

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-052668

10/11/2021

HONORABLE THEODORE CAMPAGNOLO

CLERK OF THE COURT
J. Holguin
Deputy

ROWLEY FAMILY TRUST, THE, et al.

JUSTIN R COOLEY

v.

DOVE VALLEY RANCH COMMUNITY
ASSOCIATION, et al.

B AUSTIN BAILLIO

AMANDA E NELSON
JUDGE BACHUS
JUDGE CAMPAGNOLO

MINUTE ENTRY
AWARD OF RULE 68 SANCTIONS

On May 25, 2021, the Court granted Defendant Beatrice Lee Baron's Motion for Summary Judgment. The Ruling dismissed all causes of action that had been brought against Ms. Baron. Because it resolved all issues between Plaintiff and Ms. Baron, the Court ordered Ms. Baron to submit an application for attorney's fees under A.R.S. §12-341.01(A). Ms. Baron timely filed an application for attorney's fees, and also lodged a proposed form of Judgment.

The Court has reviewed and considered Defendant Baron's Application for an Award of Attorney Fees and Costs, Declaration of Amanda Nelson in Support of Application for Award of Attorney Fees and Costs, Defendant Baron's Verified Statement of Costs and Motion for Rule 68 Sanctions, Plaintiff's Response to Defendant Baron's Application for Attorneys' Fees and Costs, Objection to Defendant Baron's Proposed Form of Judgment – and - Objection to Statement of Costs, the exhibits attached to any of the forgoing pleadings, and the applicable law.

In its Response, Plaintiff first contended that attorney's fees were not available under A.R.S. §12-341.01, because the cause of action did not arise out of a contract, or alternatively, no

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contract existed between Plaintiff and Ms. Baron, pursuant to the Court's Ruling. Based on the Court's Ruling that the CCR did not create a contractual basis between the individual property owners, Plaintiff contended that the only remaining counts sounded in tort.

Secondly, Plaintiff contended that Ms. Baron is being provided a defense by her insurance carrier, and that she has no duty to pay her attorney. Because the Court's Ruling specifically prohibited the filing of a Reply, Ms. Baron filed a request for leave to file a Reply based upon this second issue raised by Plaintiff. The Court denied Ms. Baron's request.

Third, Plaintiff contended that Ms. Baron did not satisfy the factors under *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567, 570 (1985).

Fourth, Plaintiff contended that Ms. Baron's hourly rate of \$350.00 was unreasonable.

Plaintiff did not challenge any of the time entries, or the amount of the attorney's fees requested by Ms. Baron.

Defendant also objected to Ms. Baron's Verified Statement of Costs and Motion for Rule 68 Sanctions. Plaintiff objected to the proposed award of attorney's fees under Rule 68 in the proposed judgment. Plaintiff also objected to the reasonableness of Ms. Baron's expert witness fees under Rule 68. Plaintiff's only other objection was that the proposed form of judgment should have referenced Rule 78(b) with the appropriate wording.

Although the Court denied leave for Ms. Baron to file a Reply, the Court realized that neither party had fully addressed or fully briefed Plaintiff's second issue as to whether a carrier's in-house litigators were entitled to attorney's fees. For that reason, on August 17, 2021, the Court ordered both parties to file simultaneous briefs on whether attorney's fees could be awarded to "an insurance defense attorney, who is on salary with the carrier, and has no fee agreement with either the insurer or the insured."

Both parties timely filed their respective supplemental memoranda on September 14, 2021. Both memoranda were extremely helpful; they provided the additional legal support the Court needed to issue a Ruling.

Discussion

Deciding on an award of attorney's fees requires a two-step analysis. The first step is to determine whether a movant is entitled to receive an award of attorney's fees. The second step is to decide whether a monetary amount of attorney's fees should be awarded.

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Is Ms. Baron Eligible for an Award of Attorney's Fees?

A.R.S. §12-341.01(A) provides as follows:

In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees. 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. This section shall not be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney fees.

Under A.R.S. §12-341.01, the Court may award reasonable attorneys' fees to the successful party in a disputed action arising out of a contract. There can be no legitimate dispute that Ms. Baron was the successful party in the litigation that was brought against her.

