Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-006893 06/29/2020

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
S. Motzer
Deputy

MARY BEHAR DOUGLAS IMPERI JR.

v.

MONTANA DEL SOL CONDOMINIUM ASSOCIATION JONATHAN D EBERTSHAUSER

JUDGE KILEY

MINUTE ENTRY

The Court has reviewed and considered the Application for Award of Attorneys' Fees ("Fee Application") filed by Plaintiff Mary Behar, individually and on behalf of The Behar Revocable Trust (the "Plaintiff"); the accompanying Declaration of Jonathan A. Dessaules in Support of Plaintiff's Application for Award of Attorneys' Fees ("Dessaules Declaration"); the Response to Plaintiff's Application for Award of Attorneys' Fees ("Response") filed by Defendant Montana Del Sol Condominium Association (the "Association"); and the Plaintiff's Reply in Support of Application for Award of Attorneys' Fee ("Reply"). No party has requested Oral Argument.

The Plaintiff seeks an award of attorney fees in the amount of $44,066.00, asserting that both A.R.S. § 12-341.01(A) and the contract between the parties entitle her, as "the prevailing party," to a fee award. Fee Application at pp. 1-2. Although the Association seems to suggest that the Plaintiff's request should be denied in its entirety, arguing that the Plaintiff's fee request "should be reduced significantly, *if awarded at all*," Response at p. 8 (emphasis added), the Court agrees with the Plaintiff that a fee award is warranted pursuant to the parties' contract as well as A.R.S. § 12-341.01(A).

In opposing the Fee Application, the Association argues, next, that "[t]he Association should not be required to bear an unreasonable burden," citing the so-called "*Warner* factors" in support of its position. Response at p. 4. As the Association correctly notes, the *Warner* factors, which courts are to consider in determining attorney fee applications, are as follows:

> (1) the merits of the unsuccessful party's claim,
>
> (2) whether "[t]he litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result,"
>
> (3) whether "[a]ssessing fees against the unsuccessful party would cause an extreme hardship,"
>
> (4) whether the successful party prevailed with respect to all of the relief sought,
>
> (5) the novelty of the legal issues presented, and
>
> (6) whether an award to the prevailing party "would discourage other parties with tenable claims…from litigating…legitimate contract issues for fear of incurring liability for substantial amounts of attorneys' fees."

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

Although the Plaintiff is the prevailing party, the Court agrees with the Association that "[its] defense was not without merit." Response at p. 4. The first *Warner* factor, therefore, weighs against the Plaintiff's position. *See, e.g., Scottsdale Mem. Hosp. Sys., Inc. v. Clark*, 164 Ariz. 211, 216-17, 791 P.2d 1094, 1099-1100 (App. 1990) (affirming trial court's denial of successful plaintiff's fee request and finding that the record supported trial court's determination that, even though defendant "ultimately lost," his position had "substantial merit"; "The merits of the losing party's claim or defense is one of the factors a trial judge can consider in deciding whether or not to award attorney's fees."). *See also Nationwide Mut. Fire Ins. Co. v. Jones*, 695 F.Supp.2d 978, 986 (D.Ariz. 2010) (denying successful party's fee request in part because unsuccessful party "had a colorable claim").

The Association acknowledges that "it is likely that litigation could not have been avoided" since "both parties believed that their interpretation of the Declaration and statute was correct." Response at p. 5. Indeed, the Association left the Plaintiff with little choice but to initiate this litigation because, as the Plaintiff asserts and the Association does not dispute, the Association threatened to impose "fines of up to $500.00 per day" on her based on its own interpretation of the Declaration. Fee Application at p. 3. In view of the fact that the Plaintiff was

forced to initiate this litigation to protect herself from the potentially ruinous fines that the Association threatened to impose, the second *Warner* factor supports granting the Plaintiff's fee request in full. *See Kaufman v. Warner Bros. Entertainment Inc.*, 2019 WL 2084460 at *8 (D.Ariz., May 13, 2019) (the second *Warner* factor "looks primarily to whether a non-litigation solution was not pursued that could have solved the problem and whether litigation was not necessary") (citation and internal quotations omitted).

