In the Court of Appeal of the State of California

Fourth Appellate District

Division 3

Case No. G049624

Orange County Superior Court Appellate Division Case No. 30-2013-00623099

Huntington Continental Town House Association, Inc.,

Plaintiff and Respondent,

vs.

The JM Trust, Dated January 1, 2005, Joseph A. Miner Trustee, and Does 1 through 100, inclusive,

Defendants and Appellants.

On Transfer From the Superior Court for the County of Orange Appellate Division
Hon. Craig Griffin, Presiding Judge

APPELLANTS' BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Caption:	Huntington Continental Town House Association, In. v The JM Trust, et al.
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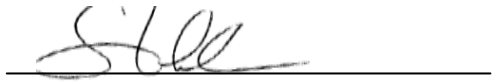
I certify that I do not know of any potentially interested persons or entities to be listed pursuant to Rule of Court 8.208.



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I. INTRODUCTION

In December 2011 appellant Joseph A. Miner ("Miner") sent to Respondent Huntington Continental Town House Association ("Huntington") a cashier's check in the amount of $3,500. This check would have paid Miner's delinquent assessments in full. Huntington's attorneys, however, refused to accept and returned the check because they said it was a "partial payment". Nine months later Huntington and its attorneys obtained a judgment ordering foreclosure of Miner's property.

Miner appealed to the Appellate Division. That Court reversed the judgment and held that Huntington's attorneys did not have the right to refuse Miner's payment just because it did not cover the entire amount the attorneys claimed was due. The case was then transferred here.

The Legislature enacted the provisions of the Davis-Stirling Act governing the collection of assessments to protect homeowners, not the practices of collection attorneys. Miner respectfully urges the Court to reject the absurd proposition that the Act protects homeowners only until a lien is recorded or their accounts are in the hands of attorneys.

Davis-Stirling is not the only law protecting homeowners in these circumstances. The laws imposing special duties on a fiduciary and that requiring a party to mitigate its losses do as well. There is no authority, statutory or otherwise, to the contrary.

Partial payments are not the only matter at stake here. Miner is entitled to reversal of the judgment however the Court comes out on partial payments. Civil

Code § 5720(b) [formerly 1367.4(b)][1] prohibits an association from using judicial foreclosure unless the total of delinquent *assessments only* exceeds $1,800 or when *assessments only* have been delinquent 12 months. Related charges, such as interest, late fees, attorney's fees, must be excluded from this total. Yet it is undisputed that the amount found by the trial court to justify foreclosure included all these charges.

In addition to foreclosure, Huntington sought to recover what Miner owed through common counts. Even if Huntington had established either an account stated or an open book account, however, which it did not, Huntington did not prove what amount, if any, Miner owed. Its accounting did not reflect credits for the payments he made that were accepted. The late fees and interest charged thus were based on false balances and there was no evidence of what the correct ending balance was.

Miner also urges the Court not to disregard the Economic Litigation issue this case presents. With no evidence of excuse, the trial court allowed Huntington to present a witness who was not listed on its statement of witnesses in response to Miner's Code of Civil Procedure § 96 demand. Therefore, even if the Court differs from the Appellate Division on partial payments, and even if it finds the judgment otherwise supported by the evidence, the Court should at least reverse the judgment on this final ground and remand so that Miner can have a fair trial.

[1] The Legislature reorganized and renumbered the Davis-Stirling Act code sections as they appear in the Civil Code, effective January 1, 2014. This brief will attempt to note the new section numbers, as well as the former ones.

II. ISSUES PRESENTED

1. Does the Davis-Stirling Act permit a homeowner's association to judicially foreclose on an assessment lien when the homeowner has paid or tendered the total amount of delinquent assessments?
2. Does a homeowner's association have the right to refuse, on the ground that it is a partial payment of the total debt, a payment that would overpay a homeowner's total of delinquent assessments?
3. Did the trial court's findings that Miner owed the Association $5,715.93 and that this debt was more than 12 months old support its order of foreclosure when this amount included late charges, interest, and attorney's fees?
4. Did substantial evidence support the trial court's findings that Miner owed the Association $5,715.93 and that this debt was more than 12 months old?

III. UNDISPUTED FACTS

The facts relevant to this case are not disputed.

