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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

LAVEEN MEADOWS HOMEOWNERS ASSOCIATION, an Arizona non-profit corporation, Plaintiff, vs. CARLOS MEJIA, a married man, as his sole and separate property; STATE OF ARIZONA, a governmental entity; LEXINGTON NATIONAL INSURANCE CORPORATION; US IMMIGRATION BONDS AND INSURANCE SERVICES, INC.; UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY-INTERNAL REVENUE SERVICE; THE UNKNOWN HEIRS AND DEVISEES OF ABOVE NAMED DEFENDANTS, IF DECEASED, Defendants.	No. CV2016-094391 **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT** Assigned to the Honorable Margaret Benny Oral Argument Requested

The Plaintiff, Laveen Meadows Homeowners Association ("Association") hereby responds in opposition to Defendant Carlos Mejia's ("Defendant") Motion to Set Aside Default Judgment ("Motion to Set Aside"). As the following analysis explains, Defendant's arguments regarding this Court's jurisdiction to enter a judgment on foreclosure are based on an improper reading of the relevant statutes. Additionally, Defendant cannot satisfy the

requirements of Rule 60(b), ARCP, for setting aside the judgment. Moreover, Defendant's arguments are no different from those raised previously by Defendant through his attempt to set aside the default, which this Court correctly and soundly rejected after multiple arguments and an evidentiary hearing. The Association, therefore, requests that this Court deny Defendant's request to set aside the default judgment.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BRIEF FACTUAL BACKGROUND

On May 11, 2016, Plaintiff filed the Complaint for lien foreclosure. On that same day, Plaintiff served Defendant. The following day, knowing the seriousness and severity of the pending lien foreclosure lawsuit, Defendant contacted the Association's counsel, traveled from his home some 30 miles and appeared for an in-office conference on May 12, 2016 to discuss the litigation, in his requested and preferred language of Spanish. *See* Exhibit "A", to the Association's Response to Defendants' Motion to Set Aside Default. Thereafter, the Association engaged in negotiations with Defendant for several months attempting to provide Defendant the opportunity he needed to work out a repayment plan or otherwise come up with a resolution to the pending foreclosure matter. Negotiations included providing a payoff that identified the total amount then due and owing, engaging in settlement discussions, working out a repayment plan, and preparing a stipulation to judgment based on Defendant's proposed repayment plan. Unfortunately, Defendant reneged on the payment agreement despite acceptance by the Association of his terms and thereafter ceased communicating with the Association. As such, the Association filed an application for entry of default on December 14, 2016, which was confirmed ten days later.

On March 31, 2017 the Association filed its request for entry of default judgment and associated documents, and this Court set a default hearing for Monday, April 17, 2017 at 9:00 a.m. Near the close of business on Friday, April 14, 2017, Defendant filed an answer, as well as a Motion to Set Aside Default, and tendered payment of $5,000.00. Defendant then argued that his eleventh-hour tender of $5,000.00 divested this Court of jurisdiction and that the entry of default should be set aside. This Court heard oral argument on the issues and correctly ruled that Defendant was in default and had not shown good cause or excusable neglect as to why the entry of default should be set aside. *See* June 2, 2017 Minute Entry attached hereto as Exhibit "1". The Association also filed a Motion to Strike, which included a request for sanctions due to the improper and disingenuous arguments raised by Defendant and his counsel. This Court conducted an evidentiary hearing on the issue of damages and ultimately granted the Association's Motion to Strike and awarded judgment in favor of the Association, foreclosing the Association's lien against Defendant's property and awarding attorney's fees and costs to the Association.

Following entry of judgment in favor of the Association, Defendant filed a Notice of Appeal and attempted to appeal the judgment to the Court of Appeals. As a result of Defendant once again failing to comply with procedural requirements, Defendant's appeal was dismissed. Thus, following dismissal of his appeal, Defendant filed the pending Motion to Set Aside, which raises the same arguments this Court previously and soundly rejected.

II. LEGAL ARGUMENT.

The issues involved in this case are nothing new for homeowner associations. Homeowners fail to pay assessments, force their association to run up fees and costs trying

to enforce the delinquency, then argue they should not be held responsible for those fees and costs once the association involves legal counsel and files suit. Fortunately, that argument is consistently rejected by Maricopa County Superior Courts as well as Federal Courts[1], regardless of the form that argument takes.

