Michael K. Jeanes, Clerk of Court
*** Filed ***
06/12/2014 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000179-001 DT 06/10/2014

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
M. Nielsen
Deputy

VELDA ROSE ESTATES HOME OWNERS ASSOCIATION
v.
EDITH POGGI (001)

CHARLES E MAXWELL

EDITH POGGI
4132 N 3RD AVE #2
PHOENIX AZ 85013

MESA JUSTICE CT-EAST
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No.CC2012–132551.

Defendant-Appellant Edith Poggi (Defendant) appeals the East Mesa Justice Court's determination that refused to set aside Plaintiff-Appellee Velda Rose Estates Homeowners Association's (Plaintiff) summary judgment. Defendant contends the trial court erred and the judgment should have been set aside because Defendant discovered new evidence, post-judgment, that the CC&Rs on which the summary judgment was based, were invalid and unenforceable; and she never received the Motion for Summary Judgment. Defendant also claims Plaintiff's counsel engaged in fraud and the HOA improperly assessed her fees based on the number of units she owned as opposed to the number of lots she owned. For the reasons stated below, this Court affirms in part and reverses in part the trial court's judgment.

I. FACTUAL BACKGROUND.

The Initial Complaint and Proceedings

Defendant owned four dwellings on two lots within the Velda Rose Estates Homeowners Association complex (HOA) and allegedly failed to pay all of the assessments for these units. On July 9, 2012, Plaintiff, represented by Charles E. Maxwell, Esq., filed a Complaint in CC2012–132551, alleging (1) breach of contract; (2) open account; and (3) quantum meruit because Defendant was indebted to Plaintiff in the sum of $1,797.77 for unpaid monthly maintenance and/or special and/or fine assessments. Plaintiff alleged it incurred attorneys' fees of $1,000.00 in bringing the suit and anticipated incurring additional attorneys' fees. Plaintiff alleged it was entitled to be reimbursed for these attorneys' fees pursuant to the Declaration of the CC&Rs, § 8; A.R.S. § 33–1256(H); A.R.S. § 33–1807(H); and A.R.S. § 12–341.01. Plaintiff alleged a second claim for an open account for the monthly maintenance and/or special assessment and/or fine assessments of the outstanding $1,797.77 plus and additional $151.25 per unit per year as well as

monthly late charges. In addition, Plaintiff alleged a cause of action for quantum meruit for the same amounts as indicated in its other claims as well as the $1,000.00 for attorneys' fees. Plaintiff attached a copy of the First and Second Amended Declarations of Covenants, Conditions and Restrictions for Velda Rose Estates East, Maricopa County, Arizona (CC&Rs) to the Complaint. The First Amended Declaration of CC&RS was dated April 22, 1997, and the Second Amended Declaration of CC&Rs was dated September 9, 1997. Article VI, Provision 8(a) of the First Amended Declaration of CC&Rs provided for the enforcement of the assessments and allowed for the imposition of reasonable attorneys' fees as well as interest on past due assessments and provided that:

> Each owner agrees that any judgment rendered in any such action shall include a sum for reasonable attorneys' fees in such amount as the Court may adjudge against the defaulting Owner, plus all court costs and necessary expenses and accounting fees incurred by the Association, plus interest on all amounts from the date the assessment becomes delinquent until paid in full, and an amount for accruing assessments, attorneys' fees and costs, until all amounts due and owing under any such judgment are paid in full.

Section 8(a) of the Second Amended Declaration of CC&Rs re-iterated this provision.

An Owner was defined as the record owner of a Lot, and a Lot was defined as:

> "Lot" shall mean and refer to any separate parcel of real property shown upon the recorded subdivision plat of the Properties, with the exception of the Common Area, including the 32 Single Family residences.[1]

Defendant, on October 10, 2012, responded to the Complaint and filed a Counterclaim. In the Response, Defendant claimed Plaintiff repeatedly sent documents to an incorrect address and Defendant and her daughter—Mrs. Saville—had mailed a full payment to the HOA.[2] Defendant attached a copy of a check dated August 22, 2012 payable to the Velda Rose HOA, for $670.62 and included a notation the check was for the total outstanding balance. Defendant also attached a copy of a letter dated August 30, 2012, from Plaintiff's counsel—Allen H. Quist—indicating the check was being returned because the total amount owing was $2,903.67 which resulted from the principal amount of the claim of $1,797.77 plus attorneys' fees of $707.50 and costs of $398.40.

The East Mesa Justice Court transferred the case to the Maricopa County Superior Court on October 10, 2012, —CV2012–096070—because Defendant's Counterclaim exceeded the trial court's jurisdiction. Plaintiff filed a Motion To Dismiss Defendant's Counterclaim on October 16, 2012, and claimed Defendant failed to allege any claim on which relief could be granted.

On November 6, 2012, Plaintiff filed a Motion For Summary Judgment. Two days later, on November 8, 2012, Plaintiff filed a Motion To Remand the case to the Justice Court because

[1] Article I, Sections 11, and 14, First Amended Declaration of CC&Rs.
[2] Answer, dated Sept. 27, 2012.

