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8 IN THE SUPERIOR COURT OF ARIZONA
9 COUNTY OF MARICOPA

10 PATRICIA BOCCHINO,

11 Plaintiff,

Case No. CV2015-012434

12 vs.

MOTION FOR SUMMARY JUDGMENT

13 FOUNTAIN SHADOWS HOMEOWNERS
ASSOCIATION,

14 Defendant.

15 **Introduction**

16
17 Plaintiff Patricia Bocchino (“Bocchino”) moves for summary judgment on her claim that
18 Defendant Fountain Shadows Homeowners Association (the “Association”) unlawfully received
19 and refuses to return proceeds from the sale of her property to which it was not entitled under
20 Arizona law. The Association contends it incurred nearly \$4,000 in attorneys’ fees and costs
21 preparing and filing an *ex parte* Injunction Against Workplace Harassment against Bocchino.
22 Although these fees and costs were never awarded, the Association apparently billed Bocchino’s
23 account and, six months later, demanded the payment of those unadjudicated fees and costs
24 from the title company as a condition of closing when Bocchino sold her unit in 2015. The
25 Association’s forced collection of these fees out of Bocchino’s escrow is both improper and
26

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1 unlawful as a matter of law. Because the Association had no legal basis for recovering these
2 unawarded fees or costs, Bocchino is entitled to recover these proceeds as a matter of law.

3 **Factual Background**

4 The Association filed an *ex parte* Petition for Injunction Against Workplace Harassment
5 against Bocchino, a member, on March 4, 2015.¹ [Statement of Facts in Support of Plaintiff’s
6 Motion for Summary Judgment (“SOF”), ¶ 1] The Petition did not request an award of
7 attorneys’ fees or costs. [SOF, ¶ 2] The Injunction was granted on March 5, 2015, without prior
8 notice to Bocchino, and did not include an award of attorneys’ fees or costs to the Association.
9 [SOF, ¶ 3] Bocchino has not requested a hearing on the matter or challenged the Injunction in
10 any way. [SOF, ¶ 4]

11 The Association retained counsel in connection with the *ex parte* Injunction matter.
12 [SOF, ¶ 6] Between January 2015 and September 2015, it submitted six invoices to the
13 Association, totaling \$3,867.28, for its attorneys’ fees and costs related to the matter. [SOF, ¶ 6]
14 Some descriptions of charges assessed in the invoice include obtaining and serving an *ex parte*
15 Injunction Against Workplace Harassment, but others include communicating with an attorney
16 previously retained by Bocchino to inquire into particular charges on her account maintained
17 with the Association (“HOA Account”), responding to an inquiry from Bocchino regarding why
18 the Association was assessing late charges on timely payments, and sending *two attorneys* to
19 cover an *ex parte* hearing. [SOF, ¶ 5; SOF ¶ 8]

20 The Association maintained two separate ledgers in connection with Bocchino’s HOA
21 Account. [SOF, ¶ 13] It is unclear which, if either, is an official accounting record that truly
22 reflects her HOA Account. Both ledgers reflect that, between May 2015 and September 2015,

23 ¹ Although the merits of the Injunction against Workplace Harassment action are not at
24 issue in this case, it appears that the gist of the action was that board members were allegedly
25 concerned about purported interactions with Bocchino largely outside of board meetings. While
26 these individual concerns may have been grounds for obtaining an Injunction Against
Harassment pursuant to A.R.S. § 12-1809, it does not appear to be a valid Injunction under
A.R.S. § 12-1810.

1 the Association unilaterally assessed Bocchino its \$3,867.28 in attorneys' fees, plus an
2 additional, unexplained \$25.00.² [SOF, ¶ 14; SOF, ¶ 15] During the same time period, Bocchino
3 paid the Association \$55.00 to be applied towards the attorneys' fees assessed against her HOA
4 Account. [SOF, ¶ 21] One of the ledgers maintained by the Association, entitled "Accounting
5 Transactions," indicates that Bocchino was properly credited for the \$55.00 in payments to the
6 Association. [SOF, ¶ 22] The other ledger, titled "Financial Transactions," appears to show a
7 credit for \$30.00 of Bocchino's payments towards the attorneys' fees assessments, but
8 erroneously shows an additional \$25.00 attorneys' fee assessment against her HOA Account.
9 [SOF, ¶ 23] As a result, the two ledgers differ by \$50.00 as to the attorneys' fees "owed" by
10 Bocchino.³ [SOF, ¶ 24]

