No. 97879-4

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 51479-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT C. TERHUNE and TARA TERHUNE, husband and wife; and EQUITY GROUP NWEST LLC, a Delaware Limited Liability Company,

Petitioners

v.

NORTH CASCADE TRUSTEE SERVICES, INC., a Washington corporation; DOE DEFENDANTS 1-10, inclusive,

Defendants

U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST, a National Association; and CALIBER HOME LOANS, INC.,

Respondents

PETITION FOR REVIEW

Michele K. McNeill
Attorney for Petitioners

Skyline Law Group PLLC
2155 112th Ave NE
Bellevue, WA 98004
Phone: (425) 455-4307
WSBA No. 32052

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A. IDENTITY OF PETITIONER

Robert C. Terhune, Tara Terhune and Equity Group NWest LLC, appellants below and owners of the real property at issue in this case, ask this Court to accept review of the Court of Appeals' decisions terminating review. See Part B of this petition.

B. COURT OF APPEALS DECISION

The Petitioners seek review of the Court of Appeals' decision in *Terhune v. N. Cascade Tr. Servs., Inc.*, 9 Wn.App.2d 708, 446 P.3d 683 (Div. 2 2019), filed August 13, 2019. See Appendix, pages A-1 through A-9. The Petitioners also seek review of the Court of Appeals' order denying the Petitioners' motion for reconsideration, filed October 24, 2019. See Appendix, page A-10.

C. ISSUES PRESENTED FOR REVIEW

1. Does the statute of limitations bar a beneficiary from commencing a non-judicial foreclosure proceeding to collect the entire loan balance, including interest, late fees, costs and attorneys' fees, as set out in a notice of trustee's sale, without any court oversight, where some of the installment payments are statutorily barred from enforcement?

2. Can an alleged beneficiary establish itself as the holder of a promissory note indorsed in blank based on testimony from the

beneficiary's agent where the testimony is not based on personal knowledge or review of the alleged beneficiary's business records?

3. Can an alleged beneficiary establish itself as the holder of a promissory note indorsed in blank based on a DTA declaration of beneficiary that is signed by the beneficiary's agent where "the applicable business records" that form the basis of the declaration is ambiguous?

D. STATEMENT OF THE CASE

1. U.S. Bank Trust commenced a non-judicial foreclosure almost eight years after the last payment was made on an installment contract without sufficient evidence that it was the holder of the note indorsed in blank

The Terhunes executed a promissory note for $1,499,999 in favor of Countrywide Bank (Countrywide). (CP 488-493). The note was secured by a deed of trust on the Terhunes' home. (CP 495-515). The monthly payments were $8,124.99 beginning March 1, 2008 with a maturity date of February 1, 2038. (CP 488-489; CP 87, ¶ 5).

In November of 2008, the Terhunes were no longer able to meet their financial obligations through no fault of their own and defaulted on the note. (CP 477). On December 17, 2008, Countrywide issued a Notice of Intent to Accelerate to the Terhune. (CP 158-159; CP 87, ¶ 6). The amount required to cure the default and avoid acceleration

included a past due payment for November and December 2008 plus a late charge. (CP 158). The November payment was paid in late December 2008. (CP 87, ¶ 7; CP 478, ¶ 10). Countrywide issued a second Notice of Intent to Accelerate on January 16, 2009 that included a past due payment for December 2008 and January 2009 plus a late charge. (CP 161-162; CP 87, ¶ 7). The December payment was paid on January 22, 2009. (CP 87, ¶ 8; CP 478, ¶ 10). A third and final Notice of Intent to Accelerate was issued on February 17, 2009. (CP 164-165).

The January 16, 2009 acceleration notice states in relevant part as follows:

> If the default is not cured on or before February 15, 2009, 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.
>
> . . .
>
> Failure to bring your loan current or to enter into a written agreement by February 15, 2009 as outlined above will result in the acceleration of your debt."

(bold type in original). (CP 520-521). The Notice also states:

> You may, if required by law or your loan documents, have the right to cure the default after the acceleration of the mortgage payments and prior to the foreclosure sale of your property if all amounts past due are paid within the time permitted by law.

(CP 520). This language comports with Section 19 of the Terhunes' deed of trust that allows the discontinuance of a foreclosure sale with payment of "all sums due *as if no acceleration had occurred*." (CP 502) (emphasis added). The language in the third Notice of Acceleration is identical but the deadline to cure the default to avoid acceleration was March 19, 2009. (CP 164).

The last payment made on the note was on January 22, 2009 for the December 2008 payment. (CP 478, ¶ 10). Under the express terms of the Countrywide notice of intent to accelerate, the Terhunes considered the mortgage payments accelerated with "the full amount remaining accelerated and becoming due and payable in full" as set out in the notice. (CP 478-479, 520).

On or about July 6, 2011, the Terhunes received a letter from BAC Home Loans telling them that the total amount owed on their note was the full balance of the loan, including all arears. The letter also said the "creditor to whom the debt is owed" was BANA CWB CIG HFI 1ST LIENS. (CP 481, 537-539).

In March 2015, the Terhune received a letter that said their note had been sold to "LSF9 Master Participation Trust" with a mailing address c/o Caliber Home Loans, Inc. U.S. Bank Trust is not mentioned in this letter. (CP 481, 551).

On October 13, 2015, Caliber executed an Appointment of Successor Trustee as an alleged attorney in fact for U.S. Bank Trust

to appoint North Cascade as successor Trustee. (CP 553-554). On December 8, 2015, Caliber, this time as an alleged attorney in fact for Bank of America, N.A., recorded an Assignment of Deed of Trust to convey the Terhunes' deed of trust to U.S. Bank Trust (CP 556-557).

On October 11, 2016, North Cascade Trustee Services issued a Notice of Trustee's Sale on behalf of U.S. Bank Trust with a nonjudicial foreclosure sale date set for February 17, 2017. (CP 286-289). The notice provides that the Terhunes' primary residence "will be sold to satisfy the expense of sale and the obligations secured by the Deed of Trust as provided by statute." (CP 288). The obligations secured by the Terhunes' deed of trust is the repayment of the debt evidenced by the Terhunes' promissory note, plus interest and late charges. (CP 496).

The Terhunes commenced this action in 2017 in Pierce County Superior Court, alleging in their Amended Complaint that the statute of limitations on their promissory note and deed of trust contracts had expired, and they were entitled to injunctive relief in part because U.S. Bank Trust was not the holder of their promissory note which was indorsed in blank. (CP 5-13). No counterclaims were filed.

2. The Court of Appeals held the statute of limitations did not bar the non-judicial foreclosure even though some of the installment payments are uncollectable, and held U.S. Bank Trust to be the holder of the note despite the absence of any firsthand knowledge or observation evidence in the record

U.S. Bank Trust and Caliber filed a joint motion for summary judgment supported by one declaration from an employee of Caliber. (CP 57-84, CP 85-309). The Caliber employee states he only reviewed Caliber's business records. (CP 85-92). The Declaration of Beneficiary required by RCW 61.24.030(7)(a) was signed only by an "authorized signatory" of Caliber. The Terhunes questioned the sufficiency of the evidence as to whether U.S. Bank Trust was the actual holder of the note. (CP 467-469, RP 9). The trial court granted U.S. Bank Trust and Caliber's joint summary judgment motion. (CP 597-599).

The Terhunes filed a motion for reconsideration where they argued the notice of acceleration was of a certain future event, and at a minimum the installment payments on the note that were not paid from January 1, 2009 to October 1, 2010 (for a total of $232,428.66) were still rendered unenforceable by the statute of limitations even if acceleration on the entire loan had not occurred. (CP 602-614; CP 113-114). The Terhunes also argued an issue of material fact remained as to whether U.S. Bank Trust was the actual

holder of the note. (CP 610-612). The motion for reconsideration was denied. (CP 634).

Division 2 accepted review of the trial court decisions and affirmed. (A-1 to A-9). In a published decision, the Court of Appeals held the statute of limitations did not bar the foreclosure action "because there was no clear and unequivocal acceleration of the promissory note," (Op. ¶ 3), and there was no genuine issue of material fact as to whether U.S. Bank Trust was the holder of the promissory note. (Op. ¶ 3). Division 2 also held it was "immaterial" if the statute of limitations had run on the earlier missed installment payments because U.S. Bank Trust was only seeking to sell the Terhunes' home at a non-judicial foreclosure sale. (Op. ¶ 61, FN 5). On October 24, 209, the Court of Appeals denied Terhunes' motion for reconsideration. (A-10).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Standard of Review

Discretionary acceptance by the Supreme Court of a petition for review of a Court of Appeals decision terminating review typically fall within four prescribed circumstances. RAP 13.4(b). Here, review is appropriate because the Court of Appeals decision conflicts with a decision of the Supreme Court, and it involves an issue of substantial

public interest that should be determined by the Supreme Court. RAP 13.4(b)(1) and (4).

This petition involves an issue of substantial public interest for two reasons. First, whether the statute of limitations prevents collection of all or part of a loan is not something that should be left for a beneficiary or its agent to determine in a non-judicial foreclosure proceeding without court oversight, which is essentially the form of relief the Court of Appeals has given the Terhunes that the lower courts will follow.

Second, it is unfairly prejudicial for a borrower to be burdened with proving who has possession of their promissory note when the alleged beneficiary relies solely on an agent's testimony derived only from the agent's review of the agent's business records and the beneficiary declaration required by RCW 61.24.030(7) is not signed by the alleged beneficiary.

The Court of Appeals decision also conflicts with this Court's holding that lay witness opinion testimony "must be based on firsthand knowledge or observation." *SentinelC3, Inc. v. Hunt*, 181 Wn. 2d 127, 142, 331 P.3d 40 (2014) (citing ER 701).

2. Whether the statute of limitations had run on earlier missed payments is material and should not be left up to the beneficiary or trustee to resolve in a non-judicial foreclosure sale absent court oversight

A negotiable instrument is not dependent upon any other document for its validity. RCW 62A.3–104. A mortgage, however, is dependent upon the validity of the underlying obligation to be enforceable. *See Fidelity & Deposit Co. of Maryland v. Ticor Title Ins. Co.,* 88 Wn.App. 64, 67-68, 943 P.2d 710 (1997). The Terhunes argue that the statute of limitations bars collection of all or some of their promissory note, and as a result sought to quiet title and to enjoin U.S. Bank Trust and Caliber from foreclosing on their home to pay off the entire loan. (CP 5-18, 454-475, 602-614). The Court of Appeals held the statute of limitations did not bar the foreclosure action "because there was no clear and unequivocal acceleration of the promissory note," (Op. ¶ 3), and it was "immaterial" if the statute of limitations had run on the earlier missed installment payments because U.S. Bank Trust was only seeking to sell the Terhunes' home at a non-judicial foreclosure sale. (Op. ¶ 61, FN 5).

