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11 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

12 IN AND FOR THE COUNTY OF MARICOPA

13 LAVEEN MEADOWS HOMEOWNERS'
14 ASSOCIATION, INC., an Arizona nonprofit
15 corporation,

16 Plaintiff,

17 vs.

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

20 Defendants.

No. CV2016-094391

**MOTION TO SET ASIDE
DEFAULT JUDGMENT**

Oral Argument Requested

(Assigned to the Honorable Commissioner
Margaret Benny)

21 **MOTION**

22 Defendant Carlos Mejia (“Defendant”) moves to set aside the entry of default judgment in
23 this matter for the reasons set forth herein. The following Memorandum of Points and Authorities
24 and the entire record supports this Motion.

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 **INTRODUCTION**

Over Defendant’s objections that the Court could not enter a judgment of foreclosure
pursuant to A.R.S. § 33-1807(A) since Defendant had tendered payment for more than the unpaid

1 assessments that gave rise to the statutory foreclosure claim, the Court entered default judgment in
2 this matter for Plaintiff on August 4, 2017 that awarded a principal sum of -\$2,152.08 (“a negative
3 amount”), costs of suit of \$1,012.25, and attorneys’ fees of \$11,190.00. The Court further awarded
4 interest, and future costs and attorneys’ fees. The default judgment further “declared foreclosed”
5 Plaintiff’s lien and authorized a sheriff’s sale of Defendant’s property. Finally, the default
6 judgment “directed that if there is any personal property present at or in the Property at the time of
7 the sale, the same will be deemed abandoned and sold as part of the Property if not removed at the
8 time the purchaser of the Property elects to take possession” and declared that possession “shall be
9 vested in the purchaser immediately following the Sheriff’s Sale as the holder of equitable title and
10 thus entitling the purchaser to pursue occupancy by all legal means.”

11 The Court’s express determination in the default judgment that Plaintiff had paid more than
12 the balance of unpaid assessments, as indicated in the award of a negative principal sum, before
13 declaring the lien foreclosed precluded a judgment of foreclosure under A.R.S. § 33-1807(A) and
14 renders the default judgment of foreclosure void and subject to being set aside pursuant to Rule
15 60(b)(4) and (6). The inclusion of legally improper provisions in the default judgment further
16 implicates Rule 60(b) and justifies setting it aside under subsections (1), (3), (4), and (6).

17 Defendant should not be forced to lose his home simply because he paid all unpaid
18 assessments after Plaintiff filed this lawsuit and failed to divine and pay Plaintiff’s unawarded fees
19 and costs at the time he tendered his payment. Relief under Rule 60(b) is warranted.

20 ARGUMENT

21 I. PLAINTIFF WAS NOT ENTITLED TO A FORECLOSURE JUDGMENT.

22 A. The Court was Divested of Jurisdiction Once Defendant Paid All Past Due 23 Assessments and, Therefore, Could Not Enter a Foreclosure Judgment Where the Statutory Threshold for Foreclosure Was Not Met.

24 Foreclosure is a statutory remedy brought under A.R.S. § 33-1807(A), which states:

25 The association's lien for assessments, for charges for late payment of those
26 assessments, for reasonable collection fees and for reasonable attorney fees and

1 costs incurred with respect to those assessments *may be foreclosed in the same*
2 *manner as a mortgage on real estate but may be foreclosed only if the owner has*
3 *been delinquent in the payment of monies secured by the lien, excluding*
4 *reasonable collection fees, reasonable attorney fees and charges for late payment*
5 *of and costs incurred with respect to those assessments, for a period of one year*
6 *or in the amount of one thousand two hundred dollars or more, whichever occurs*
7 *first.*¹

8 Arizona courts, as a general principal, presume that the legislature “mean[s] what it says.”²
9 “The most basic rule of statutory construction is that in construing the legislative language, courts
10 will not enlarge the meaning of simple English words in order to make them conform to their own
11 peculiar sociological and economic views.”³ The legislature has also codified rules of statutory
12 construction declaring, among other things, that “[s]tatutes shall be liberally construed to effect
13 their objects and to promote justice”⁴ and that:

