

Case No. G049624

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

**HUNTINGTON CONTINENTAL TOWNHOUSE ASSOCIATION,
INC., a nonprofit association,**

Plaintiff-Respondent,

v.

**THE JM TRUST, DATED JANUARY 1, 2005, JOSEPH A. MINER,
TRUSTEE,**

Defendants-Appellants.

Appeal from the Superior Court of the State of California
County of Orange Appellate Division, Case No. 30-2013-00623099
Honorable Craig Griffin, Presiding Judge

(Superior Court of the State of California County of Orange, Case No. 30-
2011-00466754
Honorable Robert H. Gallivan, Trial Judge)

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
AND AMICUS CURIAE BRIEF OF AARP, HOUSING AND
ECONOMIC RIGHTS ADVOCATES, AND NATIONAL HOUSING
LAW PROJECT**

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**APPLICATION FOR LEAVE TO FILE
AMICI CURIAE BRIEF AND PROPOSED BRIEF
IN SUPPORT OF APPELLANTS**

To the Honorable Presiding Justice O’Leary and the Honorable Associate Justices of the Court of Appeal for the State of California, Fourth Appellate District:

Pursuant to Rule of Court, rule 8.200(c), AARP, Housing and Economic Rights Advocates and the National Housing Law Project (amici) respectfully request leave to file the accompanying brief as amici curiae in this proceeding in support of the appellants, The JM Trust, et al. The proposed brief is included with this application.

Amici have appeared before other courts in cases that specifically addressed homeowners’ rights in foreclosure actions. No party other than amici and its counsel authored the proposed amicus brief in whole or in part or made a monetary contribution to the preparation or submission of the brief.

STATEMENTS OF INTEREST

AARP is a nonprofit, nonpartisan organization, with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. AARP is deeply concerned about the housing rights of its members and the ability of older people to have accessible and affordable housing options. AARP has

advocated for both state and federal legislation that would give homeowners who are in foreclosure increased protection, including legislation with enhanced protections for homeowners who own homes in Common Interest Developments. AARP has also participated as an amicus curiae in foreclosure cases nationwide including *Diamond v. Superior Court (Casa Del Valle Homeowners Ass'n)* (2013) 217 Cal.App.4th 1172 which specifically addresses homeowner protections in the Davis-Stirling Act. Approximately half of all homeowners in Common Interest Developments are over the age of 50.

Housing and Economic Rights Advocates (“HERA”) is a California statewide, not-for-profit legal service and advocacy organization. HERA’s mission is to ensure that all people are protected from discrimination and economic abuses, especially in the realm of housing. In recent years, HERA’s work has focused on asset preservation and preventing foreclosure. HERA counsels between 1,500 and 2,000 individuals annually, and offers in-depth advocacy (in some cases including legal representation) to over 500 low and moderate income homeowners and former homeowners each year. This volume of cases allows HERA to discern trends in the foreclosure-related problems homeowners face.

HERA has counseled numerous homeowners and former homeowners who are experiencing collection issues with their homeowner associations (“HOAs”) and especially from third party debt collectors

purporting to collect on HOA debts, and represents some of these consumers in state and federal court. HERA is co-counsel for plaintiff Gena Hanson in a pending case filed as a class action in the Northern District of California that challenges a third party debt collector's collection practices on HOA debt. Hanson claims that the third party debt collector ignored numerous provisions of the Davis-Stirling Act by, *inter alia*, refusing to accept partial payments, in direct contravention of the purpose of the Act. (*Hanson v. JQD, LLC*, (N.D.Cal., Feb. 19, 2014, No. 13-05377 RS) 2014 U.S. Dist. LEXIS 21360, *1-2).

National Housing Law Project ("NHLP") is a law and advocacy center established in 1968. For over 40 years, NHLP has been dedicated to advancing housing justice for the poor by using the power of the law to increase and preserve the supply of decent affordable housing, to improve existing housing conditions, including physical conditions and management practices, to expand and enforce low-income tenants' and homeowners' rights, and to increase opportunities for racial and ethnic minorities.

I. INTRODUCTION

The central issue on appeal is whether the trial court correctly held that a homeowner association is not required to accept partial payments. Explicit public policy considerations in the California Davis-Stirling Act intended to prevent avoidable foreclosures requires associations to accept

partial payments toward delinquent assessments. Therefore the trial court's judgment in favor of the Association must be reversed.