The Court of Appeals opinion negates the parties' contracts and the Deeds of Trust Act, chapter 61.24 RCW ("DTA"). The purpose of a non-judicial foreclosure sale is to collect "all sums" owed on the promissory note, (CP 504, ¶ 22, CP 286-289). The Terhunes' also have an interest in the sale proceeds that exceed the amount

owed to the beneficiary. RCW 61.24.080(3). In a non-judicial foreclosure sale, the trustee applies the proceeds from the sale to the expense of the sale and then to "the obligation secured by the deed of trust." RCW 61.24.080(1)-(2). The obligation secured by the Terhunes' deed of trust is "all sums" secured by the deed of trust. (CP 504, ¶ 22). The total amount secured by the deed of trust is determined by the beneficiary as set out in the notice of trustee's sale. (CP 286-289). After the surplus proceeds are deposited into the Superior Court registry by the trustee, "the trustee shall be discharged from all further responsibilities for the surplus." RCW 61.24.080(3).

Even assuming the Court of Appeals is correct and the Countrywide notice of intent to accelerate was insufficient to accelerate the note even though the notice was designed to convince the borrower that acceleration would actually occur without further notice or demand if the loan was not brought current on or before a date certain, there is still $232,428.66 worth of installment payments on the Terhunes' note that fall outside the six year statutory window for enforcement. (CP 610). The Court of Appeals declined to address whether the statute of limitations applied to the earlier missed payments; Instead, this was left open for the parties to address "in the foreclosure proceeding." (Op. FN 5).

A borrower "has recourse to the courts pursuant to RCW 61.24.130 to contest the alleged default on any proper ground." RCW 61.24.030(8)(j). RCW 61.24.130 governs the restraint of a trustee's sale, which a borrower may seek "on any proper legal or equitable ground." RCW 61.24.130(1). The notice of trustee sale also informs the borrower that "[a]nyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130." RCW 61.24.040(2)(d)(IX); CP 289, § IX. The Terhunes commenced their lawsuit to enjoin the defendants from selling their home to collect on a note they believed was unenforceable in whole or in part. Had they not done so, they would have lost their home and possibly waived their claim for damages on the unenforceability of the missed installment payments. (CP 289, § IX; RCW 61.24.127).

Under RCW 61.24.127, the failure to bring a civil action to enjoin a non-judicial foreclosure sale of an owner-occupied residence will not waive a claim for damages if the claim asserts:

(a) Common law fraud or misrepresentation;

(b) A violation of Title 19 RCW;

(c) Failure of the trustee to materially comply with the provisions of this chapter; or

(d) A violation of RCW 61.24.026 (notice to senior beneficiary).

In *Merry v. Nw. Tr. Servs., Inc.*, 188 Wn. App. 174, 352 P.3d 830 (Div. 3 2015), the plaintiff sought to establish entitlement to a portion of the sale proceeds from a non-judicial foreclosure sale. But, because he took no action to restrain the trustee's sale, the defendants successfully argued that the plaintiff's interest in the proceeds was eliminated by the sale and he had waived any right to set the sale aside. *Id.,* 188 Wn. App. at 177. Division 1 in *Patrick v. Wells Fargo Bank, N.A.*, 196 Wn. App. 398, 385 P.3d 165 (Div. 1 2016), *review denied*, 187 Wn.2d 1022, 390 P.3d 346 (2017) held the borrowers waived their claims for negligence, intentional infliction of emotional distress, breach of contract, criminal profiteering, and civil conspiracy, which arose out of a non-judicial foreclosure, because they failed to use the DTA's presale injunction procedure.

A statute of limitations argument on missed installment payments that is left to be "addressed in the foreclosure proceeding" (Op. FN 5), will cause confusion in the lower courts. It negates the purpose of the DTA's presale injunction procedure and is contrary to our case law. Absent a decision on whether the statute of limitations has run on 22 of the Terhunes' earlier missed installment contract payments, the Terhunes will be faced with commencing yet another lawsuit in the next foreclosure proceeding to avoid waiving their claim

that the beneficiary is barred from collecting some of the missed installment payments from the foreclosure sale proceeds. Even if the claim were to fall within the protection of RCW 61.24.127, there is nothing to prevent the beneficiary from collecting all past due installments in a non-judicial foreclosure sale absent "recourse to the courts". RCW 61.24.030(8)(j).

Whether the statute of limitations has run on the earlier missed installment payments raises a genuine issue of material fact that the Court of Appeals should not have summarily disregarded. U.S. Bank Trust was not just seeking to sell the Terhunes' home at a non-judicial foreclosure sale (Op. ¶ 61); They were seeking to collect "all sums" owed on a promissory note where at least some of those sums are statutorily barred from collection. (CP 504, ¶ 22, CP 286-289).

3. Allowing a beneficiary to establish itself as the holder of a note based on a servicing agent's testimony that is not based on personal knowledge or review of the beneficiary's business records conflicts with this Court's decisions

"[O]nly the beneficiary has the power to appoint a trustee or successor trustee." *McDonald v. OneWest Bank, FSB*, 929 F. Supp. 2d 1079, 1086 (W.D. Wash. 2013) (citing RCW 61.24.010(2)). "[O]nly the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to

appoint a trustee to proceed with a nonjudicial foreclosure on real property." *Bain v. Metro. Mortg. Grp, Inc.*, 175 Wn.2d 83, 89, 285 P.3d 34 (2012). After the Terhunes' note was indorsed in blank, the person or entity "with possession of it" was the holder of the note. *Bavand v. OneWest Bank*, 196 Wn. App. 813, 845, 385 P.3d 233 (Div. 1 2016) (2016); RCW 62A.1–201(21)(A); RCW 62A.3–205(b).

To establish U.S. Bank Trust as the holder of the Terhunes' note, the Court of Appeals relies on the declaration of a Caliber employee, Nathanial Mansi, (Op. ¶ 20), which was the only declaration filed in support of the Respondents' motion for summary judgment. (CP 69). Mr. Mansi in turn relies on his "review of Caliber's business records" to assert that U.S. Bank Trust, a separate and distinct entity, has possession of the note. (CP 86, ¶ 1, 3).

A lay witness opinion testimony "must be based on firsthand knowledge or observation." *SentinelC3, Inc. v. Hunt*, 181 Wn. 2d 127, 142, 331 P.3d 40 (2014) (citing ER 701); *See also, State v. Fallentine,* 149 Wn.App. 614, 215 P.3d 945 (Div. 1 2009) (where lay witness testimony relates to a core element the State must prove, there must be a substantial factual basis supporting the opinion). There is nothing in Mr. Mansi's declaration to show he had firsthand knowledge or observed firsthand what U.S. Bank Trust actually had in its possession. (CP 85-92). Therefore, the Court of Appeals erred in holding that Mr. Mansi's declaration, based solely on his review of

Caliber's business records, was sufficient to prove U.S. Bank Trust had possession of the Terhunes' note when it appointed a successor trustee or commenced the non-judicial foreclosure. (Op. ¶ 56-57).

4. Whether a DTA beneficiary declaration can be signed by an agent to establish the beneficiary as the holder of the note raises an issue of substantial public interest

The Court of Appeals holds there is no genuine issue of material fact as to whether U.S. Bank Trust is the holder of the note, (Op. ¶ 51, 57), even though U.S. Bank Trust did not sign the beneficiary declaration as required by RCW 61.24.030(7)(a), and the agent's signature renders the DTA declaration ambiguous.

A beneficiary declaration signed pursuant to the DTA by someone other than the beneficiary is not sufficient proof that the beneficiary is the actual holder of the note under the express language of the DTA. *See* RCW 61.24.030(7)(a). Before a notice of trustee's sale involving residential property is recorded, transmitted, or served, "the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust." RCW 61.24.030(7)(a)(2012)[1]. This subsection goes on to state:

> A declaration *by the beneficiary* made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other

[1] In June 2018, the term "owner" was replaced with "holder". RCW 61.24.030(7)(a) (2018); A-28.

> obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

RCW 61.24.030(7)(a)(2012)[2] (emphasis added). Compare this to RCW 61.24.031(9), which allows a Foreclosure Loss Mitigation Form to be executed by the "beneficiary or authorized agent for the beneficiary." If the DTA beneficiary declaration was intended to be signed by a beneficiary's authorized agent, then our legislature would have allowed for this option, but it did not.

This Court also held in *Lyons v. U.S. Bank Nat. Ass'n* that genuine issues of material fact regarding whether the beneficiary declarations were proper, and whether they could be relied on to show that the beneficiary was the actual owner of the note, precluded summary judgment on mortgagor's Consumer Protection Act (CPA) claim against the trustee. *Lyons,* 181 Wn. 2d 775, 789, 336 P.3d 1142 (2014). Here, the Terhunes sought injunctive relief to prevent the mortgagor from selling their home because they questioned whether the mortgagor had possession of their note when it appointed the trustee and commenced the non-judicial foreclosure. (CP 5-18; 454-475; 602-614). Similar to *Lyons,* the beneficiary declaration in this case cannot be relied on to show that U.S. Bank Trust is the actual holder of the note.

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[2] In June 2018, the term "actual" was removed and "any promissory note" replaced "the promissory note." RCW 61.24.030(7)(a)(2018); A-28.

The beneficiary declaration in this case was executed by an "authorized signatory" from Caliber, as attorney in fact, based on "a review of the applicable business records." (CP 559). First, there is nothing in the record to show U.S. Bank Trust appointed Caliber as its attorney in fact despite discovery requests that required production of such evidence. (CP 481-82, ¶ 26). Second, the declaration is ambiguous regarding the actual records that Caliber's "authorized signatory" relied upon, especially when Caliber's declaration discussed in section 3 above provides that only Caliber's business records were reviewed. (CP 86, ¶ 4).

Expecting the borrower to prove that U.S. Bank Trust is not the holder of the note places an unreasonable burden on the borrower to prove a negative proposition which the law does not require them to do. The question of whether a beneficiary has actual possession of an instrument is peculiarly within the knowledge of the beneficiary and cannot be readily determined by a borrower or another entity or a trustee for that matter, ergo the DTA provision that requires the beneficiary, and only the beneficiary, to execute a declaration based on personal knowledge. RCW 61.24.030(7)(a). To impose upon the borrower the burden of proving a negative, i.e., the absence of a negotiable instrument in the hands of another, is illogical and unjust. It is also not what the DTA contemplates and is unduly prejudicial to borrowers.

The DTA requires that "the trustee shall have proof that the beneficiary is the holder of any promissory note." RCW 61.24.030(7)(a). And, only a "declaration by the beneficiary made under the penalty of perjury . . . shall be sufficient proof . . ." Id. Here, we do not have a declaration signed by the alleged beneficiary, and the actual records reviewed by the signatory is ambiguous. The entity that Caliber claims holds the Terhunes' note is silent on the issue.

