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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 **OBJECTION TO PLAINTIFF'S PROPOSED JUDGMENT ON FORECLOSURE**

Defendant Carlos Mejia ("Mejia") hereby objects to Plaintiff's Proposed Judgment on Foreclosure for the following reasons.

A. The "Principal Sum" is Wrong [Paragraph 1.a]

Plaintiff's proposed judgment purports to award the "principal sum of $3,843.48 as of 2017 (after deducting interim payment after lawsuit was filed of $5,000.00)." However, as the Court will recall, Plaintiff's witness testified that all conceivable assessments and late fees were paid in full and that Plaintiff is only seeking attorneys' fees and costs. In that regard, the "principal sum" balance consists exclusively of line-item attorneys' fees charges for which

Plaintiff has neither submitted a *China Doll* affidavit nor sought a specific award.[1] Attorneys' fees in Arizona are not awarded as part of the principal sum based on single line-item charges, but must be requested and supported by an affidavit and itemized breakdown of what those charges represent.[2] It is improper to award such amounts as part of the principal.

Plaintiff's ledger confirms that the "principal sum" it requests in the proposed judgment dates to 2011 in clear violation of A.R.S. § 33-1807. Although Plaintiff contends it is not subject to Arizona's three-year statute of limitations on lien foreclosure actions because it has a separate contractual right to foreclose, Defendant cites no authority supporting its position that it is not subject to the Planned Communities Act's statute of limitations.[3] Notably, subsection (F) does not include language that suggests an association may disregard the three-year limitation period, such as the three-year statute of limitations applying "[u]nless the declaration otherwise provides" or that the statute "does not prohibit" an association from creating a longer limitations period.[4] As the Declaration is silent as to any period of limitations that might apply to its separate right to foreclose, it appears Plaintiff is arguing, without any authority, that it is not subject to any statute of limitations. Defendant urges the Court to reject such a ridiculous proposition and limit any judgment to only those amounts that accrued within the statute of limitations. Since all such accrued unpaid assessments and late fees have been paid, the proper amount to be awarded in Paragraph 1.a is $0.00.

The "principal sum" also includes amounts previously awarded in another judgment. Although Plaintiff contends it is exempt from Arizona's doctrine of merger and res judicata, Defendant has found no authority to support the assertion that a party can sue serially on the

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[1] A copy of Plaintiff's full ledger is attached hereto as Exhibit 1 for the Court's convenience.

[2] *See* Ariz. R. Civ. P. 54(f); *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983).

[3] *See* A.R.S. § 33-1801(A) ("This chapter applies to all planned communities"); A.R.S. § 33-1807(F) (imposing three-year statute of limitations on lien foreclosure actions).

[4] *See, e.g.*, A.R.S. § 33-1807(D); A.R.S. § 33-1807(G).

same debt and there exists substantial authority to the contrary.[5] It is further improper since all previously awarded unpaid assessments and late fees have been paid.

For the foregoing reasons, there is no "principal sum." According to Plaintiff's own ledger, the unpaid assessments and late fees, not including prior judgment amounts that Plaintiff is trying to include here, totaled just $2,440.00 and Defendant paid $5,000.00. Plaintiff's own witnesses testified at the default hearing that, under any conceivable calculation, Defendant has tendered payment for substantially more than the proper "principal sum." To award Plaintiff anything as a "principal sum" would wrongly award Plaintiff for circumventing the rules governing awards of attorneys' fees, statutes of limitations, and a double recovery on amounts previously reduced to judgment.

Finally, it is completely improper to award Plaintiff future assessments "accruing January 1, 2018…in an amount not less than $552.00" and to secure these not-yet due assessments to the right to foreclose.[6]

B. Plaintiff is Not Entitled to Future Fees or Costs [Paragraphs 1.c and 1.d]

Plaintiff's judgment purports to award prospectively "accruing costs" and "accruing fees not otherwise addressed herein by application." Judgments must be for a specific, definite amount; courts generally do not award prospective monetary relief.[7]

This language, though perhaps commonly included by HOA practitioners, violates Arizona law and must be stricken. The problem with this standard practice is that it has resulted

[5] *See, e.g.*, A.R.S. § 33-1807(D); A.R.S. § 33-1807(G).

[6] *See* A.R.S. § 12-586.

[7] *Birt v. Birt*, 208 Ariz. 546, 551, 96 P.3d 544, 549 (App. 2004) ("judgments involving injunctions have prospective application while money judgments do not"); *McNutt Oil & Refining Co. v. D'Ascoli*, 79 Ariz. 28, 33, 281 P.2d 966, 970 (1955); *see also Fontelieu v. Fontelieu*, 41 So. 120, 125 (La. 1906) ("If the amount remains to be determined by a future contingency, or ascertained by references, or diminished by the allowance of an unliquidated credit, or is otherwise indefinite and uncertain, it is no proper judgment").

in the improper use of these judgments as blank checks to collect whatever amounts that HOA counsel unilaterally decides is reasonable without any judicial oversight or subsequent award.