II. **THE NUMBER OF RESIDENTS IN COMMON INTEREST DEVELOPMENTS HAS RISEN DRAMATICALLY NATIONWIDE**

Since 1970, the number of Americans who live in homes managed by homeowner associations ("HOAs") has dramatically risen from 2.1 million to approximately 63 million. (Conlin, *\$288 in Unpaid fees, Homeowner Association Took Her Home* (Jan. 8, 2014) MSN News <<http://tinyurl.com/oxz5caf>> [as of June 3, 2014].) In fact, today four out of five new home buyers end up residing in a home regulated by a HOA. (*Ibid.*)

Over 25 percent of California's real estate, which includes over 6 million residential units, is in a Common Interest Development (CID) governed by an HOA. (Bertelsen, *California Law Sets New Requirements for Homeowner Association Meetings*, (Apr. 4, 2012) Pertria Articles <<http://tinyurl.com/lds6c2g> [as of May 6, 2014]>; see also United States Department of Commerce, *U.S. Census State and County Quick Facts: California* <<http://quickfacts.census.gov/qfd/states/06000.html>> [as of June 3, 2014] [30.9% California population living in multi-unit housing structures, 2008-2012].)

The number of people living in cooperatively owned housing such as CIDs is only expected to rise in coming years, given trends in urbanization.

(Badger, *The Quiet Rise of the Much-Maligned Condo* (Nov. 29, 2012) The Atlantic <<http://tinyurl.com/c2xmm4v>> [as of June 2, 2014].)

III. **FORECLOSURE ACTIONS INITIATED BY HOMEOWNER ASSOCIATIONS CAUSE CALIFORNIANS SIGNIFICANT HARM.**

Foreclosures by HOAs are increasingly commonplace. (Conlin, *supra*.) While HOAs can provide a valuable benefit to residents of the communities they serve, they also have become known for “burdensome restrictions, excessive regulation and aggressive enforcement,” including enforcement by lien imposition and foreclosure, with respect to individual homeowners. (Kiselev, *Have Homeowners Associations Crossed the Line?: Homeowners Associations Are Quick to Pursue Foreclosure for Unpaid Assessments* (Oct. 2009) 2009 Ill. Bus. L.J. 14 <<http://bit.ly/1mP3nU4>> [as of June 3, 2014].)

The use of foreclosure as an enforcement tool on those having difficulty paying homeowner assessments can be both unjust and extremely damaging. Aggressive enforcement of HOA liens and debts causes homeowners to face enormous fines, beginning a cycle of debt from which they may be unable to escape before losing their homes. (*Id.* at pp. 14-15.)

A home is often a person’s single most valuable asset. (Trawinski, *Nightmare on Main Street: Older Americans and the Mortgage Market Crisis* (July 2012) AARP Public Policy Institute, p. 3

<<http://bit.ly/QggLDE>> [as of May 7, 2014].) In addition to losing their

homes, delinquent homeowners may lose any equity they have built up over the years, resulting in a “double tragedy”. (Zupanic, *Review of Selected 2005 California Legislation: Civil: Keeping Homes off The Auction Block: California Limits Foreclosures by Homeowners Associations* (2006) 37 McGeorge L.Rev. 199, 204.)

The consequences of foreclosure are particularly severe for older homeowners. They are more likely to live on a fixed and limited income and are, therefore, more vulnerable to physical stress from unexpected expenses, such as those related to a medical conditions. (Trawinski, *supra*, at p. 4.) Additionally, older people often have a more difficult time recovering from a foreclosure because they are not well-positioned to earn and save, once again, the equity lost in a foreclosure sale. (Zupanic, *supra*, at p. 205.) It is extremely difficult to start over after losing one’s home to foreclosure. California has some of the highest cost housing in the nation, forcing Californians to spend less on food, clothing, healthcare and other necessities. *See* Bravve et al., *Out of Reach 2012 America’s Forgotten Housing Crisis* (Mar. 2012) National Low Income Housing Coalition, p. 4 <<http://nlihc.org/sites/default/files/oor/2012-OOR.pdf>> [as of June 3, 2014]. ; California Budget Project, *Locked Out 2008: The Housing Boom and Beyond* (Feb. 2008) pp. 4, 7, 29-30 <http://www.cbp.org/pdfs/2008/080212_LockedoutReport.pdf> [as of June 3, 2014].