> "In many jurisdictions it is accepted that a burden of proof may for certain sorts of facts be upon the accused. Certainly, the second burden, I.e. the duty of producing some evidence [ ], ought in some instances to be upon the accused."

City of Seattle v. Parker, 2 Wn. App. 331, 333, 467 P.2d 858, 860 (Div. 1 1970), quoting 9 J. Wigmore, Evidence s 2512 (3d ed. 1940). Here, a DTA beneficiary declaration should not be sufficient if it is signed by anyone other than the beneficiary, or, if an agent's declaration is to be considered sufficient, then the agent's signatory should at a minimum establish that they have at some point reviewed the business records of the beneficiary if the declaration is to be deemed sufficient proof that the beneficiary is the holder of the note.

F. CONCLUSION

This Court should accept review for the reasons indicated in Part E and reverse or modify the Court of Appeals decision to enjoin the beneficiary from collecting the entire debt that the statute of

limitations bars in whole or in part, regardless of the method of collection, and to enjoin U.S. Bank Trust and Caliber, and their employees, agents, trustees, successors and assigns, from scheduling another non-judicial foreclosure sale absent evidence based on personal knowledge and observation that U.S. Bank Trust or their successors or assigns, has actual possession of the Terhune's promissory note.

Dated this 21st day of November 2019.

SKYLINE LAW GROUP PLLC

By: */s/ Michele K. McNeill*
Michele K. McNeill
WSBA No. 32052
2155 112th Ave NE
Bellevue, WA 98004
(425) 455-4307
michele@skylinelaw.com
Attorney for Petitioners

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on November 21, 2019 I arranged for service of the foregoing Petition for Review and attached Appendix documents to the Court of Appeals Division 2 and to the parties as follows:

Office of Clerk Court of Appeals – Division 2 950 Broadway, #300 Tacoma, WA 98402	☐ U.S. Mail ☐ Hand Delivery ☒ E-filing system ☐ Email
Thomas Abbott Perkins Coie LLP 505 Howard Street, Suite 1000 San Francisco CA 94105-3204 Phone: 415-344-7099 Email: tabbott@perkinscoie.com Attorney for U.S. Bank Trust, N.A. and Caliber Home Loans, Inc.	☐ U.S. Mail ☐ Hand Delivery ☒ E-filing system ☒ Email
Kristine Kruger Perkins Coie LLP 1201 Third Ave., Ste. 4900 Seattle, WA 98101 Phone: 206-359-3111 Email: KKruger@perkinscoie.com Attorney for U.S. Bank Trust, N.A. and Caliber Home Loans, Inc.	☐ U.S. Mail ☐ Hand Delivery ☒ E-filing system ☒ Email

DATED this 21st day of November 2019 at Bellevue, Washington.

Julia M. Bryan

APPENDIX

A-1	*Terhune v. N. Cascade Tr. Servs., Inc.*, 9 Wash.App. 2d 708, 446 P.3d 683 (2019)
A-10	Order Denying Motion for Reconsideration
A-11	RCW 61.24.030 (2012-2018)
A-15	RCW 61.24.030 (2018-present)
A-21	RCW 61.24.080
A-22	RCW 61.24.127
A-24	RCW 61.24.130 (2008-2018)
A-26	RCW 61.24.130 (2018-present)

9 Wash.App.2d 708
Court of Appeals of Washington, Division 2.

Robert C. TERHUNE and Tara Terhune, husband and wife; and Equity Group NWest LLC, a Delaware Limited Liability Company, Appellant,
v.
NORTH CASCADE TRUSTEE SERVICES, INC., a Washington corporation; Defendant, U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, a National Association; Caliber Home Loans, Inc., a corporation; Doe Defendants 1-10, inclusive, Respondents.

No. 51479-6-II
|
Filed August 13, 2019

Synopsis

Background: Trustors of deed of trust that secured a promissory note brought action against trustee's purported assignee and loan servicer to enjoin the trustee's sale and to quiet title in property. The Superior Court, Pierce County, No. 17-2-05214-6, Jack Nevin, J., entered summary judgment for purported assignee and loan servicer. Trustors appealed.

Holdings: The Court of Appeals, Maxa, C.J., held that:

trustee's notice of intent to accelerate did not accelerate the promissory note;

sufficient evidence supported finding that purported assignee was the holder of the promissory note; but

promissory note's provision on attorney fees was not a basis on which the assignee could be entitled to recover attorney fees.

Affirmed.

****685** Appeal from Pierce County Superior Court, 17-2-05214-6, Honorable Jack Nevin, J.

Attorneys and Law Firms

Michele K McNeill, Skyline Law Group PLLC, 2155 112th Ave. Ne, Bellevue, WA, 98004-2912, for Appellant.

Kristine Elizabeth Kruger, Perkins Coie LLP, 1201 3rd Ave. Ste. 4900, Seattle, WA, 98101-3099, Thomas Abbott, Attorney at Law, 505 Howard St. Ste. 1000, San Francisco, CA, 94105-3222, for Respondents.

PUBLISHED OPINION

Maxa, C.J.

***711** ¶1 Robert and Tara Terhune and their closely held company Equity Group NWest (collectively, the Terhunes) appeal the trial court's order granting summary ***712** judgment in favor of U.S. Bank Trust (U.S. Bank) and Caliber Home Loans (Caliber).

¶2 In 2008, the Terhunes defaulted on a loan secured by a deed of trust on their home and in early 2009 received notices that their obligations on their promissory note would be accelerated if they did not cure the default. Caliber issued a notice of trustee's sale for the home on U.S. Bank's behalf in 2016, and the Terhunes filed a lawsuit to enjoin the foreclosure and to quiet title to their home. The Terhunes argued that the promissory note had been accelerated in 2009, which started the six-year statute of limitations. Therefore, they claimed that the statute of limitations period had expired before U.S. Bank's foreclosure action. The Terhunes also argued that U.S. Bank was not authorized to foreclose because there was no evidence that U.S. Bank was the holder of the note.

¶3 We hold that (1) the statute of limitations did not bar the foreclosure action because there was no clear and unequivocal acceleration of the promissory note; (2) the evidence established that U.S. Bank was the holder of the Terhunes' promissory note and the Terhunes failed to establish a genuine issue of fact on this question, and therefore U.S. Bank had authority to foreclose on the deed of trust; and (3) the trial court did not err in denying the Terhunes' motion for reconsideration.

¶4 Accordingly, we affirm the trial court's orders granting summary judgment in favor of U.S. Bank and Caliber and denying the Terhunes' motion for reconsideration.

FACTS

Promissory Note

¶5 On January 8, 2008, the Terhunes executed a promissory note for $1,499,999 in favor of Countrywide Bank (Countrywide). The note was secured by a deed of trust on the Terhunes' home in Lake Tapps. The note ****686** required the Terhunes to make payments of $8,124.99 on the first day of every month ***713** beginning on March 1, 2008. The maturity date of the note was February 1, 2038.

¶6 The note stated that the Terhunes would be in default if they failed to make a monthly payment on the due date. The note also included an acceleration clause, which stated,

> If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal that has not been paid and all the interest that I owe on that amount.

Clerk's Papers (CP) at 96.

¶7 The deed of trust stated that the lender must give written notice before accelerating the note obligations and that the notice must specify that "failure to cure the default on or before the date specified in the notice may result in acceleration." CP at 109 (bolding omitted). The deed of trust further provided that if the default was not cured on or before the date specified in the notice, "Lender at its option may require immediate payment in full of all sums" secured by the deed of trust. CP at 109 (bolding omitted). *Default and Notice of Intent to Accelerate*

¶8 The Terhunes made monthly payments on the mortgage from March 2008 through October 2008. On December 17, after the Terhunes failed to make the November and December payments, Countrywide sent them a Notice of Intent to Accelerate. The notice stated that the loan was in default and that the Terhunes had until January 16, 2009 to cure the default by paying the two missed payments plus late charges. The notice also stated that if the default was not cured, "the mortgage payments **will be accelerated** with the full amount remaining." CP at 158.

¶9 The Terhunes made the November payment, but did not make the December payment and failed to make the January 2009 payment. On January 16, 2009, Countrywide sent a second Notice of Intent to Accelerate. The notice ***714** stated that the loan was in default and that the Terhunes had until February 15 to cure the default by paying the two missed payments plus late charges. The notice again stated that if the default was not cured, "the mortgage payments **will be accelerated** with the full amount remaining." CP at 161.

¶10 The Terhunes made the December payment, but they did not make the January 2009 payment and failed to make the February payment. On February 17, 2009, Countrywide sent a third Notice of Intent to Accelerate. The notice stated that the loan was in default and that the Terhunes had until March 19 to cure the default by paying the two missed payments plus late charges. The notice stated, "If the default is not cured on or before March 19, 2009, the mortgage payments **will be accelerated** with the full amount remaining." CP at 164.

¶11 The Terhunes failed to make any further payments on the loan. However, there is no evidence that Countrywide provided any formal notice to the Terhunes that the loan actually had been accelerated.

2010 Foreclosure Action

¶12 In November 2009, BAC Home Loans Servicing, LP (BAC) sent the Terhunes a notice stating that BAC was servicing their loan and that their account was seriously delinquent. The notice stated that the past due amount was $86,382. In March 2010, BAC sent the Terhunes a notice of default stating that the total amount in arrears was $158,188.86.

¶13 In August 2010, the trustee of the deed of trust sent the Terhunes a notice of foreclosure, which stated that their property would be sold in December if their default was not cured. The notice stated that the amount in arrears was $216,503.61, and that the Terhunes had until November 22 to cure the default by paying all accrued charges that by that time were estimated to be $256,210.39. The trustee also recorded a notice of trustee's sale for December 3, 2010, which showed that the amount in arrears was $216,611.75.

***715** ¶14 In November, the Terhunes filed a lawsuit against BAC and others seeking, among other relief, an injunction

to prevent the trustee's sale and to quiet title to their home. The Terhunes' lawsuit eventually was **687 dismissed. But there is no evidence that the trustee continued to pursue foreclosure at that time.

Transfers of Note/Deed of Trust

¶15 In March 2015, LSF9 Master Participation Trust notified the Terhunes that it had purchased their loan. The Trust's mailing address was listed as "c/o Caliber Home Loans, Inc." CP at 551. On June 4, Caliber notified the Terhunes that it was the new servicer of the loan. In a June 5 letter, Caliber notified the Terhunes that the creditor on the loan was LSF9 Master Participation Trust and that their total debt was $2,292,209.26. However, the letter stated, "We are not requesting that you pay the entire loan balance." CP at 187.

