IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LAVEEN MEADOWS HOMEOWNERS' ASSOCIATION, INC., an Arizona nonprofit corporation, Plaintiff/Appellee, vs. CARLOS MEJIA, a married man, as his sole and separate property; et al., Defendant/Appellant.	1 CA-CV 18-0276 Maricopa County Superior Court No. CV2016-094391

DEFENDANT/APPELLANT'S OPENING BRIEF

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INTRODUCTION

This case presents the recurring issue of whether a homeowners' association can continue to pursue judicial foreclosure even after a homeowner has paid all past due assessments unless and until the homeowner "voluntarily" also pays all of the association's unawarded attorneys' fees and costs that the association demands. If the association is entitled to a foreclosure judgment over just the attorneys' fees and costs incurred in the lawsuit, the homeowner is effectively without any means of avoiding a foreclosure judgment while the association continues to incur more and more attorneys' fees to obtain that judgment.

The Arizona Legislature has seemingly foreseen this possibility and has crafted the law in such a way that avoids the potential for such abuse. Arizona law provides that a homeowner association's lien for assessments "*may be foreclosed* only if the owner *has been* delinquent in the payment of monies secured by the lien, excluding reasonable collection fees, reasonable attorney fees and charges for late payment of and costs incurred with respect to those 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 (emphasis added). Though the statute provides that the assessments must reach $1,200 before an association can foreclose, the statute does not directly answer the question of "what happens after the homeowner pays

the delinquent assessments before the foreclosure judgment is rendered?" Does it allow the association to continue pressing the litigation until the homeowner agrees to pay whatever fees the association demands?

Appellant Carlos Mejia ("Mejia") contends that this Court should adopt the opinion rendered in the nearly identical California case, *Huntington Continental Townhouse Ass'n, Inc. v. Miner*, 179 Cal. Rptr. 3d 47 (Cal. App. 2014), and hold that an association can no longer seek foreclosure once the homeowner's assessments are below the $1,200 or one-year statutory threshold. The Arizona Legislature could not have intended to transfer the trial court's gatekeeping function for determining the reasonableness of the fee to the party seeking that fee and give that party the awesome power to continue with litigation to compel the forced sale of a home unless the homeowner capitulates and pays all fees that the association says are owed.

Plaintiff-Appellee Laveen Meadows Homeowners' Association, Inc. (the "Association") sued and obtained entry of default against Mejia for unpaid assessments, excluding collection fees, late charges, and unawarded attorneys' fees and costs, totaling less than $3,000.00. Although Mejia tendered substantially more than this amount before entry of default judgment, the trial court declined to set aside the entry of default and instead entered a default judgment of foreclosure against

Mejia in a *negative* principal balance of "-$2,152.08" and attorneys' fees and costs of $12,202.25. The trial court's negative principal balance expressly acknowledges that Mejia was current in the payment of assessments but that the Association was still allowed to foreclose for the fees and costs the trial court awarded in that judgment. The trial court subsequently awarded an additional $7,778.51 in post-judgment fees and costs.

In entering a judgment of foreclosure for a negative amount of assessments, the trial court concluded that, once an action to foreclose is filed, an owner cannot avoid foreclosure unless the owner also pays everything an association demands, including amounts that have not been – and may never be – awarded and that it has the power to decree a judgment of foreclosure for a negative principal balance. In other words, an association's right to foreclose is fixed when a lawsuit is filed and only the payment of all amounts demanded, even those that have not been awarded, can prevent foreclosure.

The trial court's ruling is fundamentally flawed and the product of a misinterpretation of the statute. It improperly conflates the filing of a foreclosure lawsuit with the act of foreclosure and abdicates the trial court's traditional role in deciding the reasonableness of attorneys' fees that might be awarded. It also results in a judgment of foreclosure that authorizes the forced sale of property when the

statutory requirements for such a harsh remedy are not met. Ultimately, it permits associations to do precisely what the legislature did not intend: foreclose solely to enable the collection of attorneys' fees and costs.

COMBINED STATEMENT OF THE CASE AND FACTS

Mejia appeals from the trial court's grant of default judgment of foreclosure for the Association in the amount of -$2,152.08 ("a negative amount"), costs of suit of $1,012.25, and attorneys' fees of $11,190.00 and its subsequent denial of a motion to set aside said default judgment. [Index of Record ("IR") 76, 97]

The Association filed this action on May 11, 2016. [IR 1] Its complaint alleged a "principal balance due as of 2016" of $8,246.48 but did not break down this amount between unpaid assessments, late fees, collection fees, and unawarded attorneys' fees and costs. [IR 1] On December 8, 2016, the Association filed an Application for Entry of Default and Affidavit on Default and Entry of Default as to Mejia. [IR 25, 26] On April 3, 2017, the Association filed a Motion and Affidavit for Entry of Judgment by Default with Hearing Scheduled for April 17, 2017 at 9 AM, a China Doll Affidavit in Support of Award of Attorney Fees, and a Statement of Costs and Notice of Taxation. [IR 28, 29, 30, 31]

Mejia retained counsel and filed an Answer and Motion to Set Aside Entry of Default ("First Motion to Set Aside") on April 14, 2017. [IR 32, 33, 34, 35] Mejia

also filed a Notice to Court that Defendant Has Paid All Alleged Past Due Assessments.[1] [IR 36-37] As explained in the First Motion to Set Aside:

> Although the Complaint alleges that a principal balance of $8,246.48 is due and subject to foreclosure, Plaintiff has not attached a ledger to the Complaint. Nor does it appear that Plaintiff has submitted a ledger with its default judgment packet. Nowhere in the record has Plaintiff provided any breakdown with respect to how the $8,246.48 alleged in the Complaint, which has increased to $8,843.38 in the proposed Judgment on Foreclosure, has been calculated.
>
> Defendant on this date has tendered a check in the amount of $5,000.00 to cover all past due assessments and, therefore, eliminates the right to foreclose. Although this amount is less than the $8,843.38 sought in the proposed Judgment on Foreclosure, it is clear the so-called "principal sum" consists of substantially more than just unpaid assessments. Plaintiff is only allowed to foreclose over the last three years of assessments. Assuming unpaid assessments from May 2013 through May 2016 as the 2018 assessments, which Plaintiff's proposed Judgment on Foreclosure states are $552 per year, this means that the total amount of unpaid assessments due at the time Plaintiff commenced this action were just $1,656.00, not $8,246.48, and that the assessments through April 2017 would be an additional $506.00. This means that the maximum amount of unpaid assessments subject to foreclosure would be $2,162.00 and not the $8,843.38 that Plaintiff seeks in its proposed Judgment on Foreclosure. Defendant's payment of $5,000.00, therefore, eliminates the right to foreclose.
>
> In fact, Defendant's payment covers the last six years of assessments ($3,312.00) plus unpaid assessments through April 2017 ($506.00). Even if Plaintiff accelerated assessments for 2017, an additional seven months ($322.00), Defendant's payment is still sufficient to cover all assessments. Because Defendant's payment eliminates any conceivable amount of unpaid assessments, the right to foreclose no longer exists.

[1] The Notice inadvertently referenced A.R.S. § 33-1256.

