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7 IN THE SUPERIOR COURT OF ARIZONA
8
9 COUNTY OF MARICOPA

10 PATRICIA BOCCHINO,

11 Plaintiff,

12 vs.

13 FOUNTAIN SHADOWS HOMEOWNERS
14 ASSOCIATION,

15 Defendant.

Case No. CV2015-012434

**PLAINTIFF'S REPLY IN SUPPORT OF
APPLICATION FOR AWARD OF
ATTORNEYS' FEES**

16
17 Plaintiff Patricia Bocchino ("Plaintiff") hereby submits a reply in support of her request
18 for an award of the reasonable attorneys' fees. The fees she asks the Court to award were
19 incurred in her legal battle for the reimbursement of funds wrongfully collected from her by
20 Defendant Fountain Shadows Homeowners Association (the "Association"). Plaintiff brought
21 this action to remedy an injustice that should never have happened but which the Association
22 defended with an unwavering fortitude. Plaintiff's reasonable and proper request for attorneys'
23 fees was submitted after several good faith attempts to negotiate with the Association proved
24 futile. Despite the Association's suggestion otherwise, Plaintiff's request for fees should be
25 granted.

26

1 **I. PLAINTIFF IS ELIGIBLE FOR AN AWARD OF LEGAL FEES PURUSANT TO**
2 **A.R.S. § 12-341.01(A).**

3 As the Court itself noted on page 5 of its July 27, 2016 Minute Entry (the “Minute
4 Entry”), “[t]his is an action arising out of a contract.” Despite this contested action being
5 resolved in Plaintiff’s favor, the Association nevertheless argues that Plaintiff did not prevail on
6 a breach of contract claim.

7 Plaintiff initiated this action to challenge the Association’s right, under a contract
8 between the parties, to assess certain charges against her. As acknowledged by the Association,
9 a homeowner association’s Declaration constitutes a contract between the association and the
10 homeowners.¹ Article XVII, Section 1 of the Association’s Declaration permits the Association
11 to collect “all attorneys’ fees and costs and expenses thereby incurred by the Association in the
12 event the Association prevails in [an action undertaken pursuant to the Declaration].”² Pursuant
13 to this provision and after unilaterally deeming itself the prevailing party in the action, the
14 Association assessed against Plaintiff all attorneys’ fees it incurred in connection with an *ex*
15 *parte* Injunction Against Harassment it obtained against her.

16 On page 4 of the Minute Entry, the Court noted that “[u]nder no relevant authority . . .
17 does success in an uncontested, *ex parte* proceeding for which the would-be opponent is, as
18 here, not given notice make one a prevailing party.” Further, the Court ruled that Injunction
19 Against Harassment that the Association obtained against Plaintiff was unenforceable and that
20 “by no recognized standard does the Association’s failure to obtain an injunction that complies
21 with the constitutional requirements transform the Association into a successful party, and thus,

22 ¹ *McDowell Mountain Ranch Comm. Ass’n, Inc. v. Simons*, 216 Ariz. 266, 269, ¶ 14, 165
P.3d 667, 670 (App. 2007).

23 ² In relevant part, Article XVII, Section 1 reads “In the event the Association employs an
24 attorney or attorneys to enforce the collection of any amounts due pursuant to this Declaration
25 or in connection with any lien provided for herein, or the foreclosure thereof, or to enforce
26 compliance with or specific performance of the terms and conditions of this Declaration, the
Owner, Owners and parties against whom the action brought shall pay all attorneys’ fees and
costs and expenses thereby incurred by the Association in the event the Association prevails in
any such action.”

1 prevailing party.” Finally, the Court rules that “if the Association is not a prevailing party, then
2 by the express terms of the CC&Rs on which the Association relies, it has no basis for
3 recovering any attorney’s fees incurred in connection with the injunction.” By winning her
4 motion for summary judgment on this basis, Plaintiff became the successful party in a contested
5 action arising out of a contract. As such and pursuant to A.R.S. § 12-341.01(A), the Court may
6 award Plaintiff her reasonable attorney fees.

7 **II. PLAINTIFF MADE NUMEROUS GOOD FAITH EFFORTS TO NEGOTIATE**
8 **THE AMOUNT OF HER ATTORNEYS’ FEES THE ASSOCIATION WOULD**
9 **PAY BEFORE AND AFTER THE COURT’S RULING.**

10 Despite what the Association would like the Court to believe, Plaintiff attempted to
11 resolve the attorneys’ fee issue in good faith without judicial intervention. Since the Association
12 has deemed it necessary to invite the Court to review the specific settlement discussions,
13 Plaintiff seeks to clarify the record to incorporate Plaintiff’s settlement offers that occurred both
14 before and after those which were referenced in Defendant’s Response in Objection to
15 Plaintiff’s Application for Award of Attorneys’ Fees (“Response”).