¶16 In September 2015, Bank of America (as successor by merger to BAC) assigned its beneficial interest in the deed of trust to U.S. Bank, as trustee for LSF9 Master Participation Trust. On October 7, a representative of Caliber signed a declaration referencing the Terhunes' loan and stating that "U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST is the beneficiary ... and actual holder of the promissory note or other obligation secured by the deed of trust." CP at 559. Above the signature line the declaration stated, "U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, by Caliber Home Loans, Inc., as its attorney in fact." CP at 559. The document was signed by a person who listed her title as "authorized signatory." CP at 559.

2016 Foreclosure Action and Lawsuit

¶17 In December 2015, the trustee of the deed of trust sent the Terhunes a notice of default, which stated that U.S. Bank was the creditor on the loan, Caliber was the servicer *716 of the loan, and the Terhunes owed $732,627.78 in overdue payments, late charges, and advances on the loan.

¶18 On October 11, 2016, the trustee recorded a notice of trustee's sale for February 17, 2017. The notice stated that the total amount in arrears was $669,729.11 and that the Terhunes had until February 6, 2017 to cure the default by paying that amount.

¶19 On February 7, the Terhunes filed a lawsuit against U.S. Bank as trustee for LSF9 Master Participation Trust and Caliber [1] to enjoin the trustee's sale and to quiet title in their property. [2] The Terhunes claimed that the notice of trustee's sale was invalid because the statute of limitations to enforce the promissory note and deed of trust had expired, and that the trustee did not have the authority to initiate a trustee's sale because U.S. Bank was not the holder of the note.

¶20 U.S. Bank and Caliber filed a joint summary judgment motion. They argued that the statute of limitations had not expired because the loan was never accelerated. In support of their summary judgment motion, U.S. Bank and Caliber submitted the declaration of Nathaniel Mansi, a Caliber employee. Mansi stated that Countrywide did not accelerate the Terhunes' loan, and that "[a]t no time has the Loan been accelerated." CP at 92. He also stated that Countrywide had endorsed the promissory note in blank and that U.S. Bank was the owner of and was in possession of the note. Mansi stated that he made his declaration based on personal knowledge and his review of Caliber's business records regarding the Terhune loan.

¶21 The trial court granted the summary judgment motion. The Terhunes filed a motion for reconsideration *717 arguing that there was no evidence to support the trial court's ruling. The trial court denied reconsideration.

¶22 The Terhunes appeal the trial court's orders granting U.S. Bank's and Caliber's summary judgment motion and denying the Terhunes' motion for reconsideration.

**688 ANALYSIS

A. LEGAL PRINCIPLES

1. Standard of Review

¶23 We review a trial court's decision on a summary judgment motion de novo. *Merceri v. Bank of N.Y. Mellon*, 4 Wash. App. 2d 755, 759, 434 P.3d 84, *review denied* 192 Wash.2d 1008, 430 P.3d 244 (2018). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). We view all facts and reasonable inferences drawn from those facts in the light most favorable to the nonmoving party. *Merceri*, 4 Wash. App. 2d at 759, 434 P.3d 84.

¶24 The moving party bears the initial burden of proving that there is no genuine issue of material fact. *Zonnebloem v. Blue Bay Holdings, LLC*, 200 Wash. App. 178, 183, 401 P.3d 468 (2017). Once a moving defendant shows that there is an

absence of evidence to support the plaintiff's case, the burden shifts to the plaintiff to present specific facts that rebut the defendant's contentions and show a genuine issue of material fact. *Id.*

2. Nonjudicial Foreclosure

¶25 The Deed of Trust Act (DTA), chapter 61.24 RCW, "provides an alternative to judicial foreclosure by allowing for the private sale of foreclosed property." *River Stone Holdings NW, LLC v. Lopez*, 199 Wash. App. 87, 92, 395 P.3d 1071 (2017). The underlying deed of trust creates three distinct roles: a lender, a borrower, and a trustee who holds the deed as security for the lender. *Id.* at 93, 395 P.3d 1071. If the borrower ***718** defaults on the obligations owed to the lender, the trustee may foreclose on the property in a trustee's sale. *Id.*; RCW 61.24.030(3).

¶26 The DTA provides detailed procedures under RCW 61.24.030, .031, and .040 for foreclosing a deed of trust and conducting a trustee's sale. If a trustee fails to strictly comply with the DTA, the trustee lacks statutory authority to conduct a trustee's sale and any such sale is invalid. *River Stone Holdings*, 199 Wash. App. at 93, 395 P.3d 1071.

B. STATUTE OF LIMITATIONS FOR PROMISSORY NOTE

¶27 The Terhunes argue that the trial court erred by ruling that the statute of limitations did not bar U.S. Bank and Caliber from enforcing the promissory note. They argue that there were questions of material fact regarding whether their loan was accelerated in 2009, which would have resulted in the accrual of U.S. Bank's claim at that time. We disagree.

1. Legal Principles

¶28 A promissory note and deed of trust, as written contracts, are subject to a six-year statute of limitations for such contracts. RCW 4.16.040(1); *Cedar W. Owners Ass'n v. Nationstar Mortg., LLC*, 7 Wash. App. 2d 473, 482, 434 P.3d 554, *review denied* 193 Wash.2d 1016, 441 P.3d 1200 (2019). The six-year period begins "after the cause of action has accrued." RCW 4.16.005. For an installment promissory note, the cause of action "accrues for each monthly installment from the time it becomes due." *Cedar W. Owners Ass'n*, 7 Wash. App. 2d at 484, 434 P.3d 554. The final six-year period for taking action on an installment note does not begin to run until the note fully matures. *Merceri*, 4 Wash. App. 2d at 760, 434 P.3d 84. [3]

¶29 However, if a lender accelerates an installment note, "the entire remaining balance becomes due and the ***719** statute of limitations is triggered for all installments that had not previously become due." *4518 S. 256th, LLC v. Karen L. Gibbon, PS*, 195 Wash. App. 423, 434-35, 382 P.3d 1 (2016).

¶30 For acceleration to occur, the lender must take some affirmative action that informs the borrower that the entire debt is immediately due. *Merceri*, 4 Wash. App. 2d at 760, 434 P.3d 84. " '[A]cceleration must be ****689** 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.* at 761, 434 P.3d 84 (quoting *Glassmaker v. Ricard*, 23 Wash. App. 35, 38, 593 P.2d 179 (1979)). A default on the loan alone will not accelerate a note, even if an installment note provides for automatic acceleration upon default. *Merceri*, 4 Wash. App. 2d at 760, 434 P.3d 84. And even the initiation of nonjudicial foreclosure proceedings does not automatically accelerate a note. *4518 S. 256th*, 195 Wash. App. at 436-445, 382 P.3d 1.

¶31 If the statute of limitations has expired on a promissory note secured by a deed of trust on real property, the owner is entitled to quiet title on the property. *Cedar W. Owners Ass'n*, 7 Wash. App. 2d at 482, 434 P.3d 554. Under RCW 7.28.300, "[t]he 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 of trust would be barred by the statute of limitations."

¶32 Here, the Terhunes defaulted on their promissory note in February 2009, but the foreclosure proceedings at issue here were not initiated until October 2016. Therefore, if Countrywide accelerated the loan in 2009, the statute of limitations period may have run on enforcement of the note before the 2016 foreclosure action. [4] Accordingly, we must determine whether the Terhunes presented any evidence to ***720** establish an issue of fact regarding whether Countrywide accelerated the note.

2. Analysis

¶33 The Terhunes argue that Countrywide accelerated their obligations on the promissory note on February 17, 2009 when it sent the Terhunes the Notice of Intent to Accelerate. The notice stated that if the Terhunes did not cure the default before March 19, 2009, the mortgage payments "**will be accelerated**." CP at 164. The Terhunes claim that

Countrywide was conditionally electing to exercise its right to accelerate the payments, and that the Terhunes' failure to cure the default automatically triggered the acceleration of the loan. They assert that this language is sufficient to at least create a question of fact regarding whether acceleration occurred.

¶34 However, the evidence does not support the conclusion that Countrywide took an affirmative action in 2009 that clearly and unequivocally informed the Terhunes that the note had been accelerated. First, as the title of the document indicated, the Notice of Intent to Accelerate was a statement only of an *intent* to accelerate at some time in the future if the Terhunes did not cure. The notice stated that the note "will" be accelerated, CP at 164, not that the note *was* accelerated. The argument that the failure to cure automatically triggered acceleration is inconsistent with the rule that the lender must take some affirmative action to accelerate a note. *Merceri*, 4 Wash. App. 2d at 760, 434 P.3d 84.

¶35 Second, there is no evidence that Countrywide ever gave the Terhunes formal notice that the note had been accelerated. The argument that such notice is not required is inconsistent with the rule that acceleration must be invoked clearly and unequivocally. *Id.*

¶36 Third, in multiple subsequent statements and notices, BAC and Caliber made it clear that that they were seeking to recover past due installment payments, not the full balance of the loan. BAC's first notice to the Terhunes ***721** in November 2009, eight months after the Terhunes claim acceleration occurred, stated that the past due amount was $86,382. BAC did not state that the full amount of the loan was due. The 2010 and 2015 notices of default both stated that the amount in arrears was the amount of the unpaid installments, not the full amount of the loan. All the notices in the 2010 and 2016 foreclosure were based on the past due installment payments rather than the full amount of the loan, and stated that payment ****690** of the past due amounts could stop the foreclosure.

¶37 The Terhunes argue that certain notices from loan servicers stated the entire balance of the loan. They reference a July 6, 2011 letter from BAC stating that the Terhunes owed $1,830,002 on the loan without mentioning an option to bring the account current by making missed payments. But stating the outstanding balance on the loan does not mean that the full balance is immediately due.

¶38 Fourth, U.S. Bank and Caliber submitted the declaration of Mansi, who stated based on his review of the records for the Terhunes' loan that Countrywide did not accelerate the loan and that the loan had never been accelerated.

¶39 Two cases from other divisions of our court have rejected arguments similar to the Terhunes' argument here. In *Merceri*, Division One addressed a bank's notice of intent to accelerate containing language identical to Countrywide's "will be accelerated" notice. 4 Wash. App. 2d at 760-62, 434 P.3d 84. The court held that this notice did not accelerate the loan. *Id.* at 760, 763, 434 P.3d 84. The court acknowledged that the bank warned that the entire debt would be accelerated if the borrower failed to cure her default. *Id.* at 761, 434 P.3d 84. But the court relied on evidence similar to the evidence presented here in finding no acceleration:

> Thereafter, the Bank did not take an affirmative action in a clear and unequivocal manner indicating that the payments on the loan had been accelerated. The Bank never declared that the entire debt was due.
>
> ...
>
> In addition, mortgage statements ***722** sent to Merceri after the February 2010 notice show the amount due as merely the sum of unpaid past due installments, not the full principal.