14 Words and phrases shall be construed according to the common and approved use
15 of the language. Technical words and phrases and those which have acquired a
16 peculiar and appropriate meaning in the law shall be construed according to such
17 peculiar and appropriate meaning.⁵

18 Against this backdrop of statutory construction, the availability of the foreclosure remedy
19 turns on the meaning of two phrases: “may be foreclosed” and “has been delinquent.” What did
20 the legislature mean when it said that an assessment lien “may be foreclosed only if the owner has
21 been delinquent in the payment of monies secured by the lien, excluding reasonable collection
22 fees, reasonable attorney fees and charges for late payment of and costs incurred with respect to
23 those assessments, for a period of one year or in the amount of one thousand two hundred
24 dollars or more, whichever occurs first?”

25 ¹ A.R.S. § 33-1807(a) (emphasis added).

26 ² *Homebuilders Ass’n of Cent. Arizona v. City of Scottsdale*, 186 Ariz. 642, 649, 925 P.2d
1359, 1366 (App. 1996).

³ *Padilla v. Industrial Commission*, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976).

⁴ A.R.S. § 1-211.

⁵ A.R.S. § 1-213.

1 Did the legislature’s use of the phrase “may be foreclosed” intend to refer to the filing of
2 an action to foreclose, such that once it is filed it is too late for an owner to avoid a foreclosure
3 judgment, or is it describing an event subsequent to the commencement of the action (*e.g.*, a
4 foreclosure judgment or even a sheriff’s sale)? If it is the latter, as Plaintiff urges, it leads to some
5 fairly inconsistent results. For example, a homeowner who pays all past due assessments the day
6 before a suit is filed can avoid foreclosure but the homeowner who pays the day after loses his
7 home and can only avoid foreclosure by either divining and paying the attorneys’ fees and costs a
8 court might eventually award or waiting for a final judgment of foreclosure that includes an award
9 of those fees and costs and redeeming the property before the sheriff’s sale. What if the payment
10 is made the day before but not received until the day after? What if the homeowners’ association
11 does not open the envelope or credit the account quickly enough? Under Plaintiff’s analysis, the
12 homeowner could lose their home under this scenario. These are a few of the “absurd” results
13 that courts presume the legislature intended to avoid.⁶

14 Such a construction is contrary to the above rules of statutory construction. The filing of a
15 complaint seeking judicial foreclosure is clearly not the act of foreclosure or even the penultimate
16 act of foreclosure. The plain meaning of “foreclosed” means “to take mortgaged property from
17 borrowers who default on their mortgages.”⁷ Black’s Law Dictionary defines “foreclose” as
18 “[t]o shut out; to bar. Used in the process of destroying an equity of redemption existing in a
19 mortgagor.”⁸ Clearly, it means to exercise the power of sale, not the initiation of foreclosure
20 proceedings. As a foreclosure can be either judicial or non-judicial, the word itself does not refer
21 to the mere commencement of a foreclosure lawsuit. When one says that an owner was
22 foreclosed, for example, it means he or she no longer owns the property in question; it does not
23 mean that the owner is currently in litigation and might lose the home.

24 ⁶ *Linda V. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 76, 79, 117 P.3d 795, 798 (App. 2005).

25 ⁷ <https://www.law.cornell.edu/wex/foreclosure>.

26 ⁸ <https://thelawdictionary.org/foreclose/>.

1 Despite arguing that “may be foreclosed” refers to the commencement of an action seeking
2 judicial foreclosure, Plaintiff impliedly concedes in its default judgment that “foreclosed” has a
3 special meaning. Paragraphs 4 and 5 of the Default Judgment that its attorneys drafted states:

4 4. The interests of the Defendants herein are hereby foreclosed...and the
5 Defendants herein are forever barred from any or all right, title, claim, interest or
6 lien in and to the Property or with respect thereto, except such rights of redemption
as they may have by law;

7 5. Plaintiff’s lien is hereby declared foreclosed and a special execution is
8 hereby issued to the Sheriff of Maricopa County, Arizona, directing him to seize
and sell the Property as under execution in satisfaction of all amounts due Plaintiff
as aforesaid.

