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

SUPPLEMENTAL BRIEF RE: APPELLEE'S NOTICE OF NEW BINDING AUTHORITY

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This matter came to the court upon the question whether Arizona statute authorized or mandated the foreclosure of a home to satisfy exclusively attorneys' fees driven up by a demand to foreclose a home to satisfy . . . other attorneys' fees masked as assessments in violation of A.R.S. § 33-1807(A) and (J). The Legislature's amendment of the statute while this appeal pends does not change that same drive by the Association to take and auction a home to satisfy the alleged debts owed an attorney. The amendment does not apply. The amendment also does not authorize masking fees as assessments to seek foreclosure. It also does not allow an association to continue with foreclosure once the unpaid assessments, exclusive of those unawarded fees, are paid in full, or allow an association to continue to seek foreclosure over unawarded fees, just because an action seeking the remedy was filed. Nor does the amendment alter the statute's discretionary, equitable decision, which requires the moving party to come to the court having acted equitably.

I. THE STATUTORY AMENDMENT DOES NOT APPLY TO THIS MATTER.

This matter involves the most sacrosanct of vested, substantive rights; ownership of a home. The statute at issue, A.R.S. § 33-1807(A),

carves a narrow exception for requesting judicial interference with that vested substantive right upon proof of a single category of money owed (assessments only) to community associations. In short, the amendment in this matter affected the potential substance of the statutory right to request interference with the vested substantive right of home ownership. It cannot apply. "The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." *Landgraf v. USI Film Products*, 511 U.S. 244, 271 (1994).

A. By plain language, the statute applies only prospectively.

The amended statute only applies prospectively, which is the default application of statutory amendments in Arizona and in the United States Supreme Court. "Unless a statute is expressly declared to be retroactive, it will not govern events that occurred before its effective date." *Garcia v. Browning*, 214 Ariz. 250, 252, ¶ 7 (2007); *Landgraf*, 511 U.S. at 272 ("[P]rospectivity remains the appropriate default rule."). Arizona's test is simple. If the Legislature does not expressly provide for retroactive application, it cannot be applied to events prior to the effective

date. A.R.S. § 1-244; *Garcia*, 214 Ariz. at 252, ¶ 7. The source of that presumption and ban predates the republic and stems from the unfairness of such actions, particularly interference with vested rights and property rights. *Landgraf*, 511 U.S. at 270-272.

Senate Bill 1531 contains no statement of retroactive application, the bare minimum for the "binding" nature of an amendment that the Association argued to this Court.

B. Application of the statute will violate the bar to retroactively interfering with vested, substantive rights.

The bar to retroactive application of a statute cannot be evaded by simply stating the legislation is effective on a certain date or resort to the canon that a court apply the law as it then exists. Rather, the majority in *Landgraf* warned that determination of whether the law applied retrospectively came after determining the effect of such legislation on antecedent events. The majority quoted with approval Justice Story's explanation of the ban, "the ban on retrospective legislation embraced 'all statutes, which, though operating only from their passage, affect vested rights and past transactions.'" *Landgraf*, 511 U.S. at 268–69 (quoting *Society for Propagation of the Gospel v. Wheeler,* 22 F. Cas. 756 (No. 13,156) (CCNH 1814)).

Arizona applies the identical bar to application of a statutory amendment.

> A statute may not, however, "attach[ ] new legal consequences to events completed before its enactment." In other words, legislation may not disturb vested substantive rights by retroactively changing the law that applies to completed events.

San Carlos Apache Tribe v. Superior Court, 193 Ariz. 195, 205, ¶ 15 (1999) (quoting *Landgraf,* 511 U.S. at 270).

A substantive right is not of precise definition, *Allen v. Fisher*, 118 Ariz. 95, 96 (App. 1977), but real property ownership is certainly within that definition, *Finlayson v. Peterson*, 5 N.D. 587, 67 N.W. 953, 954–55 (1896); *cf. Aranda v. ICC*, 198 Ariz. 467, 471, ¶ 17 (2000) ("Property has been defined as any vested right of any value."). In contrast, procedural rights prescribe "the method of enforcing such rights or obtaining redress." *Allen*, 118 Ariz. at 96. A right vests "when every event has occurred which needs to occur to make the implementation of the right a certainty." *Aranda,* 198 Ariz. at 471, ¶ 18.

Mr. Mejia has a vested property right in his home. Again, § 33-1807(A) is a statute that authorizes community association requests to interfere with vested property rights. This is a matter of a community

association asserting that a statutory amendment conferred a right to take a home, which is mistaken under any version of § 33-1807(A) as explained below. For now though, that is an assertion of a statute conferring a right to interfere with vested property rights that did not previously exist, and did not exist at any time prior to the final judgment. The majority in *Landgraf* rejected claimed application of a modified statute conferring damages as upsetting the legal relationship of the parties at the time of the cause of action and the antecedent events. The court found the bar to retroactivity there where the legislation would alter "[t]he extent of a party's liability" and increase "monetary liability." *Landgraf*, 511 U.S. at 283–84. The Arizona Supreme Court has similarly rejected attempted application of statutes to interfere with final workers' compensation awards (property) and water rights (property).

