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7
8 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
9 IN AND FOR THE COUNTY OF MARICOPA

10 LAVEEN MEADOWS HOMEOWNERS'
ASSOCIATION, INC., an Arizona nonprofit
corporation,

11 Plaintiff,

12 vs.

13 CARLOS MEJIA, a married man, as his sole
14 and separate property; et al.,

15 Defendants.

No. CV2016-094391

**MOTION TO SET ASIDE
ENTRY OF DEFAULT**

(Expedited Consideration Requested)

16
17 **MOTION**

18 Defendant Carlos Mejia (“Defendant”) moves to set aside the entry of default in this matter
19 for the reasons set forth herein. The following Memorandum of Points and Authorities, the
20 Affidavit of Carlos Mejia, and the entire record supports this Motion.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **INTRODUCTION**

23 This is a lien foreclosure action. Although the Complaint alleges that a principal balance of
24 \$8,246.48 is due and subject to foreclosure, Plaintiff has not attached a ledger to the Complaint.
25 Nor does it appear that Plaintiff has submitted a ledger with its default judgment packet. Nowhere
26 in the record has Plaintiff provided any breakdown with respect to how the \$8,246.48 alleged in the

1 Complaint, which has increased to \$8,843.38 in the proposed Judgment on Foreclosure, has been
2 calculated.

3 Defendant on this date has tendered a check in the amount of \$5,000.00 to cover all past due
4 assessments and, therefore, eliminates the right to foreclose. Although this amount is less than the
5 \$8,843.38 sought in the proposed Judgment on Foreclosure, it is clear the so-called “principal sum”
6 consists of substantially more than just unpaid assessments. Plaintiff is only allowed to foreclose
7 over the last three years of assessments.¹ Assuming unpaid assessments from May 2013 through
8 May 2016 were the same as the 2018 assessments, which Plaintiff’s proposed Judgment on
9 Foreclosure states are \$552 per year, this means that the total amount of unpaid assessments due at
10 the time Plaintiff commenced this action was just \$1,656.00, not \$8,246.48, and that the
11 assessments through April 2017 would be an additional \$506.00. This means that the maximum
12 amount of unpaid assessments subject to foreclosure would be \$2,162.00 and not the \$8,843.38
13 that Plaintiff seeks in its proposed Judgment on Foreclosure. Defendant’s payment of \$5,000.00,
14 therefore, eliminates the right to foreclose.

15 In fact, Defendant’s payment covers the last six years of assessments (\$3,312.00) plus
16 unpaid assessments through April 2017 (\$506.00). Even if Plaintiff accelerated assessments for
17 2017, an additional seven months (\$322.00), Defendant’s payment is still sufficient to cover all
18 assessments. Because Defendant’s payment eliminates any conceivable amount of unpaid
19 assessments, the right to foreclose no longer exists.

20 These facts, among others, demonstrate good cause for vacating the entry of default.

21 ARGUMENT

22 I. THE LEGAL STANDARD.

23 Arizona courts do not favor the determination of actions by default.² Thus, in evaluating
24 a motion to set aside an entry of default or default judgment, the trial court has broad discretion,

25 ¹ A.R.S. § 33-1807(F).

26 ² *Haenichen v. Worthington*, 9 Ariz. App. 83, 449 P.2d 319 (1969).

1 and any doubt that may exist should be resolved in favor of a trial on the merits.³ The Arizona
2 Supreme Court has summarized the rule as follows:

3 [A] party should be given a reasonable opportunity to litigate his claim or defense
4 on the merits; that any doubt which may exist as to whether a default should be set
5 aside should be resolved in favor of the application, to the end that a trial upon the
6 merits may be had.⁴

7 Rule 55(c) dictates that a court may set aside entry of default “for good cause shown.” In
8 Arizona, “[t]he test of good cause is the same for an entry or judgment of default.”⁵ A party
9 must show: (1) that the failure to answer was excused by one of the grounds set forth in Rule
10 60(c); (2) that the party acted promptly in seeking relief from the entry of default; and (3) that
11 the party has a meritorious defense.⁶

12 **II. APPLICATION OF RULE 60(C) JUSTIFIES SETTING ASIDE DEFAULT.**

13 Rule 60(c) provides courts with ample power to vacate default judgments whenever such
14 action is appropriate to accomplish justice, including for (1) mistake, inadvertence, surprise or
15 excusable neglect; (2) newly discovered evidence; (4) the judgment is (or would be) void;
16 (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment

