pending appeal.

U.S. Bank and Kendall both filed motions for discretionary review, which a commissioner of this court granted.

## DISCUSSION

### A. Standard of Review

We review de novo orders on motions for summary judgment and perform the same inquiry as the trial court. Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled

to a judgment as a matter of law. Owen, 153 Wn.2d at 787; CR 56(c). "The court must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if reasonable persons could reach but one conclusion." GO2Net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 83, 60 P.3d 1245 (2003).

B. Judicial Foreclosure Issues

On reconsideration, the trial court granted U.S. Bank's motion for summary judgment seeking a decree of judicial foreclosure. The trial court determined the lien existed and U.S. Bank's motion was not time barred because Kendall's acknowledgement of the lien restarted the statute of limitations. Kendall appeals these conclusions and the decree of judicial foreclosure. U.S. Bank appeals the trial court's determination that the nonjudicial foreclosure proceedings did not toll the statute of limitations.

1. Existence of the Lien

The trial court granted U.S. Bank's motion for summary judgment on Kendall's counterclaim for declaratory judgment that the lien no longer existed. The trial court stated "there is no way under the facts that the Declaration of Payments could be deemed valid." Kendall claims the court erred because he recorded a Declaration of Payment in accordance with RCW 61.24.110(3), which extinguished the lien. U.S. Bank argues the Declaration of Payment did not conform to the statutory requirements and was subsequently voided by the

affidavit of wrongful recording. We agree with U.S. Bank regarding the lack of conformity.

The deed of trust act (DTA) provides:

> If the trustee of record is unable or unwilling to reconvey the deed of trust within one hundred twenty days following payment to the beneficiary as prescribed in the beneficiary's demand statement, a title insurance company or title insurance agent . . . may record with each county auditor where the original deed of trust was recorded a notarized declaration of payment.

RCW 61.24.110(3)(a). The beneficiary or trustee of record has 60 days from the date of recording to object to the notarized declaration of payment. RCW 61.24.110(3)(b). Absent a timely objection, "any lien of the deed of trust against the real property encumbered must cease to exist." RCW 61.24.110(3)(b).

First American Title recorded a notarized Declaration of Payment on behalf of Kendall on December 22, 2015. The Declaration stated that payment was tendered to U.S. Bank on May 8, 2013 by Stewart Title and Escrow by certified check. Licensed escrow agent Kevin Pedersen signed the Declaration. Sixty days elapsed without objection from the beneficiary or trustee. Ordinarily, under RCW 61.24.110(3)(b), this would extinguish the lien.

However, in this case, Kendall failed to comply with the prerequisite for a declaration of payment. Specifically, the statute allows for recording of a declaration of payment if the trustee fails to reconvey the deed of trust "following payment to the beneficiary as prescribed in the beneficiary's demand statement." RCW 61.24.110(3)(a). But U.S. Bank never received payment as demanded.

In April 2013, JP Morgan Chase notified Kendall it had approved his short sale request. The notice specified completion of certain paperwork and certified funds paid by wire transfer or overnight mail by May 15, 2013, or the offer became null and void. Instead of acting in accordance with these terms, Kendall placed the funds in escrow with Stewart Title and Escrow and requested U.S. Bank provide the promissory note to prove its status as holder of the note. U.S. Bank did not accept the funds or accede to the request for the promissory note. Therefore, Kendall did not comply with the beneficiary's demands and U.S. Bank did not receive payment in satisfaction of the Note. The Declaration was improperly filed without completion of the statutory requirements.

Based on the evidence, as a matter of law, the Declaration was prepared and filed without compliance with the statutory prerequisites. Therefore, the trial court did not err in concluding that the Declaration was invalid and dismissing Kendall's counterclaim for declaratory judgment that the lien was extinguished.

2. Statute of Limitations

Kendall contends U.S. Bank's claim for judicial foreclosure is time barred. U.S. Bank argues the action was timely because the nonjudicial foreclosures tolled the limitations period, and the short sale agreement served as an acknowledgement of the debt that restarted the period. Under either theory, U.S. Bank's action was timely.