However, before the Court is able to reach the issue of whether the Court should exercise its discretionary authority to award attorney's fees, it must first determine whether or not this litigation arose out of a contract. Attorney's fees are not recoverable where there is no contractual or statutory basis for their award. *State Farm Mutual Automobile Insurance Company v. O'Brien*, 24 Ariz. App. 18, 21-2 (1975).

Three of the four counts against Ms. Baron arose out of an alleged contract. The fact that the court determined that there was no contract between Plaintiff and Ms. Baron, and that there was no interference with a contract, does not negate Ms. Baron's claim for attorney's fees.

A prevailing party is entitled to its fees under §12-341.01 when sued on a contract even if the judgment is based on the absence of any contract. *Rogus v. Lords*, 166 Ariz. 600, 604 (App. 1991). A court may award fees to a party that prevails on the basis that there is no contract. *Nolan v. Starlight Pines Homeowners Association*, 216 Ariz. 482, ¶36 (App. 2007). *Accord, Rudinsky v. Harris*, 231 Ariz. 95, ¶27 (App. 2012). A party is entitled to an award of its attorney's fees under A.R.S. §12-341.01 if judgment in its favor is based upon the absence of the contract sued upon by the adverse party. *Lacer v. Navajo County*, 141 Ariz. 392, 394 (App. 1984)

The fourth count against Ms. Baron alleged the tort of breach of fiduciary duty. Tort actions generally do not allow for the recovery of attorney's fees.

However, a party may recover attorneys' fees expended in litigating an interwoven tort claim. *Modula Mining Systems, Inc. v. Jigsaw Technologies, Inc.*, 221 Ariz. 515, 522, ¶23 (App.

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2009). Claims are interwoven when they are based on the same set of facts and involve common allegations, which require the same factual and legal development. *Id.* at ¶23; *see also Bennett v. Baxter Group, Inc.*, 223 Ariz. 414, 420, ¶23 (App. 2010) (concluding that fees can be awarded on non-contract claims “when these claims are so factually connected to a contract claim that they require the same work that is already necessary for the defense or prosecution of the contract claim alone”); *Zeagler v. Buckley*, 223 Ariz. 37, 39, ¶9 (App. 2009) (holding that fees may be awarded when “claims are so interrelated that identical or substantially overlapping discovery would occur”).

A tort claim arises out of contract if it could not exist but for the contract. *See, e.g., Caruthers v. Underhill*, 230 Ariz. 513, 526, ¶57 (App. 2012) (holding that the contract must be the essential basis of the action and not merely a factual predicate); *Sparks v. Republic National Life Insurance Co.*, 132 Ariz. 529, 543 (1982). An action arises out of a contract when the contract is “the factor” giving rise to the litigation; it does not arise out of contract if the contract is merely peripheral to the cause of action. *Lewin v. Miller Wagner & Co.*, 151 Ariz. 29, 37 (App.1986).

Section 12-341.01 does not apply if the contract is a factual predicate to the action, but not the essential basis of it. *Hanley v. Pearson*, 204 Ariz. 147, ¶17 (App. 2003). When a cause of action is based on a statute rather than a contract, the peripheral involvement of a contract does not support the application of the fee statute. *Id.* *See also Keystone Floor & More, LLC v. Arizona Registrar of Contractors*, 223 Ariz. 27, ¶18 (App. 2009) (holding that the sole basis for the substantive result of disciplinary action against a contractor was a violation of statutory and regulatory requirements, and not the underlying contract).

The modifying phrase “arising out of” refers to a cause or origin, thereby describing an action in which a contract was a factor causing the dispute. *ASH, Inc. v. Mesa Unified School District No. 4*, 138 Ariz. 190, 192 (App. 1983). If the lawsuit was initiated because of a contract, the non-contract cause of action arises out of the contract. *Id.*

Under the facts of this case, the tort claim was interwoven with the contractual claims, such that it, too, arose out of the alleged contract.

Before determining whether an amount of attorney’s fees should be awarded, the Court should consider the following factors to analyze whether there is an entitlement to an award. The factors are listed in *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567, 570 (1985), as follows:

1. **The merits of the claim or defense presented by the unsuccessful party:** The factual and legal merits of Plaintiff’s claim against Ms. Baron were not strong.

