

ARIZONA COURT OF APPEALS

DIVISION ONE

LAVEEN MEADOWS HOMEOWNERS' ASSOCIATION, an Arizona nonprofit corporation, Plaintiff/Appellee,)	No.: 1-CA-CV 18-0276
)	Maricopa County Superior Court
)	No.: CV 2016-094391
v.)	
CARLOS MEJIA, a married man, as his sole and separate property; et al., Defendant/Appellant)	

OPENING BRIEF OF PLAINTIFF/APPELLEE ASSOCIATION

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I.

INTRODUCTION

The Opening Brief filed by Defendant/Appellant Carlos Mejia (“Mejia”) significantly mischaracterizes the procedural and factual history that lead the trial court to its correct conclusion in this matter. The case currently pending before this Court presents first a question of jurisdiction and of the ability of a defendant to frustrate a trial court’s subject matter jurisdiction over a foreclosure action by delivery of a partial payment after default has become effective. In this matter, the trial court correctly determined that where Mejia had repeatedly communicated with the Association regarding his delinquent account after the filing of the foreclosure lawsuit, and even agreed to enter a stipulation to judgment (which agreement he subsequently reneged), Mejia’s partial payment, delivered at 3:55 p.m. the business day before the 9:00 a.m. default hearing did not strip the trial court of jurisdiction over the Laveen Meadows Homeowners’ Association’s (“Association”) foreclosure matter.

This matter also presents a question of statutory interpretation. When codifying the Association’s ability to foreclose its lien for unpaid assessments, the Arizona legislature did not follow the California model of crafting language that identified triggers that, once satisfied, terminated the right of foreclosure. Rather, the Arizona legislature identified two triggering events that, once satisfied, allowed

the Association to foreclose its lien. The operative language in A.R.S. § 33-1807(A) provides that the Association's lien

may be foreclosed in the same manner as a mortgage on real estate but 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(A) (emphasis added). The Arizona legislature could have used language establishing that the Association may foreclose only if a homeowner *is delinquent* in the payment of assessments at the time judgment is entered, or that the Association may foreclose only if a homeowner *was delinquent* in the payment of assessments at the time judgment was entered. However, that was not the language used by the legislature. Rather, the legislature explained that the Association is given statutory permission to foreclose its lien, just like a mortgage, when one of two possible triggering events occurs: “the owner *has been delinquent* in the payment of . . . assessments, for a period of one year”, or “the owner *has been delinquent* in the payment of . . . assessments in the amount of one thousand two hundred dollars or more . . .”. A.R.S. § 33-1807(A) (emphasis added). Whichever of these two possible triggering events “occurs first” opens the statutory bars allowing the Association to foreclose.

Mejia attempts to poison this Court to the Association and its position by the repeated use of the hot-button sound bite “unadjudicated attorneys’ fees”. However, this case does not raise issues of unadjudicated attorneys’ fees. To the contrary, nothing was left unadjudicated by the trial court. The trial court reviewed the Association’s claims for fees that it sought, awarded some and struck others from the judgment. Mejia’s Opening Brief makes it appear as though the Association’s final judgment somehow circumvented the trial court’s judicial oversight regarding the attorney’s fees the Association incurred in pursuing this matter. Such a position is unfounded and disingenuous. The trial court held an evidentiary hearing on damages, and awarded the Association the damages it found to be recoverable under A.R.S. § 33-1807. In doing so, the trial court declined to award some of the attorneys’ fees that the Association had incurred pre-litigation, but found that the Association was entitled to a portion of the pre-litigation fees. And following the Association’s successful prosecution of the matter, the trial court also reviewed and awarded the Association the legal fees it incurred in the foreclosure action. Mejia’s repeated use of the phrase “unadjudicated attorneys’ fees” is nothing more than a rhetorical tactic intended to alienate this Court from the Association.

This appeal provides this Court with the opportunity to affirm as applicable to homeowner association foreclosure actions the long-established rule that

jurisdiction over a matter is determined at the inception of the case. Additionally, this appeal provides a platform for this Court to denounce the gamesmanship employed by Mejia as contravening to the intent of A.R.S. § 33-1807.

II.

STATEMENT OF THE CASE

The Association filed a complaint against Mejia on May 11, 2016. (Amended Index of Record [hereafter “IR”] #1.) The complaint alleged a single count against Mejia for foreclosure of its lien. (IR #1.) The underlying basis for the foreclosure was that, pursuant to A.R.S. § 33-1807(A) and section 8.2 of the Declaration of Covenants, Conditions and Restrictions for Laveen Meadows, which is recorded as Document No. 2004-0437118 in the Maricopa County, Arizona Recorder’s office (“Declaration”), the Association had a lien against Mejia’s home located at 7824 South 73rd Lane, Laveen, Arizona, 85339 (“Property”) that was ripe for foreclosure. (IR #1, ¶¶ 7, 9, 11.) The Association ultimately obtained a judgment on foreclosure against Mejia by default. (IR #76.)

Following entry of a judgment on foreclosure in favor of the Association, Mejia filed a Motion to Set Aside the Judgment pursuant to Rules 60(b)(1), (3), (4) and (6), ARCP. (IR #89.) Mejia’s Motion to Set Aside Default Judgment, however, addressed in substance only Rule 60(b)(4), ARCP, which allows a defendant to set aside a judgment that is void. Mejia’s claim of voidness was

based mainly on his interpretation of A.R.S. 33-1807(a). (IR #89, 2:24-7:9, and 11:6-13:21.) Mejia also identified three paragraphs of the judgment on foreclosure that he believed rendered the judgment void. (IR #89, 7:10-11:5.)

After outlining his arguments regarding voidness under Rule 60(b)(4), ARCP, Mejia dedicated one sentence to the relief he allegedly sought under Rules 60(b)(1) and (3), ARCP: “These offensive terms in the default judgment satisfy both the ‘mistake, inadvertence, surprise or excusable neglect’ requirement of Rule 60(b)(1) and the ‘misrepresentation, or other misconduct of an opposing party’ requirement of Rule 60(b)([3]).” (IR #89, 14:6-8.) Mejia’s final argument regarding relief pursuant to Rule 60(b)(6), ARCP, was only slightly more developed, with Mejia merely claiming that since he stood to lose his home, Rule 60(b)(6), ARCP, should protect him against a foreclosure judgment. (IR #89, 14:19-22.)

On appeal, Mejia has raised for the first time a claim that the judgment should have been set aside pursuant to Rule 60(b)(5), ARCP, alleging that “applying it prospectively is no longer equitable”. (Opening Brief, p. 49.) However, Mejia did not raise Rule 60(b)(5), ARCP, as a basis to set aside the judgment at the trial court. (IR #89.) As such, the Association does not address Mejia’s argument based on Rule 60(b)(5), ARCP, in its Answering Brief.

Following the denial of Mejia's Motion to Set Aside Default Judgment, Mejia filed a Notice of Appeal. This Court has jurisdiction over this matter pursuant to A.R.S. § 12-2101(A)(1).