Defendant failed to pay the required filing fee for her Counterclaim. Defendant paid her filing fee on November 9, 2012, and filed her Response to Plaintiff's Motions. On December 13, 2012, Hon. Mark Aceto, a Judge of the Maricopa County Superior Court, found Defendant failed to state a claim on which relief could be granted and dismissed Defendant's Counterclaim. The Maricopa County Superior Court determined the remaining matters were within the Justice Court's jurisdictional limits and remanded the case to the East Mesa Justice Court.

The Justice Court Action

On January 10, 2013, Plaintiff filed a request for a ruling on its summary judgment motion and asserted Defendant had not timely responded to that motion. Plaintiff claimed, pursuant to Rule 128(c) Justice Court Rules of Civil Procedure (JCRCP), a failure to challenge the requested summary judgment could be deemed consent to the request. Plaintiff also alleged the entire record supported its requested ruling.

The trial court granted Plaintiffs' Motion for Summary Judgment on February 6, 2013.The following day the trial court signed an order granting summary judgment and awarding Plaintiff the principal sum of $1,979.77 plus reasonable attorneys' fees and accruing charges as granted by the trial court. Plaintiff's counsel was told to submit a China Doll[3] for the trial court's review as well as a proposed form of Judgment.

Stephanie Van Splunder submitted her China Doll Affidavit and requested attorneys' fees of $3,353.50 for her work on the case.[4] In addition, Charles E. Maxwell submitted a separate China Doll and requested an additional $6,305.00 for his work. The combined legal fees from both firms totaled $9,658.00—a sum almost five times the total amount awarded for the underlying principal claim. The combined cost expended by both firms was $412.80.

Defendant—through counsel—responded to the fee application and claimed the requested fees were excessive and duplicative. In addition, Defendant claimed counsel did not sufficiently specify the work performed or distinguish between work on the contract claim—which would be compensable—from work requesting the tort claims be dismissed—which would be non-compensable. Plaintiff's counsel replied and, as part of this Reply, submitted as Exhibit B to Plaintiff's Reply In Support Of Application For Attorney [sic.] Fees a copy of a letter from Maxwell & Morgan to Defendant dated October 25, 2012, where they characterized the action as "ultimately, this is a straightforward collection case". Plaintiff's counsel—Maxwell & Morgan—also relied on *McDowell Mountain Ranch Cm'ty Ass'n v. Simon*, 216 Ariz. 266, 165 P.3d 667 (Ct. App. 2007) and asserted Defendant had the burden of demonstrating which billing entries were excessive.

[3] A China Doll Affidavit details the work performed and the basis for the requested attorneys' fees. *Schweiger v. China Doll Restaurant, Inc.*,138 Ariz. 183 (Ct. App. 1983).

[4] Two attorneys from Mr. Maxwell's firm worked on the case and two additional attorneys from a separate law firm associated with the Maxwell & Morgan attorneys. Four attorneys billed for their collection efforts in bringing the case to a summary judgment.

On March 26, 2013, the trial court signed Plaintiff's proposed Judgment and awarded Plaintiff a principal balance of $1,979.77; attorneys' fees of $9,658.50; costs of $412.80; and dismissed Defendant's Counterclaim with prejudice pursuant to the prior order of the Hon. Mark Aceto, Judge of the Superior Court. The Judgment also included a proviso awarding Plaintiff all future costs and attorney fees incurred by Plaintiff after submission of the Judgment. The provision stated:

> For all costs and attorney fees incurred by Plaintiff after submission of this Judgment for entry by the Court in collecting the amounts listed in this Judgment.[5]

On March 28, 2013, the trial court awarded Plaintiff's counsel an additional $500.00 in attorneys' fees for their Reply In Support Of Application For Attorney [sic.] Fees.

Defendant did not appeal from this Judgment. Plaintiff, on April 5, 2013, filed a garnishment action at the Superior Court—TJ2013–003854. On September 18, 2013, Defendant filed her Motion To Set Aside the Judgment issued by the Justice court. However, instead of filing the motion at the Justice Court, Defendant filed her Motion in the Superior Court case. By Minute Entry dated October 10, 2013, and filed on October 11, 2013, the Superior Court denied Defendant's Motion To Set Aside Judgment without prejudice to Defendant raising her argument before the trial (Justice) court.

The Motion To Set Aside The Judgment

On October 21, 2013, Defense counsel filed a Motion To Set Aside Judgment and Stay Sheriff's Sale Scheduled (Motion To Set Aside) with the trial court and claimed the CC&Rs on which Plaintiff based its Summary Judgment were invalid and unenforceable. Defendant claimed the judgment should be set aside based on newly discovered evidence; misconduct on the Plaintiff's part; and in the interest of justice.[6] Defendant claimed the newly discovered evidence was that the Second Amendment to the CC&Rs ratified on September 9, 1997, were improperly ratified as an insufficient number of lot owners agreed to the amended CC&Rs. Defendant provided a tally of the lot owners and indicated only 18 votes were cast in favor of the amended CC&Rs.[7] Defendant claimed the Second Amendment was not properly passed and the prior version of the CC&Rs did not provide for any assessments. Defendant concluded this was a material claim and would have changed the outcome of this matter. In addition, Defendant maintained she was reasonably diligent in presenting this claim because she had no reason to question the legitimacy of the CC&Rs. Defendant asserted Plaintiff knew the votes cast were insufficient to support its allegation that the Second Amendment to the CC&Rs had passed. Defendant also stated (1) she was improperly assessed fees based on the number of units she