9 Thus, the Default Judgment expressly acknowledges an interest or lien is not “foreclosed”
10 until, at the very least, the issuance of a judgment of foreclosure in much the same way that it is
11 the Trustee’s Deed, not a Notice of Trustee’s Sale, that forecloses an owner’s interest in a non-
12 judicial foreclosure context. Because it is the court that forecloses in the judicial context, it is
13 illogical to suggest that an association has the power to “foreclose” by simply starting an action.

14 It is against the rules of statutory construction to say that an owner who pays all unpaid
15 assessments before the commencement of a lawsuit cannot be foreclosed but one who pays them
16 after the filing of an action can still be foreclosed. This construction is further buttressed by the
17 use of the phrase “has been delinquent.” The phrase is presented in the present perfect progressive
18 tense, which is used to describe an action that began in the past, continues in the present, and may
19 continue into the future.⁹ Consider the following sentence: “I have not been home today.” It
20 ceases to be an accurate statement once the speaker walks through the door of his house. One
21 cannot say an owner “has been delinquent” once the owner ceases to be delinquent. Once the
22 owner pays the past due assessments, the owner “has not been delinquent.”

23 If “[s]tatutes shall be liberally construed to effect their objects and to promote justice,” then
24 homeowners must have the right to prevent the “harsh” and “drastic” remedy of foreclosure even
25

26 ⁹ www.usingenglish.com/glossary/present-perfect-continuous/html.

1 after a foreclosure action is commenced by eliminating the statutory basis for foreclosing (*i.e.*,
2 bringing the assessments current). There is nothing in the statute suggesting that the legislature
3 intended to allow associations to foreclose over unawarded attorneys' fees and costs or even late
4 fees. Otherwise, there would be no reason for explicitly carving these out in the statute
5 ("excluding reasonable collection fees, reasonable attorney fees and charges for late payment of
6 and costs incurred with respect to those assessments"). It does not promote justice to allow the
7 tool of foreclosure to be utilized as a sword to force payment of unawarded attorneys' fees and
8 costs.

9 Public policy strongly favors home ownership and protects borrowers.¹⁰ This public policy
10 is reflected in the homeowners' association context by limiting the right to foreclose only to
11 situations where the association is being denied its right to assessments.¹¹ Foreclosure is a "harsh"
12 and "extraordinary and drastic remedy, which in part, accounts for some of the more stringent rules
13 associated with foreclosure."¹² It would eviscerate this right to allow a homeowners' association to
14 foreclose where all that remained were unawarded fees and costs and elevate a debt collector's
15 ability to have a secured judgment for its fees and costs that are eventually awarded.

16 Although no Arizona appellate court has yet addressed the discrete issue presented in this
17 case, the California Court of Appeals rejected a nearly identical argument of a similar statute in
18 *Huntington Continental Townhouse Ass'n, Inc. v. Miner*.¹³ It rejected the argument that a
19 foreclosure claim, once filed, cannot end unless the homeowner also pays legal fees and costs.
20 The plain reading of A.R.S. § 33-1256, and its repeated clarification that legal fees and costs are
21 "excluded" as assessments makes it clear that the statute places a great significance on the right

22 ¹⁰ *CSA 13-101 Loop, LLC v. Loop 101, LLC*, 236 Ariz. 410, 415, 341 P.3d 452, 457
23 (2014).

24 ¹¹ A.R.S. § 33-1807(A); A.R.S. § 33-1256(A).

25 ¹² *Arizona Coffee Shops, Inc. v. Phoenix Downtown Parking Ass'n*, 95 Ariz. 98, 100, 387
26 P.2d 801, 802 (1963); *INB Banking Co. v. Opportunity Options, Inc.*, 598 N.E.2d 580, 584 (Ind.
App. 1992).

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

1 of home ownership and that homeowners should not be stripped of this right over fees and costs
2 that have never been awarded or adjudicated as reasonable. Nothing in the statute suggests an
3 intent to allow an association to take an individual's home over such charges.

