

Nos. 331768 & No. 336301

DIVISION III, COURT OF APPEALS
OF THE STATE OF WASHINGTON

WASHINGTON FEDERAL, National Association,
Respondent

v.

AZURE CHELAN, LLC, a Washington limited liability company,
Appellant

v.

LSPL CORPORATE SERVICES, INC., a Washington corporation,
Respondent

ON APPEAL FROM CHELAN COUNTY SUPERIOR COURT
(Hon. Lesley A. Allan)

JOINT BRIEF OF RESPONDENTS

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I. INTRODUCTION

A property owner may bring an action to quiet title against a lien on the property if the lienholder's right to enforce the lien is barred by the statute of limitations. Several years after Washington Federal foreclosed on a junior deed of trust encumbering certain property located in Chelan County, and purchased the property at a trustee's sale, it brought such an action against Azure Chelan, LLC ("Azure"), who held a senior deed of trust on a portion of the property. The trial court agreed that Azure's right to enforce its deed of trust was time-barred, quieted title in Washington Federal's favor, and dismissed Azure's counterclaims against Washington Federal and the foreclosure trustee, LPSL Corporate Services ("LPSL").

This Court should affirm. The undisputed evidence shows that the six-year statute of limitations on Azure's deed of trust began to run no later than May 2007, when Azure confirmed its clear and unequivocal notice to the former property owner that it had accelerated the debt on the underlying promissory note. There is no admissible evidence that the property owner paid any portion of that debt or otherwise cured its defaults, or that Azure agreed to rescind or abandon acceleration and its right to foreclose. Because Azure did not foreclose within six years of accrual—or ever, for that matter—the trial court properly concluded that Azure's deed of trust no longer had any "force and effect."

The trial court also properly rejected Azure's affirmative defenses and counterclaims challenging the validity of Washington Federal's deed of trust and ownership of the property. *First*, the "due-on-encumbrance" clause in Azure's senior lien did not invalidate the junior lien upon which Washington Federal foreclosed. Rather, under the plain language of the clause, and settled Washington law, once the owner granted the junior lien to Horizon Bank without Azure's consent, Azure was entitled to declare a default, accelerate the debt and, unless cured, foreclose on its senior lien. It is undisputed that Azure did the first two things, but not the third—and it is now time-barred from doing so.

Second, the corrected property description in the Trustee's Deed did not void the trustee's sale or harm Azure in any way. The Deeds of Trust Act does not forbid a trustee from re-wording the legal description of property for accuracy, and Azure produced no evidence to show that the Trustee's Deed described anything other than the property described in the foreclosed deed of trust. More fundamentally, it is black-letter mortgage law that Washington Federal's foreclosure on a junior lien and purchase of the property had no effect on Azure's senior lien, and LPSL owed Azure no duty under the Act with respect to the Trustee's Deed or otherwise. Azure remained free to foreclose on its senior deed of trust at any point within the six-year limitations period. It simply failed to do so.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court properly conclude that Washington Federal had standing to bring a quiet title action against Azure under RCW 7.28.300 because it was the “owner” of Phase 2 of the Property?

2. Did the trial court properly conclude that Washington Federal was entitled to an order quieting title to Phase 2 of the Property because Azure had failed to foreclose its deed of trust within six years of electing to accelerate all amounts due on the underlying promissory note?

3. Did the trial court properly conclude that Washington Federal and LPSL were entitled to summary judgment on Azure’s counter-claims because there were no grounds to invalidate the trustee’s sale, and no duty owed to or harm suffered by Azure as a senior lienholder?

III. COUNTERSTATEMENT OF THE FACTS

Azure repeatedly emphasizes the re-worded legal description in the Trustee’s Deed, and the relationship between Washington Federal and its foreclosure trustee, LPSL, to suggest that Washington Federal and LPSL conspired to invalidate Azure’s senior lien. However, Azure does not actually argue that the Deeds of Trust Act forbids a trustee from clarifying the legal description of property sold at a trustee’s sale (it doesn’t), that the legal description in the Trustee’s Deed is inaccurate (it’s not) or, most importantly, that Washington Federal’s foreclosure on Horizon Bank’s

junior lien or the Trustee's Deed had any effect whatsoever on Azure's senior lien or interest in Phase 2 of the Property (it didn't). In the end, then, only the following undisputed facts matter for purposes of appeal.¹

A. LHDD1 Grants A Senior Deed Of Trust To Azure And A Junior Deed Of Trust To Horizon Bank On Phase 2 Of The Property.

In February 2007, Lake Hills Development Division 1, LLC ("LHDD1") granted a deed of trust to Azure over a future development phase ("Phase 2") of unimproved real property located near Chelan (the "Property") that LHDD1 intended to use for residential development. CP 291-305 ("Azure Deed of Trust"). The Azure Deed of Trust secured LHDD1's obligations to Azure under a \$5.5 million Commercial Promissory Note, as well as a related Equity Redemption Agreement. CP 286-89 ("Note"). Among other terms, the Azure Deed of Trust contained a so-called due-on-encumbrance provision that required LHDD1 to repay

¹ Azure similarly insinuates that there was something sordid in the fact that LPSL is affiliated with Washington Federal's counsel, but does not actually argue that such a relationship is impermissible—for good reason. "[T]he Legislature specifically amended the statute in 1975 to allow an employee, agent or subsidiary of a beneficiary to also be a trustee." *Cox v. Helenius*, 103 Wn.2d 383, 390, 693 P.2d 683 (1985); *also Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank*, 80 Wn. App. 655, 666, 910 P.2d 1308 (1996) (trustee may serve "simultaneously as the creditor's attorney, agent, employee or subsidiary"); *Cascade Manor Assocs. v. Witherspoon, Kelley*, 69 Wn. App. 923, 935, 850 P.2d 1380 (1993) (same). Moreover, the statute expressly permits attorneys and law firm affiliates to act as trustees. *See* RCW 61.24.010.

the Note in full if it granted any junior liens on Phase 2 of the Property without Azure's consent. CP 295 (§ 4.11).