III.

STATEMENT OF FACTS

The Association has noted that Mejia combined his Statement of the Case with his Statement of Facts. Mejia has likely done this in an attempt to divert this Court's attention away from the facts of this matter, as the facts are not favorable to Mejia. As such, the Association has presented for this Court a detailed factual history in an effort to provide this Court the correct context for this matter.

The Association is an Arizona non-profit corporation whose members are owners of lots within the community known as Laveen Meadows ("Community") located in Maricopa County, Arizona. (IR #49.) All of the property within the Community is subject to the Declaration of Covenants, Conditions and Restrictions for Laveen Meadows, which is recorded as Document No. 2004-0437118 in the Maricopa County, Arizona Recorder's office ("Declaration"). (IR #49.)

Mejia is the owner of property located at 7824 South 73rd Lane, Laveen, Arizona, 85339, within the Community ("Property"). (IR #1.) The Declaration requires that homeowners pay assessments to support the maintenance and upkeep

of the Community, as well as the attorneys' fees and costs incurred by the Association to enforce their obligation. (IR #49.)

Mejia purchased the Property in 2011. (IR #50.) From the time he purchased the Property in 2011 through the time the Association filed this foreclosure matter five years later, Mejia never paid a single assessment. (IR #51.) Prior to pursuing foreclosure of its lien, the Association attempted to collect the delinquency personally from Mejia. (IR #1, ¶ 19.) Although the Association was able to obtain a money judgment against Mejia, the Association was not able to actually recover any money from him. (IR #1 and #51.) In attempting to recover unpaid assessments from Mejia, the Association incurred attorneys' fees and costs. (IR #51). Finding no other alternative to recover the amounts owed by Mejia, the Association determined to pursue foreclosure of its lien against Mejia's property. (IR #1.)

On May 11, 2016, the Association filed a Complaint for lien foreclosure against the Property. (IR #1.) On that same day, the Association served Mejia with the Summons and Complaint. (IR #5.) The following day, knowing the seriousness and severity of the pending lien foreclosure lawsuit, Mejia contacted the Association's counsel and traveled some 30 miles from his home in order to hold an in-office conference on May 12, 2016 with the Association's counsel to discuss the litigation. (IR #40-41.) The May 12, 2016 in-person conference was

held in Mejia's requested and preferred language of Spanish. (IR #41.) During the May 12, 2016 in-person conference between Mejia and the Association's counsel, Mejia requested that the Association provide him with a statement identifying the total amount at that time claimed due and owing, including attorneys' fees and costs. (IR #41.) During the May 12, 2016 in-person conference between Mejia and the Association's counsel, Mejia was encouraged to submit a payment plan proposal that the Association could consider. (IR #41.) On June 2, 2016, pursuant to Mejia's request, the Association provided to Mejia in writing the total amount of the delinquency owed the Association, including accrued attorneys' fees and costs. (IR #41.)

On June 7, 2016, five days after the Association sent payoff correspondence to Mejia, Mejia contacted the Association by telephone and spoke with the Association's counsel. (IR #41.) The June 7, 2016 telephone conversation was conducted in the Spanish language. (IR #41.) During the June 7, 2016 teleconference between Mejia and the Association's counsel, Mejia advised that he wished to enter a repayment agreement in order to resolve the amounts claimed due by the Association. (IR #41.) Mejia orally relayed his proposal to make monthly payments in the amount of \$300.00, as he advised he was unable to write his proposal in English. (IR #41.) Mejia's offer was relayed to the Association, and on July 25, 2016, under direction from the Association, the Association's

counsel spoke with Mejia and explained that the Association had not accepted his June 7, 2016 proposal. (IR #41.)

The following day, Mejia placed another call to the Association's counsel and extended a second proposal for repayment of his delinquent account. (IR #41.) Through Mejia's second proposal, Mejia offered to make an initial payment of \$4,000.00, and monthly payments of \$300.00 thereafter until his delinquent account was resolved. (IR #41.) Mejia's second proposal was relayed to the Association. (IR #41.)

Due to the Association's meeting schedule, the Association was not able to consider Mejia's proposal until their September 13, 2016 board meeting. (IR #41.) On August 25, 2016, apparently anxious for a response to his second proposal, Mejia called the Association's counsel requesting to know whether the Association had accepted his offer. (IR #41.) Mejia was advised that the Association was scheduled to review and consider his second proposal at the September 13, 2016 Board Meeting, and that Mejia would thereafter be advised as to the Board's decision. (IR #41.)

As promised, the Association considered Mejia's second proposal at the September 13, 2016 Board Meeting. (IR #41.) The Association accepted Mejia's offer to pay \$4,000.00 and monthly payments of \$300.00 thereafter until his delinquency was resolved. (IR #41.) The Association's acceptance of Mejia's

second proposal was relayed to the Association's counsel on September 28, 2016. (IR #41.) As such, the Association, through its counsel, began preparing a stipulation to judgment confirming the terms of Mejia's second proposal as accepted by the Association and mailed the same to Mejia at his Property on October 6, 2016. (IR #41.) Unfortunately, Mejia made no further attempt to communicate with the Association. (IR #41.) Thus, although the Association accepted Mejia's second proposal to resolve the delinquency through a repayment plan, Mejia refused to finalize the agreement by executing the stipulation to judgment that would have confirmed the repayment agreement. (IR #41.)

Two months later, having received no further communication from Mejia, the Association filed an application for, and an affidavit on, entry of default on December 8, 2016. (IR #25-26.) Pursuant to Rule 55(a)(4), ARCP, the default became effective ten days later.

On April 3, 2017 the Association filed a motion seeking entry of judgment by default against Mejia, along with an application for attorney's fees, a statement of costs and a *China Doll* Affidavit ("Judgment Documents"). (IR #28-31.) The Association mailed a copy of the Judgment Documents to Mejia at his Property. (IR #28-31.) The trial court set a hearing on the default for Monday, April 17, 2017 at 9:00 a.m. (IR #28.) "Immediately" upon receipt of the Association's Judgment Documents, Mejia retained counsel. (See Transcript of Proceedings

from April 17, 2017 (“April 17 Transcript”) attached as Exhibit “A” to Defendant/Appellant/Cross-Appellee’s Notice of Filing Transcripts, dated November 20, 2017, 7:14-15.) Even though Mejia allegedly hired counsel in early April, the Association received no communication from Mejia or his counsel until the close of business on Friday, April 14, 2017. (IR #32-37.) At approximately 3:55 p.m. the last business day before the Monday, April 17, 2017 default hearing, Mejia filed an Answer, as well as a Motion to Set Aside Default. (IR #32-35.) Mejia also tendered payment of \$5,000.00 to the Association and filed a Notice to the trial court stating that Mejia’s payment covered any previously unresolved assessments. (IR #36-37.)

