

COURT OF APPEALS
STATE OF WASHINGTON
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Court of Appeals No. 69959-8-1
Whatcom County Superior Court No. 12 2 00142 8

IN THE COURT OF APPEALS - STATE OF WASHINGTON
DIVISION I

GREGORY H. KIRSCH,
Plaintiff-Appellant,

v.

CRANBERRY FINANCIAL, LLC,
a Delaware Limited Liability Company

Defendant/Respondent.

REPLY BRIEF OF APPELLANT

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**I. THE STATUTE OF LIMITATION PERIOD COMMENCES
WHEN A CAUSE OF ACTION ACCRUES – NOT WHEN THE
PLAINTIFF DECIDES TO SUE**

Cranberry¹ argues that the commencement of the limitation period is dependent on its decision to exercise a “permissive” acceleration clause. It cites no authority placing the determination of accrual in the hands of the plaintiff.

At pages 10 through 11 of its brief it cites cases holding that “a cause of action accrues when the party has a right to seek relief from the court”, and, that the statute of limitation runs against a debt “from the time when an action might be brought to recover it.” Cranberry had the right to recover the entire note balance, from Channel Marine and/or Kirsch, in 2001 when the first payment was missed.

A party is not required to pursue relief in court. Whether or not to pursue a claim in court is “permissive”. A statute of limitation period that accrued when the plaintiff decided to seek relief would be meaningless. There would be no limit to when a tort victim, or a party to a breached contract, could sue. They could just claim that the statute of limitation did not commence until they decided to enforce their rights in court.

Here, Cranberry admits that there is an acceleration clause in both

¹ Here Cranberry is intended to be inclusive of the SBA, Capital Crossing and Cranberry Financial.

the note and the guarantee, but argues that it was not required to accelerate. That is true, just as the tort victim is not required to sue, and the injured party in a breached contract case is not required to sue. But if they do not sue within the limitation period they lose the right to do so; they are no longer permitted to seek relief in court.

Cranberry had the right to sue in 2001 when the first payment was missed. According to its response, it waited 12 years to seek relief from the court. It was required to seek relief within six years of having the right to do so. Cranberry is not permitted to avoid the statute of limitation by deciding not to pursue relief it had the right to pursue.

II. A MORTGAGE NOTE IS A SINGLE OBLIGATION – NOT A SERIES OF INDEPENDENT OBLIGATIONS

Cranberry argues that the mortgage note, and apparently the personal guarantee, are in fact a series of independent promises.² Under its theory the typical note and deed of trust could be enforced against the borrower at any time up to six years after the last due date for a payment.

It does not explain why interest is calculated on the entire balance from

² Cranberry makes much of the annual rather than monthly payments. However the note originally required monthly payments. There does not appear to be any legal significance in the change to annual payments.

inception (as it did in obtaining the judgment), or where in the note the independent promises are made.³

If Cranberry is correct debtors that walked away from notes could have quite a surprise (as Kirsch has) decades from now when banks pull out ancient notes and demand missed payments for the prior six years, and demand immediate payment of the remaining note balance. It would not matter if the note contained an acceleration clause, or whether the note holder had previously sued on the note, because enforcing the note through the court is “permissive”.

The cases cited by Cranberry do not support such an outlandish result. Cranberry relies on *In re Parentage of Fairbanks*, 142 Wn.App. 949, 176 P.3d 611 (2008).⁴ *Fairbanks* was concerned with whether a judgment could be obtained, and interest would accrue, on each child support payment at the time it was missed. The court concluded that each payment was a separate obligation on which judgment could be obtained. In making this determination it quoted from another case relied on by Cranberry, *Herzog v. Herzog*, 23 Wn.2d 382, 161 P.2d 142 (1945).

³ In *Herzog v. Herzog*, 23 Wn.2d 382, 387, 161 P.2d 142 (1945), a case Cranberry relies on, the court states “interest on money becomes due and payable only when the money becomes due and payable.” If the payments here are independent promises with separate statutes of limitation how can Cranberry claim interest based on the entire obligation?

