SUMMARY
October 21, 2021

2021COA128

No. 20CA1035, *Silvernagel v. US Bank National Association* — Bankruptcy — Discharge; Creditors and Debtors — Foreclosures — Limitation of Actions

A division of the court of appeals considers whether a discharge in bankruptcy has any effect on the time within which a bank may foreclose on a deed of trust given as security for a debt. The division concludes that the discharge in bankruptcy of a borrower's personal liability on a debt commences the six-year limitations period during which the bank may foreclose on the deed given as security for the debt.

COLORADO COURT OF APPEALS **2021COA128**

Court of Appeals No. 20CA1035
Douglas County District Court No. 19CV30565
Honorable David J. Stevens, Judge

Jerome D. Silvernagel and Dan Wu,

Plaintiffs-Appellants,

v.

US Bank National Association,

Defendant-Appellee.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE DAILEY
Dunn and Kuhn, JJ., concur

Announced October 21, 2021

Staggs Morris, P.C., William A. Morris, Denver, Colorado, for Plaintiffs-Appellants

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¶ 1 In this action for declaratory relief, plaintiffs, Jerome D. Silvernagel and Dan Wu, appeal the district court's judgment dismissing their case against defendant, US Bank National Association (US Bank).

¶ 2 The district court concluded that Silvernagel's discharge of a debt in bankruptcy had no effect on the time within which a bank had to foreclose the deed of trust given as security for that debt. Because we disagree, we reverse and remand with directions.

I. Background

¶ 3 Silvernagel and Wu are married. In 2004, they bought a house in Highlands Ranch. In 2006, they took out a second mortgage on the house for $62,400 with lender New Century Mortgage Corporation. Silvernagel alone signed the promissory note, agreeing to repay the underlying loan in monthly installments until October 1, 2036; both he and Wu, however, signed the deed of trust securing payment of the note.

¶ 4 In 2012, a bankruptcy court discharged Silvernagel's personal liability on the note and nothing in the record suggests that he made any payments thereafter on the note.

¶ 5 On June 28, 2019, Silvernagel and Wu (hereinafter collectively, Silvernagel) filed the present action for declaratory relief against US Bank, asserting that (1) earlier that year, US Bank "began demanding payment" on the underlying debt and "threatening [Silvernagel] with foreclosure";[1] (2) US Bank, however, lacked standing to foreclose on the property because it could not prove that it was the owner or holder of the deed of trust; and (3) US Bank was, in any event, barred from initiating foreclosure on the property by either the applicable statute of limitations or the doctrine of laches. Consequently, Silvernagel requested a judgment declaring that they own the property in fee simple unencumbered by the deed of trust and US Bank has "no further rights to the property."

¶ 6 Pursuant to C.R.C.P. 12(b)(5), US Bank filed a motion to dismiss Silvernagel's complaint, asserting that (1) it had standing, via a series of assignments of "the loan," as evidenced by a "MERS

[1] US Bank's demands occurred, Silvernagel alleged, only "after the property had appreciated substantially in value."

milestone report";[2] (2) the applicable statute of limitations could not have expired because the cause of action on parts of the underlying debt had not accrued yet; and (3) because Wu had signed the deed of trust, US Bank was also entitled to foreclose on Wu's interest in the property.

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[2] MERS stands for Mortgage Electronic Registration Systems, Inc., which

> is a private electronic database that tracks the transfer of the beneficial interest in home loans. "MERS was designed to avoid the need to record multiple transfers of the deed by serving as the nominal record holder of the deed on behalf of the original lender and any subsequent lender." MERS is designated in the deed of trust as a "nominee" for the lender and the lender's successors and assigns as well as the "beneficiary" of the deed. MERS thus holds legal title to the security interest. "If the lender sells or assigns the beneficial interest in the loan to another MERS member, the change is recorded only in the MERS database, not in county records, because MERS continues to hold the deed on the new lender's behalf." Thus, no recordation takes place unless the trust deed is transferred to an entity that is not a member of MERS.

Commonwealth Prop. Advocs., LLC v. Mortg. Elec. Registration Sys., Inc., 680 F.3d 1194, 1197 n.1 (10th Cir. 2011) (quoting *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1038-39 (9th Cir. 2011)).

¶ 7 The district court granted US Bank's motion, concluding, as relevant here, (1) US Bank "provided a copy of the MERS milestone report showing that [US Bank] is the current trustee, thus [it] has standing to enforce" the promissory note and the deed [of trust]"; (2) because "the Deed of Trust provides for payment as to [a] 2036 maturity date," a final limitations period had not yet commenced; and (3) "[a]lthough Wu may not be personally liable on the Note or under the Deed of Trust, [US Bank] may enforce the Deed of Trust against Wu who signed to grant . . . an enforceable interest in the Property to the Trustee [US Bank] under the terms of the Deed of Trust."[3]

¶ 8 Silvernagel now appeals.

