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1 THE COURT: This matter comes before the court on the
2 plaintiffs' motion for summary judgment. The court is going
3 to enter an order now that is going to explain its ruling.
4 And it may be that we'll see -- I don't know that any
5 additional order is going to be necessary, but let's see
6 where we go here.

7 This case is somewhat factually involved. So for purposes
8 of the record, though, the note was executed on September 28,
9 2006. And it relates to a piece of property here in Seattle,
10 Washington. And a loan was taken out for \$532,000. It's
11 Exhibit 1 to the Lopa declaration, which is Docket No. 36.
12 And it was taken out by GreenPoint Mortgage Funding. In
13 April of 2008 the note was transferred to GreenPoint. That's
14 Beckett declaration 37, Exhibit 1, recorded Exhibit 2.

15 As of February 2008 plaintiff had failed to make the
16 requirement payments. So when it was transferred to
17 GreenPoint, it was delinquent at that time, apparently. On
18 February 14, 2008 the notice of default, which was greatly
19 disputed here in terms of its legal effect, is Exhibit 3 to
20 the Lopa declaration. On May 22nd the successor trustee
21 recorded a notice of trustee sale. It's Beckett declaration
22 Exhibit 3, and the Beckett declaration is Docket 37. And set
23 a trustee sale. The trustee sale was set for, I believe,
24 August 12th of 2008.

25 But it must have been -- the trustee sale must have been

1 set for August 22nd. Because on August 21st the forbearance
2 agreement, which is Exhibit 6 to the Prudent declaration,
3 that's Docket 39, was entered into. And the parties dispute
4 the effect of that forbearance agreement. They dispute the
5 effect of the notice that was given, of default, on
6 February 14th.

7 Then approximately four years later, in November of 2012,
8 there was another notice of default. That is Docket 39,
9 Exhibit 8.

10 So the question is, well, what do all of these documents
11 mean? So first with respect to the law on the subject, of
12 course Washington law is going to control the court's ruling.
13 So let me just say that, first, a deed of trust has a six --
14 an agreement in writing, under Washington law, has a six-year
15 statute of limitations.

16 And the question is here whether the statute of
17 limitations has run to prevent the bank from recovering or
18 not. And if an obligation that is to be paid in installments
19 is accelerated, the entire remaining balance comes due and
20 owing. And thus the holder of the note and deed of trust
21 must sue and foreclose within six years in order to recover.

22 So, whether these loans were accelerated becomes very
23 important. To accelerate a maturity date under Washington
24 law -- and I'm referring to the *Gibbon* case at 195 Wn.App.,
25 2016, which kind of outlines generally the rule in

1 Washington -- but some affirmative action is required, some
2 action by which the holder of the note makes known to the
3 payors that it intends to declare the whole debt due.
4 Acceleration must be in a clear and unequivocal manner, which
5 holds that the maker has exercised his rights to accelerate.

6 So, the crux of the dispute here is what's the effect of
7 the notice of the intent? And was it waived by the
8 forbearance agreement?

9 So first let's turn to the notice of default. And
10 paragraph six talks in terms of an acceleration: You are
11 notified that the beneficiary has elected to accelerate, has
12 declared the entire balance due, immediately due and payable.
13 I'm satisfied that that was an acceleration of the loan by
14 the lender, as a result of this notice of default.

15 And the cases that spell that out are Judge Jones'
16 thoughtful decision in *Unouyo v. Bank of America*, found at
17 2017 WL 1532664. In that case the language was if the
18 default is not cured on or before November 5, 2009, it will
19 be accelerated. And the court found that there was an
20 acceleration, and cited the same language that I referred to
21 earlier.

22 Also the *Gibbon* case. But also *Weinberg v. Naher*, 51
23 Wash. 591. The bank doesn't have to send any other notice.
24 That is an acceleration. I think the *Fujita* case that I
25 decided back in 2016 essentially says the same thing. And

1 I'm satisfied that the notice of default given back in -- the
2 original notice of default was an acceleration as a matter of
3 law.

4 So that moves us to the forbearance agreement. And the
5 question is whether the forbearance agreement affects the
6 acceleration that, as a legal matter, has occurred. And I
7 conclude, as a matter of law, that the forbearance agreement
8 does not affect legally the acceleration. You can have a
9 waiver of an acceleration, clearly, if you wish to do that, a
10 bank a lender can waive a previous acceleration.

11 Acceptance of late payments after they're due or taking
12 other action which is inconsistent with acceleration would
13 constitute a waiver. So the question is -- and I find that
14 there's no evidence that there was any discussion or
15 negotiation dealing with this forbearance agreement. Nothing
16 has been put in the record, other than a document itself.
17 I'm also satisfied the document is clear, unambiguous and
18 must be given its legal effect.

19 And the legal effect, in my opinion, is that this does not
20 constitute a waiver of the acceleration. What it says is
21 that GreenPoint is willing to extend the opportunity to
22 essentially bring it back current, if you do the following
23 things: One of which is pay \$25,000. And then commence the
24 monthly payments in September of 2008, making the original
25 mortgage payments, plus catchup mortgage payments for 12

1 additional months. And the document on its face says,
2 assuming all of those things happened, and then subject to
3 that, the mortgage loan will be brought current.

4 The language in the forbearance agreement has many other
5 sentences and paragraphs, which all lead you to the same
6 result. That is, that this is in no way -- that this does
7 not waive the acceleration by the bank.

