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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

LAVEEN MEADOWS HOMEOWNERS' ASSOCIATION, INC., an Arizona nonprofit corporation, Plaintiff, vs. CARLOS MEJIA, a married man, as his sole and separate property; et al., Defendants.	No. CV2016-094391 **REPLY IN SUPPORT OF MOTION TO SET ASIDE ENTRY OF DEFAULT**

INTRODUCTION

Defendant has indisputably paid, in full, all assessments triggering any right to foreclose. Although Plaintiff's foreclosure claim is now moot as a matter of law, though it might be entitled to a money judgment for reasonable attorneys' fees and costs, Plaintiff contends it is still entitled to a default judgment of foreclosure since Defendant has not also paid the *unawarded* attorneys' fees and costs it eventually will request from the Court. There really should be nothing else left to do in this case except dismiss the foreclosure claim and resolve the issue of fees and costs. Instead, Plaintiff contends it is entitled to take and sell Defendant's home at a sheriff's sale for his non-payment of amounts that have not been awarded and that have never been fully disclosed to him. This is a ridiculous position.

Although Defendant has paid significantly more than the assessments that could have accrued in the last six years, Plaintiff is asking the Court to interpret the lien foreclosure statute as giving the homeowner's association the right to continue with foreclosure unless and until the owner pays every dime in fees and costs that *it* contends it is owed, even before they are awarded, under the threat of foreclosure. Plaintiff essentially argues that the right to foreclose cannot be avoided once an association commences a foreclosure action unless the homeowner pays additional amounts that have not been awarded (and that a court, in the exercise of its discretion, may not award).

This is neither the law in Arizona nor a reasonable interpretation of the law. The lien foreclosure statutes do not contemplate homeowners losing their homes over an inchoate right to attorneys' fees and court costs.

ARGUMENT

I. DEFENDANT HAS SHOWN GOOD CAUSE FOR SETTING ASIDE DEFAULT.

Arizona courts do not favor the determination of actions by default and "any doubt which may exist as to whether a default should be set aside should be resolved in favor of the application."[1] This is especially true where, as here, the motion is filed after entry of default but before entry of default judgment. In cases involving the entry of default judgment, and not simply the entry of default, the competing interest in finality in proceedings serves as a counterbalance to the interest in resolving cases on their merits. Here, Defendant filed his motion and answer before entry of default judgment.

As a threshold matter, the "good cause" standard does not apply where the judgment is or will be void. Because Defendant no longer owes unpaid assessments, the right to foreclose under A.R.S. § 33-1807(A) no longer exists. Any judgment of foreclosure, therefore, would be void because the statute does not provide for the remedy of foreclosure where assessments are not

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

delinquent by either twelve months or $1,200.00. The case, in other words, is not one in which a party could obtain a foreclosure judgment. When a judgment is void, the defendants "do not need to show all of the elements necessary for relief under Rule 60(c)."[2] "[A] trial court 'must vacate…a [void] judgment[,] … [and] a party seeking relief from a void judgment need not show that their failure to file a timely answer was excusable, that they acted promptly…, or even that they had a meritorious defense.'"[3] A void judgment is "legally ineffective-a legal nullity."[4]

Even if Plaintiff's would-be default judgment against Defendant is not void, Defendant has nevertheless shown good cause. Defendant's payment is more than sufficient to cover all assessments that may have accrued in the last six years. Although Plaintiff has conveniently failed to attach a ledger detailing a breakdown of the $8,246.48 alleged in the Complaint to *any* pleading or motion in this action, Plaintiff does not dispute that the unpaid assessments portion of this aggregate amount are less than $5,000.00. As discussed below, the payment in full of all past due assessments eliminate the "right to foreclose." There is no legal support for the conclusion that the "right to foreclose" is fixed at the time an action is filed and that a defendant cannot escape the remedy but for paying all of the unawarded attorneys' fees and costs that Plaintiff says are due. If the remedy of foreclosure is no longer available, as discussed below, then Defendant must have the ability to set aside the entry of default to avoid the Court granting an unavailable remedy.

In addition, the facts outlined in Defendant's affidavit demonstrate that he failed to file an answer based on the language barrier that prevented him from understanding the nature of the proceedings against him. These facts justify setting aside entry of default.[5] In the *Green Acres Trust* case, the Court of Appeals upheld the trial court's decision setting aside default and

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[2] *Darnell v. Denton*, 137 Ariz. 204, 669 P.2d 981 (Ct. App. 1983).