⁴ Cranberry misstates the Washington Reporter page number in its brief.

Herzog, another child support case, determined, consistent with prior cases, that each child support payment constitutes a judgment when it becomes due and is not paid, and that interest applies from the date it is missed. It also holds that the six year statute of limitation applies to bar collection of missed payments, and the payment obligation ceases when the child reaches the age of majority. The case concludes by holding that the statute of limitations runs against each installment from the time it becomes due; **that is, from the time when an action might be brought to recover it.** *Emphasis supplied.*

Future child support is not a present obligation. The court or circumstances (such as the death of the child) could change or eliminate the future payment. The recipient has no right to demand immediate payment of the future obligation. Such payments cannot be accelerated. Child support cases are inapposite; they lend no support to Cranberry's position.

Cranberry also relies on *Graves v. Cascade Natural Gas Corp.*, 51 Wn.2d 233, 316 P.2d 1096 (1957). In *Graves* the court determined that the statute of limitation began to run against a bill for legal services from the time the bill was sent to the client. No note or other contract was involved in the case. To the extent it applies here, it holds that the

limitation period runs from the time that the cause of action arises, not from the time the injured party decides to sue.

Cranberry also relies on additional inapposite cases, such as *George v. Butler*, 26 Wn. 456, 67 p. 263 (1901). The question in *George*, was whether grantee of a mortgagor could plead the statute of limitation against an action to foreclose when the statute was tolled against the out of state maker of the note secured by the mortgage. The court concluded that the statute was not tolled as to the grantee. Cranberry cites the case for the proposition that the statute of limitation was applied separately to each of the two notes secured by the mortgage. Here, there is only one note.⁵

When money is borrowed, the obligation to repay the amount and the terms of payment are fixed. If the borrower fails to pay, the creditor can take the breach to the court and demand to be made whole. To make it crystal clear that the obligation to repay the entire amount accrues upon breach, notes, like the one here, include an acceleration clause.

What rational lender would loan money on the proposition that if the debtor stopped making payments the lender could not sue to collect the entire amount owed? The lender has the right to accelerate the debt and demand full payment immediately upon breach, but if it does not file suit

⁵ The statute of limitation does apply separately to the note and guarantee here, as argued in the opening brief.

within six years, it is forever barred. RCW 4.16.040.

**III. THE STATUTE OF LIMITATION IS NOT TOLLED BY
A CASE THAT IS FILED AND DISMISSED – BUT IT IS
NOT AS IF THE CASE NEVER EXISTED**

Cranberry convinced the trial court that a case that is filed and then dismissed disappears for all purposes. The trial court therefore concluded that the complaint demanding immediate payment of the entire accelerated debt, although served on the debtor and guarantor to commence the 2004 litigation, never happened. The authority cited by Cranberry does not support its position.

Cranberry points to a long line of cases that hold that the statute of limitation is not tolled by the filing and dismissal of a lawsuit. The issue arises because the statute of limitation is tolled by the filing and pendency of a lawsuit. Thus, a lawsuit may be filed within the limitation period and be prosecuted for as long as it takes to achieve resolution. But if it is dismissed, as to tolling of the statute, it is as if the case was never filed.

Cranberry attempts to expand the tolling rule to mean that the case itself, and all actions of the parties related to the case, disappear as if the dismissed case was never filed. Under such a rule deposition testimony,

discovery answers, documents produced, correspondence, would all simply vanish. They could not be used in any case for any purpose. The case law says no such thing.

