

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-008714

04/25/2023

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
C. Ladden
Deputy

GALLERY COMMUNITY ASSOCIATION

PENNY JANE MANSHIP

v.

K HOVNANIAN AT GALLERY L L C, et al.

LOUIS W HOROWITZ

JASON J BOBLICK
LEONARD T FINK
SHANNON G HUFF
MICHAEL A LUDWIG
RINA K RAI
AMY WILKENS
DENNIS I WILENCHIK
JUDGE COOPER

RULINGS RE KHOV AND RENCO/DESERT VISTA
APPLICATIONS FOR ATTORNEYS' FEES/COSTS

Pending before the Court are the fully-briefed KHov Defendants' Motion for Award of Attorneys' Fees filed February 24, 2023; and Third-Party Defendants Renco, LLC DBA Renco Roofing ("RR") and Desert Vista, Inc.'s ("DV") Joint Application for Attorneys' Fees, Costs & Expert Fees filed February 24, 2023. The Court has reviewed the motions and supporting documentation, Responses, Replies, and Statements of Cost.

KHOV APPLICATION

KHov seeks \$156,311.22 for attorneys' fees pursuant to A.R.S. §§ 12-341.01 (contract actions) and 12-1364 (dwelling actions).

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A.R.S. § 12-341.01 Claim

A.R.S. § 12-341.01 gives the Court discretion to award attorneys' fees to the "successful party" in a "contested action arising out of a contract" to "mitigate the burden of the expense of litigation to establish a just claim or a just defense." *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 569, ¶ 9 (App. 2007) (citing A.R.S. § 12-341.01(A), (B)).

Gallery's claims against the KHov Defendants were based on a contract, specifically, the Declaration of Covenants, Conditions Restrictions and Easements for Gallery ("Declaration"). KHov is the successful party because it prevailed on all counts. Gallery stipulated to the dismissal of all but three claims which the Court dismissed by summary judgment. Ruling, February 8, 2023.

In evaluating KHov's Application, the Court considers the factors identified in *Associated Indemnity. Corp. v. Warner*, 143 Ariz. 567, 570 (1985). The Court finds as follows:

1. Whether the unsuccessful party's claims or defenses had merit.

No. Gallery sued KHov entities that should not have been sued, asserted claims that had no legal basis (negligence), and pursued claims based non-existent contractual obligations.

2. Whether litigation could have been avoided or settled.

Yes, the parties participated in a pre-litigation repair and offer process pursuant to the Purchaser Dwelling Act; two formal mediations before Hon. Lawrence Fleischman, Ret.; and exchanged multiple settlement offers. (Motion, p. 4).

In addition, KHov raised the issues dispositive to Counts 2, 3, and 4 early in a Motion for Summary Judgment (filed February 1, 2021). These were the same issues on which the Court granted summary judgment two years later. (Ruling, February 8, 2023) These were legal issues related to the Declaration and ultimately resolved as a matter of law. Nevertheless, Gallery opposed the 2021 Motion claiming discovery was necessary. (Request for Rule 56(d) Relief filed March 22, 2021). Had the 2021 Motion been addressed when filed, further litigation would have been avoided.

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3. Whether assessing fees against the unsuccessful party would pose an unreasonable or undue hardship.

Gallery contends that imposing fees on the Association would cause extreme hardship to the Association and its members. In support of this argument, Gallery provides the Declaration of Matthew Jones, the Association's President. He states that the Association cannot pay because its \$191,800 in assets is for capital improvements.

The declaration is conclusory and fails to provide sufficient information to establish unreasonable, undue hardship to the Association or its members. Gallery's members authorized the filing of this lawsuit and would have received the financial benefit of it had Gallery prevailed. It is not uncommon for HOA members to pay assessments for specific purposes. Gallery offers no information as to why a special assessment could not be imposed, perhaps over a period of time, to pay KHov's (or Renco/Desert Vista's) attorneys' fees. There is no information presented as the number of households/members and, therefore, an estimated cost per member. As to the Association's current assets, there is no information provided regarding the nature of the purported long term capital projects, the date(s) for undertaking these projects, or their estimated cost. Gallery does not provide any factual basis for a determination of unreasonable or undue hardship.

4. Whether the successful party prevailed as to all relief sought.

Yes.

5. Whether the claims involved complex or novel legal issues.

No. The dispositive legal issues had been addressed by the Arizona Supreme Court and Court of Appeals. See Ruling, February 8, 2023.

6. Whether the claims or defenses at issue have been previously adjudicated in this jurisdiction.

Construction defect cases are common. There is no information as to whether the specific issues in this case have been previously adjudicated.

7. Whether a fees award would unreasonably discourage litigants from pursuing or defending valid claims or defenses.

No, an award of reasonable fees in this matter will not discourage litigants with legitimate claims or defenses.

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Reasonableness of Fees

The Court has considered the Rule 80(c) declarations and fee summaries. Requests for an award of fees must be supported by proof of their reasonableness. *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 187 (App. 1983). The Court determines the billing rate charged by counsel, relying on the rate charged by the lawyer to the client “as the best indication of what is reasonable under the circumstances of a particular case.” *Id.* at 187. The Court must also decide whether the lawyer billed a reasonable number of hours for proper tasks. *Id.* at 188. A fee application must describe the type of legal services provided, the date the service was provided, the attorney providing the service, and the time spent in providing the service. *Id.* The description of the tasks performed should include enough detail to “allow the court to determine whether the hours claimed are justified.” *Orfaly v. Tucson Symphony Soc’y*, 209 Ariz. 260, 266 ¶ 23 (App. 2004).

