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Case No. 19-5302

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KONDAUR CAPITAL CORPORATION,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE WESTERN DISTRICT OF
MARY SMITH,	)	TENNESSEE
	)	
Defendant-Appellant.	)	

BEFORE: NORRIS, MOORE, and DONALD, Circuit Judges.

BERNICE BOUIE DONALD, Circuit Judge. This case is about a bank that accepted, as collateral for a promissory note, a deed of trust conveying a borrower's interest in a piece of property that the borrower did not own. Subsequently, the bank transferred the majority of the funds it loaned the borrower directly to another bank to pay off an existing lien on the property. This existing lien was properly secured by a separate deed of trust executed by the defendant, the borrower's wife and the sole owner of the property. After making one payment on the bank's loan, the borrower died, and no further payments were made. Nearly a decade later, after a series of assignments, a new bank acquired ownership of the deed of trust and realized that, at best, it had acquired an unsecured debt of a deceased debtor. This new bank now claims that the law of equities demands that it be permitted to foreclose on the property—after nine years of inaction—because the borrower's wife was unjustly enriched by the extinguishment of a lien on her property. We disagree.

I.

This diversity action concerns the property at 1309 Old Jasper Road, South Pittsburg, Tennessee ("the Property"), titled to Mary E. Smith ("Mary"), a Tennessee resident. On March 17, 2006, Mary executed a deed of trust conveying the Property to Citizens Tri-County Bank ("Citizens Bank") for a promissory note in the amount of $20,000, which was properly recorded. Both Mary and her husband, Kenneth W. Smith ("Kenneth"), signed the Citizens Bank deed of trust; however, it was solely executed by Mary because she is the sole owner of the Property. It is undisputed that Mary is the sole owner of the Property.[1] On March 23, 2007, the Smiths executed an amendment to the Citizens Bank deed of trust that increased their promissory note with Citizens Bank to $132,000, which was properly recorded.

On March 2, 2009, Kenneth executed a deed of trust conveying the Property for a promissory note in the amount of $173,992 from FirstBank. Mary attended the closing for the FirstBank promissory note; however, FirstBank informed her that she was not required to sign the note or the deed of trust. There is no evidence on the record suggesting that either Kenneth or Mary fraudulently or improperly induced FirstBank to sign the promissory note. After the closing, FirstBank paid Citizens Bank $136,025.56 to settle the existing lien on the Property and paid Kenneth $12,878.01 in cash.[2] On March 9, 2009, Citizens Bank released its lien on the Property, which it properly recorded.

[1] It is undisputed that Mary and Kenneth did not own the Property as tenants by the entireties, tenants in common, or as joint tenants with a right of survivorship; Mary was the sole owner of the Property.

[2] The district court mistakenly calculated the repayment of this lien to be $135,925.56. Upon review of the HUD "Settlement Statement," which Kenneth signed and initialed, the Court finds that FirstBank actually paid a total of $136,025.56 to settle the Citizens Bank lien.

Kenneth made one payment on the FirstBank promissory note before passing away in August of 2009. As far as the record shows, this was the only payment ever received on the note. The record does not reflect whether FirstBank attempted to collect additional payments on the promissory note from Kenneth's estate or Mary, nor does it reflect whether FirstBank attempted to foreclose on Mary's property to repay Kenneth's promissory note. In fact, the record does not even include a copy of the promissory note Kenneth executed with FirstBank, or any evidence that the promissory note was assigned to Kondaur along with the FirstBank deed of trust. The record does, however, show a series of assignments of the FirstBank deed of trust from one bank to another, beginning on September 29, 2011, when FirstBank assigned its deed of trust to Bank of America. On October 7, 2015, Bank of America then assigned the FirstBank deed of trust to Carrington Mortgage Services, who then assigned it to the Secretary of Housing and Urban Development ("HUD") on October 1, 2016. On October 11, 2016, HUD assigned the FirstBank deed of trust to Kondaur Capital Corporation ("Kondaur"), the current owner and holder of the FirstBank deed of trust. In each assignment, "Kenneth W. Smith" is listed as the person who executed the underlying deed of trust; none of the assignments reference Mary, nor were any amendments filed to add Mary as a borrower or cosigner of the deed of trust. There is nothing in the record indicating that any lienholder, at any time, attempted to collect on the promissory note from Mary after Kenneth's death.