Cranberry first cites *Logan v. North-West Insurance Co.*, 45 Wn.App. 95, 724 P.2d 1059 (1986). The insurance policy in *Logan* contained a one year claim limitation period. The insurer filed an action seeking a declaration of noncoverage, but the case was not pursued, and was dismissed. After years had passed the insured filed a new case, and claimed the limitation period was tolled by the dismissed case. The court rejected that argument, holding “that where an original action is dismissed, a statute of limitation is deemed to continue to run as though the action had never been brought.” The same is true in this case, the statute of limitation is not tolled by the 2004 case. But there is nothing in the *Logan* case to suggest that a dismissed case disappears, erasing all documents and claims made in the suit.

Cranberry cites *Colwell v. Eising*, 118 Wn.2d 861, 827 P.2d 1005 (1992) as stating Cranberry's position is a “basic legal premise”. *Response at 11*. In *Colwell* two partners sued a third claiming that he had been withholding management fees due them for 9 years. It was undisputed that at the beginning of the 9 year period the defendant had

refused to split management fees, and that the offended partners threatened litigation. The court found that the cause of action accrued then, at the beginning of the 9 year period, and held that suit was therefore barred by the 6 year statute of limitation. Here, Channel Marine unequivocally refused to pay the debt in 2001, as did the guarantor, and continued to refuse in response to the 2004 suit. Cranberry's cause of action therefore accrued at breach, consistent with the holding in *Colwell*.

Cranberry concedes that the 2004 suit, once dismissed, no longer tolled the statute of limitation. There is no authority supporting the proposition that the dismissal of the suit erased the admission of acceleration and the demand for full payment served on the guarantor. Dismissal of a suit removes the tolling of the limitation period, but it does not cause the past actions of the parties to evaporate.

IV. EVEN IF THE LIMITATION PERIOD COMMENCED UPON ACCELERATION, THE RECORD CONTAINS SUFFICIENT EVIDENCE OF ACCELERATION TO PREVENT SUMMARY JUDGMENT

Cranberry mistakenly asserts that Kirsch's arguments are dependent on the assumption that the 2004 lawsuit accelerated the note. Obviously, that is not so. Kirsch argues that whether or not Cranberry chose to accelerate is irrelevant; Cranberry's cause of action accrued upon

breach because the note gave it a cause of action for the full amount upon breach. But even if when Cranberry chose to accelerate were important, there is a great deal of evidence, in addition to the 2004 suit, that it accelerated more than six years before filing its claim.

Kirsch testified at summary judgment that “The SBA responded to the missed payment by declaring the loan delinquent and accelerating the debt in April of 2001 in accordance with the terms of the note.” and “Extensive correspondence between the parties, both before and after acceleration, discussed the reasons for the default, and outlined Channel Marine's claims against the SBA. The correspondence included demands by the SBA for immediate payment of the entire balance.”⁶ Prior to 2004 another “demand letter” was received by Kirsch. CP 176.⁷

Kirsch's testimony is supported by the allegation in the 2004 complaint that Capital Crossing had elected to accelerate the note and “to declare the entire principal sum and all accrued interest on the note due

6 In its response Cranberry states several times (pgs. 2, 3, 6) that Kirsch denied the allegation of accelerations under the note. No citation to the records is supplied. Appellant has not found a denial of acceleration by guarantor Kirsch in the record.

7 Cranberry complains that Kirsch does not have more documents, but Kirsch testified, “I relied on the decision by Capital Crossing to abandon its claims. My records related to the SBA loan and the litigation were no longer of importance and were discarded or lost.” CP177.

and payable.” CP 159. It is also supported by the seizure of the D.M. Fleming under the preferred marine mortgage held by Cranberry. CP 175. Documents supporting Kirsch's testimony as to the seizure of the vessel were introduced at the summary judgment hearing. CP 182-186.

At summary judgment all inferences are made in light most favorable to the nonmoving party. If whether or not the note holder chose to accelerate the debt was legally significant, there was more than enough evidence of acceleration to create a material issue of fact preventing summary judgment. In fact, the records contains no contrary evidence.

