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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Martha A. McNair, an individual,

Plaintiff,

v.

Maxwell & Morgan, P.C., *et al.*,

Defendants.

No. CV14-00869-PHX-DGC

ANSWER

(Assigned to the Hon.
David G. Campbell)

For their Answer to Plaintiff's Complaint, Defendants Maxwell & Morgan, P.C., Charles E. Maxwell, and W. William Nikolaus admit, deny, and allege as follows:

1. Defendants admit the allegations contained in Paragraph 1 of the Complaint.
2. Defendants admit Maxwell & Morgan, P.C. is an Arizona law firm but deny the remainder of Paragraph 2 of the Complaint upon the grounds that the same calls for legal conclusions.
3. Defendants admit Defendant Maxwell is a lawyer and resident of Arizona but deny the remainder of Paragraph 3 of the Complaint upon the grounds that the same calls for legal conclusions.
4. Defendants admit Defendant Nikolaus is a lawyer and resident of Arizona but deny the remainder of Paragraph 4 of the Complaint upon the grounds that the same calls for legal conclusions.

1 5. Defendants deny Paragraph 5 of the Complaint upon grounds that the same
2 calls for legal conclusions. To the extent any facts are construed to be alleged they are
3 denied.

4 6. Defendants deny Paragraph 6 of the Complaint upon grounds that the same
5 calls for legal conclusions. To the extent any facts are construed to be alleged they are
6 denied.

7 7. To preserve the defense Defendants deny subject matter jurisdiction is proper
8 in this Court as alleged in Paragraph 7 of the Complaint. Defendant raised similar challenges
9 to the debt collection practices at issue here in the Maricopa County Superior Court at
10 CV2012-093147. The Superior Court rejected those challenges. The issues in this suit are
11 inextricably intertwined with the judgment and with the decisions of the Superior Court on
12 plaintiff's motions to stop or set aside the sheriff's sale, thus barring subject matter
13 jurisdiction here under the *Rooker-Feldman* doctrine and/or issue preclusion and/or claim
preclusion.

14 8. Defendants admit the allegations contained in Paragraph 8 of the Complaint,
15 but deny subject matter jurisdiction is proper in this Court as explained above.

16 9. Defendants admit the allegations contained in Paragraph 9 of the Complaint.

17 10. Defendants deny the annual assessment amount alleged in Paragraph 10 of the
18 Complaint, but admit the remaining allegations contained in this Paragraph.

19 11. Defendants deny that Defendant Nikolaus represented Neely Commons at all
20 relevant times, but admit the remaining allegations contained in Paragraph 11 of the
21 Complaint.

22 12. Defendants admit the Justice Court suit was filed as alleged in Paragraph 12 of
23 the Complaint, but deny that Plaintiff accurately identifies all relief sought or obtained in that
24 suit. Defendants further deny that Defendant Nikolaus filed the Justice Court lawsuit, but
25 admit the remaining allegations contained in Paragraph 12 of the Complaint. The Justice
Court complaint speaks for itself.

26 13. Defendants admit the allegations contained in Paragraph 13 of the Complaint,
27 but affirmatively allege that McNair failed to appear in the suit despite service of the suit,
28

1 thus resulting in a default judgment after which McNair promised, but failed, to pay all
2 amounts owed.

3 14. Defendants admit judgment was entered in the Justice Court suit as alleged in
4 Paragraph 14 of the Complaint, but deny that Plaintiff accurately identifies the date of the
5 judgment or all relief obtained in that suit, or that Defendant Nikolaus obtained the
6 judgment. The Justice Court judgment speaks for itself.

7 15. Defendants admit the Superior Court suit was filed as alleged in Paragraph 15
8 of the Complaint, but deny that Plaintiff accurately identifies all relief sought or obtained in
9 that suit. Defendants further deny that Defendant Nikolaus filed the Superior Court suit, but
10 admit the remaining allegations contained in Paragraph 15 of the Complaint. The Justice
11 Court complaint speaks for itself.