Id. The court also noted that the lender repeatedly informed the borrower that the amount due was the missed monthly payments rather than the entire loan amount and never sent a notice of default stating that the full balance was due. *Id.* at 763, 434 P.3d 84.

¶40 In *U.S. Bank National Association v. Ukpoma*, Division Three held that acceleration did not occur even though the lender gave notice that it had elected to accelerate. 8 Wash. App. 2d 254, 259, 438 P.3d 141 (2019). In that case, a notice stated that the bank had elected to accelerate the loan, but the notice then contradicted itself by stating that the borrower could reinstate the loan by paying the delinquent payments. *Id.* at 256-57, 438 P.3d 141. The court stated that this contradiction made the notice unclear rather than a clear and unequivocal acceleration. *Id.* at 259, 438 P.3d 141. In addition, the court emphasized that all subsequent notices showed that the note had not been accelerated. *Id.*

¶41 In contrast, in *Washington Federal, National Association v. Azure Chelan LLC*, Division Three held that acceleration

had occurred under the facts of that case. 195 Wn. App. 644, 662-64, 382 P.3d 20 (2016). There, a notice of default explicitly stated that the total amount due was the accelerated balance due under the promissory note. *Id.* at 663, 382 P.3d 20. The notice also stated that as a consequence of the default, the entire principal amount of the promissory note plus interest was "immediately due and payable." *Id.* at 663-64, 382 P.3d 20. The court held that this statement in the notice of default was sufficient to prove that the lender had accelerated the loan. *Id.* at 664, 382 P.3d 20.

¶42 Our case is similar to *Merceri*, not to *Washington Federal*. Here, the notice of intent to accelerate used the same conditional language as in *Merceri*. And, unlike *Washington Federal*, Countrywide and its successors never indicated in a subsequent statement or notice that it was ***723** seeking the entire balance of the mortgage. In addition, the deed of trust explicitly required the lender to give advance notice before accelerating the mortgage payments. A notice of *intent* to accelerate is such an advance notice, not an affirmative election. And a conditional statement that failure to cure the default *will* accelerate the loan in the future does not unequivocally alert the borrower that the ****691** note holder *has* already elected to accelerate the loan.

¶43 We conclude that the Terhunes failed to establish a question of material fact whether Countrywide or its successors took an affirmative action that clearly and equivocally accelerated their promissory note and therefore that the statute of limitations had expired on U.S. Bank's foreclosure action. Accordingly, we hold that the trial court did not err in granting U.S. Bank's and Caliber's summary judgment motion with regard to the Terhunes' quiet title action.

C. HOLDER OF THE PROMISSORY NOTE

¶44 The Terhunes argue that the trial court erred by ruling that U.S. Bank had authority to enforce the deed of trust. They argue that summary judgment is inappropriate because there was a question of material fact whether U.S. Bank is the holder of the promissory note. We disagree.

1. Legal Principles

¶45 Chapter 62A RCW provides for the enforcement of negotiable instruments like promissory notes. Under RCW 62A.3-301, the holder of an instrument is entitled to enforce an instrument. *See Brown v. Dep't. of Commerce*, 184 Wash.2d 509, 524-25, 359 P.3d 771 (2015). A "holder" includes a person in possession of a negotiable instrument that is payable to bearer. RCW 62A.1-201(b)(21)(A). And an instrument is payable to bearer when a holder makes a blank endorsement – an endorsement that does not specify the person to whom the instrument is payable. RCW 62A.3-205(b).

***724** ¶46 Here, Countrywide endorsed the Terhunes' promissory note in blank. Therefore, the person in possession of the note was the holder under RCW 62A.1-201(b)(21)(A).

¶47 To initiate a trustee's sale under RCW 61.24.030(7)(a), the trustee must have proof that the beneficiary of a promissory note is the actual holder of the note with the authority to appoint a trustee to commence a nonjudicial foreclosure. *Blair v. Nw. Tr. Servs., Inc.*, 193 Wash. App. 18, 31, 372 P.3d 127 (2016). However, "[a] declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the holder of any promissory note or other obligation secured by the deed of trust shall be sufficient proof." RCW 61.24.030(7)(a); *see Blair*, 193 Wash. App. at 34, 372 P.3d 127.

2. Analysis

¶48 Here, the record contains two pieces of evidence showing that U.S. Bank is the holder of the Terhunes' note. The beneficiary declaration signed by Caliber as attorney in fact for U.S. Bank states that U.S. Bank was the actual holder of the Terhunes' note. And Mansi's declaration states that based on his review of the business records regarding the Terhunes' note, U.S. Bank had possession of the note.

¶49 This evidence satisfied U.S. Bank's initial burden of proving that there was no genuine issue of material fact. The burden then shifted to the Terhunes to present specific facts that demonstrated a genuine issue of material fact. *Zonnebloem*, 200 Wash. App. at 183, 401 P.3d 468. However, the Terhunes presented no evidence or even an inference from the evidence that U.S. Bank was not the holder of their note. Instead, they only challenge the adequacy of U.S. Bank's evidence.

¶50 First, the Terhunes argue that the beneficiary declaration was insufficient because it was not signed by U.S. Bank. Instead, it was signed by Caliber as the attorney in fact for U.S. Bank. The Terhunes emphasize that ***725** RCW 61.24.030(7) requires the *beneficiary* of the note to sign the declaration, and not the beneficiary's agent.

¶51 However, the Supreme Court in *Bain v. Metropolitan Mortgage Group, Inc.* stated, "[N]othing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves of the use of agents." 175 Wash.2d 83, 106, 285 P.3d 34 (2012). An agent includes an attorney in fact. *See* RCW 11.125.020(1); *In re Estates of Palmer*, 145 Wash. App. 249, 263, 187 P.3d 758 (2008). As a result, we conclude that a beneficiary's attorney in fact can sign a beneficiary declaration on behalf of the beneficiary.

****692** ¶52 The Terhunes note that the record does not contain an appointment of Caliber as U.S. Bank's attorney in fact. But the record contains evidence that Caliber was U.S. Banks's agent. And the Terhunes produced no evidence that Caliber was not U.S. Bank's agent and therefore was not authorized to sign the beneficiary affidavit.

¶53 Second, the Terhunes argue that the declaration was insufficient because the language is ambiguous as to whether U.S. Bank is the holder of the promissory note. They focus on the statement that U.S. Bank was the "actual holder of the promissory note *or other obligation secured by the deed of trust*." CP at 559 (emphasis added). They claim that this case is controlled by *Lyons v. U.S. Bank National Association*, 181 Wash.2d 775, 336 P.3d 1142 (2014).

¶54 In *Lyons*, the Supreme Court held that the trustee could not rely on a declaration by the note holder because the language of the declaration was ambiguous. *Id.* at 791, 336 P.3d 1142. The declaration stated that a bank was " 'the actual holder of the promissory note or other obligation evidencing the above-referenced loan *or has requisite authority under RCW 62A.3-301 to enforce said obligation*.' " *Id.* at 780, 336 P.3d 1142 (emphasis added) (quoting record). The court stated that the declaration was ambiguous regarding whether the bank was the holder of the note or had some other authority to enforce the note. *Id.* at 790-91, 336 P.3d 1142. Therefore, the court held that the ***726** declaration was not sufficient to establish the bank's holder status. *Id.* at 791, 336 P.3d 1142; *see also Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wash.2d 820, 826, 355 P.3d 1100 (2015) (holding that the same language was ambiguous and insufficient).

¶55 But the beneficiary declaration here did not include the language that the court in *Lyons* found ambiguous: " '*or has requisite authority under RCW 62A.3-301 to enforce said obligation*.' " 181 Wash.2d at 780, 336 P.3d 1142 (emphasis added) (quoting record). Instead, the declaration stated that U.S. Bank is the holder of the note or other obligation. The Terhunes argue that the declaration was ambiguous just as in *Lyons* because the declaration stated that U.S. Bank was the holder of the note "*or* other obligation." CP at 559 (emphasis added). But the declaration here tracked the statutory language. RCW 61.24.030(7)(a) provides that a beneficiary declaration stating that "the beneficiary is the holder of any promissory note *or other obligation* secured by the deed of trust" is sufficient proof that the beneficiary is the holder of the note. (Emphasis added.) Therefore, we conclude that the declaration language was not ambiguous and satisfied the statutory requirement.

¶56 Third, the Terhunes argue that the Mansi declaration is insufficient to prove that U.S. Bank had possession of the note because he was an employee of Caliber, not U.S. Bank, and lacked personal knowledge as to whether U.S. Bank actually had possession of the note. However, Caliber was the servicer of the Terhunes' loan and Mansi reviewed Caliber's business records regarding the loan. Therefore, he did have personal knowledge based on that review regarding the promissory note. And there is no requirement that only the holder can present evidence regarding possession of the note. The Terhunes' arguments may go to the weight of Mansi's testimony, but they presented no evidence to refute it.

¶57 We hold that the Terhunes failed to establish a question of material fact as to whether U.S. Bank was the holder of the Terhunes' promissory note and therefore had ***727** authority to foreclose on the note. Accordingly, we hold that the trial court did not err in granting U.S. Bank's and Caliber's summary judgment motion with regard to the Terhunes' claims.

D. MOTION FOR RECONSIDERATION

¶58 The Terhunes argue that the trial court erred in denying their reconsideration motion. We disagree.

¶59 CR 59(a) provides nine grounds under which a party can move for reconsideration of a trial court's decision. *E.g.*, *Christian v. Tohmeh*, 191 Wash. App. 709, 728, 366 P.3d 16 (2015). Under CR 59(a)(7), a party may argue that there is no evidence or reasonable inference from the evidence to support the trial court's ruling. We review a trial court's ****693** decision on a reconsideration motion for an abuse of discretion. *Fed. Home Loan Bank of Seattle v. RBS Sec., Inc.*, 3 Wash. App. 2d 642, 648, 418 P.3d 168 (2018). A trial court abuses its discretion if its decision is manifestly unreasonable, based on untenable grounds, or unsupported by the record. *Id.*

¶60 The Terhunes argued on reconsideration that at a minimum U.S. Bank could not recover installment payments not made before October 2010 based on the statute of limitations. On appeal, the Terhunes argue that the trial court erred in rejecting this argument.

¶61 The Terhunes may be correct that the statute of limitations had run on their earlier missed installment payments because the claim on those payments accrued when they were missed. But U.S. Bank was not seeking to "recover" any payments; it was seeking a nonjudicial foreclosure of the Terhunes' property. A trustee's sale is allowed if "a" default has occurred on the secured obligation, RCW 61.24.030(3), and therefore U.S. Bank was entitled to foreclose based on the later missed payments. And the Terhunes generally cannot be held personally liable in a nonjudicial foreclosure action. RCW 61.24.100(1). ***728** Therefore, whether some of the earlier payments were subject to the statute of limitations is immaterial. [5]

¶62 The Terhunes also argued on reconsideration that there was no evidence to support the trial court's summary judgment ruling that U.S. Bank was the holder of the note. However, as discussed above, the evidence showed that U.S. Bank was the holder.