**V. IF THE STATUTE OF LIMITATION DOES NOT BAR
CRANBERRY, KIRSCH MUST BE ALLOWED TO PRESENT THE
DEBTOR'S DEFENSES**

Cranberry fails to explain why Kirsch should be prevented from bringing the defenses available to Channel Marine. Statutes of limitation never run against defenses arising out of the transactions sued upon. Allis-Chalmers Corp. v. North Bonneville, 113 Wn.2d 108, 112, 775 P.2d 953 (1989). It was error for the trial court to grant summary judgment against Kirsch on Channel Marine's defenses.

VI. CRANBERRY FAILS TO MEANINGFULLY ADDRESS EQUITABLE ESTOPPEL

Cranberry argues that it is not equitably estopped to deny acceleration because 1) it now disputes whether acceleration occurred, 2) the trial court ruled “as a matter of law” that there was no acceleration, and 3) because it would be “inequitable to allow Kirsch to borrow almost \$800,000” default, and then argue that Cranberry cannot enforce its rights.

If a party could avoid being equitably estopped because it decides later to take a different position the doctrine would never apply. If trial court rulings at summary judgment were “a matter of law” that the appellate court could not review there would be no basis for this appeal. Equitable estoppel arises from reliance, here by Kirsch on Cranberry's representations, and the unfairness of allowing a later change of position. That Cranberry now feels a different position would have been better is not the fault of Kirsch.

All of the elements of estoppel are present here. Cranberry fails to even argue that they are not.

VII. CRANBERRY FAILS TO MEANINGFULLY ADDRESS LACHES

Cranberry again fails to explain waiting over 12 years to pursue collection. Nor does it explain why it filed suit within the statute of limitation period, and then allowed that suit to be dismissed for lack of prosecution.

It makes no attempt to address the elements of laches. Its only argument is that acceleration was permissive and it chose not to. The 12 year delay in attempting to enforce its rights was unreasonable; especially when Cranberry can offer no explanation.

Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them. *Lopp v. Peninsula School District No. 401, 90 Wn.2d 754, 761, 585 P.2d 801 (1978)*. Unreasonable delay is the very essence of laches. Twelve years is unreasonable.

VIII. REMARKS AND LOGIC OF THE TRIAL COURT ARE NOT CONTROLLING

Cranberry relies on the remarks of the trial court as if the reviewing court were bound by them. Review of a summary judgment is

de novo. *Michak v. Transnation Title Ins. Co.*, 148 Wn. 2d 788, 64 P.3d 22 (2003). The appellate court does not defer to the trial court. Findings of Fact and Conclusions of Law are not entered. The summary judgment order merely lists the documents and other evidence called to the attention of the court before the order was entered. CR 56(b).

The remarks of the trial judge make it evident that he was misled into determining that 1) a cause of action accrues when a plaintiff decides to exercise a “permissive” contract clause, 2) that a demand for payment and election to accelerate contained in a complaint served on the obligor evaporate if the lawsuit is not pursued, and 3) that a guarantor does not have the right to assert the obligor's defenses to payment.

The errors of the trial judge are the reason for the appeal, the appellate court is not bound to make the same errors. It reviews the matter de novo.

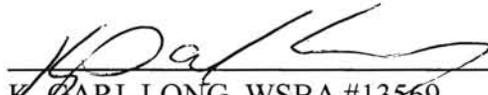
IX. CONCLUSION

The trial court should be reversed in all respects. The causes of action for collection of the note, enforcement of the guarantee, and forfeiture of the Deed of Trust all accrued in 2001 when the second note payment was missed. Cranberry's counterclaim is barred by the statute of

limitation, and should be dismissed.

As there are no disputed facts as to the statute of limitation, the Court of Appeals should grant declaratory relief clearing title to the Y Road property, and should award Kirsch attorney fees and costs.

RESPECTFULLY SUBMITTED this 9th day of August, 2013.


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I declare under penalty of perjury of the laws of the State of Washington that on this date I mailed a copy of this document to:

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