EXHIBIT 1

2015 WL 4600032
Only the Westlaw citation is currently available.
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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.
Court of Appeals of Arizona,
Division 1.

William M. BROWN, Plaintiff/Appellant,
v.
TERRAVITA COMMUNITY ASSOCIATION, INC., an Arizona non-profit corporation, Defendant/Appellee.

No. 1 CA–CV 14–0455.
|
July 30, 2015.

Appeal from the Superior Court in Maricopa County; No. LC2012–000699–001; The Honorable Crane McClennen, Judge. VACATED.

Attorneys and Law Firms

William M. Brown, Scottsdale, Plaintiff/Appellant.

Ekmark & Ekmark, L.L.C. By Curtis S. Ekmark, Counsel for Defendant/Appellee.

Judge PETER B. SWANN delivered the decision of the court, in which Presiding Judge RANDALL M. HOWE and Judge ANDREW W. GOULD joined.

MEMORANDUM DECISION

SWANN, Judge.

***1** ¶ 1 William M. Brown appeals the superior court's judgment granting attorney's fees to Terravita Community Association, Inc. ("the Association"). We hold that the fee award was not authorized under any of the four bases presented to the superior court. Accordingly, we vacate the award.

FACTS AND PROCEDURAL HISTORY

¶ 2 Brown initiated this action after the Arizona Department of Fire, Building and Life Safety rejected his complaint that the Association, which governs the planned community in which Brown is a homeowner, violated A.R.S. § 33–1805(A) by refusing to produce certain records. The superior court affirmed the administrative ruling, and the Association sought its attorney's fees. The Association moved for fees under A.R.S. § 12–341.01 and an attorney's fees provision in the community's Declaration of Covenants, Conditions, and Restrictions ("CC & Rs"). Brown opposed the motion on the grounds that his administrative complaint did not arise out of contract as required by A.R.S. § 12–341.1 and that, at the time he filed the complaint for judicial review, the governing community documents did not provide for an award of attorney's fees in an administrative action. In reply, the Association cited A.R.S. § 12–349 and Ariz. R. Civ. P. 11 as additional grounds for an award of fees. The court awarded the Association a portion of the fees it requested, but did not specify the statutory or other basis for the award. Brown timely appeals.

DISCUSSION

¶ 3 Brown contends that the superior court erred by granting attorney's fees to the Association under A.R.S. § 12–341.01 because his appeal of an administrative decision did not arise out of contract. The applicability of § 12–341.1 is a question of statutory interpretation that we review de novo. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 13, ¶ 12 (App.2000).

¶ 4 Section 12–341.01(A) provides that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees." The statute permits an award of fees only in actions that could not exist but for the breach of contract and does not apply to "purely statutory causes of action," or when a contract serves as the factual predicate of an action but is not the essential basis of it. *Keystone Floor & More, LLC v. Ariz. Registrar of Contractors*, 223 Ariz. 27, 30, ¶ 11 (App.2009) (citation omitted). To determine whether an action arose out of contract for purposes of § 12–341.01(A), we consider "the nature of the action and the surrounding circumstances" and decide if the contract is the "cause or origin of the dispute." *Id.* at ¶ 10 (citations omitted). *See also A.H. ex rel. White v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 190 Ariz. 526, 529

(1997) (stating that when an action arises from statutory obligations, "peripheral involvement of a contract does not require the application of § 12–341.01(A)"). For example, in *Keystone,* we held that an administrative proceeding before the Registrar of Contractors and the subsequent action for judicial review did not arise out of contract under § 12–341.01(A) because it focused on the contractor's statutory duties, not its contractual obligations to the homeowner, even though those duties and obligations overlapped. 223 Ariz. at 31–32, ¶¶ 14–20.

***2** ¶ 5 Similarly, in this case the administrative proceeding and judicial review action concerned the Association's statutory obligation to produce records under A.R.S. § 33–1805(A). The fact that the Association's CC & Rs purportedly contain similar terms [1] does not change the nature of the underlying action. Neither the administrative proceeding nor the action for judicial review constituted an action "arising out of a contract" for purposes of applying § 12–341.01(A).