¶63 Accordingly, we hold that the trial court did not err in denying the Terhunes' motion for reconsideration.

E. ATTORNEY FEES ON APPEAL

¶64 U.S. Bank and Caliber request attorney fees on appeal. We may grant an award of reasonable attorney fees under RAP 18.1(a) if allowed under the applicable law. The prevailing party in a breach of contract action can recover reasonable attorney fees if the contract specifically provides for such an award. *4518 S. 256th*, 195 Wash. App. at 446, 382 P.3d 1. U.S. Bank and Caliber apparently rely on the attorney fee provision in the promissory note.

¶65 The only provision in the promissory note regarding attorney fees is paragraph 7(E) which states, "If the Note Holder has required [the borrower] to pay immediately in full as described above, the Note Holder will have the right to be paid back by [the borrower] for all of its costs and expenses in enforcing this Note. ... Those expenses include, for example, reasonable attorneys' fees." CP at 96. This provision allows for the recovery of attorney fees only if the note obligations have been accelerated. Because we hold above that the note was not accelerated, U.S. Bank is not entitled to recover attorney fees under the note.

¶66 The Terhunes also request attorney fees and costs on appeal under the note. Because we affirm the trial court's ***729** orders, the Terhunes are not entitled to recover attorney fees and costs because they are not the substantially prevailing party.

CONCLUSION

¶67 We affirm the trial court's orders granting U.S. Bank's and Caliber's summary judgment motion and denying the Terhunes' motion for reconsideration.

We concur:

LEE, J.

CRUSER, J.

All Citations

9 Wash.App.2d 708, 446 P.3d 683

Footnotes

1 The lawsuit also named North Cascade Trustee Services, Inc., the trustee of the deed of trust, as a defendant. North Cascade later was dismissed from the lawsuit.

2 The Terhunes also asserted a claim for violation of the Consumer Protection Act, chapter 19.86 RCW. The Terhunes have not appealed the trial court's dismissal of that claim.

3 Some courts have adopted a rule that the initiation of nonjudicial foreclosure proceedings tolls the statute of limitations, at least as long as the lender acts diligently in perfecting its remedies. *See Cedar W. Owners Ass'n*, 7 Wash. App. 2d at 488-89.

4 U.S. Bank and Caliber argue that even if the promissory had been accelerated, the statute of limitations was tolled when the first foreclosure action was started. Because we hold that the note was not accelerated, we do not address this issue.

5 The Terhunes argue that whether the statute of limitations has expired on earlier missed payments may be relevant if their house sells for more than the outstanding balance of their loan. We do not address whether the statute of limitations would apply to earlier missed payments if U.S. Bank attempts directly or indirectly to recover the amount of those payments in the foreclosure proceeding. Instead, that issue can be addressed in the foreclosure proceeding.

End of Document

Filed
Washington State
Court of Appeals
Division Two
October 24, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ROBERT C. TERHUNE and TARA TERHUNE, husband and wife; and EQUITY GROUP NWEST LLC, a Delaware Limited Liability Company, Appellants, v. NORTH CASCADE TRUSTEE SERVICES, INC., a Washington corporation; Defendant, U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST, a National Association; CALIBER HOME LOANS, INC., a corporation; DOE DEFENDANTS 1-10, inclusive, Respondents.	No. 51479-6-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellants moved for reconsideration of the August 13, 2019 opinion in the above-entitled matter. Upon consideration, the court denies the motion. Accordingly, it is

IT IS SO ORDERED.

Panel: Jj. Maxa, Lee, Cruser

FOR THE COURT:

Maxa, C.J.
Chief Judge

West's Revised Code of Washington Annotated
Title 61. Mortgages, Deeds of Trust, and Real Estate Contracts (Refs & Annos)
Chapter 61.24. Deeds of Trust (Refs & Annos)

This section has been updated. Click here for the updated version.

West's RCWA 61.24.030

61.24.030. Requisites to trustee's sale

Effective: June 7, 2012 to June 6, 2018

It shall be requisite to a trustee's sale:

(1) That the deed of trust contains a power of sale;

(2) That the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes; provided, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially. Real property is used for agricultural purposes if it is used in an operation that produces crops, livestock, or aquatic goods;

(3) That a default has occurred in the obligation secured or a covenant of the grantor, which by the terms of the deed of trust makes operative the power to sell;

(4) That no action commenced by the beneficiary of the deed of trust is now pending to seek satisfaction of an obligation secured by the deed of trust in any court by reason of the grantor's default on the obligation secured: PROVIDED, That (a) the seeking of the appointment of a receiver shall not constitute an action for purposes of this chapter; and (b) if a receiver is appointed, the grantor shall be entitled to any rents or profits derived from property subject to a homestead as defined in RCW 6.13.010. If the deed of trust was granted to secure a commercial loan, this subsection shall not apply to actions brought to enforce any other lien or security interest granted to secure the obligation secured by the deed of trust being foreclosed;

(5) That the deed of trust has been recorded in each county in which the land or some part thereof is situated;

(6) That prior to the date of the notice of trustee's sale and continuing thereafter through the date of the trustee's sale, the trustee must maintain a street address in this state where personal service of process may be made, and the trustee must maintain a physical presence and have telephone service at such address;

(7)(a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

(b) Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.

(c) This subsection (7) does not apply to association beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW;

(8) That at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default shall be transmitted by the beneficiary or trustee to the borrower and grantor at their last known addresses by both first-class and either registered or certified mail, return receipt requested, and the beneficiary or trustee shall cause to be posted in a conspicuous place on the premises, a copy of the notice, or personally served on the borrower and grantor. This notice shall contain the following information:

(a) A description of the property which is then subject to the deed of trust;

(b) A statement identifying each county in which the deed of trust is recorded and the document number given to the deed of trust upon recording by each county auditor or recording officer;

(c) A statement that the beneficiary has declared the borrower or grantor to be in default, and a concise statement of the default alleged;

(d) An itemized account of the amount or amounts in arrears if the default alleged is failure to make payments;

(e) An itemized account of all other specific charges, costs, or fees that the borrower, grantor, or any guarantor is or may be obliged to pay to reinstate the deed of trust before the recording of the notice of sale;

(f) A statement showing the total of (d) and (e) of this subsection, designated clearly and conspicuously as the amount necessary to reinstate the note and deed of trust before the recording of the notice of sale;

(g) A statement that failure to cure the alleged default within thirty days of the date of mailing of the notice, or if personally served, within thirty days of the date of personal service thereof, may lead to recordation, transmittal, and publication of a notice of sale, and that the property described in (a) of this subsection may be sold at public auction at a date no less than one hundred twenty days in the future, or no less than one hundred fifty days in the future if the borrower received a letter under RCW 61.24.031;

(h) A statement that the effect of the recordation, transmittal, and publication of a notice of sale will be to (i) increase the costs and fees and (ii) publicize the default and advertise the grantor's property for sale;

(i) A statement that the effect of the sale of the grantor's property by the trustee will be to deprive the grantor of all their interest in the property described in (a) of this subsection;

(j) A statement that the borrower, grantor, and any guarantor has recourse to the courts pursuant to RCW 61.24.130 to contest the alleged default on any proper ground;

(k) In the event the property secured by the deed of trust is owner-occupied residential real property, a statement, prominently set out at the beginning of the notice, which shall state as follows:

"THIS NOTICE IS ONE STEP IN A PROCESS THAT COULD RESULT IN YOUR LOSING YOUR HOME.

You may be eligible for mediation in front of a neutral third party to help save your home.

CONTACT A HOUSING COUNSELOR OR AN ATTORNEY LICENSED IN WASHINGTON NOW to assess your situation and refer you to mediation if you might benefit. Mediation **MUST** be requested between the time you receive the Notice of Default and no later than twenty days after the Notice of Trustee Sale is recorded.

DO NOT DELAY. If you do nothing, a notice of sale may be issued as soon as 30 days from the date of this notice of default. The notice of sale will provide a minimum of 120 days' notice of the date of the actual foreclosure sale.

BE CAREFUL of people who claim they can help you. There are many individuals and businesses that prey upon borrowers in distress.

REFER TO THE CONTACTS BELOW for sources of assistance.

SEEKING ASSISTANCE

Housing counselors and legal assistance may be available at little or no cost to you. If you would like assistance in determining your rights and opportunities to keep your house, you may contact the following:

The statewide foreclosure hotline for assistance and referral to housing counselors recommended by the Housing Finance Commission

Telephone: ..... Web site: .....

The United States Department of Housing and Urban Development

Telephone: ..... Web site: .....

The statewide civil legal aid hotline for assistance and referrals to other housing counselors and attorneys

Telephone: ..... Web site: ....."

The beneficiary or trustee shall obtain the toll-free numbers and web site information from the department for inclusion in the notice; and

(l) In the event the property secured by the deed of trust is residential real property, the name and address of the owner of any promissory notes or other obligations secured by the deed of trust and the name, address, and telephone number of a party acting as a servicer of the obligations secured by the deed of trust; and

(9) That, for owner-occupied residential real property, before the notice of the trustee's sale is recorded, transmitted, or served, the beneficiary has complied with RCW 61.24.031 and, if applicable, RCW 61.24.163.

Credits

[2012 c 185 § 9, eff. June 7, 2012; 2011 c 58 § 4, eff. July 22, 2011; 2009 c 292 § 8, eff. July 26, 2009. Prior: 2008 c 153 § 2, eff. June 12, 2008; 2008 c 108 § 22, eff. June 12, 2008; 1998 c 295 § 4; 1990 c 111 § 1; 1987 c 352 § 2; 1985 c 193 § 3; 1975 1st ex.s. c 129 § 3; 1965 c 74 § 3.]

West's RCWA 61.24.030, WA ST 61.24.030
Current with all legislation from the 2019 Regular Session of the Washington Legislature

End of Document

West's Revised Code of Washington Annotated
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Chapter 61.24. Deeds of Trust (Refs & Annos)

West's RCWA 61.24.030

61.24.030. Requisites to trustee's sale

Effective: June 7, 2018
Currentness

It shall be requisite to a trustee's sale:

(1) That the deed of trust contains a power of sale;

(2) That the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes; provided, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially. Real property is used for agricultural purposes if it is used in an operation that produces crops, livestock, or aquatic goods;

(3) That a default has occurred in the obligation secured or a covenant of the grantor, which by the terms of the deed of trust makes operative the power to sell;

(4) That no action commenced by the beneficiary of the deed of trust is now pending to seek satisfaction of an obligation secured by the deed of trust in any court by reason of the grantor's default on the obligation secured: PROVIDED, That (a) the seeking of the appointment of a receiver, or the filing of a civil case to obtain court approval to access, secure, maintain, and preserve property from waste or nuisance, shall not constitute an action for purposes of this chapter; and (b) if a receiver is appointed, the grantor shall be entitled to any rents or profits derived from property subject to a homestead as defined in RCW 6.13.010. If the deed of trust was granted to secure a commercial loan, this subsection shall not apply to actions brought to enforce any other lien or security interest granted to secure the obligation secured by the deed of trust being foreclosed;

(5) That the deed of trust has been recorded in each county in which the land or some part thereof is situated;

(6) That prior to the date of the notice of trustee's sale and continuing thereafter through the date of the trustee's sale, the trustee must maintain a street address in this state where personal service of process may be made, and the trustee must maintain a physical presence and have telephone service at such address;

(7)(a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the holder of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the holder of any promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

(b) Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.