Mejia’s Motion to Set Aside Default was based largely on Mejia’s claim that his difficulty understanding the English language constituted excusable neglect for his failure to file an Answer. (IR #33.) At the default hearing held first thing in the morning of Monday, April 17, 2017, Mejia also argued to the trial court that his meritorious defense was that the eleventh-hour tender of \$5,000.00 divested the trial court of jurisdiction because at that point the entry of “any judgment entered would be void.” (April 17 Transcript, 9:6-11.) Noting that Mejia’s last-minute filings deprived the Association of the opportunity to respond, the trial court maintained the default in place, but scheduled a time for oral argument on Mejia’s

Motion to Set Aside Default and an evidentiary hearing to address the question of damages. (IR #39; *see also* April 17 Transcript, 9:22-10:3.)

On April 28, 2017, the Association filed a response in opposition to Mejia's Motion to Set Aside the Default. (IR #40-41.) The Association's Response to Mejia's Motion to Set Aside Default explained that Mejia knew well the significance of the Association's foreclosure action as Mejia had communicated multiple times—in Spanish—with the Association's counsel regarding the matter, and had even entered an agreement for resolution of the same, which agreement Mejia failed and refused to finalize. (IR #40-41.) Consequently, the Association's Response to the Motion to Set Aside Default argued that Mejia could not satisfy the elemental requirements to justify setting aside a default. (IR #40-41.) In preparing its Response to Mejia's Motion to Set Aside Default, the Association noted that Mejia had cited to two minute entries from the Superior Court in other matters where a similar situation had arisen and the trial court had determined that the last-minute partial payment frustrated the ability of the homeowner's association to foreclose. (IR #33-34.) The Association also noted that not only was the citation to unpublished minute entries from the Superior Court improper, but Mejia had deliberately failed to provide the trial court with a contradictory order, which Mejia's counsel had in its possession, from the Superior Court wherein the Superior Court rejected Mejia's exact argument. (IR #44-45.) The

Association, therefore, moved to strike from the record the unpublished minute entries. (IR #44-45.)

The trial court heard oral argument on the Motion to Set Aside Default and on the Motion to Strike on June 2, 2017. (*See* Transcript of Proceedings from June 2, 2017 (“June 2 Transcript”) attached as Exhibit B to Defendant/Appellant/Cross-Appellee’s Notice of Filing Transcripts, dated November 20, 2017, 4:5-10.) The trial court correctly ruled that Mejia’s citation to unpublished minute entries was improper and granted the Association’s Motion to Strike. (IR #58.) Likewise, the trial court correctly ruled that Mejia had failed to carry his burden to demonstrate any excusable neglect in order to justify setting aside the default. (IR #58.) As the evidence and argument confirmed that Mejia could not be excused in his failure to file an Answer due to his repeated contacts with the Association, his ability to communicate in Spanish with the Association, his access to family members who could translate English documents into Spanish for him and his ultimate failure to respond to the Association after they accepted his repayment proposal, the trial court correctly ruled that Mejia’s Motion to Set Aside had to fail based on Mejia’s inexcusable neglect. (IR #58; *see also* June 2 Transcript, 23:16-25:2.) As Mejia could not satisfy the element of excusable neglect, the trial court did not address the elements of meritorious defense or prompt relief. (IR #58; *see also* June 2 Transcript, 23:16-25:2.) The trial court denied Mejia’s Motion to Set Aside the

Default. (IR #58.) Rather than conducting the evidentiary hearing on the issue of damages at the June 2, 2017 hearing, the trial court scheduled a separate evidentiary hearing so the parties would have sufficient time to present evidence as to the amount of damages owed by Mejia. (IR #58; *see also* June 2 Transcript, 24:14-15.)

In preparation for the evidentiary hearing, the Association submitted a Supplemental Application for Attorneys' Fees along with a Supplemental *China Doll* Affidavit and a Supplemental Statement of Costs seeking to recover the additional fees and costs it had incurred in addressing Mejia's Motion to Set Aside the Default and the other time incurred subsequent to the filing of its original Application for Fees. (IR #62-67.) As with the original *China Doll* Affidavit submitted by the Association, the Supplemental *China Doll* Affidavit included a detailed accounting of all time that had been spent litigating the matter during the period covered by the Application. (IR #62-66.)

The evidentiary hearing was held on June 20, 2017. (IR #68.) Heather Yearack, a representative of the Association's managing agent, testified on behalf of the Association. (*See* Transcript of Proceedings from June 20, 2017 ("June 20 Transcript") attached as Exhibit C to Defendant/Appellant/Cross-Appellee's Notice of Filing Transcripts, dated November 20, 2017, 10:19-25.) As a member of the accounting staff that supports the Association and keeps its records, Ms.

Yearack was able to testify competently regarding Mejia's account with the Association and the amounts claimed due and owing under the Association's lien. (See June 20 Transcript, 14:13-25.) Ms. Yearack cited to the Association's Declaration as the basis for imposition of legal fees incurred prior to the filing of the foreclosure lawsuit. (See June 20 Transcript, 20:13-21, 21:11-20, 42:12-44:3.) Ms. Yearack explained that pursuant to both the Declaration and Arizona statute, the Association had the ability to recover through foreclosure not only the unpaid assessments, but also the late charges, collection costs and attorneys' fees that had been incurred by the Association prior to filing the foreclosure Complaint. (See *id.*) Ms. Yearack further testified, and the accounting records admitted into evidence confirmed that at the time the foreclosure lawsuit was filed, Mejia had failed to pay at least five years' worth of assessments. (See June 20 Transcript, 31:20-25.) In fact, since purchasing the property in July 2011, Mejia had never made a single payment to the Association at the time the foreclosure lawsuit was filed. (See June 20 Transcript, 33:12-16; *see also* IR #51.) The evidence presented documented that the Association had made multiple attempts to recover the amounts owed from Mejia, including a prior money judgment lawsuit. (See June 20 Transcript, 21:23-22:9.) The evidence also demonstrated that the Association had worked out multiple repayment agreements with Mejia, but that in every instance Mejia failed to follow through with the repayment plans. (See June 20

Transcript, 13:7-13.) Thus, Ms. Yearack testified that the Association reluctantly pursued foreclosure as its only viable option. (*See* June 20 Transcript, 20:22-21:3.)

Mejia presented no evidence or testimony at the June 20, 2017 evidentiary hearing. (*See* June 20 Transcript.) Rather, Mejia, merely questioned Ms. Yearack on Cross-examination regarding the amount of assessments due and owing on the date of the hearing. (*See* June 20 Transcript, 31:20-32:3.) Ms. Yearack confirmed that while Mejia was many years' delinquent in payment of assessments when the foreclosure lawsuit was filed, Mejia's delivery of a \$5,000.00 payment the business day before the default hearing had resolved the assessments. (*See* June 20 Transcript, 32:23-33:3.) Nevertheless, Ms. Yearack confirmed that the Association had incurred significant expense attempting to recover from Mejia the amounts he owed, and that the \$5,000.00 payment he delivered on the eve of the Association's default hearing left those amounts unpaid and outstanding. (*See* June 20 Transcript, 33:7-16.)

