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ADVANCE SHEET HEADNOTE
April 24, 2023

2023 CO 17

No. 21SC836, *US Bank Nat'l Ass'n v. Silvernagel*—Statute of Limitations—Accrual of Right of Action—Acceleration of Debt.

The supreme court holds that a bankruptcy discharge does not accelerate payment on a mortgage, nor does it trigger the statute of limitations for the remaining payments. The court relied on *Hassler v. Account Brokers of Larimer County, Inc.*, 2012 CO 24, ¶ 24, 274 P.3d 547, 553, which requires lenders to "perform some clear, unequivocal affirmative act" to accelerate payment on a security agreement. Because no such act occurred, Silvernagel's payments continued to become due according to the contract's original terms. *Id.* at ¶ 14, 274 P.3d at 551.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 17

Supreme Court Case No. 21SC836
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 20CA1035

Petitioner:

US Bank National Association,

v.

Respondents:

Jerome D. Silvernagel and Dan Wu.

Judgment Reversed
en banc
April 24, 2023

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JUSTICE HOOD delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE GABRIEL**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE HOOD delivered the Opinion of the Court.

¶1 To what extent does a debtor's discharge in bankruptcy provide a safe harbor from a bank's effort to foreclose on the debtor's home? The answer depends in part on whether bankruptcy affects the amount of time that the bank has to enforce a deed of trust securing a mortgage once the debtor is in default. The stakes are high for banks and borrowers, so we weigh in here.

¶2 Jerome D. Silvernagel and Dan Wu filed suit in 2019 for declaratory relief, arguing that US Bank National Association ("US Bank") couldn't foreclose on their home because the relevant six-year limitation period had expired. The trial court disagreed and dismissed the case, determining that US Bank's claim had not accrued (meaning that the six-year limitation period hadn't even commenced).

¶3 A division of the court of appeals reversed, holding that the statute of limitations began to run upon Silvernagel's 2012 bankruptcy discharge, barring US Bank's claim.

¶4 We reverse the judgment of the court of appeals. We hold that when there is no evidence that the lender accelerated payment on the mortgage agreement, a claim for any future payment doesn't accrue until that payment is missed under the agreement's original terms.

I. Facts and Procedural History

¶5 In 2006, Silvernagel took out a second mortgage on the home. He agreed to make monthly payments of $556.85 to pay down the $62,400 principal and 10% annual interest, with any remaining balance due in 2036. Silvernagel alone signed the promissory note, agreeing to repay the underlying loan. But both he and Wu signed the deed of trust securing payment of the note.

¶6 The deed of trust contained an acceleration clause, giving the lender the power to declare the entire loan immediately due and payable upon default. When exercised, acceleration authorized the lender to foreclose on the property to satisfy the outstanding debt and any related fees.

¶7 In 2012, a bankruptcy court discharged Silvernagel's personal liability on the mortgage under Chapter 7 of the Bankruptcy Code. *See* 11 U.S.C. § 727 (2018). Silvernagel had stopped making payments on the note before the discharge and has made no payments since. The discharge prohibited creditors from attempting to collect the debt from Silvernagel directly, but it did not extinguish "the right to enforce a valid lien, such as a mortgage or security interest, against the debtor's property after the bankruptcy." *In re Silvernagel*, No. 12−21304−HRT, at *2 (Bankr. D. Colo. Oct. 3, 2012) (unpublished order).

¶8 In 2019, US Bank allegedly threatened to foreclose on the property if Silvernagel did not make payments on his mortgage. Silvernagel and Wu

(hereinafter collectively, "Silvernagel") filed this case in response, requesting declaratory relief to prevent US Bank's enforcement of the deed of trust. He argued that US Bank's interest was extinguished by the six-year statute of limitations on debt collection. Alternatively, he asserted that the doctrine of laches prevented enforcement of the agreement.

¶9 US Bank moved to dismiss under C.R.C.P. 12(b)(5) for failure to state a claim upon which relief could be granted. Because the loan's maturity date was in 2036, the bank argued that its claim hadn't accrued and that, by extension, the relevant statute of limitations hadn't been triggered. The trial court granted US Bank's motion and dismissed the case, concluding that the remaining debt was not yet due because US Bank never accelerated payment on the note. The trial court order also determined that the doctrine of laches did not apply.