As written contracts, a promissory note and deed of trust are subject to the six-year statute of limitations under RCW 4.16.040(1). Cedar W. Owners Ass'n v. Nationstar Mortg., LLC, 7 Wn.App.2d 473, 482, 434 P.3d 554, 559 (2019). An

action on the promissory note and deed of trust must commence within six years of "'when the party is entitled to enforce the obligations of the note.'" Cedar W., 7 Wn.App.2d at 484 (quoting Wash. Fed., Nat'l Ass'n v. Azure Chelan LLC, 195 Wn. App. 644, 663, 382 P.3d 20 (2016)). For installment promissory notes, the six-year limitations period accrues for each monthly installment from the time it becomes due. Cedar W., 7 Wn.App.2d at 484. In the event of bankruptcy, the lien of a deed of trust is not discharged and remains enforceable. Edmundson v. Bank of Am., NA, 194 Wn. App. 920, 922, 378 P.3d 272 (2016). However, the payments are no longer due as of the discharge, and the limitations period accrues and begins to run when the last payment was due. Edmundson, 194 Wn. App. at 931.

a. Tolling

The trial court found the failed nonjudicial foreclosure proceedings did not toll the limitations period. U.S. Bank appeals this issue, arguing case law establishes that nonjudicial foreclosure proceedings toll the six-year limitations period. U.S. Bank is correct.

Here, the bankruptcy court discharged Kendall's personal liability on January 14, 2010. His last payment on the lien therefore would have due January 1, 2010. The parties do not dispute that the limitations period began running as of that date. See Edmundson, 194 Wn. App. at 931. As a result, the six-year statute of limitations would have run as of January 1, 2016. Because U.S. Bank filed for judicial foreclosure on October 3, 2016, the claim is time barred unless tolling applies.

Case law clearly states that commencement of nonjudicial foreclosure proceedings tolls the six-year limitations period. Bingham v. Lechner, 111 Wn. App. 118, 127, 45 P.3d 562 (2002) ("commencement of a nonjudicial foreclosure tolls the statute of limitations").[3] "When the nonjudicial foreclosure action tolls the statute of limitations is a factual inquiry." Cedar W., 7 Wn.App.2d at 488. Generally, the notice of trustee sale tolls the limitations period until the date scheduled for the foreclosure or 120 days later, the last day to which it could have been continued. Bingham, 111 Wn. App. at 131; Cedar W., 7 Wn.App.2d at 488.

QLS commenced and abandoned three separate nonjudicial foreclosure proceedings on behalf of U.S. Bank. For the first sale, QLS issued a notice of trustee sale on May 5, 2010, setting a sale date of August 6, 2010, and discontinuing the sale on October 18, 2010, resulting in a tolling period of 166 days. The second notice of trustee sale issued October 23, 2014 with a sale date of February 20, 2015, and discontinuation on February 5, 2015, amounting to 106 days tolled. The final notice of trustee sale occurred on November 19, 2015, with a sale date of March 18, 2016 and discontinuation on June 2, 2016, yielding 196 days tolled. Altogether, the nonjudicial foreclosure proceedings tolled the statute of limitations for 468 days, bringing U.S. Bank's filing date well

[3] A recent unpublished case from this court noted that incomplete nonjudicial foreclosure proceedings tolled the statute of limitations. See Erickson v. Am.'s Wholesale Lender, No. 77742-4-I, slip op. at 8 (Wash. Ct. App. Apr. 16, 2018) (unpublished), http://www.courts.wa.gov/opinions/pdf/777424.PDF. Moreover, multiple nonjudicial foreclosure proceedings cumulatively toll the limitations period. Erickson, No. 77742-4-I, slip op. at 8. While not binding, this decision holds persuasive value based on its similarity to the facts at hand. See GR 14.1(c).

within the required time period. Therefore, U.S. Bank's complaint for judicial foreclosure was timely.

The trial court erred in its determination that the limitations period was not tolled in this case. Despite this error, the trial court correctly found that U.S. Bank timely filed its claim for judicial foreclosure based on Kendall's acknowledgment of the debt restarting the statute of limitations.

b. Acknowledgement

The trial court found U.S. Bank's foreclosure action timely because Kendall acknowledged the debt and restarted the statute of limitations by initialing the short sale agreement in April 2013. It stated, "The Defendant acknowledged that the note was secured by the property when he entered into an agreement to short sell the property. The short sale agreement is clear that it does not seek to establish personal liability upon the Defendant, but rather secure the payment on the note through the sale of the property." Kendall claims the letter did not constitute an acknowledgement and that any acknowledgment is void under federal bankruptcy law. U.S. Bank argues that federal bankruptcy law does not bar an in rem action on the property and that the short sale letter meets the requirement for an acknowledgment before the statute of the limitations has run. We agree with U.S. Bank.

