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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 **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO SET ASIDE DEFAULT JUDGMENT** **Oral Argument Requested** (Assigned to the Honorable Commissioner Margaret Benny)

Defendant Carlos Mejia ("Mr. Mejia") files the following Reply in support of his Motion to Set Aside Default Judgment. For the reasons discussed below, his Motion should be granted.

I. THE COURT SHOULD REJECT THE HOA'S "CONTRACTUAL LIEN" THEORY

The HOA argues that it has a contractual right to foreclose on Mr. Mejia's home that is independent of its right to foreclose under A.R.S. §33-1807(A) and that the statute is just a "triggering event" that essentially allows it to foreclose how it sees fit once the $1,200 delinquency is met. Response, Point A. This argument should be rejected.

A.R.S. §33-1801(A) specifically states that this chapter "applies to all planned communities." A.R.S. §33-1807 is within Chapter 16 and is therefore applicable to plaintiff HOA. Furthermore, *Restatement (Third) of Property – Servitudes* (the "Restatement") §6.8 expressly provides that the power of a common interest community is limited by statute.[1] Nothing here says that homeowner association statutes are mere "triggering events" that allow the HOA to run roughshod over homeowners once certain statutory predicates are met.

Indeed, the homeowners' association in *Horizons at Seven Hills Homeowners Association v. Ikon Holdings, LLC*, 373 P.3d 66 (Nev. 2016) made a similar argument to the HOA in the instant case. There, the association argued that the CC&Rs gave it a "contractual lien" that allowed the association to circumvent Nevada's assessment statute and give it superpriority on collection fees and foreclosure costs. The Nevada Supreme Court rejected this argument by holding that the statute controlled. *Id*. at 73. More importantly, the Court also held that the lien did not include fees and costs preceding the actual foreclosure sale. *Id*.

Rather than supporting its baseless "contractual lien" theory with actual law, the HOA resorts to attaching irrelevant minute entries to apparently persuade this court to adopt the HOA's unsupported arguments because Mr. Mejia's counsel has made disingenuous arguments in the past. Undersigned counsel vehemently rejects this unprofessional assertion. Unlike the HOA, undersigned counsel will not base its arguments on mudslinging to support Mr. Mejia's arguments. The law speaks for itself. Since the HOA is subject to A.R.S. § 33-1807(A) and did not maintain a $1,200 principal balance at the time of Judgment, the Judgment is void and Mr. Mejia is entitled to set it aside.

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[1] Arizona courts rely on the Restatement for disputes regarding planned communities. *Powell v. Washburn*, 211 Ariz. 553, 556, 125 P.3d 373, 376 (2006); *Tierra Ranchos Homeowners Ass'n. v. Kitchukov*, 206 Ariz. 195, 202, 165 P.3d 173, 180 (App. 2008).

II. THE NEARLY-IDENTICAL CALIFORNIA CASE IS ON POINT

In an effort to distinguish *Huntington Continental Townhouse Assoc., Inc. v. Milner*, 230 Cal. App. 4th 590 (Cal. App. 4th Dist., Div. 3, 2014), the HOA tortures its reading and argues that the case is inapplicable because the California statute is not a "triggering statute" like the Arizona statute. This court should reject this unsupported argument as well.

As argued throughout these proceedings, the *Milner* case is right on point. *Milner* rejected the argument that an assessment foreclosure claim, once filed, cannot end unless the homeowner pays all attorneys' fees and costs claimed by the HOA. The HOA's reading of A.R.S. §33-1807(A) would allow the HOA to demand fees that are grossly excessive, unreasonable and unnecessary as a condition for a homeowner to avoid foreclosure. *See e.g., McDowell Mountain Ranch Comm. Ass'n., Inc. v. Simons*, 216 Ariz. 266, 271, ¶18, 165 P.3d 667, 672 (App. 2007) (homeowner entitled to challenge fees that are "excessive.") Statutes such as A.R.S. §33-1807(A) must be read to avoid this absurd and unconstitutional result. *Patches v. Industrial Com'n of Ariz.*, 220 Ariz. 179, 182, ¶10, 204 P.3d 437, 440 (App. 2009).

Based upon the foregoing, this Court should adopt the sound reasoning in *Milner* and set aside the default judgment.

III. THE JUDGMENT IS VOID BECAUSE IT CAUSES MR. MEJIA TO LOSE HIS EXEMPTIONS AND DEPRIVES HIM OF THE RIGHT OF REDEMPTION

The HOA argues that the Judgment is proper and that it can foreclose on Mr. Mejia's personal property because A.R.S. §33-1807(C) excludes personal exemptions and because the language contained in the Judgment gives him adequate protection. These arguments are without merit.

