

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-001341

11/14/2007

HON. EDWARD O. BURKE

CLERK OF THE COURT
T. Melius
Deputy

AHWATUKEE CUSTOM ESTATES
MANAGEMENT ASSOCIATION

JAMES H HAZLEWOOD

v.

JAMES M RAST, et al.

ROGER R FOOTE

MINUTE ENTRY

The following pleadings in this case have been brought to the Court's attention. Plaintiff/Counterdefendant, Ahwatukee Custom Estates Management Association, L.L.C., ("ACEMA") filed an Application For Attorneys' Fees and Costs on Remand on August 8, 2007. Defendants, James M. Rast and Chien Jui-Hsiang filed a Motion to Exceed the Page Limits and a pleading entitled "Defendants' / Counterclaimants' Application For Attorneys Fees and Response to ACEMA's Application" on August 23, 2007. On August 23, 2007, Defendants also filed a pleading entitled "Objection of Fee Application of ACEMA on its Claim and Defense of Counterclaim" along with two affidavits seeking attorneys' fees at trial and on appeal. These pleadings were brought to the Court's attention on September 12, 2007, and the Motion to Exceed Page Limits was DENIED on September 12, 2007. The minute entry reflecting the Court's denial of the motion was filed September 28, 2007.

To explain the delay in issuing this ruling, the Court points out that after Defendants' Motion to Exceed Page Limitations was denied, the Court awaited a revised memorandum from Defendants. When no further pleading was received from Defendants, to assure the Court that Defendants' counsel had not overlooked the Court's ruling denying Defendants' Motion to Exceed Page Limitations, the Court asked its judicial assistant to contact Defendants' counsel re

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the same. On November 8, 2008, Defendants' counsel advised the Court's Judicial Assistant that: "because he had combined two motions in one he was well within the bounds of the page limits." The Court disagrees but rather than spend any further time trying to convince Defendants' counsel to comply with Maricopa County Local Rule 3.2(b) it has taken the time to review all of the pleadings filed by Defendants and Plaintiff, along with the Court of Appeals' Memorandum decision and makes the following rulings.

Three issues are presented to the Court by the parties; i.e. who was the prevailing party in the trial court; who was the prevailing party in the Court of Appeals; and whether the Court of Appeals Memorandum Decision bars the Court from considering any application by Plaintiff for Attorneys Fees.

ACEMA, claiming that it was the prevailing party in both the trial court and the Court of Appeals, requests attorneys fees of \$19,871.40 for successfully defeating Defendants' counterclaim in the trial court; \$38,415.78 for pursuing its complaint in the trial court plus \$325.00 in costs, and \$8002.50 for attorneys fees incurred in the Court of Appeals. Its request is made under its Article IX Section 7 of its Declaration of Covenants, Conditions, and Restrictions ("CC&Rs") and A.R.S. § 12-341.01. The attorneys' fee provision in the CC&Rs allows ACEMA to sue to enforce the provisions of the CC&Rs and provides that the non-prevailing party in any such action shall pay the prevailing party's reasonable attorneys fees.

Defendants, claiming that that they are the prevailing party in both the trial court and the Court of Appeals, object to any award of fees or costs to ACEMA and seek attorneys fees of \$38,800.00, computerized legal research costs of \$902.40, and taxable costs of \$1,411.80 under A.R.S. §12-341.01.

ACEMA filed this action on January 22, 2004, seeking an injunction to compel Defendants to complete construction work on their home within 30 days as required by the CC&Rs. On August 4, 2004, ACEMA filed an amended complaint seeking both injunctive relief and an award of monetary penalties and contractual damages. Defendants filed a counterclaim against ACEMA claiming breach of contract and requesting monetary and injunctive relief. After a hearing, the trial court, the Hon. Barry Schneider, ordered Defendants to complete construction on or before June 8, 2005. Defendants failed to complete construction by that date and did not complete construction until just before the entry of judgment on May 3, 2006. ACEMA claims that Defendants ignored twelve separate deadlines to complete construction. Judge Schneider dismissed Defendants' counterclaim and awarded ACEMA \$15,000.00 in monetary penalties against Defendants and \$32,325.00 in attorneys' fees.