[5] Plaintiff did not explain the basis for awarding its counsel all future fees when the underlying CC&Rs only provided for the award of reasonable fees. See CC&Rs section 8. Additionally, Plaintiff's Complaint requested "accruing" attorneys' fees but never mentioned "all" attorneys' fees.
[6] Motion To Set Aside Judgment and Stay Sheriff's Sale Scheduled at p. 3, ll. 17–19, filed on Oct. 21, 2013.
[7] *Id.* at p. 5, ll. 6–22.

owned as opposed the number of lots; and (2) Plaintiff's representation that the assessments were valid was the result of a "conscious misrepresentation" on Plaintiff's part.[8] Defendant declared she should be relieved from the consequences of her actions in choosing to represent herself because (1) she is elderly (71 years old); (2) thought she could handle a dispute of approximately $1900.00 on her own; and (3) the case had "steam rollered" into a judgment in excess of $25,000.00.

Plaintiff filed a Motion to Strike Defendant's Motion To Set Aside and claimed Defendant's Motion To Set Aside was untimely based on JCRCP, Rule 141(c) which imposes a six month time limit on filing motions to set aside for newly discovered evidence, fraud, misrepresentation or other misconduct.

Defendant opposed Plaintiff's Motion To Strike her Motion To Set Aside and argued she originally filed the Motion To Set Aside in the Superior Court action, TJ2013–003854 within the six month window. She claimed she believed the Superior Court had concurrent jurisdiction with the Justice Court for purposes of the Motion To Set Aside and, when the Superior Court dismissed her Motion To Set Aside, she re-filed in the Justice Court. She asserted A.R.S. § 12–504, the "savings statute" supported her position.

On November 14, 2013, the Trial Court (1) denied Defendant's Motion To Set Aside; and (2) determined Plaintiff's Motion To Strike the Motion To Set Aside was moot. Defendant filed a timely appeal.[9] Plaintiff filed a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. Did Defendant Timely File Her Notice Of Appeal

Defendant addressed the timely filing of her Notice of Appeal in her appellate memorandum. This issue was resolved in this Court's prior Minute Entry—dated May 2, 2014, and filed on May 5, 2014,—in response to Plaintiff's procedural motion to dismiss the appeal and does not need any further discussion. This Court adopts its prior ruling.

B. Did The Trial Court Abuse Its Discretion By Failing To Set Aside Plaintiff's Summary Judgment When Defendant (1) Filed Her Request Almost Seven Months After Judgment Was Entered; And (2) Based Her Claim On Newly Discovered Evidence And Her Lack Of Notice About The Motion For Summary Judgment.

. . . .

. . . .

[8] *Id*. at p. 7, ll. 1–5. The Second Amended CC&Rs, Section 6, states the annual and special assessments "must be fixed at a uniform rate for all Lots". . . .

[9] This Court previously ruled on the timeliness of Defendant's appeal. Both parties addressed the timeliness issue in their respective appellate memoranda.

Standard of Review For Denial Of Motion To Set Aside Judgment

The Trial Court did not make any findings of fact or conclusions of law when it ruled on Defendant's Motion To Set Aside the Judgment. While most of the facts do not appear to be in controversy, where facts do appear to be contested, this Court will review the trial court's factual determination(s) for an abuse of discretion. This Court will also review the trial court's legal determinations. The trial court's decision will not be set aside absent a clear abuse of discretion. *Hirsch v. National Van Lines, Inc*. 136 Ariz. 304, 666 P.2d 49 (1983). Review is limited to questions raised in the Motion To Set Aside. *Goglia v. Bodnar*, 156 Ariz. 12, 16, 749 P.2d 921, 925 (Ct. App. 1987). However, if the undisputed facts require a different ruling as a matter of law, or material facts are in controversy, the appellate court may reverse. *Coconino Pulp and Paper Co. v. Marvin*, 83 Ariz. 117, 119, 317 P.2d 550, 551 (1957).

In determining if the trial court abused its discretion, this court must consider the standards for an abuse of discretion claim. The Supreme Court of Arizona stated:

> In exercising its discretion, the trial court is not authorized to act arbitrarily or inequitably, nor to make decisions unsupported by facts or sound legal policy. . . . Neither does discretion leave a court free to misapply law or legal principle.

City of Phoenix v. Geyler, 144 Ariz. 323, 328–329, 697 P.2d 1073, 1078–1079. (1985) (citations omitted). Thus, a trial court abuses its discretion if it:

> 1) applied the incorrect substantive law or preliminary injunction standard; 2) based its decision on a clearly erroneous finding of fact that is material to the decision to grant or deny the injunction; or 3) applied an acceptable preliminary injunction standard in a manner that results in an abuse of discretion.