i. Federal Law

Kendall contends that federal bankruptcy law governs any

acknowledgement and has very specific requirements under 11 U.S.C. § 524(c)[4] after bankruptcy discharge. AOB 32-35. However, these requirements apply to agreements as to dischargeable debt. 11 U.S.C. § 524(c). 11 U.S.C. § 524(a) enjoins a secured creditor from attempting to collect or enforce the debt, but allows the creditor to foreclose on the collateral. In re Cortez, 191 B.R. 174, 178 (B.A.P. 9th Cir. 1995). "In the case of a surviving lien, a bankruptcy discharge 'extinguishes only one mode of enforcing a claim—namely, an action against the

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[4] (c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if--

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that--

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of--

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6) (A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as--

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

11 U.S.C. § 524(c).

debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*.'" In re Cortez, 191 B.R. at 178 (quoting Johnson v. Home State Bank, 501 U.S. 78, 84, 111 S. Ct. 2150, 115 L.Ed.2d 66 (1991)).

U.S. Bank's claim for judicial foreclosure was not an action against Kendall for personal liability on the debt. Instead, U.S. Bank properly pursued the surviving *in rem* claim against the property itself. The protection in 11 U.S.C. § 524(c) only pertains to an "agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title." Because the *in rem* claim against the property survived Kendall's personal bankruptcy, the protections do not apply to the judicial foreclosure action. Therefore, federal bankruptcy law does not invalidate any acknowledgment of the debt attached to the property rather than Kendall personally.

ii. Short Sale Letter Acknowledgment

Kendall also claims the short sale letter does not amount to an acknowledgement of the debt under Washington law. "An acknowledgment or promise within the meaning of RCW 4.16.280[5] restarts the statute of limitations." Jewell v. Long, 74 Wn. App. 854, 856, 876 P.2d 473 (1994). Restarting the limitations period in this manner requires "written acknowledgment or promise signed by the debtor that recognizes the debt's existence, is communicated to the creditor, and does not indicate an intent not to pay." In re Receivership of

[5] "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this chapter, unless it is contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest." RCW 4.16.280.

Tragopan Props., LLC, 164 Wn. App. 268, 273, 263 P.3d 613 (2011). The requirements differ between acknowledgments made before and after the limitations period has run. Tragopan, 164 Wn. App. at 273. Before the period has run, the "legal action must be upon the original debt or upon the paper evidencing it," and "any acknowledgment of the debt should necessarily infer an agreement to pay it, unless something in the acknowledgment leads to a contrary conclusion." Tragopan, 164 Wn. App. at 273-74. In contrast, an acknowledgment after the limitations period requires a new agreement and courts should construe it more strictly. Tragopan, 164 Wn. App. at 274.

Here, Kendall initialed the short sale letter in April 2013, well within the six-year limitations period, which commenced January 1, 2010. Therefore, any acknowledgment of the debt leads to an inference of intent to pay, unless something in the acknowledgment demonstrates otherwise. Tragopan, 164 Wn. App. at 273.

The short sale letter provides: "we have agreed to your request to sell your home for less than you owe. . . . We will accept a minimum of $623,634.29 to release the JP Morgan Chase mortgage lien and waive any deficiency." The document further states,

> To the extent your original obligation was discharged, or is subject to an automatic stay of bankruptcy under Title 11 of the United States Code, this notice is for compliance and/or informational purposes only and does not constitute an attempt to collect a debt or to impose personal liability for such obligation.

Kendall initialed the document, signaling his approval.

This letter and Kendall's signature reaffirmed the existence of the lien on Kendall's property. The document notes Kendall's request for the short sale evidencing an intent to pay. Finally, the disclaimer clearly shows that JP Morgan Chase did not intend to revive or collect on a personal liability, eliminating the need for compliance with the requirements for acknowledgement in 11 U.S.C. § 524(c). Therefore, the short sale letter constitutes an acknowledgement under the more lenient rules for acknowledgments prior to the running of the limitations period. This restarted the period on April 11, 2013.

Under both the theories of tolling and acknowledgment, as a matter of law, U.S. Bank's timely filed its foreclosure action. During the hearing on motions for summary judgment, U.S. Bank presented the note, thereby proving itself the actual holder of the note. RP 24, 48. The holder of the note is entitled to enforce it. Deutsche Bank Nat'l Tr. Co. v. Slotke, 192 Wn. App. 166, 174, 367 P.3d 600 (2016). As a result, the trial court properly entered an order of judicial foreclosure for U.S. Bank.