A. The Association Is Entitled to Pursue Its Statutory and/or Contractual Lien Foreclosure.

Defendant seeks an incorrect reading of the statute to manufacture an intent and interpretation that simply does not exist, and Defendant completely ignores the Association's independent contractual foreclosure right. A.R.S. § 33-1807(A) gives the Association the right to pursue foreclosure of the entirety of its lien. The lien is not only for assessments, but "for charges for late payment of those assessments, for reasonable collection fees and for reasonable attorney fees and costs incurred with respect to those assessments." *Id.* The statute merely creates a triggering event, or ripeness element, that must be established before an association can file for foreclosure under statute. (The CC&Rs have their own set of requirements to foreclosure under the contractual lien, but as Defendant's arguments in his Motion to Set Aside focus on the statutory lien, the statutory lien is likewise the focus of this responsive brief.) Specifically, in order to determine the timing, or ripeness, of when the Association can foreclose its lien, the statute dictates that we must look solely to assessments to determine whether those assessments have been delinquent "for a period of one year or more or in the amount of $1,200.00 or more,

[1] Counsel for Defendant has a pattern of making disingenuous requests. In *Kinna v. Maxwell & Morgan, PC*, 2017 WL 5992336, the Court recently found on two separate instances that the arguments raised by Defendant's Counsel were disingenuous, which further supports the Association's justification in seeking sanctions. *See* Order in *Kinna* Matter attached hereto as Exhibit "2", p. 15, lns. 2-6, and p. 18, ln. 20.

whichever occurs first." *Id.* As soon as either of those alternative conditions are met, the foreclosure claim is ripe, triggering the Association's foreclosure right.

Defendant attempts to confuse and/or complicate the statute by arguing that the phrase "may be foreclosed" as used in A.R.S. § 33-1807(A) sets an ongoing burden for Courts to continually evaluate whether or not they have jurisdiction. *See* Defendant's Motion to Set Aside Judgment, p. 4. As previously described, the statute establishes a ripeness requirement *before* a foreclosure lawsuit may be brought, but not a bar to foreclosure once the ripeness requirement has been satisfied. Ripeness does not work the way that Defendant would have this case follow. It is likened to jurisdiction. Jurisdiction over a controversy, once vested, may not be divested by subsequent events, actions or omissions of the parties. *See, e.g., Daou v. Harris*, 139 Ariz. 353, 356, 678 P.2d 934, 937 (1984); *Schoenberger v. Bd. Of Adjustment*, 124 Ariz. 528, 606 P.2d 18 (1980); *Am. Smelting & Ref. Co. v. Ariz. Air Pollution Control Hearing Bd.*, 113 Ariz. 243, 550 P.2d 621 (1976); *Whitfield Transp. v. Brooks*, 81 Ariz. 136, 302 P.2d 526 (1956). "This is because 'jurisdiction is established *at the time of filing of the lawsuit and cannot be ousted by subsequent actions or events.*'" *Fry v. Garcia*, 213 Ariz. 70, 73, ¶ 10, 138 P.3d 1197, 1200 (App. 2006) (emphasis added) (citing *Resolution Trust Corp. v. Foust*, 177 Ariz. 507, 869 P.2d 183 (App. 1993)).

Therefore, once the statutory threshold has been met, and an association files suit, it can foreclose on the amounts secured by the lien, even if the defendant pays the past due assessments because jurisdiction was established at the time of filing of the lawsuit and cannot be ousted by subsequent actions or events, such as making a partial payment. The

Association here met the threshold at the time of filing suit, and Defendant has failed to pay all amounts secured by the statutory lien. Thus, the Association has the right to continue its foreclosure pursuant to the statute.

The present scenario is also akin to a mortgage foreclosure. The mortgagee is not required to cease the foreclosure just because the borrower tenders the late payments. Instead, the mortgagor is required to pay all the amounts due and owing in order to stop the foreclosure action. *See* A.R.S. §§ 33-725 & 726. There is no reason to treat association foreclosures differently, especially when A.R.S. § 33-1807(A) specifically references that HOA "assessments may be foreclosed in the same manner as a mortgage on real estate...." Like a mortgage lender, the Association is entitled to proceed with its lien foreclosure until all the amounts due and owing are satisfied.