A. The Assessments

Huntington is a common interest development governed by the Davis-Stirling Common Interest Development Act, Civil Code §§ 4000, et seq. Through his trust Miner owns a unit in this development. Pursuant to Civil Code § 5600, Huntington imposes assessments on its member homeowners, payable monthly.

Until the real estate depression began in 2008, Miner never fell behind in paying these monthly assessments. After 2008 he did. As a result, Huntington

recorded an assessment lien against his unit in January 2011, listing $4,136 in unpaid assessments. (Plaintiff's Trial Exhibit ["PTE"] 6; Reporter's Transcript ["RT"] 24:6-19.)

B. Miner's Payments and Tenders

Beginning in April 2011, Miner did everything he could think of to pay off his delinquent balance. (RT:130:22 – 131:3.) He sent an initial payment of $2,000 to Action Property Management ("Action"), Huntington's property manager at the time. Tyler Jones, a legal assistant Huntington's attorneys placed in charge of Miner's account, testified that Action forwarded this payment to the law firm. and that the law firm accepted it. (RT:61:7-17.)

Jones admitted that this constituted a partial payment of the delinquent assessments. (RT 61:18-25.) He further testified that the firm received and accepted additional partial payments from Miner in the amounts of $1,000 and $500. (RT 61:26 – 62:13.)

Jones testified that the attorneys simply stashed the payments in their trust account. Consequently, Action never accounted for them and never reduced Miner's balance accordingly. No one disclosed any of this to Miner. (RT 63:18 – 64:3, 64:23 – 65:5, 66:4 – 69:17, 71:20-23; PTE 21.)

Miner also repeatedly requested an itemized statement of his account. He sent letters and emails. He made phone calls.. However, he never received anything but obviously inaccurate and incomplete summary information that he could not reconcile with any account information he had. (RT 126:27 – 127:27.)

Miner eventually resorted to small claims, using a statute that allowed such an action to compel an association to provide the information. On March 21, 2012, at the courthouse, immediately prior to the hearing on his claim, Huntington finally gave him an itemized accounting. (RT 124:10 – 125:13, 127:12-27.)

Meanwhile, on November 15, 2011, and again on December 12, 2011, Miner tried to pay the monthly assessments so that he would not get further behind. He sent two checks each for $188. On December 16, 2011 Tyler Jones returned the checks to Miner, claiming that his firm could not accept partial payments. (RT: 121:19 – 122:9, 139:1-12; DTE K.)

Finally, on December 29, 2011, after so many futile attempts to get a properly documented pay-off amount, Miner calculated a total that would be more than he could possibly still owe. He then sent Huntington's President a cashier's check for an additional $3,500 to overpay the balance and end the matter. (RT 116:19 – 118:28; DTE H.)

The President accepted the check and sent Miner this confirming email:

> I received your money order and will get it to Feldstott and Lee to apply to your account. I will also get them to get you an up to date accounting of your account. I will ask Feldstott and Lee to update me when they have applied the check and updated the accounting on your account. I am sorry that you have had to deal with the frustrations around this situation and hope that it will now be resolved in a timely manner. (Defendants' Trial Exhibit ["DTE"] A; RT 78:9-24.)(RT 126:19-23, 117:24 – 118:28.)

Instead of crediting the payment to Miner's account, however, the attorneys returned this check as well and again claimed that they could not accept partial payments.

C. The Suit to Foreclose

On April 13, 2011, Huntington filed a complaint against Miner's trust to foreclose on its assessment lien. (Clerk's Transcript ["CT"] 1-6.) On December 16, 2011, Huntington filed an amendment to the complaint adding Miner as an individual in place of a Doe. (CT 7-8.) Huntington did not serve Miner until March 21, 2012. (CT 47-48.) Miner, then acting in pro per, answered the complaint on May 3, 2012. (CT 65-66.)

1. The Court Allows an Undisclosed Witness

On July 23, 2012, the Court set the action for a court trial to take place on September 20, 2012. On August 21, 2012, pursuant to Code of Civil Procedure § 96, Miner caused to be personally served on counsel for Huntington a Request for Statement of Witnesses and Evidence. (Supplemental Clerk's Transcript ["Supp CT"] 1, 5-7.) On September 10, 2012, Huntington, in response to Miner's Request, served a list of the two witnesses it would present at trial: Rustan Laine, President of Huntington, and Liza Salinas, Huntington's Community Manager. Huntington listed no other witnesses. (Supp CT 1-2, 13-14.)