12 16. Defendants are without information sufficient to know what Plaintiff means by
13 the assertion in Paragraph 16 of the Complaint that the \$4,027.24 sought in the Superior
14 Court suit included amounts that “made up” the First Judgment and, therefore, deny the
15 same. The Justice Court judgment and the Superior Court complaint speak for themselves.

16 17. Defendants deny Plaintiff’s characterization of the facts contained in Paragraph
17 17 of the Complaint. That said, the Stipulation was signed and the Order lodged. The
18 Stipulation and Order speak for themselves.

19 18. Defendants deny the allegations contained in Paragraph 18 of the Complaint
20 that the terms of the Stipulation were exclusively drafted by Defendants. Plaintiff suggested
21 the basic payment terms that are the basis of the Stipulation, to which the Association
22 agreed.

23 19. Defendants admit the allegations contained in Paragraph 19 of the Complaint.

24 20. Defendants deny that Plaintiff has accurately recited the terms of the
25 Stipulation in full as alleged in Paragraph 20 of the Complaint. The Stipulation speaks for
26 itself.

27 21. Defendants deny that Plaintiff has accurately recited the terms of the
28 Stipulation in full as alleged in Paragraph 21 of the Complaint. The Stipulation speaks for
itself.

1 22. Defendants deny the allegations contained in Paragraph 22 of the Complaint.

2 23. Defendants deny the May 2013 payment was the eleventh monthly payment
3 owed, or that Plaintiff has accurately recited the May correspondence in full as alleged in
4 Paragraph 23 of the Complaint. Plaintiff's payments and May 2013 correspondence speak
5 for themselves.

6 24. Defendants deny the allegations contained in Paragraph 24 of the Complaint.
7 At best, some payments and the letter were addressed to some Defendants. Plaintiff's
8 payment and correspondence speaks for themselves.

9 25. Defendants deny the allegations contained in Paragraph 25 of the Complaint.

10 26. Defendants admit there was a communication with Plaintiff in August 2013,
11 but otherwise deny Plaintiff's characterization of the facts contained in Paragraph 26 of the
12 Complaint. Defendant Nikolaus' email of August 21, 2013, speaks for itself.

13 27. Defendants deny that Plaintiff has accurately recited the September 2013
14 correspondence in full as alleged in Paragraph 27 of the Complaint. Plaintiff's September
15 2013 correspondence speaks for itself.

16 28. Defendants admit Plaintiff made the untimely and deficient payment of
17 \$275.74 as alleged in Paragraph 28 of the Complaint, but deny the remaining allegations
18 contained in that Paragraph.

19 29. Defendants deny the allegation that Plaintiff paid all amounts owed under the
20 Stipulation as alleged in Paragraph 29 of the Complaint, but admit the Stipulation was
21 breached and was a valid, final judgment and provided bases for execution.

22 30. Defendants admit that a praecipe was filed on or about November 6, 2013, and
23 that a writ of special execution for sheriff's sale was obtained, but otherwise deny Plaintiff's
24 characterization of the facts as alleged in Paragraph 30 of the Complaint. The praecipe and
25 writ of special execution speak for themselves. Defendants further affirmatively allege that
26 Plaintiff was aware of the contents of the praecipe and writ of special execution prior to the
27 sheriff's sale and that she had the opportunity to, and did, object and submit full briefing and
28 argument, but her requests were denied by the Superior Court.

1 31. Defendants deny the allegations contained in Paragraph 31 of the Complaint.
2 The Stipulation and Order speak for themselves.

3 32. Defendants deny the allegations contained in Paragraph 32 of the Complaint.
4 The Stipulation speaks for itself.

5 33. Defendants deny the allegations contained in Paragraph 33 of the Complaint,
6 but admit the Stipulation was drafted, filed, and executed upon after Plaintiff breached the
7 Stipulation. The Stipulation speaks for itself.

8 34. Defendants admit that the Superior Court did issue a writ of special execution
9 in or about November 2013 that included the sale of Plaintiff's property as alleged in
10 Paragraph 34 of the Complaint, but Defendants affirmatively state that the terms of the writ
11 were based upon terms agreed to by Plaintiff and/or authorized by the Stipulation and Order,
12 and/or the Superior Court.