McCarthy Western Constructors v. Phoenix Resort Corp., 169 Ariz. 520, 523, 821 P.2d 181, 184 (Ct. App. 1991) (citation omitted). As stated, appellate courts review an order denying a motion to vacate or set aside a summary judgment for an abuse of discretion**. O**ur Court of Appeals said:

> This is an appeal from an order denying a motion to vacate a summary judgment. The sole issue is whether the trial court abused its discretion in denying appellant's motion.

Ashton v. Sierrita Mining & Ranching, 21 Ariz. App. 303, 304, 518 P.2d 1020, 1021 (Ct. App. 1974). Accord, *Modla v. Parker*, 17 Ariz. App. 54, 56, 495 P.2d 494, 496 (1972) where the Arizona Supreme Court held:

> . . . it is within the sound discretion of a trial court to set aside a final judgment and that action will not be disturbed on appeal except for clear abuse of discretion.

To counteract the trial court's decision to refuse to set aside the Judgment, Defendant must make a clear showing of the trial court's abuse of its discretion.

The Motion To Set Aside The Judgment

Introduction

Defendant based her Motion To Set Aside on her claim about newly discovered evidence relating to how or if the HOA adopted the amended CC&Rs. This is a claim the Defendant failed to make prior to the trial court granting Plaintiff's Motion For Summary Judgment. Indeed, Defendant—a self-represented litigant at the time—failed to file any response to Plaintiff's requested Motion For Summary Judgment. In requesting that the Summary Judgment be set aside Defendant acknowledged her failure to respond to the Summary Judgment motion.[10] Defendant also raised—but did not develop—her claim she never received the Motion For Summary Judgment.[11]

Defendant's Failure To Receive The Summary Judgment Motion

Defendant claimed she never saw the summary judgment motion "to begin with" but provided no affidavit to support this assertion and did not otherwise address this point. Our Court of Appeals discussed the need to fully address a legal issue and held the failure to provide legal support for a claim results in a waiver of the claim. The Court of Appeals wrote:

> Father, however, cites no legal authority for how or why the juvenile court erred. Accordingly, this argument is waived.

Bob H. v. Arizona Dep't of Econ. Sec., 225 Ariz. 279, 237 P.3d 632, ¶ 10 (Ct. App. 2010). Defendant raised this same claim about not receiving the summary judgment motion in her appellate memorandum but again failed to do anything other than state in her argument that she did not receive the summary judgment motion "to begin with". This is not sufficient to raise the claim. Our Supreme Court held:

> Failure to argue a claim on appeal constitutes waiver of that claim.

State v. Bolton, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995). Furthermore, Defendant delayed for almost six months before requesting that the trial court set aside the summary judgment. Even if Defendant had not received the Motion for Summary Judgment—a fact which she never substantiated—she surely knew about the summary judgment once the trial court granted it. She did nothing at that time. As our Supreme Court stated:

> We first note that mere carelessness is not sufficient reason to set aside a default judgment.

Daou v. Harris, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984). After learning about the trial court granting Plaintiff its requested summary judgment, Defendant did not seek immediate relief from the trial court. If Defendant believed she received no notice about the summary judgment, she should have properly brought that claim to the trial court's attention. She failed to

[10] Motion To Set Aside at p. 2, l. 23.
[11] *Id*. at p. 7, ll. 19–20. See also Appellant's Memorandum at p. 8, # 32.

do so. Our Court of Appeals addressed the need to bring a claim to the trial court's attention and said:

> To obtain such relief under Rule 60(c), in addition to satisfying the other requirement of the rule that the party show compelling circumstances favoring relief from the judgment, a party must demonstrate (1) that it did not timely receive notice that the judgment had been entered; (2) that it promptly filed a motion after actually receiving such notice; (3) that it exercised due diligence, or had a reason for the lack thereof, in attempting to learn the date of the decision; and (4) that no party would be prejudiced

Haroutunian v. Valueoptions, Inc., 218 Ariz. 541, 189 P.3d 1114, ¶ 20 (Ct. App. 2008). Defendant slept on her rights and this claim is waived.

Was Summary Judgment Properly Granted

In her Motion To Set Aside the judgment, Defendant asserted the summary judgment was improper because (1) the Amended CC&Rs had not been correctly adopted; and (2) even if the CC&Rs had been properly adopted, these rules were not fairly administered because Defendant was being assessed based on her number of units instead of on the number of lots she owned.[12] While Defendant owned two lots, she had a total of four units on these lots. Defendant claimed Plaintiff's assessments were not supported by its own CC&Rs and therefore, summary judgment was improper.

By requesting summary judgment, Plaintiff had the burden of proof. Although Defendant did not respond to the summary judgment, her failure to respond is not a guarantee of Plaintiff's success. The Arizona Court of Appeals addressed the consequences of failing to respond to a motion for summary judgment and held:

> However, certain limitations exist on the exercise of the trial court's discretion, especially if the motion is one for summary judgment. A failure to respond to a motion for summary judgment with a written memorandum or opposing affidavits cannot, by itself, entitle the moving party to summary judgment. The trial court must consider the entire record before deciding a summary judgment motion. Rule 56(e) provides that "an adverse party may not rest upon the mere allegations or denials of [its] pleading," and that if the party does not respond, summary judgment shall be entered against the party "if appropriate." *Choisser,* 12 Ariz. App. at 261, 469 P.2d at 495 (quoting Ariz. R. Civ. P. 56(e)). This is another way of saying that the moving party is entitled to summary judgment if "there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law." The burden of showing that no genuine issue of material fact exists rests with the party seeking summary judgment.

