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10 *Attorneys for Plaintiff*

11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
12 **IN AND FOR THE COUNTY OF MARICOPA**

13 LAVEEN MEADOWS HOMEOWNERS’
14 ASSOCIATION, an Arizona non-profit
15 corporation,

16 Plaintiff,

17 vs.

18 CARLOS MEJIA, a married man, as his sole
19 and separate proeprty; *et al.*,

20 Defendants.

No. CV2016-094391

PLAINTIFF’S RESPONSE TO
DEFENDANTS’ MOTION TO SET ASIDE
DEFAULT

(Assigned to the Honorable Margaret Benny)
(Judgment Not Yet Entered – Damages
Hearing Set for June 2, 2017)

21 Plaintiff, Laveen Meadows Homeowners Association, Inc. (“Association”), by and through
22 counsel undersigned, hereby files its Response to Defendant’s Motion to Set Aside Default.
23 Defendant Carlos Mejia (“Defendant”) submits no legal or factual basis to set aside entry of default.
24 Judgment is appropriate and a damages hearing is currently set for June 2, 2017. Respectfully,
25 Plaintiff requests a ruling on this Motion to Set Aside prior to the damages hearing and/or the
26 damages hearing be postponed to a later date as to allow the Court time to rule on this Motion.

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1 **I. RELEVANT BACKGROUND**

2 1. On May 11, 2016, Plaintiff filed the Complaint meeting all statutory requirements under
3 ARS 33-1807 to foreclose its assessment lien (assessment delinquency existing 12 months or over
4 \$1,200.00).

5 2. Defendant was served that day. (See Affidavit of Service in Court's File).

6 3. On May 12, 2016 Defendant traveled from his home in Laveen to the law offices of
7 Maxwell & Morgan in Mesa (approximately 30 miles each way) to discuss the lawsuit and possible
8 methods to resolve. Mr. Porter is fluent in Spanish and spoke to Mr. Mejia in Mr. Mejia's language
9 of preference. (Exh. A, Affidavit of Jacob L. Porter, Para. 2).

10 4. Mr. Mejia requested a payoff statement at that meeting, which was provided on June 2,
11 2017. (Exh. A, Para. 2).

12 5. On June 7, 2016, Defendant called undersigned counsel's office, and offered a payment
13 agreement in resolution. Mr. Richardson is fluent in Spanish and spoke to Mr. Mejia in Mr. Mejia's
14 language of preference. (Exh. B, Affidavit of Samuel C. Richardson, Para. 3)

15 6. On July 25, 2016, Defendant was informed via telephone conference in again his
16 requested and preferred language of Spanish that his agreement offer had been denied. (Exh. B,
17 Para. 4)

18 7. On July 26, 2016, (1 day later) Defendant contacted counsel again and offered a second
19 payment proposal, and followed up on the proposal on August 25, 2016. (Exh. B, Para. 5)

20 8. Defendant was informed the Laveen Meadows Board would review Defendant's proposal
21 at their next meeting on September 13, 2016. (Exh. B, Para. 6)

1 9. During a conversation with Jacob L. Porter, Defendant explained he had family
2 members at home who assisted him with reading and understanding communications in English.
3 (Exh. A, Para. 2)

4 10. Defendant's exact proposed payment agreement terms were accepted by the
5 Association, and on October 6, 2016, a written stipulation to judgment agreement was sent to
6 Defendant for his review and signature. (Exh. B, Para. 8 and Exh. C Stipulation to Judgment).

7 11. These documents were sent to Defendant's property address and were not returned as
8 undeliverable. (Exh B, Para. 9).

9 12. Defendant did not return the agreement or make any payments, although the terms were
10 exactly as Defendant had proposed. Defendant did not respond in any fashion either objecting to the
11 proposed stipulation or otherwise. (Exh. B, Para 9).

12 13. The Application and Affidavit in Support of Entry of Default were filed on December 8,
13 2016 and mailed to Defendant at his property address. They were not returned as undeliverable.
14 (Exh B, Para. 10).

15 14. Default became effective on December 18, 2017 as Defendant failed to file an answer
16 within 10 days of the entry of default.

17 15. No further contact from Defendant was received, on March 31, 2017 Plaintiff filed its
18 request for entry of default judgment and associated documents.

19 16. 117 days after the default became effective, on April 14, 2017, Defendants filed an
20 Answer, as well as the present Motion to Set Aside Default, and tendered payment of \$5,000.00 at
21 3:55 p.m. on a Friday afternoon before the default hearing set for the following Monday morning at
22 9:00 a.m.
23
24
25
26

1 Defendant argues that his recent tender of \$5,000.00 excuses the months of delay in
2 responding to the proposed stipulation or filing an Answer in the litigation, and that he acted
3 promptly in seeking relief. As will be set forth, Defendant's Motion to set aside entry of default
4 must be denied. The "damages" arguments are irrelevant to the request to set aside entry of default
5 and will be addressed at the upcoming damages hearing set for June 2, 2017 or another date set by
6 the Court.