[IR 33-34] (footnotes omitted)

On April 28, 2017, the Association filed a response to the First Motion to Set Aside. [IR 40-41] Notably, the Association still did not provide an accounting of the $8,246.48 "principal balance" alleged in the Complaint. The Association's response included a section, entitled "Obligations of Counsel," in which it argued that Mejia's counsel "is filing legally and factually baseless motions" by filing the First Motion to Set Aside and arguing that the $5,000.00 payment eliminated any right to foreclose. Mejia responded in his reply as follows:

> As for the accusation (at 8) that "Defendant's counsel is filing legally and factually baseless motions," the Court is presumably aware that this is an issue that comes up quite often. This Court has considered on several occasions whether a homeowners' association can continue to pursue foreclosure after the defendant has paid, in full, all past due assessments. Because Plaintiff has asked for the imposition of sanctions under A.R.S. § 12-349, Defendant wishes to point out that this Court has ruled against the homeowners' association in two recent cases raising this very issue and asks the Court to take judicial notice of these cases. *See Signal Butte Ranch Community Association v. Ritchie,* Case No. CV2015-095519; *Pueblo Hermoso v. Webb*, Case No. CV2016-092658. This Court's recent rulings in favor of the defendant-homeowners in these cases belies any suggestion that the instant motion, seeking to set aside entry of default based on the payment of all unpaid assessments, is somehow "legally and factually baseless."

[IR 42-43]

The Association filed a motion to strike, essentially affirming that courts have interpreted A.R.S. § 33-1807(A) inconsistently where owners have paid all past due

assessments after the commencement of the action. [IR 44-45] Mejia responded that the reference to other trial court decisions was to point out that this was "a recurring issue." [IR 46-47] The trial court granted the motion to strike. [IR 58]

On May 26, 2017, in advance of an evidentiary hearing scheduled for June 2, 2017, the Association filed its Exhibits for Evidentiary Hearing Scheduled Currently for June 2, 2017 at 10:00 A.M. [IR 48-55] According to the Association's Exhibit C, its account ledger "detailing the unpaid amounts owing at time of filing of current litigation as detailed as the principal balance owing," unpaid assessments were $46.00 per month from October 1, 2011 through May 2016. [IR 51] The $8,246.48 "principal balance" included at least $2,836.98 in unawarded attorneys' fees, and several hundred dollars in fines that are not subject to foreclosure in accordance with A.R.S. § 33-1807. [IR 51]

On June 2, 2017, the trial court held oral argument on the First Motion to Set Aside. [IR 58] Counsel for the Association admitted at this hearing that the $5,000.00 check that was tendered in April 2017 "was not contingent upon anything, it was not – it had no restrictive language accompanying it." *See* Transcript of Proceedings dated June 2, 2017 ("June 2nd Transcript"), attached as Exhibit B to Appellant's July 23, 2018 Notice of Transcript Order and Filing of Transcripts ("Appellant's Notice"), p. 9, ll. 24-25. The trial court denied the First Motion to Set

Aside, but did not address the seminal question of whether the Association was still entitled to foreclose:

> So I am continuing to find that he's in default. Whether or not you want me to rule on whether or not he's satisfied with the payment of assessments, and there's no right to foreclosure, I'm not going to rule on that yet because I don't have anything in front of me at this point in time showing me what amounts and assessments are owed. So we'll go forward with a contested hearing.

See June 2nd Transcript, p. 24, ll. 7-13.

On June 9, 2017, Mejia filed a Hearing Memorandum reiterating that the trial court, though denying his First Motion to Set Aside, "has not ruled on whether [the Association] is entitled to pursue the remedy of foreclosure under A.R.S. § 33-1807(A) in its default judgment or if its simply limited to obtaining a judgment for money damages for its ancillary claims for attorneys' fees and costs." [IR 59] Mejia also observed, "[i]t also appears that Plaintiff is seeking a default judgment for amounts included in a prior money judgment" and that "these amounts have already been reduced to a judgment" so it is "legally improper to include them in a second judgment under the doctrines of res judicata and merger." [IR 59] Mejia's Hearing Memorandum restated the arguments as to why the Association was not entitled to a default judgment of foreclosure.

The trial court held an evidentiary hearing on June 20, 2017. [IR 68] On cross-examination, the Association's community manager, Heather Yearack, admitted that Mejia's check for $5,000 covered all conceivable assessments and late fees since the beginning of 2011. *See* Transcript of Proceedings dated June 20, 2017 ("June 20th Transcript"), attached as Exhibit C to Appellant's Notice, p. 32, ll. 23-25 – p. 33, ll. 1-3. She further agreed that the $5,000 payment covered all assessments from May of 2016 through June 2017 and that, with the payment, Mejia had "paid every last dime of assessments and late fees that he could have possible been charged since he's lived in that place." *See* June 20th Transcript, p. 33, ll. 7-21. This point was affirmed in the following exchange:

> Q …I'm asking about assessments and late fees. He's paid every last dime of assessments and late fees that he could have possibly been charged since he's lived in that place; isn't that true?
>
> A Based on the information that I was given, yes.
>
> Q Okay. So anything extra that we're looking for today are non-assessments and late fees, such as attorney's fees, costs, things of that nature; isn't that correct?
>
> A Yes.

See June 20th Transcript, p. 33, ll. 17-25.

Just prior to the evidentiary hearing, the Association filed its second fee application, China Doll affidavit, statement of costs, and a second proposed Form of

Judgment. [IR 62-67] The proposed Form of Judgment merely deducted the $5,000 "interim payment" from the $8,843.48 "principal balance." [IR 67] The Association sought attorneys' fees totaling $16,340.00. [IR 65] Mejia contested the fee application, arguing among other things that the Association "omits mentioning the thousands of dollars in line-item attorneys' fees charges that Plaintiff's counsel has included in the 'principal balance' that they also excluded from the *China Doll* affidavit." [IR 72]

In a minute entry dated August 7, 2017, the trial court stated that it was "granting Judgment in favor of [the Association]." [IR 77] The Judgment, signed August 3, 2017 and filed August 4, 2017, found that Mejia owed Plaintiff the principal sum of -$2152.09 (a negative amount). [IR 76] The trial court calculated this amount by starting with the "Principal Sum" that the Association sought in the amount of $8,843.48 and then:

- Subtracting all amounts prior to May 11, 2013 ($2,411.50) based on the three-year statute of limitations for foreclosure actions in A.R.S. § 33-1807(F);
- Subtracting $120.00 in late fees that someone added by hand onto the ledger; and
- Subtracting $3,464.06 in "Litigation Fees" that someone added by hand onto the ledger.

[IR 76]

The trial court calculated based on the foregoing math that Mejia owed just $2,847.92 at the time it was entering the Judgment. The trial court then applied the $5,000.00 payment, which it noted that the Association "accepted," to the residual principal sum for a "negative balance," or overpayment, of $2,152.08. Despite reaching the conclusion that Mejia had overpaid the "principal sum" in the amount of $2,152.08, the trial court ordered "allowing foreclosure to proceed for remaining fees and costs." [IR 76]

The trial court awarded attorneys' fees in the amount of $11,190.00. In Exhibit 3 to its Judgment, the trial court noted that it did not consider the reasonableness of more than $6,000.00 in unawarded attorneys' fees, according to the ledgers that the Association had submitted, that were also included in the principal balance sought:

> The attorneys' fees included in the ledger were expenses expended to encourage payments pre-litigation and were included as part of the principal owed. Defendant had opportunity to address at time of evidentiary hearing. The Court recognized those amounts within the 3-year statute of limitations period as part of the principal owed to Judgment Creditor and not as part of the litigation attorneys' fees.