During the evidentiary hearing, Mejia did not question or challenge the inclusion of pre-litigation attorneys' fees as part of the principal balance of the foreclosure lawsuit. (*See* June 20 Transcript.) Rather, Mejia established, through his Cross-Examination, that the Association receives regular invoices from its attorneys for work performed in attempting to recover delinquent assessments from

homeowners, and that those legal fees are posted to the delinquent homeowner's account when permitted. (*See* June 20 Transcript, 36:17-25.)

The trial court took the matter under advisement following the June 20, 2017 evidentiary hearing. (IR #68.) While the matter was pending review by the trial court, Mejia filed objections to the Association's Application for Attorneys' Fees, to the Form of Judgment and to the Statement of Costs. (IR #69-73.) After allowing the Association the opportunity to reply to Mejia's objections, the trial court entered judgment in favor of the Association. (IR #76-78.) In entering Judgment in favor of the Association, the trial court included three Exhibits in which the trial court detailed its findings with respect to the principal amount, the costs, and the attorneys' fees awarded to the Association. (IR #76.) On Exhibit "1" to the Judgment, the trial court subtracted from the principal amount sought by the Association any amounts that were incurred prior to May 11, 2013 (which was exactly three years before the Complaint was filed). (IR #76, Exhibit "1" thereto.) The trial court also deducted \$120.00 in late fees from the principal judgment amount. (IR #76, Exhibit "1" thereto.) The trial court also deleted from the principal amount sought by the Association \$3,464.06 in legal fees that the trial court identified as being related to the foreclosure litigation but appearing on the ledger. (IR #76, Exhibit "1" thereto.) Unfortunately, the trial court failed to recognize that the \$120.00 in late fees and \$3,464.06 in litigation attorneys' fees

and costs had never been included in the principal balance of the Complaint and did not need to be subtracted. (*Compare* IR #51 with IR #54.) Thus, the credit provided a windfall of \$3,584.06 to Mejia. (*Compare* IR #51 with IR #54.) As a result, after application of Mejia's last-minute payment, the trial court determined that the principal balance of the foreclosure was -\$2,152.08, which credit was applied to the award of attorneys' fees granted by the trial court. (IR #76.)

The trial court also conducted a careful analysis of the attorneys' fees and awarded to the Association the fees found to be reasonable. (IR #76, Exhibit "3" thereto.) After evaluating the attorneys' fees, costs and principal amount awarded to the Association, the trial court recognized that it allowed (or intended to allow) the Association to recover a portion of its pre-litigation legal fees under the principal balance of the judgment. (IR #76, Exhibit "3" thereto.) As such, the trial court wrote the following explanatory note on Exhibit "3" to the judgment:

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 three year statute of limitations period as part of the principal owed to Judgment Creditor and not part of the litigation attorneys' fees.

(IR #76, Exhibit "3" thereto.)

Following entry of judgment in favor of the Association, Mejia filed a Notice of Appeal and attempted to appeal the default judgment. (IR #79.) Mejia's appeal was dismissed due to Mejia's failure to first file a motion to vacate the

default judgment. (IR #88.) Mejia thereafter filed a Motion to Set Aside Default Judgment, putting forth largely the same arguments that had been fully addressed through the prior motion practice and hearings. (IR #89.) The trial court denied Mejia's Motion to Set Aside Default Judgment. (IR #97.) Mejia filed a Notice of Appeal after the denial of his Motion to Set Aside Default Judgment. (IR #105.)

The Association was entitled to foreclose on its lien against the Property pursuant to A.R.S. § 33-1807(a) and the contractual provisions of the Declaration. The Trial Court correctly applied the law in this matter and awarded judgment to the Association after providing credit for Mejia's partial payment delivered well after the default became effective.

IV.

STATEMENT OF THE ISSUES

Issue No. 1 – The Trial Court correctly found that Mejia did not meet his burden to vacate the default judgment against him.

Issue No. 2 – The Trial Court correctly found that subject matter jurisdiction was established at the outset of the matter, and that Mejia's eleventh-hour payment did not divest the court of jurisdiction over the Association's foreclosure action.

Issue No. 3 – The trial court properly interpreted A.R.S. § 33-1807(a).

Issue No. 4 – The trial court properly adjudicated all issues related to attorneys' fees.

Issue No. 5 – The trial court correctly entered judgment in favor of the Association in this matter.

V.

ARGUMENT

A. The Trial Court Correctly Found that Mejia Did Not Meet His Burden to Vacate the Default Judgment Against Him.

1. Mejia Did Not Demonstrate Excusable Neglect.

The Arizona Supreme Court has affirmed that the standard applied “to the review of a trial court’s order granting or denying relief under Rule 60([b]) is whether the court abused its discretion.” *City of Phoenix v. Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985). Additionally, the burden a moving party must carry in order to vacate a default judgment for excusable neglect is well established. The Arizona Supreme Court has explained that “[i]n order to obtain relief, [a defendant] must show each of the following: (1) that his failure to answer was excused by one of the grounds set forth in Rule 60(c) [currently 60(b)]; (2) that he acted promptly in seeking relief from the entry of default; **and** (3) that he had a meritorious defense.” *Webb v. Erickson*, 134 Ariz. 182, 86, 655 P.2d 6, 10 (1982) (emphasis added). The absence of any one of these elements mandates denial of a motion to set aside a judgment pursuant to Rule 60(b)(1), ARCP. *Daou v. Harris*, 139 Ariz. 353, 358, 678 P.2d 934, 939 (1984).

“The test of what is excusable is whether the neglect or inadvertence is such as might be the act of a reasonably prudent person under similar circumstances.” *Id.* at 359. However, the Arizona Court of Appeals has held that “[g]enerally, ignorance of the English Language will furnish no excuse for failing to defend the action or justify the vacation of a judgment, . . . where the person knows he has been sued and neglects to seek information or advice from others.” *Cota v. Southern Ariz. Bank & Trust Co.*, 17 Ariz. App. 326, 327, 497 P.2d 833, 834 (1972).

In this matter, the evidence presented to the trial court confirmed that Mejia knew of the foreclosure lawsuit, communicated multiple times with the Association’s counsel in Spanish regarding the same, had family members who were willing to assist him in translating documents written in English, and even offered a proposal for resolution that was accepted by the Association. (IR #) Then, after all the communications and effort by Mejia directed at this matter, he simply stopped responding without explanation and without excuse. (IR #) Consequently, the trial court soundly rejected Mejia’s contention that the failure to file an Answer was the result of excusable neglect. (IR #58.) As such, this Court must affirm the trial court’s finding that Mejia did not meet his burden to set aside the judgment pursuant to Rule 60(b)(1), ARCP.

Although Mejia made a passing reference to Rule 60(b)(3), ARCP, he did not provide any substantive argument or evidence that supported a claim for relief under Rule 60(b)(3), ARCP. (IR #89.) Likewise, Mejia failed to support his muted argument that Rule 60(b)(6), ARCP, could justify relief. (IR #89.) Mejia cited no law and presented no facts that would have justified the trial court in setting aside the judgment pursuant to Rule 60(b)(6), ARCP. (IR #89.) As such, the trial court correctly denied Mejia relief pursuant to Rules 60(b)(3) and (6), ARCP.

