UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

B.A.P. DOCKET NO. CC-18-1248

BANKRUPTCY CASE NO. 8:18-bk-10693-CB

[CHAPTER 13]

In re Maria Basave De Guillen,

Debtor.

APPELLANT

HIGHLAND GREENS HOMEOWNERS ASSOCIATION OF BUENA PARK

APPELLEE

MARIA A. BASAVE DE GUILLEN

MOTION FOR LEAVE TO FILE A LATE AMICUS CURIAE BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF APPELLANT HIGHLAND GREENS HOMEOWNERS ASSOCIATION OF BUENA PARK

Nathan R. McGuire, Esq. (SBN 232411)
Jason A. Savlov, Esq. (SBN 213879)
ADAMS STIRLING PLC
2566 Overland Avenue, Suite 730
Los Angeles, California 90064
(310) 945-0280 • Fax: (310) 945-0281
Email: nmcguire@adamsstirling.com
jsavlov@adamsstirling.com

INTRODUCTION

Pursuant to Rule 8017(a)(3) of the Federal Rules of Bankruptcy Procedure ("FRBP"), the Community Associations Institute ("CAI") requests leave to file the attached *amicus brief* in support of Appellant Highland Greens Homeowners Association of Buena Park ("Appellant" or "Association").

IDENTITY AND INTEREST OF AMICUS CURIAE

This motion is respectfully submitted by CAI in support of the Appellant. CAI is an international organization dedicated to providing information, education, resources and advocacy for community association leaders, members and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 40,000 members include homeowners, board members, association managers, community management firms, and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 70 million homeowners who live in more than 344,500 community associations in the United States.

Currently, CAI has over 60 chapters, including 8 chapters in California. Approximately 9,160,000 Californians live in 3,490,000 homes in 45,400 community associations. These residents pay $12.4 billion a year to maintain their communities. These costs would otherwise fall to the local government. The mission of CAI – California is to provide education and resources to California

residential condominium, cooperative, and homeowners associations, as well as to represent their interests and the interests of California community association members, on issues of legal importance, such as is presented by the case herein on appeal.

CAI respectfully requests that this Panel reverse the Bankruptcy Court's order in the instant matter.

CAI is uniquely suited to advise this Court based on its standing and experience. The author, a CAI volunteer, was chosen based on experience working with CAI on California State legislative issues and expertise representing homeowner associations, including an emphasis on homeowner association collection and foreclosure issues. The author has also written articles and presented seminars on homeowner association collection and foreclosure issues.

CONCLUSION

For the reasons stated herein, CAI respectfully requests that the Court grant leave to file late the attached *amicus curiae* brief.

Dated: December 18, 2018

Respectfully submitted,

ADAMS STIRLING, PLC

By /s/ Nathan R. McGuire
Nathan R. McGuire
Attorneys for Amicus Curiae,
Community Associations
Institute

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2018, I electronically filed and served in the manner stated below the following documents:

1. **MOTION FOR LEAVE TO FILE A LATE AMICUS CURIAE BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF APPELLANT HIGHLAND GREENS HOMEOWNERS ASSOCIATION OF BUENA PARK;**

2. **AMICUS CURIAE BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF APPELLANT HIGHLAND GREENS HOMEOWNERS ASSOCIATION OF BUENA PARK**

with the Clerk of the Court for the Bankruptcy Appellate Panel for the Ninth Circuit by using the appellate CM/ECF system.

[X] SERVED BY UNITED STATES MAIL: On December 18, 2018, I served a copy of the foregoing documents on the following person at the last known address in this bankruptcy appellate case by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows:

Laurie C. Keating
Fiore, Racobs & Powers
6820 Indiana Avenue, Suite 140
Riverside, California 92506
Attorneys for Appellant, Highland Greens Homeowners Association of Buena Park

[X] TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): The foregoing documents will be served by the Court via NEF and hyperlink to the document. On December 18, 2018, I checked the CM/ECF docket for this bankruptcy appellate case and determined that the following persons are on the Electronic Mail Notice to receive NEF transmission at the email addresses stated below:

Christopher J. Langley
Fiore, Racobs & Powers
15635 Alton Parkway, Suite 200
Irvine, California 92618
chris@langleylegal.com
Attorneys for Debtor

Erin A. Maloney
Fiore, Racobs & Powers
15635 Alton Parkway, Suite 200
Irvine, California 92618
emaloney@fiorelaw.com
Attorneys for Appellant, Highland Greens Homeowners Association of Buena Park

TRUSTEE
Amrane (SA) Cohen (TR)
770 The City Drive South Suite 8500
Orange, CA 92868
efile@ch13ac.com

U.S. TRUSTEE
United States Trustee (SA)
411 W Fourth St., Suite 7160
Santa Ana, CA 92701-4593
ustpregion16.sa.ecf@usdoj.gov

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 18, 2018, in Riverside, California.

CHRISTY JONES

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

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Nathan R. McGuire, Esq. (SBN 232411)
Jason A. Savlov, Esq. (SBN 213879)
ADAMS STIRLING PLC
2566 Overland Avenue, Suite 730
Los Angeles, California 90064
(310) 945-0280 • Fax: (310) 945-0281
Email: nmcguire@adamsstirling.com
jsavlov@adamsstirling.com

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I.

POSITION OF COMMUNITY ASSOCIATION INSTITUTE

CAI respectfully submits that the Bankruptcy Court is required to, but did not apply established California law. The Bankruptcy Court was determining whether an assessment lien recorded by a common interest development is a continuing lien, but concluded that such liens should be limited to the amount initially stated in the notice, despite applicable statutory and case law to the contrary. That alone requires reversal of the Bankruptcy Court's ruling, but more still, if the Bankruptcy Court's interpretation of the law is allowed to stand, more than 45,000 community associations consisting of over 9 million Californians will be crippled in their ability to efficiently and effectively collect delinquent assessments. Struggling homeowners will be further forced into an untenable situation, as homeowner associations seek to enforce substantially increased costs against such delinquent homeowners. If this Court upholds the Bankruptcy Court's ruling, the oppressive burden of having to record successive liens would be harmful to all involved, including homeowner associations, delinquent homeowners, and non-delinquent homeowners, without any meaningful benefit to offset the substantial burden. This case has significant public policy implications throughout the homeowner association industry in California.

CAI respectfully requests that this Panel reverse the Bankruptcy Court's order in the instant matter.

II.

STATEMENT OF FACTS AND RELEVANT PROCEDURAL HISTORY

CAI adopts and incorporates the Association's statement of facts and relevant procedural history.

III.

ARGUMENT

A. Under State Law, Assessment Liens Secure Subsequently Accrued Amounts

The California Court of Appeal has considered the question of whether regularly recurring homeowners association assessments require new liens to secure installments that become delinquent after the lien is recorded. In *Bear Creek Master Association v. Edwards* (2005) 130 Cal.App.4th 1470, 1489, 31 Cal.Rptr.3d 337, 352, the California Court of Appeal held that associations need not record successive liens in order to secure a homeowner's assessment debt, because assessment liens are continuing liens, which secure all amounts authorized by statute and the governing documents. This conclusion is supported by the statutory language, as will be demonstrated, but is also necessary to prevent absurd results.

i. Frequent successive liens are not a viable alternative.

Homeowners living within homeowners associations are required to contribute on a regular basis, pursuant to Civil Code § 5650, toward the maintenance and other responsibilities fulfilled by the association. Homeowners associations are generally nonprofit corporations (Civil Code § 4080), and as such are limited in how they can raise money to fulfill those responsibilities. Associations are required to levy assessments sufficient to fulfill those responsibilities (Civil Code § 5600) and any amount not paid by a delinquent homeowner necessarily becomes a burden on the remaining homeowners. To increase fairness in this arrangement, state law has empowered associations to use liens to secure the debt of delinquent homeowners (Civil Code § 5720), to ensure the remaining homeowners are not left paying the debts of others.