II. Standard of Review

¶ 9 The district court purported to dismiss Silvernagel's complaint pursuant to C.R.C.P. 12(b)(5). But in resolving a Rule 12(b)(5) motion to dismiss, a court may consider only the facts alleged in the

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[3] The district court did not make any findings or conclusions with respect to Silvernagel's claim that a foreclosure action by US Bank would be precluded, if not by the statute of limitations, by the doctrine of laches.

complaint, documents attached as exhibits to or referenced in the complaint, and matters of which the court may take judicial notice, such as public records. *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006) (discussing judicial notice); *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005) (discussing documents attached or referenced in the complaint).

¶ 10 Here, the district court considered a "matter" — the "MERS milestone report" — that could not be considered in resolving a motion to dismiss.[4] The effect of the court's consideration of the MERS report was to convert US Bank's motion to dismiss into a motion for summary judgment. C.R.C.P. 12(b); *see Yadon*, 126 P.3d at 335-36. Therefore we review the court's ruling applying summary judgment principles. *Cf. Grandote Golf & Country Club, LLC v. Town of La Veta*, 252 P.3d 1196, 1199 (Colo. App. 2011) (applying summary judgment principles where both parties assumed the court considered matters beyond those that could be considered in conjunction with a C.R.C.P. 12(b)(5) motion).

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[4] The MERS report was not referenced in or attached to the complaint, nor was it something of which the court could take judicial notice.

¶ 11 Summary judgment is appropriate if the pleadings and supporting documentation demonstrate that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law. *Id.* Like a dismissal under C.R.C.P. 12(b)(5), we review a district court's summary judgment ruling de novo. *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139, 146 (Colo. 2007) (summary judgment); *see Tomar Dev., Inc. v. Friend*, 2015 COA 73, ¶ 12 (C.R.C.P. 12(b)(5) dismissal).

¶ 12 Here, the parties dispute whether US Bank holds the promissory note and deed of trust. But there are no disputed issues of material fact that are necessary for us to resolve this appeal. At issue are the legal conclusions drawn from the facts that were undisputed in the record.

III. US Bank's Standing

¶ 13 Silvernagel contends that the district court erred when it concluded that US Bank has standing to enforce the note and deed of trust. We disagree.

¶ 14 "[E]nforcement of a promissory note and foreclosure of a deed of trust securing that note are separate remedies of a creditor in the event of a borrower's default. The inability to pursue one remedy

does not bar the other. . . . [N]othing under either federal or state law supports the conclusion that the discharge of personal liability on the note also discharges the lien of the deed of trust securing the note." *Edmundson v. Bank of Am.*, 378 P.3d 272, 276 (Wash. Ct. App. 2016) (citations omitted); *accord Smith v. Certified Realty Corp.*, 41 Colo. App. 170, 172, 585 P.2d 293, 294 (1978) ("The holder of a note secured by a deed of trust has a choice of independent remedies."), *aff'd*, 198 Colo. 222, 597 P.2d 1043 (1979).

¶ 15 Consequently, a creditor's right to foreclose on a deed of trust survives a discharge of the underlying debt in bankruptcy. *See Johnson v. Home Bank*, 501 U.S. 78, 82-83 (1991) (discussing actions to enforce mortgages).

¶ 16 "Colorado foreclosure law allows a holder of an evidence of debt to foreclose upon breach of the terms of the deed of trust." *Edwards v. Bank of Am., N.A.*, 2016 COA 121, ¶ 15; *see* § 38-38-101, C.R.S. 2020. A "holder of an evidence of debt" is defined as "the person in actual possession of or person entitled to enforce an evidence of debt." *Edwards*, ¶ 15 (quoting § 38-38-101.3(10), C.R.S. 2015).

> Under sections 38-38-101(1)(b)(II) and (1)(c)(I), the holder of an evidence of debt may initiate foreclosure proceedings with a copy of the evidence of debt and deed of trust, rather than the original documents.
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> To foreclose in this manner, the holder of an evidence of debt must file "*a statement signed by the attorney for such holder*, citing the paragraph of section 38-38-100.3(20)[, C.R.S. 2020,] *under which the holder claims to be a qualified holder* and certifying or stating that the copy of the evidence of debt is true and correct." § 38-38-101(1)(b)(II) (emphasis added).

Id. at ¶¶ 16-17.