After the FirstBank deed of trust was assigned to Kondaur, Kondaur began preparing for a possible non-judicial foreclosure action on the Property and discovered that Mary had not signed the FirstBank deed of trust. On January 23, 2018, Kondaur filed a complaint requesting the following relief:

> Kondaur requests that the Court enter a judgment reforming the FirstBank deed of trust to add Mrs. Smith as a party to the FirstBank deed of trust, declaring that

> the reformed FirstBank deed of trust relates back to the original date of its execution and/or recording and declaring that the FirstBank deed of trust is enforceable by its holder against Mrs. Smith in accordance with its terms as if Mrs. Smith had executed the same on the date of its execution by Mr. Smith, subject to any intervening lien of record from March 17, 2006, through the date of filing of this Complaint.
>
> Alternatively, Plaintiff requests that the Court enter a judgment imposing an equitable lien against the Property in favor of Kondaur in an amount equal to the unpaid balance of the FirstBank Loan and declaring that Kondaur or its successors have a right to enforce the equitable lien by foreclosure and sale of the Property, subject to any intervening lien of record from March 17, 2006, through the date of filing of this Complaint.
>
> Alternatively, Kondaur requests that the Court enter a judgment declaring that the FirstBank deed of trust is equitably subrogated to the position and enforceability of the Citizens Liens, such that the FirstBank deed of trust may be enforced by its holder against all interests in the Property, including Mrs. Smith's interest in the Property, by foreclosure and sale of the Property, subject to any intervening lien of record from March 17, 2006, through the date of filing of this Complaint.

Mary, proceeding *pro se*, filed a handwritten answer to the complaint. Pursuant to 28 U.S.C. § 636(c), the parties consented to the jurisdiction of the United States Magistrate Judge.

After receiving Mary's responses to its requests for admissions, Kondaur filed a motion for judgment on the pleadings or, in the alternative, for summary judgment,[3] requesting that the district court enter a judgment declaring that the FirstBank deed of trust had the same enforceability as the Citizens Bank deed of trust. Subsequently, the district court issued an order requiring Kondaur to brief the factors outlined in *Grand Trunk W. R.R. Co. v. Consol. Rail Corp.*, 746 F.2d 323 (6th Cir. 1984) (hereinafter the "*Grand Trunk* factors"), which are used to determine whether a court should exercise its jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. This order also afforded Mary an opportunity to respond to Kondaur's briefing of these factors once filed, but Mary declined to do so.

[3] Because the district court reviewed extrinsic evidence in its order granting Kondaur's motion, we will refer to the motion hereto as Kondaur's "motion for summary judgment."

Two weeks after it received Kondaur's additional brief, the district court issued an order concluding that it was appropriate to exercise its jurisdiction in this case and grant declaratory relief. The district court first determined that, due to the lack of information regarding the assignment of FirstBank's promissory note, it would be inappropriate to expressly authorize Kondaur to proceed with foreclosure on the Property. Next, the district court found that equitable subrogation was appropriate because, due to the fulfillment of the Citizens Bank loan, Mary had been unjustly enriched. Although the district court neglected to balance the equities when conducting its review, as is required under Tennessee law,[4] it acknowledged that the doctrine of equitable subrogation likely did not apply to this set of facts because this case does not regard lien priority but instead whether a lien even *exists*. Instead, the district court decided to impose an equitable lien.[5]

After finding that the record did not indicate that Mary intended for the Property to secure FirstBank's loan, the district court nevertheless held that the imposition of an equitable lien was