Arizona follows the American Rule with respect to awarding attorneys' fees in litigation, which generally states that a court can only award fees based on the existence of a contract or statute providing for fee shifting. Here, there is no statutory basis for an award of post-judgment fees incurred collecting a judgment.[8] In fact, one of the few, if any, fee shifting statutes to address post-judgment collection actions expressly prohibits shifting fees to a judgment-debtor in garnishment proceedings "unless the judgment debtor is found to have objected solely for the purpose of delay or to harass the judgment creditor."[9] Yet, Plaintiff asks for fees incurred in "collecting the amounts listed in this Judgment" in clear violation of these basic principles.

Nor does the underlying contract, in this case the Declaration, authorize an award of post-judgment fees incurred collecting the judgment. In *Baker Botts L.L.P. v. ASARCO*,[10] the United States Supreme Court recently confirmed that contractual fee provisions, such as the one in the Declaration, must be subjected to the narrowest possible reading in accordance with the American Rule. In other words, Plaintiffs cannot rely on generic fee shifting language in the Declaration as a basis for recovering post-judgment attorneys' fees. This is the outcome in nearly every jurisdiction that has considered the issue.[11]

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[8] *See Bennett Blum, M.D., Inc. v. Cowan*, 235 Ariz. 204, 330 P.3d 961 (2014) (A.R.S. § 12-341.01 does not apply to post-judgment fees incurred collecting a judgment).

[9] *See* A.R.S. § 12-1598.07(E).

[10] 135 S. Ct. 2158 (2015).

[11] *See, e.g., Torrey v. Hamilton*, 872 P.2d 186, 187 (Alaska 1994) (fee shifting statute "only provides compensation for attorney's services performed up to the time of the judgment"); *Chelios v. Kaye*, 219 Cal.App.3d 75, 268 Cal. Rptr. 38 (1990); *Allison v. John M. Biggs, Inc.*, 826 P.2d 916, 917 (Idaho 1992); *Caine & Weiner v. Barker*, 713 P.2d 1133 (Wash. Ct. App. 1986) (affirming trial court's finding that promissory note, along with its attorneys' fees provision, merged with and was extinguished by the judgment, and therefore, motion for recovery of post-judgment fees incurred in collecting judgment was properly denied); *Production Credit Ass'n of Madison v. Laufenberg*, 420 N.W.2d 778, 779-80 (Wis. Ct. App. 1988); *Accubid Excavation, Inc. v. Kennedy Contractors, Inc.*, 981 A.2d 727, 737-38 (Md. Ct. Spec. App. 2009); *Hatch v. T & L Associates*, 726 A.2d 308, 310 (N.J. Super. Ct. App. 1999);

Very few states explicitly authorize post-judgment attorneys' fees. In Idaho, for instance, a judgment-creditor is entitled to "reasonable post-judgment attorneys' fees and costs incurred in attempting to collect on the judgment" in small claims cases or replevin cases only, but "[i]n no event shall post-judgment attorney's fees exceed the principal amount of the judgment or value of property recovered."[12] California has adopted a statute authorizing post-judgment attorneys' fees "incurred in enforcing a judgment" where the underlying judgment included an award of contractually-based attorney fees.[13] Notably, Arizona has no statute analogous to either the Idaho or California statutes.

A survey of cases suggests that most courts do not allow a judgment-creditor to utilize generic fee-shifting provisions in a contract to justify an award of post-judgment cases:

- In *Chelios v. Kaye*, a case decided before California Code of Civil Procedure § 685.040 was amended to specifically authorize post-judgment fees, the California Court of Appeals held that any contractual basis for fees merged into the judgment and "has no remaining vitality" for an award of post-judgment fees.[14]
- In *Allison v. John M. Biggs, Inc.*, Supreme Court of Idaho held that "it is also elementary that after judgment a cause of action based on a note is merged into the judgment thereby extinguishing the note as the basis for post-judgment collection proceedings."[15]
- In *Woodcraft Construction, Inc. v. Hamilton*, the Washington Court of Appeals held that "the judgment based upon the promissory note extinguished the note and the debtor then became obligated on the judgment. The attorney fee provision of the note merged into the judgment and ceased to exist."[16]
- In *Production Credit Ass'n of Madison v. Laufenberg*, the Wisconsin Court of Appeals held that, following entry of judgment, "PCA no longer had a contractual right to costs and attorney's fees" because "[w]hen a valid and

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Florida Pottery Stores of Panama City, Inc. v. American Nat. Bank, 578 So.2d 801, 804 (Fla. Dist. Ct. App. 1991).

[12] *See* Idaho Code Ann. § 12-120(6).

[13] *See, e.g.*, Cal. Code. Civ. Proc. § 685.040.

[14] 219 Cal.App.3d 75, 268 Cal. Rptr. 38 (1990).

[15] 826 P.2d 916, 917 (Idaho 1992).