13 35. Defendants deny the allegations contained in Paragraph 35 of the Complaint.
14 The writ speaks for itself.

15 36. The writ and amounts owed under the Stipulation speak for themselves.
16 Nevertheless, Defendants affirmatively allege that further analysis identified a clerical error
17 in the writ pursuant to Rule 60(a), Arizona and/or Federal Rules of Civil Procedure, wherein
18 a late payment of \$275.74 was inadvertently not included in the writ. Plaintiff's late
19 payment did not cure the breach of the Stipulation, and Plaintiff previously raised, in
20 Superior Court, the contention that all payments had not been accounted for. The Superior
21 Court, however, allowed the sale to proceed and did not set it or the Judgment aside, which
22 was correct because the clerical error had no impact on the ultimate outcome of the sale. To
23 the extent the allegations contained in Paragraph 36 of the Complaint allege any liability as a
24 result of the clerical error, the same are denied.

25 37. Defendants admit the allegations contained in Paragraph 37 of the Complaint.

26 38. Defendants are without information sufficient to form a belief as to the
27 allegations in Paragraph 38 of the Complaint and, therefore, deny the same.

28 39. Defendants are without information sufficient to form a belief as to the
allegations in Paragraph 39 of the Complaint and, therefore, deny the same. Defendants

1 further affirmatively allege that Plaintiff's failure to comply with her obligations caused any
2 purported loss.

3 40. Defendants deny the allegations contained in Paragraph 40 of the Complaint.

4 41. Defendants deny the allegations contained in Paragraph 41 of the Complaint.

5 42. Defendants deny the allegations contained in Paragraph 42 of the Complaint.

6 43. Defendants deny the allegations contained in Paragraph 43 of the Complaint.

7 44. Defendants deny the allegations contained in Paragraph 44 of the Complaint.

8 45. Allegations of the Complaint not specifically admitted are denied.

9 **Affirmative Defenses**

10 Plaintiff's claims and damages are or may be barred in whole or in part by: failure to
11 state a claim upon which relief may be granted; lack of subject matter jurisdiction,
12 specifically including under the *Rooker-Feldman* doctrine (to preserve the defense); statute
13 of limitations; issue and claim preclusion (to preserve the defenses); clerical error under Rule
14 60(a), Arizona or Federal Rules of Civil Procedure; bona fide error defense; the Justice Court
15 judgment at CC2009-723602 and the Superior Court judgment and decisions at CV2012-
16 093147; accord and satisfaction; failure to mitigate damages; case law; breach of the
17 Association's governing documents, and the Stipulated Judgment; release; waiver; estoppel;
18 laches; comparative fault; and unclean hands. Additionally, Plaintiff's damages are or may
19 be limited by her failure to seek excess proceeds following the sheriff's sale or by lien
20 amounts asserted by or owed to other creditors against the property. Defendants assert the
21 right to assert additional defenses that may not be known or apparent to Defendants at the
22 present time or which will become known or apparent as a result of discovery in preparation
23 for trial.

24 WHEREFORE, having answered the allegations of Plaintiff's Complaint, Defendants
25 pray that the same be dismissed with prejudice, that Plaintiff take nothing thereby, that
26 Defendants be awarded their attorneys' fees and costs incurred herein under Association
27 governing documents and the FDCPA, and for such other and further relief as the Court
28 deems just and proper.

1 DATED this 9th day of September, 2014.

2 MAXWELL & MORGAN, P.C.

3
4 By /s/ Paul Neil

5 Brian W. Morgan, Esq.

6 Paul R. Neil, Esq.

7 4854 East Baseline Road, Suite 104

8 Mesa, Arizona 85206

9 *Attorneys for Defendants Maxwell & Morgan,*

10 *P.C., Charles E. Maxwell, and*

11 *W. William Nikolaus*

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 9, 2014 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and for transmittal of Notice of Electronic Filing to the following CM/ECF registrants:

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