On September 10, 2012, pursuant to Code of Civil Procedure § 1987(b), Miner caused to be personally served on counsel for Huntington a Notice to Appear at trial listing, among other persons, Tyler Jones. On September 15, 2012, counsel for Huntington served an objection to the Notice requiring Mr. Jones to appear. (Supp CT 2, 16-18.)

Trial proceeded on September 20, 2012 before Hon. Robert H. Gallivan, a retired judge serving in a temporary capacity in Department W10 at the West

Justice Center. Miner filed a motion in limine to exclude a number of exhibits that no witness listed on Huntington's witness list could testify about. (CT 86-89.) Huntington appeared and its counsel stated her intent to present three witnesses, including Tyler Jones, who was not listed on its witness list and to whose appearance Huntington had objected. (RT:5:8-21.) Miner objected to the presentation of this witness. (RT:7:12-21, 8:3-5.)

Counsel for Huntington argued that it should be allowed to introduce Mr. Jones' testimony despite the mandatory dictate of Code of Civil Procedure § 97. Only after counsel had argued the matter, and as the judge appeared about to rule, Huntington's counsel claimed that the omission of Mr. Jones from the witness list was due to clerical error and asked for relief on that basis. (RT 7:25 – 8:5.) However, she did not explain how the supposed error occurred or offer any evidence to support the claim. She also did not explain how clerical error could be involved when she specifically and formally objected to Mr. Jones' appearance.

Nevertheless, the judge allowed the testimony subject to a motion to strike. (RT 6:2-5, 8:15-19.) Then, after both sides rested, he simply cited "clerical error" and denied the motion. (RT 151:8-21.)

2. Huntington's Attorney Admitted That If They Had Kept and Applied Miner's Final $3,500 Payment His Balance Would Be Only $260 and Change

In her opening statement counsel for Huntington claimed that "currently the defendant owes $6215.93 in assessments, late charges, and interest through today's date." This amount, she said, reflected $3,000 in payments Miner had

made in 2011, but which her firm kept in its trust account. (RT 13:6-10.) She further stated that this amount did not reflect Miner's December 2011 tender of $3,500, which her law firm had returned. (RT 10:24 – 11:24.)

She admitted, however, "that had that 3500-dollar payment been applied to the account, the remaining balance would have been $760 and change." (RT18:10-14.) In its closing brief Huntington acknowledged an additional $500 in payments that should have been credited to Miner's balance. (CT 107.) Thus the total with the refused $3500 payment, according to Huntington, would be "$260 and change."

3. The Only Evidence of What Miner Owed Was Based On False Balances, Interest and Late Fees That Did Not Account For Payments That Were Accepted

Liza Salinas, the Action employee responsible for Huntington, identified an account report showing charges and credits for Miner's assessment account through September 5, 2012, 15 days before trial. The report included interest and late fees computed monthly on the basis of increasing balances. According to Ms. Salina, this report showed a balance of $6,215.93. (RT 25:17 – 26:20; PTE 21.)

This report was the only evidence Huntington introduced to establish the amount of Miner's debt. As explained above, Huntington subsequently acknowledged that the amount shown should be reduced by $500, leaving a total of $5,715.93. The Court accepted this and entered judgment for that amount.

Ms. Salinas admitted, however, that the payments Miner made in May, June, and July of 2011, and that were accepted by Huntington's attorneys, were not entered into Action's account system, and not credited to Miner's assessment

account. (RT 33:16 – 35:5; DTE E, F, and G.) The interest and late fees, therefore, were calculated on false balances, as if those payments had not been received. Hence the report itself was false.

D. The Judgment and Reversal

On October 22, 2012, the Court issued a minute order containing this ruling: "The Court finds Defendant owes Plaintiff $5715.39 as of 09/2012; a debt more than 12 months delinquent. The Court further finds Plaintiff has complied with all statutory requirements of CC 1367.1 and CC 1367.4 entitling the Plaintiff to foreclose on the property securing the debt and otherwise referenced in Plaintiff's complaint." (CT 119.)

