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IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

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

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I.

INTRODUCTION

Plaintiff/Appellee Laveen Meadows Homeowners' Association ("Association"), hereby submits this supplemental brief pursuant to the August 13, 2019 Order from this Court to address the "meaning and application of the newly-amended Arizona Revised Statute § 33-1807". (*See* August 13, 2019 Order.)

II.

ARGUMENT

A. The Newly-Amended Arizona Revised Statute § 33-1807 Confirms that Once a Foreclosure Action is Filed, a Homeowner Cannot Frustrate the Action by Paying the Accrued Assessments Only.

A.R.S. § 33-1807(A) has long established that homeowners associations may foreclose their statutory liens provided the unpaid assessments total at least $1,200 or have been delinquent for a period of one year. A.R.S. § 33-1807(A). The statute has likewise long confirmed that only one of these criteria must be satisfied in order for homeowners associations to foreclose. Moreover, the Arizona Planned Communities Act has long provided that homeowners' associations may foreclose under A.R.S. § 33-1807(A) based on either triggering event, whichever occurs first. To the statute establishing the Association's right to foreclose when at least one of the two triggering events has occurred, SB 1531 added the following to

clarify that the eligibility of an assessment lien for foreclosure is "determined on the date the action is filed." Only one sentence of A.R.S. § 33-1807(A) was amended by SB 1531. The full text of the amended sentence in A.R.S. § 33-1807(A) reads as follows:

> 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 within 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 $1,200 or more, whichever occurs first, ***as determined on the date the action is filed.***

A.R.S. § 33-1807(A) (amended language in bold italics).[1]

A.R.S. § 1-215(1) explains that "[i]n the statutes and laws of this state, unless the context otherwise requires: 'Action' includes any matter or proceeding in a court, civil or criminal." Thus, the term "action" as used in the amendment to A.R.S. § 33-1807(A) refers to the filing of a proceeding in court. Although, there is no prior reference to the word "action" in the statute other than the newly amended language, A.R.S. § 33-1807(A) exclusively addresses the rights held by homeowners' associations to foreclose the liens they hold in the same manner as mortgages. A.R.S. § 33-721 provides that "[m]ortgages of real property . . . shall

[1] The other change to A.R.S. § 33-1807(A) was to replace the phrase "one thousand two hundred dollars" with the numerical values of the same number as cited above.

be foreclosed by action in a court." Consequently, the "action" referenced in the amended language of A.R.S. § 33-1807(A) refers to the filing of a foreclosure matter by a homeowners' association.

As the "action" referenced in the newly-amended language of A.R.S. § 33-1807(A) refers to the filing of a lien foreclosure matter by a homeowner's association, the date the foreclosure matter is filed is of expressed significance to the statute. It is not uncommon for the Arizona legislature to use language attaching special significance to the filing of judicial proceedings, or actions. For example, A.R.S. § 46-457 provides that an action brought under that section must be served on the "attorney general within thirty days **after the action is filed** in the superior court." A.R.S. § 46-547(A) (emphasis added). In similar fashion, the Arizona legislature also uses language in statute to tie special significance to the end of an action rather than to the commencement of an action. For example, A.R.S. § 49-1901(F) demonstrates how the legislature crafts statutory language when it wishes to identify the "date the final decision or determination is rendered" as the date that should be used for purposes of interpretation. In this instance, the date of significance identified by the legislature is the date the foreclosure action is filed. A.R.S. § 33-1807(A).

The first words of the newly-amended language serve to connect the preceding statutory phrases with the amendment itself. The phrase "as

determined" signals that the requirements preceeding the amendment must be evaluated based on the terms established by the amendment. Immediately prior to the newly-adopted language, A.R.S. § 33-1807(A) confirms that the Association's right to foreclose arises if assessments are delinquent in the amount of at least $1,200 or if assessments have been delinquent one year, whichever occurs first. Inclusion of the clarifying amendment confirms that the question of whether a homeowner has been delinquent for one year or was delinquent in the payment of assessments in the amount of $1,200 must be determined as of the date the homeowners' association files its foreclosure lawsuit. According to the language of the amendment, if on the date a homeowners' association files a foreclosure action, the defendant homeowner has been delinquent in payment of assessments in the amount of at least $1,200, or the defendant homeowner has been delinquent in payment of assessments for one year, the Association will be entitled to foreclose its lien regardless of what partial payments the homeowner delivers during the pendency of the action. The clarifying language of the amendment confirms that the requirement to determine whether there are $1,200 in unpaid assessments, or assessments that are one year delinquent, is not an ongoing obligation that continues through the duration of the litigation. Because the Legislature has clarified that the triggering events of $1,200 or one year delinquency are determined as of the date the foreclosure action is filed, the

Legislature has confirmed that homeowners may not frustrate foreclosure actions by delivering payment to satisfy merely the assessment only before a final judgment is entered.