[IR 76]

Mejia appealed and the Association cross-appealed. [IR 79, 83] On October 5, 2017, this Court stayed the appeal ordering the parties to file separate memoranda "addressing whether the court has jurisdiction over the appeal and the cross-appeal" on the basis that Mejia filed a notice of appeal without filing a motion to set aside

the default judgment. On December 7, 2017, this Court issued a ruling terminating the stay and dismissing the appeal. [IR 94]

On December 20, 2017, Mejia filed a Motion to Set Aside Default Judgment (the "Second Motion to Set Aside"). [IR 89] The Association opposed the Second Motion to Set Aside on January 10, 2018 and again argued, among other things, that Mejia was making "improper and disingenuous arguments" pertaining to the interpretation of the A.R.S. § 33-1807 and imploring the Court to deny the motion and tack on more fees. [IR 90-92] Mejia filed his reply in support of the Second Motion to Set Aside on January 30, 2018. [IR 96] The trial court denied the motion in a signed minute entry dated March 27, 2018. [IR 97]

On April 25, 2018, Mejia filed a second Notice of Appeal. [IR 105] This Court *sua sponte* issued an Order Dismissing Appeal on June 12, 2018. On June 13, 2018, Mejia filed a Motion for Reconsideration of Order Dismissing Appeal and to Reinstate Appeal. Mejia, out of an abundance of caution, also filed a third Notice of Appeal, or, in the Alternative, Amended Notice of Appeal. [IR 115-116] On July 13, 2018, the Court granted the Motion for Reconsideration and reinstated the appeal.

STATEMENT OF ISSUES

1. Does A.R.S. § 33-1807 allow an association to continue to pursue the statutory remedy of foreclosure once a homeowner unconditionally tenders an amount equal to or greater than the unpaid assessments that were owed?

2. Can a court still enter a default judgment of foreclosure under A.R.S. § 33-1807, as opposed to a money judgment, for fees that have not been adjudicated to be reasonable or awarded where the uncontroverted evidence presented at a default hearing proves that the owner-defendant has paid all past due assessments?

3. Does an owner-defendant who has indisputably paid all past due assessments after commencement of the action also have to pay all unawarded attorneys' fees in order to avoid a foreclosure judgment?

4. Is an owner-defendant who has indisputably paid all past due assessments after entry of default barred from challenging the association's right to foreclose?

5. Does a court have the power to enter a negative principal balance against an owner-defendant but still enter an judgment of foreclosure for the association's attorneys' fees and costs?

STANDARD OF REVIEW

The Court employs a *de novo* standard of review to questions of statutory interpretation. *See State ex rel. Dep't of Econ. Sec. v. Hayden*, 210 Ariz. 522, 523-24, ¶ 7 (2005). Rulings regarding entitlement to attorneys' fees and the trial court's authority to award fees, likewise, are reviewed *de novo*. *Bennett Blum, M.D., Inc. v. Cowan,* 235 Ariz. 204, 205, ¶ 5 (App. 2014).

The standard of review of the denial of a Rule 60(b) motion is abuse of discretion. *Coconino Pulp and Paper Co. v. Marvin*, 83 Ariz. 117 (1957). The term "abuse of discretion" has been described as "unfortunate" because it falsely "implies some form of corrupt practice, deceit or impropriety," when, in the legal context, "the phrase as a whole has been interpreted to apply where the reasons given by the court for its action are clearly untenable, legally incorrect or amount to a denial of justice." *City of Phoenix v. Geyler*, 144 Ariz. 323, 328-29 (1985).

Under an abuse of discretion standard, courts are not "free to misapply law or legal principle." *Id.* Where "facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual, or equitable considerations, the resolution of the question is one of law or logic," and it is the appellate court's "final responsibility to determine law and policy," "to 'look over the shoulder' of

the trial judge and, if appropriate, substitute [its] judgment for his or hers." *Id.* (quoting *State v. Chapple*, 135 Ariz. 281, 297 n.18 (1983)).

ARGUMENT

I. THE TRIAL COURT ERRED IN ENTERING A DEFAULT JUDGMENT OF FORECLOSURE DESPITE EXPRESSLY FINDING THAT MEJIA DID NOT OWE ANY ASSESSMENTS AT THE TIME OF JUDGMENT.

The trial court calculated that, before applying his $5,000.00 payment, Mejia owed just $2,847.92 in "principal." [IR 76] Although the trial court's calculations are hard to follow and fail to exclude additional thousands of dollars in unawarded attorneys' fees reflected in the ledger from the "principal sum," the trial court correctly concluded that Mejia's payment eliminated any conceivable amount that might remain owing for assessments. The trial court reflected this overpayment by awarding a "negative balance" in principal to the Association (*i.e.*, -$2,152.08).

The "principal sum" included all unpaid assessments, late fees, and thousands of dollars in unawarded attorneys' fees. In awarding the Association a principal sum in a "negative amount," therefore, the trial court determined that Mejia had paid *all* assessments and late fees and that the only amounts still due and owing at the time of his payment were unawarded attorneys' fees and costs. The trial court expressly recognized this by stating in the default judgment that, though Mejia was clearly not delinquent in the payment of assessments, it was nevertheless "allowing foreclosure to proceed for remaining fees and costs." [IR 76]

It is beyond dispute, in other words, that the trial court expressly allowed the Association to foreclose solely as a means of collecting the attorneys' fees and costs that the Association incurred in the litigation. Although the statute deliberately distinguishes between assessments, which determine whether a lien "may be foreclosed," and all other amounts (*e.g.*, reasonable collection fees, reasonable attorney fees and charges for late payment of and costs incurred with respect to those assessments), which are expressly excluded from the calculus in determining whether the lien "may be foreclosed," the trial court ruled that the right to foreclose was fixed at the inception of a case and could not be undone by subsequent events such as the payment, in full, of all assessments. This is an issue of first impression in Arizona and, with the notable exception of the *Miner* case, which is directly on point and held that a decree of foreclosure was improper once an owner tenders payment before the entry of judgment that brought the delinquency below the statutory threshold,[2] Mejia has not found a single case addressing whether an association that commences an action to foreclose has the right to obtain a foreclosure judgment where the owner subsequently brings his or her unpaid

[2] *Huntington Continental Townhouse Ass'n, Inc. v. Miner*, 179 Cal. Rptr. 3d 47, 58 (Cal. App. 2014).

assessments current prior to entry of judgment and force the sale of the owner's property to collect the fees and costs awarded in that judgment.

A. An Association's Right to Foreclose is Determined at the Entry of Judgment and Not Fixed at the Time the Action is Filed.

A.R.S. § 33-1807(A) provides that an association's lien for unpaid assessments "may be foreclosed only if the owner has been delinquent in the payment of monies secured by the lien, excluding reasonable collection fees, reasonable attorney fees and charges for late payment of and costs incurred with respect to those assessments, for a period of one year or in the amount of one thousand two hundred dollars or more, whichever occurs first." The availability of the remedy of foreclosure turns on what the Legislature meant by "may be foreclosed only if the owner has been delinquent." Specifically, whether it refers to the commencement of a civil action seeking judicial foreclosure or issuance of a judgment of foreclosure.

The analysis begins, obviously, with the statute itself. "[T]he legislature is presumed to mean what it says." *Homebuilders Ass'n of Cent. Arizona v. City of Scottsdale*, 186 Ariz. 642, 649 (App. 1996). "The most basic rule of statutory construction is that in construing the legislative language, courts will not enlarge the meaning of simple English words in order to make them conform to their own peculiar sociological and economic views." *Padilla v. Industrial Commission*, 113 Ariz. 104, 106 (1976). The legislature has also codified rules of statutory construction declaring,

among other things, that "[s]tatutes shall be liberally construed to effect their objects and to promote justice." A.R.S. § 1-211. In addition:

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

A.R.S. § 1-213; *HCZ Const., Inc. v. First Franklin Financial Corp.*, 199 Ariz. 361, 364, ¶ 10 (App. 2001) ("best and most reliable index of a statute's meaning is its language").