2. The Default Judgment Was Not Void.

Unlike review of a trial court's denial of a Rule 60(b)(1) motion, the standard of review applied to a trial court's denial of a motion brought under Rule 60(b)(4) is de novo. *Ezell v. Quon*, 224 Ariz. 532, 536, ¶ 15, 233 P.3d 645, 649 (Ct. App. 2010). The Arizona Supreme Court has outlined the circumstances that require a court to set aside a default judgment pursuant to Rule 60(b)(4), ARCP, where the judgment is void. The Supreme Court explained that a judgment is void if the court that entered the judgment "lacked jurisdiction: (1) over the subject matter, (2) over the person involved, or (3) to render the particular judgment or order entered." *Matter of Adoption of Hadtrath*, 121 Ariz. 606, 608, 592, P.2d 1262, 1264 (1979). "When a judgment is void due to lack of jurisdiction, the court has no discretion, but must vacate the judgment." *Ezell v. Quon*, 224 Ariz. 532,

536, ¶ 15, 233 P.3d 645, 649 (Ct. App. 2010) (citations omitted). However, where a court held jurisdiction over the matter, the judgment is not void. *See id.* Moreover, “where a judgment is challenged on voidness grounds, the movant generally bears the burden of demonstrating his entitlement to have a default judgment set aside . . . by clear and convincing evidence.” *Duckstein v. Wolf*, 230 Ariz. 227, 234, ¶ 10, 282 P.3d 428, 435 (Ct. App. 2012).

Although in Mejia’s briefing, his reference to Rule 60(b)(4), ARCP, appears almost an afterthought, Mejia’s argument hinges largely on Rule 60(b)(4), ARCP. Mejia appealed to this Court claiming that the trial court erred by failing to grant his Motion to Set Aside the Default Judgment under Rule 60(b)(4), ARCP, as he believes his eleventh-hour partial payment destroyed the trial court’s jurisdiction over the Association’s foreclosure case. (IR #89.) Yet, Mejia criticized the Association for framing the question as a jurisdictional one. (Mejia’s Opening Brief, p. 26.) Mejia fails to acknowledge, however, that the Arizona Court of Appeals and Arizona Supreme Court have clearly held that in Arizona, the question of whether a judgment is void pursuant to Rule 60(b)(4), ARCP, is unquestionably a jurisdictional one.

As the following analysis explains, in Arizona the question of subject-matter jurisdiction is determined at the time of filing, and the subsequent gamesmanship of a defendant cannot destroy subject-matter jurisdiction once established.

B. The Trial Court Correctly Found that Subject Matter Jurisdiction Was Established at the Outset of the Matter, and that Mejia’s Eleventh-Hour Payment Did Not Divest the Court of Jurisdiction over the Association’s Foreclosure Action.

The Arizona Supreme Court and Court of Appeals have spoken clearly and directly on the question of whether a trial court possesses subject matter jurisdiction over a particular case. 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)).

In this matter, there is no question but that all parties agree the trial court unquestionably had jurisdiction over the Association’s foreclosure matter at the time it was filed. (June 2 Transcript, 11:8-9.) The accounting presented by the Association confirmed that Mejia had made no payment to the Association in over

five years at the time the lawsuit was filed. (IR #51.) The Association's witness further testified to the same fact during her direct examination. (June 20 Transcript, 20:5-8.) And during cross-examination of the Association's witness, Mejia demonstrated that the amount in unpaid assessments—fees, costs and other charges excluded—totaled well over \$1,200.00 at the filing of the lawsuit. (June 20 Transcript, 31:20-32:3.) As A.R.S. § 33-1807(A) sets as the statutory threshold for foreclosure assessments that have gone unpaid for one year or exceed \$1,200.00, the Association indisputably had the right to pursue foreclosure of its lien. As such, the trial court correctly ruled that subject matter jurisdiction had been established, and Mejia's after-default payment did not divest the trial court of jurisdiction. (June 20 Transcript, 7:2-5.)

C. The Trial Court Properly Interpreted A.R.S. § 33-1807(A).

Central to this matter is the statutory language of A.R.S. § 33-1807(a). Mejia's entire argument and appeal rests centrally on his reading of the statute, which reading the Association asserts is erroneous, and which reading the trial court properly rejected. Mejia has offered no authority from Arizona law that supports his tortured reading of A.R.S. § 33-1807(a). And in order for Mejia to make his interpretation appear as reasonable as possible, Mejia is forced to ignore the case law in Arizona confirming that subject matter jurisdiction is established at

the filing of the lawsuit. As explained herein, the trial court correctly rejected Mejia's interpretation of A.R.S. § 33-1807(a).

A.R.S. § 33-1870(a) provides in pertinent part as follows:

The association has a lien on a unit for any assessment levied against that unit from the time the assessment becomes due. The association's lien for assessments, 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 *may be foreclosed in the same manner as a mortgage on real estate* but 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(a) (emphasis added). Mejia incorrectly reads the statute to manufacture an intent and interpretation that simply does not exist, and Mejia 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 Declaration has its own set of requirements to proceed with foreclosure under the contractual lien, but as Mejia's arguments on appeal and in his Motion to Set Aside

focused on the statutory lien, the statutory lien is likewise the focus of the Association's Answering 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, whichever occurs first." *Id.* As soon as either of those alternative conditions is met, the foreclosure claim is ripe, triggering the Association's foreclosure right.

Meija 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. Opening Brief, p. 19-28. Meija argues that the legislature intended that a homeowner association should lose the right to foreclose its lien after filing a foreclosure lawsuit if the defendant thereafter pays all assessments. *Id.* However, Meija's interpretation ignores the plain meaning of the language, ignores important phrases within the statute, and ignores established case law interpreting subject matter jurisdiction.

One important phrase of the statute that Meija ignores is that the legislature specifically explained that the Association's lien "may be foreclosed in the same manner as a mortgage on real estate". A.R.S. § 33-1807(A). A.R.S. § 33-721, *et seq.* addresses the procedure for foreclosure by a mortgagee. The mortgagee is not

required to cease the foreclosure just because the borrower tenders the late payments. Instead, the mortgagor is required to pay the entire redemption amount, which includes attorney's fees and costs, in order to stop the foreclosure. *See* A.R.S. § 33-725(C). 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 the redemption amount, which would include the attorney's fees and costs, is satisfied.

Another important phrase in A.R.S. § 33-1807(A) that Mejia must ignore in order to arrive at his troublesome interpretation is the phrase "whichever occurs first". The fact that the legislature expressly explained that whichever of the two possible triggering events "occurs first" creates a situation where the Association's lien "may be foreclosed", clearly indicates that there must be a discernable point in time when, once satisfied, the Association's lien is thereafter eligible for foreclosure. The phrase "whichever occurs first" confirms that the two triggering events (i.e., \$1,200.00 in unpaid assessments or one year delinquent) are threshold events that remove the bars to foreclosure of the Association's lien as soon as either is once satisfied. The phrase "occurs first" eliminates the possibility that the legislature could have intended the courts to engage in an ongoing evaluation of

whether the lien continues to be ripe for foreclosure. Rather, once either of the statutory preconditions “occurs”, the Association’s lien “may be foreclosed” regardless of any gamesmanship a defendant may undertake after the filing of the foreclosure lawsuit.