C. CPA Claims

Kendall filed CPA claims based on the DTA against QLS and U.S. Bank. The trial court dismissed the CPA claim against QLS but denied U.S. Bank's motion for summary judgment on the claim. U.S. Bank appeals this decision, and Kendall appeals the decision as to QLS.[6] After examining the record, we

[6] The parties do not dispute that the statute of limitations bars any tort claim against U.S. Bank and QLS for their activities prior to March 8, 2013.

conclude Kendall has not present sufficient evidence of compensable injury to sustain a CPA claim against either QLS or U.S. Bank.

A CPA claim based on violations of the DTA must meet the same requirements as any other claim under the CPA. Lyons v. U.S. Bank Nat'l Ass'n, 181 Wn.2d 775, 785, 336 P.3d 1142 (2014). "The plaintiff must show [an] '(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in [their] business or property; (5) causation.'" Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 115, 285 P.3d 34 (2012) (quoting Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986)). A plaintiff must establish all five elements. Bavand v. OneWest Bank, 196 Wn. App. 813, 840, 385 P.3d 233 (2016). The CPA requires "a causal link" between the unfair or deceptive act and the injury suffered. Hangman Ridge, 105 Wn.2d at 785. The claimant must establish he or she would not have suffered an injury but for the other party's unfair or deceptive practices. Bavand, 196 Wn. App. at 842.

The trial court denied summary judgment on the CPA claim against U.S. Bank. However, Kendall's CPA claim against U.S. Bank fails as a matter of law because he does not provide evidence of compensable injury.

The CPA requires injury to business or property. Frias v. Asset Foreclosure Serv., Inc., 181 Wn.2d 412, 430, 334 P.3d 529 (2014). "[B]usiness or property injuries might be caused when a lender or trustee engages in an unfair or deceptive practice in the nonjudicial foreclosure context." Frias, 181 Wn.2d at 431. An injury under the CPA does not require quantifiable monetary

loss. Frias, 181 Wn.2d at 431. "Where a business demands payment not lawfully due, the consumer can claim injury for expenses [they] incurred in responding, even if the consumer did not remit the payment demanded." Frias, 181 Wn.2d at 431. But mental distress, embarrassment, inconvenience, and the "associated physical symptoms are not compensable under the CPA." Frias, 181 Wn.2d at 432. Furthermore, "the financial consequences of such personal injuries are also excluded." Frias, 181 Wn.2d at 431.

Here, Kendall claims the actions taken by U.S. Bank and QLS "have caused me extreme distress over the last 9 years," including "anxiety, sleeplessness and other physical symptoms." But as noted above, the CPA does not compensate for such injuries. See Frias, 181 Wn.2d at 432.

According to Kendall, "due to the constant stress, stigmatization and time spent defending against these wrongly brought proceedings, [his] income plummeted from 2008 through 2015." To prove these damages, Kendall provided a letter from the owner of his real estate office describing Kendall's loss of income during this time period. The letter provides, "What I witnessed can be most easily described as an intense distraction coupled with loss in confidence and positive attitude." The letter also described the publicity that stems from foreclosure proceedings and its negative impact on a real estate agent involved in personal foreclosures. Accordingly, "it's taken a heavy toll on him financially and personally." But again, the CPA does not compensate for the financial consequences of mental distress, embarrassment, inconvenience, and associated physical symptoms. See Frias, 181 Wn.2d at 431. And Kendall does

not provide legal authority to support his damages theory that the alleged CPA violation caused him stigmatization and time loss, which in turn, he claims, affected his income.[7]

Because the record lacks evidence of compensable injury to property or business, Kendall cannot establish the injury element of the CPA. As a result, summary judgment and dismissal was appropriate for the claims against both QLS and U.S. Bank.

D. Outrage

Kendall claims the trial court erred by granting summary judgment to both QLS and U.S. Bank on his outrage claims. We conclude the trial court properly granted summary judgment on these claims.

A claim for outrage requires proof of three elements: "'(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress.'" Trujillo v. NW. Tr. Servs. Inc., 183 Wn.2d 820, 840, 355 P.3d 1100 (2015) (quoting Kloepfel v. Bokor, 149 Wn.2d 192, 195, 66 P.3d 630 (2003)). A plaintiff must demonstrate outrageous conduct so extreme as to go beyond all possible bounds of decency. Kloepfel, 149 Wn.2d at 196. Mere insults, indignities, and annoyances do not rise to the level of outrageousness required for outrage. Kloepfel, 149 Wn.2d at 196.