A cursory review of the entire statute confirms that "may be foreclosed" does not refer to the mere commencement of a lawsuit. Indeed, the statute as a whole draws an explicit distinction between the institution of "proceedings to enforce the lien" and a final "judgment or decree." Compare A.R.S. § 33-1807(F) and (H). If "may be foreclosed" in subsection (A) referred to the inception of the action, subsection (F) would read that the lien "is extinguished unless foreclosed within three years after the full amount of the assessment becomes due." These other subsections make little sense if "may be foreclosed" refers to the filing of an action. *State v. Ball*, 157 Ariz. 382, 384 (Ct. App. 1988) (court's role is to construe statute "as a whole and give harmonious effect to all its sections").

The above rules of statutory construction make it clear that the phrase "may be foreclosed" in A.R.S. § 33-1807 does not refer to the mere commencement of a civil

action any more than it does in A.R.S. §§ 20-1805, 23-733, 33-807, 33-902, 33-1021.01, 33-1022, 45-1212, 47-4504, or 49-295. The Court can consider these other statutes under the rule of *in pari material* to ascertain the meaning of A.R.S. § 33-1807. *See Collins v. Stockwell*, 137 Ariz. 416, 420 (1983) (courts can look and reach together at similar statutes). Section 33-807, for example, refers to an "action to foreclose a deed of trust." Defendants generally have defenses; there is no strict liability. *See, e.g.*, *Volk v. Dunn*, 161 Ariz. 24, 26-27 (1989). The use in each of these statutes makes it clear that "may be foreclosed" refers to the end, not the beginning, of the process.

A.R.S. § 33-725(A) further reinforces this conclusion. It reads:

> When a mortgage or deed of trust is foreclosed, the court shall give judgment for the entire amount determined due, and shall direct the mortgaged property, or as much thereof as is necessary to satisfy the judgment, to be sold.

"Foreclosed," in this context, refers to the final judgment that the court gives directing the property to be sold and not simply initiating the process to obtain such a judgment. This is also consistent with the plain meaning of "foreclose" as "to take mortgaged property from borrowers who default on their mortgages." *See* https://www.law.cornell.edu/wex/foreclosure. When one says that an owner was foreclosed, for example, it generally means he or she no longer owns the property in question; it does not mean that they are currently in litigation and eventually might

lose the home. Generally, a lien is not "foreclosed" until, at the very earliest, the issuance of a judgment or decree of foreclosure.[3]

The trigger for whether a lien "may be foreclosed" is that the owner "has been delinquent…for a period of one year or in the amount of one thousand two hundred dollars or more." Nothing in the statutory language suggests that "has been delinquent" refers to an owner's status at the commencement of the action or that the status of an owner's account is fixed at the time of filing. Although the use of the present perfect tense ("has been"), read in isolation, "can connote either an event occurring at an indefinite past time ('she has been to Rome') or continuing to the present ('she has been here for five hours')," courts generally "do not consider 'has been' in isolation from its context." *Padilla-Romero v. Holder*, 611 F.3d 1011, 1013 (9th Cir. 2010) (citing cases); *Deschaine v. St. Germain*, 671 N.W.2d 79, 82 (Mich. 2003) (present perfect tense "generally 'indicates action that was started in the past and has recently been completed or is continuing up to the present time'… or shows

[3] The Association effectively concedes this point in its Complaint and the Judgment that it drafted, requesting in the former judgment "[f]oreclosing the interests of the Defendants" and "[d]eclaring that the lien be foreclosed" and decreeing in the latter that Defendants' interests "are hereby foreclosed" and its lien "is hereby declared foreclosed." Such verbiage would be unnecessary if the commencement of an action to foreclose was the quintessential act of foreclosure referenced in subsection (A).

'that a current action is logically subsequent to a previous recent action.'") (citations omitted).

The statute reflects a deliberate intent on the part of the Legislature to restrict the ability to foreclose. It expressly distinguishes between assessments and all other charges, excluding the latter in deciding whether the lien "may be foreclosed." It also provided that the right to foreclose would exist "only if" the owner "had been delinquent for a period of one year or in the amount of one thousand two hundred dollars or more." The Legislature could have, but did not, choose language preventing an owner from avoiding foreclosure once an action is filed. Thus, it would be contrary to the statute's chosen words, verb tense, and syntax to conclude that the Legislature nevertheless intended to require owners to pay unawarded attorneys' fees and costs as a condition of avoiding foreclosure.

If a defendant's delinquency at the start of an action determines the right to a foreclosure judgment, then A.R.S. § 33-1807 essentially imposes strict liability on the defendant not only for all assessments but all other charges, including unawarded fees and costs (even though the statute expressly refers to *reasonable* collection fees and *reasonable* attorney fees). Thus, there would be no need for the exclusions if the right to foreclose was fixed at the time of filing and a party could only avoid foreclosure by paying not only the assessments but all unawarded fees and costs as well. Similarly,

if filing a foreclosure action eliminated the right to avoid foreclosure by paying unpaid assessments, then subsection (K) would be rendered meaningless. Subsection (K) contemplates payments of less than the full amount owed and states that any payments are applied first to unpaid assessments. If a party also had to pay all unawarded attorneys' fees and costs in order to avoid being foreclosed, then the break down in (K) is meaningless and serves no legitimate purpose. Courts "presume the legislature did not intend to write a statute that contains void, meaningless, or futile provision[s]." *State v. Pitts*, 178 Ariz. 405, 407 (1994).

Such an interpretation is also contrary to the long-standing rule that courts, not plaintiffs or putative judgment-creditors, decide what is reasonable and the "determination of the reasonable amount of attorney fees was peculiarly within the discretion of the trial court." *Woliansky v. Miller*, 146 Ariz. 170, 172 (App. 1985); *see also* A.R.S. § 12-341.01(A) ("In any contested action arising out of a contract…the *court* may award the successful party reasonable attorney fees") (emphasis added); A.R.S. § 33-1807(H) ("A judgment or decree in any action brought under this section shall include costs and reasonable attorney fees for the prevailing party"). Since only a court has the power to decide the reasonableness of attorneys' fees, the only logical interpretation of the statute is that a court decides whether foreclosure is available at the entry of judgment before awarding fees.

Such an interpretation would also lead to some "absurd" and inconsistent results that courts generally presume the legislature intended to avoid. *Linda V. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 76, 79, ¶ 11 (App. 2005). For example, a homeowner who pays all past due assessments the day before a suit is filed can avoid foreclosure but the homeowner who pays the day after loses his home and can only avoid foreclosure by either divining and paying the attorneys' fees and costs a court might eventually award or waiting for a final judgment of foreclosure that awards those fees and costs and then redeeming the property before the sheriff's sale. What if the payment is made the day before but not received until the day after? What if the homeowners' association does not open the envelope or credit the account quickly enough? The Legislature certainly did not intend for the statute to be so random and unevenly applied.

Such an interpretation is also contrary to this Court's recent opinion in *Bocchino v. Fountain Shadows Homeowners Association*, 244 Ariz. 323 (App. 2018). In *Bocchino*, the Court recognized that an association generally may not "assess…directly against a homeowner, attorney fees incurred in a judicial proceeding that have not been awarded by a qualified tribunal." *Id.* at 326, ¶ 14. The Court held:

> [T]he Association has cited no authority for the proposition that it was permissible to simply charge Bocchino's Association account for

> attorney fees it incurred without first receiving an award from the court. Requiring the tribunal that resolves the litigation to evaluate attorney fees claims—as generally required by our statutes and rules[—] constitutes sound policy. Courts play a significant role in assessing and awarding attorney fees incurred in judicial proceedings.

Id., ¶ 15.