Mejia spends a great deal of space in his Opening Brief dedicated to addressing the phrase “has been delinquent”. Opening Brief, pp. 22-24. In doing so, Mejia acknowledges that the present perfect tense “has been” “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’)”. Opening Brief, p. 22. Mejia attempts to use these examples to suggest that the legislature intended that courts have an ongoing duty to evaluate jurisdiction up to and including the moment a foreclosure judgment is signed in favor of an association; however, the examples cited by Mejia support exactly the opposite conclusion. *Id.* Comparing the statutory language to the example used by Mejia: “she has been to Rome”, it is evident that once the event occurs, the description of what “has been” will continue to remain constant even if the condition subsequently changes.

Mejia’s acknowledgement that courts around the country “generally do not consider ‘has been’ in isolation from its context” further supports the Association’s position. Opening Brief, p. 22. In the context of A.R.S. § 33-1807(a), the condition “has been delinquent” must be accomplished by the “occurrence” of

unpaid assessments totaling at least \$1,200.00, or of unpaid assessments that are one year old. Thus, according to the context of A.R.S. § 33-1807(a), the condition triggering foreclosability of the Association’s lien “occurs” at a point in time, and then continues to be true. Additionally, the context of A.R.S. § 33-1807(a) confirms that the Association’s lien may be foreclosed in the same manner as a mortgage. As a mortgagor is required to pay the full redemption amount, including attorney’s fees and costs (*see* A.R.S. § 33-725(c)) in order to stop the mortgage foreclosure process rather than just the delinquent principal, this context requires that the Association’s lien be treated in the same manner.

Mejia cited to a California case that interpreted a California statute to support his position that this Court should adopt Mejia’s interpretation of A.R.S. § 33-1807(a). However, the operative language of the California statute interpreted by the California Court of Appeals in *Huntington Continental Townhouse Assoc., Inc. v. Miner*, 230 Cal.App.4th 590 (Cal.App.4th Dist., Div. 3, 2014) is significantly different from the language of the Arizona statute at issue in this matter. In the California statute, the California Court of Appeals even explained that the language of the operative California statute was of paramount importance to its analysis and conclusion. *Miner*, 230 Cal.App.4th at 600-601. 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 from the statute adopted by the Arizona legislature. The operative California statute is drafted in the negative, and explains when an association’s right to foreclose is eliminated. *Id.* Thus, in interpreting the California statute, the California court was required to evaluate when the facts of a particular matter triggered the expiration of an association’s right to foreclose. *Id.* 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 foreclose its lien becomes ripe. Because of the monumental differences between the California statute at issue in *Miner* when compared with the operative language of A.R.S. § 33-1807(A), Mejia’s reliance on *Miner* is misplaced and irrelevant to the question of interpretation of A.R.S. § 33-1807(A). The trial court properly interpreted A.R.S. § 33-1807(A) and confirmed that the Association was entitled to foreclose its lien as the statutory triggering events authorizing foreclosure were satisfied at the filing of the matter.

D. The Trial Court Properly Adjudicated All Issues Related to Attorneys' Fees.

Mejia repeatedly uses the scare tactic of suggesting that the Association's foreclosure judgment allowed the Association to recover "unadjudicated attorneys' fees" in order to create a false sense of urgency with respect to reversing the trial court's judgment. (Opening Brief, pp. 24-27, and 31-32.) However, repetition of a phrase alone does not increase its merit. In this instance, there is no merit to Mejia's oft-repeated concern that the foreclosure judgment allowed the Association to recover "unadjudicated attorneys' fees."

In this matter, there were two categories of attorneys' fees addressed by the trial court: (1) pre-foreclosure attorneys' fees included on the ledger and incorporated into the principal balance of the complaint; and (2) attorney's fees incurred in successfully prosecuting the foreclosure matter, which fees were awarded upon application to the trial court. (IR #76, Exhibit "3" thereto.) Evidence regarding the pre-foreclosure attorneys' fees was presented to the trial court during the June 20, 2017 evidentiary hearing. (IR #51 and #54.) Upon review of the evidence and testimony, the trial court held as follows:

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 three year statute of limitations period as part of the principal owed to Judgment Creditor and not part of the litigation attorneys' fees.

(IR #76, Exhibit “3” thereto.) Accordingly, the trial court issued a specific ruling as to the pre-foreclosure attorneys’ fees. Therefore, the pre-foreclosure attorneys’ fees were fully and finally adjudicated by the trial court. The trial court specifically noted that before adjudication of the pre-foreclosure attorneys’ fees, Mejia had the opportunity to address the same. (IR #76, Exhibit “3” thereto.) The trial court correctly agreed with the Association’s position that based on the contractual language of the Declaration, the Association was within its rights to include pre-foreclosure attorneys’ fees and costs in the principal balance of the foreclosure lawsuit. (IR #76, Exhibit “3” thereto.) Following the evidentiary hearing on the principal amount sought by the Association, including the pre-foreclosure attorneys’ fees and costs, the trial court issued a final adjudication on the merits as to the principal amount the Association was entitled to recover through the foreclosure of its lien and entered a judgment for the same. (IR #76.) Thus, by entry of the final judgment on foreclosure, all pre-foreclosure attorneys’ fees were fully and finally adjudicated.

The second category of attorneys’ fees—the fees incurred during the successful prosecution of the Association’s foreclosure action—were also fully litigated and adjudicated by the entry of the judgment on foreclosure. The Association submitted to the trial court a *China Doll* Affidavit with a detailed history bill identifying each and every time entry incurred by the Association, to

which Mejia filed an objection. (IR #29-30, #62-66, and #71-72.) The trial court carefully reviewed the time entries and hand-wrote a two-page exhibit explaining the award of attorneys' fees granted to the Association. (IR #76, Exhibit "3" thereto.) Without question, the attorneys' fees awarded to the Association were properly reviewed and awarded according to the trial court's determination of reasonableness. Therefore, Mejia's argument that the statutory interpretation of A.R.S. § 33-1807 advanced by the Association allows for foreclosure based exclusively on unadjudicated attorneys' fees is blatantly false. On the record before this Court, it is clear that nothing remains unadjudicated, including the attorneys' fees.