[7] Nor does Kendall provide evidence—apart from conclusory statements—establishing a causal link to such injuries. "Mere allegations or conclusory statements of facts unsupported by evidence do not sufficiently establish such a genuine issue." Discover Bank v. Bridges, 154 Wn. App. 722, 727, 226 P.3d 191 (2010).

Kendall defaulted on his loan in 2009 and failed to make any subsequent payments. In light of his long history of default, efforts to foreclose on the property were more logical rather than so extreme as to go beyond all possible bounds of decency. Because Kendall does not establish an issue of fact regarding the level of outrageous conduct required, the trial court properly granted summary judgment and dismissed both outrage claims.

E. Breach of Contract

Kendall claimed U.S. Bank breached their contract for the 2013 short sale of his home. The trial court denied U.S. Bank's motion for summary judgment on this claim, finding questions of material fact remained. It stated, "Viewing all the facts in the light most favorable to the nonmoving party, there is an argument that can be made that Mr. Kendall attempted to comply with the conditions of the short sale and that it was U.S. Bank's behavior that did not allow for that to be completed." U.S. Bank argues the parties never entered into an enforceable contract, entitling it to summary judgment as a matter of law. We agree.

"Contract formation requires an objective manifestation of mutual assent." P.E. Sys., LLC v. CPI Corp., 176 Wn.2d 198, 207, 289 P.3d 638 (2012). An identical offer and acceptance is necessary for a meeting of the minds and a resulting contract. Sea-Van Inv. Assoc. v. Hamilton, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994). Under traditional contract principles, the offeror is the master of the offer. Discover Bank v. Ray, 139 Wn. App. 723, 727, 162 P.3d 1131 (2007). The offeror may propose acceptance by conduct, and the buyer may accept by performing those acts as proposed. Discover Bank, 139 Wn. App. at

727. "Generally, a purported acceptance which changes the terms of the offer in any material respect operates only as a counteroffer, and does not consummate the contract." Sea-Van Inv., 125 Wn.2d at 126. Mutual assent is normally a question of fact, but "may be determined as a matter of law if reasonable minds could not differ." P.E. Sys., 176 Wn.2d at 207.

In April 2013, JP Morgan Chase sent Kendall a document entitled, "Terms and conditions to sell your home for less than you owe." It outlined the requirements for Kendall to complete the short sale of his house and release the lien. Specifically, the document provided, "The full amount must be received in the form of certified funds no later than 05/15/2013, or this offer becomes null and void." It further directed, "To accept this offer, please send payment by wire transfer or overnight mail to the address provided below." This document established the offer and means of acceptance for Kendall to release the lien.

The record shows that Kendall did not wire transfer or overnight mail certified funds by May 15, 2013, choosing instead to deposit the funds into an escrow account with Stewart Title and Escrow. As a result, Kendall did not perform the acts required for acceptance of the contract. Because Kendall did not comply with the means of acceptance established by the offeror, the parties did not arrive at a meeting of the minds and did not form a contract. At most, Kendall's actions constituted a counteroffer, which JP Morgan Chase did not accept. Additionally, the terms of the original offer by JP Morgan Chase expired on May 15, 2013, after Kendall failed to accept as specified.

As master of the offer, JP Morgan Chase established the means of acceptance and Kendall failed to perform as specified. While the trial court determined that evidence demonstrated Kendall attempted to comply with the terms of the offer, leaving issues of fact for resolution, the record shows as a matter of law that the parties never demonstrated the legally required meeting of the minds and mutual assent to form a contract. Therefore, U.S. Bank is entitled to summary judgment on Kendall's breach of contract claim.

F. Attorney Fees

The terms of the Deed of Trust allow for payment of attorney fees. "Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument." Under RCW 4.84.330, the terms of this provision apply to the "prevailing party, whether or not [they are] the party specified in the contract." The prevailing party means "the party in whose favor final judgment is rendered." RCW 4.84.330. As the prevailing party on all issues, U.S. Bank is awarded fees and costs on appeal, subject to its compliance with RAP 18.1.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Chun, J.

