

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-002237

12/31/2015

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
B. Randhawa
Deputy

ROSEVIEW HOMEOWNERS ASSOCIATION

MARK A HOLMGREN

v.

DANIELA C MIHAILA, et al.

JONATHAN A DESSAULES

MINUTE ENTRY

The Court has considered the briefing on the parties' respective applications for attorneys' fees and costs as set forth below. It declines to hear oral argument and makes the following findings and orders.

- Plaintiff's Application in Support of Attorneys' Fees and Costs and Proposed Form of Judgment filed on October 5, 2015:
 - Defendants' Response to Plaintiff's Application;
 - Defendants' Response to Plaintiff's Statement of Costs; and
 - Plaintiff's Reply in Support of its Application for Attorneys' Fees and Costs.
- Defendants' Application for Attorneys' Fees and Proposed Form of Judgment filed on October 9, 2015:
 - Plaintiff's Response to the Application;
 - Plaintiff's Objection to Defendants' Proposed Form of Judgment;
 - Plaintiff's Objection to Defendants' Statement of Costs; and
 - Defendants' Reply in Support of Attorneys' Fees and Costs.

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BACKGROUND

Plaintiff Roseview Homeowners' Association (the "Association") filed a complaint against Daniela and Valentin Mihaila on August 14, 2012 seeking foreclosure of its statutory assessment lien on Defendants' property and recovery of unpaid assessments, monetary penalties for violations of certain provisions of the Declaration of Covenants, Conditions, Restrictions and Easements (the "CCR's"), late fees, collection costs, interest, and attorneys' fees. Defendants paid the overdue assessments by September 20, 2012, but denied owing any other fees, penalties, costs, interest or attorneys' fees. Plaintiff proceeded to litigate its other claims for monetary relief and continued with its foreclosure efforts.

In May 2013, Defendants moved for partial summary judgment on Plaintiff's lien foreclosure claim and Plaintiff cross-moved for summary judgment on all of its claims. At the time the motions were filed, the monetary relief sought by Plaintiff (other than attorneys' fees, costs and interest) included late fees and penalties for violating the CCR's (collectively, the "monetary penalties.") On October 8, 2013, the Court granted summary judgment in Defendants' favor on Plaintiff's lien foreclosure claim and denied Plaintiff's Motion for Summary Judgment on the monetary penalties, finding genuine issues of material fact. Plaintiff filed another such motion in February 2014, which was denied by minute entry dated April 29, 2014.

After Defendants obtained summary judgment on Plaintiff's lien foreclosure claim, Plaintiff amended its certificate of compulsory arbitration to reflect that it was seeking money damages of less than \$50,000. The Court ordered the case to compulsory arbitration, and on June 12, 2015, the assigned arbitrator issued an award in favor of Plaintiff. Defendants appealed the award on June 18, 2015.

The Court set the case for trial in October 2015 on Plaintiff's remaining claims for monetary penalties. On September 18, 2015, the parties filed a stipulation to dismiss the entire case with prejudice, without any monetary relief for Plaintiff. The stipulation allowed for each party to seek attorneys' fees and costs from the Court.

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LEGAL ANALYSIS

Attorneys' Fees

1. Basis for an Award of Fees

Between them, the parties have presented three possible sources for an award of fees: (1) the CCR's; (2) the Assessment Lien Foreclosure Statute (A.R.S. §33-1807); and (3) A.R.S. §12-341.01(A).

a. The CCR's

Article VI, paragraph 39 of the CCR's provides that any judgment entered in the Association's favor for collection of fees shall include reasonable attorneys' fees. Plaintiff relies on this provision to support its request for fees, stating several times in its briefing that it obtained a "judgment" against Defendants. For example, at page three of its Application, Plaintiff states that it "prevailed at arbitration and obtained a judgment against Defendants. Defendants appealed."¹ An arbitration award is not a judgment, however. And while a court can enter judgment on an award, no such judgment was ever entered in this case.

b. Assessment Lien Foreclosure Statute (A.R.S. §33-1807)

Section 33-1807 grants homeowners' associations a lien on a homeowner's property for unpaid assessments. Subsection H provides that "[a] judgment or decree in any action brought under this section shall include costs and reasonable attorney fees for the prevailing party." Plaintiff's lien foreclosure claim clearly constitutes an "action" under A.R.S. §33-1807. Because summary judgment was granted in favor of Defendants on this claim, Defendants are the prevailing party under §33-807(H) and are therefore entitled to an award of attorneys' fees.

c. A.R.S. §12-341.01(A)

Both sides agree that the dispute over unpaid assessments and monetary penalties arises out of contract. And, as expected, each side argues that it is the prevailing party under A.R.S. §12-341.01(A). The Court has already determined that Defendants are the prevailing party on the lien foreclosure claim. It was unable to locate any authority addressing attorneys' fees requests in cases involving multiple claims where only one of those claims is subject to a mandatory statutory fee award and the other claims arise out of contract. Therefore, to avoid

¹ The parties make passing references in their briefing to a monetary judgment obtained by Plaintiff in a separate action in justice court, which apparently was related to a different time period. Plaintiff does not rely on this judgment, however, to support its argument that it is entitled to fees under the CCR's in this case.

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any appellate issues as to whether §12-341.01(A) applies to claims not subject to a mandatory statutory fee award, the Court will assume that it does.