As stated in Mr. Mejia's moving brief, the Default Judgment states that "any personal property present at or in the Property at the time of sale… will be deemed abandoned and sold as part of the Property." Although it goes on to state that the sale is conditional, "if not removed prior to the time the purchaser of the Property elects to take possession of the Property," how does

one sell personal property ("will be deemed abandoned and sold") with a condition subsequent ("if not removed prior to the time the purchaser of the Property elects to take possession of the Property")? If the successful purchaser who decides to try to take possession before the expiration of the redemption period (assuming this is allowed under the law), the wording of the Default Judgment means that the debtor's personal property was sold because it was not removed when the purchaser elected to take possession. The HOA's argument does not respond to these inquiries.

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

The Legislature's clear intent in the statutory redemption period was to provide the homeowner a set period of time to pay-off the alleged debt and save their property and this protection cannot be waived or shortened. *See Elson Development Co. v. Arizona Sav. & Loan Ass'n*, 99 Ariz. 217, 223-27, 407 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).

Based upon the foregoing, the Default Judgment violates Mr. Mejia's established rights.

IV. THE JUDGMENT CANNOT AWARD FUTURE UNACCRUED AMOUNTS

Without any discussion, the HOA argues that this Court should ignore law cited by Mr. Mejia simply because it is from outside the jurisdiction. However, the logic remains sound.

As stated in Mr. Mejia's opening brief, Arizona follows the American rule with respect to an award of attorneys' fees and Arizona law does not provide for fee-shifting except where expressly permitted by statute or another basis. *See Bennett Blum, M.D., Inc. v. Cowan*, 235 Ariz. 204, 209, 330 P.3d 961, 966 (App. 2014). A party cannot create their own legal right to

fees or costs. Any legal right to fees and costs must be grounded in either a statute or contractual fee provision.

Unlike states such as Idaho and California, Arizona does not have a post-judgment fee statute. There is no A.R.S. § 12-341.01 applicable to post-judgment proceedings. *See C & J Travel, Inc. v. Shumway*, 161 Ariz. 33, 36, 775 P.2d 1097, 1100 (App. 1989). This means that any right to fees, if any, must be spelled out in a contract.

To that end, Arizona follows the doctrine of merger which provides that underlying contracts and rights thereunder are merged into a judgment and extinguished as a basis for any further claims. *See Water West, Inc. v. Entek Corp.*, 788 F.2d 627, 629 (9th Cir. 1986). While it would be nice for a creditor to keep milking a case after a judgment is obtained, generic fee language does not allow the creditor to do so. Indeed, the Court need look no further than to Black's definition of "foreclosure." Each type invariably includes the words "end" or "close."

Therefore, the Default Judgment's inclusion of claim for "accruing" fees and costs is improper and unlawful.

V. RULE 60(B) RELIEF IS APPROPRIATE

The HOA argues that Mr. Mejia is not entitled to Rule 60(b) relief based on the same arguments that it has made throughout this short-lived case. Based on the reasons set forth in all of Mr. Mejia's briefs and the arguments made at the various hearings, Mr. Mejia is entitled to relief because, among other reasons, the judgment is void and contains unlawful terms. Additionally, if there ever was a case where the court should exercise its discretion under Rule 60(b)(6) it is this one. The court awarded the HOA a negative amount to foreclose on. The fact that an HOA can foreclose on a homeowner's home when the face of the judgment indicates that the HOA actually owes Mr. Mejia money requires this Court to exercise its discretion and vacate the Default Judgment.

It is well established that Arizona courts favor actions to be resolved on the merits and not by default. *Haenichen v. Worthington*, 9 Ariz. App. 83, 449 P.2d 319 (1969). Based upon the foregoing, the Default Judgment should be set aside.

VI. CONCLUSION

Based upon the foregoing, Mr. Mejia's Motion to Set Aside Default Judgment should be granted.

DATED this 30th day of January 2018.

DESSAULES LAW GROUP

By: /s/ Jonathan A. Dessaules
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COPY filed electronically with
The Clerk of the Court
this 30th day of January, 2018.

COURTESY COPY hand-delivered
this 30th day of January, 2018 to:

Commissioner Margaret Benny
MARICOPA COUNTY SUPERIOR COURT
Southeast Facility-3C
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Mesa, AZ. 85210-6234

COPY of the foregoing mailed and e-mailed
this 30th day of January 2018, to:

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