In May 2007, LHDD1 obtained a \$9.9 million construction loan from Horizon Bank to pay off various liens on the Property and to develop Phase 1 of the proposed subdivision. CP 257-58 (¶ 2). To secure payment on the loan, and without Azure's consent, LHDD1 granted Horizon Bank a deed of trust on the entire Property, including Phase 2. *Id.*; CP 261-71 ("Horizon Deed of Trust"). The Horizon Deed of Trust contains the same legal description of Phase 2 as the Azure Deed of Trust. *Id.*; CP 291-305.

B. After LHDD1 Defaults, Azure Accelerates All Amounts Due Under The Note No Later Than May 2007.

LHDD1 defaulted on the Azure obligations almost immediately. In March 2007, Azure sent a "Notice of Events of Default" notifying LHDD1 of its various defaults under the Note, the Equity Redemption Agreement and the Azure Deed of Trust. CP 307-09. The March 2007 notice stated that if the defaults were not cured, "the entire amount of the ... Note shall be due and immediately payable plus penalties and default interest." *Id.* Azure sent two supplemental notices of default in April 2007, which also warned LHDD1 that failure to cure would result in acceleration. CP 372-73; 374-75.

LHDD1 did not cure the defaults. Thus, on or around May 1, 2007 Azure sent LHDD1 a “Notice of Default” as required by the Deeds of Trust Act, declaring LHDD1 in default of its payment and performance obligations under the Note and Equity Redemption Agreement. CP 311-17. The notice informed LHDD1 that “the entire unpaid balance of the [Note], ... with the principal amount of \$5,500,000.00, plus all accrued interest and all other amounts ... are immediately due and payable,” and listed the “[a]ccelerated balance due under the ... Note” in its statement of monetary defaults and itemized account of amounts in arrears. *Id.*

Azure sent LHDD1 a supplemental notice of default later in May 2007 and another in October 2008, both of which identified additional grounds of default—including, specifically, LHDD1’s grant of a junior lien to Horizon Bank without Azure’s consent. CP 376-77; 78-87. There is no evidence in the record that Azure, in writing or otherwise, intended or agreed to abandon or rescind its May 2007 notice of acceleration. On the contrary, its October 2008 notice states that “as of October 15, 2008”—four months before the Note was due to mature in February 2009, *see* CP 286—the “Amount due” included the entire unpaid \$5.5 million principal, along with over \$1.6 million in accrued interest. CP 386.

C. Washington Federal Acquires The Horizon Loan And Deed Of Trust, And Initiates Foreclosure On The Property.

Azure continued to send LHDD1 notices of default, but it did not foreclose the Azure Deed of Trust. CP 258 (¶ 6). Meanwhile, in January 2010, Washington Federal acquired Horizon Bank's interest in the construction loan and Horizon Deed of Trust. *Id.* (¶ 3). Because LHDD1 had also defaulted on the Horizon loan, later that year, Washington Federal directed the successor trustee, LPSL, to nonjudicially foreclose on the Horizon Deed of Trust. *Id.* (¶ 4). Washington Federal purchased the Property, which included Phase 2, at a January 7, 2011 trustee's sale. *Id.* (¶ 5). Although Azure received notice of the trustee's sale, it did not make any effort to restrain the sale. *Id.*; CP 6; 68 (¶ 2.18).

Approximately a week after the trustee's sale, LPSL delivered a Trustee's Deed conveying the Property to Washington Federal, which was duly recorded. CP 273-82. The Trustee's Deed describes the Property with reference to its various parcels. *Id.* The legal description of Phase 2 in the Trustee's Deed is worded differently than the description of Phase 2 in the Horizon (and Azure) Deed of Trust. *Id.* The re-worded legal description, prepared by LPSL after consultation with the title company, is simply a more accurate description of the same Phase 2 of the Property historically described in the Horizon Deed of Trust; the Trustee's Deed

does not add or subtract any land from Phase 2. CP 417; CP 476 (¶ 1.25). There is no evidence (admissible or otherwise) that the re-worded legal description of Phase 2 in the Trustee’s Deed is inaccurate or conveys more or different property than that described in the Horizon Deed of Trust.

D. The Trial Court Quiets Title In Favor Of Washington Federal Because Azure Did Not Foreclose On The Azure Deed Of Trust Within Six Years Of Acceleration.

Because the Azure lien was senior to the Horizon lien, Washington Federal’s purchase of the Property did not impact Azure’s secured interest in Phase 2. Still, Azure did nothing to enforce the Azure Deed of Trust. So, in June 2014—more than six years after Azure accelerated the Note—Washington Federal brought an action to quiet title. CP 3-60. Azure answered, and asserted counterclaims against Washington Federal and third-party defendant LPSL. CP 66-80. In October 2014, Washington Federal amended its complaint, asserting a claim to invalidate the Azure Deed of Trust under RCW 7.28.300 on the grounds that its enforceability was barred by the statute of limitations. CP 119-20; 181-239.

Washington Federal moved for summary judgment on that basis, arguing that the six-year limitations period started when Azure accelerated the debt by May 2007. CP 240-320. In response, Azure admitted it sent the notices of default to LHDD1 in early 2007, but argued that it “either permitted LHDD1 to cure or temporarily excused performance.” CP 329.

