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

11 LAVEEN MEADOWS HOMEOWNERS'
12 ASSOCIATION, INC., an Arizona nonprofit
13 corporation,

14 Plaintiff,

15 vs.

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

18 Defendants.

No. CV2016-094391

**DEFENDANT'S HEARING
MEMORANDUM**

(Assigned to the Honorable
Commissioner Margaret Benny)

Evidentiary Hearing: June 20, 2017 @ 10 a.m.

19 Although the Court has denied Defendant's motion to set aside default, it has not ruled on
20 whether Plaintiff is entitled to pursue the remedy of foreclosure under A.R.S. § 33-1807(A) in its
21 default judgment or if its simply limited to obtaining a judgment for money damages for its
22 ancillary claims for attorneys' fees and costs. It also appears that Plaintiff is seeking a default
23 judgment for amounts included in a prior money judgment and that may be barred by the statute of
24 limitations. Defendant therefore submits this Hearing Memorandum and requests rulings on these
25 narrow issues before it considers a judgment award to Plaintiff.

26 **I. PLAINTIFF IS NOT ENTITLED TO A JUDGMENT OF FORECLOSURE.**

As discussed in Defendant's motion to set aside entry of default, his reply thereto and
during the last two oral arguments, the right to foreclose requires the existence of unpaid

1 assessments either in the amount of \$1,200.00 or one year. Neither of these conditions currently
2 exists. Defendant tendered payment in the amount of \$5,000.00 on April 14, 2017. Plaintiff's
3 ledgers, which were first produced in this case on May 26, 2017, show that the assessment portion
4 of the balance allegedly owed as of March 26, 2017 was just \$1,936.94. Because Defendant has
5 paid significantly more than the amount due in unpaid assessments, Plaintiff no longer has the right
6 to foreclose and, consequently, is not entitled to a judgment of foreclosure. Any judgment should
7 be limited to a money judgment for damages (to the extent that Plaintiff has plead a claim for
8 money damages).

9 The relevant statute, A.R.S. § 33-1807(A), states that a lien for assessments “may be
10 foreclosed only if the owner has been delinquent in the payment of monies secured by the lien,
11 excluding reasonable collection fees, reasonable attorney fees and charges for late payment of
12 and costs incurred with respect to those assessments, for a period of one year or in the amount of
13 one thousand two hundred dollars or more, whichever occurs first.” Although it is undisputed
14 here that Defendant has paid all “monies secured by the lien, excluding reasonable collection
15 fees, reasonable attorney fees and charges for late payment of and costs incurred with respect to
16 those assessments,” no Arizona court has addressed whether an association can continue with a
17 foreclosure action if a payment of all such monies is received prior to entry of final judgment.

18 California, which has a nearly identical lien foreclosure statute, has squarely addressed
19 this issue. In *Huntington Continental Townhouse Ass'n, Inc. v. Miner*,¹ the California Court of
20 Appeals held that the payment of all assessments before final judgment prevents the association
21 from proceeding with foreclosure. The *Miner* court held that, once the owner made a payment
22 bringing the balance down below the statutory threshold, the association could not pursue the
23 foreclosure.²

25 ¹ 230 Cal. App. 4th 590 (Cal. App. 4th Dist. Div. 3 2014).

26 ² *Id.* at 606-607.

1 The *Miner* court’s conclusion, however, is consistent with the language of the statute.
2 The Legislature used the phrase, “may be foreclosed.” The word, “foreclosed,” refers to the
3 forced sale of real property to pay for a secured debt. It means to exercise the power of sale,
4 which obviously does not refer to the initiation of foreclosure proceedings. As a foreclosure can
5 be either judicial or non-judicial, the word itself does not refer to the commencement of a
6 foreclosure lawsuit. When one says that an owner was foreclosed, for example, it means the
7 owner no longer owns the property in question; it does not mean that the owner is currently in
8 litigation. One does not refer to a complaint seeking foreclosure, which consists merely of
9 unproven allegations at that point, as the ultimate act of foreclosure. Similarly, the statute’s
10 repeated clarification that legal fees and costs are “excluded” as assessments makes it clear that
11 the statute places a great significance on the right of home ownership and that homeowners
12 should not be stripped of this right over fees and costs that have never been awarded or
13 adjudicated as reasonable. Nothing in the statute suggests an intent to allow an association to
14 take an individual’s home over such charges.