Courts play "a significant role in assessing and awarding attorney fees incurred in judicial proceedings" except, according to the Association, where those fees are incurred in foreclosure proceedings. In such cases, the Association's argument goes, the homeowner has an obligation to pay every dime in unawarded fees and costs that the Association demands or get foreclosed. This absurd result is inconsistent with *Bocchino* and the "value of judicial oversight" that the *Bocchino* court found so compelling. In such a scenario, the Association completely avoids judicial oversight as to the reasonableness and its entitlement to those fees.

The Association's attempt to frame the question as jurisdictional, suggesting that the right to foreclose is a jurisdictional issue that either exists or does not at the commencement of an action, misses the mark. Foreclosure is a remedy and availability of remedies is generally determined at the end, not the beginning, of a case. *Vista Mgmt., Ltd. v. Cooper*, 726 P.2d 974, 977 (Ore. 1986). This is especially true where the remedy in question is an equitable one. *See Woliansky v. Miller*, 135 Ariz. 444, 446 (App. 1983). A party who sues for specific performance, for example,

might not be entitled to that remedy and might have to settle for damages at the conclusion of a case. *Id.* Equitable remedies, such as foreclosure, are never set in stone.

It is clear that it was not the Legislature's intent to allow an association to conduct a forced sale of a homeowner's property solely to satisfy the attorneys' fees and costs that a trial court might award where, as here, the homeowner has brought his assessments current prior to the entry of the judgment. The trial court's express determination, as reflected by its award of a negative principal sum, that Mejia was no longer delinquent and had paid substantially more than the assessments owed eliminated any legal basis for the Association to obtain a foreclosure judgment.

This was the result in the *Miner* case and it is the appropriate result here. In *Miner*, the California Court of Appeals rejected an association's nearly identical argument on a similar statute in *Huntington Continental Townhouse Ass'n, Inc. v. Miner*, *supra*. The *Miner* court rejected the argument that a foreclosure claim, once filed, cannot end unless the homeowner also pays legal fees and costs. The plain reading of A.R.S. § 33-1807, and its repeated clarification that legal fees and costs are "excluded" as assessments makes it clear that the statute, like the one in California, places a great significance on the right of home ownership and that homeowners should not be stripped of this right over fees and costs that have never

been awarded or adjudicated as reasonable. Nothing in the statute suggests an intent to allow an association to take an individual's home over such charges.

B. Mejia Did Not Lose the Right to Challenge the Improper Entry of a Foreclosure Judgment by Virtue of the Entry of Default Against Him.

The above conclusion does not change simply because the judgment was entered following a defendant's default rather than in a contested proceeding. The trial court serves a crucial function on default judgments. It does not simply rubberstamp judgments for the relief being sought but still must determine that the party seeking the relief is legally entitled to it. *Mayhew v. McDougall*, 16 Ariz. App. 125, 130 (App. 1971) ("simply giving the plaintiff what he asks for may not attain that level of judicial discretion which will pass appellate muster"); *Hilgeman v. Amer. Mortg. Sec., Inc.*, 196 Ariz. 215, 221-22, ¶ 23 (App. 2000) (plaintiff must still prove entitlement to punitive damages to obtain default judgment for same).

While courts generally accept the well-pleaded factual allegations of a complaint as established fact, the same is not true with respect to conclusions of law or the amount of damages. *Louisiana Counseling and Family Services, Inc. v. Makrygialos, LLC*, 543 F. Supp. 2d 359, 364 (D.N.J. 2008). Consequently, before granting a default judgment, the Court must first ascertain whether "the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit

mere conclusions of law." *Id.* (quotations omitted); *Broadcast Music, Inc. v. Spring Mount Area Bavarian Resort, Ltd.*, 555 F. Supp. 2d 537, 541 (E.D. Pa. 2008) (same). "If the complaint does not state a cause of action or the allegations do not support a claim for relief, a default judgment is erroneous and 'cannot stand.'" *Kim v. Westmoore Partners, Inc.*, 133 Cal. Rptr. 3d 774, 787 (Cal. App. 2011) ("if the well-pleaded allegations of the complaint do not state any proper cause of action, the default judgment in the plaintiff's favor cannot stand"). "Although a defaulting party admits the factual basis of the claims asserted against it, the defaulting party does not admit the legal sufficiency of those claims." 10 James Wm. Moore, *Moore's Federal Practice* § 55.32(1)(b) (3d ed. 2013). Rule 55(b)(2)(D) expressly recognizes the trial court's non-ministerial function in the default judgment context.

An analogous situation is the issuance of an injunction on a motion for default judgment. Where a plaintiff seeks entry of a permanent injunction against a defaulted defendant, courts still undertake the analysis to confirm that the plaintiff "is entitled to injunctive relief under the applicable statute" and otherwise "meets the prerequisites for the issuance of an injunction." *Victoria Cruises, Inc. v. Changjiang Cruise Overseas Travel Co.*, 630 F. Supp. 2d 255, 265 (E.D.N.Y. 2008) (denying request for permanent injunction on motion for default judgment) (internal citations omitted).

Here, the statutory remedy of foreclosure was legally unavailable once Mejia made his $5,000.00 payment. Mejia's failure to file an answer did not breathe life into the statute or create the right to an otherwise unavailable remedy.

C. Foreclosure is an Equitable Remedy and the Equities Do Not Favor Allowing Associations to Foreclose Over Purely Legal Fees.

Foreclosure is an equitable remedy. *Byers v. Wik*, 169 Ariz. 215, 223 (App. 1991); *Volk*, 161 Ariz. at 26 ("foreclosure is an equitable proceeding"). Foreclosure is a "harsh" and "extraordinary and drastic remedy, which in part, accounts for some of the more stringent rules associated with foreclosure." *Arizona Coffee Shops, Inc. v. Phoenix Downtown Parking Ass'n*, 95 Ariz. 98, 100 (1963); *INB Banking Co. v. Opportunity Options, Inc.*, 598 N.E.2d 580, 584 (Ind. App. 1992). If "[s]tatutes shall be liberally construed to effect their objects and to promote justice," then homeowners must have the right to prevent the "harsh" and "drastic" remedy of foreclosure even after a foreclosure action is commenced by eliminating the statutory basis for foreclosing (*i.e.*, bringing the assessments current). This is true even if the homeowner is willing to waive any challenge over fees and costs and allow a money judgment to be entered against him for those amounts.

Public policy also strongly favors home ownership and protects borrowers. *CSA 13-101 Loop, LLC v. Loop 101, LLC*, 236 Ariz. 410, 415, ¶ 23 (2014). This public policy is reflected in the homeowners' association context by limiting the right

to foreclose only to situations where the association is being denied its right to assessments. A.R.S. § 33-1807(A); A.R.S. § 33-1256(A). It would eviscerate this right to allow a homeowners' association to foreclose where all that remained were unawarded fees and costs and elevate a debt collector's ability to have a secured judgment for its fees and costs that are eventually awarded. This is consistent with the statute's scheme of excluding attorneys' fees and other non-assessments from the right-to-foreclose calculus.

There is nothing in the statute suggesting that the legislature intended to allow associations to foreclose solely over unawarded attorneys' fees and costs or even late fees. Otherwise, there would be no reason for explicitly carving these out in the calculation for determining the right to foreclose ("excluding reasonable collection fees, reasonable attorney fees and charges for late payment of and costs incurred with respect to those assessments"). It does not promote justice to allow the tool of foreclosure to be utilized as a sword to force payment of unawarded attorneys' fees and costs.

As demonstrated in the court below in Mejia's reply to his First Motion to Set Aside and the Association's motion to strike, this is not an isolated issue. Trial courts are struggling with the failure of the Legislature to directly address the precise situation before this Court: whether the ability to foreclose becomes moot if the owner

brings his assessments current after commencement of the action but before entry of final judgment.