WE CONCUR:

# Appendix – B

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
# DIVISION ONE

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| U.S. BANK NA, Successor Trustee to BANK OF AMERICA, NA, Successor in Interest to LASALLE BANK NA, as Trustee, on Behalf of the holders of the WASHINGTON MUTUAL MORTGAGE PASS-THROUGH CERTIFICATES, WMALT SERIES 2007-OA3,<br><br>Respondent/Cross-Appellant,<br><br>v.<br><br>KREG KENDALL, aka KREG L. KENDALL, aka KREG L. HARDING-KENDALL,<br><br>Appellant/Cross-Respondent,<br><br>QUALITY LOAN SERVICE CORP. OF WASHINGTON, a Washington Corporation,<br><br>Other Party,<br><br>NATIONAL CITY BANK; YAKIMA VALLEY CREDIT UNION; STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES; DOES 1-10 inclusive; UNKNOWN OCCUPANTS of the Subject Real Property; PARTIES in possession of the Subject Real Property; PARTIES claiming a right to possession of the Subject Real Property; ALL OTHER UNKNOWN PERSONS OR PARTIES claiming any right, title, estate, lien or interest in the Real Estate described in the complaint herein,<br><br>Defendants. | No. 77620-7-I<br><br>ORDER DENYING MOTION TO PUBLISH |

The respondent/cross-appellant, U.S. Bank NA, has filed a motion to publish. The other party, Quality Loan Service Corp. of Washington, has filed a

motion to publish. A panel of the court has considered its prior determination and has found that the opinion will not be of precedential value; now, therefore it is hereby

ORDERED, that the unpublished opinion filed July 1, 2019 shall remain unpublished.

FOR THE COURT:

Chun, J.

Judge

No. 77620-7-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

King County Superior Court Cause No. 16-2-23801-7 SEA

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KREG KENDALL,

Appellant/Cross-Respondent,

v.

US BANK, N.A.,

Respondent/Cross-Appellant,

v.

QUALITY LOAN SERVICE CORP. OF WASHINGTON,

Respondent.

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# MOTION TO PUBLISH DECISION

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Vanessa Soriano Power, WSBA #30777
J. Scott Pritchard, WSBA #50761
KC L. Hovda, WSBA #51291
STOEL RIVES LLP
600 University Street, Suite 3600
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**Attorneys for Respondent – Cross Appellant**
**U.S. Bank, N.A.**

## I. Identity of Moving Party

Respondent/Cross-Appellant U.S. Bank, N.A. ("U.S. Bank") is the moving party.

## II. Statement of Relief Sought

Pursuant to RAP 12.3(e), U.S. Bank requests publication of the Court's unpublished opinion issued July 1, 2019 (the "Decision").

## III. Facts Relevant to Motion

After Mr. Kendall failed to pay his mortgage, several non-judicial foreclosure proceedings were commenced that did not end in a sale of the property that is subject to the mortgage. As a result, U.S. Bank—the undisputed holder of the note secured by the deed of trust encumbering the property—filed an action for a decree of judicial foreclosure. On cross-motions for summary judgment, the trial court found U.S. Bank's action was timely and granted U.S. Bank's request for a judgment and decree of judicial foreclosure. In doing so, the trial court rejected U.S. Bank's argument that it was entitled to tolling for past non-judicial foreclosures, but agreed that the statute of limitations restarted when Mr. Kendall acknowledged the debt via a short sale letter he initialed in 2013. The trial court also rejected Mr. Kendall's theory that U.S. Bank's lien ceased to exist because he recorded a "Declaration of Payment" on the loan, reasoning that payment was a prerequisite to invalidating the lien under the relevant provision of the Washington Deeds of Trust Act.

This Court affirmed the trial court in part and reversed in part. As relevant to this motion, the Decision holds that (1) U.S. Bank should be credited with tolling during prior non-judicial foreclosure sales, (2) Mr. Kendall acknowledged the debt in 2013, re-starting the statute of

limitations, and (3) Mr. Kendall's alleged "Declaration of Payment" did not meet the statutory requirements to invalidate U.S. Bank's lien.

## IV. Grounds for Relief and Argument

Publication is appropriate here because the unpublished opinion determines a new question of law, clarifies established principles of law, and is of general public interest and importance. *See* RAP 12.3(e)(3)-(5).

### A. The Decision Determines New Questions of Law

This Court decided two new issues of Washington state law in the Decision, both of which warrant publication.

#### (1) Washington's Acknowledgment Doctrine Applies to *In Rem* Foreclosure of Debts Previously Discharged in Bankruptcy

Before the Decision, no Washington state court had addressed the issue of whether the acknowledgment doctrine, which operates to re-start the statute of limitations when a borrower acknowledges a debt, applies in the context of a debt that was previously discharged in bankruptcy. The Western District of Washington recently discussed this issue in a decision that is currently on appeal to the Ninth Circuit, which U.S. Bank submitted as supplemental authority in this appeal. *See Thacker v. Bank of New York Mellon*, No. 18-5562 RJB, 2019 WL 1163841 (W.D. Wash. Mar. 13, 2019) (on appeal as Ninth Circuit Case No. 19-35215). U.S. Bank submits that this issue is recurring, as many borrowers who received bankruptcy discharges in the 2008-era financial crisis are now bringing statute of limitations claims arguing that the foreclosing lender waited too long to act, even though the lender was often responding to loss mitigation requests from the borrower in the post-discharge period which operated to

acknowledge and affirm the debt. Thus, this issue will continue to present itself to Washington trial courts that look to this court for guidance. Having binding Washington authority on this issue now would be particularly helpful given that it is currently on review before the Ninth Circuit in *Thacker*, and could offer the Ninth Circuit applicable state court authority on the same issue.