7
8 **II. DEFENDANT PROVIDES NO LEGAL OR FACTUAL BASIS TO SET ASIDE**
9 **ENTRY OF DEFAULT**

10 Pursuant to ARCP 55(c), "The court may set aside an entry of default for good cause, and it
11 may set aside a final default judgment under Rule 60(c)."

12 No judgment has been entered yet, so the grounds set forth in Rule 60(c) are arguably not
13 relevant to this discussion as Defendant still has the opportunity to contest the damages being
14 sought. To the extent they are relevant to the issue of whether Defendant should be afforded the
15 opportunity to Answer or otherwise defend, they will be addressed.

16
17 "The test of good cause is the same for an entry or judgment of default." *Webb v. Erickson*,
18 134 Ariz. 182, 185-86, 655 P.2d 6, 9-10 (1982). "In order to obtain relief, [Defendant] must show
19 each of the following: (1) that his failure to answer was excused by one of the grounds set forth in
20 Rule 60(c); (2) that he acted promptly in seeking relief from the entry of default; and (3) that he had
21 a meritorious defense." *Id.* at 186.

22 **A. Defendant Cannot Establish Good Cause for His Failure to Timely Answer or Defend**

23
24 "To establish that its failure to timely file an answer is excusable, a party seeking relief must
25 demonstrate that its actions were those of a reasonably prudent person under the circumstances."
26 *Daou v. Harris*, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984). Defendant's argument to set aside

1 entry of default is that he does not speak English and did not understand the seriousness of the
2 litigation is untrue.

3 All evidence shows Defendant was aware of the seriousness of the situation and understood
4 the litigation related to potential foreclosure of his home. He contacted the undersigned's office no
5 less than 3 times. He drove to this office to discuss the litigation. All conversations occurred in
6 Defendant's requested language of Spanish. Defendant explained he had family at home that could
7 help him with anything written in English. Defendant made payment plan offers.
8

9 Defendant's conduct is certainly not that of a person unaware of the seriousness of the
10 litigation. Of concern, Defendant's Affidavit neglects to mention any of these salient, relevant
11 facts. Either Defendant did not inform his counsel of all of his efforts made after the litigation was
12 filed and his communications with counsel for the Association, or Defendant's counsel attempted to
13 deceive this Court by omitting material facts.

14 **B. Defendant Did Not Act Promptly**

15 Default became effective on December 18, 2016. Defendant was informed of the default
16 hearing via Notice on April 17, 2017. Defendant's Motion was filed on the eve of the hearing –
17 being filed on Friday April 14, 2017.
18

19 Defendant's conduct after being served with the litigation shows he understood the
20 seriousness of the matter. His communications through the summer and fall of 2016 likewise show
21 he understood. When no further contact, communication or payments of any sort were received
22 from Defendant after he was informed his proffered repayment agreement was accepted, the
23 Association still waited almost 4 months before moving forward with setting the hearing.
24

25 Defendant's failure to act promptly in light of the facts and circumstances further justifies
26 refusing to set aside the entry of default.

1 **C. If a Judgment Had Been Entered, Defendant Would Only Be Entitled to Set Aside Its**
2 **Entry if Rule 60(c) Criteria Was Met – Which Defendant Cannot Do**

3 Rule 60(c) provides six bases for relief from an order or judgment: (1) mistake,
4 inadvertence, surprise or excusable neglect; (2) newly discovered evidence; (3) fraud,
5 misrepresentation, or other misconduct of an opposing party; (4) the judgment is void (*as no*
6 *judgment has been entered, this basis is in applicable*); (5) the judgment has been satisfied,
7 released, or discharged (*in applicable*); it is based on an earlier judgment that has been reversed or
8 vacated; or applying it prospectively is no longer equitable (*inapplicable*); or (6) any other reason
9 justifying relief.
10

11 Defendant offers no evidence of mistake, inadvertence, surprise, excusable neglect, newly
12 discovered evidence, fraud, misrepresentation or other misconduct of the opposing party. As the
13 first five prongs are inapplicable, Defendant's argument must be that other reasons justify relief,
14 namely his 11th hour tender of payment.
15

16 The issue of the amount of the Judgment to which Plaintiff is entitled is the subject of the
17 upcoming damages hearing. But to the extent, Defendant's argument that tendering \$5,000.00
18 somehow meets the "any other reason justifying relief" standard to set aside the entry of default,
19 that argument likewise fails.