[12] *Id*. at p. 7, ll. 2–5.

> The admonition in Rule 56(e) simply means that a nonmoving party who fails to respond does so at his peril because the trial court will presume that any uncontroverted evidence favorable to the movant, and from which only one inference can be drawn, is true. If that uncontroverted evidence would entitle the movant to a judgment as a matter of law, then the trial court must grant the summary judgment motion. However, if a moving party's summary judgment motion fails to show an entitlement to judgment, the nonmoving party need not respond to controvert the motion. *see also Zimmerman v. Shakman,* 204 Ariz. 231, 237, ¶ 21, 62 P.3d 976, 982 (App. 2003) (stating that Rule 7.1(b) "is not mandatory, and the failure to respond does not in and of itself authorize a judgment against the nonmoving party if the motion fails to demonstrate the movant's entitlement to the requested relief").

Schwab v. Ames Const., 207 Ariz. 56, 83 P.3d 56, ¶¶ 15–16 (Ct. App. 2004). Despite this standard, Plaintiff advocated that by failing to appeal the entry of the Summary Judgment, Defendant effectively waived her right to complain about the entry of the Judgment. This is incorrect. Plaintiff had the burden of demonstrating it was entitled to its requested summary judgment based on the facts before the trial court.

To prevail on a summary judgment motion, the proponent must show there are no material facts in controversy and the proponent is entitled to judgment as a matter of law *Chanay v. Chittenden*, 115 Ariz. 32, 38, 563 P.2d 287, 293 (1977). Plaintiff alleged there were no material facts in controversy and the trial court determined Plaintiff was entitled to judgment as a matter of law. Once the trial court made this determination, the burden switched to Defendant to show (1) there were material facts in controversy and/or (2) Plaintiff was not entitled to Judgment as a matter of law. Defendant met this burden based on the documents Plaintiff submitted.

Defendant claimed she was improperly assessed because the assessment was based on the number of her units as opposed to the number of her lots. In reviewing the Edith Poggi Account Summary which Plaintiff (1) provided as Exhibit D to its Motion For Summary Judgment; and (2) referenced on page 2, ll. 14–15 of Plaintiff's Separate Statement Of Facts In Support Of Plaintiff's Motion For Summary Judgment, the Assessments for 2012 are listed as "Assessments ($151.25 x 4 Units) for a total of $605.00. This Amount indicates Defendant was assessed based on the number of units she owned and not on the number of lots she owned as required by the CC&Rs. Although Defendant never provided the trial court—or the appellate court—with proof as to the amount of the monthly assessment per lot or the number of occupants that were present in each of her units, Plaintiff's exhibits demonstrated the problems with its calculations and the contradictory nature of its own pleadings where,—in Plaintiffs' Separate Statement of Facts In Support Of Plaintiff's Motion For Summary Judgment[13]—Plaintiff asserted Defendant was accruing maintenance assessments and monthly charges per lot and not per unit but its calculations show a per unit charge. Plaintiff's Exhibit D demonstrated Defendant was likely overcharged in the amount Defendant was assessed. This discrepancy indicated there were

[13] Plaintiffs' Separate Statement of Facts In Support Of Plaintiff's Motion For Summary Judgment at p. 3, l. 10.

material facts in controversy. Therefore, Plaintiff did not prove it was entitled to Judgment as a matter of law, particularly where one of Defendant's claims was she was charged for assessments she did not owe. Because Defendant claimed she was not responsible for the amount assessed, and because Plaintiff's own exhibits supported her claim, the trial court should have set the summary judgment aside. Thus, although the trial court did not err by disregarding Defendant's claim about not timely receiving the Motion for Summary Judgment, the trial court did err by refusing to set the summary judgment aside based on a demonstrated conflict in the facts.

Defendant Alleged Newly Discovered Evidence

Defendant premised a major portion of her Motion To Set Aside the summary judgment on her allegation that she had newly discovered evidence of fraud relating to how the CC&Rs were amended. She claimed the Amended CC&Rs were (1) never properly passed; (2) ineffective; and (3) improperly applied to her;[14] and based her Motion To Set Aside on Rule 141, JCRCP—the functional equivalent of A.R.C.P., Rule 60 (c).[15] Defendant claimed her position on the Amended CC&Rs was newly discovered evidence. It was not. The Court of Appeals discussed the standard for finding newly discovered evidence and stated:

> The standard governing motions on the grounds of newly discovered evidence is concisely set out in 11 Wright & Miller, supra, s 2859 as follows:
>
> > 'Under both rules, (Rule 59(a) 4 and Rule 60(c) 2) the evidence must have been in existence at the time of the trial, but if it was in possession of the party before the judgment was rendered it is not newly discovered and does not entitle him to relief. The rule speaks of 'due diligence,' and the moving party must show why he did not have the evidence at the time of the trial or in time to move under Rule 59(b). A judgment will not be reopened if the evidence is merely cumulative and would not have changed the result.' 11 Wright & Miller at 182-85.