Regarding Gallery’s objection to KHov’s representation by two law firms, the Court does not find such representation to be unreasonable given the substantial exposure KHov faced with Gallery’s \$3 million damages claim.

KHov does not seek fees related to the dismissal of K. Hovnanian Companies of Arizona, LLC and K. Hovnanian Developments of Arizona, Inc. and all claims related to the claims related to civil grading, drainage, and concrete issues that resolved by settlement. These fees for the dismissed parties total \$2,422. The fees related to the civil grading/drainage/concrete issues total \$6,245.75.

KHov was required to file its indemnity claims against Third- Party Defendants. These claims were integral to the defense of Gallery’s claims. The fees and costs related to litigating the indemnity claims were necessary to KHov’s overall defense against Gallery’s lawsuit.

As to the time entries, the Court reviewed them and finds that they are sufficiently detailed to determine their reasonableness and that they are all, in fact, reasonable. The Court considers the nature of the tasks described, the relationship (if any) of the tasks to each other, the description of other work by the time-keeper, and the time entered. Gallery has not identified fee entries showing the time billed to be excessive, duplicative, or otherwise unreasonable. The time entries meet the *China Doll* standard.

Statement of Costs

KHov is entitled to its taxable costs pursuant to A.R.S. § 12-332(A)(6). The Court has reviewed the Statement of Costs, seeking \$23,536.06. KHov agrees that the costs related to the

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deposition of Liberty Constructors, LLC's expert and representative should be removed and not included in the award of costs. Those costs total \$5,706.68, reducing the costs awarded to \$20,589.06.

RENCO ROOFING and DESERT VISTA'S JOINT APPLICATION

RR and DV also seek fees from Gallery -- \$115,209 for RR; \$86,715.50 for DV. Like KHov, RR and DV are entitled to recover their fees under Section §§ 12-341.01.

In determining whether RR/DV are the successful parties under § 12-341.01, the Court finds that RR/DV are the successful parties in the contested action arising from the Declaration and the Master Subcontract Agreement between KHov and RR and DV. KHov filed a Third-Party Complaint against RR/DV seeking indemnity for Gallery's claims against KHov caused by RR/DV's alleged negligence. KHov's derivative claims for indemnity would not have existed but for Gallery's lawsuit against KHov. As a result, both KHov and RR/DV were adverse to Gallery. *See Nationwide Res. Corp. v. Ngai*, 129 Ariz. 226, 232 (App. 1981) (third-party defendants were in an adverse position to the counterclaim plaintiff asserting a claim for which the third-party defendants may be ultimately responsible). For the reasons stated above, Gallery's claims against KHov lacked merit. The dismissal of those claims made RR/DV prevailing parties as well as RR/DV. A subcontractor (third-party defendant) is the prevailing party for the purposes of attorneys' fees when the initial complaint against the defendant/third-party plaintiff is dismissed. *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566 (App. 2007).

As to factors 2, 3, 4, 5, 6, and 7 discussed above the same findings apply to RR/DV.

Reasonableness of Fees

The Court has reviewed the billing statements for RR/ DV's representation. Gallery does not object to any individual time entries or billing rates. Its sole objection is to the fees related to RR/DV's Joint Objection and Motion to Preclude Defendant/Third-Party Plaintiff's [KHov] Untimely and New Expert Reports and Opinions filed March 29, 2022. This motion concerned the disclosure of KHov's supplemental expert reports regarding RR/DV's stucco work.

Gallery has the burden of showing that any fees challenged are unreasonable or improper. *Assyia v. State Farm Mutual Auto. Ins. Co.*, 229 Ariz. 216, 223, ¶ 29 (App. 2012). Objections must be specific. A party opposing a fee application cannot merely complain that the lawyers spent "too much time," or that "the work was not necessary." *Rudinsky v. Harris*, 231 Ariz. 95, 102 (App. 2012). However, RR/DV fail to show specifically the amount of the fees related to this motion and, therefore, the objection is overruled.

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Statement of Costs

RR/DV submit a joint Statement of Costs totaling \$9,051.83. There is no breakdown of the costs related specifically to RR and DV individually. Therefore, the Court divides the award of costs to RR and DV as equally as possible.

A.R.S. § 12-1364 Claims

Fees are not awarded to KHov or RR/DV under § 12-1364. To award fees under this statute, the Court must consider specific statutory factors. A.R.S. § 12-1364(B) requires that, in determining the reasonableness of attorney fees, the Court “shall consider all of the following” factors, including “the repairs, replacements or offers made by the seller, if any, before the purchaser filed the dwelling action pursuant to section 12-1363” and “the purchaser’s response to the seller’s repairs, replacements or offers made or proposed, if any, before the purchaser filed the dwelling action.” Neither application provides sufficient facts for the Court to conduct this analysis.

CONCLUSION

For the reasons stated, **IT IS ORDERED:**

Awarding KHov and RR/DV their respective attorneys’ fees pursuant to § 12-341.01 as follows:

KHov: \$156,311.22 less \$8,667.75 for a total of \$147,643.47

RR: \$115,209

DV: \$86,715.50

IT IS FURTHER ORDERED awarding KHov and RR/DV their taxable costs pursuant to A.R.S. § 12-332 as follows:

KHov: \$23,536.06 less \$2,947 for a total of \$20,589.06.

RR: \$4,525.91

DV: \$4,525.92

A Final Judgment will be entered separately.