(c) This subsection (7) does not apply to association beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW;

(8) That at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default and, for residential real property, the beneficiary declaration specified in subsection (7)(a) of this section shall be transmitted by the beneficiary or trustee to the borrower and grantor at their last known addresses by both first-class and either registered or certified mail, return receipt requested, and the beneficiary or trustee shall cause to be posted in a conspicuous place on the premises, a copy of the notice, or personally served on the borrower and grantor. This notice shall contain the following information:

(a) A description of the property which is then subject to the deed of trust;

(b) A statement identifying each county in which the deed of trust is recorded and the document number given to the deed of trust upon recording by each county auditor or recording officer;

(c) A statement that the beneficiary has declared the borrower or grantor to be in default, and a concise statement of the default alleged;

(d) An itemized account of the amount or amounts in arrears if the default alleged is failure to make payments;

(e) An itemized account of all other specific charges, costs, or fees that the borrower, grantor, or any guarantor is or may be obliged to pay to reinstate the deed of trust before the recording of the notice of sale;

(f) A statement showing the total of (d) and (e) of this subsection, designated clearly and conspicuously as the amount necessary to reinstate the note and deed of trust before the recording of the notice of sale;

(g) A statement that failure to cure the alleged default within thirty days of the date of mailing of the notice, or if personally served, within thirty days of the date of personal service thereof, may lead to recordation, transmittal, and publication of a notice of sale, and that the property described in (a) of this subsection may be sold at public auction at a date no less than one hundred twenty days in the future, or no less than one hundred fifty days in the future if the borrower received a letter under RCW 61.24.031;

(h) A statement that the effect of the recordation, transmittal, and publication of a notice of sale will be to (i) increase the costs and fees and (ii) publicize the default and advertise the grantor's property for sale;

(i) A statement that the effect of the sale of the grantor's property by the trustee will be to deprive the grantor of all their interest in the property described in (a) of this subsection;

(j) A statement that the borrower, grantor, and any guarantor has recourse to the courts pursuant to RCW 61.24.130 to contest the alleged default on any proper ground;

(k) In the event the property secured by the deed of trust is owner-occupied residential real property, a statement, prominently set out at the beginning of the notice, which shall state as follows:

"THIS NOTICE IS ONE STEP IN A PROCESS THAT COULD RESULT IN YOUR LOSING YOUR HOME.

You may be eligible for mediation in front of a neutral third party to help save your home.

CONTACT A HOUSING COUNSELOR OR AN ATTORNEY LICENSED IN WASHINGTON NOW to assess your situation and refer you to mediation if you might benefit. Mediation **MUST** be requested between the time you receive the Notice of Default and no later than twenty days after the Notice of Trustee Sale is recorded.

DO NOT DELAY. If you do nothing, a notice of sale may be issued as soon as 30 days from the date of this notice of default. The notice of sale will provide a minimum of 120 days' notice of the date of the actual foreclosure sale.

BE CAREFUL of people who claim they can help you. There are many individuals and businesses that prey upon borrowers in distress.

REFER TO THE CONTACTS BELOW for sources of assistance.

SEEKING ASSISTANCE

Housing counselors and legal assistance may be available at little or no cost to you. If you would like assistance in determining your rights and opportunities to keep your house, you may contact the following:

The statewide foreclosure hotline for assistance and referral to housing counselors recommended by the Housing Finance Commission

Telephone: ..... Website: .....

The United States Department of Housing and Urban Development

Telephone: ..... Website: .....

The statewide civil legal aid hotline for assistance and referrals to other housing counselors and attorneys

Telephone: ..... Website: ..... "

The beneficiary or trustee shall obtain the toll-free numbers and web site information from the department for inclusion in the notice;

(l) In the event the property secured by the deed of trust is residential real property, the name and address of the holder of any promissory note or other obligation secured by the deed of trust and the name, address, and telephone number of a party acting as a servicer of the obligations secured by the deed of trust;

(m) For notices issued after June 30, 2018, on the top of the first page of the notice:

(i) The current beneficiary of the deed of trust;

(ii) The current mortgage servicer for the deed of trust; and

(iii) The current trustee for the deed of trust;

(9) That, for owner-occupied residential real property, before the notice of the trustee's sale is recorded, transmitted, or served, the beneficiary has complied with RCW 61.24.031 and, if applicable, RCW 61.24.163;

(10) That, in the case where the borrower or grantor is known to the mortgage servicer or trustee to be deceased, the notice required under subsection (8) of this section must be sent to any spouse, child, or parent of the borrower or grantor known to the trustee or mortgage servicer, and to any owner of record of the property, at any address provided to the trustee or mortgage servicer, and to the property addressed to the heirs and devisees of the borrower.

(a) If the name or address of any spouse, child, or parent of such deceased borrower or grantor cannot be ascertained with use of reasonable diligence, the trustee must execute and record with the notice of sale a declaration attesting to the same.

(b) Reasonable diligence for the purposes of this subsection (10) means the trustee shall search in the county where the property is located, the public records and information for any obituary, will, death certificate, or case in probate within the county for the borrower and grantor;

(11) Upon written notice identifying the property address and the name of the borrower to the servicer or trustee by someone claiming to be a successor in interest to the borrower's or grantor's property rights, but who is not a party to the loan or promissory note or other obligation secured by the deed of trust, a trustee shall not record a notice of sale pursuant to RCW 61.24.040 until the trustee or mortgage servicer completes the following:

(a) Acknowledges the notice in writing and requests reasonable documentation of the death of the borrower or grantor from the claimant including, but not limited to, a death certificate or other written evidence of the death of the borrower or grantor. The claimant must be allowed thirty days from the date of this request to present this documentation. If the trustee or mortgage servicer has already obtained sufficient proof of the borrower's death, it may proceed by acknowledging the claimant's notice in writing and issuing a request under (b) of this subsection.

(b) If the mortgage servicer or trustee obtains or receives written documentation of the death of the borrower or grantor from the claimant, or otherwise independently confirms the death of the borrower or grantor, then the servicer or trustee must request in writing documentation from the claimant demonstrating the ownership interest of the claimant in the real property. A claimant has sixty days from the date of the request to present this documentation.

(c) If the mortgage servicer or trustee receives written documentation demonstrating the ownership interest of the claimant prior to the expiration of the sixty days provided in (b) of this subsection, then the servicer or trustee must, within twenty days of receipt of proof of ownership interest, provide the claimant with, at a minimum, the loan balance, interest rate and interest reset dates and amounts, balloon payments if any, prepayment penalties if any, the basis for the default, the monthly payment amount, reinstatement amounts or conditions, payoff amounts, and information on how and where payments should be made. The mortgage servicers shall also provide the claimant application materials and information, or a description of the process, necessary to request a loan assumption and modification.

(d) Upon receipt by the trustee or the mortgage servicer of the documentation establishing claimant's ownership interest in the real property, that claimant shall be deemed a "successor in interest" for the purposes of this section.

(e) There may be more than one successor in interest to the borrower's property rights. The trustee and mortgage servicer shall apply the provisions of this section to each successor in interest. In the case of multiple successors in interest, where one or more do not wish to assume the loan as coborrowers or coapplicants, a mortgage servicer may require any nonapplicant successor in interest to consent in writing to the application for loan assumption.

(f) The existence of a successor in interest under this section does not impose an affirmative duty on a mortgage servicer or alter any obligation the mortgage servicer has to provide a loan modification to the successor in interest. If a successor in interest assumes the loan, he or she may be required to otherwise qualify for available foreclosure prevention alternatives offered by the mortgage servicer.

(g) (c), (e), and (f) of this subsection (11) do not apply to association beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW; and

(12) Nothing in this section shall prejudice the right of the mortgage servicer or beneficiary from discontinuing any foreclosure action initiated under the deed of trust act in favor of other allowed methods for pursuit of foreclosure of the security interest or deed of trust security interest.

Credits

[2018 c 306 § 1, eff. June 7, 2018; 2012 c 185 § 9, eff. June 7, 2012; 2011 c 58 § 4, eff. July 22, 2011; 2009 c 292 § 8, eff. July 26, 2009. Prior: 2008 c 153 § 2, eff. June 12, 2008; 2008 c 108 § 22, eff. June 12, 2008; 1998 c 295 § 4; 1990 c 111 § 1; 1987 c 352 § 2; 1985 c 193 § 3; 1975 1st ex.s. c 129 § 3; 1965 c 74 § 3.]

OFFICIAL NOTES

Findings--Intent--Short title--2011 c 58: See notes following RCW 61.24.005.

Findings--2008 c 108: See RCW 19.144.005.

Application--1985 c 193: See note following RCW 61.24.020.

Notes of Decisions (63)

West's RCWA 61.24.030, WA ST 61.24.030
Current with all legislation from the 2019 Regular Session of the Washington Legislature

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Chapter 61.24. Deeds of Trust (Refs & Annos)

West's RCWA 61.24.080

61.24.080. Disposition of proceeds of sale--Notices--Surplus funds

Effective: June 12, 2014
Currentness

The trustee shall apply the proceeds of the sale as follows:

(1) To the expense of sale, including a reasonable charge by the trustee and by his or her attorney: PROVIDED, That the aggregate of the charges by the trustee and his or her attorney, for their services in the sale, shall not exceed the amount which would, by the superior court of the county in which the trustee's sale occurred, have been deemed a reasonable attorney fee, had the trust deed been foreclosed as a mortgage in a noncontested action in that court;

(2) To the obligation secured by the deed of trust; and

(3) The surplus, if any, less the clerk's filing fee, shall be deposited, together with written notice of the amount of the surplus, a copy of the notice of trustee's sale, and an affidavit of mailing as provided in this subsection, with the clerk of the superior court of the county in which the sale took place. The trustee shall mail copies of the notice of the surplus, the notice of trustee's sale, and the affidavit of mailing to each party to whom the notice of trustee's sale was sent pursuant to RCW 61.24.040(1). The clerk shall index such funds under the name of the grantor as set out in the recorded notice. Upon compliance with this subsection, the trustee shall be discharged from all further responsibilities for the surplus. Interests in, or liens or claims of liens against the property eliminated by sale under this section shall attach to the surplus in the order of priority that it had attached to the property, as determined by the court. A party seeking disbursement of the surplus funds shall file a motion requesting disbursement in the superior court for the county in which the surplus funds are deposited. Notice of the motion shall be personally served upon, or mailed in the manner specified in RCW 61.24.040(1)(b), to all parties to whom the trustee mailed notice of the surplus, and any other party who has entered an appearance in the proceeding, not less than twenty days prior to the hearing of the motion. The clerk shall not disburse such surplus except upon order of the superior court of such county.