17 ³ *Id.*; *Marquez v. Rapid Harvest Co.*, 99 Ariz. 363, 409 P.2d 285 (1965); *Alvarez v.*
18 *Superior Court*, 146 Ariz. 189, 704 P.2d. 830 (Ct. App 1985); *Phillips v. Findlay*, 19 Ariz. App.
19 348, 354, 507 P.2d 687, 693 (1973); *see also Walker v. Dallas*, 146 Ariz. 440, 706 P.2d 1207
20 (1985) (holding that absent defendant may often set aside default judgment on proper showing
21 of excusable lack of notice and no intent to evade process); *Vital v. Johnson*, 128 Ariz. 129, 624
22 P.2d 326 (1983) (holding that, when an aggrieved party establishes lack of knowledge that
23 judgment has been entered and asserts additional reasons that are so extraordinary as to justify
24 relief, trial court has authority to vacate judgment); *Roll v. Janca*, 22 Ariz. App. 335, 527 P.2d
25 294 (1974) (holding that court did not abuse discretion in setting aside default judgment where,
26 among other things, uncertainty existed as to whether defendant had been served and defendant
acted promptly to seek relief upon learning of the default judgment); *Coconino Pulp & Paper*
Co. v. Marvin, 83 Ariz. 117, 317 P.2d. 550 (1957) (holding that, in determining whether to set
aside default judgment, court is guided by certain equitable principles, including that a
defendant should be allowed to defend a matter on the merits when circumstances are such that
it would be extremely unjust to enforce judgment).

⁴ *Hendrie Buick Co. v. Mack*, 88 Ariz. 248, 253, 355 P.2d 892, 895 (1960).

⁵ *Webb v. Erickson*, 134 Ariz. 182, 185, 655 P.2d 6, 9 (1982).

⁶ *Id.* at 183, 655 P.2d at 10.

1 that has been reversed or vacated; or applying it prospectively is no longer equitable; and
2 (6) any other reason justifying relief from operation of the judgment.⁷ Each of these applies
3 here.⁸

4 Because Defendant has indisputably paid *all* alleged past due assessments, any judgment
5 of foreclosure would violate A.R.S. § 33-1807 and, consequently, would be void. Under the
6 circumstances, the Court should set aside the entry of default even if it concludes that Defendant
7 has not shown good cause for failing to file a timely answer. Otherwise, the Court would be
8 placing its imprimatur on a default judgment of foreclosure where Defendant has paid all
9 amounts giving rise to such a foreclosure. It would be a judgment of foreclosure where Plaintiff
10 is not entitled to foreclose. Relief under Rule 60(b)(4), therefore, is appropriate.

11 As set forth in the Affidavit of Carlos Mejia (attached hereto as Exhibit 1), however,
12 Defendant did not file a timely answer due to his failure to read and comprehend English and
13 concomitant failure to appreciate the nature of the proceedings against him. Relief is therefore
14 appropriate under Rule 60(b)(1), (2), (5), and (6).

15 **III. DEFENDANT ACTED PROMPTLY IN SEEKING RELIEF FROM DEFAULT.**

16 Defendant has acted promptly in filing this motion. He retained counsel, immediately
17 tendered all sums due and owing, and has filed the motion before entry of default judgment.
18 Defendant has acted promptly in seeking this relief.

19 **IV. DEFENDANT HAS MERITORIOUS DEFENSES TO FORECLOSURE.**

20 Plaintiff filed this action seeking to foreclose its assessment lien. This is not an action
21 simply to recover a money judgment. In fact, it does not appear that Plaintiff is seeking a money

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23 ⁷ *Beyerle Sand & Gravel, Inc. v. Martinez*, 118 Ariz. 60, 574 P.2d 853 (App. 1977);
24 *Arizona State Department of Economic Security v. Mahoney*, 24 Ariz. App. 534, 540 P.2d. 153
(1975); *Phillips v. Findlay*, 19 Ariz. App. 348, 507 P.2d 687 (1973).

25 ⁸ Although Rule 60(c)(2), (4), and (5) may be more applicable in a case where a party is
26 seeking to set aside a default judgment, as opposed to the entry of default, it is important to note
that, if the Court declines to set aside the entry of default, the default judgment that it issues will
directly implicate each of these subsections.

1 judgment. Thus, the only question in this case, therefore, is whether Plaintiff has the right to
2 foreclose. This is a question that must be answered in the negative.

3 **A. Defendant’s Payment of Assessments Eliminates any Basis to Foreclose.**

4 No one disputes Plaintiff has a lien under A.R.S. § 33-1807. What is disputed is whether
5 Plaintiff is entitled to proceed with foreclosure where a homeowner pays all past due
6 assessments prior to the association obtaining a judgment of foreclosure. Defendant contends
7 that the act of tendering such payment prohibits an association from obtaining such a judgment.