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2. **The litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result:** Plaintiff should have settled, if not dismissed, its claims against Ms. Baron. Its failure to do so required Ms. Baron to continue to defend the claims, and to seek summary judgment. Ms. Baron's efforts were not superfluous.
3. **Assessing fees against the unsuccessful party would cause an extreme hardship:** Plaintiff asserted that an attorney's fee award would cause an extreme hardship on it. Plaintiff's assertions may or may not be well-founded, but its reasons were conclusory without any supporting basis. Thus, the Court finds that an award of attorney's fees would not cause an extreme hardship on Plaintiff.
4. **The successful party did not prevail with respect to all of the relief sought:** Ms. Baron prevailed in full.
5. **The novelty of the legal question presented, and whether such claim or defense had previously been adjudicated in this jurisdiction:** This was not a novel legal question. There are other appellate cases pertaining to this type of issue.
6. **Whether the award in any particular case would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear of incurring liability for substantial amounts of attorney's fees:** Based on the unique facts of this case, a monetary award of attorney's fees would not discourage other litigants.

The Court finds that Ms. Baron has shown that she would be entitled to an award of attorney's fees under A.R.S. §12-341.01(A).

Has Ms. Baron Showed that She is Entitled to a Specific Amount of Attorney's Fees?

The next issue is to determine if Ms. Baron has justified an amount to which she would be entitled. Ms. Baron sought an award of attorney's fees under A.R.S. §12-341.01. Therefore, an award under A.R.S. §12-341.01 is limited to the statute's parameters.

A.R.S. §12-341.01(B) provides:

The award of reasonable attorney fees pursuant to this section should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense. It need not equal or relate to the attorney fees actually paid or

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contracted, but **the award may not exceed the amount paid or agreed to be paid.**

[emphasis added].

In this case, Ms. Baron's attorneys requested attorney's fees at an hourly rate of \$350.00, based upon the prevailing rate of non-in-house attorneys with similar time and experience in the legal profession. For purposes of this Ruling, the Court does not question that \$350.00 an hour may be the prevailing rate for non-in-house attorneys with Ms. Baron's counsel's experience.

The Arizona cases indicate that a litigator who serves as in-house counsel for an insurance carrier can be entitled to attorney's fees under A.R.S. §12-341.01. In an unreported decision, which is not precedential, the Court of Appeals held that both governmental attorneys and in-house defense counsel for an insurance carrier's insured were entitled to attorney's fees. *HSBC Bank USA, N.A. v. Cluff*, 2018 WL 5117167, ¶36 (Ariz. App., Oct. 18, 2018). Although *Cluff's* discussion of attorney's fees seemed to mostly refer to an award of attorney's fees under A.R.S. §33-420(A), the Court's concluding paragraph stated that the award was also under A.R.S. §12-341.01.

The Court finds *HSBC* to have persuasive value in that it equates governmental lawyers with in-house insurance litigators. This is helpful, because most, if not all of the reported cases on this issue pertain to governmental lawyer having a right to seek attorney's fees under A.R.S. §12-341.01. See *Barth v. Cochise County, Arizona*, 213 Ariz. 59, ¶19 (App. 2006); *Smith v. City of Phoenix*, 175 Ariz. 509, 516 (App. 1992); *Lacer v. Navajo County*, 141 Ariz. 392, 395 (App. 1984).

Ms. Baron cited a number of appellate cases in which a governmental lawyer received an award of attorney's fees based upon the hourly rate in the legal community. Because A.R.S. §12-341.01 limits the recovery of attorney's fees to the amount paid or agreed to be paid, the Court finds that many of the cases cited by Ms. Baron are inapplicable. Many of the cases cited by Plaintiff awarded fees under statutes that did not have a restriction on the amount of fees that could be awarded as contained in §12-341.01. See, e.g., *Matter of Shannon*, 179 Ariz. 52, 80 (1994) (holding that the assessment of costs and expenses of a disciplinary proceeding are assessed against a sanctioned attorney pursuant to Supreme Court rule 52(a)(8), which does not contain language that limits the recovery to actual costs or expenses incurred); *City of Tempe v. State*, 237 Ariz. 360, ¶¶25-27 (App. 2015) (awarding fees to a governmental entity under A.R.S. § 12-348.01, which authorizes reasonable attorney's fees to the successful party); *Day v. Armendt*, 2017 WL 2332892, ¶¶34-36 (Ariz. App., May 30, 2017) (insurer's in-house counsel awarded attorney's fees as a sanction under Rule 77).