IV. THE DAVIS-STIRLING ACT PROVIDES CORE FORECLOSURE PROTECTIONS FOR HOMEOWNERS

In the past, homeowners frequently found themselves in foreclosure for “relatively small amounts of delinquent payments” and found themselves paying for costs and fees that often greatly exceeded the amounts of delinquent payments. (Sen. Com. on Judiciary, Analysis of Assemb. Bill 2289 (2001-2002 Reg. Sess.) June 25, 2002, pp. 4-5.) In response, the California legislature amended the Davis-Stirling Act in AB 2289 to provide procedural protections for homeowners.¹ The bill required associations to provide a 30-day waiting period prior to recording a lien on the property, right to request a meeting with the association board, and

¹ The legislative history of the original 2002 Davis Stirling Act explains the Legislature’s intent: to avoid the harsh effects and exponential expenses of HOAs’ use of non-judicial foreclosure to collect small-dollar assessments owed, and to do so by creating procedural protections that encourage other collection options and make foreclosure a last resort:

“This bill will provide minimal due-process protection for homeowners in common interest developments (CIDs) who are faced with non-judicial foreclosures. Under current law, homeowner's associations can foreclose on homeowners for small amounts of money owed without going to court. There is substantial evidence that the non-judicial process is being used in ways that are unfair and not as visualized by the original legislation that permitted it. While we recognize the need of homeowner's associations to have a legal tool to collect dues when owed, we believe that the ultimate weapon of foreclosure should be the last, not the first, process to be used. Sen. Com. on Judiciary, Analysis of Assemb. Bill 2289 (2001-2002 Reg. Sess.) June 25, 2002, p. 4-5.

required associations to accept partial payments from homeowners, the provision at issue here. (Civ. Code § 5655.)

Just three years later, the legislature acted again to pass SB 137 to further protect homeowners from the "extreme hammer of non-judicial foreclosure in order to collect relatively small amounts of overdue assessments." (California Bill Analysis, S.B. 137 Assembly Fl. (2005-2006 Reg. Sess.) To achieve this purpose, SB 137 prohibited foreclosure until delinquent assessments reaches \$1,800, required additional pre-foreclosure procedures, including an open vote by the board, and added the right to reinstate after a non-judicial foreclosure. (Civ. Code § 5720.) In these ways, the Davis-Stirling Act created procedural protections that encourage other collection options in order to protect homeowners from the jarring, and often devastating, effect of a foreclosure.

Since the clear intent behind the enactment of the Davis-Stirling Act legislation at issue in this case is to protect homeowners from foreclosure, the Act must be interpreted in that light. (*See Diamond v. Superior Court* (2013) 217 Cal.App.4th 1172, 1188.) Further, the Davis-Stirling Act constitutes remedial legislation and as such must be liberally construed in favor of the homeowner. (See, e.g., *Prunty v. Bank of America* (1974) 37 Cal.App.3d 430, 436, 441-442 [Holding that since the "spirit" of Cal. Code of Civil Pro. 580b was to protect the borrower, the statute must be afforded a "liberal construction in light [] of the legislative purpose"].)

V. **VIEWED IN LIGHT OF LEGISLATIVE INTENT TO PROTECT HOMEOWNERS FROM FORECLOSURE, THE DAVIS-STIRLING ACT REQUIRES ASSOCIATIONS TO ACCEPT PARTIAL PAYMENTS**

A. The Davis-Stirling provisions relating to homeowner payments are designed to avoid foreclosure and preserve homeowner equity

The Davis-Stirling statutory scheme relating to homeowner payments on delinquent accounts is designed to create reinstatement opportunities for homeowners so they can avoid foreclosure. (See *Huntington Continental Town House Ass'n v. Miner* (2014) 222 Cal.App.4th Supp. 13, 17 (“Allowing partial payments to pay down delinquent assessments after lien recordation would be consistent with the Legislature's desire to limit the remedy of foreclosure to those circumstances where it appears to be the only viable option for collecting delinquent assessments”).)