Although the Association asserts that an award of fees would cause it to suffer "an extreme hardship," Response at p. 5, the Association has presented no evidence to support this assertion. The Court therefore finds that the third *Warner* factor does not apply here. *Woerth v. City of Flagstaff*, 167 Ariz. 412, 420, 808 P.2d 297, 305 (App. 1990) ("[T]he party asserting financial hardship" in response to opposing party's fee request "has the burden of coming forward with *prima facie* evidence of financial hardship," and cannot rely solely on "unsworn and unsupported assertions of [its] attorney in memoranda filed with the court.").

As the Plaintiff correctly asserts, she prevailed with respect to the central issue in this case, *i.e.*, the validity and enforceability of the Third Amendment to the Declaration of Covenants, Conditions and Restrictions (the "Third Amendment"). Reply at pp. 2-3. The fourth *Warner* factor therefore weighs in the Plaintiff's favor.

The Court agrees with the Association that the issues in the case were sufficiently novel that the fifth *Warner* factor counsels against granting the Plaintiff's fee request, at least in full. *Kaufman*, 2019 WL 2084460 at *10 (the fifth *Warner* factor "will weigh against awarding attorneys fees if a claim is novel or has not previously been adjudicated"). Finally, although the Association does not expressly address the sixth *Warner* factor in its Response, the Court finds that the fifth and sixth *Warner* factors go together: a substantial fee award in a case that raises novel legal issues would risk deterring others from litigating similar novel issues in the future. *Cf. Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 573, 155 P.3d 1090, 1097 (App. 2007) (affirming fee award and holding that the amount of fees awarded was "not so exorbitant" as to "discourage other parties from litigating tenable claims due to fear of having to pay attorneys' fees"). The important interest in not deterring the litigation of novel claims weighs against granting fees in the full amount sought by the Plaintiff. *See Nationwide Mut. Fire Ins. Co. v. Jones*, 695 F.Supp.2d 978, 987 (D.Ariz. 2010) (denying fee request of successful insurer in declaratory judgment action in part because "the legal questions presented were relatively novel" and "assessing fees against an insured who has already sufficient a substantial loss would tend to discourage other insureds with tenable claims from litigating").

After weighing the *Warner* factors, the Court finds that an award to the Plaintiff of two-thirds of the attorney fees and costs she reasonably and necessarily incurred in this matter is warranted.

"[T]he number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate…is presumed to be the proper, reasonable fee." *Bogard v. Cannon & Wendt Elec. Co.*, 221 Ariz. 325, 336, 212 P.3d 17, 28 (App. 2009) (citation and internal quotations omitted). "Once a party establishes its entitlement to fees and meets the minimum requirements in its application and affidavit for fees, the burden shifts to the party opposing the fee award to demonstrate the impropriety or unreasonableness of the requested fees." *Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, 491, 167 P.3d 1277, 1286 (App. 2007).

Here, the Court finds the hourly rates billed by the Plaintiff's counsel to be reasonable, and the Association does not contend otherwise. Moreover, although the Association asserts that the amount of fees the Plaintiff incurred for particular tasks was "unreasonable," Response at p. 6. the Court finds that, for the most part, the Association has failed to meet its burden of establishing the unreasonableness of the claimed fees. The Court simply sees no basis to find that the Plaintiff's counsel spent an excessive amount of time performing many of the disputed tasks. On the contrary, the time spent by counsel performing those tasks appears to have been time well-spent, since the oral and written advocacy of the Plaintiff's counsel was of exceptionally high quality.[1] Because the legal work performed on the Plaintiff's behalf was of the highest quality, the Court will not arbitrarily reduce the Plaintiff's fee award based on speculation that she could have obtained the same success if her counsel had devoted less time to legal research and dispositive motion practice. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) ("By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.").