> The Legislature "may certainly enact laws that apply to rights vested before the date of the statute. Such laws, however, may only change the legal consequences of *future* events."

Aranda, 198 Ariz. at 473, ¶ 28 (quoting *San Carlos,* 193 Ariz. at 205).

By the Association's own argument throughout this matter, it cannot claim the application and benefit of the amendment to § 33-1807. Throughout the written materials, the Association asserts a right to

foreclose on a property if $1200 is owed at a certain date regardless whether a negative amount is owed at the time of the court's judgment. That is an argument of a substantive rule, which cannot be conferred retroactively, *Allen*, 118 Ariz. at 96, and certainly not to abridge a vested, substantive right. Statutes "that retroactively alter vested substantive rights violate the due process clause, article II, section 4 of the Arizona Constitution." *San Carlos*, 193 Ariz. at 205–06, ¶ 16.

This is not new ground. The Arizona Supreme Court invalidated legislation much the same as the amendment to § 33-1807, at least if applied retroactively to affect water rights. The Court described the "paradigm of unconstitutional retrospective application" as "changes [that] not only apply to previous conditions but also change the consequences of past events." *San Carlos*, 193 Ariz. at 207, ¶ 21. The court also invalidated provisions "intended to alter the legal consequences of preenactment events." *Id.* ¶ 22. And, more than one hundred years ago, a party secured a statutory amendment intended to alter the statute barring a requested foreclosure. There, the North Dakota Supreme Court held that the respondent failed to comply with statutory notice requirements necessary to obtain a valid foreclosure.

Finlayson, 67 N.W. at 953–54. The respondent attempted to argue validity based upon a statutory amendment altering that notice requirement four years after commencement of the foreclosure proceeding. The court rejected the claim that the amendment was clarifying, and further rejected the request to "allow this statute to have a retroactive effect, and thus validate an absolutely void sale." *Id*. at 955.

The amendments to A.R.S. § 33-1807(A) cannot apply to this matter to interfere with, alter, or destroy Mr. Mejia's vested property rights.

I. THE STATUTORY AMENDMENT CREATING A HOST OF CHANGES TO § 33-1807 THIRTEEN YEARS AFTER THE FACT IS NOT CLARIFYING.

The Association also cannot claim that the amendment is clarifying of what it claimed in the Notice of Binding Authority to be the routine interpretation of the trial courts. First, it is troubling that the Association would assert its position to reflect the standard interpretation of a statute in a case in which it successfully struck from the record the numerous trial court decisions to the contrary. (*Compare* Notice of Binding Authority, at 3 *with* I.R. 44, (moving to strike as improper the trial court rulings consistent with Mr. Mejia's argument)). Second, the amendment cannot be treated as clarifying because it was made thirteen years after the statutory language at issue was added. Third, the amendment

contains a litany of changes to § 33-1807, reflecting substantive changes, not clarifications. And fourth, though this court need not reach the issue, absent perhaps a clarification to a statute within one year, in Arizona with its legislative term limits, the concept of clarifying legislation needs to be abandoned as it rests on a presumption no longer in existence of a legislative body that generally remains static.

At present, Arizona courts will indulge the concept that legislation is meant to merely clarify what was intended by earlier legislation if the amendment is close in time and does not create substantive changes. "When an amendment is enacted 'after a considerable length of time and constitutes a clear and distinct change of the operative language, it is an indication of an intent to change rather than clarify the previous statute." *E.g.*, *San Carlos*, 193 Ariz. at 209–10, ¶ 31 (refusing to give weight to bill with significant departures to prior law even twenty-five years before). Examples of passages of time that are not considered close in time are twenty-five years and seventeen years.

> This useful canon of statutory construction can assist with interpretation when both statutes were passed by the same Legislature or perhaps within a few years of each other. But to suggest that the 1995 Legislature knows and can clarify what the 1919 or 1974 Legislatures intended carries us past

> the boundary of reality and into the world of speculation. We refuse to cross that border.