(1) Prevailing Party

The Court first addresses which party is the prevailing party. Plaintiff obtained no court-ordered relief in this case. It lost on summary judgment on its lien foreclosure claim and then stipulated to dismissal of the entire case with prejudice without any monetary recovery. To support its claim that it is the prevailing party, Plaintiff relies on the fact that the filing of the lawsuit resulted in Defendants paying their overdue assessments and that it obtained an arbitration award on the monetary penalties.² However, that award never became a judgment and Plaintiff ultimately agreed to dismiss the entire case. Consequently, the most Plaintiff obtained from the lawsuit was Defendants' payment of overdue assessments, which was made without court order and shortly after the filing of the complaint. Defendants, on the other hand, obtained court-ordered relief, including summary judgment in their favor on the lien foreclosure claim and a judgment dismissing the entire case with prejudice.

In a contract case with multiple claims and varied success, a trial court may apply a "percentage of success" or a "totality of the litigation" test. [*Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 38, 800 P.2d 20, 25 \(App. 1990\)](#). Giving Plaintiff the benefit of the doubt that recovering the unpaid assessments as a result of the lawsuit constitutes a "success," application of either a percentage of success or totality of the litigation test to the facts set forth above dictates a finding that Defendants are the prevailing party.

(2) Whether Fees Should be Awarded

The award of attorneys' fees under §12-341.01(A) is discretionary. In determining whether to award fees, the court considers the following factors:

1. The merits of the claim or defense presented by the unsuccessful party.
2. Whether the litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result.
3. Whether assessing fees against the unsuccessful party would cause an extreme hardship.
4. Whether the successful party did not prevail with respect to all of the relief sought.
5. The novelty of the legal question presented.
6. Whether such claim or defense had previously been adjudicated in this jurisdiction.

² As Defendants point out in their Application for Attorneys' Fees, Plaintiff's Rule 30(b)(6) witness admitted that Defendants were current on their assessments as of June 2015, but the arbitration award included unpaid assessments. Plaintiff's witness also admitted to multiple errors in Plaintiff's ledgers.

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7. Whether the award in any particular case would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear of incurring liability for substantial amounts of attorneys' fees.

Associated Indemnity Co. v. Warner, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985).

Considering all of these factors, the Court exercises its discretion to award fees to Defendants. It finds the following factors to be particularly relevant here: (1) the merits of the defense to Plaintiff's lien foreclosure claim and Defendants' statutory entitlement to fees as the prevailing party on that claim; (2) Plaintiff's continuation of the litigation, including efforts to foreclose on Defendants' property, after Defendants paid their overdue assessments; (3) Plaintiff's failure to obtain any relief on the remaining claims for monetary penalties; (4) the lack of sufficient evidence to support a finding that the assessment of fees against the Association will cause "an extreme hardship;" and (5) the lack of evidence to support a finding that a fee award in favor of Defendants would discourage other associations with tenable claims from litigating those claims.

Reasonableness of Defendants' Fee Request

Defendants have requested an award of fees in the amount of \$48,490.00. The following factors are relevant in determining the reasonableness of a fee request:

1. The qualities of the advocate;
2. The character of the work to be performed;
3. The work actually performed;
4. The result;
5. The billing rate; and
6. The number of hours expended.

Schweiger v. China Doll Restaurant, 138 Ariz. 183, 187-88, 673 P.2d 927, 932 (App. 1983).

Plaintiff argues that defense counsel spent an excessive amount of time on certain tasks such as summary judgment briefing and legal research. The Court disagrees that the time

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expended on these tasks was excessive.³ However, because it is undisputed that Defendants were in default on their assessments for a considerable period of time and failed to respond to multiple demands from Plaintiff, the Court finds that Plaintiff's only recourse for collecting the unpaid assessments was to file a lawsuit. Consequently, the Court is deducting \$3310 from Defendants' fee request, which is the total of the amount spent by Plaintiff's attorneys from the preparation of the complaint to the initial review of the Answer, and the amount spent by Defendants' attorneys in preparing and filing the Answer.

In determining the reasonableness of a fee award, this Court also considers the amount at issue in relation to the amount of fees incurred. While the Court recognizes that the monetary amount at issue was small compared to the fees incurred by Defendants, Plaintiff was seeking to foreclose on their property. Given that foreclosure on one's residence would likely be a life-altering event, it was reasonable for Defendants to vigorously defend against the foreclosure. Had Plaintiff dropped its foreclosure efforts after Defendants paid the assessments and sought recovery only for the monetary penalties, attorneys' fees, costs and interest, the outcome of this ruling would likely have been different.

Costs

Defendants seek costs in the amount of \$1,480.07. This amount includes \$585.12 in "Arbitration Expenses (Transcript, Exhibits, Hand-delivery, etc.)." The Court finds that these expenses do not qualify as taxable costs under A.R.S. §12-332, and will exclude them from the cost award.

For the reasons set forth above,

THE COURT FINDS that Defendants are the prevailing party in this action pursuant to A.R.S. §§33-1807(H) and 12-341.01(A) and are entitled to an award of reasonable attorneys' fees in the amount of \$45,180.00.

THE COURT FURTHER FINDS that Defendants are entitled to an award of costs in the amount of \$894.95.

A separate judgment will issue.

³ Plaintiff asks the Court to exclude fees for the time recorded by associate Maureen McAuliffe on January 21 and 22, 2014 because her work was duplicative. However, the spreadsheet submitted by defense counsel reflects a zero charge for Ms. McAuliffe's time.