8 The resolution of this dispute turns on the second sentence of § A.R.S. § 33-1807(a):

9 The association's lien for assessments, for charges for late payment of those
10 assessments, for reasonable collection fees and for reasonable attorney fees and
11 costs incurred with respect to those assessments may be foreclosed in the same
12 manner as a mortgage on real estate *but may be foreclosed only if the owner has
13 been delinquent in the payment of monies secured by the lien, excluding
reasonable collection fees, reasonable attorney fees and charges for late payment
of and costs incurred with respect to those assessments, for a period of one year
or in the amount of one thousand two hundred dollars or more, whichever occurs
first.*⁹

14 This sentence is plain and unambiguous. The Legislature used the phrase, “may be
15 foreclosed.” The word, “foreclosed,” does not simply refer to the filing of a foreclosure action
16 but rather the ultimate act of foreclosing. If the Legislature wanted to prevent an owner from
17 avoiding foreclosure once an action is filed, it easily could have chosen language to clearly
18 reflect such intent; it did not. Regardless of the various amounts comprising it or the total
19 amount of the lien, the italicized language states that the lien “may be foreclosed only if” the
20 *assessments* are past due either by one year or more than \$1,200.00. In determining whether the
21 lien may be foreclosed, one first “exclud[es] reasonable collection fees, reasonable attorney fees
22 and charges for late payment of and costs incurred with respect to those assessments.” In other
23 words, it is the amount of the assessments, stripped of all other charges, that governs the right of
24 foreclosure.

25 _____
26 ⁹ A.R.S. § 33-1256(a) (emphasis added).

1 According to its proposed default Judgment on Foreclosure, Plaintiff contends that the
2 “principal sum” due is \$8,843.38. Yet, Plaintiff notably does not explain how it calculates this
3 amount or even provides a ledger from which Defendant or the Court can do its own calculation.
4 The only information that Plaintiff provides is the fact that the 2018 assessment is \$552.00. This
5 means they are \$46.00 per month.

6 Although Plaintiff does not provide its ledger, Defendant has been able to locate additional
7 information concerning prior assessments from the other two lawsuits that Plaintiff has filed
8 against Defendant. In a 2013 action filed in South Mountain Justice Court, *Laveen Meadow*
9 *Homeowners Association, Inc. v. Mejia*, Case No. CC2013-089601, Plaintiff filed a document
10 entitled, “Notice of Affidavit and Proof of Debt per JCRCP 140.”¹⁰ Plaintiff attaches a ledger to the
11 Notice of Affidavit and Proof of Debt that shows that the assessments were also \$46.00 per month
12 since at least 2011.

13 Thus, Defendant’s \$5,000.00 payment is more than sufficient to cover all past due
14 assessments dating back six years plus all assessments through December 2017.¹¹ The right to
15 foreclose (*i.e.*, obtain a foreclosure judgment), therefore, no longer exists.

16 To the extent that the \$8,843.38 includes other charges, which it clearly must, the
17 legislature explicitly sought to distinguish between assessments and such other amounts that
18 may be incurred in connection with assessments, stating it is the former, alone, that triggers the
19 right to foreclose. Presumably, this is because of the significance of assessments to the ability of
20 the community to operate. Late fees, attorneys’ fees and other charges, conversely, are not given
21 such a priority. While these additional amounts arguably may be included in the lien pursuant to
22 the first sentence of A.R.S. § 33-1807(a), they may not be foreclosed unless the assessments are
23 past due either by one year or more than \$1,200.00. This is because the primary purpose in
24 bringing an action under A.R.S. § 33-1807 is to recover the unpaid assessments.

25 ¹⁰ A copy is attached as Exhibit 2.

26 ¹¹ A copy of this check is attached as Exhibit 3.

1 Because the “monies secured by the lien,” excluding all other charges and fees, were paid
2 prior to the issuance of a foreclosure judgment, Plaintiff no longer has any right to foreclose in
3 this case or even obtain a money judgment for unpaid assessments. To permit an association to
4 obtain a foreclosure judgment for non-assessments ignores the plain wording of A.R.S. § 33-
5 1807.

6 **B. It Appears Plaintiff Is Impermissibly Double-Dipping the “Principal Sum.”**

7 Although Plaintiff has not provided any breakdown for the \$8,843.38, it appears that this
8 amount includes attorneys’ fees and costs incurred in the South Mountain Justice Court action.
9 Of course, Plaintiff has no right to file a second lawsuit over these same amounts, including the
10 attorneys’ fees it incurred in the 2013 action.

11 At a minimum, Defendant should have the right to challenge the \$8,843.38. But
12 Defendant has no ability to do so without seeing the actual ledger on which the Complaint is
13 based. If the \$8,843.38 includes late fees or attorneys’ fees incurred in the 2013 action, which it
14 appears to, Plaintiff does not have the right to obtain these amounts a second time in this case.

15 **CONCLUSION**

16 For the above reasons, this is not a case that should be resolved with a default judgment.
17 Defendant has paid all past due assessments that would give Plaintiff the right to obtain a default
18 judgment of foreclosure. The proper course of action at this stage should be for Plaintiff to
19 submit a breakdown of the alleged charges for a determination of what amounts, if any, to be
20 awarded in a money judgment.

21 DATED this 14th day of April 2017.

22 **DESSAULES LAW GROUP**

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24 By: /s/ Jonathan A. Dessaulles

Jonathan A. Dessaulles

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1 COPY of the foregoing mailed/e-mailed
2 this 14th day of April 2017, to:

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8 /s/ Hilary Narveson