20 Defendant states that the \$5,000.00 pays all assessments due, thereby divesting this Court of
21 the ability to enter a judgment against him. Defendant argues that he has tendered payment of all
22 assessments, and thus a foreclosure judgment is no longer allowed.
23

24 Defendant's attempt to divest the Court of jurisdiction with the tender of a partial payment
25 is gamesmanship. Jurisdiction over a controversy, once vested, may not be divested by subsequent
26 events, actions or omissions of the parties. *See, e.g., Daou v. Harris*, 139 Ariz. 353, 356, 678 P.2d

1 934, 937 (1984); *Schoenberger v. Bd. Of Adjustment*, 124 Ariz. 528, 606 P.2d 18 (1980); *Am.*
2 *Smelting & Ref. Co. v. Ariz. Air Pollution Control Hearing Bd.*, 113 Ariz. 243, 550 P.2d 621
3 (1976); *Whitfield Transp. v. Brooks*, 81 Ariz. 136, 302 P.2d 526 (1956). “This is because
4 ‘jurisdiction is established *at the time of filing of the lawsuit and cannot be ousted by subsequent*
5 *actions or events.*” *Fry v. Garcia*, 213 Ariz. 70, 73, ¶ 10, 138 P.3d 1197, 1200 (App. 2006)
6 (emphasis added) (citing *Resolution Trust Corp. v. Foust*, 177 Ariz. 507, 869 P.2d 183 (App.
7 1993)).
8

9 Defendant admits that the statutory threshold requirement was met at the time the lawsuit
10 was filed, and as a result, the Association can now proceed to foreclose on all amounts secured by
11 the lien, even if the defendant pays the past due assessments. This is because jurisdiction was
12 established at the time of filing the lawsuit and cannot be ousted by subsequent actions or events,
13 such as making a partial payment. The tender of partial payment is an issue that goes to damages,
14 but does not change Defendant’s liability, or the Association’s right to foreclose.
15

16 If this were a mortgage foreclosure, the mortgagor would be required to pay all amounts due
17 in order to stop the foreclosure action. *See* A.R.S. §§ 33-725 & 726. There is no reason to treat this
18 lien foreclosure action any differently.

19 **D. Defendant lacks any meritorious defenses.**

20 Defendant has no meritorious defense. Again, Defendant’s only argument is that this
21 eleventh hour tender of payment eliminates the Association’s right to foreclose. Defendant cites no
22 cases to support this beyond a strained reading of A.R.S. § 33-1807 – arguing the verb “foreclose”
23 only means the finalized sale of a property.
24

25 As mentioned earlier, A.R.S. § 33-1807(A) provides that the Association’s lien for
26 assessments and related charges “may be foreclosed in the same manner as a mortgage on real

1 estate” Under Arizona law, “Mortgages of real property . . . notwithstanding any other
2 provision in the mortgage or deed, shall be foreclosed by action in a court.” A.R.S. § 33-721.
3 “When a mortgage or deed of trust is foreclosed, the court shall give judgment for the entire amount
4 determined due, and shall direct the mortgaged property, or as much thereof as is necessary to
5 satisfy the judgment, to be sold.” A.R.S. § 33-725(A).

6 Arizona law permits foreclosure of an association’s lien if the owner has been delinquent in
7 the payment of assessments “for a period of one year or in the amount of on thousand two hundred
8 dollars or more, whichever occurs first.” A.R.S. § 33-1807(A). As explained above, the
9 Association’s lien secures more than just assessments, and once the lien is foreclosed (*i.e.*, an action
10 for foreclosure is initiated), nothing short of redemption can stop the Court from entering judgment
11 and a sale from being completed. *See* A.R.S. §§ 33-726 & 1807(A). As a result, Defendant is
12 without meritorious defense, and partial payment is not sufficient justification to set aside default.
13 The payment will be considered in the Court’s determination of damages, but will not frustrate the
14 Association’s ability to obtain judgment.
15

16
17 **E. Obligations of Counsel**

18 The facts of this litigation demonstrate Defendant was aware of the seriousness of the
19 litigation and understood the implications. What the facts also show is that Defendant, and/or his
20 attorney, are unnecessarily increasing the scope, time and expense of this litigation. Instead of
21 attempting to resolve the litigation, which clearly the Association was willing to do via terms of a
22 proposal Defendant proffered, Defendant’s counsel is filing legally and factually baseless motions.
23

24 The Association agrees Defendant has a right to contest the damages and make any salient
25 arguments in that regard. Counsel for Defendant has done his client no favors by expanding the
26

1 scope of this litigation and submitting documents to the Court with substantial factual omissions
2 seeking to set aside entry of default.

3 **III. REQUEST FOR ATTORNEYS' FEES**

4 As this matter arises out of contract, per the terms of the contract at issue and per ARS 33-
5 1807 as well as ARS 12-349, the Association will be seeking an award of its legal fees and costs
6 incurred in responding to Defendant's Motion to Set Aside Entry of Default.

7 **IV. CONCLUSION**

8 Because Defendant did not act promptly, has not shown any justification under Rule 60(c),
9 and has no meritorious defenses, the Court should not set aside the entry of default. Plaintiff
10 respectfully requests that the Court deny Defendant's Motion to Set Aside Default.
11

12
13 Dated this 28th day of April, 2017.

14 MAXWELL & MORGAN, P.C.
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1 COPY of the foregoing submitted for
filing this 28 day of April, 2017, to:

2 Clerk of the Court
3 Maricopa County Superior Court

4
5 COPY of the foregoing
mailed this 28 day of
6 April, 2017, to:

7 Jonathan A. Dessales
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8 Phoenix, AZ 85016
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