

1 **RAI DUER, P.C.**

3033 North Central Avenue, Suite 500

2 Phoenix, Arizona 85012

PH: (602) 476-7100

3 FAX: (602) 476-7101

Rina Rai, #018886

RRai@raiduer.com

4 Mohamad H. Tokko, #033015

MTokko@raiduer.com

5 *Attorney for Third-Party Defendants Renco, LLC dba Renco Roofing and Desert Vista, Inc.*

6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

7 **IN AND FOR THE COUNTY OF MARICOPA**

8 GALLERY COMMUNITY
ASSOCIATION, an Arizona non-profit
9 corporation,

10 Plaintiff;

11 v.

12 KHOVNIANIAN AT GALLERY, LLC,
an Arizona limited liability company;
13 KHOVNIANIAN ARIZONA
OPERATIONS, LLC, an Arizona limited
14 liability company; KHOVNIANIAN
DEVELOPMENTS OF ARIZONA, INC.,
15 an Arizona corporation; KHOVNIANIAN
COMPANIES OF ARIZONA, LLC, an
16 Arizona limited liability company; JOHN
DOES I-X AND JANE DOES I-X,
17 WHITE COPRORATIONS I-X ;
18 BLACK PARTNERSHIPS I-X; AND
GRAY LIMITED LIABILITY
19 COMPANIES I-X,

20 Defendants.

21
22 KHOVNIANIAN AT GALLERY, LLC,
an Arizona limited liability company;
23 KHOVNIANIAN ARIZONA
OPERATIONS, LLC, an Arizona limited
24 liability company; KHOVNIANIAN

NO. CV2020-008714

**THIRD-PARTY DEFENDANTS RENCO,
LLC DBA RENCO ROOFING AND
DESERT VISTA, INC.'S JOINT REPLY
IN SUPPORT OF THEIR APPLICATION
FOR ATTORNEYS' FEES, COSTS, &
EXPERT FEES**

*(Assigned to the Honorable Katherine
Cooper)*

1 DEVELOPMENTS OF ARIZONA, INC.,
2 an Arizona corporation; KHOVNANIAN
3 COMPANIES OF ARIZONA, LLC, an
4 Arizona limited liability company;

5
6 Third-Party Plaintiffs

7 v.

8 CHAS ROBERTS AIR
9 CONDITIONING, INC., an Arizona
10 corporation; DESERT VISTA, INC., an
11 Arizona corporation; GOTHIC
12 LANDSCAPING, INC., a California
13 corporation; HOME BUILDERS SITE
14 SERVICES OF ARIZONA, LLC an
15 Arizona limited liability company;
16 LEBLANC BUILDING CO., INC., an
17 Arizona corporation; LIBERTY
18 CONSTRUCTORS, LLC, an Arizona
19 limited liability company DBA LIBERTY
20 ARIZONA; RENCO LLC, an Arizona
21 limited liability company; dba RENCO
22 ROOFING; R/S SERVICE & SUPPLY,
23 INC., an Arizona corporation; SARGON
24 MASONRY CONSTRUCTION, LLC, an
Arizona limited liability company; and
DOES 1-50.

Third-Party Defendants.

18 Third-Party Defendants Renco, LLC d/b/a Renco Roofing and Desert Vista, Inc., by and
19 through undersigned counsel, hereby Reply in support of their Application for Award of
20 Attorneys' Fees.

21 Plaintiff admits that Renco and Desert Vista did not participate in the prelitigation PDA
22 process and thus, the approach to Third-Party Defendants' application for attorneys' fees is
23 different than that of KHov's request because Third-Party Defendants were not afforded the
24 opportunity to notify Plaintiff that it lacked standing. Under the PDA statute, we should have

1 received notice and being deprived of that may also be a basis to award fees under PDA.

2 Further, Plaintiff argues that it was not a party to the contract with Third-Party
3 Defendants, however that argument is without merit. A.R.S. § 12-341.01 allows for the recovery
4 of fees, “in any contested action arising out of a contract” to the “successful party.” It does not
5 require privity in contract, only that the matter arise out of a contract.