Mejia further criticizes the Association's foreclosure judgment alleging that because Mejia paid the outstanding assessments prior to final entry of the foreclosure judgment, the Association was foreclosing exclusively for attorneys' fees and costs. (Opening Brief, p. 27.) However, Mejia's argument fails to acknowledge that A.R.S. § 33-1807(A) expressly provides that the Association's foreclosable lien includes attorneys' fees and costs. Specially, A.R.S. § 33-1807(A) provides that "[t]he association's lien for assessments, 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 may be foreclosed . . .". A.R.S. § 33-1807(A). Therefore, the Legislature expressly

provided for the Association to be able to foreclose its lien and thereby recover attorneys' fees and costs incurred seeking to collect assessments. As explained above, the lien, including all its permissible amounts, becomes foreclosable upon the occurrence of one of the triggering events. A.R.S. § 33-1807(A). Once one of the triggering events has occurred, the Association may foreclose its lien. A.R.S. § 33-1807(A). Thus, there is nothing erroneous about the Association being able to foreclose for attorneys' fees and costs when, as in this instance, the triggering events occurred prior to the filing of the foreclosure matter. Mejia's arguments to the contrary ignore relevant and important language of the operative statute.

E. The Trial Court Correctly Entered Judgment in Favor of the Association.

Mejia's Opening Brief alleges that the judgment on foreclosure issued in favor of the Association is improper for several reasons. However, none of the reasons identified by Mejia justifies reversing or setting aside the judgment. As such, this Court should uphold the judgment of the trial court.

1. The Default Judgment Does Not Violate Mejia's Personal Property Rights.

Mejia alleged that the Association's foreclosure judgment was unlawful because paragraph 6 of the judgment purportedly "violate[d] A.R.S. § 33-1123 . . . , A.R.S. § 33-1124; and A.R.S. § 33-1125 . . .". (Opening Brief, p. 33.) However,

Mejia'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 Revised Statutes is entitled "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 Mejia claimed render the Association's judgment "unlawful" are expressly inapplicable by the language of A.R.S. § 33-1807(C).

2. The Default Judgment Does Not Violate Mejia's Redemption Rights.

Mejia, without any citation to applicable statutory or case law, claimed that paragraph 9 of the Association's default judgment violated Mejia's right of redemption. However, again, Mejia's argument is based solely on Mejia's own misreading of the judgment. The language in paragraph 7 of the default judgment is patterned directly after the language of A.R.S. § 12-1282(A) and (B), and 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". (IR #76, ¶ 7) Therefore, the Association's foreclosure judgment expressly preserves and confirms Mejia's right to redeem.

Contrary to Mejia's argument, after foreclosure and the sheriff's sale, the purchaser of the property sold does actually obtain equitable title, which is nothing

if not 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.” *Perry*, 25 Ariz.App. at 445, 544 P.2d at 269. 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 Mejia’s position that if equitable title is transferred at a sheriff’s sale, Mejia’s right of redemption has somehow been compromised.

3. The Default Judgment’s Confirmation of the Association’s Right to Collect Future Fees and Costs Upon Application to the Court is Proper.

Mejia 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. (Opening Brief, pp. 35-39.) While Mejia 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 Mejia’s 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 Mejia's clear knowledge of *Bennett Blum* (as Mejia cited the case in his Opening Brief), Mejia ignores the clear reading of the case and instead attempts to put forth the specious argument that somehow the contract (which in this case is the Declaration) 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. Opening Brief, pp. 37-39. Mejia cites to the Idaho and California Civil Codes and to case law from Nevada, New Jersey, Alaska, Florida, and California to make his 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 this Court evaluated the issue of whether post-judgment attorneys' fees were recoverable in a collection action, this 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 Declaration did not merge with the judgment, the contractual provisions of the Declaration providing for recovery of attorney's fees by the Association remain operative and enforceable. 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, was wholly proper and did not provide any basis for the trial court to set aside the Association's judgment.

4. The Equitable Nature of the Foreclosure Matter Requires that Mejia Pay the Attorneys' Fees and Costs Incurred by the Association as Part of the Foreclosure Judgment.

Curiously, Mejia makes an appeal to equity in order to support his position that the Association should not have been granted a judgment on foreclosure due to the eleventh-hour partial payment delivered by Mejia. (Opening Brief, pp. 30-32.) Mejia cites the case of *Byers v. Wik*, 169 Ariz. 215, 818 P.2d 200 (App. 1991) for the proposition that “[f]oreclosure is an equitable remedy”. (Opening Brief, p. 30.) However, the holding by this Court in *Byers* does not support Mejia's position.

In *Byers*, this Court was faced with the question of how to resolve a quiet title action by a trust that obtained title to a piece of property from a judgment

debtor. *See Byers*, 169 Ariz. 215, 818 P.2d 200. The judgment creditor, whose judgment was recorded against the property prior to the conveyance to the trust by the judgment debtor, levied on the property and sold it at a sheriff's sale without providing actual notice to the trust. *See Byers*, 169 Ariz. at 222-23, 818 P.2d at 207-8. After the property was sold at the sheriff's sale, the trust sued the purchaser to quiet title claiming the levy by the judgment creditor was ineffective. *See id.* The trust argued that title to the property had to be quieted in it and that it was not required to pay the redemption amount because the levy was ineffective in the first instance. *See id.* Thus, the trust argued that the property should be returned to it unencumbered by the judgment that was resolved through the sale alleged by the trust to have been ineffective. *See id.*, 169 Ariz. at 224, 818 P.2d at 209. This Court held that although the sheriff's sale was ineffective as against the trust for lack of notice, because the foreclosure proceeding was an equitable proceeding, the trust was not entitled to re-obtain title to the property without paying the full redemption amount to the Wiks, who purchased the property in good faith at the sheriff's sale. *See id.*

In this matter, Mejia's approach is akin to that taken by the trust in *Byers*. Mejia admittedly failed to pay assessments for five years, compelled the Association to pursue its contractual and statutory right of foreclosure in order to recover the amounts admittedly owed, forced the Association to incur as many

attorneys' fees as possible by waiting until the evening prior to the default hearing before delivering payment, and then delivering payment only sufficient to cover the unpaid assessments but not much else. (IR #51; *see also* June 20 Transcript, 31:7-32:3 *and* 32:23-33:17; *see also* June 2 Transcript, 10:12-17.) After believing he successfully gamed the system, Mejia then appealed to equity claiming that it was not fair for him to have to suffer such a drastic remedy as foreclosure. At the June 2, 2017 hearing, the trial court questioned Mejia about his claimed jurisdiction-destroying tactic.

THE COURT: With the way you interpret 33-1807(a), you're basically saying you have until the time of judgment to pay [the assessments], or there can be no foreclosure. But basically, you're causing the other side to incur significant costs and attorney's fees as a result of that.

MR KUBERT: That's absolutely true, Judge.

(June 2 Transcript, 10:12-17.) Shortly thereafter in the hearing, Mejia's counsel confirmed as follows: "So that's the counter position where—I completely appreciate that, that once its (indiscernible) you're leaving the HOA in the lurch."

(June 2 Transcript, 11:13-15.)