**(2) Interpretation of the Declaration of Payment Statute**

There is very little Washington case law interpreting the Declaration of Payment provision of the Deed of Trust Act, RCW 61.24.110(3)(a). There are no locatable decisions, before this case, discussing the perquisites to an effective recording of a Declaration of Payment, nor are there any locatable cases finding an alleged Declaration of Payment ineffective. Therefore, this Court's decision that the document Mr. Kendall recorded and alleged was a "Declaration of Payment" was ineffective to invalidate U.S. Bank's lien under RCW 61.24.110(3)(a) was a determination on a new question of law, per RAP 12.3(e), and it would be helpful to future litigants and the public to ensure this determination is published and citable.

**B. The Decision Clarifies Established Principles of Law**

The Decision also clarifies the continued viability of non-judicial foreclosure tolling, which is another issue that warrants publication. While non-judicial foreclosure tolling is not a "new" issue, some borrowers, like Mr. Kendall here, argue that there are no published Washington appellate decisions definitively stating that tolling should be granted for prior incomplete non-judicial foreclosure sales, and thus question the rule. The trial court below agreed with Mr. Kendall on this issue, further demonstrating the need for clarification in this area. The

Decision cites to another unpublished decision, *Erickson v. Am.'s Wholesale Lender*, and a published decision, *Bingham*, for the proposition that non-judicial foreclosure tolling exists in Washington. *See* Decision at 10, n. 3. But as Mr. Kendall pointed out in his briefing, the issue of non-judicial foreclosure tolling was not squarely presented in *Bingham*. *See* Kendall Reply Br. at 22-24 (arguing that "a careful reading of *Bingham* shows that whether a non-judicial foreclosure proceeding tolls the limitations period was not at issue in that case"). Publication, therefore, should also be considered by this Court as the Decision clarifies non-judicial foreclosure tolling is an "established principle of law." RAP 12(e)(4).

In sum, the Decision clarifies important principles of law and decides new issues of law, all of which are of general public interest. It therefore meets the requirements of RAP 12.3(e).

DATED: July 12, 2019. Stoel Rives LLP

*s/ Vanessa Soriano Power*

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Attorneys for Respondent/Cross-Appellant U.S. Bank, N.A.

## CERTIFICATE OF SERVICE

I, Michele Brandon, certify that at all times mentioned herein, I was and am a resident of the state of Washington, over the age of eighteen years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Stoel Rives LLP, 600 University Street, Suite 3600, Seattle, WA 98101.

On July 12, 2019, I caused a copy of Respondent/Cross-Appellant's Motion to Publish Decision to be served upon the following individual(s) in the manner indicated below:

| | |
|---|---|
| Delbert D. Miller<br>David E. Crowe<br>Van Kampen & Crowe PLLC<br>1001 4th Ave, Suite 4050<br>Seattle, WA 98154-1000<br>dmiller@vkclaw.com<br>dcrowe@vkclaw.com<br>*Attorney for Appellant - Cross Respondent Kreg Kendall* | ☒email/court eservice delivery |
| Joseph W. McIntosh<br>McCarthy & Holthus LLP<br>108 1st Ave. So., Suite 300<br>Seattle, WA 98104-2104<br>jmcintosh@mccarthyholthus.com<br>*Counsel for Respondent* | ☒email/court eservice delivery |

Executed on July 12, 2019.

*/s/ Michele Brandon*
Michele Brandon, Practice Assistant
Stoel Rives, LLP

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Case No. 77620-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

---

KREG KENDALL

Appellant / Cross Respondent,

v.

US BANK, N.A.,

Respondent / Cross Appellant

v.

QUALITY LOAN SERVICE CORP. OF WASHINGTON,

Respondent.

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# MOTION TO PUBLISH DECISION

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Attorney for Quality Loan Service Corp. of Washington

## MOTION

Quality Loan Service Corporation of Washington ("Quality") joins the motion to publish filed by co-respondent U.S. Bank.

