

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2003-015126

09/29/2006

HONORABLE ROBERT E. MILES

CLERK OF THE COURT
E. Parrish
Deputy

EAGLE MOUNTAIN COMMUNITY
ASSOCIATION

WILLIAM F SHORE III

v.

EAGLE MOUNTAIN INVESTORS L L C

WILLIAM A NEBEKER

RULING

The Court has received and considered the various filings relating to Defendant Eagle Mountain Investors, L.L.C.'s Application for Attorneys' Fees, the Association's Rule 58(g) Motion for Award of Attorneys' Fees and Costs, and Defendant Eagle Mountain Investors L.L.C.'s Objection to Plaintiff's Statement of Costs and Notice of Taxation of Costs.

There were essentially two claims alleged by Plaintiff in this case – the breach of fiduciary duty/financial claim and the construction defect claim. The damages sought by Plaintiff with respect to each of these claims exceeded the amount of the jury verdict of \$150,000.00. Thus, there is no way to know if the jury's award was for the financial claim, the construction claim, or a combination thereof. While the verdict was close to the amount Defendant suggested should be awarded for both claims, it would be pure speculation to say that the jury adopted Defendant's argument.

Since there is no way to know if the jury awarded anything on the construction defect claim, the Court cannot conclude that the fee provision of the Purchaser Dwelling Act applies. As a result, attorneys' fees, expert fees, or costs cannot be awarded under that statute. However, both parties agree that both claims in this case arose out of contract, so that an award of attorneys' fees would be appropriate for that reason. Defendant, having made a written offer of

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settlement of \$770,000.00 prior to trial, which offer was rejected by Plaintiff, asserts it is entitled to fees pursuant to the following provision of A.R.S. § 12-341.01(A):

If a written settlement offer is rejected and the judgment finally obtained is equal to or more favorable to the offeror than an offer made in writing to settle any contested action arising out of a contract, the offeror is deemed to be the successful party from the date of the offer and the court may award the successful party reasonable attorney fees.

Plaintiff, on the other hand, contends it is entitled to fees pursuant to the Declaration of Covenants, Conditions, and Restrictions for Eagle Mountain, and that the Declaration trumps the above-quoted statutory provision.

Assuming that the Declaration provides for an award of fees in this case, the Court concludes that the above-referenced statutory provision still applies.¹ As a result, because the jury verdict was more favorable to Defendant than Defendant's settlement offer, Defendant is "the successful party from the date of the offer" and the Court may award it a reasonable fee. In addition, however, a logical construction of the statute allows for two successful parties in the circumstances of this case: one before the date of the offer and one after the date of the offer.² Thus, Plaintiff, which achieved a verdict in its favor (albeit one less favorable than Defendant's offer) is also a "successful party."

In such circumstances, fees would most logically be awarded in accordance with the amount of fees incurred by the respective parties before and after the offer. Such an allocation is easier with parties like Defendant, which incurred fees on an hourly rate basis, but less so with a party incurring a contingent fee, like the Plaintiff. The Court notes that had Plaintiff incurred fees on an hourly basis, the amount incurred prior to the settlement offer would have far exceeded the amount of the contingent fee actually incurred (\$52,500.00). Furthermore, had Plaintiff accepted the settlement offer, it would have owed its counsel a fee of \$231,000 (30% of \$770,000) for work done prior to the date of the offer.

In the exercise of its discretion, the Court awards Plaintiff the full amount of the contingent fee it incurred, \$52,500. With regard to Defendant's request for fees incurred after the date of the settlement offer, Plaintiff's only argument that they are not reasonable is that Defendant's counsel appears to have done a substantial amount of work in the period after the

¹ By virtue of this conclusion, the Court need not decide the issue of whether any contractual attorneys' fee provisions apply under the circumstances and posture of this case.

² If this were not the case, there would be no reason for the words "from the date of the offer." Instead, the statute would just declare the offeror to be "the successful party," period.

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offer. Plaintiff does not contend the work was unnecessary or duplicative, or that the hourly rates were unreasonable. In the exercise of its discretion, the Court awards Defendant \$203,611.50 as a reasonable fee from the date of the settlement offer. In making these awards, the Court has reviewed and considered the various factors for making a fee award as discussed in *Associated Indemnity Corporation v. Warner*.

Finally, in the exercise of its discretion, the Court concludes that because Plaintiff achieved some award, it may be considered the successful party for purposes of an award of costs. The Court awards Plaintiff the amount of \$12,102.64 for filing fees, service fees, and deposition costs. The Court concludes the other expenses claimed by Plaintiff may not be awarded as costs.

Counsel for the parties shall confer to attempt to stipulate to a form of judgment consistent with the jury's verdict and these rulings. If no stipulation is reached by **October 12, 2006**, each party shall submit its proposed form of final judgment by **October 16, 2006**.