Miner appealed to the Appellate Division. On September 26, 2013, that Court issued a decision reversing the judgment. On October 22, 2013, the Court ordered rehearing, and on January 13, 2014, published its decision reversing the judgment in all respects. The Court remanded for the trial court to make a correct determination of Miner's debt.

On February 4, 2014, the Appellate Division certified the matter for transfer to this Court of Appeal. On February 24, 2014, this Court ordered transfer.

IV. STANDARD OF REVIEW

The facts presented here are largely undisputed. The Court must "independently review [the] legal questions regarding the construction and application of [] statute[s]" to these undisputed facts. (*Dowling v. Farmers Ins.*

Exchange (2012) 208 Cal. App. 4th 685, 694.) Only with respect to Issue Number 4 should the Court conduct a substantial evidence review.

V. NEITHER THE LAW NOR THE RECORD SUPPORTS HUNTINGTON'S JUSTIFICATION FOR REFUSING MINER'S PAYMENT

The first issue presented here is whether Huntington's attorneys acted rightfully when they refused to accept, and returned, Miner's payment of $3,500 at the end of 2011. As noted above, Huntington conceded that this payment would have paid Miner's delinquent assessments in full and left owing in other charges no more than $260 and change.

Neither the law nor the record here, nor common sense for that matter, justifies Huntington's refusal to accept this payment. There is no authority for it. There is no statutory authority and no precedent in case law.

There is authority, however, statutory and otherwise, specifically protecting homeowners in common interest developments from such an act. This authority distinguishes cases like this from all others where the right to make partial payments might be restricted.

Homeowners in California common interest developments are protected by the Davis-Stirling Act. Portions of this Act were specifically designed to govern the manner in which common interest homeowners associations collect assessments. A common interest homeowner also has a fiduciary relationship with his or her homeowners association. It must employ collection practices that do not breach this duty. The law requiring a party to mitigate also imposes a duty

on a homeowners association not to refuse payments that would reduce its damages.

A. The Davis-Stirling Act Specifically Directs How Partial Payments Are to Be Applied

The Davis-Stirling Act includes provisions clearly requiring a homeowner's association to accept partial payments of delinquent assessments. The Legislature enacted certain sections of the Davis-Stirling Act specifically to control the process by which homeowners associations collect delinquent assessments. (*See Diamond v. Superior Court (Casa Del Valle Homeowners Association*) (2013) 217 Cal.App.4th 1172, 1184, 1190.)

Among these sections is 5655 ([formerly 1367.1(b)], emphasis added):

> (a) Any ***payments*** made by the owner of a separate interest toward a debt described in subdivision (a) of Section 5650 shall first be applied to the assessments owed, and, only after the assessments owed are paid in full shall the ***payments*** be applied to the fees and costs of collection, attorney's fees, late charges, or interest.
>
> (b) When an owner makes ***a payment***, the owner may request a receipt and the association shall provide it. The receipt shall indicate the date of payment and the person who received it.

The Court of Appeal has held that the sections of Davis-Stirling concerning assessments and collection are to be strictly construed to effectuate their purpose of protecting homeowners. (*Diamond*, 217 Cal.App.4th at 1190-1191.) "[T]he legislative history indicates that the public purpose of sections 1367.1 and 1367.4 ... was to protect the interest of a homeowner who has failed to timely pay an assessment levied by a homeowners association." (*Id.*)

Thus section 1367.1(b) [now 5655] dictating how payments are to be applied must be construed so as to maximize protection of homeowners. Consequently, since the section is not expressly limited in some manner, e.g., applying only to pre-lien delinquencies, such a limitation cannot be added by construction, cannot be read into the statute.

Indeed, the opposite interpretation is mandated. The section must be read to provide for what it reasonably infers. Hence section 1367.1(b), which directs *how* payments are to be applied, must be construed to provide a homeowner with the right to make payments that do not cover the total amount owed. This statute would not apply to a payment that satisfies the total debt, because in such case there is no uncertainty about how to apply it. Consequently, it must contemplate a homeowner making payments that do not satisfy the total debt.

There is nothing in Davis-Stirling, or anywhere else in the Civil Code, or in any other statute or regulation or reported case, limiting this section to pre-lien payments only. Given the strict construction required, therefore, and the public purpose of the Act, it would be nonsensical to read section 5655 as allowing a homeowner to partially reduce his delinquent assessments only until a lien is recorded.