Ashton v. Sierrita Mining & Ranching, id., 21 Ariz. App. at 305, 518 P.2d at 1022. The reviewing court must distinguish between a lack of due diligence and Defendant's reasons for her claimed inability to discover the evidence. Here, both the first and second Amended

[14] Defendant claimed the CC&Rs were improperly applied to her because she was assessed based on the number of units she owned instead of the number of lots. This Court addressed this claim in the preceding section.

[15] Although there is not a lot of case law interpreting Rule 141, JCRCP, case law interpretations for Rule 60(c) apply. See JCRCP, Rule 101(d), adopting the case law interpretations of the A.R.C.P.

> **Relationship of these rules to the Arizona Rules of Civil Procedure.** These rules replace the Arizona Rules of Civil Procedure ("the superior court rules"). Differences in language between a justice court rule and a superior court rule are intended only to make the justice court rule simpler and easier to understand. Case law interpreting a superior court rule is authoritative unless a justice court rule expressly adds a requirement or provides a right not found in a superior court rule. For ease of reference, any related superior court rules are shown in brackets at the end of a corresponding subsection of these rules.

Declarations of CC&Rs had existed for over a decade. Defendant should have been aware of these amendments and could have chosen to investigate how the amended CC&Rs were passed. Plaintiff provided copies of these Declarations with its pleadings. Defendant had ample opportunity to read and research the amendments had she chosen to do so. Similarly, Defendant had time to locate the original Declaration of CC&Rs (the 1969 Declaration). Defendant failed to assert any issue about the 1969 Declaration prior to claiming the amendments were incorrectly passed. Failure to conceive of or develop an argument is not synonymous with newly discovered evidence. A newly thought of claim is not the same as newly discovered evidence. This claim fails.

Defendant Alleged Fraud

Defendant also claimed fraud and alleged several types of fraud. Her first claim for fraud related to the passing of the amended Declarations. As stated above, this claim failed because Defendant premised this claim on "newly discovered evidence" and the evidence was available throughout these proceedings. Her second allegation related to the pending disciplinary proceedings against Plaintiff's counsel. This—second— fraud allegation will be addressed in *Issue C* discussing the use of a pending ethics investigation and Court of Appeals opinion from an unrelated case.

Fraud on the Court

Defendant requested Rule 141 (c)(6) relief re "any other reason that justifies relief from the judgment" in addition to her generic fraud claim. Here, this Court found Plaintiff's counsel erred by changing the terms of the trial court's summary judgment order and by requesting relief that exceeded the relief it originally pleaded in its Complaint and summary judgment motion. In its Complaint, Plaintiff requested attorneys' fees based on the Declaration of CC&Rs. Plaintiff also requested attorneys' fees pursuant to A.R.S. 12–341.01; A.R.S. 33–1807 (H); and A.R.S. 33–1256(H). The Declaration and all of these statutes use the term "reasonable" as the modifier for the attorneys' fees provision.

After granting Plaintiff's requested summary judgment, the trial court signed an Order on February 7, 2013. That order, signed by the Hon. Mark Chiles, Sr.; stated:

> This Court grants Plaintiff's Motion for Summary Judgment as follows:
> Principal: $1979.77
> Interest
> Costs
> Reasonable Attorney Fees (China Doll required for consideration on amount.)
> Accruing charges as granted by court.
>
> Please submit a purposed [sic.] form of judgment for further consideration.

When Plaintiff's counsel submitted its proposed form of judgment, counsel included a provision for "all" attorneys' fees instead of "reasonable" fees. Counsel knew—or should have known—this request was in derogation of the clearly expressed contractual terms as well as of the

statutory authority on which Plaintiff based its right to attorneys' fees. Counsel did not disclose the change in the terms to the trial court. The trial court had the right to rely on counsel's proffered proposed judgment to be accurate since counsel is an officer of the court.

Fraud requires nine elements: a knowing intentional misstatement of a material fact made with the intent the opposite party relies on it; the opposite party does rely on it; and the statement causes detriment.

> The elements of actionable fraud may be stated as follows: (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) his consequent and proximate injury. 26 C. J. 1062. If these factors all appear, a cause of action for fraud will unquestionably exist.

Moore v. Meyers, 31 Ariz. 347, 354, 253 P. 626, 628 on reh'g, 31 Ariz. 519, 255 P. 164 (1927). Here, counsel's fraud was a fraud on the court as well as on Defendant. Counsel provided a proposed judgment that contained a misstatement of a material fact—that the future attorneys' fees were to be for "all" fees and costs in the future. Thereafter, counsel used the judgment to acquire "all" requested fees in counsel's later legal work on behalf of his client. Counsel made no attempt to amend his judgment and this statement was both material and a misstatement of a fact. Because counsel then used this judgment to obtain his entire claimed fee, he made his claim for "all" fees with the intent that courts—in any subsequent filings—would rely on this misstatement to the detriment of both Defendant and the entire system of justice and fair dealing. As our Supreme Court stated:

> It is urged that fraud on the court vitiates everything it touches and hence, when it is shown to have been committed by the party in whose favor the judgment is rendered, such judgment may be vacated at any time upon a proper showing made by the injured party. As an abstract matter we agree with the above proposition of law.