[4] "Subrogation is defined as 'the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt.'" *Bankers Trust Co. v. Collins*, 124 S.W.3d 576, 579 (Tenn. 2003) (quoting *Blankenship v. Estate of Bain*, 5 S.W.3d 647, 650 (Tenn. 1999). "[T]he application of the doctrine of equitable subrogation must be determined in each case 'according to the dictates of equity and good conscience, and consideration of public policy, and will be allowed in all cases where the equities of the case demand it.'" *Trustmark Nat'l Bank v. Deutsche Bank Nat'l Tr. Co.*, No. W200901658COAR3CV, 2010 WL 3269978, at *5 (Tenn. Ct. App. Aug. 19, 2010) (quoting *Dixon v. Morgan*, 285 S.W. 558 (Tenn. 1926)). Accordingly, "the right will only be enforced in favor of a meritorious claim and after a balancing of the equities." *Castleman Constr. Co. v. Pennington*, 432 S.W.2d 669, 676 (1968).

[5] Under Tennessee law, to impose an equitable lien on a piece of property, a plaintiff must demonstrate "(1) that the parties intended to make the particular property a security for the obligation, (2) that valuable consideration passed between the parties, and (3) there is an equitable reason for imposing the lien." *Ewing v. Smith*, No. 85-294-II, 1986 WL 2582, at *5 (Tenn. Ct. App. Feb. 26, 1986) (citing *Federal Land Bank of Louisville v. Monroe County*, 54 S.W.2d 716, 717 (Tenn. 1933)).

appropriate because Mary received a benefit from the transaction.[6] Specifically, the district court declared that Kondaur was entitled to an equitable lien, considered effective as of March 9, 2009, the date the Citizens Bank lien was released, worth $135,925.56, which it determined was the value of the Citizens Bank lien on the Property that FirstBank satisfied to unencumber the Property.[7] Although the district court determined that expressly declaring that Kondaur was permitted to proceed with a foreclosure action would be improper, because Tennessee is a title theory state,[8] this holding effectively grants Kondaur the authority to proceed with foreclosure anyway.

II.

A.

"A federal court sitting in diversity applies the choice of law provisions of the forum state," which in this case is Tennessee. *Solo v. United Parcel Serv. Co.*, 819 F.3d 788, 794 (6th Cir. 2016) (citing *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941)). In applying Tennessee law, we "must follow the decisions of the state's highest court when that court has addressed the relevant issue." *Talley v. State Farm Fire & Cas. Co.*, 223 F.3d 323, 326 (6th Cir. 2000). If the forum state's highest court has not directly addressed an issue, we must "anticipate how the relevant state's highest court would rule in the case and are bound by controlling decisions of that

[6] Essentially, the district court combined the doctrines of equitable subrogation and equitable liens to hold that, because Mary was unjustly enriched by a transaction that occurred nine years ago with FirstBank, Kondaur was now entitled to a lien on Mary's home.

[7] As previously noted, the district court improperly calculated the amount of funds transferred from FirstBank to Citizens Bank.

[8] *See Howell v. Tomlinson*, 228 S.W.2d 112, 116 (Tenn. Ct. App. 1949). When a borrower secures a loan with his interests in real property by executing a deed of trust, legal title is conveyed to a trustee, on behalf of the lender, via the deed of trust, until the debt is paid. *Mortg. Elec. Registration Sys., Inc. v. Ditto*, 488 S.W.3d 265, 270 n.6 (Tenn. 2015).

court." *In re Dow Corning Corp.*, 419 F.3d 543, 549 (6th Cir. 2005). "Intermediate state appellate courts' decisions are also viewed as persuasive unless it is shown that the state's highest court would decide the issue differently." *Id.*

On appeal, Mary contends that the district court improperly inferred that Kondaur was seeking declaratory relief in its complaint and its subsequent motion for summary judgment. Alternatively, she argues that the district court improperly exercised its jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201-2202. Additionally, Mary challenges the district court's grant of declaratory relief on the grounds that Kondaur's claim was barred by the applicable statute of limitations, Tenn. Code Ann. § 28-3-109(a)(3); Kondaur was not entitled to an equitable lien because it failed to pursue other legal remedies available to it; and the record was insufficiently developed factually to warrant equitable relief. We address each argument in turn.