Azure claimed that it did not accelerate the Note until mid-2009—after the Azure Note had already matured. *Id.* at 330. Azure filed a half-page declaration in support of its opposition, from its own in-house attorney (who also represented Azure in the trial court), which summarily stated that all facts in the opposition were “true and correct.” CP 336-37.

After considering additional briefing on the import of the corrected legal description in the Trustee’s Deed, the trial court granted Washington Federal’s motion for summary judgment. CP 454-59. In its Order, the court concluded that the Azure Deed of Trust was “barred by the statute of limitations and the Deed of Trust is of no force and effect.” CP 455. The court quieted title to Phase 2 in favor of Washington Federal, expressly referencing the legal description of Phase 2 contained in the Horizon and Azure Deeds of Trust, rather than the Trustee’s Deed. *Id.* Because the Order did not resolve Azure’s counterclaims, the trial court certified its Order under CR 54(b) for immediate appeal. *Id.* Azure appealed. CP 460.

Washington Federal and LPSL then moved for summary judgment on Azure’s counterclaims—arguing (among other things) that, as a senior lienholder, Azure’s interest in Phase 2 was unaffected by Washington Federal’s foreclosure on a junior lien, that the only “harm” Azure suffered was the result of its own failure to foreclose on its senior lien within the limitations period, and that LPSL owed no duty to Azure as a senior

lienholder. CP 486-500. The parties submitted no additional evidence in connection with this second motion for summary judgment. The trial court granted the motion and entered final judgment in favor of Washington Federal and LPSL. CP 544-47. Azure filed a second appeal, CP 549-50, which this Court consolidated with the first.

IV. ARGUMENT

This Court reviews summary judgment orders *de novo*, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hearst*, 154 Wn.2d at 501.

The trial court properly granted summary judgment to Washington Federal and LPSL on three grounds: (a) Washington Federal owns Phase 2 of the Property and, thus, had standing under RCW 7.28.300 to bring a quiet title action against the Azure Deed of Trust; (b) Washington Federal was entitled to quiet title because Azure failed to foreclose on its Deed of Trust within RCW 4.16.040's six-year limitations period; and (c) for these

and other reasons, Washington Federal and LPSL were entitled to a judgment as a matter of law on Azure's counterclaims.

A. Washington Federal Is The "Owner" Of The Property.

The trial court correctly rejected Azure's claim that Washington Federal lacked standing to challenge the enforceability of Azure's Deed of Trust on statute of limitations grounds. RCW 7.28.300 states:

The record *owner* of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed would be barred by the statute of limitations, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien.

(Emphasis added). It is undisputed that the Horizon Deed of Trust, upon which Washington Federal foreclosed, encumbered the entire Property, including Phase 2—the portion of the Property secured by the Azure Deed of Trust. CP 5; 67 (¶¶ 2.9, 2.14); CP 270-71; 304-05 (legal descriptions). Nor is it disputed that Washington Federal purchased the Property at the January 7, 2011 trustee's sale and its ownership is reflected in a Trustee's Deed recorded shortly after the sale. CP 6; 68 (¶ 2.19); CP 258 (¶ 5); CP 273-82 (Trustee's Deed).

As the "owner" of Phase 2 of the Property, Washington Federal plainly had standing to bring a quiet title action against the Azure Deed of Trust on statute of limitations grounds. RCW 7.28.300; *Westar Funding*,

Inc. v. Sorrels, 157 Wn. App. 777, 785, 239 P.3d 1109 (2010) (“When an action for foreclosure on a deed of trust is barred by the statute of limitations, RCW 7.28.300 authorizes an action to quiet title.”). Seeking to avoid the merits, Azure argues that Washington Federal is not an “owner” of Phase 2 of the Property because (1) the Azure Deed of Trust contained a “due-on-encumbrance” clause; and (2) the Trustee’s Deed contained a differently worded legal description of Phase 2 than the Horizon Deed of Trust. Neither argument has merit.²

1. The “Due-On-Encumbrance” Term In The Azure Deed Of Trust Did Not Invalidate The Horizon Deed of Trust.

This Court can easily reject Azure’s argument that Washington Federal is not an “owner” because the Azure Deed of Trust prohibited LHDD1 from granting junior liens, including the Horizon Deed of Trust upon which Washington Federal foreclosed. According to Azure, “the Deed of Trust that LHDD1 conveyed to Horizon Bank’s Trustee conveyed nothing because LHDD1 had nothing left to convey.” Op. Br. at 25-26. It relies on the same argument to defend its dismissed first counterclaim. *Id.*

² Azure abandons all but three of its counterclaims on appeal (including breach of fiduciary duty and slander of title) and, as to those three, it argues that the trustee’s sale is invalid and/or LPSL violated some duty owed to Azure under the Deeds of Trust Act for the same reasons it argues that Washington Federal is not the “owner” of the Property. *See* Op. Br. 43-48. Because the issues and arguments on Azure’s defenses and counterclaims are the same, to avoid redundancy, Respondents address them simultaneously in this section of their answering brief.

at 43-46. Azure cites no authority to support this novel argument—because there is none. Azure mischaracterizes the relevant provision and its effect. The Azure Deed of Trust did not forbid LHDD1 from granting a junior lien on Phase 2 of the Property. It provided that if LHDD1 did so without Azure’s prior written consent, LHDD1 had to “repay[] in full the Note and all other sums secured thereby.” CP 295 (§ 4.11). In short, the provision is not a “disabling” restraint, but an acceleration clause.