The Association's reading of A.R.S. § 33-1807 would allow an association, under threat of impending foreclosure, to demand fees that are grossly excessive, unreasonable, or unnecessary as a condition for the owner to avoid foreclosure. This is not a result that is consistent with Arizona law. *See e.g., McDowell Mountain Ranch Comm. Ass'n., Inc. v. Simons*, 216 Ariz. 266, 271, ¶ 20 (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 (App. 2009).

D. The Default Judgment of Foreclosure Also Contains Unlawful and Prohibited Provisions.

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

1. <u>The Default Judgment of Foreclosure Purports to Authorize Foreclosure of Personal Property.</u>

The Default Judgment, paragraph 6, states:

> It is hereby directed that if there is any personal property present at or in the Property at the time of the sale, the same will be deemed abandoned

> and sold as part of the Property if not removed prior to the time the purchaser of the Property elects to take 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.

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

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.

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

2. The Default Judgment of Foreclosure Violates Mejia's Redemption Rights and Purports to Convey Possession to the Purchaser "Immediately" Following the Sheriff's Sale.

The Default Judgment, paragraph 9, states:

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

A Default Judgment of Foreclosure that 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, 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 (1965) (holding that

redemption statute was enacted in interest of public policy and such intent and purpose cannot be violated by agreement). By bestowing in the purchaser the right of immediate possession, and the right to declare all personal property present at that time abandoned, it violates the protections afforded by the right of redemption.

3. The Default Judgment of Foreclosure Purports to Award Future Unaccrued Amounts.

The Default Judgment awards "accruing costs not otherwise addressed herein upon application" and "accruing fees not otherwise addressed herein upon application." Arizona, however, follows the American rule with respect to an award of attorneys' fees. "Unlike the British legal system rule, in which the winner automatically gets attorneys' fees, the rule in American courts, commonly known as the American Rule, looks with disdain upon awarding attorneys' fees unless an independent basis exists for the award." *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 (1975)). In *Baker Botts L.L.P. v. ASARCO*, 135 S. Ct. 2158, 2164-65 (2015), the United States Supreme Court held that fee shifting provisions must be narrowly construed in accordance with the American Rule.

With respect to post-judgment attorneys' fees, Arizona law does not provide for fee-shifting except where expressly permitted by statute or another basis. As an

initial matter, the inclusion of self-serving language awarding future fees or costs is insufficient to create a right to post-judgment fees or costs. 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.

Arizona, unlike some states like Idaho and California, does not have a post-judgment fee statute. *See Bennett Blum, M.D., Inc. v. Cowan*, 235 Ariz. 204, 209, ¶¶ 18-20 (App. 2014). Notably, Arizona has no statute analogous to either the Idaho or California statutes. There is no equivalent A.R.S. § 12-341.01 applicable to post-judgment proceedings.[4] This means that any right to fees, if any, must be spelled out in a contract.

However, Arizona follows the doctrine of merger. *See C & J Travel, Inc. v. Shumway*, 161 Ariz. 33, 36 (App. 1989). "The doctrine of merger of a cause of action in a judgment rendered thereon proceeds upon the principle that a superior right covers an inferior right, or that a security of a higher nature extinguishes a security of an inferior nature, and that a judgment is of a higher right or security than an

[4] A.R.S. § 12-341.01 does not apply since the claim for fees arises not out of contract but out of the judgment itself since post-judgment proceedings in Arizona are generally "'treated in all respects...as an original independent action' from the underlying lawsuit." *See Bennett Blum*, 235 Ariz. at 207-08, ¶ 13 (quoting *Davis v. Chilson*, 48 Ariz. 366, 371 (1936)).

ordinary cause of action." *Id.* (quoting 46 Am. Jur. 2d Judgments § 384, at 552-53 (1969)). It is well-settled that, under the doctrine of merger, 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) ("The claim 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.").

In other words, a party seeking post-judgment attorneys' fees generally cannot rely on generic fee shifting provisions, entitling the prevailing party to "reasonable attorneys' fees," that may have served as the basis for the original judgment. *See also Hatch v. T & L Associates*, 726 A.2d 308, 310 (N.J. Super. Ct. App. 1999) ("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 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 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 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 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 collection proceedings"); *Florida Pottery Stores of Panama City, Inc. v. American Nat. Bank*, 578 So.2d 801, 804 (Fla. Dist. App. 1991) (contractual fee shifting provision was insufficient to support an award of post-judgment attorneys' fees incurred in collecting the judgment); *Chelios v. Kaye*, 268 Cal. Rptr. 38 (1990) ("the judgment extinguished all further contractual rights of the [judgment creditor], including the contractual attorney's fees clause."); *Production Credit Ass'n of Madison v. Laufenberg*, 420 N.W.2d 778, 779-80 (Wis. App. 1988) ("By operation of merger, upon entry of judgment, the contract sued upon loses all of its vitality and ceases to bind the parties to its execution") (internal citations omitted); *Caine & Weiner v. Barker*, 713 P.2d 1133 (Wash. App. 1986) (affirming denial of motion for post-judgment fees incurred in collecting judgment because promissory note, along with its attorneys' fees provision, merged with and was extinguished by the judgment).

The Declaration, attached to each of the Association's numerous fee applications, in this case includes generic fee-shifting language relating to the collection of *assessments*, not judgments ("such costs and reasonable attorneys' fees,

costs and other litigation fees and costs as may be incurred by the Association in seeking to collect such Assessments"). It does not include specific language authorizing the collection of post-judgment fees and costs incurred in collecting a judgment. The generic fee shifting language lacked specificity to support a claim for post-judgment fees and costs and was extinguished under the doctrine of merger. Therefore, the inclusion of a claim for "accruing" fees and costs is improper and unlawful.

II. THE TRIAL COURT ERRED IN NOT GRANTING MEJIA'S MOTION TO SET ASIDE ENTRY OF DEFAULT AND DEFAULT JUDGMENT.

Arizona courts do not favor the determination of actions by default. *Haenichen v. Worthington*, 9 Ariz. App. 83 (1969). In evaluating a motion to set aside an entry of default or default judgment, the trial court has broad discretion, and any doubt that may exist should be resolved in favor of a trial on the merits. *Id.; Marquez v. Rapid Harvest Co.,* 99 Ariz. 363 (1965); *Almarez v. Superior Court*, 146 Ariz. 189 (App. 1985); *Phillips v. Findlay*, 19 Ariz. App. 348, 354 (1973); *see also Walker v. Dallas,* 146 Ariz. 440 (1985) (holding that absent defendant may often set aside default judgment on proper showing of excusable lack of notice and no intent to evade process); *Patrick v. Strick*, 137 Ariz. 100 (1983) (holding that where an aggrieved party establishes lack of knowledge that judgment has been entered and

asserts additional reasons that are so extraordinary as to justify relief, the trial court has authority to vacate the judgment and reenter a new judgment in order to allow the party to file a timely appeal); *Roll v. Janca,* 22 Ariz. App. 335 (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 (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); *Davis v. Davis*, 143 Ariz. 54, 58 (1984) (holding that, in determining whether to set aside a default judgment, the court is permitted to consider the proximity of appellant's compliance with time limits for appeal and the reasonableness of appellant's conduct in failing to do so).

The Arizona Supreme Court has summarized the rule as follows:

> [A] party should be given a reasonable opportunity to litigate his claim or defense on the merits; that any doubt which may exist as to whether a default should be set aside should be resolved in favor of the application, to the end that a trial upon the merits may be had.

Hendrie Buick Co. v. Mack, 88 Ariz. 248, 253 (1960).

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

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

As discussed below, all of the above factors apply in this case. In addition, as discussed below, Mejia has demonstrated that he has meritorious defenses and has acted promptly in seeking Rule 60(b) relief.