B.

First, we address Mary's argument that Kondaur failed to adequately plead a claim for relief under the Declaratory Judgment Act in its complaint, which she asserts precluded the district court from raising the issue because she was not adequately put on notice that Kondaur was requesting declaratory relief. In response, Kondaur argues that, because it requested that the district court declare its legal right to enforce the FirstBank deed of trust in its prayer for relief, it sufficiently raised a claim under the Declaratory Judgment Act.

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. Although Mary accurately points out that Kondaur did not cite the Declaratory Judgment Act in either its complaint or its motion

for summary judgment, that does not preclude Kondaur from seeking declaratory relief. As the district court noted, in both its complaint and its motion for summary judgment, Kondaur requests that the district court enter a judgment declaring that the FirstBank deed of trust was enforceable against Mary. We find that this, along with the facts Kondaur alleged regarding the sequence of events leading up to the present status of FirstBank's loan to Kenneth and its relationship to Mary, plausibly state a claim for declaratory relief under the Declaratory Judgment Act. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

C.

Additionally, Mary raises several objections to the district court's decision to grant jurisdiction over Kondaur's declaratory judgment action, which we review for abuse of discretion. *See Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 554 (6th Cir. 2008). "Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment." *Tahfs v. Proctor*, 316 F.3d 584, 593 (6th Cir. 2003) (quoting *Amernational Indus., Inc. v. Action-Tungsram, Inc.*, 925 F.2d 970, 975 (6th Cir. 1991)).

According to the Supreme Court, the Act vests federal courts with "unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). In other words, Congress "created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants." *Id.* at 288. District courts are afforded such discretion "because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp." *Id.* at 289. Although challenges to a district court's subject-matter jurisdiction are not waived by a failure to raise them during proceedings before the district court, "the issue presented is not actually a jurisdictional challenge." *Scottsdale*, 513 F.3d at 552.

Upon review of Kondaur's motion for summary judgment, the district court ordered Kondaur to file additional briefing regarding the application of the *Grand Trunk* factors before issuing its ruling regarding Kondaur's request for declaratory relief. The district court also invited Mary to respond if she so desired, which she declined. As Mary's objection is not a true jurisdictional challenge, but instead questions "the propriety of the district court's decision to exercise its discretion with respect to the subject matter jurisdiction granted it by Congress in the Declaratory Judgment Act," traditional waiver rules apply. Thus, because Mary declined to challenge the district court's decision to exercise jurisdiction under the Declaratory Judgment Act when expressly invited to do so, we find that this claim is waived.

III.

Finally, we address Mary's arguments regarding the validity of the district court's grant of declaratory relief to Kondaur. Although we review a district court's decision to exercise jurisdiction under the Declaratory Judgment act for abuse of discretion, we review its grant of declaratory judgment to a party *de novo*. *Scottsdale*, 513 F.3d at 563 (citing *DaimlerChrysler Corp. v. Cox*, 447 F.3d 967, 971 (6th Cir. 2006)).

A.

Mary contends that the district court erred when it granted Kondaur a declaratory judgment without considering the applicable statute of limitations or the defense of latches. In response, Kondaur asserts that Mary waived her right to raise a statute of limitations defense because she failed to adequately allege the affirmative defense in her answer to Kondaur's complaint.

Under Rule 8 of the Federal Rules of Civil Procedure, the assertion of a statute of limitations or a defense of laches is an assertion of an affirmative defense. Fed. R. Civ. P. 8(c). Therefore, to preserve these defenses, they must be properly set forth in a response to a pleading.