¶10 Silvernagel appealed, and the division reversed. *Silvernagel v. US Bank Nat'l Ass'n*, 2021 COA 128, ¶ 33, 503 P.3d 165, 171. The division held that the balance of a mortgage becomes due upon bankruptcy discharge, at which point the lender's claim accrues and the statute of limitations begins to run. *Id.* at ¶¶ 27–30, 503 P.3d at 170–71. Because six years had passed since the discharge, the division

determined that US Bank's claim had expired. *Id.* at ¶ 31, 503 P.3d at 171. US Bank petitioned this court for certiorari review, which we granted.[1]

II. Analysis

A. Standard of Review

¶11 We interpret statutes of limitation de novo. *Hassler v. Acct. Brokers of Larimer Cnty., Inc.*, 2012 CO 24, ¶¶ 15–16, 274 P.3d 547, 551–52. Because the issue on appeal stems from US Bank's motion to dismiss, we "must accept all allegations of material fact [in the complaint] as true and view the allegations in the light most favorable to the plaintiff." *Sch. Dist. No. 1 in City & Cnty. of Denver v. Masters*, 2018 CO 18, ¶ 13, 413 P.3d 723, 728 (alteration in original) (quoting *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999)).

B. The Statute of Limitations

¶12 The relevant statute of limitations dictates that all actions enforcing the "rights set forth in any instrument securing the payment of or evidencing any debt" must be brought "within six years after the cause of action *accrues*."

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[1] We granted certiorari to review the following issue:

> Whether the Court of Appeals erred in determining the six-year statute of limitations period during which a lender may foreclose on a security instrument accrued upon the borrower's bankruptcy discharge.

§ 13-80-103.5(1)(a), C.R.S. (2022) (emphasis added). A cause of action accrues "on the date such debt, obligation, money owed, or performance *becomes due*." § 13-80-108(4), C.R.S. (2022) (emphasis added). To defeat US Bank's claim on this basis, then, Silvernagel needs to show that the debt *became due* more than six years ago.

¶13 A payment in a security agreement "becomes due" on the date required by the contract's original terms. *Hassler*, ¶ 14, 274 P.3d at 551. If a security agreement mandates regular monthly payments, as it does here, the debt becomes due when each installment is missed. *Id.* at ¶ 4, 274 P.3d at 549. As a result, a "separate cause of action arises on each installment, and the statute of limitations runs separately against each." *Id.* at ¶ 22, 274 P.3d at 553 (quoting 31 Richard A. Lord, *Williston on Contracts* § 79:17 (4th ed.), Westlaw (database updated July 2022)). When payments are scheduled over an extended period, a single lender could simultaneously have claims that have expired and others that have not yet accrued. *See id.*

¶14 Certain agreements, like the one here, include an acceleration clause. When such a clause is triggered, all remaining payments become due immediately and the lender's cause of action accrues. *Id.* at ¶ 4, 274 P.3d at 549. While some agreements include conditions that automatically accelerate payment, typically the lender must affirmatively invoke the acceleration clause. *Id.* at ¶ 22, 274 P.3d

at 553. In either circumstance, acceleration triggers the statute of limitations for all payments that have not yet become due but doesn't affect the statute of limitations for payments that were already due. *See id.*

¶15 When an agreement gives the lender the power to accelerate, the lender "must perform some *clear, unequivocal affirmative act* evidencing his intention to take advantage of the accelerating provision." *Id.* at ¶ 24, 274 P.3d at 553 (emphasis added) (quoting *Moss v. McDonald*, 772 P.2d 626, 628 (Colo. App. 1988)). To determine whether the lender unequivocally invoked the clause, "we look to see whether some *act* of the [lender] amounted to a clear manifestation of its intent to accelerate." *Id.* at ¶ 36, 274 P.3d at 557. Even in agreements where acceleration is permitted "without demand or notice," an affirmative act on the part of the lender is still required to give the debtor notice. *Id.* at ¶ 24, 274 P.3d at 553–54 (quoting *Moss*, 772 P.3d at 628). Notice of acceleration gives debtors the opportunity to cure a deficiency, but the debtor may not accelerate a payment's due date unilaterally. *See id.* at ¶¶ 32–34, 274 P.3d at 556.

¶16 Our approach regarding acceleration is in line with most other states. *See id.* at ¶¶ 25, 27, 274 P.3d at 554–55; *see also, e.g.*, *Diaz v. BBVA USA*, 504 P.3d 945, 951 (Ariz. Ct. App. 2022) ("Arizona requires that the lender take affirmative steps to accelerate the debt to trigger the statute of limitations."); *Wilmington Sav. Fund Soc'y, FSB v. Fernandez*, 113 N.Y.S.3d 443, 446–47 (N.Y. App. Div. 2019) (citing to

Kansas and Florida for further evidence of the majority rule). Other than a few recent cases in Washington, Silvernagel didn't cite, nor did we find, any other rulings in accordance with the division's holding.