Such a construction would conflict with the section of Davis-Stirling that imposes a threshold of $1,800 in *assessments only* before an association may proceed with judicial foreclosure. (Civil Code § 5720(b) [formerly 1367.4(b)].) Interest, late fees, attorney's fees and other charges must be excluded from this total. (*Id.*) However, if an association or its attorneys can refuse to accept a

payment that reduces only the assessment delinquency, and does not pay off the other related charges, the $1800 dollar threshold would be meaningless.

So too would subsection 5720(b)(2). This subsection allows an association, as an alternative collection procedure, where the delinquency is less than $1,800, to record a lien on the homeowner's separate interest. The association then may not foreclose until the amount of the delinquency exceeds $1,800 or is 12 months delinquent.

If the recording of a lien cut off the homeowner's right to pay anything but the full amount of the debt, including interest, late fees, and attorney's fees, the homeowner would be compelled to pay the full amount just to prevent the assessments only amount from automatically growing to exceed $1,800. This would eliminate the purpose of the subsection.

The Legislature could not have intended to make it so easy for collection attorneys to manipulate the process, especially in a manner harmful to the interests of homeowners. If it were lawful for associations and their attorneys to refuse a partial payment they could prevent a homeowner from reducing his delinquency below the threshold simply by returning any payments that did not cover the full amount the attorneys claim is owing.

1. The Payments Provided For By Section 5655 Are Consistent With The Sections Concerning Payment Plans

Huntington contended, as did some of those who submitted amicus letters, that if section 5655 allowed a homeowner to make partial payments once his account is in collections there would be no purpose for the sections of Davis-Stirling that concern payment plans. This contention is not correct. These Davis-

Stirling sections each serve a different purpose.

The payment plan provisions offer the homeowner an alternative that carries certain protections. Section 1367.1(c)(3) [now 5665(c)], for example, precludes an association from charging late fees while a payment plan is in effect. The availability of a plan with such protections does not in any way affect a homeowner's right to pay down his delinquency without them. Nor does it excuse a homeowners' association from the consequences of rejecting such payments.

B. Huntington Breached Its Fiduciary Duty to Miner

Associations like Huntington also have a fiduciary duty to their members. (*Cohen v. Kite Hill Community Assn.* (1983) 142 Cal. App. 3d 642, 650-651.) It must adhere consistently to its own rules and standards and not impose any arbitrary or capricious requirements upon its members. (*See Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal. App. 3d 766, 772.)

Huntington's breach of its fiduciary duty to Miner was particularly egregious. It accepted his partial payments beginning in May 2011. Without disclosing it to him, Huntington's attorneys secretly kept the payments in their trust account and did not credit his balance. Meanwhile Huntington added late fees and interest based on the unreduced balance, refused payments that would have paid off all but a minimal portion of the balance, then used the inflated balance as justification to foreclose on his property.

Huntington breached its fiduciary duty also by treating Miner arbitrarily and capriciously. It claimed to have a policy of not accepting partial payments.

Yet Huntington's own Assessment Collection Policy, a 5-page, single-spaced detailing of the policy (PTE 2), did not include a word about partial payments. So Huntington breached its duty each time one of its representatives falsely told Miner of the policy and used it as justification for refusing his payments.

Huntington and its attorneys allowed an untrained legal assistant to decide, quite arbitrarily, whether and when he would accept Miner's payments. Thus he did accept the first three. Then he refused to accept the next three, including one that would have paid off the delinquency. This was a singularly inexcusable violation of Huntington's fiduciary duty to Miner.

C. Huntington Also Failed to Mitigate Its Loss

The attorneys' refusal to accept and apply Miner's payments was wrongful for the additional reason that it caused Huntington to breach its duty to mitigate damages. A "wrongdoer is not required to compensate the injured party for damages which are avoidable by reasonable effort on the latter's part." (*Green v. Smith* (1968) 261 Cal. App. 2d 392, 396.) "The duty to minimize damages is predicated upon the statutory rule that a person is required to use reasonable care to prevent an unwarranted piling up of damages." (*Guerrieri v. Severini* (1958) 51 Cal. 2d 12, 23.)

Huntington's attorneys did not merely fail to take steps to mitigate; they acted affirmatively to prevent it. They had in their hands a payment that would have reduced their client's loss to $260 and change. Their client had directed them to apply the payment and make that happen.