See Broad. Music, Inc. v. Roger Miller Music, Inc., 396 F.3d 762, 783 (6th Cir. 2005) (citing Fed. R. Civ. P. 8(c)). As the Supreme Court has explained, "the purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and a chance to rebut it." *See Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993) (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971)). As both parties acknowledge in their respective briefs, however, a pleading filed *pro se* is to be liberally construed and held to less stringent standards than a pleading filed by counsel. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)); *Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004). To that end, when reviewing *pro se* pleadings it is important to avoid elevating form over substance.

In her answer to the complaint, Mary stated the following:

> At no faulth [sic] of my own, due to a mistake of the Title Insurance Company, my deceased husband Kenneth W. Smith was the sole title to the deed of trust. The land itself was past [sic] down to me, and was in my family since 1921. I already had the land before my husband and I married. When he passed away I was without any income. I [sic] no way do I believe I should have to lose my land, because of some else [sic] mistakes. It has been almost nine years since his death.

To succeed on a laches defense, Mary must establish that Kondaur's unreasonable delay in asserting its claim prejudiced her in some way. *Depositors Ins. Co. v. Estate of Ryan*, 637 F. App'x 864, 871 (6th Cir. 2016) (quoting *Gleason v. Gleason*, 164 S.W.3d 588, 592 (Tenn. Ct. App. 2004)); *Grand Valley Lakes Prop. Owners Ass'n, Inc. v. Burrow*, 376 S.W.3d 66, 83-84 (Tenn. Ct. App. 2011). "Prejudice includes the loss of evidence, expenditure of money, change of value, or a change of a party's right." *Archer v. Archer*, 907 S.W.2d 412, 416 (Tenn. Ct. App. 1995). Because Mary failed to allege any facts showing that she was prejudiced by the delayed pursuit of any rights established under the FirstBank deed of trust, she waived her ability to assert the affirmative defense of laches.

Mary's answer does, however, preserve her ability to raise the statute of limitations defense. In her answer, Mary states in relevant part, "I [sic] no way do I believe I should have to lose my land, because of some else [sic] mistakes. It has been almost nine years since his death." Essentially, Mary is claiming that it is unfair for a bank to bring a lawsuit against her nine years after another bank made a mistake that gave rise to that very lawsuit. Mary's answer, in combination with the documents Kondaur attached to its own complaint, put Kondaur on notice that Mary was the sole owner of the Property, which she owned prior to her marriage to Kenneth; Kenneth was the sole borrower listed on the FirstBank deed of trust and the only person who signed the deed of trust; nine years had passed since Kenneth's death and the last payment made on the loan; and Mary believed she shouldn't "have to lose [her] land" because of "someone else[']s] mistake" made nine years ago. Thus, Kondaur was sufficiently put on notice that Mary was arguing that it had brought its claim too late (*i.e.*, that its claims are time-barred) for purposes of Rule 8(c).[9] *See Coffey*, 992 F.2d at 1445. Accordingly, we find that Mary sufficiently pleaded that Kondaur's claims were time-barred. "To reach a contrary holding would negate the express purpose of the rule in order to exalt form over substance." *McMillan v. Barksdale*, 823 F.2d 981, 983 (6th Cir. 1987).

[9] Notably, Kondaur itself barely contests that Mary inadequately preserved her affirmative defense, presumably because it recognizes that the argument is tenuous. We also make this determination keeping in mind our holding that, upon review of the substance of Kondaur's requested relief, its failure to cite to or even mention the Declaratory Judgment Act in its complaint did not preclude its ability to seek declaratory relief. Kondaur cannot both claim that it sufficiently put Mary on notice that it was asking the court to enter a declaratory judgment via its use of the term "declare" throughout its prayer for relief and also assert that Mary's statements regarding the delay in the filing of this action were insufficient to put it on notice of a potential time-bar challenge.

B.

