IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SANDRA M. MERCERI, a single woman, Appellant, v. THE BANK OF NEW YORK MELLON, a national banking association, as trustee, on behalf of the holders of the Alternative Loan Trust 2006-OA19, Mortgage Pass Through Certificate Series 2006-OA19; and THE BANK OF NEW YORK, as trustee, on behalf of the holders of the Alternative Loan Trust 2006-OA19, Mortgage Pass Through Certificate Series 2006-OA19; and BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK, as trustee, on behalf of the holders of the Alternative Loan Trust 2006-OA19, Mortgage Pass Through Certificate Series 2006-OA19, Respondent.	No. 80654-8-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — The trial court denied Sandra Merceri's CR 60(b) motion to vacate a judgment based on newly discovered evidence. She appeals, contending that the trial court erred in entering its order without first issuing a mandatory show cause order as required by CR 60(e)(2). We conclude that the court acted within its discretion in denying the motion to vacate, and we affirm.

BACKGROUND

In 2006, Sandra Merceri obtained a residential loan from Countrywide Bank, secured by a deed of trust and adjustable rate note payable in monthly installments. Merceri defaulted on the loan in 2010. On February 16, 2010, the loan servicer issued a "Notice of Intent to Accelerate" informing Merceri that "if the default is not cured on or before March 18, 2010, the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time."

In June 2011, the Mortgage Electronic Registration System (MERS) assigned the deed of trust to the Bank of New York Mellon (BONY) as trustee. Between 2013 and 2016, loan servicer Select Portfolio Services (SPS) sent Merceri mortgage statements showing the "amount due" as the amount necessary to reinstate the debt, not the accelerated full amount of the loan. A February 2013 statement specified that "SPS may accelerate all payments owing and sums secured by the Security Instrument."

On June 2, 2016, a substitute trustee acting on BONY's behalf issued a notice of trustee sale to sell Merceri's home. Merceri then filed a quiet title action asserting that the six-year statute of limitations precluded foreclosure because the February 2010 notice clearly communicated that her loan would be fully accelerated on March 18, 2010 and this acceleration took place more than six years before the suit was filed.[1] On March 17, 2017, the trial court granted

[1] An action to foreclose on a deed of trust must be commenced within six years. RCW 4.16.040; Terhune v. N. Cascades Tr. Serv., Inc., 9 Wn. App. 2d 708, 718, 446 P.3d 683 (2019).

Merceri's motion for summary judgment, entered a declaratory judgment quieting title to Merceri, and awarded her attorney fees and costs.

This court reversed, holding that the "will be accelerated" language in the February 2010 notice of default, without more action, did not accelerate the debt. Merceri v. Bank of New York Mellon (Merceri I), 4 Wn. App. 2d 755, 761, 434 P.3d 84 (2018). "Acceleration 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." Id. (quoting Glassmaker v. Ricard, 23 Wn. App. 35, 38, 593 P.2d 179 (1979)). Because BONY did not take "affirmative action in a clear and unequivocal manner indicating that the payments had been accelerated," the six-year limitations period had not commenced. Merceri I, 4 Wn. App. 2d at 761. On remand, the trial court entered judgment in favor of BONY and awarded its attorney fees and costs under the note and deed of trust.

In October 2017, the Federal Bureau of Consumer Financial Protection's new Truth In Lending Act (TILA) rule became effective, requiring lenders and servicers to provide borrowers with mortgage statements that prominently state the total amount due under all payment options, including the accelerated amount if applicable. 12 C.F.R § 1026.41(d)(1)(iii). On August 1, 2019, Merceri received a mortgage statement from Bayview Loan Servicing, LLC specifying the accelerated amount due as of July 16, 2019. On October 11, 2019, Merceri filed a CR 60(b)(3) ex parte motion for order to show cause why the judgment should not be vacated based on this newly discovered evidence of acceleration. On

October 16, 2019, without issuing a show cause order to BONY or requiring it to appear, the trial court denied Merceri's motion for order to show cause on this basis: "Plaintiff's offer of proof is insufficient to establish that judgment should be vacated. The statement from July 2019, does not establish acceleration occurred in 2010." Merceri appeals from this ruling.

ANALYSIS

Motion to Vacate

Merceri argues that the court committed reversible error in denying her CR 60(b)(3) motion to vacate without first issuing a CR 60(b)(2) show cause order requiring BONY to appear and address the newly discovered evidence of acceleration. We disagree.

We review a trial court's decision on a CR 60(b) motion to vacate for abuse of discretion. Luckett v. Boeing Co., 98 Wn. App. 307, 309, 989 P.2d 1144 (1999). A court abuses its discretion when its decision stems from untenable grounds or reasoning. Luckett, 98 Wn. App. at 309. We review de novo the interpretation of a court rule. Guardado v. Guardado, 200 Wn. App. 237, 243, 402 P.3d 357 (2017). "Court rules are interpreted in the same manner as statutes. If the rule's meaning is plain on its face, we must give effect to that meaning as an expression of the drafter's intent." Jafar v. Webb, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013).