Damiano v. Damiano, 83 Ariz. 366, 369, 321 P.2d 1027, 1030 (1958). The provision about "all" future attorneys' fees in the signed Judgment is vacated and void.

Timely Filing Of Motion To Set Aside Judgment

The parties disputed whether Defendant timely filed her Motion To Set Aside. Although Defendant originally filed her Motion To Set Aside within the six month allowable period, the Motion To Set Aside was filed at the Superior Court where there was an active collection case based on Plaintiff's Summary Judgment. By the time the Superior Court issued its Minute Entry ruling—October 10, 2013,—informing Defendant she had chosen the incorrect court, the six month period had ended. Defendant claimed her Motion To Set Aside was timely because the initial filing was done within the allowable period while Plaintiff asserted the filing of the Motion To Set Aside was untimely because it was not filed at the Justice Court until October 21,

2013, almost seven months had elapsed after the summary judgment was originally issued on March 26, 2013.

JCRCP, Rule 141 (c), provides:

> **Reasons for relief from a judgment or order.** A party may file a motion asking the court for relief from a final judgment, order, or proceeding based on one or more of the following:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> (2) Newly discovered evidence that with the exercise of due diligence could not have been discovered in time to file a motion for a new trial;
>
> (3) Fraud, misrepresentation, or other misconduct of an opposing party;
>
> (4) The judgment is void;
>
> (5) The judgment has been satisfied, released, or discharged; or a prior judgment upon which it is based has been reversed or vacated; or it is no longer equitable that the judgment should have prospective application;
>
> (6) Any other reason that justifies relief from the judgment.
>
> A motion under Rule 141(c) must be filed within a reasonable time, and for reasons (1), (2), and (3), within six (6) months after the judgment or order was entered or after the proceeding occurred. The filing of a motion under this section does not affect the finality of a judgment, nor does it suspend the operation of a judgment. This rule does not limit the power of the court to relieve a party from a judgment, order, or proceeding if a fraud was committed upon the court; and this rule does not limit the power of the court to grant relief to a defendant served by publication, as provided by Rule 140(j). **[ARCP 60(c)]**

Here, the Rule imposes a reasonable time for "any other reason that justifies relief from the judgment" as well as a six month limit for claims relating to fraud, and newly discovered evidence. Defendant met this standard. The Superior Court allowed for Defendant re-filing her Motion To Set Aside with the Justice Court when it held the claim could be re-filed. This Court finds (1) Defendant did not unduly delay in filing her Motion To Set Aside after the Superior Court ruled on her Motion; and (2) her initial filing of her Motion To Set Aside was timely as it was filed within the six month allowable period. Based on these circumstances, this Court finds Defendant timely filed her Motion To Set Aside.

C. Did Defendant Provide Sufficient Grounds To Set Aside The Judgment When She Alleged Plaintiff's Counsel Was Responsible For A Fraud In Her Case Because He Had Been Censured In An Unrelated Case.

One of Defendant's claims in her Motion To Set Aside was based on her allegation that a sanction against Plaintiff's counsel in an unrelated case was relevant to Defendant's case and

indicated counsel must have committed fraud in her case as well. To support her allegation, Defendant attached a copy of the Supreme Court Report and Order Imposing Sanctions against Charles E. Maxwell and Brian Morgan in PDJ—2012–9112 as an exhibit to her appeal. That report indicated both counsel violated a number of ethical rules—ERs—relating to honesty to a tribunal because they asserted an HOA's statutory lien had priority over a deed of trust and, during a hearing before Commissioner Kongable, asserted A.R.S. §33–1807 was a new statute and had no legislative history. Mr. Maxwell told the trial court he had been on the legislative action committee and there was no canon of statutory construction relating to A.R.S. §33–1807. Commissioner Kongable ruled in counsel's favor. Thereafter, the intervenors appealed to the Arizona Court of Appeals. In its appellate decision in *Cypress on Sunland HOA v. Orlandini,* 227 Ariz. 288, 257 P.3d 1168 (Ct. App. 2011), the Court of Appeals (1) determined there was legislative history for A.R.S. §33–1807; (2) found the legislative history reflected the legislature's intent "to give lien priority to a first deed of trust over an earlier perfected HOA assessment lien";[16] and (3) commented on counsel's work in the case and held:

> The basis of Commissioner Kongable's ruling was that the HOA's attorneys presented a "legitimate" legal argument supporting the HOA's position and therefore, as a matter of law, could not have committed a fraud upon the court. We disagree. The HOA's interpretations of the statute and the CC&Rs are not supportable on any legitimate ground. Its arguments are specious, legally and logically unsound, and are so contrived as to be little more than sophistry. Because Commissioner Kongable's ruling was based upon a false premise, namely that the HOA had a defensible position, he reached an incorrect conclusion.
>
> Further, we agree with the Intervenors that the HOA's attorneys obtained the default judgment by perpetrating a fraud upon the court as that term is defined and that the judgment can therefore be set aside under either Rule 60(c)(6) or in an independent action. When a party obtains a judgment by concealing material facts and suppressing the truth with the intent to mislead the court, this constitutes a fraud upon the court, and the court has the power to set aside the judgment at any time. *Ivancovich v. Meier*, 122 Ariz. 346, 349, 595 P.2d 24, 27 (1979). A fraud upon the court is perpetrated "by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases." *In re Intermagnetics Am., Inc.*, 926 F.2d 912, 916 (9th Cir.1991) (quoting J. Moore and J. Lucas, Moore's Federal Practice ¶ 60.33, at 515 (2nd Ed. 1978)).

