

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2014-050603

10/28/2014

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 RULING**  
**DENYING MOTION FOR ENTRY OF JUDGMENT**  
**DENYING APPLICATION FOR ATTORNEY'S FEES AND LITIGATION EXPENSES**  
**DENYING REQUEST FOR HEARING**  
***SUA SPONTE* RECONSIDERING AND DENYING PLAINTIFF'S MOTION FOR**  
**SUMMARY JUDGMENT**

Pending before the Court are: (1) Plaintiff's Motion for Entry of Judgment – and Request for Hearing; and (2) Plaintiff's Application for Attorneys' Fees and Litigation Expenses. The Motion, Request and Application were filed October 10, 2014.

The filing of the Motion and Application caused the Court to *sua sponte* review and reconsider its minute entry order granting, in part, Plaintiff's Motion for Summary Judgment. *See Minute Entry* (filed September 22, 2104). The Court finds that its ruling was clear legal error, and the minute entry will be vacated in its entirety.

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The outcome of the summary-judgment request is governed by Arizona's HOA Foreclosure Statute. See Ariz. Rev. Stat. Ann. § 1807 (2014) ("HOA Foreclosure Statute"). The interpretation of the HOA Foreclosure Statute is a question of law. *Cypress v. Sunland Homeowners Association v. Orlandini*, 227 Ariz. 288, 298, 357 P.3d 1168, 1178 (Ariz. Ct. App. 2011). The Court's primary goal is to effectuate legislative intent. *Id.* The Court will, of course, avoid interpretations that lead to absurd results. *Id.*

Toward that end, the Court has determined that there are material questions of fact as to whether Plaintiff may exercise the foreclosure rights under the HOA Foreclosure Statute as pled in the Complaint. 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).

**A. The Motion for Summary Judgment: Background.**

The facts are largely as the Court recited in its September 22, 2014 minute entry. Plaintiff is a homeowners association. The Crane Defendants 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 have ranged between \$597.00 and \$720.00 per month. The underlying dispute began when the Crane Defendants 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 ("Letter Agreement"). The Letter Agreement, entered into on May 3, 2013 appears to be retroactive to at least January 2013. It 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 a priority for the application of all payments. It provided that they 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. Exhibit 4 to Jeffrey Dixon's Affidavit in Support of Plaintiff's Motion for Summary Judgment (filed as Exhibit C).

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Plaintiff has filed a two-count complaint seeking: (1) foreclosure of the liens created by the Foreclosure Statute; and (2) a personal judgment against the Crane Defendants for amounts not discharged in bankruptcy.

**B. Material Questions of Fact Preclude the Entry of Summary Judgment.**

The Court finds that there is a material fact question as to whether there is a sufficient delinquency in assessments to permit foreclosure. The Letter Agreement disregards the HOA Foreclosure Statute which expressly requires that:

[A]ll payments received on a member's account *shall be applied first to any unpaid assessments*, for unpaid charges for late payment of those assessments, for reasonable collection fees and for unpaid attorney fees and costs incurred with respect to those assessments, *in that order*. . .

*See* Ariz. Rev. Stat. Ann. § 33-1807 (K)(2014) (emphasis added).

Thus, the Association must properly credit the Crane Defendants' back payments. Until that is completed, there remains the material question of whether:

the owner has been delinquent in the payment of monies secured by the lien, excluding reasonable collection fees, reasonable attorney fees and charges for late payment of and costs incurred with respect to those assessments, for a period of one year or in the amount of one thousand two hundred dollars or more, whichever occurs first.

*See* Ariz. Rev. Stat. Ann. § 33-1807(A) (2014).

The Court finds that an additional question of fact exists as to whether the Association improperly seeks foreclosure on charges which may not legally be the basis for foreclosure. The record reflects that the Association seeks to foreclose on charges, some of which appear to fall outside the rubric of charges upon which it can seek foreclosure. *See, e.g., Exhibit "C" to Count 1; Exhibit 1 to Jeffrey Dixon's Affidavit (filed as Exhibit C in Support of Plaintiff's Motion for Summary Judgment)*. For example, the Association seeks foreclosure on the Crane Defendants' obligations to pay lock-box payments, demand fees, and document preparation fees. *Id.*

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While these charges may be the proper subject of a lien that runs with the property (paid upon the property's transfer), those liens do not subject the property to foreclosure. Whether the lien may be the basis to foreclose turns on whether it arises from an obligation under Title 33, Section 1803 (other than an obligation to pay late fees on assessments). Thus, unlike unpaid monthly assessments or late fees, these liens ripen upon the entry of judgment and the recording of the judgment.

Specifically, the relevant portion of Section 1807(A) provides:

The association has a lien for fees, charges, late charges, other than charges for late payment of assessments, monetary penalties or interest charged pursuant to section 33-1803 after the entry of a judgment in a civil suit for those fees, charges, late charges, monetary penalties or interest from a court of competent jurisdiction and the recording of that judgment in the office of the county recorder as otherwise provided by law. **The association's lien for monies *other* than 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 not be foreclosed and is effective only on conveyance of any interest in the real property.**

*See* Ariz. Rev. Stat. Ann. § 33-1807(A) (2014) (emphasis added).

The charges for lock-box payments, demand fees, and document preparation fees are made pursuant to Section 33-1803. As such, they may not be foreclosed and are effective only on conveyance of the property.

**C. Conclusion.**

For the foregoing reasons, the Court hereby:

1. VACATES the Minute Entry filed September 22, 2014;
2. DENIES Plaintiff's Motion for Summary Judgment filed July 25, 2014.
3. DENIES Plaintiff's Motion for Entry of Judgment and Request for Hearing filed October 10, 2014.

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4. DENIES Plaintiff's Application for Attorney's Fees and Litigation Expenses filed October 10, 2014.
5. AFFIRMING deadlines set forth at the status conference held on September 17, 2014.