[3] *Blair v. Burgener*, 226 Ariz. 213, 216, 245 P.3d 898, 901 (App. 2010) (quoting *Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, 74, 90 P.3d 1236, 1240 (App. 2004).

[4] *In re Milliman's Estate*, 101 Ariz. 54, 58 (1966) (quoting 7 Moore's Federal Practice § 60.25(2) (2d ch. 1955), p. 263, footnotes #29).

[5] *Green Acres Trust v. London*, 142 Ariz. 12, 16, 688 P.2d 658, 662 (App. 1983).

concluded that the defendant "did not understand the legal significance of the papers served on her."[6] Although Plaintiff arguably may still be entitled to a money judgment for the fees and costs it reasonably incurred in connection with securing Defendant's payment, it is not allowed to exercise the awesome power of foreclosure to collect those fees and costs.

Plaintiff submits various affidavits to try to impugn Defendant's affidavit, but those affidavits support Defendant's affidavit. The Affidavit of Jacob Porter acknowledges that Mr. Mejia "indicated that he could not read or write very well." He further avows that Mr. Mejia told him that he would need the help of a family member "who could write English." While it is commendable that Mr. Porter apparently "went over the complaint with Mr. Mejia, discussed the lien foreclosure complaint in detail and what efforts could be done to resolve the matter," Mr. Porter was neither an attorney nor was he representing Mr. Mejia. Certainly Mr. Porter could not have provided Mr. Mejia legal advice. Notably, he does not avow that he informed Mr. Mejia to consult with an attorney who did not represent the party suing him. Mr. Porter also does not explain the "efforts" he discussed with Mr. Mejia "to resolve the matter." Mr. Richardson's affidavit, likewise, raises many questions. Mr. Richardson confirms that Defendant "was unable to write the proposal in English."[7]

II. DEFENDANT HAS ACTED PROMPTLY.

Defendant filed the motion to set aside entry of default before entry of default judgment and just over four months after Plaintiff filed for entry of default.[8] Beyond saying that he filed the motion to set aside "on the eve of the hearing," Plaintiff fails to explain why it contends (at 5) that he "failed to act promptly." One of the reasons that courts consider whether a defendant has acted

[6] *Id.*

[7] Defendant is submitting herewith as Exhibit A a supplemental affidavit refuting the affidavits submitted by Plaintiff.

[8] Plaintiff inaccurately states (at 5) that "[d]efault became effective on December 18, 2016." Because the entry of default is calculated based on business, not calendar, days default became effective on December 22, 2016.

promptly is to gauge the extent of prejudice a plaintiff may face from vacating a default judgment. Where the motion to set aside is filed before the entry of default judgment, however, this concern does not exist. Considering that Defendant did not appreciate the legal significance of the papers and acted swiftly upon consulting counsel, this element has been met.[9]

III. DEFENDANT HAS A MERITORIOUS DEFENSE: HIS PAYMENT OF MORE THAN THE AMOUNT OF UNPAID ASSESSMENTS ELIMINATES THE RIGHT TO FORECLOSE.

Defendant has meritorious defenses in this case. Plaintiff contends that, "once the lien is foreclosed (*i.e.*, an action for foreclosure is initiated), nothing short of redemption can stop the Court from entering judgment and a sale from being completed." This is not an accurate reading of the statute or applicable law.

The statute provides that:

> The Association's lien for assessments…*may be foreclosed only if the owner has 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*.[10]

The central question is the meaning of the phrase "may be foreclosed." Does it mean the initiation of a judicial action to foreclose or does it refer to the act of obtaining a judgment of foreclosure? If it is the former, as Plaintiff urges, then a foreclosure action under A.R.S. § 33-1807 essentially imposes strict liability on the defendant and prevents the defendant from saving his or her home. However, the Legislature chose the phrase "may be foreclosed." This language is plain and unambiguous.

A cardinal rule of statutory construction is to give effect to legislative intent.[11]

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[9] *Green Acres Trust*, 142 Ariz. at 16, 688 P.2d at 662 (six-month delay after entry of judgment was "reasonable time" where motion alleged excusable neglect based on defaulted defendant's failure to understand legal significance of papers).

[10] A.R.S. § 33-1807(A) (emphasis added).

[11] *HCZ Const., Inc. v. First Franklin Financial Corp.*, 199 Ariz. 361, 364, 18 P.3d 155, 158 (App. 2001).

