ARIZONA COURT OF APPEALS

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

RESPONSE TO MOTION FOR LEAVE TO HAVE CLERICAL ERROR CORRECTED BY THE TRIAL COURT

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I. INTRODUCTION

After approximately 1½ years, 17 pleadings, 5 Minute Entries / Orders and Appellant's Opening Brief, all ***following*** the Foreclosure Judgment at issue, Plaintiff/Appellee Laveen Meadows Homeowners' Association (the "Association") conveniently argues for the first time ever that the trial court judge committed a clerical error in the Foreclosure Judgment and requests this Court to correct it.[1] The Association's Motion underscores just how improper this Foreclosure Judgment is in the first place and that it would be a complete miscarriage of justice if Appellant lost his home over it.[2] Notwithstanding the foregoing, this Court should deny the Association's Motion.

Under Arizona law, the Association's Motion must be denied because it failed to raise this objection in the trial court after the Foreclosure Judgment was entered and before the appeal was filed. Furthermore, the Association waived this argument and has already tacitly admitted that there was no clerical error in the Foreclosure Judgment. If the Association survives these arguments, the Association is still not entitled to a correction because the error is not "clerical" under Arizona law. Finally, this Court should deny the Motion regardless because granting it would prejudice

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[1] See Electronic Index of Record ("EIR") – entries following Item No. 76.

[2] For some reason, the Association did not attach a complete copy of the Foreclosure Judgment to its Motion. As such, the Appellant has attached it hereto as Exhibit A.

Appellant's appeal by improperly changing the playing field and creating unnecessary added expenses.

II. THE ASSOCIATION WAIVED ITS ARGUMENT THAT THE TRIAL COURT COMMITTED A CLERICAL ERROR

This Court can avoid analyzing the quagmire of calculations brought on by the Association's handwritten ledger insertions and thousands of dollars of unawarded attorneys' fees to determine whether a clerical error exists because the Association waived this argument anyway. This Court has specifically held that a party's failure to raise an objection on clerical error grounds at the trial court level precludes correction on appeal. *Ace Automotive Products, Inc. v. Van Duyne*, 156 Ariz. 140, 143, 750 P.2d 898, 901 (App. 1987); *see also Minjares v. State*, 223 Ariz. 54, 58-59, ¶¶16-19, 219 P.3d 264, 268-269 (App. 2009) (discussing waiver in the context of a clerical error motion and citing case law that a waiver would occur when a party intentionally relinquishes a known right or that their conduct would raise such an inference).

The trial court entered the Foreclosure Judgment on August 4, 2017. EIR 76. The Association did not file an objection in the trial court that it contained a clerical error. On those grounds alone, the Association's instant motion should be denied. *Ace Automotive*, 156 Ariz. at 143.

Not only did the Association fail to object to the Foreclosure Judgment based on clerical error after it was rendered, it had numerous opportunities to assert this objection since then and did not do so.

On August 16, 2017, Appellant filed his Notice of Appeal. EIR 79. On August 31, 2017, the Association eschewed a Rule 60 motion and instead filed its Notice of Cross-Appeal. EIR 83. The Association did not object that the Foreclosure Judgment contained a clerical error. In fact, this filing should be construed as a tacit admission that there was no Rule 60 errors in the Foreclosure Judgment and that any error must have been one of judgment.

On October 5, 2017, this Court dismissed the appeal because Appellant had not filed a Motion to Set Aside the Default Judgment first. Upon remand, Appellant filed his Motion to Set Aside Default Judgment. EIR 89. The Association responded with an extensive brief extolling the virtues of just how valid the Foreclosure Judgment was. EIR 90, 91, 92. The Association said nothing about it containing a clerical error. *Id*.

After the trial court denied Appellant's Motion to Set Aside and found that the Association was entitled to request even more fees, the Appellant filed another Notice of Appeal on April 25, 2018. EIR 105. On June 12, 2018, this Court dismissed that appeal because it appeared from the electronic record that the Association's fee application was still pending in the trial court. Unbeknownst to

anyone, the trial court had already ruled on it. Consequently, Appellant filed a Motion for Reconsideration to this Court to reconsider the dismissal since the trial court had in fact ruled on the fee application but did not tell anyone. The Association opposed this Motion (apparently to avoid Appellant's meritorious appeal) by arguing the appeal should remain dismissed because the judgment did not contain Rule 54(b) language. Again, the Association did not argue that the Foreclosure Judgment contained a clerical error. This Court then granted Appellant's Motion for Reconsideration and reinstated the appeal. See this Court's July 13, 2018 Order Reinstating Appeal.

On September 12, 2018, Appellant filed his Opening Brief. Nearly 2½ months later and with the benefit of already having Appellant's opening arguments asking how the Association can possibly take his home based on a judgment containing a "negative balance," the Association filed its Clerical Error motion.

The Association had numerous opportunities to file its Clerical Error motion but chose not to. Based on the Association's conduct, this Court should draw an inference that the Association clearly waived this argument. *Minjares* at ¶17 *citing Am. Cont'l. Life Ins. Co. v. Ranier Constr. Co.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980).