Likewise, the Court rejects the Association's position that the Plaintiff's fees should be reduced because her counsel simultaneously represented another client in another lawsuit that raised the same challenge to the validity of the Third Amendment as that presented here. *See* Response at p. 7*, citing Scottsdale Valley Real Estate L.L.C. v. Montana Del Sol Condominium Ass'n*, Maricopa County Superior Court Case No. CV2019-000176 (the "Scottsdale Valley" case). Undoubtedly, it is true that the Plaintiff's counsel's simultaneous litigation of two cases involving the same challenge to the validity of the Third Amendment resulted in a savings of attorney time spent conducting legal research and in drafting pleadings. Nevertheless, the Court sees no basis for the Association's contention that the Plaintiff's counsel had to do no more, in this case, than "copy and paste" pleadings he previously prepared for use in the Scottsdale Valley case. On the contrary, the record supports the Plaintiff's assertion that, "[w]hile the cases may [have been] similar in some respects, there [were] issues unique to each." Reply at p. 4.

[1] Of course, the work performed by counsel for the Association was also of exceptionally high quality, but that fact has no bearing on the amount of fees to be awarded to the Plaintiff.

The dispositive motion practice in this case, for example, included briefing on the Plaintiff's statutorily-based challenges to the process by which the Third Amendment was adopted and to the reasonableness of the Association's $500-per-day fine. *See* Plaintiff's Motion for Summary Judgment at p. 13 ("The Amendment is also void because the voting ballots either expired by statutory mandate or were invalid from initiation," *citing* A.R.S. § 33-1250(C)(4)); *id*. at p. 16 ("The Association's blanket $500 daily fine for only short-term rentals…violates [statutory] requirements," *citing* A.R.S. § 33-1242(A)(11); Defendant's Response to Plaintiff's Motion for Summary Judgment at pp. 18-19 ("[T]he Third Amendment was approved by the Members without a meeting of the members pursuant to A.R.S. § 10-3704. Accordingly, A.R.S. § 33-1250(C) is inapplicable to this analysis."); *id*. at p. 20 ("The Association's 2019 Fine Policy is consistent with Arizona law and does not deprive Owners of their right to notice and an opportunity to be heard pursuant to A.R.S § 33-1241(A)(11)."). These issues, which were briefed and litigated in this case, do not appear to have been raised or litigated in the Scottsdale Valley case.[2] *See generally* Verified Complaint filed on January 14, 2019 in CV2019-000176; Plaintiff's Motion for Summary Judgment filed on June 27, 2019 in CV2019-000176. The Court therefore rejects the Association's contention that little original work was required in this case because this case and the Scottsdale Valley case were, purportedly, "nearly identical." Response at p. 7.

In some respects, however, the Court agrees with the Association that some of the tasks performed on behalf of the Plaintiff were not necessary to her ultimate success, and so are not compensable. For example, as the Association correctly points out, the Plaintiff seeks to recover fees for "at least 14 hours relating to her Application for Preliminary Injunction." Response at p. 8. The Plaintiff's request for preliminary injunctive relief was not necessary to her ultimate success in this matter. Indeed, no hearing was ever held on the Plaintiff's Application for Preliminary Injunction. Instead, this case was resolved by summary judgment, and the Plaintiff's successful Motion for Summary Judgment was filed more than a month *before* the Plaintiff filed her Application for Preliminary Injunction. Because the Application for Preliminary Injunction was superfluous to the ultimate result, the Court agrees with the Association that fees incurred in connection with the Application for Preliminary Injunction and related filings should be disallowed.

Likewise, as the Association correctly points out, the Plaintiff seeks "fees for 13.9 hours relating to the drafting of [her] Objection to Defendant's Motion to Exceed Page Limits" in

[2] Although the plaintiff in the Scottsdale Valley case moved to amend its complaint to add a challenge to the Association's "fine" policy, *see* Motion for Leave to File Amended Complaint filed September 13, 2019 in CV2019-000176, the granting of the plaintiff's motion for summary judgment in that case rendered its request for leave to amend its complaint moot. *See* Minute Entry of January 21, 2020 in CV2019-000176 at p. 3.