A “due-on-encumbrance” clause in a senior deed of trust does not prohibit or invalidate a junior lien on the same property. *See McCausland v. Bankers Life Ins. Co. of Nebraska*, 110 Wn.2d 716, 727, 757 P.2d 941 (1988) (“A complete, direct restraint on alienation is distinguishable from a due-on-sale clause which only requires payment of the loan upon sale.”); 18 W. Stoebuck & J. Weaver, *Wash. Practice: Real Estate: Transactions* § 18.17 (2d ed. 2004) (“A due-on-sale clause in a mortgage provides basically that the mortgage lender may accelerate the debt if the mortgagor ... transfers title without the mortgagee’s consent. Thus, the clause ... does not outright forbid, the mortgagor’s transfer of title.”); *also Moss v. Minor Prop., Inc.*, 262 Cal.App.2d 847, 855, 69 Cal. Rptr. 341 (1968) (“Although the failure of appellant to obtain such consent might give the lender the right to accelerate the loan [at] its option, it ... in no way restricts the trustor’s right to alienate the property.”).

Rather, if the grantor fails to obtain the senior lienholder's consent, the due-on-encumbrance clause permits the senior lienholder to accelerate the note and, if the borrower fails to pay, creates an event of default that permits foreclosure of the senior lien. *Id.*; Stoebuck & Weaver, *supra*, § 17.15 (“a due-on-sale clause is a kind of acceleration clause, providing that if the mortgagor attempts to convey the land subject to the mortgage without the mortgagee's consent, the mortgagee may declare the entire debt due and foreclose the mortgage.”). And that is what the Azure Deed of Trust provides too: if LHDD1 “further encumber[s]” Phase 2 of the Property without consent, LHDD1 must repay the Note “in full” (§ 4.11); failure to do so is an “Event of Default” (§ 5.1(c)); which, in turn, would permit Azure to “Foreclose this Deed of Trust” (§ 5.4(b)). CP 295-97.

Indeed, Azure could have exercised its rights under the Azure Deed of Trust to accelerate the debt and foreclose on Phase 2—thereby extinguishing Horizon's junior lien on Phase 2 years before Washington Federal acquired it. *In re Upton*, 102 Wn. App. 220, 224, 6 P.3d 1231 (2000) (“A nonjudicial foreclosure extinguishes all junior liens on the property.”). There is no dispute that Azure was aware that LHDD1 had granted Horizon a lien on the Property at least as early as May 2007—when it sent a supplemental notice of default to LHDD1 specifically identifying the Horizon Deed of Trust as a breach of the due-on-

encumbrance clause. CP 376-77. Azure’s 2008 and 2009 notices did so as well. CP 378-408. While Azure did accelerate the debt, it did not foreclose in 2007, 2008, 2009—or ever. Instead, Washington Federal became “owner” when it foreclosed on Horizon’s junior deed of trust first and purchased the Property in January 2011. CP 258 (¶ 5).

Finally, even if Azure’s Deed of Trust could somehow prohibit Washington Federal from foreclosing the Horizon Deed of Trust, it is too late for Azure to complain about it now.³ Not only did Azure know about the Horizon lien, it received notice of the January 2011 trustee’s sale. CP 6; 68 (¶ 2.18). A party can seek to restrain a trustee’s sale on any proper legal or equitable ground. *See* RCW 61.24.130. By the same token, if one receives notice of a sale and knows it has defenses to foreclosure, its failure to seek an injunction results in a waiver of the right to challenge the sale after it occurs. *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061

³ Azure argues it only admitted receiving “notice of the pending foreclosure,” but not “legally sufficient notice.” Op. Br. at 48-49. This argument is “too little, too late.” *First*, Washington Federal and LPSL specifically argued waiver in their second motion for summary judgment. CP 497-98. In response, Azure did not dispute it received statutory notice of the trustee’s sale; it failed to address the issue at all. CP 525-30. Azure cannot contest notice for the first time on appeal. RAP 9.12; *Green*, 137 Wn. App. at 687. *Second*, even if the issue were preserved, as the non-moving party, it was Azure’s burden to come forward with specific facts to show it did not receive “legally sufficient notice.” *Elcon Const., Inc. v. Eastern Wash. Univ.*, 174 Wn.2d 157, 169, 273 P.3d 965 (2012). Azure did not do that either because, as noted, it never disputed that fact.

(2003); *Merry v. Northwest Trustee Servs., Inc.*, 188 Wn. App. 174, 182-83, 352 P.3d 830 (2015). If Azure truly believed the due-on-encumbrance clause voided the Horizon Deed of Trust, it should have tried to restrain the sale. Azure did not do so because, as explained below, it knew that foreclosure of a junior lien had no effect on its senior lien. Washington Federal’s status as “owner” cannot be disputed for this reason as well.

2. The Re-Worded Legal Description Of Phase 2 In The Trustee’s Deed Did Not Invalidate The Trustee’s Sale Or Affect Azure’s Rights Under Its Senior Lien.