While acknowledging that Mejia was in fact attempting to game the system, Mejia's counsel was compelled to acknowledge that the Association was not only acting fully within its rights by filing foreclosure, but also was attempting to be generous in seeking to resolve the foreclosure short of completing and executing

on the judgment. (June 2 Transcript, 11:6-9.) At the June 2, 2017 hearing, Mejia’s counsel acknowledged the following: “So there’s a dispute what’s owed, HOA rushes to – I don’t want to allege that they rushed or anything like that, because this is clearly a case where they didn’t rush – HOA could file a foreclosure complaint.” (June 2 Transcript, 11:6-9.) In fact, the record clearly demonstrated that the Association engaged in good faith negotiations with Mejia and even agreed to the repayment terms Mejia proposed to that would have allowed Mejia to resolve the foreclosure with the Association’s expressed agreement “not to execute upon this Judgment so long as Mejia makes payments . . .”. (IR #53, p. 3, ¶ 7.)

The Association was fair and measured in pursuing its foreclosure action, which action it is entitled to pursue pursuant to both statute and contract. In contrast to the Association’s equitable approach to this matter, Mejia thought he found a loophole that would require the Association to incur significant fees and costs and then end up in a “lurch” without the ability to finalize their foreclosure judgment. According to the Court in *Byers*, if Mejia seeks equity, he must do equity. *Byers*, 169 Ariz. at 209, 818 P.2d at 224. Like the Court in *Byers*, this Court must hold that if Mejia wishes to avoid foreclosure, he must pay the entire redemption amount, including the attorneys’ fees and costs awarded to the Association.

The trial court correctly entered judgment on foreclosure in favor of the Association. This Court should uphold the Association's foreclosure judgment.

5. The Negative Principal Balance of the Judgment Was a Product of Mathematical Error on the Part of the Trial Court.

Mejia repeatedly argues that because the principal balance identified in the Judgment was “a negative amount”, the Association should not have been allowed to foreclose. As explained above, the balance at the time the judgment was entered reflected Mejia's improper attempt to frustrate the trial court's jurisdiction. However, it must be pointed out that the trial court determined the balance to be negative due to a mathematical error.¹

At the time the Association's foreclosure lawsuit was filed, the amount claimed due and owing by the Association, for its statutory and contractual lien, was \$8,246.48. (IR #1, and IR #51.) By the time the Association submitted its Motion for Judgment by Default, additional assessments had accrued. Thus, at the June 20, 2017 evidentiary hearing on damages, the Association provided accounting records showing that the balance due at that time to the Association was \$8,843.48. (IR #54, and IR #76, Exhibit “1” thereto.) While the Association

¹ The Association will be a Motion to Correct Clerical Error in Judgment pursuant to Rule 60(a), ARCP, in conjunction with the filing of this Answering Brief. Because Rule 60(a), ARCP, requires that clerical errors in judgments may only be corrected with leave of the Court of Appeals if an appeal is pending, the Association will also be filing a Motion for Leave to have Clerical Error Corrected by the Trial Court.

asserted that the principal foreclosable balance was \$8,843.48 at the time it sought judgment by default (before receiving Mejia’s eleventh-hour payment), the ledger accounting showed a balance due of \$12,013.54. (IR #54.) The reason that the ledger balance exceeded the actual principal balance sought by the Association was that the Association tracked the attorneys’ fees related to the foreclosure action on the ledger accounting. (IR #54.) Thus, on the ledger accounting presented to the trial court, the Association provided the following hand-written calculations to arrive at the principal balance:

\$12,013.54	Balance appearing on the ledger;
+\$414.00	Remaining monthly installments of the 2017 annual assessment;
-\$120.00	“2016 Late Fees not included in principal balance of judgment”; and
<u>-\$3,464.06</u>	“Litigation attorneys’ fees and costs not included in principal balance of Judgment” (application for these amounts was sought through a <i>China Doll</i> Affidavit.)
\$8,843.48	Resulting principal balance of foreclosure judgment sought.

(IR #54.) (Emphasis added.) When calculating the principal amount to award in the judgment and when determining how to apply the \$5,000.00 payment delivered by Mejia, the trial court used as its starting figure the balance the Association claimed due of \$8,843.48. (IR #76, Exhibit “1” thereto.) The trial court then made the following calculations:

\$8,843.48	Principal Sum;
-\$2,411.50	All amounts prior to May 11, 2013;

-\$120.00 “2016 late fees in ledger but not included in principal balance”;
-\$3,464.06 “Litigation atty fees and costs in ledger but not included in principal balance”.

\$2,847.92 Resulting subtotal to which Mejia’s payment was applied.

(IR #76, Exhibit “1” thereto.) (Emphasis added.) Consequently, when the trial court calculated the principal amount to award in the foreclosure judgment, the trial court took as its starting figure the sum of \$8,843.48, which figure was calculated by subtracting \$120.00 in late fees and \$3,464.06 in litigation-related attorneys’ fees from the Association’s ledger balance, and then subtracted a second time \$120.00 in late fees and \$3,464.06 in attorneys’ fees. Thus, the trial court subtracted from the principal balance sought by the Association two amounts that the claimed balance did not include. Had the trial court handled the calculation of the principal balance correctly, the resulting calculation would have been as follows:

\$8,843.48 Principal Sum claimed (which included subtraction of \$3,464.06 in litigation-related attorneys’ fees and costs appearing on the ledger, as well as subtraction of \$120.00 in late charges);
-\$2,411.50 All amounts incurred prior to May 11, 2013, as the trial court elected to apply the statutory three-year statute of limitations to the Association’s ability to foreclose as opposed to the contractual six-year statute of limitations afforded based on the Declaration;

\$6,431.98 Resulting subtotal
-\$5,000.00 Mejia’s payment

\$1,431.98 Resulting principal balance of foreclosure judgment.

As clearly shown, had the trial court not erroneously given double credit for late fees and attorneys' fees, the principal balance would not have been a negative amount. The trial court's mathematical error is not grounds for Mejia to set aside the judgment. Furthermore, when including the attorneys' fees and costs awarded by the trial court in the foreclosure action, it is clear that there was never actually a negative balance on the lien. Mejia's appeal must be denied and the judgment affirmed.

VI.

NOTICE UNDER RULE 21(a)

The Declaration is a contract between the Association and Mejia. This appeal arises out of a dispute regarding the provisions of the Declaration. Pursuant to sections 8.2 and 8.3 of the Declaration, and pursuant to A.R.S. §§ 12-341.01 and 33-1807, the Association is entitled to an award of attorneys' fees and costs incurred on this appeal. This section provides the requisite notice that the Association intends to claim attorneys' fees incurred on this appeal.

VII.

CONCLUSION

The trial court correctly found that Mejia's partial payment delivered on the eve of the default hearing did not strip the court of jurisdiction to enter a judgment

on foreclosure in favor of the Association. For the foregoing reasons, the trial court's rulings were correct and should be affirmed. The Association respectfully requests that this Court affirm the trial court's foreclosure judgment.

Respectfully submitted,

DATED: November 21, 2018

MAXWELL & MORGAN, P.C.

By: /s/Chad M. Gallacher

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MEADOWS HOMEOWNERS
ASSOCIATION