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Court of Appeals  
Division I  
State of Washington

No. 74016-4-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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KEVIN E. EDMUNDSON and MECHE D. EDMUNDSON,  
husband and wife,

Respondents,

v.

CARRINGTON MORTGAGE SERVICING, LLC,

Appellant.

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**APPELLANT'S REPLY BRIEF**

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Wesley Werich, WSBA No. 38428  
Nicolas Daluiso, WSBA No. 23505  
Robinson Tait, P.S.  
710 Second Avenue, Suite 710  
Seattle, WA 98104  
Phone: (206) 676-9640  
Facsimile: (206) 676-9659  
Counsel for Appellant

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## **I. INTRODUCTION**

This appeal results from an erroneous ruling from the trial court that the Chapter 13 bankruptcy discharge voided the Deed of Trust thereby eliminating Carrington's right to foreclose on subject property. Stability of land titles also supports finding in Carrington's favor because it contracted with the Edmundsons over a thirty year period. The Edmundsons' position erodes creditor's right and ignores the contract terms that they specifically bargained for when taking out their loan. The obligation is in effect for 30 years unless the debt is paid off earlier, or the loan is accelerated. Here, it is undisputed that neither of those things occurred here. Moreover, the Edmundsons do not argue that the bankruptcy discharged the subject deed of trust. Rather, the Edmundsons seem to argue that Carrington did not timely exercise the power of sale under the Deed of Trust despite the evidence in the record to the contrary, including the trial court's ruling that the statute of limitations had not run. ("VROP", pp. 17, ¶ 19-25).

## **II. ARGUMENT**

### **A. The Edmundsons' Stability of Land Titles Argument is Unpersuasive.**

The Edmundsons' argument concerning stability of land title is unpersuasive. Stability of land title serves only as a collateral, equity-based argument. Moreover, under the circumstances, stability of land title favors

Carrington's position. In the instant action, the Edmundsons took out a loan and agreed to pay that loan over the course of 30 years. (*CP* 125). The Edmundsons subsequently surrendered subject property in their bankruptcy proceeding. (*CP* 3-4). Consequently, contract law and principles of equity favor title being restored to Carrington opposed to the Edmundsons who breached their mortgage obligations and forfeited their property in their bankruptcy. Carrington has retained its right to enforce the Deed of Trust because undisputedly the Note was never accelerated and six years from the maturity date has not passed. Therefore, the Deed of Trust continues to be enforceable.

**B. The Edmundsons' Deed of Trust Strict Compliance Argument is Misplaced.**

Compliance with the Deed of Trust Act is not at issue here. This is not a typical "wrongful foreclosure" case where the borrower is alleging various flaws in the non-judicial foreclosure process. Rather, this case deals with when the statute of limitations on the ability to enforce Carrington's Deed of Trust began running.

**C. The Statute of Limitations Has Not Run on Carrington's Installment Contract.**

The right to enforce a deed of trust in Washington is governed by a six-year statute of limitation. RCW 4.16.040. The Edmundsons' position is that

the statute of limitations begins running the moment a lender has the right to foreclose a deed of trust. This position, however, is unsupported by Washington law. Nowhere in their brief do Respondents cite to any case law or statutory authority that provides “breach equals acceleration.” Yet, ample authority wholly supports Carrington’s position that where debt is payable in installments, as it is here, each installment payment triggers its own statute of limitations as further explained below.

The Edmundsons do not provide any opposition to Carrington’s briefing on the application of the statute of limitations to an installment contract. Unlike demand notes where the statute begins to run on the date the note becomes due, that is not the case with installment contracts. When a promissory note provides for installments, “[t]he general rule provides that “[a] separate cause of action arises on each installment, and the statute of limitations runs separately against each.” 31 Richard A. Lord, *Williston on Contracts* § 79:17 (4th ed. 2004); *see also* 25 Washington Practice §16:20 at 196 (2013-13 Supp.) (“Where a contract calls for payment of an obligation by installments, the statute of limitations begins to run for each installment at the time such payment is due); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 208–09, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997); *see also Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142 (1945).

The loan in this case is an installment contract and payments are due monthly over the course of 30 years. (CP 123). Specifically, the Deed of Trust provides that “this debt is evidenced by the Borrower’s note . . . which provides for monthly payments, with the full debt, if not paid earlier, due and payable on August 1, 2037.” (CP 9). Absent acceleration, an instrument does not mature until the date specified. *Mallroy v. J.B. Trucking, Inc.*, 100 Wn. App. 1042 (2000). Here, it is undisputed that there was no acceleration of the debt. “Mere default in payment does not mature the whole debt.” *See e.g. A.A.C. Corp. v. Reed*, 73 Wn.2d 612, 615, 440 P.2d 465 (1968). To accelerate a promissory note, affirmative action is required. Acceleration must be made in a clear and unequivocal manner. *See, e.g., Glassmaker v. Ricard*, 23 Wash. App 35, 37 (1979). Unless the creditor expressly exercises the acceleration option, the statute of limitations applies to each installment separately, and does not begin to run on any installment until it is due.