¶ 6 We reject the Association's contention that such a ruling is contrary to *A.H.,* in which our supreme court held that an action arises out of contract for purposes of § 12–341.01 when a statutory obligation is imputed as part of the parties' contract. 190 Ariz. at 530. The court in *A.H.* noted that it had previously examined the relevant statute (A.R.S. § 20–673(C)) and determined that it was "the functional equivalent of an 'other insurance' clause typical in insurance contracts," and, therefore, it was designed to be statutorily imputed to an insolvent insurer's contract when a statutory fund assumed its rights and obligations. 190 Ariz. at 530. Here, by contrast, we have found no authority—including the plain language of the statute—to support the notion that the Legislature intended to integrate A.R.S. § 33–1805 as part of the declarations, bylaws, articles of incorporation, and rules of all planned communities.

¶ 7 We also reject the Association's argument that Brown's complaint for judicial review arises out of contract based on § 12–341.01's policy to "mitigate the burden of the expense of litigation to establish a just claim or defense." The Association correctly identifies the policy of the statute as set forth in § 12–341.01(B). But, as discussed above, Arizona law is clear that the statute does not apply to all actions that tangentially involve a contract. Further, we observe an equally compelling policy argument that homeowners who initiate administrative actions to enforce their statutory rights should not confront potential liability for attorney's fees simply because a planned community association has chosen to restate its statutory obligations in its governing documents. We hold that the Association was not entitled to recover fees under § 12–341.01.

¶ 8 We further hold that the Association was not entitled to an award of fees based on the attorney's fees provision of the CC & Rs. That provision authorized fee awards to prevailing parties in actions instituted to enforce the CC & Rs. [2] As we have already discussed, Brown's action arose out of statute and was not an action to enforce any of the provisions of the CC & Rs. [3] The attorney's fees provision of the CC & Rs therefore did not apply. Further, because the superior court did not make the findings required for an award of sanctions, we reject the Association's contention that we may affirm the fee award as appropriate under A.R.S. § 12–349 or Rule 11. [4] *See* A.R.S. § 12–350 ("In awarding attorney fees pursuant to § 12–349, the court shall set forth the specific reasons for the award...."); *Rogone v. Correia,* 236 Ariz. 43, 50, ¶ 22 (App.2014) (holding that statutory findings for an award of fees under § 12–349 must be sufficiently specific to allow a reviewing court to test the validity of the judgment); *Wells Fargo Credit Corp. v. Smith,* 166 Ariz. 489, 497 (App.1990) (vacating Rule 11 sanctions because, *inter alia,* trial court failed to "make specific findings to justify its conclusion").

CONCLUSION

***3** ¶ 9 We determine that the Association was not entitled to an award of attorney's fees on any of the four bases it cited in the superior court. We vacate the award.

¶ 10 Because this action does not arise out of contract, we deny the Association's request for an award of attorney's fees on appeal under § 12–341.01. In addition, we determine that the prerequisites to an award of fees under § 12–349 are not present, and therefore deny the Association's request for fees under that statute. As the prevailing party on appeal, Brown is entitled to an award of his appellate costs upon his compliance with ARCAP 21.

All Citations

Not Reported in P.3d, 2015 WL 4600032

Footnotes

1 The relevant portions of the CC & Rs are not part of the record on appeal.

2 The CC & Rs were amended during the pendency of Brown's action to allow the Association to recover fees incurred defending administrative claims and related appeals. We reject the Association's argument that it was entitled to recover the fees it incurred in the already-pending action after the effective date of the amendment. *Cf. Bouldin v. Turek,* 125 Ariz. 77, 78 (1979) (holding that A.R.S. § 12–341.01 does not apply to actions commenced before its effective date because it is similar to a statute changing the measure of damages, a substantive provision that cannot be applied retroactively).

3 The Association claims in its answering brief that the CC & Rs also provide for an award of attorney's fees to the prevailing party in an action "arising out of ... the operations of the Association," citing, for the first time, Article XVII, Section 17.05(iii) of the CC & Rs. That provision does not, however, appear in the record on appeal.

4 We decline the Association's invitation to find that Brown has waived the issue of the award's propriety under § 12–349 and Rule 11.