> The best and most reliable index of a statute's meaning is its language. *Rineer v. Leonardo*, 194 Ariz. 45, 46, 977 P.2d 767, 768 (1999) (citations omitted). Words are given their ordinary meaning unless the context of the statute requires otherwise. *See* A.R.S. § 1-213 (1995); *Bustos v. W.M. Grace Dev.*, 192 Ariz. 396, 398, 966 P.2d 1000, 1002 (1997) (citation omitted).[12]

In other words, courts assume that the Legislature's word choice was deliberate and not fortuitous or random.[13] Here, the Legislature used the phrase, "may be foreclosed." The word, "foreclosed," does not simply refer to the filing of a foreclosure action. If the Legislature wanted to prevent an owner from avoiding foreclosure once an action is filed, it easily could have chosen language to clearly reflect such intent; it did not.

Moreover, courts adhere to the rule of *in pari material*, which states that the meaning and application of a specific statute or portion thereof is determined by looking at similar statutes and reading them together.[14] Here, subsection (A) must be read in conjunction with the other subsections. Subsection (F) specifically provides that liens are extinguished "unless proceedings to enforce the lien are instituted within three years…." That the Legislature has distinguished between the filing of a foreclosure action in (F) from the act of foreclosing in (A) indicates that a material distinction exists between the phrases, "may be foreclosed," and commencing "an action to enforce the lien." Otherwise, both subsections would have used the same language.[15]

Subsection (K) further buttresses this construction. If the filing of a foreclosure action eliminated the right to avoid foreclosure by paying unpaid assessments, then subsection (K) would be rendered meaningless. Subsection (K) contemplates payments of less than the full amount owed and states that any payments are applied first to unpaid assessments. If a party had

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[12] *Id.*

[13] A.R.S. § 1-213 (1995).

[14] *Collins v. Stockwell*, 137 Ariz. 416, 420, 671 P.2d 394, 398 (1983).

[15] *State v. Ball*, 157 Ariz. 382, 384, 758 P.2d 653, 655 (Ct. App. 1988) (court's role is to construe statute "as a whole and give harmonious effect to all its sections").

to pay all unawarded attorneys' fees and costs in order to avoid being foreclosed, then the break down in (K) is meaningless and serves no legitimate purpose.[16]

According to Black's Law Dictionary, "foreclosure" means "to shut out, to bar, to destroy an equity of redemption."[17] The common meaning of "foreclosed" does not equate to the commencement of a lawsuit; it is the conclusion of the foreclosure process. The plain meaning of the word, "foreclose," refers to the forced sale of real property to pay for a secured debt. It means to exercise the power of sale, which obviously does not refer to filing a suit to obtain the judgment. As a foreclosure can be either judicial or non-judicial, it is clear that the word itself does not refer to the commencement of such an action. When one says that an owner was foreclosed, for example, the plain meaning of the sentence is that the owner no longer owns the property in question; it does not mean that the owner is in the process of losing the property.

Regardless of the various amounts comprising the lien or its total amount, the portion of the statute italicized above states that the lien "may be foreclosed" only if the assessments included in the lien are past due either by one year or more than $1,200.00. In determining whether the lien may be foreclosed, one first "exclud[es] reasonable collection fees, reasonable attorney fees and charges for late payment of and costs incurred with respect to those assessments." In other words, it is the amount of the assessments, stripped of all other charges, that governs the right of foreclosure.

Plaintiff's argument (at 7-8) that it is entitled to proceed with its foreclosure because Defendant has not paid all unawarded attorneys' fees and costs completely ignores the italicized second-half of the second sentence and urges a construction of A.R.S. § 33-1807(A) that, in effect, would improperly render the italicized phrase meaningless. The legislature explicitly sought to distinguish between assessments and other amounts that may be incurred in

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[16] *State v. Pitts*, 178 Ariz. 405, 407, 874 P.2d 962, 964 (1994) ("We presume the legislature did not intend to write a statute that contains a void, meaningless, or futile provision").

[17] Black's Law Dictionary. West Publishing Co., 1968, 4th ed., page 775.

connection with assessments, stating it is the former, alone, that triggers the right to foreclose. Presumably, this is because of the significance of assessments to the ability of the community to operate. Late fees, attorneys' fees and other charges, conversely, are not given such a priority. While these additional amounts arguably may be included in the lien pursuant to the first sentence of A.R.S. § 33-1807(a), they may not be foreclosed unless the assessments are past due either by one year or more than $1,200.00.