Defendant also attempts in his Motion to Set Aside to misconstrue the phrase "has been delinquent" in order to support his tortured reading of A.R.S. § 1807(A). Defendant compares the statutory phrase "has been delinquent" (which is a positive phrase) to the phrase "I have not been home today" (which is a negative phrase) to illustrate his point. *See* Defendant's Motion to Set Aside, p. 5. However, the illustrative phrase Defendant used is not in parallel construction to the statutory phrase and thus provides no comparative value. The parallel version of the phrase Defendant used for illustrative purposes should have been "I have been gone today." That phrase avoids the negative construction in the same way the statute does. When Defendant's re-worked phrase is parallel to the statutory phrase, it no longer supports his position. Using Defendant's analogy, the phrase "I have been gone today" will be true even after the speaker walks through the door.

Curiously, Defendant cited to a California case to support his position that contains the same parallel construction problem as Defendant's illustrative phrase. The California Court of Appeals in *Huntington Continental Townhouse Assoc., Inc. v. Milner*, 230 Cal.App.4th 590 (Cal.App.4th Dist., Div. 3, 2014) explained that the language of the operative California statute was of paramount importance to its analysis and conclusion. Specifically, the California Court of Appeals explained the following:

> Particularly significant to this case is the Civil Code section 5720, which places limits on foreclosure. Relevant parts of section 5720(b) state: "An association that seeks to collect delinquent regular or special assessments of an amount less than one thousand eight hundred dollars ($1,800), not including any accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest, **may not collect** the debt through judicial or nonjudicial foreclosure, but may attempt to collect or secure that debt in any of the following ways . . ."

Id., 230 Cal.App.4th at 600-601. (Emphasis added.) That is very different language than the Arizona legislature has adopted. The operative California statute is drafted in the negative, and explains when an association's right to foreclose is eliminated. Thus, in interpreting the California statute, the California courts must evaluate when the facts of a particular matter trigger the expiration of an association's right to foreclose. Contrary to the California statute, the operative Arizona statute is drafted such that the language identifies a triggering event, as explained above, as to when the Association's right to pursue foreclosure becomes ripe. Because of the monumental difference between the California statute at issue in the *Milner* case when compared with the operative language of A.R.S. § 33-1807(A), the *Milner* case is not at all helpful to this Court in applying Arizona law.

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B. The Association's Foreclosure Judgment is Lawful and Proper.

Defendant alleges that the Association's foreclosure judgment is unlawful because paragraph 6 of the judgment purportedly "violates A.R.S. § 33-1123 . . ., A.R.S. § 33-1124; and A.R.S. § 33-1125 . . .". *See* Defendant's Motion to Set Aside, p. 7. However, Defendant's contention is contrary to law. A.R.S. § 33-1807(C) expressly provides in pertinent part as follows: "the lien under this section is not subject to chapter 8 of this title." Chapter 8 of Title 33 of the Arizona Revise Statutes is titled "Homestead and Personal Property Exemption". Chapter 8 contains three Articles that comprise A.R.S. § 33-1101 through A.R.S. § 33-1153, inclusive. All of the statutory objections that Defendant claimed render the Association's judgment "unlawful" are expressly inapplicable by the language of A.R.S. § 33-1807(C).

C. The Association's Foreclosure Judgment Does Not Violate Defendant's Redemption Rights.

Defendant, without any citation to applicable statutory or case law, claims that paragraph 9 of the Association's default judgment violates Defendant's right of redemption. However, again, Defendant's argument is based solely on Defendant's own misreading of the judgment. Paragraph 7 of the default judgment expressly provides as follows: "It is declared that the redemption period shall be six (6) months, unless the property has been abandoned, in which event the redemption period shall be 30 days". *See* Judgment on Foreclosure, ¶ 7. Therefore, the Association's foreclosure judgment expressly preserves and confirms Defendant's right to redeem.