4 Simply put, the payment of all unpaid assessments eliminated the statutory basis for a
5 foreclosure judgment. The Court's default judgment awarding principal in a negative amount
6 reflects the reality that Defendant was current in his assessments at the time the Court "declared
7 foreclosed" Plaintiff's lien. The statutory threshold to permit foreclosure, therefore, was not met.
8 Although an association arguably might still have a right to a money judgment for late fees,
9 fees, costs, and other charges, it no longer possessed the statutory right to foreclose.

10 **II. THE JUDGMENT CONTAINS UNLAWFUL AND PROHIBITED PROVISIONS.**

11 The default judgment also included unlawful and prohibited provisions that separately
12 justify setting aside the default judgment. These provisions include the right to seize and sell
13 personal property as part of the sheriff's sale of the real estate and the curtailment of Defendant's
14 redemption rights.

15 **A. The Default Judgment of Foreclosure Forecloses on Personal Property.**

16 The Default Judgment, paragraph 6, states:

17 It is hereby directed that if there is any personal property present at or in the Property
18 at the time of the sale, the same will be deemed abandoned and sold as part of the
19 Property if not removed prior to the time the purchaser of the Property elects to take
20 possession of the Property as more fully set forth below, but no later than expiration
of the redemption period, to the extent permit by law, and that the Property to be sold
at public auction, and that Plaintiff may be the purchaser at such sale.

21 This violates Defendant's personal property exemption rights in A.R.S. § 33-1121, *et seq.*
22 Specifically, it violates A.R.S. § 33-1123 (household furniture, furnishings and appliances "are
23 exempt from process"), A.R.S. § 33-1124 ("food, fuel and provisions actually provided for the
24 debtor's individual or family use for six months are exempt from process"); and A.R.S. § 33-
25 1125 (enumerated personal property "used primarily for personal, family or household purposes
26 shall be exempt from process").

1 The Default Judgment states that “any personal property present at or in the Property at
2 the time of sale... will be deemed abandoned and sold as part of the Property.” Although it goes
3 on to state that the sale is conditional, “if not removed prior to the time the purchaser of the
4 Property elects to take possession of the Property,” how does one sell personal property (“will be
5 deemed abandoned and sold”) with a condition subsequent (“if not removed prior to the time the
6 purchaser of the Property elects to take possession of the Property”)? If the successful purchaser
7 who decides to try to take possession before the expiration of the redemption period (assuming this
8 is allowed under the law), the wording of the Default Judgment means that the debtor’s personal
9 property was sold because it was not removed when the purchaser elected to take possession.

10 These provisions are patently unlawful and violate well-established exemptions set forth in
11 Arizona law to protect debtors’ personal property from executing, garnishment, replevin, or sale.

12 **B. The Default Judgment of Foreclosure Violates Defendant’s Redemption Rights**
13 **and Purports to Convey Possession to the Purchaser “Immediately” Following**
14 **the Sheriff’s Sale.**

14 The Default Judgment, paragraph 9, states:

15 Possession of the Property shall be vested in the purchaser immediately following
16 the Sheriff’s Sale as the holder of equitable title and thus entitling the purchaser to
17 pursue occupancy by all legal means, subject only to Defendants’ right of
18 redemption pursuant to Arizona law.

18 A Default Judgment of Foreclosure that bestows an immediate right of possession in the
19 purchaser, based on nothing more than a claim of equitable ownership and prior to the expiration of
20 the redemption period, violates the protections afforded under A.R.S. § 12-1171, *et seq.*, which in
21 turn prematurely curtails an owner’s redemption rights and violates the right of redemption.

22 The Legislature’s clear intent in the statutory redemption period was to provide the
23 homeowner a set period of time to pay-off the alleged debt and save their property and this
24 protection cannot be waived or shortened.¹⁴ By bestowing in the purchaser the right of

25 ¹⁴ See *Elson Development Co. v. Arizona Sav. & Loan Ass’n*, 99 Ariz. 217, 223-27, 407
26 P.2d 930, 935-37 (1965) (holding that redemption statute was enacted in interest of public
policy and such intent and purpose cannot be violated by agreement).