Azure next argues that Washington Federal is not an “owner” because the Trustee’s Deed describes Phase 2 differently than the Horizon Deed of Trust. Op. Br. at 26-32. It makes the same argument in support of its dismissed third and fifth counterclaims, alleging that the trustee’s sale was invalid and violated the Deeds of Trust Act. *Id.* at 46-48.⁴ This claim is equally baseless. To start, although it does not matter for the

⁴ In addition to arguing that the trustee’s sale should be invalidated on this basis and/or there was a violation of the Deeds of Trust Act, Azure suggests that it would also violate the Consumer Protection Act (“CPA”). Op. Br. at 48-49. But Azure did not allege violation of the CPA in its counterclaims, *see* CP 76-78, or argue the point in opposition to Washington Federal’s and LPSL’s motion for summary judgment. CP 525-30. The argument is therefore waived. Azure could not prevail on a CPA claim in any event because even if rewording a legal description violated the Deeds of Trust Act (it doesn’t), Azure would have to show—among other things—that it suffered injury as a result. *Trujillo v. Northwest Trustee Services, Inc.*, --- Wn.2d ---, 355 P.3d 1100 (2015). As explained below, because a senior lien is not affected by foreclosure of a junior lien, Azure’s CPA claim would be dead on arrival.

reasons explained below, Azure has waived any argument based on the statute of frauds. Azure did not argue (or mention) the statute of frauds in opposition to Washington Federal's first motion for summary judgment (CP 325-34), its supplemental brief (CP 421-36), or its opposition to Washington Federal and LPSL's second motion for summary judgment (CP 525-30). Azure cannot raise this issue for the first time on appeal. RAP 9.12; *Green v. Normandy Park*, 137 Wn. App. 665, 687, 151 P.3d 1038 (2007) (issues and contentions not raised in opposition to motion for summary judgment may not be considered for the first time on appeal).

Moreover, nothing in the Deeds of Trust Act forbids a trustee from re-wording the legal description of property sold at a trustee's sale. Azure presented no evidence to show that the Trustee's Deed describes anything other than Phase 2. *Elcon Const., Inc. v. Eastern Wash. Univ.*, 174 Wn.2d 157, 169, 273 P.3d 965 (2012) ("nonmoving party must set forth specific facts rebutting the moving party's contentions"). The naked hearsay from Azure's attorney that a surveyor "advised" him that the Trustee's Deed "significantly expanded" Phase 2 (CP 423) was plainly inadmissible and insufficient to carry Azure's burden on summary judgment. *Id.*; *Sparks v. Douglas County*, 39 Wn. App. 714, 717, 695 P.2d 588 (1985) (description inadequate only if surveyor could not locate the property without resort to parol evidence). Indeed, Azure claimed (again without evidence) that the

original legal description—not the corrected one—was “deficient.” CP 423. Because there is no allegation or evidence that the legal description in the Trustee’s Deed is inaccurate or defective, Azure’s reliance on the statute of frauds to invalidate the trustee’s sale is particularly inapt.

In any event, even had Azure presented evidence showing that the Trustee’s Deed purported to convey more of the Property than the same Phase 2 described in the Horizon (and Azure) Deed of Trust, it would not void the trustee’s sale. The Deeds of Trust Act states:

When delivered to the purchaser, the trustee’s deed shall convey all of the right, title, and interest in the real and personal property sold at the trustee’s sale which the grantor had or had the power to convey at the time of the execution of the deed of trust and such as the grantor may have thereafter acquired.

RCW 61.24.050(1). “The trustee’s delivery of the deed ... is a ministerial act, symbolizing conveyance of property rights to the purchaser.” *Udall v. T.D. Escrow Serv. Inc.*, 159 Wn.2d 903, 911, 154 P.3d 882 (2007). It is the trustee’s sale itself, not the trustee’s deed, that “conveys to the purchaser the rights, title, and interests possessed by the [borrower] when the borrower originally executed” the deed of trust. *Id.* at 910; *Kezner v. Landover Corp.*, 87 Wn. App. 458, 467, 942 P.2d 1003 (1997) (“Because rent was included ... in the deed of trust, specific mention of past due amounts in the legal description was not necessary.”). In short, no matter

what the Trustee's Deed says, it is undisputed that Washington Federal owns the property described in the Horizon Deed of Trust, *i.e.*, Phase 2—which is the legal description used in the order quieting title. CP 454-59.

By the same token, Azure cannot rely on a supposed discrepancy in the Trustee's Deed to void the trustee's sale because it cannot show prejudice. *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 113, 752 P.2d 385 (1988) (plaintiff must show prejudice to void trustee's sale). Washington Federal's foreclosure on Horizon's junior lien had no affect whatsoever on Azure's senior lien. It is axiomatic that "senior ... liens are unaffected by foreclosure [of junior liens] and remain on the foreclosed real estate ... even where obligations secured by senior liens are in default." *Worden v. Smith*, 178 Wn. App. 309, 320, 314 P.3d 1125 (2013). Thus, even if the Trustee's Deed did describe more of the Property than just Phase 2, it would not impact Azure's senior lien on Phase 2, on which Azure could have foreclosed even after the trustee's sale.⁵ Notably,

⁵ Azure admits as much. In trying to explain why it did not seek to restrain the trustee's sale even though it claimed such a sale violated the Azure Deed of Trust's due-on-encumbrance provision, even though it concededly had notice of this supposed defense to foreclosure, Azure admits that the "nonjudicial foreclosure of [the Horizon] Deed of Trust ... did not trigger any need in Azure to bring any suit to enjoin the sale" because Horizon's lien "was indisputably junior to, and had no effect upon Azure's rights." Op. Br. at 49. On this point, Azure is entirely correct.

nowhere in its 50-page brief does Azure once explain how the re-worded Trustee’s Deed affected its senior secured interest in Phase 2. It didn’t.