Civil Code section 5665 clearly encourages cooperation between the HOA and the homeowner to avoid foreclosure. Civil Code sections 5665 (a) and (b) mandate that HOA boards must meet with homeowners and discuss payment plans if the homeowner requests such a meeting. If a homeowner is fortunate enough to work out a payment arrangement with the HOA, late fees and collection efforts will be halted so long as the homeowner remains in compliance with the plan. (See Civil Code § 5665

subd. (c) and (e)). However, nothing in this provision requires an HOA to offer homeowners a payment plan.

Since payment plans are not a mandatory option for homeowners, Civil Code sections 5655 (former §1367.1 subd. (b)) and 5720 (former § 1367.4) work together to ensure that a homeowner has at least some opportunity to avoid foreclosure. Civil Code section 5720 establishes that a HOA cannot foreclose unless a homeowner owes at least \$1,800 or is more than one year behind on delinquent regular or special assessments, not including any accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest. Civil Code section 5655 helps homeowners to stay below this foreclosure threshold by establishing (1) that the HOA must accept "any" payment from a homeowner toward their assessment debt, and (2) that any homeowner payment must first be applied to delinquent assessments, and only after delinquent assessments are paid in full to costs of collection, attorney's fees, late charges, or interest. The statutory mandate for HOAs to accept partial payments is therefore an essential component of the California's legislature's attempts to protect homeowners from unnecessary foreclosure on HOA debt.

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B. Without mandatory partial payments, the balance of the Davis-Stirling collection scheme would be undercut and HOAs (and their agents) would be given unchecked power to threaten homeowners and rack up egregious fees

A holding that Civil Code § 5655(a) does not require HOAs to accept partial payments would substantially shift the balance of interests Davis-Stirling created and profoundly undercut the Act's protections against foreclosure.

The current structure of the Davis-Stirling Act incentivizes HOAs and homeowners to enter into payment plans: HOAs have an incentive to offer payment agreements because they are a cooperative and predictable manner to recover assessments and homeowners are incentivized to accept because they halt late fees and collection efforts. *See* Civil Code § 5665 subd. (c) and (e). However, if HOAs were permitted to refuse partial payments from homeowners, the HOAs would have no incentive to offer repayment agreements and could simply force homeowners straight to foreclosure. HOAs could easily refuse to offer any type of payment plan or could only offer payment plans that are unworkable for homeowners. Denied a repayment option, homeowners would have to stay in delinquency longer while they struggled to find the money to make a payment in full. With the passage of time and the accrual of late fees and interest, the feasibility of avoiding foreclosure for most homeowners would be exceedingly dismal.

This is already proving to be the case for many homeowners in California because HOAs are not always collecting their own debts. Non-profit HOAs frequently hire for-profit third-party debt collectors to take over the collection of accounts. (Nguyen, Ngoc, *Hard Pressed Homeowners Facing Another Financial Threat* (Apr. 14, 2011) N.Y. Times <http://www.nytimes.com/2011/04/15/us/15bchomes.html?pagewanted=all&_r=0> [as of June 6, 2014])(associations often work with debt collectors and cause HOA debt to skyrocket). It has been customary, as the Association notes, for HOAs and the “myriad management and related industries surrounding homeowners associations,” to refuse partial payments from homeowners. Plaintiff-Respondent’s Application Requesting Certification for Transfer p. 1. By refusing partial payments, HOAs and, more significantly, the “myriad management and related industries” surrounding them, subject homeowners who cannot immediately pay all demanded fees in addition to their principal debt to additional late fees and interest costs and to payment plan fees and other fees associated with extended delinquency.

VI. DAVIS-STIRLING’S MANDATE THAT HOAS ACCEPT AND APPLY PARTIAL PAYMENTS DOES NOT UNDULY RESTRICT THEIR ABILITY TO COLLECT FEES

Moreover, the Association’s argument that requiring HOAs to accept partial payments would “indefinitely impede an association’s ability to foreclose,” Resp Br p. 17, is simply incorrect. The Davis-Stirling Act

specifically allows HOAs to foreclose when the homeowner is more than 12 months delinquent, even if the homeowner owes less than the \$1,800 statutory minimum. (Civ. Code § 5720 subd. (c).) Since many HOAs must wait close to 12 months to simply reach the \$1,800 foreclosure threshold, the Davis-Stirling Act creates only a short window of opportunity for homeowners to avoid foreclosure while maintaining their incentive to timely pay for delinquent assessments. The HOA only has to wait for 12 months of delinquency before it may leverage foreclosure as a means to recover debt.