1 immediate possession, and the right to declare all personal property present at that time
2 abandoned, it violates the protections afforded by the right of redemption.

3 **III. THE JUDGMENT PURPORTS TO AWARD FUTURE UNACCRUED AMOUNTS.**

4 The Default Judgment awards “accruing costs not otherwise addressed herein upon
5 application” and “accruing fees not otherwise addressed herein upon application.” Arizona,
6 however, follows the American rule with respect to an award of attorneys’ fees. “Unlike the
7 British legal system rule, in which the winner automatically gets attorneys’ fees, the rule in
8 American courts, commonly known as the American Rule, looks with disdain upon awarding
9 attorneys’ fees unless an independent basis exists for the award.”¹⁵ In *Baker Botts L.L.P. v.*
10 *ASARCO*, the United States Supreme Court held that fee shifting provisions must be narrowly
11 construed in accordance with the American Rule.¹⁶

12 With respect to post-judgment attorneys’ fees, Arizona law does not provide for fee-
13 shifting except where expressly permitted by statute or another basis.¹⁷ As an initial matter, the
14 inclusion of self-serving language awarding future fees or costs is insufficient to create a right to
15 post-judgment fees or costs. A party cannot create their own legal right to fees or costs. Any
16 legal right to fees and costs must be grounded in either a statute or contractual fee provision.

17 Arizona, unlike some states, does not have a post-judgment fee statute.¹⁸ Notably,
18 Arizona has no statute analogous to either the Idaho or California statutes. There is no A.R.S. §

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20 ¹⁵ *Middle Mountain Land and Produce Inc. v. Sound Commodities Inc.*, 307 F.3d 1220,
1225 (9th Cir. 2002) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240
21 (1975)).

22 ¹⁶ *Baker Botts L.L.P. v. ASARCO*, 135 S. Ct. 2158, 2164-65 (2015).

23 ¹⁷ *See Bennett Blum, M.D., Inc. v. Cowan*, 235 Ariz. 204, 209, 330 P.3d 961, 966 (App.
24 2014).

25 ¹⁸ *See, e.g.*, Idaho Code Ann. § 12-120(6) (judgment-creditor entitled to “reasonable post-
26 judgment attorneys’ fees and costs incurred 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”); Cal. Code. Civ.
Proc. § 685.040 (authorizing post-judgment attorneys’ fees “incurred in enforcing a judgment”
where underlying judgment included award of contractually-based attorney fees).

1 12-341.01 applicable to post-judgment proceedings.¹⁹ This means that any right to fees, if any,
2 must be spelled out in a contract. However, Arizona follows the doctrine of merger.²⁰ “The
3 doctrine of merger of a cause of action in a judgment rendered thereon proceeds upon the
4 principle that a superior right covers an inferior right, or that a security of a higher nature
5 extinguishes a security of an inferior nature, and that a judgment is of a higher right or security
6 than an ordinary cause of action.”²¹ It is well-settled that, under the doctrine of merger,
7 underlying contracts and rights thereunder are merged into a judgment and extinguished as a
8 basis for any further claims.²²

9 In other words, a party seeking post-judgment attorneys’ fees generally cannot rely on
10 generic fee shifting provisions, entitling the prevailing party to “reasonable attorneys’ fees,” that
11 may have served as the basis for the original judgment.²³ The Declaration in this case includes

12 ¹⁹ A.R.S. § 12-341.01 does not apply since the claim for fees arises not out of contract
13 but out of the judgment itself since post-judgment proceedings in Arizona are generally “treated
14 in all respects...as an ‘original independent action’ from the underlying lawsuit.” See *Bennett*
Blum, 235 Ariz. at 207-08, 330 P.3d at 964-65 (quoting *Davis v. Chilson*, 48 Ariz. 366, 371, 62
P.2d 127, 130 (1936)).

15 ²⁰ See *C & J Travel, Inc. v. Shumway*, 161 Ariz. 33, 36, 775 P.2d 1097, 1100 (App.
1989).

16 ²¹ *Id.* (quoting 46 Am. Jur. 2d Judgments § 384, at 552-53 (1969)).