Credits
[2014 c 107 § 2, eff. June 12, 2014; 1998 c 295 § 10; 1981 c 161 § 5; 1967 c 30 § 3; 1965 c 74 § 8.]

Notes of Decisions (15)

West's RCWA 61.24.080, WA ST 61.24.080
Current with all legislation from the 2019 Regular Session of the Washington Legislature

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Chapter 61.24. Deeds of Trust (Refs & Annos)

West's RCWA 61.24.127

61.24.127. Failure to bring civil action to enjoin foreclosure--Not a waiver of claims

Effective: July 22, 2011
Currentness

(1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting:

(a) Common law fraud or misrepresentation;

(b) A violation of Title 19 RCW;

(c) Failure of the trustee to materially comply with the provisions of this chapter; or

(d) A violation of RCW 61.24.026.

(2) The nonwaived claims listed under subsection (1) of this section are subject to the following limitations:

(a) The claim must be asserted or brought within two years from the date of the foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier;

(b) The claim may not seek any remedy at law or in equity other than monetary damages;

(c) The claim may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property;

(d) A borrower or grantor who files such a claim is prohibited from recording a lis pendens or any other document purporting to create a similar effect, related to the real property foreclosed upon;

(e) The claim may not operate in any way to encumber or cloud the title to the property that was subject to the foreclosure sale, except to the extent that a judgment on the claim in favor of the borrower or grantor may, consistent with RCW 4.56.190, become a judgment lien on real property then owned by the judgment debtor; and

(f) The relief that may be granted for judgment upon the claim is limited to actual damages. However, if the borrower or grantor brings in the same civil action a claim for violation of chapter 19.86 RCW, arising out of the same alleged facts, relief under chapter 19.86 RCW is limited to actual damages, treble damages as provided for in RCW 19.86.090, and the costs of suit, including a reasonable attorney's fee.

(3) This section applies only to foreclosures of owner-occupied residential real property.

(4) This section does not apply to the foreclosure of a deed of trust used to secure a commercial loan.

Credits

[2011 c 364 § 2, eff. July 22, 2011; 2009 c 292 § 6, eff. July 26, 2009.]

Notes of Decisions (20)

West's RCWA 61.24.127, WA ST 61.24.127
Current with all legislation from the 2019 Regular Session of the Washington Legislature

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Title 61. Mortgages, Deeds of Trust, and Real Estate Contracts (Refs & Annos)
Chapter 61.24. Deeds of Trust (Refs & Annos)

This section has been updated. Click here for the updated version.

West's RCWA 61.24.130

61.24.130. Restraint of sale by trustee--Conditions--Notice

Effective: June 12, 2008 to June 6, 2018

(1) Nothing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper legal or equitable ground, a trustee's sale. The court shall require as a condition of granting the restraining order or injunction that the applicant pay to the clerk of the court the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed:

(a) In the case of default in making the periodic payment of principal, interest, and reserves, such sums shall be the periodic payment of principal, interest, and reserves paid to the clerk of the court every thirty days.

(b) In the case of default in making payment of an obligation then fully payable by its terms, such sums shall be the amount of interest accruing monthly on said obligation at the nondefault rate, paid to the clerk of the court every thirty days.

In the case of default in performance of any nonmonetary obligation secured by the deed of trust, the court shall impose such conditions as it deems just.

In addition, the court may condition granting the restraining order or injunction upon the giving of security by the applicant, in such form and amount as the court deems proper, for the payment of such costs and damages, including attorneys' fees, as may be later found by the court to have been incurred or suffered by any party by reason of the restraining order or injunction. The court may consider, upon proper showing, the grantor's equity in the property in determining the amount of said security.

(2) No court may grant a restraining order or injunction to restrain a trustee's sale unless the person seeking the restraint gives five days notice to the trustee of the time when, place where, and the judge before whom the application for the restraining order or injunction is to be made. This notice shall include copies of all pleadings and related documents to be given to the judge. No judge may act upon such application unless it is accompanied by proof, evidenced by return of a sheriff, the sheriff's deputy, or by any person eighteen years of age or over who is competent to be a witness, that the notice has been served on the trustee.

(3) If the restraining order or injunction is dissolved after the date of the trustee's sale set forth in the notice as provided in RCW 61.24.040(1)(f), the court granting such restraining order or injunction, or before whom the order or injunction is returnable, shall, at the request of the trustee, set a new sale date which shall be not less than forty-five days from the date of the order dissolving the restraining order. The trustee shall:

(a) Comply with the requirements of RCW 61.24.040(1) (a) through (f) at least thirty days before the new sale date; and

(b) Cause a copy of the notice of trustee's sale as provided in RCW 61.24.040(1)(f) to be published in a legal newspaper in each county in which the property or any part thereof is situated once between the thirty-fifth and twenty-eighth day before the sale and once between the fourteenth and seventh day before the sale.

(4) If a trustee's sale has been stayed as a result of the filing of a petition in federal bankruptcy court and an order is entered in federal bankruptcy court granting relief from the stay or closing or dismissing the case, or discharging the debtor with the effect of removing the stay, the trustee may set a new sale date which shall not be less than forty-five days after the date of the bankruptcy court's order. The trustee shall:

(a) Comply with the requirements of RCW 61.24.040(1) (a) through (f) at least thirty days before the new sale date; and

(b) Cause a copy of the notice of trustee's sale as provided in RCW 61.24.040(1)(f) to be published in a legal newspaper in each county in which the property or any part thereof is situated, once between the thirty-fifth and twenty-eighth day before the sale and once between the fourteenth and seventh day before the sale.

(5) Subsections (3) and (4) of this section are permissive only and do not prohibit the trustee from proceeding with a trustee's sale following termination of any injunction or stay on any date to which such sale has been properly continued in accordance with RCW 61.24.040(6).

(6) The issuance of a restraining order or injunction shall not prohibit the trustee from continuing the sale as provided in RCW 61.24.040(6).

Credits

[2008 c 153 § 5, eff. June 12, 2008; 1998 c 295 § 14; 1987 c 352 § 5; 1981 c 161 § 8; 1975 1st ex.s. c 129 § 6; 1965 c 74 § 13.]

West's RCWA 61.24.130, WA ST 61.24.130
Current with all legislation from the 2019 Regular Session of the Washington Legislature

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Chapter 61.24. Deeds of Trust (Refs & Annos)

West's RCWA 61.24.130

61.24.130. Restraint of sale by trustee--Conditions--Notice

Effective: June 7, 2018
Currentness

(1) Nothing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper legal or equitable ground, a trustee's sale. The court shall require as a condition of granting the restraining order or injunction that the applicant pay to the clerk of the court the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed:

(a) In the case of default in making the periodic payment of principal, interest, and reserves, such sums shall be the periodic payment of principal, interest, and reserves paid to the clerk of the court every thirty days.

(b) In the case of default in making payment of an obligation then fully payable by its terms, such sums shall be the amount of interest accruing monthly on said obligation at the nondefault rate, paid to the clerk of the court every thirty days.

In the case of default in performance of any nonmonetary obligation secured by the deed of trust, the court shall impose such conditions as it deems just.

In addition, the court may condition granting the restraining order or injunction upon the giving of security by the applicant, in such form and amount as the court deems proper, for the payment of such costs and damages, including attorneys' fees, as may be later found by the court to have been incurred or suffered by any party by reason of the restraining order or injunction. The court may consider, upon proper showing, the grantor's equity in the property in determining the amount of said security.

(2) No court may grant a restraining order or injunction to restrain a trustee's sale unless the person seeking the restraint gives five days notice to the trustee of the time when, place where, and the judge before whom the application for the restraining order or injunction is to be made. This notice shall include copies of all pleadings and related documents to be given to the judge. No judge may act upon such application unless it is accompanied by proof, evidenced by return of a sheriff, the sheriff's deputy, or by any person eighteen years of age or over who is competent to be a witness, that the notice has been served on the trustee.

(3) If the restraining order or injunction is dissolved after the date of the trustee's sale set forth in the notice as provided in RCW 61.24.040(2), the court granting such restraining order or injunction, or before whom the order or injunction is returnable, shall, at the request of the trustee, set a new sale date which shall be not less than forty-five days from the date of the order dissolving the restraining order. The trustee shall:

(a) Comply with the requirements of RCW 61.24.040(1) (a) through (e) at least thirty days before the new sale date; and

(b) Cause a copy of the notice of trustee's sale as provided in RCW 61.24.040(2) to be published in a legal newspaper in each county in which the property or any part thereof is situated once between the thirty-fifth and twenty-eighth day before the sale and once between the fourteenth and seventh day before the sale.

(4) If a trustee's sale has been stayed as a result of the filing of a petition in federal bankruptcy court and an order is entered in federal bankruptcy court granting relief from the stay or closing or dismissing the case, or discharging the debtor with the effect of removing the stay, the trustee may set a new sale date which shall not be less than forty-five days after the date of the bankruptcy court's order. The trustee shall:

(a) Comply with the requirements of RCW 61.24.040(1) (a) through (e) at least thirty days before the new sale date; and

(b) Cause a copy of the notice of trustee's sale as provided in RCW 61.24.040(2) to be published in a legal newspaper in each county in which the property or any part thereof is situated, once between the thirty-fifth and twenty-eighth day before the sale and once between the fourteenth and seventh day before the sale.

(5) Subsections (3) and (4) of this section are permissive only and do not prohibit the trustee from proceeding with a trustee's sale following termination of any injunction or stay on any date to which such sale has been properly continued in accordance with RCW 61.24.040(10).

(6) The issuance of a restraining order or injunction shall not prohibit the trustee from continuing the sale as provided in RCW 61.24.040(10).

Credits

[2018 c 306 § 5, eff. June 7, 2018; 2008 c 153 § 5, eff. June 12, 2008; 1998 c 295 § 14; 1987 c 352 § 5; 1981 c 161 § 8; 1975 1st ex.s. c 129 § 6; 1965 c 74 § 13.]

Notes of Decisions (50)

West's RCWA 61.24.130, WA ST 61.24.130
Current with all legislation from the 2019 Regular Session of the Washington Legislature

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