¶ 17 The record contains a copy of the promissory note and the deed of trust. But it does not contain a statement, signed by an attorney, certifying that US Bank is the holder of the evidence of debt. Instead, it contains, as an exhibit to US Bank's C.R.C.P. 12(b)(5) motion to dismiss, a one-page copy of a MERS milestone report. That report purports to reflect that, through a series of transfers, US Bank became the trustee of "Batch Number 4541072," originating from New Century Mortgage Corporation, the original lender, passing through Credit Suisse Securities (USA), and finally ending with US Bank. Though the batch of transfers are numbered, nowhere on this document is there any indication that

the promissory note, the deed of trust, or the property are included in any, much less all, of those batches of transfers. Nonetheless, the district court concluded that US Bank "[was] the current trustee, thus [it] has standing to enforce" the promissory note and the deed of trust.

¶ 18 On appeal, Silvernagel asserts that the MERS milestone report is insufficient to establish US Bank's standing to foreclose on the property. We need not, however, resolve that issue because US Bank is not the plaintiff in this proceeding, and "traditional standing principles do not apply to defendants." *Mortg. Invs. Corp. v. Battle Mountain Corp.*, 70 P.3d 1176, 1182 (Colo. 2003).

¶ 19 As the supreme court explained in *People ex rel. Simpson v. Highland Irrigation Co.*, 893 P.2d 122, 127 (Colo. 1995), the standing

> requirement limits plaintiffs from asserting claims in which they have no stake, and ensures that the jurisdiction of the courts is exercised only when an actual case or controversy exists. *Colo. Gen. Assembly v. Lamm*, 700 P.2d 508, 515-16 (Colo. 1985). Those same concerns are not implicated with respect to the defendants, because once the plaintiff has established standing and the defendants have been haled into court by the

> plaintiff, the only role for the defendants is to defend against the suit.

¶ 20 Because US Bank is the defendant in this declaratory judgment action, it did not need to establish standing. *See Sandstrom v. Solen*, 2016 COA 29, ¶ 19 (citing *Simpson*, 893 P.2d at 127); *see also Johnson v. Nelson*, 861 N.W.2d 705, 713 (Neb. 2015) ("[I]t is the party initiating the suit who must meet the standing requirement, not a defendant.").

IV. Statute of Limitations

¶ 21 We do, however, agree with Silvernagel's contention that the district court erroneously dismissed their complaint based on its rejection, as a matter of law, of their claim that any suit by US Bank would be barred by the statute of limitations.

¶ 22 Here, the district court concluded that, as a matter of law, US Bank would not be barred by the statute of limitations from foreclosing on the property. The court reached this conclusion based on its determination that the period for pursuing a claim on the debt underlying the deed of trust had not yet commenced.

¶ 23 Section 13-80-103.5(1)(a), C.R.S. 2020, states that "all actions for the enforcement of rights set forth in any instrument securing

the payment of or evidencing any debt" must be "commenced within six years after the cause of action accrues."

¶ 24 If "a creditor fails to sue to enforce [a] promissory note after default within the six-year limitations period, the creditor's right to foreclose on the lien of the deed of trust is extinguished under section 38-39-207, C.R.S. (2002)." *Mortg. Invs. Corp.*, 70 P.3d at 1185-86; *see* § 38-39-207, C.R.S. 2020 ("The lien created by any instrument shall be extinguished, regardless of any other provision in this article to the contrary, at the same time that the right to commence a suit to enforce payment of the indebtedness or performance of the obligation secured by the lien is barred by any statute of limitations of this state.").

¶ 25 "[T]he statute of limitations for a debt owed pursuant to a promissory note begins to run when the cause of action accrues, which occurs on the date that the debt 'becomes due.'" *Castle Rock Bank v. Team Transit, LLC*, 2012 COA 125, ¶ 21 (quoting *Hassler v. Acct. Brokers of Larimer Cnty., Inc.*, 2012 CO 24, ¶ 18).

> Generally, when a loan is to be repaid in monthly installments, each default on an individual monthly installment payment results in the accrual of a separate cause of action, each with its own limitations period. In

> contrast, if the loan agreement contains an acceleration clause giving the creditor the option to require immediate payment of the entire balance of the loan if the borrower defaults on a single monthly installment payment, only a single claim to recover the entire debt accrues. Under these circumstances, the entire debt becomes due, and a claim to recover that debt accrues, when the creditor triggers the acceleration clause.

Igou v. Bank of Am., N.A., 2020 COA 15, ¶ 12 (citing *Castle Rock Bank*, ¶¶ 22-23).