11 Bocchino entered into a binding contract for the sale of her condominium on August 25,
12 2015 with a close of escrow date of September 24, 2015. [SOF, ¶ 25] The title company, as part
13 of the sale, requested a payoff balance from the Association. [SOF, ¶ 26] On September 18,
14 2015, five days before the anticipated close of escrow, the Association's property manager,
15 Planned Development Services, provided a Resale Disclosure Statement that disclosed that
16 Bocchino owed \$4,062.28, \$3,887.28 of which was for the collection of the Association's
17 attorneys' fees incurred in connection with the Injunction matter.⁴ [SOF, ¶ 27] \$240.00 of the
18

19 ² Each assessment for attorneys' fees charged to Bocchino's HOA Account directly
20 correlates with one of the six invoices submitted to the Association by Association's counsel,
21 except one. [SOF, ¶ 14; SOF, ¶ 15; SOF, ¶ 16; SOF, ¶ 17; SOF, ¶ 18; SOF, ¶ 19; SOF, ¶ 20] The
22 assessment for \$1,126.50, charged on June 14, 2015, is \$25.00 greater than the correlating
23 January 31, 2015 invoice for \$1,101.50. [SOF, ¶ 15]

24 ³ Both ledgers reflect the same initial \$25.00 discrepancy. [SOF, ¶ 15] The attorneys'
25 fees ultimately collected from Bocchino, however, was based on the more inaccurate Financial
26 Transactions ledger, which calculated an amount due of \$3,887.28, based on the \$3,867.28
invoice amount, plus the unexplained \$25.00, minus the \$30.00 credit for Bocchino's payments,
plus the \$25.00 payment that the Association misapplied as an additional charge. [SOF, ¶ 15;
SOF, ¶ 21]

⁴ The \$4,062.28 was calculated by adding \$3,887.28 in attorneys' fees that Bocchino
purportedly owed the Association, per the miscalculated Financial Transactions ledger, to the
unpaid \$175.00 monthly assessment charged on September 1, 2015. [SOF, ¶ 31]

1 attorneys' fees were assessed to her HOA Account after she had entered into the real estate
2 purchase contract. [SOF, ¶ 19; SOF, ¶ 20; SOF, ¶ 25;] The Resale Disclosure Statement stated
3 that, "[a]ll fees are due at close of escrow." [SOF, ¶ 28]

4 Bocchino reasonably feared that disputing the attorneys' fee charges would result in a
5 forfeit of the sale, so on September 18, 2015 the sum of \$4,062.28 was transferred from the title
6 company to the Association. [SOF, ¶ 30] Bocchino's unit was sold on September 24, 2015.
7 [SOF, ¶ 29]

8 **Argument**

9 **I. THE ASSOCIATION WAS NOT ENTITLED TO ITS FEES AND COSTS.**

10 This case concerns the Association's decision to apply charges to Bocchino's account for
11 attorneys' fees and costs allegedly incurred in obtaining an *ex parte* Injunction Against
12 Workplace Harassment against Bocchino. Putting aside the questionable wisdom of paying
13 thousands of dollars for a lawyer to fill out self-help forms to obtain an *ex parte* order that are
14 largely granted as a matter of right based on a low showing, the Association was not entitled to
15 recoup those voluntary charges from Bocchino.

16 Arizona generally follows the American rule with respect to attorneys' fees. In essence, a
17 party is not entitled to attorneys' fees except where expressly permitted by statute or contract.⁵
18 Even then, the right to recover attorneys' fees and costs is not absolute and must be awarded by
19 a court of competent jurisdiction presiding over the dispute giving rise to the fees. The idea that
20 a homeowner's association can impose thousands of dollars for its own attorneys' fees on a
21 homeowner without any judicial oversight, or even a court case, is contrary to well-established
22 law and constitutes an abuse of an association's power to assess fees against its members.

23 The Arizona judicial system does not recognize a creditor's right to self-determine either
24 the entitlement to fees or the amount of those fees, especially where inaccurate and conflicting

25 ⁵ See *Bennett Blum, M.D., Inc. v. Cowan*, 235 Ariz. 204, 209, 330 P.3d 961, 966 (App.
26 2014).