17 ²² See *Water West, Inc. v. Entek Corp.*, 788 F.2d 627, 629 (9th Cir. 1986) (“The claim
18 upon which this action is founded is the Nevada judgment; it is not the underlying claim for the
breach of the distributorship agreement. That underlying claim was merged into the Nevada
judgment and is extinguished.”).

19 ²³ See also *Hatch v. T & L Associates*, 726 A.2d 308, 310 (N.J. Super. Ct. App. 1999)
20 (“We are persuaded 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
21 services. We think it plain that a contrary construction would have a substantial potential for
abuse, for unduly burdening consumer and other commercial transactions, for indefinitely
22 delaying finality, and for spawning a host of ancillary litigation.”); *Torrey v. Hamilton*, 872 P.2d
186, 187 (Alaska 1994) (fee shifting statute “only provides compensation for attorney’s services
23 performed up to the time of the judgment”); *Allison v. John M. Biggs, Inc.*, 826 P.2d 916, 917
(Idaho 1992) (award of post-judgment attorneys’ fees incurred attempting to execute on
24 judgment was improper: “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
25 collection proceedings”); *Florida Pottery Stores of Panama City, Inc. v. American Nat. Bank*,
578 So.2d 801, 804 (Fla. Dist. Ct. App. 1991) (contractual fee shifting provision was
26 insufficient to support an award of post-judgment attorneys’ fees incurred in collecting the
judgment); *Chelios v. Kaye*, 219 Cal.App.3d 75, 268 Cal. Rptr. 38 (1990) (“the judgment

1 generic fee-shifting language. It does not include specific language authorizing the collection of
2 post-judgment fees and costs incurred in collecting a judgment. The generic fee shifting
3 language lacked specificity to support a claim for post-judgment fees and costs and was
4 extinguished under the doctrine of merger. Therefore, the inclusion of a claim for “accruing” fees
5 and costs is improper and unlawful.

6 **IV. RULE 60(B) RELIEF IS APPROPRIATE.**

7 Arizona courts do not favor the determination of actions by default.²⁴ Thus, in evaluating
8 a motion to set aside an entry of default or default judgment, the trial court has broad discretion,
9 and any doubt that may exist should be resolved in favor of a trial on the merits.²⁵ The Arizona
10 Supreme Court has summarized the rule as follows:

11 [A] party should be given a reasonable opportunity to litigate his claim or defense
12 on the merits; that any doubt which may exist as to whether a default should be set
13

14 extinguished all further contractual rights of the [judgment creditor], including the contractual
15 attorney’s fees clause.”); *Production Credit Ass’n of Madison v. Laufenberg*, 420 N.W.2d 778,
16 779-80 (Wis. App. 1988) (“By operation of merger, upon entry of judgment, the contract sued
17 upon loses all of its vitality and ceases to bind the parties to its execution”) (internal citations
18 omitted); *Caine & Weiner v. Barker*, 713 P.2d 1133 (Wash. App. 1986) (affirming denial of
19 motion for post-judgment fees incurred in collecting judgment because promissory note, along
20 with its attorneys’ fees provision, merged with and was extinguished by the judgment).

21 ²⁴ *Haenichen v. Worthington*, 9 Ariz. App. 83, 449 P.2d 319 (1969).

22 ²⁵ *Id.*; *Marquez v. Rapid Harvest Co.*, 99 Ariz. 363, 409 P.2d 285 (1965); *Alvarez v.*
23 *Superior Court*, 146 Ariz. 189, 704 P.2d. 830 (Ct. App 1985); *Phillips v. Findlay*, 19 Ariz. App.
24 348, 354, 507 P.2d 687, 693 (1973); *see also Walker v. Dallas*, 146 Ariz. 440, 706 P.2d 1207
25 (1985) (holding that absent defendant may often set aside default judgment on proper showing
26 of excusable lack of notice and no intent to evade process); *Vital v. Johnson*, 128 Ariz. 129, 624
P.2d 326 (1983) (holding that, when an aggrieved party establishes lack of knowledge that
judgment has been entered and asserts additional reasons that are so extraordinary as to justify
relief, trial court has authority to vacate judgment); *Roll v. Janca*, 22 Ariz. App. 335, 527 P.2d
294 (1974) (holding that court did not abuse discretion in setting aside default judgment where,
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).