San Carlos, 193 Ariz. at 209, ¶ 30. This is a rare, narrow exception to the common-sense canon and presumption that an amendment to a statute is meant to change the meaning of the statute in some way. *E.g.*, *Ruben v. Arizona Med. Bd.*, 1 CA-CV 18-0079, 2019 WL 471031, at *6, ¶ 26 (Mem. Dec. App. Feb. 7, 2019). Some courts have also set a threshold for reliance on this canon of finding ambiguity in a near-in-time, prior version of the statute. *Id.* The Association though cannot argue ambiguity for a statute that it asserted to this Court as "expressly explained" and "clearly indicates" their argued interpretation. (Answering Br., at 25, 28) Against that, Appellant's interpretation was described as "tortured" and "troublesome." (*Id.* at 25, 28)

Here, the amendment relied upon by the Association for claims about subsection (A) alters language enacted thirteen years ago. S.B. 1008 (2006 47th Leg. Second Reg. Session). This was during Arizona's time period of legislative term limits. The members of both chambers have turned over, some several times. This Court has rejected claims of clarifying language under near identical terms. In *Ruben*, the statute was amended seventeen years later. The question was regarding the written

findings required of the subject state board. This Court found that because the amendment further required forwarding findings to leaders of the Legislature, the amendment was a significant "change" to the prior law. *Ruben*, at *6, ¶ 27. Similarly, in *Siete Solar, LLC v. ADOR*, 1 CA-CV 15-0126, 2015 WL 8620672, at **4–5, ¶¶ 21-22 (Mem. Dec. App. Dec. 10, 2015), this Court rejected the same argument for an amendment fourteen years later adding definitions to tax statutes.

Additionally, the amendment to § 33-1807 contained significant additions to the prior version of the statute. The bill also went through phases with negotiations and arguments over changing the accounting protections in subsection (J). Compare Introduced Version of S.B. 1531 with Senate Engrossed Version of S.B. 1531; *see also* Alston Floor Amendment to S.B. 1531. The final bill included the change of adding protective written notices to homeowners prior to not just foreclosure actions, but any transfer of debt disputes to an attorney. That is brand new subsection (K). The final bill also struck negotiated resolutions regarding the many new changes, stating a prospective date for some provisions in the year 2020. That provision is another additional subsection, (L), again providing homeowners with a mandate that a

statement of account be provided to all homeowners at the same frequency with which assessments are issued by the Association.

The bill made significant changes to § 33-1807 thirteen years after the fact, including the addition of significant notice provisions. That indicates a change to what the Association claims has always been the law, a right to take someone's home if they simply file a lawsuit. That has never been the law and is not even the law under the amended version of § 33-1807 that adopted language sought by the Association. Certainly, that amendment changing the statute to what the Association argues was previously and silently the law further indicates its error.

II. EVEN IF APPLICABLE, THE AMENDMENT DOES NOT CHANGE THE ISSUE OF A VOID JUDGMENT AND THE ASSOCIATION'S MISTAKEN ASSERTION OF A "RIGHT" TO AN INHERENTLY EQUITABLE REMEDY.

The issue before this Court remains the same, did the Legislature in § 33-1807(A) authorize (or by the Association's claim, mandate) the foreclosure of a home for auction to solely satisfy attorneys' fees multiplied in an attempt to recover, hidden attorneys' fees simply because the Association was authorized to file the suit for other satisfied amounts. The answer remains no for three reasons.

A. The Amendment left in place the statutory protections violated by the Association's action. An association may not mask attorney fees as assessments, and the lien for all fees and costs other than assessments remains non-foreclosable.

As this Court is aware, the Legislature carefully drafted the threshold for judicial foreclosure at an amount owed for assessments only of $1200 or delinquency of one year or more. A.R.S. § 33-1807(A). All other amounts are excluded from that equation, including "collection fees" and "reasonable attorney fees." *Id*. This Court has previously published decisions admonishing against attempts to unilaterally assess against homeowners allegedly incurred attorney fees. *Bocchino v. Fountain Shadows Homeowners Association*, 244 Ariz. 323, 325-26, ¶¶ 13-15 (Ct. App. 2018). This matter represents that unlawful practice now carried over in violation of § 33-1807(A) by mislabeling those unawarded attorney fees as assessments in an attempt to take a man's home for their satisfaction.

As outlined in the Reply Brief, the Association mislabeled even to this Court $3,803.96 in unawarded attorneys' fees as alleged assessments authorizing judicial foreclosure and auction and included $480 in fines toward that threshold as well. (Reply Br., at 9-13) Nothing in current or amended § 33-1807(A) altered the Legislature's carefully crafted bar

against that practice to restrict foreclosure actions to examine only claims for actual assessments owed. In this matter, from the first day that Mr. Mejia appeared in court through counsel, there were none owed. The statute still bars foreclosure of the "lien for monies other than 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." A.R.S. § 33-1807(A).