8 For example, paragraph seven says: If you default under
9 the terms of this agreement, this agreement will terminate
10 without notice. And any foreclosure that may have been
11 commenced will resume. And acceptance of any such payments
12 shall not constitute a waiver of any rights under any pending
13 foreclosure action, and shall not prevent or delay the sale
14 of the mortgaged property.

15 On page five of six, this agreement merely suspends the
16 proceedings. "Your failure to comply will result in
17 foreclosure proceedings being resumed." There's all sorts of
18 language in here, including an integration clause at
19 paragraph 19 saying: This is the entire agreement.

20 So both from the basis of the integration clause and from
21 the basis that we don't have any facts of any kind to the
22 contrary, I believe this forbearance agreement does not and
23 did not act in any way to affect the acceleration by the bank
24 of this loan.

25 It would be nice if that's where the record ended, but we

1 have now in the record a notice of intent. This is the
2 notice of intent to accelerate and foreclose, sent
3 November 5th of 2012. We have in the record of the original
4 complaint that was filed in state court, a verified
5 complaint. And that means that the plaintiffs signed it
6 verifying that the facts were true. They alleged that they
7 were sent and received this document, which is in our record
8 at Exhibit 8 to Mr. Prudent's declaration, which is Docket
9 39.

10 So then the question is, what is the effect of this? So
11 then we get into the question of what's a waiver, and is this
12 a waiver? Is this another acceleration? What's the legal
13 effect of this document, which the plaintiffs apparently, for
14 my purposes, received? And the cases have -- so we need to
15 really talk about, well, what's a waiver? And under
16 Washington law -- so we've got an acceleration. It wasn't
17 waived by the forbearance agreement. So the only thing
18 that's going to save the bank is whether this document, that
19 later notice, somehow affected, legally, the acceleration,
20 that's turning and causing the statute of limitations to run.
21 And that's essentially the more difficult question.

22 The document is captioned, "Notice of Intent to Accelerate
23 and Foreclose." But the notice of intent, I believe, when it
24 talks about, "If the default is not cured on or before
25 December 15, 2012, the mortgage will be accelerated," is

1 certainly not a waiver and it would be itself an
2 acceleration, in my opinion, based on the earlier case law
3 that I have referenced.

4 I think that's where we are. That is, that we had a loan,
5 we had an acceleration of the loan, the forbearance agreement
6 did not waive or affect, legally, the acceleration that
7 occurred. And I conclude, as a matter of law, that this
8 document, the notice of intent in 2012, does not affect that
9 result.

10 The *NationsBank of North Carolina v. Baines* case is
11 helpful in this regard. The question there was one of
12 waiver. And the court seems to suggest that waiver and
13 estoppel were not appropriate. The case of *Meehan v. Cable*,
14 again a North Carolina case, supports the proposition that
15 the note holder does not waive his rights to accelerate by
16 accepting late payments.

17 There's one more case I want to refer to. This is the
18 case out of Arizona, *Steinberger v. IndyMac Mortgage*, found
19 at 2017 WL 6040003, decided in 2017. It's a good discussion
20 of the cases dealing with what's necessary to waive. And the
21 court indicates that -- it's referring to Arizona law, of
22 course, but refers to and says: "...provide acceleration of a
23 debt requires an affirmative act to make clear to the debtor
24 it has accelerated the obligations. Sensibly, that same
25 requirement should apply to revocation of acceleration. That

1 is, revocation occurs when a lender takes an affirmative act
2 that places the borrower on active or constructive notice of
3 the revocation."

4 But in my opinion the notice of 2012 does not provide that
5 type of notice to the borrower of anything other than an
6 intent to continue an acceleration, if they didn't have one
7 before.

8 I think, under all the facts, the facts that are not in
9 dispute, I think the statute of limitations in this case has
10 run on this transaction. And I'm going to enter judgment
11 granting the plaintiffs' motion and dismissing the case -- or
12 granting the motion to quiet title. And I'm satisfied that
13 what the borrower may have put in his bankruptcy schedules is
14 not relevant in any way. I think the bank, in this case, of
15 course, has continued to say in all its briefing and even in
16 the argument today, they never accelerated in the first
17 place.

18 Well, I think that's crystal clear that that earlier
19 notice of default was an acceleration. And waiver in
20 Washington, under Washington law, requires an intentional,
21 knowing act. And, of course, I don't know how the bank could
22 really waive something they didn't really know they needed to
23 waive, because they have continued to believe that there was
24 never an acceleration in the case.

25 I started the discussions by saying that it's a difficult

1 case for me because here we have a borrower who borrowed
2 maybe a million dollars, and hasn't paid. And now if the
3 title is quieted, which it will be, unless there's an appeal
4 and a reversal, we've got a debtor that doesn't pay and a
5 lender who doesn't get the money or the property. I don't
6 like that result. But I think that the cases and the
7 documents require that result.

8 That will be my ruling. I won't enter a further order
9 other than to -- I will enter a brief order along the lines
10 that was submitted by the plaintiff, just to quiet -- to get
11 the legal description and have a formal order consistent with
12 my ruling. And then we'll enter a judgment. Thank you for
13 the arguments and the briefs. And we'll be in recess.

14 (Adjourned.)

15 C E R T I F I C A T E

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18 I certify that the foregoing is a correct transcript from
19 the record of proceedings in the above-entitled matter.

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23 /s/ *Debbie Zurn*

24 DEBBIE ZURN
25 COURT REPORTER