1 accounting ledgers form the basis of those fees. The idea that a homeowner’s association can
2 simply demand or coerce payment from an owner of its legal fees, absent a court order, finds no
3 more support in the law than the assertion that it can decide for itself the reasonableness of those
4 fees.

5 **A. The Association Never Requested and Was Never Awarded its Fees or Costs.**

6 The Association claims it incurred \$3,917.28⁶ in costs and fees relating primarily to the
7 Injunction against Bocchino. By applying those fees to Bocchino’s HOA Account as
8 assessments for “Attorneys Fees”, the Association seems to ignore the fact that it was never
9 actually awarded its legal fees in that action.

10 The award of attorneys’ fees is quintessentially a function of the court and not parties.
11 Even if a party has a legal basis for requesting attorneys' fees, a court must still award the fees
12 before that party can claim any right to recover them. The timing, determination, and method
13 of all requests and awards of attorneys’ fees and costs, incurred in connection with a litigated
14 matter, are governed by Arizona law. Rule 54(g) provides that, in Arizona, claims for attorneys’
15 fees must be made in the pleading.⁷ The established method for obtaining the claimed attorneys’
16 fees involves an application to the court establishing the entitlement to fees, accompanied by an
17 affidavit and supporting documents attesting to the reasonableness of fees sought.⁸

18 The Court’s pivotal role in awarding fees exists even where a litigant asserts a mandatory
19 right to fees.⁹ Judicial determinations of entitlement and reasonableness prevent one party from

20 ⁶ \$3,917.28 is the amount charged and collected from Bocchino, but the figure attributes
21 \$75.00 more in legal fees than the Association actually incurred. [SOF, ¶32]

22 ⁷ ARCP, Rule 54(g)(1); *see also King v. Titsworth*, 221 Ariz. 597, 598, 212 P.3d 935, 936
(App. 2009) (holding that a claim for attorneys’ fees not included in the initial pleading cannot
be awarded).

23 ⁸ ARCP, Rule 54(g)(2); *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 673 183,
24 189, 673 P.2d 927, 933 (App. 1983) (describing general information to include in affidavits of
counsel and rejecting a fee application as “plainly insufficient” for failing to include this
information).

25 ⁹ *McDowell Mountain Ranch Com. Ass’n, Inc. v. Simons* 216 Ariz. 266, 271, 165 P.3d
26 667, 672 (App. 2007). (citations omitted)

1 forcing the other side to pay for a task that took its attorney an inordinate amount of time to
2 complete or that was billed at an excessive rate.¹⁰ Courts serve an indispensable gatekeeping
3 function when it comes to an award of fees that a homeowner's association is not free to bypass.

4 The Association's failure to request fees from the court presiding over the Injunction
5 matter is fatal to any possible claim or right to fees or costs incurred in connection with that
6 action.¹¹ The fact that the court hearing that matter also did not award fees is equally fatal to the
7 Association's alleged right to such fees. Assuming that the legal right existed for the
8 Association to recover its fees relating to the Injunction action, which it did not as discussed
9 below, it is unknown how much, if anything, the court in that case might have awarded to the
10 Association on a timely fee request. The Association's actions of substituting its own judgment
11 for that of the court perfectly illustrates why unilateral shifts in litigation costs are not permitted.
12 The Association decided that it was entitled to fees and independently determined it reasonable
13 to collect more fees from Bocchino than the Association actually incurred.¹² The absence of a
14 valid fee request and award barred the Association from charging and collecting from Bocchino
15 for any legal fees incurred.

16 **B. The Association's Declaration Does Not Provide a Basis for the**
17 **Association Recovering Its Fees and Costs in the Injunction Action**
18 **Against Bocchino.**

19 A homeowner's association that files a lawsuit often will rely on its Declaration of
20 Covenants, Conditions and Restrictions for Fountain Shadows ("Declaration") as the contractual
21 basis for its entitlement to fees. The Association's Declaration contains the following provision:

22 In the event the Association employs an attorney or attorneys to enforce the
23 collection of any amounts due pursuant to this Declaration or in connection with
any lien provided herein, or the foreclosure thereof, or to enforce compliance with
or specific performance of the terms and conditions of this Declaration, the

24 ¹⁰ *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. at 188, 673 P.3d at 933.

25 ¹¹ *King*, 221 Ariz. at 598, 212 P.3d at 936.

26 ¹² The Association forcibly collected attorneys' fees from Bocchino in the amount of
\$3,917.28, despite having incurred only \$3,867.28 in fees.

