

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-090335

12/20/2002

HONORABLE ROBERT L. GOTTSFIELD

CLERK OF THE COURT
M. Johnson
Deputy

FILED: 12/25/2002

TORRE BLANCA ASSOCIATION

MARK E LINES

v.

DENNIS M NEWMAN, et al.

JACK H SIMON

MINUTE ENTRY

8:00 a.m. This is the time of continued hearing on various motions. Counsel Charles Maxwell is present telephonically on behalf of plaintiff. Counsel Jack H. Simon is present in person on behalf of defendant.

Court Reporter, Mike Haley, is present.

Arguments are held.

After argument,

IT IS ORDERED taking the matter under advisement.

8:35 a.m. Matter concludes.

LATER:

The court has received and read: plaintiff's Motion For Summary Judgment, defendants' Response, plaintiff's Reply, Notice Of Filing Accounting Pursuant To Court Order and Amended Accounting, plaintiff's Statement Of Facts, plaintiff's Motion To Strike Response, defendants' Response To Plaintiff's Statement Etc., defendants' Evidence Index Etc., defendants' Motion To Strike Molly Spector's Affidavit, defendants' Motion to Accelerate Hearing On Motion (re Molly Spector), defendants' Motion To Vacate Portion Of The September 24, 2002 Minute Order, plaintiff's Response thereto, and defendants' Reply. The court has also received and read

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plaintiff's additional Reply dated December 17, 2002 and Response to Motion to Strike of same date and defendants' Reply to Response of December 18, 2002. The court has also reviewed its prior Orders and in particular the Orders of July 17, August 9, August 19, September 24 and October 16, 2002.

The court now Finds, Determines and Orders as follows:

1. Granting, in part, defendants' Motion to Vacate a portion of the court's September 24, 2002 minute entry, in that the court agrees with defendants that Dennis and Marcia Newman are not bound by the justice court judgment and that their interest in the real property is not included in the lien of the judgment. Until the justice court judgment is set aside as void for some reason it would continue to bar Michelle from contesting the justice court judgment and any lien assessed on the property in connection therewith except Michelle should always have the right to contest that any amounts accruing since the date of the judgment are improper. As the court understands it Commissioner Woodburn has denied a motion by Michelle Newman to set aside the justice court judgment without prejudice to her contesting the same in the justice court and that the subsequent motion to set aside judgment as void was denied in the justice court. If that determination was not appealed then the validity of that judgment is the law of the case in this matter as to Michelle Newman. This court assumes that the justice court held that the original judgment was valid as against Michelle so that Michelle may still contest, as she is doing in the instant pleadings, the present amount of the judgment and lien impressed on the real property. This court specifically determines that Michelle's co-tenants, her parents Dennis and Marcia Newman, are not, based on this record, in privity with Michelle or bound in any manner by the judgment or judgment lien, except that the judgment lien may constitute a valid lien against an undivided one-third interest (i.e. Michelle's interest) in the real property. (Although the judgment reflects it is entered against Michelle Newman and John Doe Newman, plaintiff has never claimed a judgment was entered against any other person but Michelle. The defendants also apparently hold the real property in fee as tenants in common.)
2. The court has previously denied plaintiff's Motion to Continue Rule 26.1 Disclosure Requirements agreeing with defendants it would be helpful in framing a response to plaintiff's motion for summary judgment; has granted defendants' Rule 56 (f) motion to permit further discovery before the court held argument on the motion for summary judgment; granted defendants' motion to compel production of the occupant ledgers showing charges made and payments received and proof of payments made by plaintiff to its attorneys (i.e. plaintiff's Amended accounting dated October 8, 2002 advises that of the amended amount now claimed of \$3,888.21, a certain portion (in addition to the \$500 attorney's fees awarded in the justice court judgment) are continuing and accruing attorney's fees of \$122.50, 56.00, 274.50, 835.50, 487.10, or \$1,775.60); denied mutual requests for sanctions,; and permitted a further delay for defendants to respond to the motion for summary judgment (their having just received

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the occupant ledger a week before the scheduled hearing). Plaintiff somehow feels these decisions were improper and show a bias against plaintiff or its attorneys. The court regards them as necessary in this hotly contested matter to determine what the facts are in order to decide plaintiff's motion for judgment. Thus in the latest accounting in October plaintiff concedes that three additional payments made by defendants have been credited (made during the period Jan-March 2002), so the delay has been beneficial and important to both parties in this search for the truth.

3. With respect to plaintiff's Motion For Summary Judgment the court determines as a matter of law (based on its assumption the original judgment remains valid against Michelle Newman) that fact issues remain with respect to all defendants as set forth below:

A. With respect to Michelle the court finds as follows:

- a. She is bound by the \$130 specified in the judgment (as well as all other terms therein) until the judgment is set aside. She may of course show that the \$130 was no longer due on and after a certain day because the judgment by its terms assesses \$130 "until all amounts due and owing under this Judgment are paid in full".
- b. She is bound by the assessment of "all reasonable costs and attorney fees incurred by Plaintiff after entry of this Judgment in collecting the amounts listed in this Judgment". There will need to be further briefing of the issue whether she may contest the reasonableness of the costs and attorney's fees assessed or is she foreclosed by res judicata, as argued by plaintiff, or collateral estoppel because of an Order of Continuing Lien on Earnings Upon Answer of Garnishee entered August 31, 2001. At the moment the court assumes she may contest reasonableness. (As the court also understands it Michelle has argued to the justice court and lost on the issue that the default judgment was void because the complaint did not pray for accruing attorney's fees and costs and thus was erroneously set forth in the judgment. Apparently that justice court determination was not appealed and thus is binding on this court so that no provision of the judgment can now be claimed to be void.)