1 aside should be resolved in favor of the application, to the end that a trial upon the
2 merits may be had.²⁶

3 Rule 60(b) entitles a party to seek relief from a final judgment, order, or proceeding,
4 including a default judgment, based on, among other possible reasons:

- 5 (1) Mistake, inadvertence, surprise, or excusable neglect;
6 (3) Fraud (whether previously called intrinsic or extrinsic), misrepresentation,
7 or other misconduct of an opposing party;
8 (4) The judgment is void; [and]
9 (6) Any other reason that justifies relief from the judgment.

10 All of the above factors apply in this case. The following discussion demonstrates that
11 compelling grounds exist under Rule 60(b) to set aside the default judgment, that Defendant has
12 acted promptly in seeking relief from default judgment, and has meritorious defenses.

13 **A. The Default Judgment is Void.**

14 Subject matter jurisdiction “refers to a court’s statutory or constitutional power to hear and
15 determine a particular type of case.”²⁷ “A judgment or order is void, and not merely voidable, if
16 the court that entered it lacked jurisdiction ‘to render the particular judgment or order
17 entered’”²⁸ “A void judgment is a ‘nullity’ and ‘all proceedings founded on [a] void judgment
18 are themselves regarded as invalid and ineffective for any purpose.’”²⁹ A void judgment can be
19 challenged at any time.³⁰

20 A void judgment obviously presents significantly different public policy concerns than
21 the other five grounds for setting aside a judgment found in Rule 60(b). Whereas the other

22 ²⁶ *Hendrie Buick Co. v. Mack*, 88 Ariz. 248, 253, 355 P.2d 892, 895 (1960).

23 ²⁷ *State v. Espinoza*, 229 Ariz. 421, 425-26, 276 P.3d 55, 59-60 (App. 2012).

24 ²⁸ *Id.* at 428, 276 P.3d at 62 (quoting *State v. Cramer*, 192 Ariz. 150, 153, 962 P.2d 224,
227 (App. 1998).

25 ²⁹ *Id.*

26 ³⁰ *Master Financial, Inc. v. Woodburn*, 208 Ariz. 70, 74, 90 P.3d 1236, 1240 (Ct. App.
2004).

1 grounds generally concern the party's actions or inactions, a void judgment contravenes law and
2 public policy. This is particularly true with respect to default judgments. A default judgment
3 bearing the Court's imprimatur states that the judgment was entered in accordance with the
4 applicable law despite the absence of one of the parties. The Court's imprimatur on a default
5 judgment is not merely a rubberstamp, and the judgment must comport with fundamental
6 principles of due process and not be contrary to law. A court which makes a void order may set
7 aside such void order at any time, and Defendant submits the Court has an affirmative duty to do
8 so since a void judgment challenges the integrity of the Court's ruling.³¹

9 The Court's jurisdiction to enter a judgment of foreclosure was predicated solely on A.R.S.
10 § 33-1807(A). As discussed above, the statute has a threshold requirement to foreclose that the
11 assessments, exclusive of all other amounts, is at least \$1,200.00 or one year past due. In this case,
12 it is undisputed that, at the time the Court entered the default judgment of foreclosure, Defendant
13 was not past due in any amount. This is reflected most notably in the Court's award of a judgment
14 in a negative amount. Since the statutory grounds for foreclosure were not met, the Court lacked
15 subject matter jurisdiction to enter the default judgment. The Court's foreclosure power, expressly
16 limited by the terms of the statute, cannot be exercised if the statute's requirements are not met.

17 Because Defendant has indisputably paid *all* alleged past due assessments, the default
18 judgment of foreclosure violates A.R.S. § 33-1807 and, consequently, is void. Under the
19 circumstances, the Court should set aside the default judgment. Otherwise, the Court would be
20 placing its imprimatur on a default judgment of foreclosure rather than let stand a judgment
21 where the right to foreclose is not met. Relief under Rule 60(b)(4), therefore, is appropriate.