[16] 786 P.2d 307 (1990).

final personal judgment is rendered in favor of the plaintiff: (1) The plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he may be able to maintain an action upon the judgment....The doctrine of merger is a common-law principle applied throughout all state and federal forums, in a basically consistent manner."[17]

- In *In re Schlecht*, the Bankruptcy Court for the District of Alaska held that "the bank's note containing the provision for attorney's fees has merged with its Alaska Superior Court judgment. There is no longer an agreement pursuant to which attorney's fees can be awarded…."[18]

- In *Accubid Excavation, Inc. v. Kennedy Contractors, Inc.*, the Maryland Court of Appeals held that the entry of final judgment on a breach of contract claim extinguishes any right to post-judgment attorneys' fees under the doctrine of merger because "a simple contract is merged in a judgment or decree rendered upon it, and that all its powers to sustain rights and enforce liabilities terminated in the judgment or decree."[19]

- In *Hatch v. T & L Associates*, the New Jersey Superior Court (an appellate court) rejected a request for post-judgment fees, holding that "there are sound policy reasons consistent with the philosophy of the American rule for not construing the typical attorney-fees provision as including post-judgment services."[20]

- In *Florida Pottery Stores of Panama City, Inc. v. American Nat. Bank*, the Florida District Court of Appeal held that a standard contractual attorneys' fees provision did not entitle the judgment-creditor to post-judgment fees.[21]

The common theme running through the above cases is that the doctrine of merger states the contract giving rise to a debt merges into a final judgment and ceases to serve as a basis for future fee awards. Arizona follows the doctrine of merger.[22] In other words, the underlying contract giving rise to the claim for fees ceases to have any further relevance or vitality. A party cannot overcome the doctrine of merger by including self-serving language in a judgment.

Most of the HOA law firms that seek to include this or similar language in their form

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[17] 420 N.W.2d 778, 779-80 (Wis. Ct. App. 1988).

[18] 36 B.R. 236, 241 (Bankr. D. Alaska. 1983).

[19] 981 A.2d 727, 737-38 (Md. Ct. Spec. App. 2009) (internal citations omitted).

[20] 726 A.2d 308, 310 (N.J. Super. Ct. App. 1999).

[21] 578 So.2d 801, 804 (Fla. Dist. Ct. App. 1991).

[22] *Mid Kansas Fed. Savings and Loan Ass'n of Wichita v. Dynamic Dev. Corp.*, 167 Ariz. 122, 804 P.2d 1310 (1991).

judgments rely on the *Bennett Blum* case. *Bennett Blum* stands only for the limited, and unremarkable, proposition that attorneys' fees incurred defending the *validity* of a judgment (against, for example, a Rule 60 challenge) might be recoverable; *Bennett Blum* does not hold, however, that attorneys' fees incurred *collecting* a judgment are recoverable.

There is no contract provision entitling Plaintiff to fees incurred collecting a judgment. In sum, post-judgment proceedings are "'treated in all respects…as an original independent action' from the underlying lawsuit," making any contractual fee provision or A.R.S. § 12-341.01 inapplicable bases for an award of fees.[23] The fee provision in this case, Section 8.3, does not expressly provide for post-judgment fees, but simply for "such costs and attorney fees seeking to collect such Assessments." Because any "Assessments" merge into, and are replaced with, the judgment, this provision is not specific enough to cover post-judgment fees. Not to mention, Defendant paid all assessments in this case.

C. Plaintiff is Not Entitled to Sell Personal Property [Paragraph 6].

Plaintiff's judgment purports to allow it to sell Defendant's personal property present at the time of the sheriff's sale. There is no support for this in the law, especially considering that an owner has the right of redemption. It violates A.R.S. § 33-1121, *et seq*.

D. Possession Does Not Vest in the Purchaser "Immediately Following the Sheriff's Sale." [Paragraph 9]

Plaintiff also includes language purporting to vest possession in the purchaser immediately following the sheriff's sale. Although Plaintiff makes possession "subject only to Defendants' right of redemption pursuant to Arizona law," a prospective purchaser does not have a right to possession until she or he obtains a deed. The idea that right to immediate possession exists by being the successful bidder at a sheriff's sale, prior to the expiration of the right of redemption, is legally unsupported. Equitable title is not the same as legal title and does

[23] *Bennett Blum,* at 207-08, 330 P.3d at 964-64 (quoting *Davis v. Chilson*, 48 Ariz. 366, 371, 62 P.2d 127, 130 (1936)).

not vest possession in a purchaser at a sheriff's sale. This language violates A.R.S. § 12-1171 for these reasons.

E. Conclusion

Based upon the foregoing, Plaintiff's proposed form of judgment should be rejected.

DATED this 3rd day of July 2017.

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COPY filed electronically with
the Clerk of the Court
this 3rd day of July, 2017

COURTESY COPY hand-delivered
this 3rd day of July, 2017 to:

Honorable Commissioner Margaret Benny
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