At the same time, California State law has also limited what can be included in the liens (Civil Code § 5720(b)) as well as the conditions of when foreclosure becomes an option (Civil Code
§ 5720(b)(2)). California State laws also increase the burden of recording a lien by including fees. Government Code § 27388.1 adds $75 for each recorded document, implemented by SB 2 effective January 1, 2018, which, together with the existing recording fees, costs of legal assistance, collection agencies, and management, make each lien a significant hurdle. While this hurdle may be justified, these

additional costs would be carried by the homeowner, or else by the homeowner's neighbors if the association is unable to enforce the debt. In either case, the community suffers when costs are unnecessarily incurred. Delinquent owners are provided numerous notices at various stages in the collection and foreclosure process, and have every opportunity to obtain records of the delinquent amount; the recording of a new lien provides no tangible benefit to delinquent owners since notices are provided for by law.

In either outcome, requiring a new lien for each delinquent monthly or otherwise regular assessment would cause the costs to grow exponentially, to the point where the cost of collecting could far exceed the relatively small incremental assessments being sought. This would be detrimental to associations and even to the delinquent homeowners. Frequent successive liens are not a viable alternative to a continuing lien that includes ongoing delinquencies.

ii. The California Civil Code has established this as State Law.

Instead of frequent successive liens for each assessment payment, California law provides that associations can record a lien that secures current *and future* delinquent assessments. The authority to use a lien to enforce a homeowner's obligation to contribute the assessment amount is expressly granted in California Civil Code §5720 (which was renumbered in 2013 from prior Civil Code § 1367.4). That section states, in relevant part:

> (b) An association that seeks to collect delinquent regular or special assessments of an amount less than one thousand eight hundred dollars ($1,800), not including any accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest, may not collect that debt through judicial or nonjudicial foreclosure, but may attempt to collect or secure that debt in any of the following ways:
> ...
> (2) By recording a lien on the owner's separate interest upon which the association may not foreclose until the amount of the delinquent assessments secured by the lien, exclusive of any accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest, equals or exceeds one thousand eight hundred dollars ($1,800) or the assessments secured by the lien are more than 12 months delinquent.

In relevant part, "[a]n association that seeks to collect delinquent regular or special assessments of an amount less than one thousand eight hundred dollars ($1,800) [...] may attempt to collect or secure that debt [...] [b]y recording a lien on the owner's separate interest." (Civ. Code § 5720.) The association can record a lien for a debt less than $1,800, upon which lien the association may not *foreclose* "until the amount of the delinquent assessments secured by the lien [...] equals or exceeds one thousand eight hundred dollars ($1,800) or the assessments secured by the lien are more than 12 months delinquent." *Id.* This is not a matter of delaying recordation of the lien until the debt reaches a level that can be foreclosed upon. The association is expressly allowed to record a lien for under $1,800, and then foreclose when the delinquent assessments secured by that *previously recorded lien* have increased above $1,800.

Despite these provisions in the California Civil Code, the Bankruptcy Court concluded that an assessment lien could only secure the amount stated on the original lien when it was recorded. One argument that supported this erroneous interpretation of California law was the requirement in Civil Code § 5675 that the lien include the amount and an itemization of the debt. However, reading in a meaning that assessment liens are limited to the listed amount would conflict with Civil Code § 5720.

iii. The California Court of Appeal has resolved the matter.

As mentioned, the California Court of Appeal considered this potential conflict in *Bear Creek Master Assn. v. Edwards*, *supra*, at 1489 (which was decided before the applicable Civil Code provisions were renumbered from §1350 et seq. to §§4000-6150). In light of the above considerations, and others, the *Bear Creek* court held as follows:

> "Condominium homeowners associations *must* assess fees on the individual owners in order to maintain the complexes." (*Park Place Estates Homeowners Assn. v. Naber* (1994) 29 Cal.App.4th 427, 431-432, 35 Cal.Rptr.2d 51, italics original.) Those fees are statutorily prescribed to be "a debt of the owner ... at the time the assessment ... [is] levied." (Civ.Code, § 1367, subd. (a).) "These statutory provisions reflect the Legislature's recognition of the importance of assessments to the proper functioning of condominiums in this state. Because homeowners associations would cease to exist without regular payment of assessment fees, the Legislature has created procedures for associations to quickly and efficiently seek relief against a nonpaying owner." (*Park Place Estates Homeowners Assn. v. Naber*, *supra*, 29 Cal.App.4th at p. 432, 35 Cal.Rptr.2d 51, italics added.)

