

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-009167

08/12/2019

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

DESERT RIDGE COMMUNITY ASSOCIATION JEFFREY D GROSS

v.

B R E THUNDER DESERT RIDGE PROPERTY OWNER L L C, et al. STEVEN MARTIN AARON

J GARY LINDER
MICHAEL J PLATI

RULING ON APPLICATION FOR ATTORNEYS' FEES AND COSTS

The Court reviewed BRE Thunder Desert Ridge Property Owner LLC's (BRE's) application for attorneys' fees and costs, the response and reply.

The Court finds that the briefing submitted on these issues is sufficient and that oral argument would not add to the Court's consideration of the issues presented. Accordingly, oral argument is waived pursuant to Ariz. R. Civ. P. Rule 7.1(c)(2) to expedite the business of this Court. The Court issues the following ruling.

BRE seeks \$707,673.37 in attorneys' fees and \$1,748.02 in costs.

I. INTRODUCTION

On June 17, 2019, this Court granted BRE's motion for judgment on the pleadings and denied Desert Ridge Community Association's (Association) cross-motion. As noted in the

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-009167

08/12/2019

ruling, “this case involves interpretation of a contract provision that both parties claim is unambiguous.”

The instant dispute arises out of a contract and BRE may recover its attorneys’ fees as the successful party under A.R.S. § 12-341.01(A).

II. ANALYSIS OF WARNER FACTORS

Considering all relevant factors, an award of attorneys’ fees is appropriate. The Court makes the following findings as to relevant factors. *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567 (1985).

1. *Whether the unsuccessful party’s claim or defense was meritorious.* The Association was wholly unsuccessful in this litigation. BRE has been successful in demonstrating that its interpretation of the contract was correct and has defeated a claim the Association asserted was worth millions of dollars.

2. *Whether the litigation could have been avoided or settled and whether the successful party’s efforts were completely superfluous in achieving the results.* A.R.S. § 12-341.01(A) provides that the Court may consider a “written settlement offer” that is equal to or more favorable than the final judgment. Here, there is no suggestion that the Association made a settlement offer that is more favorable to BRE than the final judgment. BRE’s litigation efforts were therefore necessary to achieve the result, especially the declaration interpreting the contract. This factor strongly cuts in favor of an award of fees to BRE.

3. *Whether a fee award would be an extreme hardship.* The Court was not persuaded that a fee award would be an “extreme” hardship to the Association. From BRE’s standpoint, this was a case involving millions of dollars. The Association has the financial means to pay an award of fees. But even if there was some evidence of hardship, the hardship is outweighed by other factors. The Association decided to aggressively engage in multimillion dollar litigation against BRE in the face of a Declaration which, in the Court’s mind, contradicts the Association’s position. The Association took a risk, lost, and should bear the consequences of this litigation decision.

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

5. *Whether the matter presented a novel legal question.* The case was about interpretation of a disputed contract provision. Nothing about the nature of the question presented cuts against an award of attorneys’ fees.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-009167

08/12/2019

6. *Whether the award would discourage other parties with tenable claims or defenses from litigating them.* The Court does not believe an award would discourage parties with tenable claims from pursuing them. On the other hand, any party that undertakes litigation pursuant to rights granted under a declaration should be aware that, if it loses, it will be subject to attorneys' fees.

Thus, the *Warner* factors cut in favor of an award of fees to BRE. Having determined that a fee award is appropriate, the question is the amount.

A trial court may, of course, award a party some but not all of its requested fees. *Lee v. IMG Inv. Mgt., LLC*, 240 Ariz. 158, 161, ¶ 13 (App. 2016). In addition, unsuccessful parties should not be required to pay for tasks that take an unreasonable amount of time, nor should they be required to pay for unnecessary or unproductive tasks. *Hawk v. P.C.Vill. Ass'n, Inc.*, 233 Ariz. 94, 100, ¶ 22 (App. 2013); *In re Guardianship of Sleeth*, 226 Ariz. 171, 176, ¶ 25 (App. 2010).

The Court expresses surprise at the magnitude of the fee request. The case was resolved by a cross motion to interpret a single paragraph (§ 8.1.5) in a Declaration. The parties agreed that the provision was unambiguous. No material facts were in dispute. No depositions were taken. Neither party submitted expert reports. Discovery in the case would be minimal.¹ BRE's disclosure statement was adequate but unremarkable. The motion for judgment on the pleadings was not complicated and did not require specialized expertise. In fact, BRE's motion was foreshadowed by its disclosure statement.

Arguments presented by the Association confirm that the fee request is excessively large. The Association's legal fees were only \$75,952. BRE did not prevail on a discovery dispute.

1. In a November 12, 2018 letter from Susanna Geltman of Simpson Thacher (attached to Gross Affidavit), Ms. Geltman characterizes the case as a "Tier 2" case and makes the following statement accurately outlining the limited scope of the case:

This is a simple case about the proper interpretation of a contract term, and the Association's sudden decision to change its own longstanding interpretation of that term. With respect to both the Association's claim and BRE's counterclaim, there are limited areas of relevant discovery: information about the understanding of Section 8.1.5 of the Declaration when it was drafted; the Association's course of performance under the Declaration, including the Association's provision of the Estoppel Certificate to BRE; and the Association's sudden altered interpretation of the Declaration, which BRE alleges is asserted in bad faith.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-009167

08/12/2019

BRE's use of three law firms resulted in duplicative efforts. BRE submitted a counterclaim which is being dismissed.

Nevertheless, BRE's fees should not be limited to the amount charged by the Association's attorneys. First, the damages sought by the Association were significant and the Association unreasonably sought retroactive damages for 14 years. Having made a decision to bring a multimillion dollar claim, the Association could reasonably expect that BRE would spend significant efforts to defend the claim. In other words, the Association took a big risk and lost. It should bear the consequences of this decision. Moreover, some additional attorneys' fees were necessary because of the successful effort to have the title insurance company assume BRE's defense. Such efforts were reasonable and entirely appropriate.

Having reviewed dozens of motions and fee applications, the Court believes that \$707,673 is too high for what was accomplished here. The case was resolved with minimal discovery based on a judicial interpretation of a contract provision. Although a party is free to choose higher-priced out-of-state counsel to represent it in litigation, that party should not expect this Arizona Court to order the other party to pay the extra costs caused by the sometimes duplicative and expensive efforts of out-of-state counsel. This is especially true where, as here, the legal issues presented were generic and not highly specialized like patent or antitrust litigation.

The Court finds there is minimal block billing and some duplicative billings. There are certain inefficiencies resulting from the use of multiple firms and out-of-state counsel. The Court's experience is that a fee award of \$235,000 (one-third of the requested amount) is consistent with fees requests in other similarly-litigated cases. The Court awards an additional \$5,000 for the preparation of the attorneys' fees application.

IV. CONCLUSION

Taking into account the *Warner* factors and the equities of the situation, the Court awards BRE its attorneys' fees in the amount of \$240,000 pursuant to A.R.S. § 12-341.01(A). The Court finds this amount to be a fair and reasonable amount for attorneys' fees in this case.

BRE is awarded its costs in the amount of \$1,748.02. The Court allows defendants their subpoena costs and the costs of *pro hac vice* applications.

IT IS ORDERED that BRE is awarded \$240,000 in reasonable attorneys' fees, with said amount accruing interest at the rate of 6.25% from the date of this Order.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-009167

08/12/2019

IT IS FURTHER ORDERED that BRE is awarded \$1,748.02 in costs, with said amount accruing interest at the rate of 6.25% from the date of this Order.