A. Application of the Rule 60(b) Factors.

Appellate courts generally have an obligation "to affirm where any reasonable view of the facts and law might support the judgment of the trial court. This rule is followed even if the trial court has reached the right result for the wrong reason." *Geyler*, 144 Ariz. at. 330. Here, the "undisputed facts and circumstances require a contrary ruling" than the one the trial court reached. *Id.* As discussed above, the Legislature certainly did not intend to allow associations to exercise the "harsh" and "drastic" remedy of foreclosure as a means of collecting attorneys' fees where the owner is not delinquent, especially where the owner has paid all assessments triggering the right to foreclose and the fees and costs have not been awarded. It

seems clear and unambiguous that the Legislature did not intend for an owner who brings his assessments current, and indeed tenders substantially more than the amount of assessments owed, to lose his home for failing to divine and pay how much a court might eventually award in fees and costs. This is the precise result that the legislature appears it wanted to avoid – foreclosing based on fees or other charges – in expressly limiting an association's power to foreclose only where there are unpaid assessments at issue. The issue before the Court falls squarely within the purview of Rule 60(b) for several reasons.

As a threshold matter, Mejia's payment of $5,000.00 presented a meritorious defense to the Association's foreclosure claim that justified setting aside the entry of default and default judgment under any provision of Rule 60(b) because it eliminated the right to foreclose. There can also be no legitimate dispute that he acted swiftly. Mejia first sought to set aside the entry of default under Rule 60(b)(1), (2), (4), (5), and (6). [IR 33-34] He subsequently raised the same issues in his Hearing Memorandum. [IR 59] His subsequent motion sought to set aside the default judgment expressly incorporated both of these earlier filings. [IR 89] When one considers these two factors in conjunction with the application of the Rule 60(b) subsections, as discussed below, it is clear that the trial court abused its discretion in not setting aside the entry of default or subsequent default judgment because the

denial was "clearly untenable, legally incorrect or amount[ed] to a denial of justice." *Geyler*, 144 Ariz. at 328-29.

1. The Entry of Default and Default Judgment is the Product of Mistake, Inadvertence, Surprise, or Excusable Neglect.

In *Sax v. Superior Court, Pima County*, 147 Ariz. 518, 520 (App. 1985), the court held that in order to establish excusable neglect, a moving party must show that he acted as a reasonably prudent person under the circumstances. More specifically, as the Arizona Supreme Court as previously stated:

> If a default judgment is acquired because of a party's mere neglect, inadvertence or forgetfulness without any reasonable excuse, the judgment will not be disturbed and the neglecting party must suffer the consequences. The general test of what is excusable is whether the neglect or inadvertence is such as might be the act of a reasonably prudent person under the circumstances.

See, *Coconino Pulp and Paper Co. v. Marvin,* 83 Ariz. 117, 120 (1957).

As detailed in the affidavits attached to his First Motion to Set Aside and Reply, Mejia's cardinal sin was, due to his limited English-language skills, not understanding the process sufficiently to appreciate the gravity of the foreclosure proceedings and to know that he needed to file an answer. He eventually did hire counsel but not before the Association defaulted him. Mejia immediately tendered a $5,000.00 check to bring his assessments current to avoid losing his home and it is undisputed he was current at the time of the first of several default hearings in this

case. Arizona courts have long found such facts can constitute both "good cause" under Rule 55(c) and "excusable neglect" under Rule 60(b)(1). *Cota v. S. Arizona Bank & Trust Co.*, 17 Ariz. App. 326, 327 (1972) (entry of default and default judgment should have been set aside based on, among other facts, defendants' limited knowledge of English). As the *Cota* court held:

> There are many Spanish-speaking persons in Arizona who are unable to speak or read English or who are greatly limited in use of the English language. When their linguistic handicap causes them to fail to answer a complaint, they should not be penalized by the extreme sanction of a default judgment, provided a meritorious defense exists.

Id.; accord Green Acres Trust v. London, 142 Ariz. 12 (App. 1983), affirmed in part and vacated in part on other grounds by *Green Acres Trust v. London,* 141 Ariz. 609 (1984) (holding that court did not abuse its discretion in setting aside default because motion alleged excusable neglect in that defaulting defendant had not understood legal significance of the papers served upon her); *Patrick v. Strick*, 137 Ariz. 100 (1983) (same); *Daly v. Okamura*, 25 Ariz. 50, 51 (1923) (same).

The same is true in other jurisdictions. In *Straub v. Straub*, 327 P.2d 358 (Idaho 1958), the Idaho Supreme Court held that a defendant "handicapped by her ignorance of the English language" established excusable neglect to set aside default and vacate a default judgment:

> It appears from the showing made by appellant that she was neither guilty of deliberate neglect nor of indifference. She was in a difficult

> situation. She was living in a land foreign to her and foreign to the residence of her husband where the divorce proceedings were commenced. She was handicapped by her ignorance of the English language. She acted with reasonable promptitude in having the divorce papers translated to her and in retaining a solicitor to advise her and to represent her interests in the litigation. Her desire in good faith to appear and contest the action is shown in the record. Respondent made no showing that any of his rights were prejudiced or that he was deprived of any advantage to which he was properly entitled by the delay between the time of the taking of the default and the filing of the application to have the same set aside.

Id. at 360; *see also Cuevas v. Barraza*, 198 P.3d 740 (Idaho 2008) (reversing denial of motion to set aside judgment based on "misunderstanding of the English language and his mistaken belief that counsel was representing him"); *accord Village of Cherornak v. Hooper Bay Const. Co.*, 758 P.2d 1266, 1271 (Alaska 1988) (allegations that defendant's officers "do not speak English and therefore did not understand or become aware of the judgment against the city" implicate "a mistake or excusable neglect under Rule 60(b)(1)").

As the Court of Appeals, Division 2, observed in the *Cota* case:

> [A] default judgment is not favored by the courts. Courts should be liberal in relieving parties of defaults caused by inadvertence or excusable neglect and where doubt exists as to whether the motion to vacate should be granted it should be resolved in favor of the moving party. *Haenichen v. Worthington*, 9 Ariz. App. 83, 449 P.2d 319 (1969).

Cota, 17 Ariz. App. at 327.

The facts of this case strongly favored setting aside entry of default and, by extension, the default judgment. Mejia's affidavits demonstrated that he lacked the requisite English-language skills to comprehend the nature of the proceedings around him and, not surprisingly, his account of the attempts to communicate with the Association's counsel in a mix of broken-English and broken-Spanish only underscore this conclusion.

The trial court's denial of the motions to set aside entry of default and default judgment do not reveal any "careful study of all relevant considerations" or that there was any "consideration of equity." *Camacho v. Garder*, 104 Ariz. 555 (1969) (quoting *Patapoff v. Vollstedt's Inc.*, 267 F.2d 863 (9th Cir. 1959)). Given the "liberal construction" applied to Rule 60(b) [*id.*], the meritorious defense to the foreclosure claim, and the significant equities in a case that has the trial court ordering the forced sale of Mejia's home solely to pay for the Association's attorneys' fees and costs, it was a clear abuse of discretion not to set aside the default and default judgment in this case.

As the Supreme Court of Arizona long-ago observed:

> [T]he showing exhibited a meritorious defense – one, if true, that would certainly defeat a recovery. It goes further, and shows that a recovery would be an outrage on justice and right. The liberality of the statute authorizing the court "upon good cause shown" to set aside its judgments upon the facts shown in the record was not violated, but, we think, respected and followed, in this instance.

Daly v. Okamura, 25 Ariz. 50, 53 (1923).

The same outcome is warranted here.