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Ms. Baron also cited a number of California appellate cases in which in-house counsel were awarded attorney's fees. All of these cases, however, were decided under California Civil Code section 1717(a), which provides in pertinent part as follows:

In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

As in the other cases cited above, the California cases rely upon a statute that is not only inapplicable to the facts of this case, but does not contain the limitation in A.R.S. §12-341.01(B). Likewise, Ms. Baron listed federal case citations, as well as numerous case citations in a footnote from other jurisdictions in which in-house counsel were awarded attorney's fees based on hourly rates in the legal community. It appears that none of these foreign cases pertained to attorney's fees under a statute like A.R.S. §12-341.01(B).

Fortunately, there are a few Arizona cases that discuss the components of a request for attorney's fees by governmental attorneys or in-house counsel under A.R.S. §12-341.01. In the seminal case of *Lacer v. Navajo County*, 141 Ariz. 392 (App. 1984), Navajo County sought an award of attorney's fees at \$70.00 per hour. The Court of Appeals, noting that such a fee may be reasonable, held that A.R.S. §12-341.01(B) requires that the amount awarded "not exceed the amount paid or agreed to be paid." *Lacer*, 141 Ariz. at 396. The Court further held that Navajo County could not "receive greater than its actual hourly cost, **irrespective of the reasonableness of the hourly fee requested.**" *Id.* [emphasis added]. The Court noted that Navajo County had not provided evidence of the hourly cost actually incurred by the County. *Id.*

The Court then set forth general guidelines for attorney's fee requests for governmental attorneys, which would be applicable to in-house counsel, as follows: 1) the share of the party's attorney's salaries which are allocable to the case based upon the time expended, and 2) allocated shares of the costs of office space, support staff, office equipment and supplies, law library and continuing legal education. *Id.*

In *Barth v. Cochise County*, 213 Ariz. 59, ¶19 (App. 2006), the Court of Appeals, relying on *Lacer*, approved a request from Cochise County that contained an affidavit that based the hourly rate on the attorney's "hourly rate of pay, the reasonable costs of associated support staff, the costs of equipment and materials allocated to this effort, administrative costs, and other direct and indirect costs incurred by the County." *Id.* at ¶20.

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Lastly, in an unreported case, the Court of Appeals affirmed the trial court's award of attorney's fees for a title insurer's in-house counsel, in which the affidavit set the attorney's hourly rate that was based on "attorneys' salaries ... costs of office space, support staff, office equipment and supplies, law library and continuing legal education." *HSBC Bank USA, N.A. v. Cluff*, 2018 WL 5117167 at ¶37. This case, while not precedential, has persuasive value, because it pertained to similar counsel as in this case.

The facts are undisputed that Ms. Baron has no contract to pay or agree to pay anything to her counsel. The fact that she may have paid premiums to the insurer does not equate with an agreement to pay legal fees to her counsel. There is no evidence that CSAA, counsel's employer, has a contract with in-house counsel to pay them \$350.00 per hour, as requested by Ms. Barons' counsel. In the absence of evidence, the Court must presume that CSAA has agreed to pay its in-house counsel an annual salary to handle many cases. No evidence was presented as to counsel's annual salary. No evidence was presented as to the share of CSAA's attorney's salaries which are allocable to this case based upon the time expended, and no evidence was presented as to the allocated shares of the costs of office space, support staff, office equipment and supplies, law library and continuing legal education.

Plaintiff did not object to Amanda Nelson's time entries. The Court finds that the time incurred appeared to be reasonable. However, the Court finds that Amanda Nelson's affidavit did not satisfy the directives in *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183 (App. 1983), because it failed to provide a reasonable basis for the hourly rate requested by Ms. Nelson as required by *Lacer*.

An award of attorneys' fees under A.R.S. §12-341.01 is permissive; there is no requirement that the trial court grant fees to the prevailing party in a contested contract action. *Title Insurance* discretion to determine whether a party is entitled to an award of attorneys' fees under A.R.S. §12-341.01(A). *Associated Indemnity Corp. v. Warner*, 143 Ariz. at 570.

For the reasons stated herein, Ms. Baron's counsel has failed to show a reasonable basis for the amount requested, and there is no basis to award any amount of attorney's fees to Ms. Baron.

