No. 97931-6

SUPREME COURT
OF THE STATE OF WASHINGTON

U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF8 MASTER PARTICIPATION TRUST,

Plaintiff/Respondent,

v.

JASON HAGEN, et al.

Defendant/Petitioner

ANSWER TO PETITION FOR REVIEW

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I. COURT OF APPEALS' DECISION

Jason Hagen ("Hagen") has asked the Court to grant discretionary review of the unanimous, unpublished decision of Division II of the Court of Appeals in *U.S. Bank Tr., N.A. as trustee for LSF8 Master Participation Tr. v. Bailey*, No. 51556-3-II, 2019 WL 5704788, at *1 (Wash. Ct. App. Nov. 5, 2019).

II. ISSUE PRESENTED FOR REVIEW

Hagen presents three issues to this Court. U.S. Bank answers the issues as follows, in order to present the petition to this Court in a manner which more accurately reflects the standard under RAP 13.4(b) and the issues raised and argued before the Court of Appeals.

Answer to Issue No. 1.

The Court of Appeals' decision regarding acceleration is not in conflict with a decision of the Supreme Court or a published decision of the Court of Appeals.

Answer to Issue No. 2.

The Court of Appeals' decision not to reach the issue of whether a nonjudicial foreclosure tolls the limitations period is not in conflict with a decision of the Supreme Court or a published decision of the Court of Appeals.

Answer to Issue No. 3.

The Court of Appeals' decision not to reach the issue of whether a bankruptcy tolls the limitations period is not in conflict with a decision of the Supreme Court.

III. STATEMENT OF THE CASE

A. The Loan

On or about July 11, 2002 Jack and Sharon Bailey (the "Baileys") executed a promissory note (the "Note") in exchange for a $291,102.72 loan from Household Realty Corporation ("Household"). (CP 268-270.) The Baileys executed a security instrument (the "Deed of Trust") securing the Note, and the same was recorded on July 15, 2002 with the Clark County Auditor. (CP 272-277.) The recorded Deed of Trust encumbers real property commonly known as 16203 N.E. 36th Ave., Ridgefield, WA 98642 (the "Property"). (CP 268.)

The Deed of Trust specifies that, prior to acceleration of the loan debt owed, the lender must provide notice explaining:

> (1) the breach; (2) the action required to cure such breach, (3) a date, not less than 30 days from the date the notice is mailed to Borrower, by which such breach must be cured; and (4) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the sums secured by this Deed of Trust and sale of the Property at public auction at a date not less than 120 days in the future. (CP 275, ¶ 17.)

B. The Default, Nonjudicial Foreclosure, and Bankruptcy

As of August 2008, the Baileys defaulted on the loan by failing to make payments. (CP 47, ¶ 16; CP 265, ¶ 5.)

On or about May 18, 2009, a written Notice of Default was transmitted to the Baileys. (CP 172-175.) On June 19, 2009, Household appointed Regional Trustee Services ("Regional Trustee") as successor trustee under the Deed of Trust. (CP 55-56.) That same date, Regional Trustee recorded a Notice of Trustee's Sale, scheduling a sale of the Property for September 18, 2009. (CP 58-61.)

The trustee's sale did not occur because on September 17, 2009, the Baileys filed a Chapter 7 bankruptcy petition. (CP 63-118.) The Baileys stated an intent to surrender the Property. (CP 107.) On December 16, 2009, the Bankruptcy Court granted the Baileys a standard discharge of their personal liability on certain debts. (CP 120-121.)

C. Communications Showing No Acceleration

On or about June 2, 2011, Household sent the Baileys a letter advising them of the loan's arrearage. (CP 279.) This letter stated, "it is our intent to declare your loan past due and payable immediately if the… breach is not remedied as outlined…. You have the right to reinstate after acceleration and to bring court action to assert the nonexistence of a default or any other defense you may have to acceleration and sale of your

property." (*Id*.) On or about June 12, 2012 and January 4, 2013, Household sent additional letters to the Baileys advising them of the loan's arrearage and containing substantially similar language. (CP 281, 284). On or about January 21, 2014, Household sent a fourth letter to the Baileys that is substantially similar to the first three. (CP 287.)