Defendants appealed from the judgment against them and ACEMA cross-appealed. The Court of Appeals reversed holding that ACEMA did not have the authority to levy fines against

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its members and it vacated the entire judgment including the award of attorneys' fees to ACEMA. The dismissal of Defendants' counterclaim was affirmed. The Court of Appeals remanded the case to this court to determine which, if any, party was the prevailing party. Both parties requested attorneys' fees on appeal. Both requests for attorneys fees on appeal were denied but the Court of Appeals said that this court may consider the fees incurred by the prevailing party on appeal in determining whether and how much to award as reasonable attorneys' fees. Defendants were awarded their costs on appeal.

The prevailing party for the purpose of awarding attorneys fees is determined as follows. In Huey v. Honeywell, 82 F.3d 329, 33 (Ct. App. 9th Cir. 1996) the court said:

“A.R.S. § 12-341.01 provides that in “any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees.” The Arizona Supreme Court in *Wagenseller* held that a party who appeals and succeeds in reversing the trial court's entry of summary judgment is a “successful party” within in the meaning of A.R.S. § 12-341.01, and is thus eligible to recover attorney's fees. *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025, 1048 (1985). However, because success on appeal was equally shared by both parties, both parties' requests for attorney's fees and costs are denied.”

In Fisher v. National General Insurance Company, 192 Ariz. 366, 369-370, 965 P.2d 100 (1998) the court said:

“NGIC argues that the trial court should have awarded attorneys' fees under A.R.S. sections 12-341.01(C) and 12-349 . To award sanctions under these statutes the court must determine that the party's claim: (1) constitutes harassment; (2) is groundless; and (3) is not made in good faith. All three elements must be shown and the trial court must make appropriate findings of fact and conclusions of law. *State v. Richey*, 160 Ariz. 564, 565, 774 P.2d 1354, 1355 (1989); *Gilbert v. Board of Med. Exam'rs*, 155 Ariz. 169, 180, 745 P.2d 617, 628 (App.1987). See also A.R.S. § 12-349(F). Under A.R.S. section 12-341.01(C), the court must find these elements by clear and convincing evidence, *Richey*, 160 Ariz. at 565, 774 P.2d at 1355; under A.R.S. section 12-349, the standard is preponderance of the evidence. *Phoenix Newspapers, Inc. v. Department of Corrections*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App.1997).”

In Sanborn v. Brooker and Wake Property Management, Inc. 179 Ariz 425, 430, 894 P.2d 982 (App. 1994) the Court said:

“The decision as to who is the successful party for purposes of awarding attorneys' fees is within the sole discretion of the trial court, and will not be disturbed on appeal if

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any reasonable basis exists for it. [Schwartz v. Farmers Ins. Co.](#), 166 Ariz. 33, 800 P.2d 20 (App.1990). While the award of money is an important item to consider when deciding who is the prevailing party, the fact that a party does not recover the full measure of relief it requests does not mean that it is not the successful party.”

And,

In [Altfillisch Const. Co. v. Torgerson Const. Corp.](#), 140 Ariz. 438, 440, 586 P.2d 994 (App. 1978) the court said:

“Seller argues that [Trollope v. Koerner](#), 21 Ariz.App. 43, 515 P.2d 340 (1973), requires the successful party to win a net monetary judgment. A successful party does not necessarily win a monetary judgment. [National Mutual Insurance Co. v. Granillo](#), 117 Ariz. 389, 573 P.2d 80 (App.1977). Neither party in Trollope sought possession of property. The party prevailing on a claim for possession of property is a “successful party” within the meaning of [A.R.S. Sec. 12-341.01](#).”

Applying these principles to this case, the Court finds that, notwithstanding that the dismissal of Defendants counterclaim was upheld by the Court of Appeals, Defendants were the prevailing party in the Court of Appeals, but ACEMA was the prevailing party in the trial court. Considering these findings, and for the reasons set forth in ACEMA’s memoranda, in the exercise of its discretion, the Court awards ACEMA the sum of \$35,000.00 for its attorneys' fees and \$325.00 for its costs incurred in the trial court.

Defendants’ Application for Attorneys’ Fees is DENIED.