connection with its Response to the Plaintiff's Motion for Summary Judgment. Response at p. 7. In the Court's view, the Plaintiff's opposition to the Association's Motion to Exceed Page Limit for Response to Plaintiff's Motion for Summary Judgment was simply not reasonable. The Plaintiff herself had sought, and was granted, page limit extensions for two of her own filings. *See* Plaintiff's Motion to Exceed Page Limits for Motion for Summary Judgment; Plaintiff's Motion to Exceed Page Limits for Reply in Support of Motion for Summary Judgment. Objecting to the opposing party's request for a page limit extension after seeking and obtaining a page limit extension for oneself is hardly reasonable. Moreover, in the response she filed on October 22, 2019 in opposition to the Association's Motion to Exceed Page Limit for Response to Plaintiff's Motion for Summary Judgment, the Plaintiff repeated, often verbatim, the same arguments that she asserted in another motion that she filed the same day, *i.e.*, the Plaintiff's Motion to Strike Defendant's Response to Plaintiff's Separate Statement of Facts.[3] The Court finds that the Plaintiff's Response to Defendant's Motion to Exceed Page Limit was neither necessary nor reasonable, and was, in fact, duplicative of another filing, and so will disallow all fees incurred in connection with the drafting of that filing.

With those exceptions, the Court rejects the Association's challenge to the reasonableness of the amount of time spent by the Plaintiff's counsel.

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[3] *Compare* Plaintiff's Response to Defendant's Motion to Exceed Page Limit at p. 2 ("Arizona has long recognized the difference between facts and legal argument in the summary judgment context.") *with* Plaintiff's Motion to Strike Defendant's Response to Plaintiff's Separate Statement of Facts ("Plaintiff's Motion to Strike") at p. 2 ("Arizona distinguishes between the contents of a memorandum in support of or responding to a request for summary judgment and the separate statements of facts."); *compare* Plaintiff's Response to Defendant's Motion to Exceed Page Limit at p. 2 (asserting that "[c]ourts as a general practice refuse to consider and/or strike legal arguments stuffed into the statement of facts or response to the statement of facts," and citing *McClure v. Country Life Ins. Co.*, 2017 WL 3268841 (D. Ariz., Aug. 1, 2017) for the proposition that "a statement of fact is not to contain legal arguments over the significance or effect of facts") *with* Plaintiff's Motion to Strike at p. 2 (asserting that "[c]ourts as a general practice refuse to consider and/or strike legal arguments stuffed into the statement of facts or response to the statement of facts," and citing *McClure v. Country Life Ins. Co.*, 2017 WL 3268841 (D. Ariz., Aug. 1, 2017) for the proposition that "a statement of fact is not to contain legal arguments over the significance or effect of facts"); *compare* Plaintiff's Response to Defendant's Motion to Exceed Page Limit at p. 8 ("Telling of the replete violations of Rule 56, this Court can see no citations to the record for claimed disputes of fact at paragraphs 5, 6, 7, 8, 9, 10, 11, 16, 17, 19, 20, 21, 22, 24 through 33, 35, 36 through 41, 43, 47, 49, 51, 52, 59, 60, and 62.") *with* Plaintiff's Motion to Strike at p. 2 ("There are no citations to the record for claimed disputes of fact at paragraphs 5, 6, 7, 8, 9, 10, 11, 16, 17, 19, 20, 21, 22, 24 through 33, 35, 36 through 41, 43, 47, 49, 51, 52, 59, 60, and 62.").

The Plaintiff seeks an award of $44,066.00. After disallowing fees of $7,628.00 that were incurred in connection with the Plaintiff's Application for Preliminary Injunction and opposition to the Association's Motion to Extend Page Limits, *see* Response at p. 6, the remaining fees claimed by the Plaintiff total $36,438.00. For the reasons set forth above, the Court will award the Plaintiff two-thirds of this amount, or $24,292.00.

Citing A.R.S. § 12-341, the Plaintiff seeks an award of taxable costs in the amount of $594.69. Statement of Costs at p. 1. The Association asserts no objection to these claimed costs, which the Court will award in full.

In accordance with the foregoing,

IT IS ORDERED granting in part and denying in part the Plaintiff's Application for Award of Attorneys' Fees and her Statement of Costs, and awarding the Plaintiff attorney fees of $24,292.00 and taxable costs of $594.69.

The Plaintiff has lodged a proposed form of Judgment to which the Association has not objected. The Court will therefore enter judgment in the form lodged by the Plaintiff.