D. Transfer to Hagen and Hagen's Indictment Subjecting Property to Criminal Forfeiture

On September 27, 2011, the Baileys conveyed the still-encumbered Property to Hagen via quit claim deed. (CP 42.) On December 13, 2013, a Grand Jury indicted Hagen in the United States District Court for the District of Oregon, making the Property subject to criminal forfeiture. (CP 392.)

On February 17, 2015, the District Court entered a final order of forfeiture as to Hagen, but did not include the Property. (CP 395-399.) The government later withdrew its recorded lis pendens against the Property. (CP 401-403.)

E. Procedural History

On September 22, 2015, U.S. Bank commenced a judicial foreclosure action. (CP 1.) On September 2, 2016, U.S. Bank filed an Amended Complaint for judicial foreclosure. (CP 23.) On January 12, 2017, Hagen answered the Amended Complaint and counterclaimed to quiet title as to U.S. Bank's lien. (CP 45-49.)

U.S. Bank moved for judgment on the pleadings with respect to Hagen's counterclaim, and Hagen sought summary judgment as to the same. (CP 122-430.) On February 15, 2017, the trial court granted an order in U.S. Bank's favor and entered a CR 54(b) ruling to permit Hagen's appeal, which followed. (CP 431-433.)

IV. ARGUMENT

Relevant here, the Rules of Appellate Procedure state that a petition for review will be accepted by the Court "only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals ..." RAP 13.4(b).

Hagen's petition cites only to RAP 13.4(b)(1)-(2). *See* Pet. However, Hagen simply argues that the Court of Appeals erred in affirming the trial court's orders on U.S. Bank's motion for judgment on the pleadings and Hagen's motion for summary judgment. The Supreme Court of Washington is not simply an "error-checking" court; rather, it reviews limited categories of cases in the exercise of its discretion within the Rules of Appellate Procedure.

Even if Hagen's asserted bases for seeking discretionary review were one of the bases on which the Court grants review, there is still no reason to grant review of Hagen's case because Hagen's arguments are

incorrect. The unanimous Court of Appeals correctly determined there was no acceleration of the debt. The Court of Appeals merely made the routine decision of applying well-established case law to the facts of the case and concluded that there was no acceleration as a matter of law.

In sum, there is no reason to review this case because the decision of the Court of Appeals does not conflict with any decision of this Court or a published decision of the Court of Appeals.

A. The Court of Appeal's Decision That No Acceleration Occurred Does Not Conflict With Any Decision of the Supreme Court or a Published Decision of the Court of Appeals

Citing RAP 13.4(b)(1)-(2), Hagen argues that the Court of Appeals ruling on acceleration is in conflict with decisions of the Court of Appeals and the Supreme Court. Pet. at 7-8. Hagen argues that the Deed of Trust securing the Baileys' loan required acceleration before nonjudicial foreclosure proceedings. *Id.* at 7. Hagen further argues that the language of the Deed of Trust is unambiguous and the actions of the parties shows the intent to accelerate. *Id.* at 8. Hagen further argues that the Notice of Default and Notice of Trustee's Sale show acceleration. *Id.* at 7.

Well established Washington law disagrees with Hagen on each point. Acceleration is not self-executing. *See Kenworth Sales Co. v. Salantino*, 154 Wash. 236, 238 (1929) (language purporting to accelerate after default "gives no more than the option" of such outcome). "The law

is settled in this jurisdiction that even if the provision in an installment note provides for the automatic acceleration of the due date upon default, mere default alone will not accelerate the note." *A. A. C. Corp. v. Reed*, 73 Wash. 2d 612, 615 (1968); *Weinberg v. Naher*, 51 Wash. 591, 594 (1909); *Merceri v. Bank of New York Mellon*, 4 Wash. App. 2d 755, 760 (2018), *review denied*, 192 Wash. 2d 1008 (2018) (same).

Well established authority also makes clear that for a lender to avail itself of the remedy of acceleration, the lender must notify the maker that it has accelerated the debt. "[A]cceleration must be made in a clear and unequivocal manner which effectively apprises the maker that the holder *has exercised* his right to accelerate the payment date." *Glassmaker v. Ricard*, 23 Wash. App. 35, 38 (1979) (quoting *Weinberg v. Naher*, 51 Wash. 591, 594 (1909)).