Indeed, the Deeds of Trust Act itself recognizes that a foreclosure trustee owes no duty to a senior lienholder precisely because foreclosure of a junior lien has no impact on a senior lien. A trustee is not required to give notice of sale to senior lienholders whose “lien or interest ... shall not be affected by the sale.” RCW 61.24.040(1) & (7); *also* RCW 61.24.060 (purchaser entitled to possession only against parties junior to foreclosed deed of trust). Even more to the point, the Act states that a foreclosure trustee only owes a “duty of good faith to the borrower, beneficiary, and grantor,” and “shall have no fiduciary duty or fiduciary obligation to ... other persons having an interest in the property subject to the deed of trust.” RCW 61.24.010(3) & (4). Thus, both under the common law and the Deeds of Trust Act, the trustee’s sale did not affect Azure’s lien, and the foreclosure trustee neither owed nor breached any duty to Azure under the Act or otherwise when it prepared and conveyed the Trustee’s Deed.⁶

⁶ Indeed, only the borrower could be adversely affected by a trustee’s deed that purportedly conveyed more of the borrower’s property than the property described in the foreclosed deed of trust. Here, LHDD1 never challenged the accuracy of the corrected legal description contained in the Trustee’s Deed. And, even had LHDD1 done so, the result would have been reformation of the Trustee’s Deed to conform to the parties’ original intent to describe Phase 2—not invalidation of the trustee’s sale. *See GLEPCO, LLC v. Reinstra*, 175 Wn. App. 545, 307 P.3d 744 (2013).

Finally, if all that were not enough (and it is), the trial court’s order quieting title ensures that Azure was not prejudiced by the corrected legal description contained in the Trustee’s Deed. The order quieted title in favor of Washington Federal as to Phase 2 as it is identically described in the Azure and Horizon Deeds of Trust—not as it is described in the Trustee’s Deed. CP 454-59. In the end, then, the only prejudice Azure suffered was the result of its own inaction; as described below, Azure lost its right to enforce the Azure Deed of Trust because it failed to foreclose within the six-year limitations period. Washington Federal had standing to quiet title on that basis because it is an “owner” under RCW 7.28.300.

B. The Azure Deed Of Trust Is Unenforceable Because Azure Failed To Foreclose Within Six Years After Accelerating The Amount Due On The Note.

The trial court correctly concluded that Washington Federal was entitled to an order quieting title to Phase 2 of the Property because the Azure Deed of Trust no longer had any “force and effect.” CP 455. The statute of limitations for enforcement of a deed of trust is the same as the underlying promissory note: six years. *Westar*, 157 Wn. App. at 784-85; RCW 4.16.040(1) (six-year limitations period on “action upon a contract in writing, or liability express or implied arising out of a written agreement”). For purposes of accrual, this limitations period begins to run when the deed of trust beneficiary is first entitled to enforce the debt

secured by the deed of trust through foreclosure. *Id.* at 785; *Walcker v. Benson and McLaughlin, P.S.*, 79 Wn. App. 739, 904 P.2d 1176 (1995).

The Azure Deed of Trust secured LHDD1’s monetary and non-monetary obligations under the Equity Redemption Agreement and Note.

CP 293 (§ 3.1). Upon default of those obligations, the Note provided:

... at the option of [Azure], the entire unpaid principal balance of this Promissory Note, plus all accrued and unpaid interest, and all other amounts that may be owing hereunder shall immediately become due and payable at the option of [Azure] upon written notice to [LHDD1] ... The Deed of Trust or any other lien(s) securing payment of this Promissory Note may be foreclosed in such manner as [Azure] may elect in accordance with applicable law.

CP 287 (§ 7). The Azure Deed of Trust also provided that, after notice and failure to cure, “all sums secured hereby shall become immediately due and payable,” allowing Azure to, “Foreclose this Deed of Trust.” CP 297 (§ 5.4). Thus, as Azure concedes, it was entitled to foreclose—and, thus, the six-year statute of limitations accrued—when it first elected to accelerate LHDD1’s payment obligations under the Equity Redemption Agreement and Note. Op. Br. at 35-36; *also* RCW 62A.3–118 (“an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced ... within six years after the accelerated due date”).

1. The Statute of Limitations Began To Run When Azure Gave Formal Notice Of Acceleration In May 2007.

The undisputed facts show that Azure accelerated LHDD1’s debt no later than May 2007—more than six years before Washington Federal sought to quiet title on limitations grounds in October 2014. Washington law is clear that acceleration requires some affirmative action, and “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 Wn. App. 35, 38, 593 P.2d 179 (1979) (citing *Weinberg v. Naher*, 51 Wash. 591, 99 Pac. 736 (1909)). Washington law is equally clear that, “[t]his exercise of the option ... may be exercised by giving the payors formal notice to the effect that the whole debt is declared to be due[.]” *Weinberg*, 51 Wash. at 594; *Meyers Way Dev. Ltd. P’ship v. Univ. Sav. Bank*, 80 Wn. App. 655, 660, 910 P.2d 1308 (2012) (bank sent letter to borrowers “notifying them that it had elected to accelerate the loan, making the full debt immediately due and owing”).

Azure gave clear and unequivocal notice no later than May 2007. In March 2007, Azure sent LHDD1 a “Notice of Events of Defaults” identifying LHDD1’s various defaults under the Note, Equity Redemption Agreement, and Azure Deed of Trust. CP 307-09. This notice expressly warned LHDD1 that if the defaults were not cured, “the entire amount of

the Commercial Promissory Note shall be due and immediately payable plus penalties and default interest. Azure may then elect to pursue multiple remedies including but not limited to ... non-judicial foreclosure.” *Id.* A “Supplemental Notice of Events of Default” sent in April 2007 contained the same warning of acceleration and right to foreclose. CP 372-73.