22 **B. The Judgment's Legally Impermissible Terms Requires Setting It Aside.**

23 As discussed above, the Default Judgment includes several provisions that are directly
24 contrary to Arizona law and public policy. In essence, Plaintiff has used the Default Judgment to
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26 ³¹ *In re Milliman's Estate*, 101 Ariz. 54, 58, 415 P.2d 877, 881 (Ct. App. 1966).

1 do what it otherwise had no right to do under Arizona law – namely, foreclose not just on the real
2 property that is the subject of the action but also on the Defendant’s personal property, in disregard
3 for the personal property exemptions explicitly spelled out under Arizona law, and including a
4 provision purporting to allow any purchaser, including itself, to oust the legal owner from
5 possession before the expiration of the redemption period.

6 These offensive terms in the default judgment satisfy both the “mistake, inadvertence,
7 surprise or excusable neglect” requirement of Rule 60(b)(1) and the “misrepresentation, or other
8 misconduct of an opposing party” requirement of Rule 60(b)(4). Defendant has, likewise, acted
9 swiftly to set aside the default judgment, including seeking to set aside default even before the
10 entry of default judgment, and has meritorious defenses to this action as set forth in Sections I,
11 II, and III of this Motion.³²

12 **C. Other Compelling Reasons Exist to Set Aside the Judgment.**

13 The catch-all provision of Rule 60(b), subsection (6), also applies in this case. In fact, it
14 is difficult to fathom a case in which Rule 60(b)(6) might be more applicable. Under Rule
15 60(b)(6), “a court may relieve a party from a final judgment for any reason justifying relief,
16 provided that the movant can show ‘extraordinary circumstances of hardship or injustice
17 justifying relief’ and ‘a reason for setting aside the judgment other than one of the reasons set
18 forth in the preceding five clauses of [Rule 60(b)].”³³

19 Defendant stands to lose his home over three principal reasons: (1) not having enough
20 money to pay Plaintiff’s counsel’s attorneys’ fees, (2) not making his \$5,000.00 payment before
21 the commencement of this action, and (3) not having the ability to predict how much those fees
22 were when Plaintiff tendered his payment. This is not a case involving a dispute over money but
23

24 ³² Defendant incorporates herein by reference his Motion to Set Aside Entry of Default
25 (filed April 14, 2017), Notice to Court that Defendant Has Paid All Alleged Past Due
Assessments (filed April 14, 2017), Reply in Support of Motion to Set Aside Entry of Default
(May 10, 2017), and Defendant’s Hearing Memorandum (filed June 9, 2017).

26 ³³ *Skydive Arizona, Inc. v. Hogue*, 238 Ariz. 357, 364, 360 P.3d 153, 160 (App. 2015).

1 rather a fight that, if lost, very likely may leave Defendant and his family homeless.
2 Homelessness due to the failure to divine and pay the unawarded attorneys' fees incurred, but
3 not awarded, at a time when Defendant paid \$2,000.00 more than what was owed in assessments
4 presents "extraordinary circumstances of hardship or injustice justifying relief." This is the
5 precise result that the legislature appears it wanted to avoid – foreclosing based on fees or other
6 charges – in expressly limiting an association's power to foreclose only where there are unpaid
7 assessments at issue.

8 **CONCLUSION**

9 For the above reasons, the Court should set aside the default judgment in this case.

10 DATED this 20th day of December 2017.

11 **DESSAULES LAW GROUP**

12
13 By: /s/ Jonathan A. Dessaulles
14 Jonathan A. Dessaulles
15 Jacob A. Kubert
Attorneys for Defendant

16 COPY filed electronically with
17 The Clerk of the Court
this 20th day of December, 2017.
18 COURTESY COPY hand-delivered
19 this 20th day of December, 2017 to:
20 Commissioner Margaret Benny
21 MARICOPA COUNTY SUPERIOR COURT
Southeast Facility-3C
22 222 E. Javelina Ave.
23 Mesa, AZ. 85210-6234
24
25
26

1 COPY of the foregoing mailed and e-mailed
2 this 20th day of December 2017, to:

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/s/ Hilary Narveson