B. With respect to Dennis and Marcia the following questions of fact appear to remain.

- a. Is the amount of monthly assessment as to these defendants, \$115 (year 2001), \$118 (2002) or the \$130 charged by plaintiff as set forth in the Amended Accounting? What is unpaid in connection therewith? Have they been assessed a proper late fee and interest?
- b. Is the assessment of costs and attorney's fees by the plaintiff as reasonable to them and properly assessed prior to a judgment being entered against them.

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C. Fact issues common to all parties (and additional legal issues to be resolved)

- a. Was there an agreement between Michelle and plaintiff whereby Michelle would pay the amount of the judgment and the accruing monthly installments in return for an itemization of amounts owed? If so was the itemization provided? What is the effect of any failure to itemize if such failure is shown?
- b. Did the property manager (Cuellar) give Michelle (Brian Galindo) a receipt indicating all assessments were paid in full through February 28, 2002 (re waiver and /or estoppel issues) or was the receipt solely to show she had paid for February 2002 or for some other purpose?
- c. Have the defendants paid all amounts due and owing (\$3,888.21) and if not what remains to be paid? What is the effect of the Cuellar Occupant Ledger allegedly showing defendants had a credit balance of \$17.50 as of the date the lawsuit was filed if attorney's fees were not included?
- d. Were charges for attorney's fees and costs demanded against all parties reasonable under the circumstances? Could such a demand be made against Dennis and Marcia who are not bound by any judgment requiring payment of fees and costs prior to a court determination. Is an expert attorney witness required in connection with plaintiff's demand for attorney's fees and costs assessed as part of a judgment requiring payment of "reasonable costs and attorney fees" or for the case against Dennis and Marcia?
- e. Has plaintiff demanded that defendants pay all of the monthly assessments coming due in 2002 in advance and at one time? If so, is this permissible under the circumstances although permissible under statute (§33-1807A).
- f. Is it true as alleged by plaintiff that \$2275 of the amount requested (\$3,888.21 now that three additional payments of \$486.91 have been credited to defendants) is attorney's fees and, if so, is that reasonable under the circumstances?
- g. Did plaintiff accelerate payment of the monthly assessment and if so was it proper? If plaintiff has that right must notice be given of same prior to such acceleration?
- h. Is there any merit to defendants' argument that a judgment lien is not a foreclosable lien in this situation (pg. 12, Response to Summary Judgment)? Was a lien waived by filing suit against only one of three debtors? Is it equitable to permit a foreclosure under the circumstances?
- i. What exactly was the issue (issues) decided in the recent justice court proceeding and who does it bind (court has no pleadings re this).
- j. Were defendants ever contacted prior to plaintiff commencing suit with a demand for payment and statement of account? If not, what is the legal effect if any, of same?
- k. Have all assessments and late fees for the year 2002 been paid in fact as alleged by defendants?

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4. Denying all motions not specifically referred to including defendants' Motion to Strike Molly Spector's Affidavit which the court believes only goes to weight and not admissibility.
5. Under the circumstances setting the following jury trial and deadlines:

IT IS ORDERED setting this case for a **jury trial on March 26, 2003 at 9:30 a.m.**

Estimated length of trial: 3 days.

THIS IS A FIRM TRIAL SETTING. A MOTION TO CONTINUE BASED ON LACK OF PREPARATION WILL NOT BE GRANTED.

1. Discovery shall be completed on or before **February 14, 2003**.
2. Final Supplemental Disclosure statements shall be completed on or before **February 3, 2003**.
3. A final pre-trial conference is set for **March 19, 2003 at 9:00 a.m.**
4. A joint pretrial statement in accordance with Rule 16(d), Arizona Rules of Civil Procedure, shall be due at the time of the pre-trial conference.
5. Jury Instructions are to be provided at the pre-trial conference.
6. All Motions in Limine shall be filed 30 actual days (Sun.-Sat.) before the trial date. Responses shall be filed 10 actual days (calendar) before the trial date. No replies allowed. All Motions in Limine shall be faxed to Court and counsel. All Motions in Limine shall be heard on **March 19, 2003 at 9:00 a.m.** (30 min.).
7. At the pre-trial conference, counsel shall provide the Court with copies of any deposition transcripts to be read to the jury. The offering party should highlight the portions to be read. The other side should highlight Rule 106 additions. Any objections for the Court to rule on should be clearly marked in the margin.
8. In the ordinary case, counsel may assume the jury will be picked and opening statements will take place in the morning. Witnesses will then be called on the first day. Trial days are normally 9:30 a.m. to 12:30 p.m., and 1:30 p.m. to 4:45 p.m., four days a week (Monday - Thursday).
9. At the pre-trial conference, counsel shall be prepared to discuss:

(a) time limits in voir dire, opening statements, examination of witnesses and closing statements.

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(b) stipulation as to the foundation and authenticity of exhibits.

(c) preliminary jury instructions.

10. Counsel shall make arrangements with the Clerk of the Court for marking exhibits 5 days prior to trial date.

11. One day's jury fees will be assessed unless the Court is notified of settlement before 2:00 p.m. on the judicial day before trial.

IT IS FURTHER ORDERED that the parties shall conduct a settlement conference on or before **March 3, 2003** with the Alternative Dispute Resolution section of the Superior Court with a Judge Pro Tem.