Azure meant what it said. On or around April 30 or May 1, 2007, Azure issued a “Notice of Default” notifying LHDD1 that, because it had failed to cure the defaults, “[t]he entire unpaid balance of the ... Note ..., with the principal amount of \$5,500,000.00, plus all accrued interest and all other amounts that may be owing thereunder are immediately due and payable.” CP 311-17. Similarly, in its “Itemized Account of Amounts in Arrears,” the notice listed \$5,656,151.92 as the “[a]ccelerated balance due” under the Note. *Id.* It reminded LHDD1 that failure to cure and/or pay the accelerated debt “may lead to recordation, transmittal, and publication of a Notice of Trustee’s Sale, and the property ... may be sold at public auction at a date no less than 120 days in the future.” *Id.*

Azure cannot avoid the effect of these notices. Azure first argues that there is “no evidence” that the notices were sent because Washington Federal submitted “unsigned, undated” copies in support of its motion, Op. Br. at 39-40—which was all Azure produced in discovery. CP 284 (¶ 6); CP 320. Azure did not object to the authenticity of the unsigned

copies below, and it cannot do so now. *Bonneville v. Pierce County*, 148 Wn. App. 500, 509, 202 P.3d 309 (2008). On the contrary, Azure verified that the documents were “true and correct copies” of the signed and sent versions of the notices. CP 320. Not only that, Azure did not dispute—in fact, it readily conceded—that it sent the notices to LHDD1. CP 328 (“Plaintiff correctly points out that Defendant Azure sent Notices of Events of Default to LHDD1 in late spring and early summer of 2007.”).⁷ In short, there is no dispute that Azure sent a formal notice of acceleration.

Azure next argues that the May 2007 notice was not “unequivocal” because it informed LHDD1 of its right to reinstate. Op. Br. at 41-42. Wrong. The Deeds of Trust Act allows borrowers to reinstate a deed of trust after acceleration by paying the “amount then due ... had no default occurred.” RCW 61.24.090(1)(a). Washington courts reject the notion that the right to reinstate bars acceleration, *Meyers Way*, 80 Wn. App. at 669 (“[n]othing in this provision prohibits the acceleration of a loan”), and the Act itself expressly contemplates reinstatement after acceleration. RCW 61.24.090(1)(c) (“deed of trust shall be reinstated as though no acceleration had taken place”). Indeed, Azure was statutorily required to

⁷ Indeed, the Third and Fifth Supplemental Notices of Default, signed and dated copies of which do appear in the summary judgment record, both state that the “Notice of Events of Default” was “mailed to LHDD1 on March 30, 2007,” and that the “Notice of Default” was “served on LHDD1 on April 30, 2007.” CP 376; 378.

notify LHDD1 of its right to reinstate and itemize the unaccelerated amounts then due in the Notice of Default, *see* RCW 61.24.030(8)(f)—which is what it did. CP 315. Of course, giving statutorily-required notice as a prerequisite to foreclosure is entirely consistent with acceleration.

2. There Is No Evidence That LHDD1 Reinstated The Deed Of Trust Or That Azure Abandoned Acceleration.

There is no merit to Azure’s claim that it “offered evidence that LHDD1 paid ... the amount demanded in the notice, and therefore cur[ed] the default.” Op. Br. at 41-42. The only support for this claim is a one-off statement in Azure’s opposition to Washington Federal’s motion for summary judgment, CP 329 (“LHDD1 made the required payments”)—which Azure’s own attorney purported to verify as “true and correct.” CP 336-37. His half-page declaration claims that “all” the facts in Azure’s opposition are based on “personal knowledge” but is wholly devoid of detail.⁸ Notably, Azure failed to produce a single cancelled check, bank statement, accounting, or other document (or first-person testimony from

⁸ Washington Federal properly objected to the admissibility and sufficiency of Azure’s declaration in its reply brief. CP 412; *Parks v. Fink*, 173 Wn. App. 366, 374 n. 7, 293 P.3d 1275 (2013). Although it appears that the issue has not been specifically addressed in Washington, federal courts consider this kind of perfunctory verifying declaration improper under the identical provisions of Federal Rule of Civil Procedure 56. *See, e.g., Washington v. Marymount Hosp., Inc.*, 2010 WL 447256 (N.D. Ohio Feb. 3, 2010); *Fidelity & Deposit Co. of Maryland v. Marian Prof. Constr., Inc.*, 2004 WL 1718655 (N.D. Ill. July 29, 2004); *In re Snow*, 1993 WL 428677 (N.D. Ill. Sept. 29, 1993).

Azure's and/or LHDD1's principals) evidencing payments by LHDD1. Declarations that contain only "[u]ltimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a question of fact." *Curran v. City of Marysville*, 53 Wn. App. 358, 367, 766 P.2d 1141 (1989) (citing *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 753 P.2d 517 (1988)). That is all there is here—and it is insufficient as a matter of law.⁹

Moreover, the unsupported allegation that LHDD1 satisfied the monetary defaults identified in the March 2007 notice prior to the issuance of the April 2007 supplemental notice contradicts the evidence. The May 2007 notice, in its "Statement of Monetary Defaults," identifies the same amounts owing under the Equity Redemption Agreement as the original March 2007 notice. *Compare* CP 309 & 313. In any event, LHDD1's alleged payment did not address the non-monetary defaults identified in the March 2007 notice or April 2007 supplemental notice, which Azure likewise demanded to be cured within 20 days or else "the entire amount of the Commercial Promissory Note shall be due and payable." CP 372-73. Thus, whether the defaults were monetary or non-monetary, it is

⁹ Azure notes that, under certain circumstances, partial payment on an overdue debt will toll the running of the statute of limitations. *Op. Br.* at 43 n. 77 (citing RCW 4.16.270). Conspicuously, however, Azure did not argue below, and does not argue on appeal, that the limitations period was tolled by the alleged "substantial payment" Azure says LHDD1 made after it accelerated the debt—presumably because Azure did not and cannot show that LHDD1 ever actually made such a payment or when.

undisputed that LHDD1 failed to cure, and that Azure was entitled to—and did—issue notice in May 2007 that “the accelerated balance” was due and owing. CP 311-17. If LHDD1 had cured its defaults, or Azure “excused” them, Azure would not have identified the debt as accelerated.

