

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-007263

07/14/2016

HON. RANDALL H. WARNER

CLERK OF THE COURT
K. Ballard
Deputy

JEFFREY SALLUS, et al.

JAMES ROBERT ECKLEY

v.

SUNRISE DESERT VISTAS PROPERTY
OWNERS ASSOCIATION INC, et al.

GUY W BLUFF

LARRY D LANGLEY

JUDGMENT SIGNED

Before the court and fully briefed is Defendants' May 17, 2016 Motion for Attorney Fees, Expert Fees, Sanctions, and Costs. Defendants have also lodged a form of judgment. Oral argument is unnecessary.

1. Attorneys' Fees.

A.R.S. § 12-341.01(A) authorizes an award of attorneys' fees to the successful party in a contested action arising out of contract. Defendants are the successful parties here, having prevailed both before the jury and on claims adjudicated by the court. But only some of the claims arose out of contract. Defendants may not recover fees incurred defending the tort claims, which were not intertwined with the contract claims.

Considering all relevant factors, an award of attorneys' fees for the contract claims is appropriate. The court makes the following findings as to relevant factors. *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567, 694 P.2d 1181 (1985).

1. *Whether the unsuccessful party's claim or defense was meritorious.* Plaintiffs' claims were not meritorious.

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2. *Whether the litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result.* Defendants' efforts were necessary to achieve the result. Plaintiffs had the opportunity in 2014 to accept an offer of judgment but declined to settle.

3. *Whether a fee award would be an extreme hardship.* A fee award would not be an extreme hardship.

4. *Whether the successful party prevailed with respect to all of the relief sought.* Defendants prevailed with respect to all relief sought.

5. *Whether the matter presented a novel legal question.* This matter did not present novel legal questions.

6. *Whether the award would discourage other parties with tenable claims or defenses from litigating them.* An award would not discourage parties with tenable claims from pursuing them.

Having found a fee award appropriate as to the contract claims only, the question is how to apportion Defendants' fees among tort and contract claims. Although the claims were not intertwined, the litigation of them was such that it is impracticable, if not impossible, to decide on a time-entry-by-time-entry basis which tasks were for tort claims and which were for contract claims. In this circumstance (which is fairly typical in mixed tort/contract cases), the most reasonable approach is for the court to apportion fees based on its determination of the relative percentage of the litigation devoted to contract and tort claims. This is not a precise science, much like allocating fault in tort cases is not a precise science. But it best achieves A.R.S. § 12-341.01's purpose of fee-shifting only in cases arising out of contract.

The court finds 50% is a fair allocation of attorneys' fees to the contract claims. Although Plaintiffs devoted substantial time to their defamation and other tort claims, much of their case had to do with allegations that the Association either failed to enforce the CC&R's or did so selectively.

The court further finds a reasonable amount of total attorneys' fees to be \$280,034.00, of which Defendants are awarded half. Given the expansiveness of Plaintiffs' allegations and the aggressiveness with which they pursued them, it was reasonable for Defendants to incur that amount of attorneys' fees in their defense. And the fee affidavits submitted are sufficiently detailed to permit the court and counsel to assess the reasonableness of attorneys' fees.

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Defendants are awarded \$140,017.00 in attorneys' fees.

2. Motion to Strike.

Defendants move to strike the Declaration of Bruce Meyerson, which Plaintiffs submit with their objection to the fee applications. Although part of that affidavit consists of legal argument, which is not the proper subject of expert testimony, other parts of the affidavit are appropriate.

IT IS ORDERED denying the Motion.

3. Taxable Costs and Rule 68 Sanctions.

Defendants made an offer of judgment of \$32,001 on December 11, 2014, which Plaintiffs did not accept. There is no dispute that Defendants beat the offer and so are entitled to Rule 68 sanctions.

Defendants seek \$880.24 in taxable costs incurred before the offer of judgment and double the taxable costs of \$3,256.88 incurred after. Plaintiffs do not contest these amounts.

Defendants also seek expert witness fees under Rule 68, but Plaintiffs object that the expert witnesses did not testify at trial. "In some circumstances, the fee for an expert who never testifies may be includable as a sanction pursuant to Rule 68(g)." *Flood Control Dist. of Maricopa Cty. v. Paloma Inv. Ltd. P'ship*, 230 Ariz. 29, 46, 279 P.3d 1191, 1208 (App. 2012). Here, the reason Defendants did not call their experts was that Plaintiffs elected not to pursue at trial the theory for which the experts were retained. Under that circumstance, Defendants' expert fees are properly includable as Rule 68 sanctions.

Defendants are awarded \$880.24 in pre-offer costs, \$6,513.76 in post-offer costs, and \$4,771.10 in expert witness fees.

4. A.R.S. § 12-349 Sanctions.

Sanctions under A.R.S. § 12-349 are not warranted.

5. Form of Judgment.

The court finds Defendants' lodged form of judgment appropriate. Plaintiffs' objections to it are overruled.

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Consistent with the above rulings,

IT IS ORDERED approving and settling the Judgment in favor of all Defendants and against Plaintiffs Suzanne and Jeffrey Sallus and the Sallus Family Trust (jointly and severally), electronically signed by the court on July 14, 2016. The Judgment will be electronically filed (entered) by the clerk on July 15, 2016.