Before SB 1531 was passed by the Legislature and signed into law, counsel for Defendant/Appellant Carlos Mejia ("Mejia") drafted an article encouraging voters to contact their Representatives and Senators to encourage them not to pass the Bill. Mejia's counsel posted the article to the Firms' blog. Near the end of the article, Mejia's counsel made the following observation regarding the proposed changes to A.R.S. § 33-1807(A): "Perhaps the greatest unintended consequence relates to an owner's ability to prevent foreclosure once a foreclosure action is filed by paying the amount of the unpaid assessments." https://dessaules.com/blog/2019/3/5/sb-1531-bad-for-hoas-but-really-really-bad-for-homeowners. Although SB 1531 underwent additional revisions after Mejia's counsel posted the above-quoted statement, the statement reveals that Mejia's counsel interpreted the amendment in the same manner the Association has done herein.

B. The Operative Language of the Newly-Amended Statute is Procedural in Nature and, Thus, Applies Retroactively.

A.R.S. § 1-244 sets forth the general rule regarding application of statutory amendments. A.R.S. § 1-244 provides as follows: "No statute is retroactive unless

expressly declared therein." Notwithstanding the direct language of A.R.S. § 1-244, the Arizona Supreme Court has "engrafted an exception" to the statute whereby a statutory amendment must be interpreted to apply retroactively. *Seisinger v. Siebel*, 220 Ariz. 85, 96, ¶ 43, 203 P.3d 483, 494 (2009). This engrafted exception arises when the amendment adopted by the Legislature "is merely procedural." *Id.* "Enactments that are procedural only, and do not alter or affect earlier established substantive rights may be applied retroactively." *Aranda v. Indus. Comm'n*, 198 Ariz. 467, 470, ¶ 11, 11 P.3d 1006, 1009 (2000). "Even if a statute does not expressly provide for retroactivity, it may still be applied if merely procedural because litigants have no vested right in a given mode of procedure." *Id.*

In *Aranda*, the Arizona Supreme Court identified the difference between procedural law and substantive law. Specifically, the Supreme Court explained as follows:

> In general, procedural law relates to the manner and means by which a right to recover is enforced or provides no more than the method by which to proceed. . . . Substantive law "creates, defines and regulates rights" while a procedural law establishes only "the method of enforcing such rights or obtaining redress."

Aranda, 198 Ariz. at 470, ¶ 12, 11 P.3d at 1009. (Citations omitted.) Consequently, the question of whether a statutory amendment is procedural or

substantive turns on the issue of whether the law creates rights or addresses the method of enforcing rights. *See id.*

The Arizona Supreme Court in *Aranda* evaluated the substantive and the procedural rights held in matters relating to workers' compensation to illustrate the difference. *See id.* In differentiating the procedural aspects of the law from the substantive aspects, the Supreme Court explained that a final worker's compensation award amounted to a property right entitling the injured individual to monetary value, and thus was a substantive right. *Id.*, 198 Ariz. at 471, ¶ 17, 11 P.3d at 1010. On the other hand, the Supreme Court explained that the process requiring beneficiaries to report annual income on the award's anniversary date each year constituted merely a procedural right. *Aranda*, 198 Ariz. at 471, ¶ 14, 11 P.3d at 1010.

In this matter, the amendment in question addressed only the appropriate point in time when the evaluation takes place as to whether a lien held by the homeowners' association is ripe for foreclosure. *See* A.R.S. § 33-1807(A). Applying the analysis used by the Arizona Supreme Court in *Aranda*, the substantive rights established by A.R.S. § 33-1807(A) would be (1) the right held by each homeowners' association in the State of Arizona to a lien for unpaid assessments and related charges; and (2) the right to foreclose that lien provided certain criterion are met. *See Aranda*, 198 Ariz. at 470-71, 11 P.3d at 1009-10; *see*