Kondaur additionally argues that Mary's failure to respond to its motion for summary judgment waives her ability to express *any* opposition to its motion or the district court's judgment on appeal, regardless of whether she raised the defense in her pleading. For support, Kondaur cites to a series of cases holding that a plaintiff's failure to respond to a defendant's motion to dismiss renders any objections to the motion waived for want of prosecution. *See Humphrey v. U.S. Attorney Gen.'s Office*, 279 F. App'x 328, 332 (6th Cir. 2008) (holding that a plaintiff's failure to respond to a motion to dismiss warrants any appeal on the merits of the decision waived); *Scott v. State of Tenn.*, 878 F.2d 3 82 (6th Cir. 1989) ("It is an established principle of law that a district court may properly dismiss a plaintiff's case for want of prosecution. Similarly, if a plaintiff fails to respond or to otherwise oppose a defendant's motion, then the district court may deem the plaintiff to have waived opposition to the motion." (citations omitted)); *Moody v. CitiMortgage, Inc.*, 32 F. Supp. 3d 869, 875 (W.D. Mich. 2014) ("A plaintiff must oppose a defendant's motion to dismiss or otherwise respond or he waives opposition to the motion."). Additionally, Kondaur cited one case regarding a plaintiff's abandonment of a claim for relief as a matter of course due to the plaintiff's failure to respond to a defendant's argument regarding that claim in a motion for summary judgment. *Alexander v. Carter for Byrd*, 733 F. App'x 256, 261 (6th Cir. 2018) ("When a plaintiff 'fails to address [a claim] in response to a motion for summary judgment,' the claim is deemed waived." (quoting *Haddad v. Sec'y, U.S. Dept. of Homeland Sec.*, 610 Fed. Appx. 567, 568-69 (6th Cir. 2015)). None of the cases Kondaur cites for support parallel the procedural posture of this case, and instead, at their core, regard a plaintiff's duty to prosecute its claims or suffer the consequences.

Moreover, the rule "that courts of appeals do not consider claims or arguments that were not raised before the district court [] is a prudential rule, not a jurisdictional one." *United States v. Martin*, 438 F.3d 621, 627 (6th Cir. 2006) (quoting *United States v. Hayes*, 218 F.3d 615, 619 (6th Cir. 2000)). This Court "has frequently addressed belated challenges" when an issue on appeal is "a purely legal one that has been fully briefed by both parties." *Id.* Generally, whether we choose to exercise this discretion is guided by consideration of factors such as:

> 1) whether the issue newly raised on appeal is a question of law, or whether it requires or necessitates a determination of facts; 2) whether the proper resolution of the new issue is clear beyond doubt; 3) whether failure to take up the issue for the first time on appeal will result in a miscarriage of justice or a denial of substantial justice; and 4) the parties' right under our judicial system to have the issues in their suit considered by both a district judge and an appellate court.

Scottsdale, 513 F.3d at 552 (quoting *Friendly Farms v. Reliance Ins. Co.*, 79 F.3d 541, 545 (6th Cir. 1996)).

In this case, whether the applicable statute of limitations bars Kondaur's claims is a question of law requiring no additional factual development. As limitations statutes operate to bar untimely claims, a clear resolution of the matter is available if the applicable statute of limitations is applied—unlike the declaratory judgment issued by the district court. We find it more appropriate to resolve this matter based on the clear result dictated by the applicable statute of limitations versus evaluating the applicability of Tennessee's equitable doctrines, which requires a fact-intensive analysis of state laws rooted in the state's public policy that Tennessee has not previously addressed in its precedent. Further, because both parties have fully briefed the matter, we find that our consideration of the issue would not contravene their right to have the matter considered by both the district court and the appellate court. Most importantly, though, we find it would serve a substantial injustice to refuse to consider whether a party's claims are time barred when they are so tenuously granted under equitable doctrines.

