Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-055035 05/12/2020

HONORABLE GARY L. POPHAM JR.

CLERK OF THE COURT
W. Tenoever
Deputy

PALM TERRACE CONDOMINIUM ASSOCIATION

KATHRYN A BATTOCK

v.

MAGTON L L C

JONATHAN A DESSAULES

COMM. POPHAM

MINUTE ENTRY

The Court is in receipt of Defendant Magton, L.L.C.'s *Motion to Set Aside Default Judgment and for New Trial Pursuant to Rule 59* (filed with the Court on March 12, 2020) and Plaintiff Palm Terrace Condominium Association's response and supplemental response objecting to same. No *Reply* was filed. While oral argument was requested, the Court finds that neither oral argument nor additional briefing would operate to benefit or aid the Court in addressing the issues presented by Defendant's *Motion* and, as such, oral argument is deemed unnecessary. It is further noted that, as Plaintiff Palm Terrace Condominium Association ("PTCA") argues, many (if not all) of the arguments raised by Defendant Magton in its present *Motion* were previously addressed by this Court when the Court, on February 27, 2020, entered Judgment by Default against Defendant Magton and in favor of Plaintiff PTCA.

Nevertheless, Defendant Magton seeks an order pursuant to Rule 60(b), Arizona Rules of Civil Procedure, setting aside the Default Judgment entered against it or an order pursuant to Rule 59 granting it a new trial. In addition, Magton requests in the alternative that this Court deem portions of the Judgment "satisfied."

First, while Defendant Magton asserts that it has meritorious defenses to Plaintiff PTCA's *Complaint,* Defendant Magton (although properly served as required by Rule 4.1, Rules of Civil Procedure) did not timely appear in response to PTCA's *Complaint* in January 2020 and does not offer any explanation as to why it failed to file a timely Answer or otherwise defend. Instead, Defendant Magton argues that the Default Judgment is void because this Court lacked jurisdiction to order foreclosure, as Magton had made a partial payment on the eve of the default hearing of the monies PTCA claimed it was owed and had previously made repairs to the condominium unit at issue. Notwithstanding Magton's assertion, Magton, due to its failure to timely respond and defend, was in default and, as a result, all of the facts alleged in PTCA's *Complaint* were deemed admitted by operation of Rule 55. Magton's argument that it has evidence (most of which, the Court notes, dates back to 2017 to 2019 – prior to PTCA's *Complaint* – and none of which is newly discovery) to dispute PTCA's claims is misplaced due to Magton's failure to timely respond and defend.

Furthermore, where, as here, judgment is challenged as void, the defendant bears the burden of demonstrating his entitlement to have the judgment set aside. *Miller v. Nat'l Franchise Servs., Inc., 167 Ariz. 403, 406, 807 P.2d 1139, 1142 (App. 1991)*. Only errors that undermine jurisdiction render a judgment void for purposes of Rule 60(b)(4). *See, Ezell v. Quon, 224 Ariz. 532, 537, 233 P.3d 645, 650 (App. 2010)*. Defendant Magton has shown no errors undermining jurisdiction and, therefore, has failed to meet its burden.

Additionally, Defendant Magton's argument, relying primarily upon the California case *Huntington Continental Townhouse Ass'n, Inc. v. Miner, 179 Cal.Rptr.3 47 (2014)*, that this Court was divested of jurisdiction to order foreclosure as a result of Defendant Magton's payment of $5,850 toward the monies Plaintiff claimed it was owed flies in the face of A.R.S. § 33-1256. A.R.S. § 33-1256 clearly and specifically states that a condominium association "has a lien on a unit for any assessment levied against that unit from the time the assessment becomes due" and that the

> lien for 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 may be foreclosed…if the owner has been delinquent in the payment of the monies secured by the lien…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. § 33-1256(A). As alleged in Plaintiff PTCA's *Complaint* and as argued by PTCA at the February 27 default hearing and in response to Magton's present *Motion*, Magton was delinquent in paying monthly assessments for a period longer than a year and for an amount greater than $1,200 when PTCA's *Complaint* was filed. Plaintiff PTCA made a clear showing that it was

entitled to foreclosure pursuant to A.R.S. § 33-1256, including an award for reasonable attorney fees and costs (as required by A.R.S. § 33-1256(H), and the same authority equipped this Court with the jurisdiction to order foreclosure and to award the monies claimed by PTCA notwithstanding Magton's partial payment in the amount of $5,850 on February 26, 2020.

What's more, the majority of Division One of the Court of Appeals, in *Laveen Meadows Homeowners Ass'n v. Mejia*, recently addressed arguments very similar to those asserted by Defendant Magton here in affirming the Superior Court in a case where the Court declined to set aside a judgment by default as void pursuant to Rule 60(b)(4). In particular, the majority of the Court of Appeals concluded that the California case *Huntington Continental Townhouse Ass'n, Inc. v. Miner* was "unpersuasive" because Arizona law,[1] unlike California Code § 5720, allows an association "to sue to foreclose once the lien either exceeds $1,200 in unpaid assessments or is delinquent for one year [, and] ***does not expressly eliminate*** the foreclosure remedy if [the] owner makes a payment to reduce or eliminate the unpaid assessment balance." *See, Laveen Meadows Homeowners Ass'n v. Mejia, ___ P.3d ___, *4, ¶ 15 (2020)*. Indeed, the majority noted, "the lien created…expressly includes not only assessments but charges for late payment of those assessments, reasonable collection fees and reasonable attorney fees and costs incurred with respect to those assessments." *Id.* Accordingly, for these reasons set forth herein and for the reasons stated on the record at the February 27, 2020 default hearing, Defendant Magton's argument fails. So does Magton's argument for a new trial or to have this Court deem portions of the Default Judgment "satisfied" as Defendant Magton has presented no evidence, newly discovered or otherwise, that it has completed or had others complete the work in its condominium unit necessary to eliminate the threat of damage to the condominium unit located above its unit.

Therefore,

IT IS HEREBY ORDERED that Defendant Magton, L.L.C.'s *Motion* requesting relief pursuant to Rule 60(b), Arizona Rules of Civil Procedure, is **DENIED**;

IT IS FURTHER ORDERED that Defendant Magton, L.L.C.'s *Motion* requesting relief pursuant to Rule 59, Arizona Rules of Civil Procedure, is **DENIED**; and

IT IS FURTHERE ORDERED that Defendant Magton, L.L.C.'s *Motion* requesting portions of the February 27, 2020 Judgment be deemed "satisfied" is **DENIED**.

[1] While A.R.S. § 33-1807 is the Arizona statute discussed in the *Laveen Meadows Homeowners Ass'n v. Mejia* case, A.R.S. § 33-1256 and § 33-1807 have nearly identical language and, consequently, this Court concludes that the principles discussed in *Mejia* equally apply in this case involving a condominium unit and that application of A.R.S. § 33-1256.