Therefore, because the loan in this case is an installment contract and acceleration did not occur, the statute of limitations did not begin running when the November 1, 2008 payment was missed as the Edmundsons allege, rather an installment payment for that month came due. It was not until the Edmundsons obtained their discharge on December 31, 2013 that the statute of limitations began running. (CP 4). The statute of limitations starts to run as of the date of discharge. *See App. B. Silvers v. U.S. Bank Nat. Ass'n*, 2015 WL 5024173, at \*4

(W.D.Wash., 2015)(“The statute of limitations on the right to enforce the Deed of Trust began running when the debt was discharged in bankruptcy”). Since there was no acceleration as a matter of law, the statute of limitations has not run, Carrington is not barred from enforcing its Deed of Trust.

**D. Non-Judicial Foreclosure Sale was Timely Initiated.**

Even if the statute of limitations began running on December 1, 2014, which it did not, it is well-established that “the commencement of a non-judicial foreclosure tolls the statute of limitations.” *Bingham v. Lechner*, 111 Wash.App. 118, 131 (2002). The issuance of the Notice of Default initiates foreclosure proceedings. *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 109, 752 P.2d 385, 386 (1988)(lender commenced foreclosure proceedings by issuing the Notice of Default); *see also Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 316-17, 308 P.3d 716, 726 (2013), as modified (Aug. 26, 2013); RCW 61.24.030. The Notice of Default precedes the Notice of Trustee’s Sale. *Vawter v. Quality Loan Serv. Corp. of Washington*, 707 F. Supp. 2d 1115, 1121 (W.D. Wash. 2010). The *Vawter* case cited to by the Edmundsons provides as follows: “[o]nce a default on the secured obligation occurs, either the beneficiary or trustee may initiate the nonjudicial foreclosure process by giving written notice of default to the borrower and grantor.” *Id.*

Moreover, a borrower may be referred to mediation by any time

*after a notice of default has been issued.* RCW 61.24.163. If the Notice of Default is not considered commencement of a non-judicial action, the referral of a borrowers to a foreclosure mediation program for a foreclosure that has not been initiated is absurd. The fact that the Notice of Trustee's Sale includes language pertaining to a borrower's right to restrain the sale has nothing to do with commencement of the non-judicial foreclosure in terms of the clock running on the statute of limitations. The Edmundsons' argument in this regard is unclear.

As discussed above, because the Note had not matured and there was no acceleration of the debt, the statute of limitations did not begin running on the initial date of default – November 1, 2008. The foreclosure was initiated on October 23, 2014 with the issuance of the Notice of Default. Therefore, had the statute of limitations been running as to the entire debt owed, which is not the case here, the non-judicial foreclosure was timely initiated.

**E. Bankruptcy did not Discharge the Debt**

The Edmundsons agree that the bankruptcy did not discharge the deed of trust lien, but they inaccurately label this as a red herring argument.<sup>1</sup> This, however, is at the core of the present appeal because the trial court

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<sup>1</sup> See Respondents' Brief, Page 1.

determined that as a result of the note becoming unenforceable as of December 13, 2013, Carrington lost its right to foreclose. *See* VROP, pp. 26, ¶¶6-11; CP 355. The trial court’s ruling contravened long-standing well-established law that liens pass through bankruptcy unaffected. “It is well-established that a lien on real property, including all amounts due thereunder, passes through a bankruptcy unaffected.” *Dewsnup v. Timm*, 502 U.S. 410, 418 (1992). “A bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*.” *Johnson v. Home State Bank*, 501 U.S. 78, 84, 111 S. Ct. 2150, 2154, 115 L. Ed. 2d 66 (1991). Therefore, the discharge itself has no effect on liens, and the creditor retains its right to foreclose upon the case's conclusion without violating the discharge injunction. *Johnson*, 501 U.S. at 84. Had the trial court applied this rule of law to the present case, Carrington would have been entitled to proceed with enforcement of its security interest. As such, the trial court erred by denying Carrington’s motion for summary judgment and subsequent motion for reconsideration, and these orders should be reversed on appeal.