DATED July 12, 2019

/s/ Joseph Ward McIntosh
Joseph Ward McIntosh, WSBA # 39470
Attorney for Quality Loan Service Corp. of Washington

# Appendix – C

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
# DIVISION ONE

U.S. BANK NA, Successor Trustee to BANK OF AMERICA, NA, Successor in Interest to LASALLE BANK NA, as Trustee, on Behalf of the holders of the WASHINGTON MUTUAL MORTGAGE PASS-THROUGH CERTIFICATES, WMALT SERIES 2007-OA3,

Respondent/Cross-Appellant,

v.

KREG KENDALL, aka KREG L. KENDALL, aka KREG L. HARDING-KENDALL,

Appellant/Cross-Respondent,

QUALITY LOAN SERVICE CORP. OF WASHINGTON, a Washington Corporation,

Other Party,

NATIONAL CITY BANK; YAKIMA VALLEY CREDIT UNION; STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES; DOES 1-10 inclusive; UNKNOWN OCCUPANTS of the Subject Real Property; PARTIES in possession of the Subject Real Property; PARTIES claiming a right to possession of the Subject Real Property; ALL OTHER UNKNOWN PERSONS OR PARTIES claiming any right, title, estate, lien or interest in the Real Estate described in the complaint herein,

Defendants.

No. 77620-7-I

ORDER DENYING MOTION FOR RECONSIDERATION

The Appellant/Cross-Respondent, Kreg Kendall, filed a motion for reconsideration on July 22, 2019. Respondent/Cross-Appellant, U.S. Bank and Other

Party, Quality Loan Service Corp. of Washington, have filed a response. A panel of the court has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Chun, J.

Judge

# Appendix – D

# RCW 61.24.110

## Reconveyance by trustee.

(1) The trustee of record shall reconvey all or any part of the property encumbered by the deed of trust to the person entitled thereto on written request of the beneficiary, or upon satisfaction of the obligation secured and written request for reconveyance made by the beneficiary or the person entitled thereto.

(2) If the beneficiary fails to request reconveyance within the sixty-day period specified under RCW **61.16.030** and has received payment as specified by the beneficiary's demand statement, a title insurance company or title insurance agent as licensed and qualified under chapter **48.29** RCW, a licensed escrow agent as defined in RCW **18.44.011**, or an attorney admitted to practice law in this state, who has paid the demand in full from escrow, upon receipt of notice of the beneficiary's failure to request reconveyance, may, as agent for the person entitled to receive reconveyance, in writing, submit proof of satisfaction and request the trustee of record to reconvey the deed of trust.

(3)(a) If the trustee of record is unable or unwilling to reconvey the deed of trust within one hundred twenty days following payment to the beneficiary as prescribed in the beneficiary's demand statement, a title insurance company or title insurance agent as licensed and qualified under chapter **48.29** RCW, a licensed escrow agent as defined in RCW **18.44.011**, or an attorney admitted to practice law in this state may record with each county auditor where the original deed of trust was recorded a notarized declaration of payment. The notarized declaration must: (i) Identify the deed of trust, including original grantor, beneficiary, trustee, loan number if available, and the auditor's recording number and recording date; (ii) state the amount, date, and name of the beneficiary and means of payment; (iii) include a declaration that the payment tendered was sufficient to meet the beneficiary's demand and that no written objections have been received; and (iv) be titled "declaration of payment."

(b) A copy of the recorded declaration of payment must be sent by certified mail to the last known address of the beneficiary and the trustee of record not later than two business days following the date of recording of the notarized declaration. The beneficiary or trustee of record has sixty days from the date of recording of the notarized declaration to record an objection. The objection must: (i) Include reference to the recording number of the declaration and original deed of trust, in the records where the notarized declaration was recorded; and (ii) be titled "objection to declaration of payment." If no objection is recorded within sixty days following recording of the notarized declaration, any lien of the deed of trust against the real property encumbered must cease to exist.

[ **2013 c 114 § 1; 1998 c 295 § 13; 1981 c 161 § 7; 1965 c 74 § 11.**]

**VAN KAMPEN & CROWE PLLC**

**September 09, 2019 - 2:37 PM**

**Filing Petition for Review**

**Transmittal Information**

| | |
|---|---|
| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | Case Initiation |
| **Appellate Court Case Title:** | US Bank, Respondent-Cross Appellant v. Kreg Kendall et al, Appellant-Cross Respondent (776207) |

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