Instead of doing that the attorneys returned the payment and kept the

meter running. They thus caused Huntington to breach its obligation to mitigate and Miner is not liable for the loss that could so easily have been avoided.

There was no justification whatsoever for what Huntington and its attorneys did to Miner. By refusing a payment that would have wiped out his assessment delinquency they artificially maintained the requisite threshold to foreclosure. The judgment they obtained by such artifice cannot stand.

VI. THE COURT MUST REVERSE THE JUDGMENT REGARDLESS OF HOW IT RULES ON PARTIAL PAYMENTS

A. The Judgment For Foreclosure Was Based On A Finding That Impermissibly Included Interest Charges, Late Fees, And Attorney's Fees

As explained above, the Davis-Stirling Act prohibits a homeowners association from foreclosing when the delinquent assessments total $1800 or less, unless the assessments have been delinquent for at least 12 months (Civil Code §§ 1367.4(b), (b)(2) [now § 5720(b)].) The total may not include any late charges, fees, costs of collection, attorney's fees, or interest. (*Id*.)

The trial court rested its judgment ordering foreclosure on a finding that Miner owed Huntington $5,715.93. This finding was based on evidence and testimony introduced by Huntington showing that to be the total amount owed.

As Huntington admitted, however, and as its own account report revealed, this amount included late charges, fees, costs of collection, attorney's fees, and interest. Thus the trial court's finding that Miner owed $5,715.93, and that this total satisfied the prerequisites to foreclosure set forth in section 1367.4(b), was clearly erroneous.

To order foreclosure the trial court was required to find that Miner owed at

least $1,800 in assessments only, or that the assessments only were at least 12 months delinquent. The Court did neither. This Court, therefore, must reverse the judgment, and, at a minimum, remand the matter for the trial court to make the proper finding.

B. The Finding Also Improperly Included Assessments And Charges Incurred After Huntington Had Refused To Accept Miner's Payments

The total evidenced by Huntington's testimony and its account report, and accepted by the trial court in its finding, included charges for assessments, late fees, and interest incurred from January to September 2012. Including these charges was not proper because Huntington had returned Miner's payments and advised him that it would not accept partial payments.

"The law [does] not require [a party] to engage in futile or useless acts." (*Sutherland v. Barclays American/Mortgage Corp.* (1997) 53 Cal.App.4th 299, 313.) Clearly it would have been futile and useless for Miner to continue sending payments.

In *Sutherland*, the mortgage company allowed the plaintiff to miss three months of mortgage payments, then required her to pay the total amount accrued for the three months. Informing the company that she could not afford to do that, she sent a check for the amount due for the first month following. The company returned the check saying it could not accept a partial payment. Then, a few months later, after HUD had declined to take assignment of the mortgage, the company sought to foreclose based on her failure to make the monthly payments due while HUD was reviewing the loan.

The Court of Appeal held that the plaintiff was not required as a matter of law to make the payments. Citing Civil Code § 3532, the Court explained that it would have been futile for the plaintiff to do so after the company returned her check and informed her that they would not accept partial payments. (*Id*.)

Without evidence of the amount of delinquent assessments only, or of their age, and including in the total payments Miner was not required to make, there was no substantial evidence to support the judgment for foreclosure

C. Huntington Also Did Not Satisfy the Burden of Proof for Its Common Counts

Huntington also pled two common counts: account stated and open book account. To the extent that the trial court's finding as to an amount owed is regarded as a finding on these common counts it is equally erroneous. Huntington did not prove what amount Miner owed, let alone the other elements of these claims.

To prevail on its common count claim for open book account Huntington was required to prove that Miner owes it a ***sum certain*** because that sum shows in a properly and regularly maintained account book reflecting ***all*** charges and credits and that is not simply a private internal record. (*See* CACI 372; *Robin v. Smith* (1955) 132 Cal. App. 2d 288, 290-291.) Huntington offered no such proof.

It offered only its internal account record. That record, as pointed out above, was not accurate or complete. It did not account for payments Miner made that were accepted, and thus did not reduce the balances for calculation of interest and late fees. The record did not show anything close to a sum certain.