Contrary to Defendant's argument, after foreclosure and the sheriff's sale, the purchaser of the property sold does actually obtain equitable title, which is the possessory

interest to the property. *See Perry v. Safety Federal Sav. And Loan Ass'n of Kansas City*, 25 Ariz.App. 443, 445, 544 P.2d 267, 269 (2001). Specifically, the Court in *Perry* held that "[a]t a mortgage foreclosure sale the equitable title passes to the sheriff's sale purchaser with the legal title remaining in the judgment-debtor-mortgagor during the period of redemption." The *Perry* Court cited the Arizona Supreme Court, which further explained that "[u]nder the law of foreclosure up to the time of the sale of the property, the mortgagor holds both the legal and equitable titles. When the sale is made, the equitable title passes to the purchaser, subject to defeasance by redemption within the statutory period. (Citations omitted.) If there is no redemption, the sheriff's deed completes the legal title of the purchaser. (Citation omitted.) If a redemptioner appears, the purchaser loses all title, legal and equitable, in the property, which passes to the former. (Citations omitted.)" *First Nat. Bank v. Maxey*, 34 Ariz. 438, 443-44, 272 P. 641, 642 (1928). Although legal title will not be obtainable to the purchaser after the sheriff's sale for six months pursuant to A.R.S. § 12-1282, equitable title, which is nothing if not the right to possess the property in question, will immediately be held by the purchaser of the property at the sheriff's sale. Nothing in Arizona law supports Defendant's position that if equitable title is transferred at a sheriff's sale, the Defendant's right of redemption has somehow been compromised.

D. The Foreclosure Judgment's Confirmation of the Association's Right to Collect Future Fees and Costs Upon Application to the Court Is Proper.

Defendant also attempts to argue that because the Judgment confirmed the Association's right to recover post-judgment fees and costs upon application to the Court, that the Judgment was somehow improper. While Defendant cites to a myriad of cases to support his argument, the cases that make up his argument are from other jurisdictions and

have no relevance in Arizona as they are directly contradicted by Arizona law. The recent case of *Bennett Blum, M.D., Inc. v. Cowan* authoritatively settled the issue of "merger" as well as the issue of post-judgment attorney's fees and costs based on contract. As such, this Court need look no farther than Arizona law to address Defendant's baseless arguments.

In a recent case, *Bennett Blum, M.D., Inc. v. Cowan*, 235 Ariz. 204, 330 P.3d 961 (App. 2014), the Arizona Court of Appeals determined that awards of post-judgment attorney fees are appropriate when supported by contract. The court in *Bennett Blum* explained the following:

> The attorney fees stemming from appellants' Rule 60(c) motion and motion to stay fall squarely within the broad language of this contractual provision. There is no dispute that the underlying action arose from the parties' contract and that Blum was the prevailing party on his breach-of-contract claim in that action. In their Rule 60(c) motion, appellants sought relief from the underlying judgment, and, in their motion to stay, appellants sought to delay execution of that judgment . . . The trial court denied appellants' motion for stay, and appellants withdrew their Rule 60(c) motion.
>
> The trial court therefore had no discretion to refuse to award Blum attorney fees for appellants' Rule 60(c) motion and motion to stay under contract.

Id. at 235 Ariz. at 207, 330 P.3d at 964. Consequently, the Court of Appeals evaluated the issue of whether post-judgment attorney's fees could be awarded and found that when such fees were based on the language of the contract, they must be awarded. *See id.*

Despite Defendant's clear knowledge of *Bennett Blum* (as Defendant cited the case in his Motion to Set Aside), Defendant ignores the clear reading of the case[2] and instead attempts to put forth the nonsensical argument that somehow the contract (which in this case

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[2] Defendant's Counsel attempted a similar misconstruction of *Bennett Blum* in *Kinna* and the Federal District Court referred to the arguments as "tortured" and "disingenuous". *See* Exhibit "2", p. 15, lns. 2-6, and p. 18, ln. 20.