The facts also show Hagen is wrong. The Notice of Default itemizes the delinquent payments, late charges, and beneficiary advances (i.e., insurance and taxes) that were past due for a total amount due of $40,906.86. (CP 172.) The loan amount was $291,102.72. (CP 268, 272.) Had there been an acceleration the Notice of Default would have specified a higher amount due. However, the Notice of Default sought only the past due amounts and not the entire loan balance. The Notice of Trustee's Sale contains a similar itemization limited only to past due amounts totaling

$46,208.58. (CP 59.) Hagen asserts that the reference to the total sum owing on the obligation indicates an acceleration. Pet. at 7. This is incorrect because the form of a notice of trustee's sale is dictated by RCW 61.24.040 and requires the notice to include a summary of the entire debt in Section IV. RCW 61.24.040(1)(a), (2)(d) (setting forth the form and language required for notices of trustee's sale). The Notice of Trustee's Sale issued here conforms with the form requirements set forth under RCW 61.24.040. (CP 58-61.)

As the forgoing demonstrates, the Court of Appeals' decision does not conflict with the laws of this Court or with a published decision of the Court of Appeals. Rather, the Court of Appeals correctly applied the facts to the law in reaching its conclusion that no acceleration occurred.

B. Whether a Nonjudicial Foreclosure Tolls the Limitations Period is not Grounds for Review

Again citing RAP 13.4(b)(1), (2), Hagen next argues that there is a split of authority among the Divisions of the Court of Appeals that justifies review on the issue of whether a nonjudicial foreclosure tolls the limitations period. Pet. at 9-10. This argument fails for several reasons.

First, the Court of Appeals' decision in this case did not reach the issue of tolling by a nonjudicial foreclosure. *U.S. Bank Tr., N.A. as trustee for LSF8 Master Participation Tr. v. Bailey*, No. 51556-3-II, 2019 WL

5704788, at *4 n.5 (Wash. Ct. App. Nov. 5, 2019). As such, the decision is not in conflict with any Supreme Court decision or published opinion of the Court of Appeals.

Second, there is no split of authority as Hagen suggests. Hagen concedes that Division One recognizes tolling effect of a nonjudicial foreclosure. Pet. at 11 (citing *Edmundson v. Bank of America, N.A.*, 194 Wash. App. 920 (2016)). Hagen cites no authority either way from Division Two. For Division Three, Hagen asserts that the Court of Appeals "concluded that no such tolling was available" in the decision in *U.S. Bank National Association v. Ukpoma*. Pet. at 11.

Hagen's reading of *Ukpoma* is incorrect. In *Ukpoma*, the Court of Appeals found there was no acceleration:

> We therefore hold that QLS's February 2008 notice did not accelerate the installment note. And because the note never accelerated, the six-year statute of limitations has not run on all of the installment payments. We conclude that the trial court did not err in granting U.S. Bank's motion for summary judgment.

U.S. Bank Nat'l Ass'n as Tr. of Holders of Adjustable Rate Mortgage Tr. 2007-2 v. Ukpoma, 8 Wash. App. 2d 254, 259 (2019). The Court of Appeals further held:

> Because the installment note was never accelerated, **we need not address whether**

> **commencement of the various nonjudicial foreclosures tolled the statute of limitations.**

Id. at 260 (emphasis added). However, a concurring opinion addressed tolling and the author of the primary decision therefore offered his opinion on the issue. *Id.* As such, the Court of Appeals' discussion in *Ukpoma* regarding whether a nonjudicial foreclosure tolls the limitations period is, at most, dicta and is not binding authority. "A statement is dicta when it is not necessary to the court's decision in a case" and as such is not binding authority. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wash. App. 201, 215, *review denied* 178 Wash. 2d 1022 (2013). As dicta, *Ukpoma* is not instructive on whether there is a split of authority. The controlling authority in Division Three is *Bingham v. Lechner*, which holds that the initiation of a nonjudicial foreclosure tolls the statute of limitations. *Bingham v. Lechner*, 111 Wash. App. 118, 127 (2002). Thus, there is no split of authority as Hagen suggests.