1 Owner, Owners and parties against whom the action is brought shall pay all
2 attorneys' fees, costs and expenses thereby incurred by the Association in the
event the Association prevails in any such action.

3 [SOF, ¶ 33]

4 Thus, the Declaration provides for an award of attorneys' fees in three circumstances:

5 (a) "to enforce the collection of any amounts due pursuant to the Declaration," (b) "in
6 connection with any lien provided [in the Declaration], or the foreclosure thereof," and (c) "to
7 enforce compliance with or specific performance of the terms and conditions of this
8 Declaration." The commencement of an *ex parte* Injunction Against Workplace Harassment
9 action does not fall into any of these categories. It is not the "collection of any amount due"; it is
10 not "in connection with any lien...or the foreclosure thereof"; and it is not "to enforce
11 compliance with or specific performance of" the Declaration. The statutory right to seek an
12 injunction against harassment does not fall within this contractual provision.

13 This provision is further inapplicable because it is clear that the Association is entitled to
14 the fees and costs only "in the event the Association prevails in any such action." In other
15 words, this provision of the Declaration only applies to fee requests and awards if the matter
16 was litigated, the Association prevailed, and fees and costs are awarded. This provision does not
17 allow the Association to self-determine its entitlement and the amount of its fees. Notably, the
18 attorneys' fees assessed to Bocchino's HOA Account are not limited to the litigation costs
19 related to the Injunction action but also includes nearly \$1,000.00 in fees incurred after the fact.

20 [SOF, ¶¶ 9-12]

21 The Declaration did not justify the Association's collection of its attorneys' fees and any
22 attempt to collect attorneys' fees pursuant to the Declaration constitutes an abuse of the
23 Association's power to assess fees on its members.

1 **C. The Injunction Against Workplace Harassment Statute Does Not Provide**
2 **for an Award of Attorneys’ Fees and Costs for Obtaining an *Ex Parte*,**
3 **Uncontested Injunction.**

4 Injunctions against Workplace Harassment are governed by A.R.S. § 12-1810. The
5 statute allows plaintiffs to obtain an injunction without providing notice to the adverse party.¹³
6 The defendant in an Injunction against Workplace Harassment matter is not entitled to a hearing
7 until after the injunction is imposed.¹⁴ At any time during the period that the injunction is in
8 effect, the defendant may request a hearing.¹⁵ Within ten days of defendant’s request, the court
9 will hold a hearing and then continue, modify or quash the injunction.¹⁶ Presumably because it
10 demarks the final decision on the merits, “the court may enter an order that requires any party to
11 pay the costs of the action, including *reasonable* attorney fees,” only after the opposing party
12 has requested and been heard at a hearing to contest the injunction.¹⁷

13 The injunction in this case was issued on an *ex parte* basis and was never challenged by
14 Bocchino. The Association, therefore, cannot rely on A.R.S. § 12-1810 as a statutory basis for
15 collecting its fees. If the Association had requested fees, which it did not, and a hearing had
16 been conducted for Bocchino to contest the injunction, which did not occur, then the next step
17 would be for the presiding court to decide whether fees are warranted in this case and, if so, in
18 what amount. The statutory language underscores the obvious fact that it is the courts, and not
19 the litigants, who decide whether and in what amount fees should be awarded. The

20
21 ¹³ See A.R.S. § 1810(E) (“Rule[] 65(a)(1) [Preliminary injunction; notice] . . . of the
22 Arizona rules of civil procedure do[es] not apply to injunctions requested pursuant to this
23 section”).

24 ¹⁴ See A.R.S. § 12-1810(G).

25 ¹⁵ *Id.*

26 ¹⁶ *Id.*

¹⁷ See A.R.S. § 12-1810(O) (“On notice to the affected party and after a hearing, the court
 may enter an order that requires any party to pay the costs of the action, including *reasonable*
 attorney fees”) (emphasis added).

1 Association's attempt to get around this process was an abuse of the Association's power to
2 assess charges against its members and a clear violation of the law.

3 **II. A.R.S. § 33-1255 DOES NOT ENTITLE DEFENDANTS TO UNILATERALLY**
4 **DETERMINE THE AMOUNT OF ATTORNEYS' FEE TO BE CHARGED TO**
5 **BOCCHINO.**

6 Bocchino anticipates that the Association will argue that it was entitled to recover its
7 attorneys' fees under A.R.S. § 33-1255(E) as a "common expense" assessed exclusively to
8 Bocchino due to alleged "misconduct." This statute provides that: "If any common expense is
9 caused by the misconduct of any unit owner, the association may assess that expense
10 exclusively against that unit."