is the CC&Rs) merged with the judgment and ceased to exist, which rendered the attorney-fee provision in the contract no longer applicable, and which in turn prevented the Association from including language in the judgment confirming that it could apply to this Court for future fees. *See* Defendant's Motion to Set Aside, pgs. 9-11. Defendant cites to the Idaho and California Civil Codes and to case law from Nevada, New Jersey, Alaska, Florida, and California to make his tortured argument. Regardless of what curious kinds of merger doctrines other states may have, Arizona does not have a contract-judgment merger doctrine. To the contrary, when the Arizona Court of Appeals evaluated the issue of whether post-judgment attorney's fees were recoverable in a collection action, the Appellate Court held that where the contract provides language shifting responsibility for fees in the event of a dispute, the contract continues to control after entry of a judgment. *See Bennett Blum,* 235 Ariz. at 207, 330 P.3d at 964. Because Arizona law is clear that the CC&Rs did not merge with the judgment, the contractual provisions of the CC&Rs providing for recovery of attorney's fees by the Association remain operative and enforceable. *See* Exhibit "B" to the Association's Application for Attorney's Fees and *China Doll* Affidavit. Therefore, inclusion in the judgment of language confirming the Association's contractual right to recover additional attorney's fees and costs that could be incurred in the future, upon application to the Court, is wholly proper and does not provide any basis for Defendant to attack or set aside the Association's judgment.

E. Defendant Cannot Satisfy Rule 60(b), ARCP.

Defendant's attempt to satisfy the requirements of Rule 60(b), ARCP, are nothing more than a re-hashing of Defendant's failed arguments regarding the intent of A.R.S. § 33-

1807(A) and the language of the judgment. As explained above, Arizona law permits foreclosure of an association's lien if the owner has been delinquent in the payment of assessments "for a period of one year or in the amount of one thousand two hundred dollars or more, whichever occurs first." A.R.S. § 33-1807(A). As also explained above, the Association's lien secures more than just assessments, and once the lien foreclosure is initiated, Defendant cannot frustrate the jurisdiction of this Court by delivering an eleventh-hour partial payment. *See, e.g., Daou*, 139 Ariz. at 356, 678 P.2d at 937; *Schoenberger*, 124 Ariz. 528, 606 P.2d 18; *Am. Smelting & Ref. Co.*, 113 Ariz. 243, 550 P.2d 621; *Whitfield Transp.*, 81 Ariz. 136, 302 P.2d 526; *see also* A.R.S. §§ 33-726 & 1807(A).

Moreover, as explained above, defendant's contention that the Association's foreclosure judgment contains unlawful language is directly contradicted by statute. The supposedly "unlawful" provisions of the judgment that Defendant identified are all perfectly legal as the statutes Defendant claimed rendered the provisions "unlawful" are expressly declared to be inapplicable to the Association's lien pursuant to A.R.S. § 33-1807(C). Consequently, Defendant has no valid basis under rule 60(b)(1),(3) or (4), ARCP, to set aside the Association's judgment, and Defendant's Motion to Set Aside must be denied as a matter of law.

Defendant's final argument regarding Rule 60(b)(6), ARCP, also fails to raise any valid argument that would justify setting aside the judgment. Beyond the arguments already address herein, Defendant also suggests that failure to set aside the judgment would cause extraordinary hardship because Defendant should not be required to "predict" how much the attorney's fees will be so he can pay them. *See* Defendant's Motion to Set Aside, p. 14.

Defendant's argument is disingenuous at best because Defendant is moving to set aside a judgment in which this Court evaluated the Association's application for fees, Defendant had the opportunity to contest the fees, and this Court issued an award. Any guess work regarding the amount of attorney's fees Defendant was liable for at the time the judgment was signed was removed by this Court's adjudication of the issue. As a result, Defendant's arguments are wholly without merit and must be rejected as a matter of law. Defendant cannot satisfy Rule 60(b), ARCP, and Defendant's Motion to Set Aside must be denied.

III. CONCLUSION.

The foregoing establishes that this Court has no legal basis on which to grant Defendant's Motion to Set Aside and vacate the default judgment. Defendant did not and cannot satisfy the requirements of Rule 60(b), ARCP. Moreover, as explained herein, Defendant's last-minute delivery of partial payment did not divest this Court of jurisdiction over this matter as Defendant argued. This Court must deny Defendant's Motion to Set Aside. The Association is entitled to recover it's attorney's fees for defense of Defendant's Motion to Set Aside pursuant to the language of the contract, A.R.S. § 33-1807(H), and A.R.S. § 12-341.01.

RESPECTFULLY SUBMITTED this 10th day of January, 2018.

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COPY of the foregoing submitted for filing this 10th day of January, 2018, to:

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