C. Whether the Bankruptcy Tolls the Limitations Period is Not Grounds for Review

Finally, Hagen argues that the Court of Appeals' decision as it relates to tolling from the bankruptcy is in conflict with two decisions of this Court, citing RAP 13.4(b)(1). Pet. 12-17. This argument does not provide a basis for review either because the Court of Appeals' decision in this case did not reach the issue of whether the statute of limitations was

tolled by bankruptcy. *U.S. Bank Tr., N.A. as trustee for LSF8 Master Participation Tr. v. Bailey*, No. 51556-3-II, 2019 WL 5704788, at *4 n.5 (Wash. Ct. App. Nov. 5, 2019). As such, the decision is not in conflict with any Supreme Court decision.

Nonetheless, Hagen speculates that *if* the Court of Appeals had addressed the issue of the bankruptcy's effect on tolling it would have reached a decision that contrary to the reasoning in *Summerrise v. Stephens* and *Smith v. Forty Million*. Pet. at 15-16. This hypothetical argument provides no grounds for review, and if it did, every Court of Appeal decision would be subject to review by this Court, which, of course, is not the case.

Neither case is applicable to the question of whether a bankruptcy stay tolls the limitations period.

In *Summerrise*, the issue on appeal was:

> Is an action for damages for a tort committed in this state by a then resident of this state, who subsequently became a resident of another state, tolled by his absence from the state as provided in RCW 4.16.180 during a period when the plaintiff was aware of the claimed tort-feasor's place of residence and had available to him the right to proceed under RCW 4.28.185, the long-arm statute?

Summerrise v. Stephens, 75 Wash. 2d 808, 809 (1969). Even if the Court of Appeals here had reached the issue, which it did not, its analysis would turn on RCW 4.16.230, which *Summerrise* does not discuss. Further, there are no issues raised in Hagen's appeal regarding application of a long-arm statute or tolling for service on out-of-state litigants.

In *Smith*, the issue on appeal was:

> In an action for damages arising out of an automobile collision on a highway in this state is the statute of limitations tolled by the absence from the state of a nonresident defendant, as provided in RCW 4.16.180, when the plaintiff has available to him at all times the right to proceed under RCW 46.64.040, which makes the Secretary of State the agent of such nonresident for the purpose of service of summons?

Smith v. Forty Million, Inc., 64 Wash. 2d 912, 913 (1964). Like *Summerrise*, *Smith* does not discuss RCW 4.16.230 and the issues on appeal in *Smith* are not relevant to whether a bankruptcy tolls the limitations period for a foreclosure proceeding. At its core, Hagen offers a strained analogy between *Summerrise* and *Smith* on the one hand and this case on the other. However, the fact that a plaintiff does not expeditiously serve process to advance his or her prosecution of an action (as is the case in *Summerrise* and *Smith*) does not lend any support for Hagen's argument that a lender should be required to seek relief from the automatic stay in

order to avail itself of the tolling under RCW 4.16.230. Hagen's strained analogy does not establish a conflict between this case and the decisions in *Summerrise* and *Smith*.

Put simply, the Court of Appeals' decision here does not conflict with either *Summerrise* or *Smith*. Further, the decision does not reach the issue that Hagen asks this Court to consider. Accordingly, there are no grounds for review under RAP 13.4(b)(1).

V. CONCLUSION

Based on the foregoing, U.S. Bank requests the Court deny Hagen's petition for review.

DATED: December 31, 2019

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CERTIFICATE OF SERVICE

On January 6, 2020, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Ben Shafton CARON, COLVEN, ROBISON & SHAFTON 900 Washington Street, Suite 1000 Vancouver, WA 98660-3455 Phone: (360) 699-3001 Email: bshafton@ccrslaw.com Counsel for Defendant/Petitioner	_X_ Via the Appellate Court Web Portal ___ Via hand delivery _X_ Via U.S. Mail, 1st Class, Postage Prepaid ___ Via Overnight Delivery ___ Via Facsimile ___ Via Email

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at San Francisco, California, on January 6, 2020.

Matthew Walkup

PERKINS COIE LLP

January 06, 2020 - 11:23 AM

Transmittal Information

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