C. Acceleration and Bankruptcy

¶17 Under the security agreement, Silvernagel was required to make scheduled monthly payments until 2036, and the lender had the option to accelerate payment in case of default. The acceleration clause was the sole provision allowing the parties to move up the debt's due date. So, Silvernagel's statute-of-limitations argument is contingent on a finding that the lender made a "clear" and "unequivocal" act to accelerate the remaining installment payments. *See Hassler*, ¶ 26, 274 P.3d at 554.

¶18 In *Hassler*, for example, we determined that the standard was met when a lender repossessed a car and sent a message to the borrower demanding full repayment of the loan. *Id*. From the perspective of the debtor, we concluded these acts constituted a "clear, unequivocal intent to accelerate all remaining installments." *Id.*

¶19 Here, there was no commensurate action. Silvernagel's complaint falls far short of alleging that US Bank made a "clear, unequivocal" affirmative act to accelerate payment. He only alleged that the lender "did not commence any action to enforce its rights under the note within six years" of his default. There is no

allegation that the lender demanded repayment of the entire mortgage upon default or bankruptcy. The division acknowledged that the lender never accelerated payment. *Silvernagel*, ¶ 26, 503 P.3d at 170.

¶20 Still, the division—adopting disputed case law from the state of Washington—held that a note always becomes due "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." *Id.* at ¶ 29, 503 P.3d at 170–71 (emphasis omitted) (quoting *Jarvis v. Fed. Nat'l Mortg. Ass'n*, No. C16-5194-RBL, 2017 WL 1438040, at *2 (W.D. Wash. Apr. 24, 2017), *aff'd*, 726 F. App'x 666 (9th Cir. 2018) (mem.)).

¶21 But by allowing Silvernagel to unilaterally accelerate the due date of his payments through bankruptcy, the division effectively grafted a new provision onto the contract. Not only is the division's rule unsupported by Colorado law, but the out-of-state case law on which it relied has since been repudiated by a Washington appellate court. *See Copper Creek (Marysville) Homeowners Ass'n v. Kurtz*, 508 P.3d 179, 191 (Wash. Ct. App. 2022) (holding that Washington law does not "stand for the proposition that bankruptcy discharge of personal liability of the debtor accelerates the obligation on an installment note or commences the statute of limitations").

¶22 Silvernagel argues the division correctly held that the lender's claim accrued at bankruptcy because he no longer had to make payments. However, this argument misconstrues the structure of a secured debt like a mortgage. A discharge "extinguishes only one mode of enforcing a claim—namely, an action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*." *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991). After bankruptcy, the "lender's only recourse in the event of a default is to repossess the property" because the borrower is not personally liable. *See* Robert Sellers Smith & Adele Turgeon Smith, *Nonrecourse Debt*, West's Tax Law Dictionary § N1110, Westlaw (database updated Feb. 2023). Consequently, a mortgage is one type of debt that survives bankruptcy. *Johnson*, 501 U.S. at 84.

¶23 Even though Silvernagel's bankruptcy order "prohibits any attempt to collect from the debtor a debt that has been discharged," it still allows him to "voluntarily pay any debt that has been discharged." *In re Silvernagel*, at *2. This feature is a significant benefit for borrowers: bankruptcy does not automatically enable a lender to foreclose on a property. *See* Sarah W. Carroll & Wenli Li, *The Homeownership Experience of Households in Bankruptcy*, 13 Cityscape: A J. of Pol'y Dev. & Rsch. 113, 114 (2011), https://www.huduser.gov/portal/periodicals/cityscpe/vol13num1/Cityscape_March2011_ref_home_ownership.pdf [https://perma.cc/7L8J-WFKN]. Instead, "by discharging unsecured debt, bankruptcy

leaves borrowers with more available income for mortgage payments and decreases the risk that their homes will be encumbered by judgment liens." *Id.* So, while the lender's lien survives bankruptcy, the borrower also benefits because the discharge enables them to prioritize making mortgage payments to avoid default. *Id.* One study in a HUD-funded journal found, for example, that less than 30% of bankruptcy filers lost their homes to foreclosure. *Id.* at 115.

¶24 The division's holding presupposes that an individual going through bankruptcy has already defaulted on their mortgage, but that isn't always the case. If a claim automatically accrues at bankruptcy, as the division held, lenders would be able to foreclose on a home even if payments are up to date. So, the division's rule would incentivize lenders to foreclose against debtors in good standing to prevent their claim from expiring under the bankruptcy-triggered statute of limitations. If upheld, the division's rule would have the perverse result of making it more difficult for individuals in bankruptcy proceedings to keep their homes.

III. Conclusion

¶25 We reverse the judgment of the court of appeals and remand the case for the division to consider Silvernagel's laches argument.