16 On June 10, 2016, the Friday following oral arguments on the parties’ motions for
17 summary judgment, Plaintiff offered to settle for \$23,887.28.³ That figure represented the
18 \$3,887.28 principal sum plus \$20,000.00 for Plaintiff’s legal fees and costs.⁴ The legal fees and
19 costs that Plaintiff had incurred on that date totaled \$23,087.10.⁵ From the outset, Plaintiff
20 offered to settle for \$3,087.50 less than what she incurred to bring a lawsuit she should not have
21 had to bring in the first place. Plaintiff’s initial offer was rejected and countered with an offer to
22 settle the entire matter for \$5,000.⁶ After reimbursing Plaintiff for the principal sum of

23 ³ See Exhibit 1 (Letter to C. Miesen, settlement offer).

24 ⁴ Exhibit 1.

25 ⁵ As evidenced in Exhibit 1 of Plaintiff’s Statement of Costs, this figure represents the
26 total of all fees and costs incurred through June 7, 2016 and is reduced by the \$7.50 charge
erroneously applied to this matter on October 1, 2015.

⁶ See Exhibit 2 (Email from C. Cruz, rejection and counteroffer).

1 \$3,887.28, the figure would have provided her with only \$1,112.72 to put towards the \$452.10
2 in costs and \$23,087.50 in legal fees she incurred in bringing a lawsuit that should never have
3 needed to be filed in the first place.

4 Due to the apparently insurmountable divide between the parties' positions, settlement
5 communications did not resume until after the Court's July 27, 2016 Minute Entry was issued.
6 As the Association correctly noted, Plaintiff issued another settlement proposal on July 28,
7 2016, for a total of \$26,339.78.⁷ Having obtained a favorable judgment entitling Plaintiff to her
8 \$3,887.28 principal sum, Plaintiff advised the Association in its July 28, 2016 letter that if the
9 parties were unable to reach a settlement, Plaintiff's attorneys' fees would likely exceed
10 \$25,000. They now have.⁸ Plaintiff's offer of \$26,339.78, would have reimbursed Plaintiff her
11 principal sum and costs, and reduced the award of legal fees to \$22,000.40.⁹

12 On August 15, 2016, the Association rejected the July 28, 2016 offer but indicated that it
13 would settle for a total of \$15,000, which after the principal sum and costs, would have provided
14 Plaintiff with \$10,660.62 in attorneys' fees.¹⁰ On August 18, 2016, Plaintiff rejected this offer
15 and countered with an offer to settle for a total of \$22,000 which, less the principal sum and
16 costs, left Plaintiff with \$17,660.62 for her legal fees.¹¹

17 On August 22, 2016, the Association rejected that offer without any counteroffer.¹² The

18 _____
19 ⁷ See Exhibit 3 (Letter to C. Miesen, settlement offer).

20 ⁸ Exhibit 3. Plaintiff, however, is not amending her fee request to account for the
21 additional fees being incurred in preparing this reply. Further, the amount requested does not
22 account for the total fees incurred as \$1,200 in legal fees were written off before Plaintiff's
23 application for attorneys' fees was submitted and no fees were charged for attending the oral
24 argument on June 7, 2016.

25 ⁹ Exhibit 3. At that time, Plaintiff's counsel believed the taxable costs to equal \$452.50
26 and did not learn the correct amount was \$452.10 until preparing the Statement of Costs on
27 August 25, 2016. [See Exhibit 9]

28 ¹⁰ See Exhibit 4 (Email from C. Cruz, rejection and counteroffer).

29 ¹¹ See Exhibit 5 (Email to C. Cruz, rejection and counteroffer).

30 ¹² See Exhibit 6 (Email from C. Cruz, rejection).

