

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2007-053132

06/04/2010

HONORABLE BRIAN R. HAUSER

CLERK OF THE COURT  
W. Tenoever  
Deputy

DOMINICK ABATEMARCO

BRIAN M BERGIN

v.

CANTERRA AT SQUAW PEAK  
CONDOMINIUM ASSOCIATION INC

MARK A HOLMGREN

JUDGMENT SIGNED

Courtroom 109 - NE

9:05 a.m. This is the time set for Oral Argument on Plaintiff's Application for Award of Attorneys' Fees and Expenses and Defendant's Application for Attorneys' Fees. Plaintiff Dominick Abatemarco is present and represented by counsel, Brian M. Bergin and Kenneth M. Frakes. Defendant Canterra at Squaw Peak Condominium Association, Inc. is represented by counsel, Mark A. Holmgren and Joshua M. Bolen.

A record of the proceedings is being made by CD (FTR) in lieu of a court reporter.

Arguments are heard.

IT IS ORDERED taking Plaintiff's Application for Award of Attorneys' Fees and Expenses and Defendant's Application for Attorneys' Fees under advisement.

9:35 a.m. Hearing concludes.

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LATER:

The court has considered each party's application for attorneys' fees and costs.

The court must determine which party was successful in the litigation and then determine a reasonable amount of fees and costs to be awarded. The purpose of the fees statute, A.R.S. § 12-341.01(A) is remedial and the successful prosecution or defense of a claim are both entitled to consideration and weight in the exercise of the court's discretion. Schwartz v. Farmers Ins. Co. of AZ, 166 Ariz. 33 (App. 1990).

At trial the jury returned verdicts in favor of plaintiff totaling \$90,000 on his claims for breach of contract and breach of the covenant of good faith and fair dealing. The jury found for defendant on plaintiff's claim for breach of the statutory duty to repair. All of the plaintiff's tort claims and his claim for punitive damages were dismissed by the court before trial. The trial ended two years and four months (not three years as asserted by plaintiff) after the complaint was filed. A considerable amount of litigation involved plaintiff's application for injunctive relief to require defendant to repair his and all the other balconies. Plaintiff obtained injunctive relief and defendant has repaired the defective balconies as a result of plaintiff's efforts, at least in large part. By any reasonable measure of success, plaintiff has been successful in this significant aspect of the case. The damages aspect of the litigation is problematical, however.

In his twice amended complaint, plaintiff alleged numerous tort causes of action and a punitive damages claim in addition to the contractual-based claims for relief. All of the tort claims and the claim for punitive damages were dismissed before trial. On these claims, defendant clearly is the successful party. Because of this, defendant contends it is the successful party in this case and it should be awarded its attorneys' fees and costs. Defendant contends that under either the percentage of success factor or totality of the litigation test it is the victor. *Id.* at 38. On a purely mathematical basis, defendant is correct that more claims were dismissed than went to trial and so on a percentage basis, defendant prevailed. But considering the totality of the circumstances, including the injunctive relief awarded to him, plaintiff prevailed in the case. Plaintiff successfully sued to recover damages caused by the faulty construction which defendant resisted repairing despite its duty under the CC&R's. Plaintiff also sued to compel defendant to undertake the repairs and he was successful in that claim, as well. On balance, considering the claims won and lost by plaintiff, the court finds him to be the successful party and finds him entitled to attorneys' fees and costs. Moreover, the CC&R's provide for an award of reasonable attorneys' fees and costs to a party who prevails in an action to enforce any of its provisions. The jury verdict that defendant breached the CC&R's is conclusive on this point.

Only reasonable attorneys' fees are to be awarded to the successful party. Plaintiff's request for \$523,825.50 in attorneys' fees for services rendered by the Rose Law Group, P.C., is

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unreasonable. The additional request for \$67,650.00 from Snell & Wilmer, LLP is similarly unreasonable and the total of the two fee applications, \$591,475.50, is patently unreasonable.

This case was over-litigated even when the court considers the intractable positions the parties took throughout its course. The record is replete with repetitive motions to dismiss, motions for summary judgment, motions to strike, motions to exclude, motions to file sur-replies and emergency motions that were anything but emergencies. Furthermore, plaintiff's time entries contain scores of hours devoted to the constant review and revision of drafts of pleadings that are well beyond the norm for a case with this lack of complexity.

Of particular concern is the application for attorneys' fees from the Snell & Wilmer firm. The work represented by this application is duplicative of the inflated charges in the Rose Law Group's application. Further, the application reflects no effort to assign any of the work to a lower rate partner or associate to mitigate the cost of representation.

Based on its presiding over this action through trial, the court finds the plaintiff's fee applications excessive and unreasonable. The court finds that an appropriate award for reasonable attorneys' fees is \$250,000.00 and costs of \$60,818.24 all in accordance with the formal written Judgment signed by the Court on June 4, 2010 and filed (entered) by the Clerk on June 4, 2010. This case exemplifies the profligacy that results when one is spending someone else's money.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>