In *Lacer*, because it was a case of first impression, the Court of Appeals remanded the case to allow the County to submit an amended application based on the newly-created guidelines provided in *Lacer*. However, *Lacer* provided these guidelines nearly 30 years ago. Thus, the application of these guidelines for in-house counsel should come as no surprise to Ms. Baron's attorney, especially since *Lacer* and its prodigy were cited in Ms. Baron's supplemental memorandum. Thus, Ms. Baron's attorneys are not entitled to a second bite at the apple to submit a new application. Ms. Baron's counsel failed to present a proper application for attorney's fees.

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Taxable Costs and Rule 68 Sanction

Ms. Baron is requesting an award of reasonable expert witness fees, taxable costs, and double Ms. Baron's taxable costs incurred after the offer of judgment was made, pursuant to Rule 68 of the Rules of Civil Procedure.

Rule 68(a) provides that "any party may serve upon any other party an offer to allow judgment to be entered in the action."

Rule 68(g) provides:

If the offeree rejects an offer and does not later obtain a more favorable judgment ... the offeree must pay, as a sanction, reasonable expert witness fees and double the taxable costs, as defined in A.R.S. § 12-332, incurred by the offeror after making the offer and prejudgment interest on unliquidated claims to accrue from the date of the offer.

Rule 68 requires specificity. *Greenwald v. Ford Motor Co.*, 196 Ariz. 123, ¶5 (App. 1999). The Offer must 1) contain a specific monetary sum to settle the asserted causes of action; 2) must contain a specific monetary sum for attorneys' fees; and 3) be specific enough so that it can be determined, at the time of judgment, whether the offer or the judgment favored the offeree. *Id.* at ¶6.

An award of sanctions pursuant to Rule 68(g) is mandatory. *Arellano v. Primerica Life Ins. Co., Co.*, 235 Ariz. 371, ¶48 (App. 2014). *See also Levy v. Alfaro*, 215 Ariz. 443, ¶8 (App. 2007) (holding that an award of sanctions is mandatory if the party has complied with Rule 68).

Ms. Baron's offer of judgment was served on Plaintiff's counsel on March 14, 2019 (Exhibit A to Ms. Baron's Verified Statement of Costs and Motion for Rule 68 Sanctions). Ms. Baron offered to settle the claims against her by paying Plaintiff the amount of \$1,000, inclusive of attorney's fees and costs. The offer of judgment complied with the requirements of Rule 68.

Plaintiff rejected the offer. Based on the summary judgment ruling, Plaintiff did not receive a more favorable judgment than the offer.

Plaintiff agreed that Ms. Baron was entitled to sanctions under Rule 68, but objected to Ms. Baron's expert fees as being unreasonable. Plaintiff's objection was generic and conclusory. Plaintiff largely relied upon a "general" rule that "lawyers are generally held to a 1 hour per page of legal writing standard with respect to reasonableness of attorneys' fees...." Based on this,

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Plaintiff argued that expert's fees should be based on the same rule, if not a more restrictive one. This Court is unaware of such a rule, and has never applied that rule to a determination of reasonable attorney's fees. After reviewing the expert's invoice in Exhibit B to the Motion for Rule 68 Sanctions, the Court finds that the expert's fees appear to be reasonable, and should be allowed.

The Court has reviewed the remainder of Exhibit B, and finds that the items requested are allowable as mandatory sanctions under Rule 68, and as taxable costs under A.R.S. §§12-341 and 12-332. Ms. Baron is entitled to Rule 68 sanctions in the amount of \$2,323.45.

IT IS ORDERED that no judgment for attorney's fees shall be awarded against Plaintiff due to Ms. Baron's failure to provide sufficient evidence as to an amount of attorney's fees to which she would be legally entitled.

IT IS FURTHER ORDERED that Judgment shall be separately entered against Plaintiff in the amount of **\$2,323.45**, as mandatory sanctions under Rule 68 of the Rules of Civil Procedure.

IT IS FURTHER ORDERED that this Ruling is entered as an Order of the Court.

Dated: October 11, 2021

/s/ HONORABLE THEODORE CAMPAGNOLO

HON. THEODORE CAMPAGNOLO
JUDGE OF THE SUPERIOR COURT