

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-050603

09/18/2014

HONORABLE MICHAEL D. GORDON

CLERK OF THE COURT
M. MINKOW
Deputy

TRILOGY AT VISTANCIA COMMUNITY
ASSOCIATION

EDITH I RUDDER

v.

MICHAEL R CRANE, et al.

MICHAEL R CRANE
28566 N 124TH DR
PEORIA AZ 85383

VIRGINIA K CRANE
28566 N 124TH DR
PEORIA AZ 85383

**MINUTE ENTRY GRANTING PLAINTIFF'S MOTION
FOP SUMMARY JUDGMENT IN PART**

Pending before the Court is Plaintiff's Motion for Summary Judgment (filed July 25, 2014). Defendants Michael Crane and Virginia Crane ("Defendants Crane") filed their Response to the Motion on August 26, 2014. The Plaintiff filed its optional Reply on September 15, 2014.

The Court has reviewed the Motion, the Response, and the entire file. The Court applies the standards under *Orme School v. Reeves*, 802 P.2d 1000 (Ariz. Sup. Ct. 1990) (summary judgment standards) and *National Bank of Arizona v. Thruston*, 180 P.3d 977 (Ariz. Ct. App. 2008) (requiring movant to meet its burden of production with respect to affirmative defenses).¹

¹ Defendants Beneficial Mortgage Co. of Arizona, American Express Centurian Bank, and Chase Bank USA, N.A. did not file a response. While a party must generally file a response to a written motion, the Court will not grant summary judgment unless it independently reviews the entire file and deems that it is warranted. *See Schwab v. Ames Constr.*, 83 P.3d 56 (Ariz. Ct. App. 2004). In that review, the Court will examine the file to ensure that the

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Plaintiff is a homeowner's association. Defendants Crane own the property which is subject to the Declaration of Covenants, Conditions and Restrictions for Trilogy at Vistancia (Declaration). The Declaration is recorded in the Maricopa County Recorder's Office.

The Declaration requires payment of quarterly assessments which has ranged between \$597.00 and \$720.00 per month. The underlying dispute began when Defendants Crane failed to pay the second 2011 quarterly assessment which was followed by their filing of bankruptcy.

Subsequent to the bankruptcy, the parties entered into a letter agreement to provide for the payment of past-due quarterly assessments at the rate of \$100.00 per month. The letter agreement, entered into on May 3, 2013, appears to be retroactive to at least January 2013. Notwithstanding the discharge in bankruptcy, the letter agreement provided for payment of pre-petition assessments, late charges and attorney's fees---- presumably to stave off the threat of foreclosure. Further, the letter agreement provided for the application of all payments to be applied: (1) first, to the quarterly assessment that comes due; (2) second, to the attorney's fees that the Plaintiff "incurred or will incur" in collecting the past due assessment and enforcing the letter agreement; (3) third, to late fees due and owing as of the date of the parties' entering into the letter agreement; and (4) fourth, to past assessments.

In Count I of the Complaint, Plaintiff seeks to foreclose on the lien through February 2014. *See* Ariz. Rev. Stat. Ann. § 33-1807(A) (2014). Plaintiff seeks \$7299.60 plus attorney's fees. The amount of that lien that Plaintiff seeks foreclosure upon is set forth in Exhibit "C" to Count 1 and is also set forth as Exhibit 1 to Jeffrey Dixon's Affidavit (filed as Exhibit B in Support of Plaintiff's Motion for Summary Judgment).

While the Court will grant summary judgment with respect to Count I and the "right to foreclose," it will not permit the foreclosure to proceed until the precise amount of lien is determined.² Plaintiff's ledger, for example, reflects a claim for attorney's fees which is permissible under Arizona law. Notwithstanding that fact, the statutory lien extends only to "reasonable attorney's fees," and the Court has no way of determining whether the fees demanded as part of its lien were reasonable. In fact, the Court cannot determine whether they were, in fact, incurred. *Id; see also* Ariz. Rev. Stat. 341.01 (B) (2014).³

moving party has also met its burden of production with respect to affirmative defenses, but none were raised in this case. *Thruston*. Nonetheless, the Court finds an absence of material question of fact with respect to these defendants and will grant summary judgment on Count I with respect to them.

² Regardless of the amount owed, it has been owed for more than one year. *See* Ariz. Rev. Stat. Ann. § 33-1807(A) (2014).

³ The amount of lien impacts the ability of Defendants Crane to redeem the property.

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Further complicating the issue is the fact that Defendants Crane agreed and apparently have in fact paid monies toward past assessments under the letter agreement which the Plaintiff now asserts is unenforceable or alternatively breached. Whether those payments were properly credited against the past due assessments is not addressed, especially given the Plaintiff's position that the Letter Agreement may not be enforceable.⁴

In Count II, Plaintiff seeks a personal judgment for damages against the Defendants Crane. Whether Plaintiff is seeking damages as measured by the letter agreement is unclear. Thus, the nature of the breach and the damages that may arise therefrom create questions of fact that preclude summary judgment on Count II.

Accordingly,

IT IS ORDERED GRANTING Plaintiff's Motion for Summary Judgment in part, as set forth *herein*.

⁴ Plaintiff was responding to the argument of Defendants Crane that the Letter Agreement permits them to skip payments when they could not afford it.