2. <u>The Entry of Default and Default Judgment Should Have Been Set Aside Based on Newly Discovered Evidence (*i.e.*, Mejia's $5,000.00 Payment).</u>

Mejia made his $5,000.00 payment after default had been entered against him. This payment constituted newly-discovered evidence that did not exist prior to entry of default. It was also evidence that materially altered the factual and legal landscape and, as discussed above, should have prevented the trial court from entering a judgment of foreclosure. *See State v. Turner*, 92 Ariz. 214, 218 (1962) (newly discovered evidence warrants relief under Rule 60 if it is "material and of such weight as most likely would have changed the result of the trial had it been given"). Because Mejia's $5,000.00 payment was both material and weighty in that it eliminated the statutory trigger for foreclosure, the trial court abused its discretion in not setting aside the judgment under Rule 60(b)(2).

3. <u>The Default Judgment of Foreclosure is Void.</u>

Subject matter jurisdiction "refers to a court's statutory or constitutional power to hear and determine a particular type of case." *State v. Espinoza*, 229 Ariz. 421, 425-26, ¶ 19 (App. 2012). "A judgment or order is void, and not merely voidable, if the court that entered it lacked jurisdiction 'to render the particular judgment or order

entered'" *Id.* at 428, ¶ 31 (quoting *State v. Cramer*, 192 Ariz. 150, 153, ¶ 16 (App. 1998)). "A void judgment is a 'nullity' and 'all proceedings founded on [a] void judgment are themselves regarded as invalid and ineffective for any purpose.'" *Id*. at 429, ¶ 32. A void judgment can be challenged at any time. *Master Financial, Inc. v. Woodburn*, 208 Ariz. 70, 74, ¶ 17 (App. 2004).

A void judgment obviously presents significantly different public policy concerns than the other five grounds for setting aside a judgment found in Rule 60(b). Whereas the other grounds generally concern the party's actions or inactions, a void judgment contravenes law and public policy. This is particularly true with respect to default judgments. A default judgment bearing the Court's imprimatur states that the judgment was entered in accordance with the applicable law despite the absence of one of the parties. The Court's imprimatur on a default judgment is not merely a rubberstamp, and the judgment must comport with fundamental principles of due process and not be contrary to law. A court which makes a void order may set aside such void order at any time, and Defendant submits the Court has an affirmative duty to do so since a void judgment challenges the integrity of the Court's ruling. *In re Milliman's Estate*, 101 Ariz. 54, 58 (App. 1966).

The Court's jurisdiction to enter a judgment of foreclosure was predicated solely on A.R.S. § 33-1807(A). As discussed above, the statute states that a lien "may be

foreclosed only if" assessments, exclusive of all other amounts, are at least $1,200.00 or one year past due. The trial court expressly found that the assessments were not past due at the time it entered the judgment but nevertheless issued a decree of foreclosure. Since the statutory grounds for foreclosure were not met, the Court lacked jurisdiction to enter the default judgment and the resulting judgment is void. *Master Financial*, *supra.*

As explained in the *Master Financial* case, "[a] judgment or order is void if the court lacked jurisdiction over the subject matter, over the person, or over the particular judgment or order entered." *Id.* at 74, ¶ 19. Because the Court's foreclosure power is expressly prescribed by the terms of the statute and cannot be exercised where the statute's requirements are not met, the trial court lacked jurisdiction over the particular judgment of foreclosure entered in this case.

4. The Prospective Application of the Default Judgment of Foreclosure Where Mejia Paid All Assessments Before its Entry Justifies Setting It Aside.

Rule 60(b)(5) permits a court to set aside entry of default or default judgment where "applying it prospectively is no longer equitable." Such is the case here. The judgment of foreclosure has prospective application because the Association will turn it over to the sheriff who, in turn, will use it to sell Mejia's home. The sheriff, to be clear, will not be selling Mejia's home to collect unpaid assessments owed to

the Association but, as the trial court observed in its order, solely to pay its attorneys' fees and costs. The harsh inequities of the Judgment in this case support setting it aside.

5. The Default Judgment, if Not Void, Nevertheless Presents Extraordinary Circumstances of Hardship or Injustice Justifying Relief.

Rule 60(b)(6) "authorizes a court to vacate a judgment for 'any other reason justifying relief from the operation of the judgment.' It may be applied when relief is not available under any of the other subsections to the rule…and 'when our systemic commitment to finality of judgments is outweighed by extraordinary circumstances of hardship or injustice.'" *Birt v. Birt*, 208 Ariz. 546, 551, ¶ 22 (App. 2004). When the burden to consider such relief has been met, the court should exercise its discretion so as to not deny relief where the result is harsh, rather than fair and equitable. *Id.* Rule 60(b)(6) recognizes that facts justifying setting aside a default or judgment do not always fall squarely within one of the other subsections and that courts need the ability to remedy manifest errors of law or other situations of manifest injustice.

It is difficult to imagine a fact pattern better suited for Rule 60(b)(6) relief. The trial court strictly adhered to the application of rules and deadlines for filing answers over the inequities inherent in this case and the strong public policy against

allowing an association to sell its member's home to pay its attorneys' fees. While one can understand why an association might need the ability to foreclose where an owner has defaulted on his or her assessment obligations, there is no compelling reason why an association should be permitted to foreclose, as opposed to being awarded a money judgment, once the owner has paid those assessments and owes unawarded attorneys' fees and costs. Despite finding that Mejia had more than satisfied not only the unpaid assessments but also all late fees and unawarded pre-litigation attorneys' fees included in the principal balance, the trial court granted the association the "harsh" remedy of "foreclosure to proceed for remaining fees and costs," in clear contravention of the statute, based on Mejia's defaulted status.

Allowing homeowners' associations to foreclose over attorneys' fees and costs sacrifices an individual's home to pay an attorney's contingent fee and circumvents the protections in the law generally protecting home ownership from being liquidated to pay for such debts. *See*, *e.g.*, A.R.S. § 33-964. The fact that Mejia is faced with losing his home simply because he paid, in full, the "principal balance" after entry of default demonstrates extraordinary circumstances of hardship and injustice that far outweigh the rules governing default and the finality of judgments.

B. The Judgment's Legally Impermissible Terms Also Require Setting It Aside.

As discussed above, the Default Judgment includes several provisions that are directly contrary to Arizona law and public policy. In essence, the Association has used the Default Judgment to do what it otherwise had no right to do under Arizona law – namely, foreclose not just on the real property that is the subject of the action but also on Mejia's personal property, in disregard for the personal property exemptions explicitly spelled out under Arizona law, and including a provision purporting to allow any purchaser, including itself, to oust the legal owner from possession before the expiration of the redemption period.

These offensive terms in the default judgment satisfy both the "mistake, inadvertence, surprise or excusable neglect" requirement of Rule 60(b)(1) and the requirements of Rule 60(b)(5).

REQUEST FOR ATTORNEYS' FEES AND COSTS

Mejia hereby requests an award of costs and attorneys' fees pursuant to Rule 21 of the Arizona Rules of Civil Appellate Procedure and A.R.S. §§ 12-341.01 and 33-1807(H).

CONCLUSION

The Legislature did not intend to give a homeowners' association carte blanche authority to take a homeowner's home if those homeowners, upon bringing his assessment account current, did not also pay every unawarded dime that the association demands (and without giving the homeowner a right to challenge those amounts). It also did not intend to force homeowners to choose between keeping their homes or losing them if they sought to challenge the reasonableness of the unawarded amounts the association was demanding. For the foregoing reasons, the Court should reverse the trial court's order denying Mejia's Motion to Set Aside Default Judgment, remand to the trial court with instructions to set aside the default judgment of foreclosure and deny the award of post-judgment fees and costs.

RESPECTFULLY SUBMITTED this 12th day of September 2018.

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