

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-010791

11/25/2020

HONORABLE RANDALL H. WARNER

CLERK OF THE COURT
C. Ladden
Deputy

MARDY C TOEPKE, et al.

MITCHELL W FLEISCHMANN

v.

PIONEER CONDOMINIUM ASSOCIATION OF SUN CITY WEST

DAVID G SCHMIDT

JUDGE WARNER

MINUTE ENTRY

Before the court are the parties' competing forms of judgment, requests for attorneys' fees, and statements of costs.

The main in this case was whether certain Amendments to the Declaration are unenforceable because they were not adopted in the manner required by A.R.S. § 33-1227(D). The court granted a preliminary injunction on that issue, and subsequently granted summary judgment on that issue. As a consequence, Plaintiff prevailed on her claim for declaratory and injunctive relief. Summary judgment was granted for Defendant on her claim for damages, and on contract, tort, and statutory claims.

The court finds that, on balance, Plaintiff is the successful party. Although she lost on various claims, she prevailed on the main issue in the case. For that reason, she is entitled to costs.

Plaintiff argues for attorneys' fees under A.R.S. § 12-341.01(A) on the ground that this matter arises out of contract. Defendant agrees that this matter arises out of contract, but argues that either it should be awarded fees, or that no party should be awarded fees.

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The court has considered all relevant factors and finds that a partial award of attorneys' fees to Plaintiff as the prevailing party is appropriate. As to the factors listed in *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567, 694 P.2d 1181 (1985), the court finds as follows.

1. *Whether the unsuccessful party's claim or defense was meritorious.* Although Plaintiff prevailed on the main issue in this case, Defendant prevailed on a number of defenses to Plaintiff's claims.

2. *Whether the litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result.* Litigation could have been avoided. Defendant should have known the Amendments were not lawfully passed. And even if they did not know before the litigation, they did know once Judge Mroz granted a preliminary injunction based on A.R.S. § 33-1227(D). At the very least, the main issue in this case should have been resolved then instead of having to relitigate it on summary judgment.

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.* Plaintiff did not prevail with respect to all of the relief sought.

5. *Whether the matter presented a novel legal question.* The matter presented was not novel. It involved a straightforward application of a statute.

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

Based on these factors, the court finds that an award of attorneys' fees to Plaintiff in the amount of \$25,000 is appropriate. This accounts for the fact that part of Plaintiff's efforts were spent pursuing ultimately unsuccessful claims, and \$25,000 is a reasonable amount of attorneys' fees for the claims Plaintiff did prevail on.

IT IS ORDERED awarding Plaintiff attorneys' fees in the amount of \$25,000.00.

IT IS FURTHER ORDERED awarding Plaintiff costs in the amount of \$386.30.

With respect to the form of judgment, there is slight disagreement between the parties. The court agrees with Defendant that the judgment should include dismissal of the claims on

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which Plaintiff did not prevail. The court has entered judgment in Plaintiff's lodged form as modified consistent with this ruling.

NOTE: Due to the spread of COVID-19, the Arizona Supreme Court Administrative Order 2020-79 requires all individuals entering a court facility to wear a mask or face covering at all times they are in the court facility. With limited exceptions, the court will not provide masks or face coverings. Therefore, any individual attempting to enter the court facility must have an appropriate mask or face covering to be allowed entry to the court facility. Any person who refuses to wear a mask or face covering as directed will be denied entrance to the court facility or asked to leave. In addition, all individuals entering a court facility will be subject to a health screening protocol. Any person who does not pass the health screening protocol will be denied entrance to the court facility.