Even if partial payments prevent an HOA from actually foreclosing to recover minimal assessment debt, they still have other, less drastic remedies. The HOA may always collect or secure its debt by filing a civil action in small claims court, by recording a lien on the owner's separate interest in the property, or by any other manner provided by law. (Civ. Code § 5720 subd. (b).) Nothing prohibits an HOA from going to court and seeking a civil judgment on anything owed or from enforcing a judgment against the homeowner's title. Moreover, homeowners will always have a strong incentive to bring their HOA accounts current as soon as possible without further collection activity because HOAs are statutorily permitted to charge delinquent homeowners for the costs that they incur in the collection of delinquent assessments. (See Civ. Code § 5650 subd.

(b)(1).) [HOA may recover reasonable costs incurred in collecting assessments, including reasonable attorneys' fees]).

VII. **CALIFORNIA'S NONJUDICIAL FORECLOSURE STATUTE DOES NOT CONFLICT WITH THE DAVIS-STIRLING ACT**


Nor is Appellant's interpretation of the Davis-Stirling Act inconsistent with the nonjudicial foreclosure scheme set out in Civil Code 2924 *et seq.* The Association argues that because the statutory nonjudicial foreclosure scheme defines the contours of the ordinary mortgagor's right of reinstatement, Davis-Stirling cannot apply once foreclosure is underway. (Resp Br p. 12.) This argument misses the point: Davis-Stirling provides greater, and entirely consistent, protections for homeowners in foreclosures based on HOA assessments rather than mortgage loans. (See *Multani v. Witkin & Neal* (2013) 215 Cal.App.4th 1428 (holding that the Davis-Stirling Act provides post-foreclosure redemption rights to homeowners in HOA foreclosures that are not available to homeowners in mortgage foreclosures).) Regardless of the borrower's ability to reinstate, a California non-judicial foreclosure sale can be stayed "by operation of law." (Civ. Code § 2924g, subd. (c)(2); see also 4 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 10:186, p. 553) [cited by *Hicks v. E. T. Legg & Assocs.*(2001) 89 Cal. App. 4th 496, 504][emphasis added].) A non-judicial foreclosure by an HOA on its assessment debt cannot proceed by operation of law if the total amount of HOA debt, exclusive of interest and

fees, is less than \$1,800. (Civil Code § 5720.) The requirement that HOAs accept partial payments and apply them to the principal debt is part and parcel of this protection.

VIII. **CONCLUSION**

The requirement that a HOA accept partial payments from a delinquent homeowner is a critical, and explicit, component of legislation enacted specifically to protect homeowners from foreclosure on small amounts of HOA debt. The policy arguments the Association raises here were part of the legislative dialog leading up to its enactment. The legislature nevertheless spoke clearly, and its decision must stand.

DATED: June 9, 2014



Noah Zinner

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CERTIFICATE OF WORD COUNT

I certify that this brief contains 2,528 words, as counted by the Microsoft Word 2010 software used to generate it.

Dated: June 9, 2014



Noah Zinner

PROOF OF SERVICE

I, Noah Zinner, state:

I am a citizen of the United States. My business address is 1814 Franklin Street, Suite 1040, Oakland, CA 94612. I am employed in the County of Alameda where this mailing occurs. I am over the age of eighteen years and not a party to this action. On June 9, 2014, I served the foregoing documents described as:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF AARP, HOUSING AND ECONOMIC RIGHTS ADVOCATES, AND NATIONAL HOUSING LAW PROJECT

On the following persons by placing a true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the mail at Oakland, California, addressed as follows:

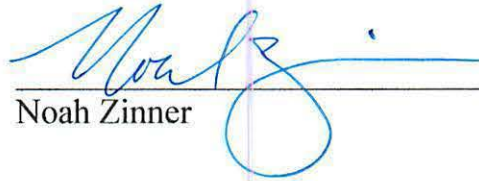
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June 9, 2014 at Oakland, California.



Noah Zinner