III. IF AN ERROR EXISTS, IT IS ONE OF JUDGMENT THAT CANNOT SIMPLY BE CORRECTED

A clerical error is a mistake in a judgment or order "arising from oversight or omission." Ariz. R. Civ. P. 60(a). This rule allows a party to correct obvious errors such as typographical, copying or transcribing errors and not to change a judgment for failure to embody what the parties established in the record. *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.*, 213 F.2d 702, 705 (5th Cir. 1954). In other words, the trial court's power to correct clerical errors "does not extend to the changing of a judgment, order or decree which was entered as the court intended." *Ace Automotive*, 156 Ariz. at 143.

This Court in *Ace Automotive* rejected a similar argument that the trial court committed a clerical error because it had miscalculated the principal balance of the judgment. The Court of Appeals assumed the amount of the judgment was incorrect but still held that Rule 60(a) did not allow it to be corrected:

> In this case the trial court intended to enter judgment in the amount that the defendants now challenge. If there was error in the amount, the error was not clerical but judgmental, and defendants' failure to object at trial precludes correction on appeal.

Id.

Here, there are several reasons that if any errors exist in the Foreclosure Judgment, they are judgmental in nature and cannot be corrected with a simple pen stroke.

First and foremost, Judge Benny intended to render a judgment in "a negative amount." Judge Benny specifically used the words "in a negative amount" and clearly intended her Foreclosure Judgment to comprise a "negative amount" element to it. This "negative amount" element comprises half of Appellant's appeal. Rule 60(a) and the caselaw discussed above precludes this Court from second guessing Judge Benny's calculations because she clearly intended her Foreclosure Judgment to comprise a "negative amount." Her intentions were plain and that was to enter a judgment of a principal sum in "a negative amount."

Second, there is nothing in the Foreclosure Judgment or the Association's explanation that stands out as "obvious error." *West Virginia Oil & Gas, Co.*, 213 F.2d at 705. The Association's evidence of record substantiating the Foreclosure Judgment is muddled to be kind. Much of its ledger contains amounts due that are handwritten in, amounts that are over three years old that are uncollectible and attorneys' fees without descriptions that were never awarded. It is anyone's guess what Judge Benny had in mind when she rendered her largely illegible Foreclosure Judgment. Moreover, the fact that the Association's explanation is so convoluted and hard to understand proves on its face that an "obvious error" does not exist. *Id*. Therefore, this Court should find that the error is one of judgment and not a clerical error.

Substantively, the Association seeks to change the "resulting principal balance" from -$2,152.06 to $1,431.98, arguing that "there was never actually a negative balance on the lien." In purporting to address a mere "clerical error" in the Foreclosure Judgment, the Association effectively seeks to bless its inclusion of unawarded "pre-litigation" attorneys' fees totaling $2,836.99 as part of the "principal balance" without requiring the trial court to determine the propriety or reasonableness of those unawarded fees. The trial court's perceived double deduction effectively eliminated these improper amounts and the Association's motion effectively seeks to put them back into the judgment.

Indeed, the Association's request to increase the principal sum effectively challenges the trial court's determination that Appellant's $5,000.00 payment had satisfied all assessments and that the Association was being awarded the remedy of foreclosure "for remaining fees and costs." This is a troubling argument given the Association's argument that it is entitled to foreclose for unawarded attorneys' fees.

The fact of the matter is that the Foreclosure Judgment is replete with errors and one cannot possibly reconcile it with either applicable law or the relevant facts. For these reasons, this Court should consider errors, if they exist, to be purely errors of judgment that are not correctible.

IV. APPELLANT WOULD SUFFER SIGNIFICANT PREJUDICE IF THE JUDGMENT WAS CHANGED NOW

A.R.S. §33-1807(A) states that a homeowners' association cannot foreclose on an owner's home unless he owes the association at least $1,200 in assessments alone. One of the threshold issues on appeal is what amounts in the Foreclosure Judgment allow the Association to reach this amount in order to foreclose and take Appellant's home from him. The Association cannot simply change these amounts with a simple pen stroke under the guise of "clerical error" to undercut Appellant's primary arguments on appeal.

The Association had over a year to raise this argument before Appellant filed his opening brief and disclosed his arguments for reversing the Foreclosure Judgment. Time and again, the Association had various opportunities to raise this argument but remained silent. This Court should not condone this type of gamesmanship. Otherwise, it would be inviting appellees to request changes to judgments on the fly to thwart meritorious appeals. Perhaps for this reason, this Court in *Ace Automotive* held that the Rule 60(a) motion must be filed before the judgment is appealed. *Ace Automotive*, 156 Ariz. at 143.

V. THIS COURT SHOULD DENY THE ASSOCIATION'S REQUEST FOR FEES AND COSTS

Judge Benny entered the Foreclosure Judgment based strictly on the Association's muddled ledgers. Unbelievably, the Association requests, as part of its

Motion to Correct the Judgment, an award of fees and costs for its Motion and the errors (if they exist) that it brought upon itself. As this Court will soon learn after reviewing the record, reading the appellate briefing and hearing oral argument (if it schedules it), the Association's serial fee applications are par for the course and are the primary reason for this entire case. This Court should deny the Association's request. *Saylor v. Hawes*, 30 Ariz. 197, 202, 245 P. 354 (1926) (costs not awarded to modify judgment necessitated by clerical error of court).

VI. CONCLUSION

Based on the foregoing, this Court should deny the Association's Motion for Leave to Have Clerical Error Corrected by the Trial Court.

DATED this 7th day of January 2019.

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