#### **F. Time Tolloed During the Bankruptcy**

Carrington provides both case law and statutory authority supporting its position that even if the statute of limitations had been running, tolling would

have occurred as a result of the bankruptcy. On June 12, 2009, Edmundsons filed for Chapter 13 Voluntary and then subsequently amended the plan on August 17, 2009. The Edmundsons' first amended Chapter 13 plan provides that as follows:

“Upon confirmation, all creditors to which the debtor is surrendering property . . . are granted relief from the automatic stay to enforce their security interest against the property including taking possession and sale.”

Consequently, Carrington had to wait until receiving relief from the stay on October 22, 2009 before it could proceed with the foreclosure. (*CP* 153). Because its ability to exercise that right was frustrated by the automatic stay, tolling should be applied for that period of time. *See In re Hunters Run Ltd. Partnership*, 875 F.2d 1425, 1429 (9th Cir.1989).

Additionally, equitable tolling pursuant to RCW 4.16.230 also applies. Specifically, RCW 4.16.230 provides that

“When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action.”

Washington courts have adopted the view that when a person is prevented from exercising a legal remedy, the time during which the person is prevented from such action should not be included in calculating the statute of limitations. *Seamans v. Walgren*, 82 Wash.2d 771, 775, 514 P.2d 166 (1973).

Therefore, at a minimum, tolling should be applied from the initial filing of the bankruptcy (June 12, 2009) to the confirming of the Chapter 13 plan (October 22, 2009). In sum, Carrington strongly maintains that the statute of limitations was not running from the date of default- November 1, 2008 – but that even if it was, tolling was in effect for roughly 4 months in light of the bankruptcy.

**G. The Edmundsons Waived Their Right to Challenge the Foreclosure.**

Equity also favors overturning the trial court’s ruling and finding for Carrington on summary judgment. The question of whether equitable relief is appropriate is a question of law. *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 483, 254 P.3d 835, 841 (2011). The Edmundsons assert Carrington is not entitled to such relief because of its inaction to take the property back after plan confirmation on October 22, 2009.<sup>2</sup> The Edmundsons, however, must acknowledge three important details—(1) this is a 30 year mortgage so they are dealing with a long-term contractual obligation; (2) a Notice of Default was issued roughly five years after the relief from stay and only ten months after discharge entered on December 31, 2013; and (3) they surrendered the subject property in bankruptcy. Equity favors allowing Carrington to enforce a contractual agreement that spans over 30 years and whose security is the Property

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<sup>2</sup> Respondents’ Brief, Page. 13.

expressly surrendered by the Edmundsons in their bankruptcy.

Generally, Courts have consistently agreed that when a debtor surrenders property under § 1325(a)(5)(C), the debtor relinquishes his or her rights to the collateral in favor of the creditor. *In re Cormier*, 434 B.R. 222, 230 (Bankr. D. Mass. 2010). The Edmundsons' argument that estoppel does not apply to Carrington because of their failure to timely act is undercut by the fact that a 30-year loan is at issue here, and Edmundsons did not receive their discharge until December 31, 2013. Carrington, therefore, took less than a year to commence its foreclosure action after discharge was entered. Moreover, there is nothing in the record suggesting that Carrington or its predecessor engaged in concealment, misrepresentations, or any other sort of misconduct.

Because the Edmundsons surrendered the subject property in the bankruptcy proceeding, it is inequitable for the Edmundsons to now argue that they should be entitled to quiet title to property. The Edmundsons would receive a significant windfall if they were permitted to essentially obtain a free house that they previously abandoned and ceased making regular payments to the creditor in their Chapter 13. Moreover, the incongruous trial court ruling that the statute of limitations has not expired but that the debt is no longer enforceable because of the discharge needs to be set straight.

## H. CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's summary judgment order and find in favor of Carrington. The Court should also award Carrington its reasonable attorney fees and costs on appeal.

Respectfully submitted this 25<sup>th</sup> day of March, 2016.

By:     /s/ Wesley Werich      
Nicolaus Daluiso, WSB  
Wesley Werich, WSB #38428  
Robinson Tait, P.S.  
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Natalie Quarnstrom, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a paralegal at Robinson Tait, P.S., attorneys for Appellant, and am competent to be a witness herein.

On March 25, 2016, I caused to be served via first class, U.S. Mail a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF to the following:

Thomas H. Oldfield and  
Andrea Peterson  
Oldfield & Helsdon, PLLC  
PO Box 64189  
University Place, WA 98464

Rossi Maddalena  
Merrick, Hofstedt & Lindsey, P.S.  
3101 Western Ave., Ste. 200  
Seattle, WA 98121

/s/ Natalie Quarnstrom  
Natalie Quarnstrom