1 next day, Plaintiff nevertheless made one last settlement attempt regarding attorneys' fees
2 offering to settle for the lump sum of \$20,000, with \$15,660.62 allocated to Plaintiff's legal
3 fees.¹³ Though Plaintiff was advised that the offer would be forwarded to the Association's
4 Board and a response would be provided, Plaintiff heard nothing further.¹⁴ Plaintiff then
5 contacted the Association in an attempt to at least stipulate to the costs, but likewise never
6 received a response.¹⁵

7 By the end of negotiations, Plaintiff had offered to settle with the Association for an
8 amount reduced by 29.8% from that which she has since requested the Court to award in
9 attorneys' fees and costs, which itself was reduced from the amount incurred and which
10 continues to accrue. Unlike the Association, Plaintiff made numerous good faith attempts to
11 negotiate the amount to be awarded and the Association's suggestion otherwise is deceptive and
12 wrong.

13 **III. PLAINTIFF'S CLAIM FOR LEGAL FEES IS PROPER AND REASONABLE.**

14 The Association claims that Plaintiff's request for attorneys' fees is unreasonable since
15 she did not attempt to resolve the issue before initiating litigation. While the Association is not
16 wrong regarding Plaintiff's lack of attempts to resolve the issue before involving the Court, the
17 it made no claim that having done so would have brought about a different result. Plaintiff did
18 not reach out to the Association before initiating litigation because at the time that Plaintiff
19 retained undersigned counsel, counsel was litigating another action against the Association and
20 was familiar with the attitude and temperament of the individuals on the Association's Board of
21 Directors. Based on the knowledge and experience of Plaintiff's undersigned counsel, any
22 attempt to resolve the matter without the Court was expected to be an exercise in futility. In the
23 same vein, if the Association thought the matter could be resolved without judicial intervention,

24 ¹³ See Exhibit 7 (Email to C. Cruz, settlement offer).

25 ¹⁴ See Exhibit 8 (Email from C. Cruz, received offer).

26 ¹⁵ See Exhibit 9 (Email to C. Cruz, request to stipulate to costs).

1 it could have initiated settlement discussions before ever filing its Answer, but it failed to do so.

2 The Association further suggests that Plaintiff's claim for attorneys' fees regarding
3 Plaintiff's real estate purchase contract and the Association's lien against Plaintiff was
4 improper.¹⁶ In Defendant's Response to Plaintiff's First Request for Admissions, the
5 Association denied that "the attorneys' fees assessed against Plaintiff's account were not
6 incurred in in connection with any lien provided for in the Declaration."¹⁷ Plaintiff had a right to
7 investigate further.

8 Plaintiff's review of the real estate purchase contract was not improper either. Plaintiff
9 allowed the Association to collect the funds it wrongfully assessed against her because she had
10 entered into a real estate purchase contract with a buyer, in order to move out of the
11 Association's reach. In anticipation of the Association arguing that Plaintiff willingly released
12 the money, the purchase contract was reviewed to determine what repercussions Plaintiff may
13 have faced if she had backed out of the real estate transaction in favor of immediately disputing
14 the assessment of attorneys' fees.

15 Finally, the Association suggests that Plaintiff's claim for attorneys' fees is unreasonable
16 because too many hours were billed considering the lack of complexity involved in the case.
17 Focusing only on the time expended, the Association ignores the low billing rate at which most
18 of the hours in question were billed.¹⁸ Moreover, if the case was as simple as the Association

19 ¹⁶ The Association also argues that Plaintiff is wrongfully asking for legal fees incurred
20 on October 1, 2015 to draft a Notice of Appearance in a different case. Plaintiff admits to this
21 mistake and requests that the Court reduce its award by that \$7.50 wrongfully attributed to
22 Plaintiff's billing records. Plaintiff would also like to point out, however, that Plaintiff wrote off
23 \$1,200 from the billing records before they were submitted with Plaintiff's application for
24 attorneys' fees, and that the billing records do not account for *any* attorney attending the June 7,
25 2016 oral argument.

26 ¹⁷ See Exhibit 10 (Request for Admissions, pg. 1-2).

¹⁸ Most of the hours complained of by the Association are attributable to an associate
attorney who bills at a rate of \$150 per hour, and a paralegal who bills at a rate of \$75 per hour,
both of whose billing rates are lower than even the paralegal who billed to the Injunction
Against Harassment action at a rate of \$170 per hour, per the records submitted to the Court by
the Association on May 25, 2016.

1 COPY of the foregoing mailed
2 and emailed this 3rd day of October to:

3 Chad P. Miesen
4 CARPENTER HAZLEWOOD, DELGADO & BOLEN, PC
5 1400 E. Southern Avenue, Suite 400
6 Tempe, AZ 85282

7 /s/ Jenna Pitchel
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