"Statutes of limitations are vital to the welfare of society and are favored in the law. Stale conflicts should be allowed to rest undisturbed after the passage of time has made their origins obscure and the evidence uncertain." *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1467 (6th Cir. 1988) (quoting *Campbell v. Upjohn Co.*, 676 F.2d 1122 (6th Cir. 1982)). The purpose of Tennessee's statutes of limitation is to protect defendants from stale or fraudulent claims. *Hunter v. Brown*, No. 03A01-9504-CV-00127, 1996 WL 57944, at *4 (Tenn. Ct. App. Feb. 13, 1996). As nothing in the record suggests that FirstBank was tricked out of or otherwise prevented from adding Mary to the FirstBank note and deed of trust, and neither party has alleged fraudulent behavior, this case exemplifies why stale claims are barred from being litigated. Since its execution, the FirstBank deed of trust has been assigned to five entities, but there is no evidence on the record regarding whether FirstBank or any of the subsequent assignees advised Mary of the note's delinquency or attempted to pursue a non-foreclosure action over the course of the nine years since the first payment was missed on the FirstBank loan.

Additionally, as the district court repeatedly pointed out in its order, Kondaur was unable to even produce the promissory note giving rise to the execution of the FirstBank deed of trust. To that end, the district court was unable to ascertain whether the promissory note was even assigned to Kondaur, and although "securitizing a note does not sever the note from the deed of trust," under Tennessee law, "[w]hoever holds the note owns the deed." *Thompson v. Bank of Am., N.A.*, 773 F.3d 741, 749 (6th Cir. 2014) (citing *W.C. Early Co. v. Williams*, 186 S.W. 102, 103-04 (Tenn. 1916)). What the record does reflect, though, is that the FirstBank deed of trust defined the "Borrower" as "Kenneth W. Smith," and that Kenneth, and only Kenneth, conveyed his interest in the Property. There is no mention of *any* other borrower or grantor in the entire deed of trust,

much less any mention of Mary specifically, and Mary's signature does not appear anywhere on the FirstBank deed of trust.

Further, the district court failed to explain how balancing the equities weighed in favor of rewarding a sophisticated entity for securing its loan with property interests that simply did not exist. FirstBank and its subsequent assignees, which includes Kondaur, are sophisticated parties whose "sophistication relates to this precise area of business and law—lending money and securing the loans with an interest in the borrowers' property." *Mortg. Elec. Registration Sys., Inc. v. Church*, 423 F. App'x 564, 567 (6th Cir. 2011). "No entities are better situated to properly perfect interests in land than banks, whose purposes are to maximize profit derived from lending money and to ensure the repayment of their loans by taking an interest in a borrower's collateral." *In re May*, 310 B.R. 405, 419 (E.D. Ark. 2004) (quoted with approval by *Anchor Pipe Co. v. Sweeney-Bronze Dev., LLC*, 2012 WL 3144638, at *6 (Tenn. Ct. App. Aug. 2, 2012). Thus, they are all certainly aware that "[a] deed of trust is 'a conveyance of an interest in real property to secure a debt'" and that "a person or entity cannot effectively convey an interest it does not possess." *Anchor Pipe Co.*, 2012 WL 3144638, at *6.

Kondaur does not claim that the Property was entangled in a particularly nuanced or complicated history of title transfers or that it was difficult to ascertain that Mary was the only owner of the Property. It simply asked the district court to reward a bank's failure to exert the most *minimal* of efforts to confirm that its interests were protected. "Courts can not underwrite Defendants' business risks under the guise of equity when Defendants themselves failed to take minimal steps to ensure their interests were properly protected." *In re May*, 310 B.R. at 419.

Accordingly, to the extent that Mary waived her statute of limitations argument by failing to specifically raise it in response to Kondaur's motion for summary judgment, we find that declining to consider it on appeal will result in a miscarriage of justice.

C.

Next, we must determine what, if any, limitations statute applies to this action and whether it precludes Kondaur's claim for declaratory relief. Kondaur argues that limitations statutes do not apply to declaratory judgments unless the claim underlying the declaratory relief sought would be time barred. Kondaur then reasons that, because its claim for declaratory relief arises under the Declaratory Judgment Act, which does not contain a statute of limitations, its claims cannot be time barred. This argument is circular and frivolous. The Declaratory Judgment Act is procedural in nature and "does not create an independent cause of action" that can be invoked absent some showing of an articulated legal wrong. *Davis v. United States*, 499 F.3d 590, 594 (6th Cir. 2007). Thus, "[a] request for declaratory relief is barred to the same extent that the claim for substantive relief on which it is based would be barred." *Int'l Ass'n of Machinists & Aerospace Workers v. Tenn. Valley Auth.*, 108 F.3d 658, 668 (6th Cir. 1997). Kondaur is therefore bound by the statute of limitations applicable to the claims underlying its request for declaratory relief.