Orlandini at ¶¶ 41–42.

Defendant failed to connect the Court of Appeals ruling in *Orlandini* to her own case. She claimed there was a connection because Plaintiff's counsel drafted the amended CC&Rs. Assuming arguendo that Plaintiff's counsel represented the HOA continuously since 1997, a fact

[16] *Orlandini* at ¶ 36.

which Defendant did not establish, their mere representation does not indicate fraudulent conduct in this case. Defendant did not demonstrate counsel was involved in the passage of the amended CC&Rs. Instead, she claimed counsel drafted these CC&Rs. She did not show how Plaintiff's counsel's misstatement about the legislative history of A.R.S. § 12–1807 to Commissioner Kongable related to her case about the payment of HOA assessments. Instead, Defendant attempted to tar counsel with a broad brush and intimated that if counsel was responsible for a misrepresentation in one case, counsel must have been engaged in fraudulent conduct in her case. This is too sweeping a claim and Defendant did not support her assertion with any fact or law. This claim fails.

D. Is Defendant Entitled To Leniency Because She Represented Herself During The Case.

Defendant maintained part of her problem stemmed from her choice to represent herself in the claim about assessments. Arizona treats pro se litigants (who represent themselves) according to same standards used for attorney representation and courts do not excuse the failure to conform to mandated rules because a litigant represents himself or herself. In *In re Marriage of Williams*, 219 Ariz. 546, 200 P.3d 1043, ¶ 13 (Ct. App. 2008) the Arizona Court of Appeals held:

> Parties who choose to represent themselves "are entitled to no more consideration than if they had been represented by counsel" and are held to the same standards as attorneys with respect to "familiarity with required procedures and . . . notice of statutes and local rules." A party's ignorance of the law is not an excuse for failing to comply with it.

[Citations omitted.] Similarly, in *Higgins v. Higgins*, 194 Ariz. 266, 279, 981 P.2d 134, 138 (Ct. App. 1999) the Court ruled:

> One who represents herself in civil litigation is given the same consideration on appeal as one who has been represented by counsel. She is held to the same familiarity with court procedures and the same notice of statutes, rules, and legal principles as is expected of a lawyer.

[Citations omitted.] Accord, *Kelly v. NationsBanc. Mortg. Corp*., 199 Ariz. 284, 17 P.3d 790, ¶ 16 (Ct. App. 2001). This may be a harsh determination. However, it is the decision required by our state law

E. Is Either Party Entitled To Attorneys' Fees On Appeal.

Neither Plaintiff nor Defendant entirely prevailed in this appeal. Although this Court has the discretion to award attorneys' fees, this Court finds neither party prevailed and, in its discretion, this Court finds attorneys' fees on appeal are not appropriate.

SCRAP—Civ, Rule 13 allows for attorneys' fees but uses discretionary language. In relevant part, the statute provides:

> **(b) Attorneys' Fees Taxable as Costs.** When attorneys' fees are recoverable by statute or contract, the claim for such fees in connection with the prosecution or

> defense of an appeal may be included in the statement of costs prescribed by this rule. The claim for attorneys' fees for the prosecution or defense of the case in the trial court may also be included, provided that the trial court has not previously awarded such fees.

III. CONCLUSION.

Based on the foregoing, this Court concludes the East Mesa Justice Court erred when it granted summary judgment and refused to set it aside when there was a material fact in controversy as to whether the HOA properly assessed Defendant based on her number of lots as opposed to her number of units. Defendant demonstrated she timely filed her Motion To Set Aside. In addition, this Court finds Plaintiff's counsel provided a factually incorrect Judgment where counsel included a provision for "all" future attorneys' fees in derogation of the provisions of the first and second amended Declarations of CC&Rs. In summary, this Court finds the trial court erred by refusing to set aside the summary judgment motion.

This Court further finds Defendant did not prevail on a number of the issues she raised. Defendant failed to (1) prove fraud based on the Court of Appeals censuring Plaintiff's counsel in an unrelated case followed by the disciplinary ruling by the State Bar (currently on appeal); (2) demonstrate newly discovered evidence based on her claim about the passing of the Amended Declarations of the CC&Rs; (3) demonstrate she did not receive the Motion for Summary Judgment; and (4) establish she was entitled to leniency because she chose to represent herself at the trial court.

IT IS THEREFORE ORDERED affirming in part and reversing in part the judgment of the East Mesa Justice Court.

IT IS FURTHER ORDERED remanding this matter to the East Mesa Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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