By the Association's argument, the right to file the action conferred the right to take Mr. Mejia's home even if the changed circumstances were such that the only matter at issue and driving up the cost was chasing unawarded attorney fees. The Legislature was aware of this Court's warning against that practice, *Greenwood Villas Homeowners' Ass'n v. Block*, 1 CA-CV 15-0210, 2016 WL 5074298, at *4, ¶¶ 23-24 (App. Sept. 20, 2016), and did nothing in the amendment to bless it. Yet, that is the interpretation that the Association now wants to give the amended version of § 33-1807, foreclosure solely for unawarded attorney fees and fees expended chasing them. As demonstrated above, the Legislature did not eliminate the bar to foreclosure for those monies.

The Association's selfish construction conflicts with the obligation to interpret statutes to be consistent with all acts *in pari materia* and to harmonize them. *State v. Pinto*, 179 Ariz. 593, 596 (App. 1994). The Association's interpretation would create irreconcilable conflict between that bar to foreclosure for attorney fees and collection costs and the new amendment setting the timing of analysis on that threshold. That too would inherently conflict with the nature of the remedy for a valid, successful suit pursuant to § 33-1807(A); a discretionary, equitable decision.

B. The Amendment did not change that the foreclosure decision remains a discretionary, equitable decision.

Even post-amendment, the remedy available for a viable judicial foreclosure action remains discretionary and equitable. Pre-amendment and post-amendment, upon the necessary proof, a lien "*may be* foreclosed." A.R.S. § 33-1807(B) (emphasis added). That is the authorization of a discretionary decision. Additionally, a foreclosure action remains an action in equity upon which a court exercises equitable authority. *Ticktin v. W. Sav. & Loan Ass'n*, 8 Ariz. App. 63, 65 (1968); *Chaparral Dev. v. RMED Int'l, Inc.*, 170 Ariz. 309, 311 n.1 (App. 1991).

The Association's argued interpretation of both pre- and post-amendment § 33-1807(A) renders the nature of the potential remedy instead an inflexible, statutory right. But Arizona courts have long held that "he who seeks equity must do equity." *E.g.*, *Ticktin*, 8 Ariz. App. at 65. An interpretation of any version of § 33-1807 to state that after all assessments (and more) are satisfied, an Association may take a home to satisfy only collection costs that may otherwise be reduced to a judgment lien does violence to the equitable powers expected of courts.

C. The Amendment does not allow an association to continue with foreclosure once an owner pays (or, as in this case, overpays), in full, the unpaid assessments.

The Association misreads the Amendment to suggest that its "right" to foreclose is fixed at the time an action is filed and that a subsequent payment that eliminates all unpaid assessments, but not unawarded attorneys' fees, is insufficient to prevent foreclosure. In essence, the Association argues that the Amendment codifies its argument that once it files an action to foreclose the only way to avoid foreclosure is to also pay every dime in unawarded attorneys' fees and costs that an association may demand.

In this case, this presumably includes unawarded attorneys' fees purportedly incurred prelitigation that the Association's counsel blended into the so-called "principal sum" and made no effort to either break down or highlight for Mr. Mejia or the trial court to distinguish. It also includes the unawarded fees that the Association's lawyers claim they incurred in bringing the action. The Association now contends that the Amendment bolsters their entitlement to foreclose over the unawarded attorneys' fees even when it is undisputed that the owner has paid the amounts initially creating the right to seek the remedy of foreclosure.

Nothing in the Amendment supports such a reading. Nothing in the statute abrogates this Court's holding in *Bocchino* or the long line of cases holding that courts, not putative judgment-creditors, decide whether and in what amount to award attorneys' fees and that the "right" to fees is determined at the end, and not the beginning, of a case.

The Amendment merely provides that the statutory trigger of the availability of foreclosure as a remedy (*i.e.*, $1,200 or one year) is "determined on the date the action is filed." It does not state that the availability of the remedy becomes a vested, absolute right. It does not state that the unawarded fees and costs that are or will be incurred must

be paid to avoid a court awarding the remedy. And it certainly does not state that the remedy of foreclosure is fixed at the time of filing and can only be cured by paying the plaintiff a king's ransom in the form of unawarded attorneys' fees and costs that, if paid, would never be awarded.

The same outcome would be warranted under the Amendment as under the original statute. When Mr. Mejia tendered his check for $5,000.00, it was for substantially more than the "principal sum," when stripped of the unawarded attorneys' fees included in it, it eliminated the availability of the foreclosure remedy.

III. CONCLUSION.

No portion of amended A.R.S. § 33-1807 may apply to this matter or these previous events to alter or interfere with Mr. Mejia's vested property rights. Regardless, the issue remains the same, a negative judgment that included unawarded attorney fees in violation of A.R.S. § 33-1807(A). Or, put another way, a judicial order of foreclosure to satisfy alleged debts entirely distinct from the assessments completely paid months before the final judgment. The statute did not, does not, and will not authorize that.

DATED this 27th day of August 2019.

By: /s/ David E. Wood

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