Under Tennessee law, "a court must ascertain the 'gravamen of the complaint'" to determine the statute of limitations applicable to each claim. *Benz-Elliott v. Barrett Enters., LP*, 456 S.W.3d 140, 147 (Tenn. 2015) (quoting *Whaley v. Perkins*, 197 S.W.3d 665, 670 (Tenn. 2006)). This analysis requires consideration of "the legal basis of the claim" and "the type of injuries for which damages are sought." *Id.* at 151. Kondaur raises claims under the theories of unjust enrichment, equitable subrogation, and equitable liens, which are quasi-contractual theories

arising under the laws of equity.[10] Kondaur is using these theories to substitute what would otherwise be its breach-of-contract claim against Mary for her failure to repay the promissory note that the FirstBank deed of trust secures. Specifically, Kondaur is requesting a form of equitable relief that will allow it to assert a contractual right to the Property. These legal theories are, therefore, based in contract law. As to the nature of the damages Kondaur seeks, they solely request economic damages, which further suggests its claims are contractual in nature. *See Benz–Elliott*, 456 S.W.3d 151 (citing with approval *Alexander v. Third Nat'l Bank*, 915 S.W.2d 797, 799–800 (Tenn. 1996), for the proposition that the six-year statute of limitations was applicable to a claim with a legal basis in breach of contract in which the plaintiff solely sought economic damages). Thus, we find that each of Kondaur's claims arises under contract law. Accordingly, because "[a]ctions on contracts not otherwise expressly provided for" must be filed "within six (6) years after the cause of action accrued," we find that Kondaur's claims are time-barred. Tenn. Code Ann. § 28-3-109(a)(3); *Deutsche Bank Nat'l Tr. Co. v. Lee*, No. M201801479COAR3CV, 2019 WL 2482423, at *5 (Tenn. Ct. App. June 13, 2019) ("Chapter 28 of the Tennessee Code does not otherwise expressly provide for actions regarding promissory notes."); *see, e.g.*, *Estate of*

[10] *See Greer v. Am. Sec. Ins. Co.*, 445 S.W.2d 904, 907 (Tenn. 1969) (explaining that in the absence of an express contract, an equitable lien may be implied based on the intent of the parties to make a particular property a security for the obligation); *Metro. Gov't of Nashville & Davidson Cty. v. Cigna Healthcare of Tennessee, Inc.*, 195 S.W.3d 28, 32 (Tenn. Ct. App. 2005) ("Unjust enrichment is a quasi-contractual theory or an equitable substitute for a contract claim in which a court may impose a contractual obligation where one does not exist."); *Bankers Tr. Co. v. Collins*, 124 S.W.3d 576, 579 (Tenn. Ct. App. 2003) (noting that equitable subrogation "may arise by contract [o]r application of equitable principles of law").

Lyons v. Baugh, 2018 WL 3578525, at *4 (explaining that because unjust enrichment is "an action on a contract," it is bound by the six-year statute of limitations).[11]

Because we find that the statute of limitations bars Kondaur's request for relief in this matter, we need not reach the merits of the district court's imposition of an equitable lien on the Property.

IV.

For the foregoing reasons, we **REVERSE** and **VACATE** the judgment of the district court and **REMAND** with instructions to dismiss the underlying litigation.

[11] Mary also raises a defense of the statute of limitations under Tenn. Code Ann. § 30-2-310(a), which imposes an even shorter limitations period for claims brought by creditors against an estate. Because she prevails under either limitations period, we need not consider whether § 30-2-301(a) applies here.