To prevail on its claim for account stated Huntington was required to prove that Miner agreed to a statement of the amount of his debt and promised to pay it. (*See* CACI 373 (*Maggio, Inc. v. Neal* (1987) 196 Cal.App.3d 745, 752-753 ["key element in every context is agreement on the final balance due"].)

Huntington did not even provide a complete statement of his account to Miner until March 2012 after he sued in small claims to get it. Miner certainly never agreed to pay the inflated and grossly inaccurate amounts stated. Huntington offered no proof to the contrary.

D. With No Evidence of Excusable Error, the Trial Judge Did Not Have Discretion to Hear Huntington's Undisclosed Witness

Code of Civil Procedure § 97 is clear and mandatory. It prohibits a party from calling as a witness, or offering into evidence, any person or exhibit that is not listed on the Statements served in response to the section 96 Request for Statement of Witnesses and Evidence. (*See In re Jeanette H.* (1990) 225 Cal. App. 3d 25 ["Witnesses not identified in the response to a [§ 96] request may not testify at trial"].)

The only exception to this mandatory prohibition is set forth in § 97(b), which authorizes the court to allow the testimony where it finds "that the failure to comply was the result of ... mistake, inadvertence, surprise or excusable neglect as provided in Section 473." (Code Civ. Pro. § 97(b).) Section 473, however, allows a court to grant this relief only if an attorney submits an "application for relief" "in proper form" that is accompanied by the attorney's "sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect."

In this case Huntington's counsel made no application for relief, let alone one in proper form. More importantly, she submitted no affidavit or any other evidence demonstrating mistake, inadvertence, surprise, or neglect. She merely mentioned, as an afterthought, that she wanted relief based on "clerical error." After postponing its decision, thus allowing the testimony, the Court accepted this wholly unsupported request and ruled that counsel's unfounded claim of "clerical error" overrides the mandatory rule of section 97(b).

The economic litigation statutes promulgated as Code of Civil Procedure §§ 90 – 100 must serve some purpose. Yet they have no force if parties can evade their dictates as Huntington did in this case, merely by its counsel's offhand and unsupported claim of clerical error. If no proof or other explanation is required a party can always simply claim "clerical error", no party can rely on the statutes being enforced, and they become useless.

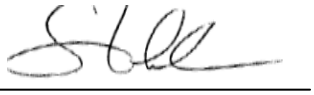
Appellants urge the Court to make section 97 mean something. The Court should find that the trial judge erred and that the testimony of Tyler Jones must be stricken. Mr. Jones' testimony was the foundation of Huntington's case. Without it the case collapses, providing yet one more reason why the Court must reverse the judgment and enter a new judgment in Miner's favor or remand for further, and more fair, proceedings.

VII. CONCLUSION

For the reasons stated herein appellants Joseph A. Miner and The JM Trust, Dated January 1, 2005, respectfully urge the Court to reverse the judgment

of the trial court and to either enter a new judgment in their favor or remand the action for further proceedings.

Dated: April 9, 2014

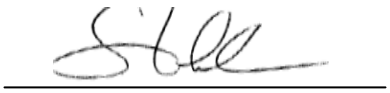


Sam Walker
Attorney for Appellants
The JM Trust and Joseph A. Miner

CERTIFICATE OF WORD COUNT

The text of this brief, excluding the Table of Contents, Table of Authorities, this Certificate and Proof of Service, consists of 5,400 words, as counted by the Microsoft Word 2007 word processing program used to generate this brief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed by my hand on April 9, 2014, in Arcata, California.



Sam Walker

PROOF OF SERVICE

I am an active member of the State Bar of California, over the age of eighteen years, and not a party to this action. My business address is 340 S. Lemon Ave. #4709, Walnut, CA 91789.

. On April 9, 2014, I served the attached:

APPELLANTS' BRIEF

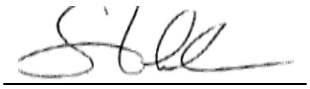
by placing a copy thereof in an envelope addressed as follows:

Martin L. Lee
Jacqueline Pagano
Feldsott & Lee
23161 Mill Creek Drive, Suite 300
Laguna Hills, CA 92653

And depositing the envelope with the United States Postal Service with postage fully prepaid in the city of Arcata, California.

On this same day I submitted an electronic copy of the document to both the Supreme Court and the Orange County Superior Court

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 9, 2014, at Arcata, California.



Sam Walker