15 It is illogical to argue that a homeowner could avoid foreclosure by paying just the past
16 due assessments, without the legal fees, the day before the association files its lawsuit but not
17 the day after. What if the payment is made the day before but not received until the day after?
18 What if the homeowners’ association does not open the envelope or credit the account quickly
19 enough? What if the association refuses payment in order to coerce a defendant to paying all
20 attorneys’ fees claimed (unreasonable or not) under the threat of losing his home? Under
21 Plaintiff’s analysis, the homeowner would be forced to pay unawarded fees simply to avoid a
22 scenario that would not exist but for delays beyond the control of the homeowner. These are
23 ludicrous results that courts presume the legislature intended to avoid.³

26 ³ *Linda V. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 76, 79, 117 P.3d 795, 798 (App. 2005).

1 Foreclosure is a “harsh” and “extraordinary and drastic remedy, which in part, accounts for
2 some of the more stringent rules associated with foreclosure.”⁴ The stringent rules in the Planned
3 Communities Act for relatively small amounts of money make it clear that foreclosure as a remedy
4 is only available in narrow circumstances. Those circumstances are not present in this case.
5 Accordingly, the Court at the upcoming hearing must make a ruling on this issue before it
6 determines whether foreclosure is even available. For the reasons discussed herein and during the
7 prior hearings, the remedy of foreclosure is simply not available.

8 **II. THE AMOUNT PLAINTIFF SEEKS IMPROPERLY INCLUDES AMOUNTS**
9 **THAT WERE ALREADY AWARDED IN A PRIOR MONEY JUDGMENT**

10 Plaintiff’s ledger includes amounts that it was previously awarded in the prior South
11 Mountain Justice Court action that it filed against Mejia in 2013. As these amounts have already
12 been reduced to a judgment, it is legally improper to include them in a second judgment under the
13 doctrines of res judicata and merger.⁵ The same is true with respect to alleged fees and costs that
14 Plaintiff incurred attempting to collect that prior money judgment. A plaintiff is not allowed to file
15 serial lawsuits over the same amounts.⁶

16 There are numerous other logical reasons why Plaintiff cannot seek a foreclosure judgment
17 on amounts that have already been reduced to judgment. These reasons include, but are not limited
18 to:

- 19 i) Such action violates the three year statute of limitations on lien foreclosure
20 actions;⁷

21 ⁴ *Arizona Coffee Shops, Inc. v. Phoenix Downtown Parking Ass’n*, 95 Ariz. 98, 100, 387
22 P.2d 801, 802 (1963); *INB Banking Co. v. Opportunity Options, Inc.*, 598 N.E.2d 580, 584 (Ind.
App. 1992).

23 ⁵ *C&J Travel, Inc. v. Shumway*, 161 Ariz. 33, 775 P.2d 1097 (App. 1989) (The creditors
24 can only recover on the judgments they hold against David Shumway and cannot sue him again
for breach of contract...the doctrines of merger and res judicata prevent the creditors from suing
David Shumway again).

25 ⁶ *Id.*

26 ⁷ A.R.S. § 33-1807(F).

1 COPY of the foregoing e-filed
2 this 9th day of June 2017 with:

3 Clerk of the Court
4 through AZ Turbo Court

5 COURTESY COPY of the foregoing hand-delivered
6 this 9th day of June 2017 to:

7 Commissioner Margaret Benny
8 Southeast Facility-3C
9 222 E. Javelina Ave.
10 Mesa, AZ. 85210-6234

11 COPY of the foregoing mailed and e-mailed
12 this 9th day of June 2017, to:

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/s/ Hilary Narveson