¶ 26 Because it did not accelerate repayment of the debt, US Bank argues that a new cause of action accrues upon Silvernagel's default on each monthly installment until the maturity date of the loan, i.e., October 1, 2036. Consequently, the statute of limitations has not accrued, much less expired, with respect to parts of the debt.

¶ 27 US Bank's argument, however, overlooks the effect of Silvernagel's October 2012 discharge in bankruptcy.

¶ 28 In *Edmundson*, 378 P.3d 272, the Washington Court of Appeals addressed the effect of a discharge in bankruptcy on the operation of a statute of limitations. Like Colorado, in Washington "when recovery is sought on an obligation payable by installments,

the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it." *Id.* at 277 (quoting *Herzog v. Herzog*, 161 P.2d 142, 144-45 (Wash. 1945)). The *Edmundson* court concluded that "the statute of limitations for each [missed] monthly payment accrued" on the date it was due "until the [parties] no longer had personal liability [for making payments] under the note. They no longer had such liability as of the date of their bankruptcy discharge." *Id.* at 278.

¶ 29 Applying *Edmundson*, the federal district court for the Western District of Washington reached the same conclusion in *Jarvis v. Federal National Mortgage Ass'n* on facts similar to the ones here. No. C16-5194-RBL, 2017 WL 1438040 (W.D. Wash. Apr. 24, 2017) (unpublished order), *aff'd*, 726 F. App'x 666 (9th Cir. 2018). There, a bankruptcy court discharged the homeowner's personal obligation on the note. *Id.* at *1. More than six years after the discharge, the lender commenced a trustee sale, asserting that the discharge did not affect its ability to take in rem action against the property. *Id.* Rejecting that argument, the court concluded:

> The last payment owed commences the final six-year period to enforce a deed of trust securing a loan. This situation occurs when the final payment becomes due, such as when the note matures or a lender unequivocally accelerates the note's maturation. *It also occurs at the payment owed immediately prior to the discharge of a borrower's personal liability in bankruptcy*, because after discharge, a borrower no longer has forthcoming installments that he must pay.
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> . . . .
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> The discharge [in bankruptcy] of a borrower's personal liability on his loan — the cessation of his installment obligations — is the analog to a note's maturation. In both cases, no more payments could become due that could trigger . . . [a] limitations period.

Id. at *2-3 (citations omitted); *see Jarvis*, 726 F. App'x at 667 ("The final six-year period to foreclose runs from the time the final installment becomes due. This may occur upon the last installment due before discharge of the borrower's personal liability on the associated note.") (citations omitted); *see also* § 38-39-207.

¶ 30 We are persuaded by, and consequently adopt, the reasoning in *Jarvis*. As the federal district court in *Jarvis* said, "[t]he discharge of a borrower's personal liability on a note . . . alert[s] the

lender that the limitations period to foreclose on a property held as a security has commenced." 2017 WL 1438040, at *2.[5]

¶ 31 According to the allegations in the complaint, (1) Silvernagel was discharged in bankruptcy of personal responsibility for the underlying debt in October 2012; and (2) as of June 2019, US Bank had not initiated foreclosure proceedings with respect to the deed of trust. If true, US Bank would have failed to timely seek relief within the applicable six-year limitations period and, consequently, would be barred from foreclosing on Silvernagel's property. Silvernagel would, then, be entitled to the relief sought in their complaint. *See id.* at *3.

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[5] We are not persuaded by US Bank's argument that the *Jarvis* decision is based on a misreading of *Edmundson*. In our view, *Edmundson* correctly recognized that a discharge in bankruptcy of personal liability for a debt (1) would not, in and of itself, discharge the deed of trust on the property but (2) could affect a statute of limitations analysis. *Edmundson*'s ultimate conclusion, i.e., that the statute of limitations did not bar foreclosure *in that case*, was based on facts easily distinguishable from those in the present case. Unlike here, in *Edmundson* the bank initiated foreclosure proceedings within the limitations period (i.e., six years) of the borrower's discharge in bankruptcy.

¶ 32 Because the district court erroneously rejected, as a matter of law, Silvernagel's claim that a foreclosure action would be barred by the statute of limitations claim, the court erred by dismissing the complaint.[6]

V. Disposition

¶ 33 The judgment is reversed and the case is remanded to the district court with directions to reinstate Silvernagel's complaint and conduct further proceedings with respect thereto.

JUDGE DUNN and JUDGE KUHN concur.

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[6] Because of the manner in which we have resolved this appeal, we need not address Silvernagel's alternative arguments: (1) US Bank is barred by the doctrine of laches from pursuing a foreclosure of the property; and (2) US Bank cannot, in any event, foreclose on Wu's interest in the property.