Plaintiff essentially conflates a final judgment with the initiation of an action. The initiation of a lien foreclosure action, however, is not foreclosure any more than the filing of a negligence action establishes a defendant's liability. Plaintiff's reliance on A.R.S. § 33-725 is misplaced on this point and further supports the above analysis. The statute talks about the award of the "debt, damages and costs" in the final judgment of foreclosure. Subsection (A) reinforces the conclusion that the word, "foreclose" refers to the final judgment and not the commencement of the action:

> When a mortgage or deed of trust is fo*reclosed, the court shall give judgment for the entire amount determined due*, and shall direct the mortgaged property, or as much thereof as is necessary to satisfy the judgment, to be sold.[18]

If, as Plaintiff argues, "foreclosure" simply refers to the "initiation" of an action, then a defendant would have no right to challenge the action and the plaintiff would be entitled to a judgment as a matter of strict liability. This construction is illogical and self-defeating. If the only way to avoid foreclosure once a suit is filed is for the defendant to pay everything that Plaintiff claims is owed, including the unawarded fees and costs incurred in the foreclosure action, then a defendant could avoid foreclosure only before the action is filed or after entry of final judgment, yet at no time in between. This is a ludicrous result that courts presume the legislature intended to avoid.[19] As no fees or costs have been awarded, it is circular argument to

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[18] *See* A.R.S. § 33-725(A) (emphasis added).

[19] *Linda V. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 76, 79, 117 P.3d 795, 798 (Ct. App. 2005) (statutes will not be interpreted to create absurd or illogical results).

suggest that the only way a defendant can avoid foreclosure is to pay amounts that might be awarded in the future.

Although no Arizona appellate court has yet addressed the discrete issue presented in this case, the California Court of Appeals rejected a nearly identical argument of a similar statute in *Huntington Continental Townhouse Ass'n, Inc. v. Miner*.[20] The California Court of Appeals in *Miner* rejected the argument that a foreclosure claim, once filed, cannot end unless the homeowner capitulates to paying the full unawarded and unadjudicated legal fees and costs. The plain reading of A.R.S. § 33-1807, and its repeated clarification that legal fees and costs are "excluded" as assessments makes it clear that the statute places a great significance on the right of home ownership and that homeowners should not be stripped of this right over fees and costs that have never been awarded or adjudicated as reasonable. Nothing in the statute suggests an intent to allow an association to take an individual's home over such charges.

IV. PLAINTIFF'S SCURRILOUS *AD HOMINEM* ATTACKS ARE WITHOUT MERIT.

It is an old lawyer adage that if the law is on your side, you argue the law; if the facts are on your side, you argue the facts; and if neither is on your side, you attack your opponent. Plaintiff's response to the motion to set aside entry of default illustrates this adage deftly. Under the innocuous heading, "**Obligations of Counsel**," Plaintiff submits that Defendant's counsel "is filing legally and factually baseless motions" and "has done his client no favors by expanding the scope of this litigation and submitting documents with substantial factual omissions seeking to set aside entry of default."

Shockingly, Plaintiff's counsel appears to be suggesting that "expanding the scope of this litigation" means retaining counsel or that Defendant simply should have let Plaintiff obtain a foreclosure judgment against him. While it is true that the instant motion may be "increasing the scope, time and expense of this litigation," this is only due to Plaintiff's continued insistence that it

[20] 230 Cal. App. 4th 590 (Cal. App. 4th Dist. Div. 3 2014).

is still entitled to foreclose notwithstanding Defendant's payment that more than exceeds the amount of unpaid assessments in this action. Plaintiff could have agreed to dismiss the foreclosure count and leave the issue of fees and costs up to the Court, but has opted to try to take and sell Defendant's home over its unawarded attorneys' fees and costs.

As for the accusation (at 8) that "Defendant's counsel is filing legally and factually baseless motions," the Court is presumably aware that this is an issue that comes up quite often. This Court has considered on several occasions whether a homeowners' association can continue to pursue foreclosure after the defendant has paid, in full, all past due assessments. Because Plaintiff has asked for the imposition of sanctions under A.R.S. § 12-349, Defendant wishes to point out that this Court has ruled against the homeowners' association in two recent cases raising this very issue and asks the Court to take judicial notice of these cases. *See Signal Butte Ranch Community Association v. Ritchie*, Case No. CV2015-095519; *Pueblo Hermoso v. Webb*, Case No. CV2016-092658. This Court's recent rulings in these cases in favor of the defendant-homeowners in these cases belies any suggestion that the instant motion, seeking to set aside entry of default based on the payment of all unpaid assessments, is somehow "legally and factually baseless."

CONCLUSION

For the foregoing reasons, the Court should set aside the entry of default.

DATED this 10th day of May 2017.

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