CR 60(b) permits parties to seek relief from a final judgment, order, or proceeding for several reasons, including newly discovered evidence. CR 60(e) establishes the procedure for vacation of judgment:

> (1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or the applicant's attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.
>
> (2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.
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> (3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

Merceri asserts that the "shall enter an order" language in CR 60(e)(2) is plain on its face. This plain language, she contends, required the trial court to issue a show cause order requiring BONY to appear and explain the July 2019 mortgage statement, which states the accelerated amount due but does not address when acceleration occurred. She also contends that, if the trial court had issued the mandatory show cause order, it would have been able to resolve this pivotal issue of fact.

But Merceri's argument disregards CR 60(e)(1), which requires the moving party to set forth "facts constituting a defense to the action or proceeding."[2]

> The prime purpose of [CR 60(e)(1)] is to prove to the court that there exists, at least prima facie, a defense to the claim. This avoids a useless subsequent trial if the defaulted defendant cannot bring forth facts to make such a showing when seeking to vacate the default. The affidavit must set out facts constituting a defense; it cannot merely state allegations and conclusions.

Farmers Ins. Co. of Wash., Inc. v. Waxman Indus., Inc., 132 Wn. App. 142, 146, 130 P.3d 874 (2006) (internal citation omitted).

CR 60(e)(1) serves a gate-keeping function by requiring the moving party to make a prima facie showing that the motion has merit. If the court determines that the moving party has made this showing, CR 60(e)(2) then requires it to enter an order fixing the time and place for a hearing and directing the non-moving party to appear and show cause why relief should be granted. If the court determines that the moving party has failed to make this showing, there is no reason to put the judgment holder through the needless expense of responding. Were this not the case, the moving party could simply move to vacate the judgment without first meeting CR 60(e)(1)'s requirements.

Merceri asserts that the trial court's denial of her motion to show cause prejudicially deprived her of an opportunity to force BONY to reveal the date her loan was accelerated. But CR 60(e)(2) is not a discovery tool for the moving

[2] Merceri was not the defendant below. But because she brought a declaratory judgment action seeking to prevent BONY from foreclosing, she was in the legal position of defending against a foreclosure proceeding. Therefore, CR 60(e)(1) required her to produce "facts constituting a defense to the action or proceeding."

party. It merely describes the process for setting an order to show cause, should one be required.

The CR 60(e)(2) show cause order is mandatory only if the moving party has met its CR 60(e)(1) burden of demonstrating a valid defense to the claim. Thus, the question before us is whether Merceri's offer of proof brings forth facts that make a prima facie showing for relief. We conclude that it does not.

A motion to vacate must show the presence of newly discovered evidence that will probably change the result of the trial. Go2Net, Inc. v. C I Host, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). Here, the July 2019 mortgage statement did not show when the acceleration took place. It cannot change the outcome of the trial court's prior rulings on remand in accordance with Merceri I. Given the trial court's determination that the newly discovered evidence did not suffice to change the outcome of the case, the court acted within its discretion in ruling on the motion to vacate without issuing a show cause order and requiring BONY to appear. Once it drew this conclusion, there was no reason to issue a CR 60(e)(2) show cause order.

BONY also argues that we must reject Merceri's arguments on mootness and collateral estoppel grounds. Because we conclude that the trial court did not err in denying Merceri's motion to vacate without a show cause hearing, we need not reach these arguments. As a result, we deny BONY's RAP 9.10 and 9.11 motion to supplement the appellate record with evidence supporting its mootness claim.

Attorney Fees on Appeal

Both parties request an award of attorney fees and costs on appeal. RAP 18.1 authorizes a party to recover reasonable attorney fees and expenses so long as the party "request[s] the fees or expenses" and "applicable law grants to a party the right to recover." RAP 18.1(a). We will award attorney fees to the prevailing party "only on the basis of a private agreement, a statute, or a recognized ground of equity." Equitable Life Leasing Corp. v. Cedarbrook, Inc., 52 Wn. App. 497, 506, 761 P.2d 77 (1988). "Generally, if such fees are allowable at trial, the prevailing party may recover fees on appeal." Thompson v. Lennox, 151 Wn. App. 479, 484, 212 P.3d 597 (2009). Here, the trial court has already awarded BONY attorney fees and costs under the deed of trust. We therefore award BONY reasonable attorney fees and costs as the prevailing party on appeal subject to compliance with RAP 18.1(d).

We affirm.

Chun, J.

WE CONCUR:

Brennan, J.

Andrus, A.C.J.