11 Attorneys' fees incurred in litigation are not "common expense assessments" within the
12 meaning of that statute. It is clear from subsection (C) that the "common expenses" in the statute
13 refer to expenses associated with maintenance, repair or replacement of common elements.¹⁸
14 According to an article written by James Hazlewood and published on a website maintained by
15 the Association's counsel, A.R.S. § 33-1255(C) is coined the "pass through" statute that "can
16 impact *who pays for a repair*."¹⁹ An article published by a different local firm, which also
17 advocates for homeowner associations, discusses A.R.S. § 33-1255(C), noting that the statute
18 allows homeowner associations to assess unit owners *for repairs* where the association initially
19 bore the expense.²⁰ This statute does not apply to fees incurred in a lawsuit.

20 ¹⁸ A.R.S. § 33-1255(C) ("Unless otherwise provided for in the declaration, all of the
21 following apply: (1) Any common expense associated with the maintenance, repair or
22 replacement of a [common area allocated for the exclusive use of fewer than all units] shall be
23 equally assessed against the units to which the [common area] is assigned. (2) Any common
24 expense or portion of a common expense benefitting fewer than all of the units shall be assessed
25 exclusively against the units benefited.")

26 ¹⁹ James Hazlewood, *Condominiums: How Do We Know Who Repairs What?* (June 4,
2010), <http://www.carpenterhazlewood.com/condominiums-know-repairs/> (emphasis added).

²⁰ Charles E. Maxwell and Brian W. Morgan, *Passing on Common Expenses to
Benefitting Homeowners*, <https://hoalaw.biz/passing-on-common-expenses-to-benefiting-homeowners/> (last visited Feb. 17, 2016) (emphasis added).

1 Attorneys' fees incurred in a legal proceeding are not "common expense assessments."
2 Moreover, if A.R.S. § 33-1255 was applicable, the Association has assessed the wrong owner.
3 Under A.R.S. § 33-1255(C)(2), "Any common expense . . . benefiting fewer than all of the units
4 shall be assessed exclusively against the units benefitted." Here, the HOA sought and obtained
5 an injunction against harassment solely for the benefit of individual board members. Bocchino
6 received no benefit from the Injunction Against Workplace Harassment action. Under A.R.S. §
7 33-1255, therefore, the expenses that the Association incurred for the benefit of its board
8 members should be properly assessed against them. The fact that they happen to be board
9 members does not entitle them to use community funds to further their personal agendas.

10 A.R.S. § 33-1255 trumps neither the attorneys' fees provision in the Declaration nor the
11 Arizona Rules of Civil Procedure regarding attorneys' fees.²¹ To suggest that an association
12 could characterize the fees it incurs as "common expense assessments" and then assess them to
13 the owner against whom those fees were incurred deliberately ignores the express provisions in
14 the Declaration and Arizona law that govern when such fees are awardable and to whom.
15 Finally, absent a judicial determination of "misconduct" by Bocchino, A.R.S. § 33-1255(E) does
16 not provide a basis through which the Association can unilaterally assess attorneys' fees,
17 especially in excess of those actually incurred.

18 **Conclusion**

19 The Association does not have unfettered power to collect unadjudicated and unawarded
20 attorneys' fees and costs from an owner. In demanding the payment of these amounts out of
21 Bocchino's escrow, the Association has effectively conducted an improper and unlawful
22

23 ²¹ See Arizona Rules of Civil Procedure, Rule 54(g) (requiring parties to include a claim
24 for attorneys' fees in pleading and requiring a motion for attorneys' fees after a decision on
25 merits); see also *McDowell Mountain Ranch Community Ass'n, Inc. v. Simons*, 216 Ariz. 266,
26 165 P.3d 667 (App. 2007) (holding that courts retain a vital role in awarding fees, regardless of
the source of the fee provision); *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673
P.2d 927 (App. 1983) (outlining the proper methodology for establishing a claim for attorneys'
fees so that a court can make a reasonability determination).

1 garnishment of her sale proceeds. Accordingly, Bocchino is entitled to summary judgment and
2 to her costs and attorneys' fees in bringing this action.

3 DATED this 19 day of February 2016.

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