For similar reasons, this Court can easily reject Azure’s claim that Azure “abandoned or waived” its acceleration of LHDD1’s debt. In some circumstances, a lender can rescind its acceleration if it clearly manifests an intent to do so. M.J. Rombauer, 27 Wash. Prac., Creditors’ Remedies – Debtors’ Relief § 3.119. Here, too, Azure cites only the arguments made in opposition to Washington Federal’s motion—this time to the effect that Azure “chose to accept the actions, assurances and other commitments” and “verbal assurances” of LHDD1 rather than to initiate foreclosure. Op. Br. at 40-41, nn. 68-69, 71 (citing CP 329). As before, the conclusory assertions by Azure’s in-house counsel—unsupported by any first-hand testimony or documentary evidence—are insufficient to survive summary judgment. *Grimwood*, 110 Wn.2d at 359-60; *Elcon*, 174 Wn.2d at 169.

In fact, the only actual evidence submitted by Azure—the post-acceleration notices of default—confirm that LHDD1 never paid Azure to reinstate the Deed of Trust and that Azure never waived acceleration. Specifically, in October 2008 (well *before* Azure sent LHDD1 a second “Notice of Default” in August 2009, which it argues is the first time it

accelerated the debt, *see* Op. Br. at 12, 42), Azure sent LHDD1 a “Fifth Notice of Events of Default” which supplemented the events of default identified in the March, April and May 2007 notices. CP 378-87. The notice states unequivocally that “as of October 15, 2008”—four months before the Note was due to mature in February 2009, CP 286—the “Amount due” on the Note consisted of the entire unpaid \$5.5 million principal, along with over \$1.6 million in accrued interest. CP 386.¹⁰

Lest there be any doubt on the issue, the Note included an express “No Waiver” term, which provided that no “right or obligation ... shall be deemed to have been waived unless evidenced by a writing signed by the party against whom waiver is asserted.” CP 288. The credit agreement statute of frauds—which was disclosed in the Note, CP 289—likewise required any agreement, promise or commitment to “modify or amend” a note, “forbear with respect to the repayment of any debt,” or “make any accommodation pertaining to a debt” to be evidenced “in writing and signed by the creditor.” RCW 19.36.100-.140; *Cowlitz Bank v. Leonard*,

¹⁰ Azure’s suggestion that the supplemental notices of default were “pointless” if Azure had already accelerated the Note reveals a basic misunderstanding of the nonjudicial foreclosure process. Op. Br. at 42. As noted, under the Deeds of Trust Act, even after acceleration, a borrower can reinstate a deed of trust by curing all defaults, both monetary and non-monetary, identified in one or more notices of default. RCW 61.24.030(8). The lender therefore has every incentive to supplement the original notice to identify other events of defaults the borrower would be required to cure in order to effectively reinstate and avoid foreclosure.

162 Wn. App. 250, 254 P.3d 194 (2011) (alleged post-default oral agreement to forebear unenforceable). There is, of course, no evidence of a signed writing by Azure rescinding or abandoning its election to accelerate. Azure's *post hoc* "waiver" theory fails for this reason as well.

In sum, in the absence of any actual evidence of waiver, Azure asks the Court to simply infer that it abandoned its clear and unequivocal acceleration of the Note because it never foreclosed on the Deed of Trust. But under that theory, the statute of limitations would never run against a deed of trust. The statute of limitations accrues against a deed of trust when the beneficiary has the *right* to foreclose upon acceleration, not when it exercises that right, because the purpose of the statute is to remove clouds on title and restraints on alienation—which is why Washington Federal sought to quiet title here. In short, the fact that Azure sat on its rights supports application of the statute of limitations, not the other way around. Summary judgment was proper for this reason too.

V. CONCLUSION

The trial court properly concluded that Azure's right to enforce its Deed of Trust is barred by the statute of limitations because it failed to foreclose within six years of accelerating the debt. Azure's various defenses and counterclaims cannot resurrect that right, and were properly dismissed as well. The judgment below should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of October, 2015.

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CERTIFICATE OF SERVICE

I, Kathryn Savaria, hereby certify under penalty of perjury of the laws of the State of Washington that on October 30, 2015, I caused to be served a copy of the foregoing document on the following person(s) in the manner indicated below at the following address(es):

Mr. Brian L. Myers Attorney at Law 6026 - 25th Ave NE Seattle, WA 98115 brianmyers@mindspring.com	<input type="checkbox"/> by Electronic Mail <input type="checkbox"/> by Facsimile Transmission <input checked="" type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery
Mr. Charles D. Zimmerman Ogden Murphy Wallace, P.L.L.C. One Fifth Street, Suite 200 Wenatchee, WA 98801 czimmerman@omwlaw.com cc: lcooper@omwlaw.com lrussell@omwlaw.com	<input checked="" type="checkbox"/> by ECF (JIS) <input type="checkbox"/> by Electronic Mail <input type="checkbox"/> by Facsimile Transmission <input checked="" type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of October, 2015.

s/Kathryn Savaria

Kathryn Savaria