> Were the relevant provisions to be construed as Edwards suggests, the described statutory purpose of providing for a quick and efficient means of enforcing the CC&R's would be seriously undermined; each month, or at such other intervals as the assessments are charged under a given set of CC&R's, the association would be required to record successive liens. A successive recordation requirement would impose a heavy - and needless - burden upon homeowners' associations, fraught with risk to the association, and undue windfall to the delinquent homeowner, should any installment be overlooked. We are unwilling to construe Civil Code section 1367 to require such an oppressive burden. Both delinquent homeowners and the public at large are placed on notice, with the recordation of the initial assessment lien, that subsequent regularly and specially levied assessments, if they continue unpaid, will accrue in due course. The purpose of the lien notice and recordation will have been served, and the association's remedy justly preserved, by the initial recordation of lien." *Id.*

Any uncertainty about how to interpret the statutory language is resolved by the California Court of Appeal. Under California law, associations are not required to record successive liens to secure subsequently accruing delinquent assessments. Instead, assessment liens are continuing liens, and assessments that continue to become due, and then delinquent, are noticed and secured by the existing lien.

B. <u>Existing State Law Must Be Applied</u>

The Bankruptcy Court is required to apply state law to determine whether a lien in question is valid. *In re Southern California Plastics, Inc.*, 208 B.R. 178, 181 n. 3 (9th Cir. BAP 1997) (citing McKenzie v. Irving Trust Co., 323 U.S. 365, 369-72, 65 S.Ct. 405, 89 L.Ed. 305 (1945)). Similarly, the effect of the lien in the bankruptcy context is also a question of state law. *Cool Fuel v. Board Equalization*

(In re Cool Fuel), 210 F.3d 999, 1007 (9th Cir. 2000). If the Bankruptcy Court had been applying California law, then *Bear Creek* would have determined the outcome.

The California Supreme Court has not considered this particular question regarding assessment liens. Thus, according to *In re Croshier*, 228 B.R. 468, 471 (Bankr. S.D. Cal. 1998), "in the absence of a supreme court decision, [bankruptcy courts] must follow a decision of an intermediate appellate court absent convincing evidence the highest court of the state would decide differently." Therefore, because the California Supreme Court has not opined on the matter, the Bankruptcy Court was required to adhere to the decision from the California Court of Appeal in *Bear Creek.*

IV.

CONCLUSION

The error of the Bankruptcy Court can be described simply: the existing state law has already resolved the question in a way that is both practical and compatible with related statutory schemes, but the Bankruptcy Court did not apply the established state law as required. Instead, the Bankruptcy Court drew a

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conclusion that is not only incorrect, but is harmful to millions of Californians and California corporations who will be unable fairly enforce delinquent assessment liens.

Dated: December 18, 2018

Respectfully submitted,

ADAMS STIRLING, PLC

By /s/ Nathan R. McGuire
Nathan R. McGuire
Attorneys for Amicus Curiae,
Community Associations
Institute

CERTIFICATE OF COMPLIANCE

Federal Rules of Bankruptcy Procedure 8015(a)(7) and 8017 Pursuant to Federal Rule of Bankruptcy Procedure 8015(a)(7) and 8017, the undersigned certifies that this Brief complies with the type-volume limitation and that this Brief contains 1,844 words (excluding the cover page, tables, signature blocks and required certificates) as counted by the computer program used to prepare this Brief.

Dated: December 18, 2018

Respectfully submitted,

ADAMS STIRLING, PLC

By /s/ Nathan R. McGuire
Nathan R. McGuire
Attorneys for Amicus Curiae,
Community Associations
Institute