

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-000741

05/08/2019

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
T. DeRaddo
Deputy

MANISH THAKRAR

GREGORY G MCGILL

v.

SURENDRA PALA

GORDON S BUELER

GORDON S BUELER / BUELER JONES
L L P
1300 N MCCLINTOCK DR STE B4
CHANDLER AZ 85226
JUDGE STEPHENS
GORDON S BUELER / BUELER JONES
L L P
1300 N MCCLINTOCK DR STE B4
CHANDLER AZ 85226
JUDGE STEPHENS

MINUTE ENTRY - RULING

The Court has considered the Motion to Set Amount of Supersedeas Bond-Rule 7(a)(2), *Arizona Rules Civil Appellate Procedure* filed March 15, 2019, the Response to Motion to Set Bond filed April 2, 2019, the Reply in Motion to Set Amount of Supersedeas Bond and Request for Hearing filed April 12, 2019, Thakrar's Supplemental Memorandum Re Bond Amount filed May 7, 2019, and the evidence and oral argument presented on May 2, 2019. In the motion, Defendant Pala requests the Court set the supersedeas bond amount at zero dollars pending his appeal to the Arizona Court of Appeals.

Following a bench trial, the Court awarded zero dollars in actual damages but ordered Defendant to pay \$77,900 to Plaintiff for attorneys' fees. A judgment was issued in November 2018. Defendant Pala contends collection on the judgment should be stayed and no supersedeas

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bond required, citing to Rule 7(a)(4)(A), *Arizona Rules of Civil Appellate Procedure*, in effect in November 2018. Plaintiff Thakrar contends the supersedeas bond should be set at an amount that includes the award of attorneys' fees, citing to the current version of Rule 7(a)(4)(A), Ariz.R.Civ.P., *City Center Executive Plaza, LLC v. Jantzen*, 344 P.3d 339 (2015) and *Desert Mountain Properties v. Liberty Mutual*, 225 Ariz. 194 (2010).

Effective January 4, 2019, Rule 7, *Arizona Rules of Civil Appellate Procedure*, was amended. As amended Rule 7, *Arizona Rules of Civil Appellate Procedure*, requires the Court to set the amount of the supersedeas bond relating to the monetary award to include total damages, costs, attorney's fees and prejudgment interest. The former version stated that the amount of the supersedeas bond did not include attorney's fees but only the total amount of damages awarded. A.R.S. § 12-2108 provides that the amount of the bond necessary to stay execution during the course of all appeals shall be set at the total amount of damages awarded excluding punitive damages. In *City Center Executive Plaza, LLC v. Jantzen*, 237 Ariz. 37 (App. 2015), the Court of Appeals found the trial court erred in considering attorneys' fees as damages in setting the amount of the supersedeas bond. The Court found that word "damages" used in A.R.S. § 12-1208 does not include attorneys' fees awarded by statute but means compensation for actual injury.

Plaintiff contends the current version of Rule 7, Ariz.R.Civ.P., should apply and that there is an applicable exception in the *City Center* decision as stated in *Desert Mountain Properties v. Liberty Mutual*, 225 Ariz. 194 (App. 2010) (damages" include expenses (attorneys' fees) when the breach of contract required a party to incur expenses to protect his interest and thus made it a legal consequence of the original wrongful act). The Court agrees with Plaintiff that the current version of Rule 7 should apply but recognizes that it is inconsistent with the provisions of A.R.S. § 12-2108. In *City Center*, the Court of Appeals relied on the language in the statute to decide the case. Also see *Starr Pass Resort Developments, LLC v. Harrington*, 245 Ariz. 495 (App. 2018) (both the legislature and the court have rulemaking power; in the event of an irreconcilable conflict between a procedural statute and a rule, the rule prevails; however, if the statute is substantive, the statute controls). The Court disagrees with Plaintiff that the exception noted in *City Center* and *Desert Mountain* applies here. The *Desert Mountain* case involved an indemnity clause. Liberty Mutual failed to accept coverage, requiring Desert Mountain to incur attorneys' fees and other costs. That Court found those fees and expenses were damages under the insurance indemnity provision. The facts in this case are more like those in *City Center*.

Here, no actual or compensatory damages were awarded by the Court following trial. Thus, a supersedeas bond of zero dollars is appropriate pursuant to A.R.S. § 12-2108 and *City Center Executive Plaza, LLC v. Jantzen*, 237 Ariz. 37 (App. 2015). Also, the Court finds, based upon the testimony of Defendant Pala on May 2, 2019, that Defendant/Appellant Pala will suffer

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CV 2013-000741

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substantial economic hard if required to post a supersedeas bond. See A.R.S. § 12-2108(C) and Rule 7(a)(9)(B), *Arizona Rules of Civil Appellate Procedure*.

Accordingly,

IT IS ORDERED granting the Motion to Set Amount of Supersedeas Bond-Rule 7(a)(2), *Arizona Rules Civil Appellate Procedure* filed March 15, 2019 and setting the supersedeas bond in the amount of zero dollars.