also A.R.S. § 33-1807(A). Likewise, the Supreme Court's *Aranda* analysis confirms that statutory language addressing timing and dates would constitute procedural aspects of the law affecting the manner and means of enforcement of a right. *See id.* As the amendment addressed only the timing, or the manner and means, for determining whether the conditions prerequisite to a homeowners' association's ability to foreclose its lien had been satisfied, the amendment did not address the substantive rights established by A.R.S. § 33-1807(A). Rather, the clarification provided by the recent amendment was strictly procedural. *See Aranda*, 198 Ariz. at 470-71, 11 P.3d at 1009-10; *see also* A.R.S. § 33-1807(A). If the statutory requirement to prepare and file annual reports each year on a certain date constituted procedural aspects of the law in *Aranda*, the statutory language confirming that the foreclosability of a lien should be evaluated on the date the action is filed is certainly procedural in nature. *See Aranda*, 198 Ariz. at 470-71, 11 P.3d at 1009-10. As the amendment addressed only the manner and means of pursuing the already-established right to foreclose, the amendment was procedural only. As explained by the Arizona Supreme Court, a statutory amendment addressing the "manner and means by which a right . . . is enforced . . ." is purely procedural in nature and thus applies retroactively. *Aranda*, 198 Ariz. at 470, ¶ 12, 11 P.3d at 1009. Therefore, because the amendment to A.R.S. § 33-1807(A) addressed only the procedural aspects of the law and the manner and means for its

enforcement, the amendment must be applied retroactively. *Aranda*, 198 Ariz. at 470-71, 11 P.3d at 1009-10.

C. The Newly-Amended Language Would Be Instructive and Persuasive to This Matter Even if the Amendment Were Not Retroactive.

As explained in the Association's Answering Brief, Arizona law has long established that the time for determining whether a court has jurisdiction over a case and controversy is at the initial filing of the matter. *See* Answ. Br., at 24. The Association submits that the amendment to A.R.S. § 33-1807(A) did not actually alter the meaning of the statute. Rather, the amendment clarified the original intent of the statute in accordance with the controlling case law. In fact, the ruling by the trial court coincided perfectly with the now-amended statutory language. The trial court in this matter actually did what the statute now clearly requires. The trial court held, under the former version of the statute, that the date of the filing of the action was the proper date to determine whether the Association was entitled to foreclose its lien. The statute as amended now confirms with clarity that the trial court was correct in so doing.

The appeal before this Court can be distilled in its simplest form to the question addressed by the amendment. Mejia has argued on appeal that under the pre-amended language of A.R.S. § 33-1807(A), there was a loophole that would allow him to forbear paying assessments to the Association for years, and then

avoid foreclosure by the last-minute delivery of partial payment in the amount of the assessments only. *See* Open. Br., at 19-28. The Association argued that the pre-amended language of A.R.S. § 33-1807(A) did not allow Mejia to frustrate the Association's foreclosure action by payment of assessments only if, as was the case in this matter, Mejia was delinquent in the payment of assessments for more than one year and in an amount greater than $1,200, whichever occurred first. *See* Answr. Br., at 24-31. The Association further argued that based on the pre-amended version of A.R.S. § 33-1807(A), the evaluation of foreclosability should be determined as of the date the foreclosure action was filed. *See id.* The trial court agreed with the Association and found that because Mejia was delinquent in payment of assessments in an amount greater than $1,200 and that he had fail to pay assessments for more than on year as determined on the date the foreclosure matter was filed, the Association was entitled to a judgment foreclosing its lien. *See* Amended Index of Record #76. The newly-amended language of A.R.S. § 33-1807(A) now codifies that the evaluation performed by the trial court was proper. Consequently, even if the newly-amended statute were not retroactively applied (which the Association believes it should be retroactively applied), there would be no reason that this Court could not rely on the newly amended language as persuasive authority to affirm that the trial court's ruling (which ruling would now

be required by the statutory amendment and conforms perfectly to the newly-amended statute) must be affirmed.

III.

CONCLUSION

For the reasons stated herein, the Association submits that the meaning and application of the newly-amended language of A.R.S. § 33-1807(A) has direct bearing on this matter. The central question of the appeal before this Court was settled by the newly-enacted amendment to A.R.S. § 33-1807(A). Moreover, the trial court's ruling and judgment in this matter was in conformance with the requirements of A.R.S. § 33-1807(A) as amended. The Association, therefore, respectfully requests that this Court affirm the judgment of the trial court.

DATED this 27th day of August, 2019.

Respectfully submitted,

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