6 Here, the matter arises out of a Master Subcontract Agreement between Third-Party
7 Defendants and KHov for the construction of Plaintiff’s townhome residences. For purposes of
8 A.R.S. § 12–341.01(A), an action arises out of contract if it could not exist but for the contract.
9 *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 543, 647 P.2d 1127, 1141, *cert. denied*,
10 459 U.S. 1070, 103 S.Ct. 490, 74 L.Ed.2d 632 (1982). Here, this action would not exist but for
11 the existing Master Subcontract Agreement between the parties because that contract led to the
12 building of the townhomes at issue in this matter. It is undisputed that this matter arises out of a
13 contract.

14 Further, for purpose of awarding attorneys’ fees to successful party, trial court has
15 discretion to determine who is successful party in multiparty litigation. *Pioneer Roofing Co. v.*
16 *Mardian Const. Co.*, 152 Ariz. 455, 733 P.2d 652 (Ct. App. 1986). The claims against Third-
17 Party Defendants were dismissed pursuant to summary judgment. This supports the notion that
18 the parties (Third-Party Defendants and Plaintiff) are still adverse. Third-Party Defendants are
19 successful parties for all intents and purposes and are adverse to Plaintiff such that an award of
20 attorneys’ fees is warranted.

21 This is supported by Arizona case law wherein the issue was presented of whether third-
22 party defendants may recover attorneys’ fees from a party other than the third-party plaintiff.
23 *Nationwide Res. Corp. v. Ngai*, 129 Ariz. 226, 232, 630 P.2d 49, 55 (Ct. App. 1981). This Court
24 held that third-party defendants were adverse to plaintiff and that the judgment for attorney’s

1 fees in their favor and against plaintiff was proper. *Id.*

2 Here, Renco and Desert Vista may recover its fees from a party other than KHov, and
3 here it is Plaintiff because the parties are adverse. *See Nationwide Res. Corp.*, 129 Ariz. 226,
4 232 (“The rules involving third-party practice clearly recognize that third-party defendants are
5 in an adverse position to the party asserting a claim for which they may be ultimately
6 responsible.”). Therefore, Third-Party Defendants should be awarded their attorneys’ fees
7 against Plaintiff.

8 In the alternative, if the Court finds that Plaintiff should not pay fees, Third-Party
9 Defendants should be entitled to recover their fees from KHov because KHov did not argue that
10 the fees were unreasonable or that Third-Party Defendants are not entitled to fees. Third-Party
11 Defendants have established their fees are reasonable. Third-Party Defendants are entitled to
12 their fees by way of summarily adjudication based on KHov’s lack of response. Thus, the issue
13 is not whether Third-Party Defendants are entitled to fees, but rather, who will pay those fees.

14 **A. Third-Party Defendants Have Met Their Burden to Prove Entitlement to**
15 **Attorneys’ Fees Under A.R.S. § 12-341.01.**

16 In exercising its discretion, the trial court should consider the facts set forth in *Warner*,
17 which include:

18 “(1) the merits of the unsuccessful party's claim, (2) whether the claim could have
19 been avoided or settled and whether the successful party's efforts were completely
20 superfluous in achieving the result, (3) whether assessing fees against the
21 unsuccessful party would cause an extreme hardship, (4) whether the successful
22 party did not prevail with respect to all of the relief sought, (5) the novelty of the
23 legal question presented, and (6) whether an award to the prevailing party would
24 discourage other parties with tenable claims from litigating legitimate contract
issues for fear of incurring liability for substantial amounts of attorneys' fees.”

Associated Indem. Corp. v. Warner, 143 Ariz. 567, 570–71, 694 P.2d 1181, 1184–85 (1985).

Here, as to factor one, Plaintiff’s claims were meritless because it lacked standing to bring

1 any claims, the very definition of meritless. As shown above, this Court has held that third-party
2 defendants may recover from plaintiff. *Nationwide Res. Corp.*, 129 Ariz. 226, 232.

3 As to factor two, whether the claim could have been avoided, Plaintiff argues KHov failed
4 to bring the lack of standing issue sooner, which would have avoided this litigation; however,
5 that is not Third-Party Defendants' obligation and those were the inactions of KHov – not Third-
6 Party Defendants. As to Third-Party Defendants, it provided multiple offers to resolve this
7 matter and Plaintiff refused to accept settlement on multiple occasions. Finally, KHov did in
8 fact advise of their legal position early in the litigation. Plaintiff's lack of standing would apply
9 equally to Third-Party Defendants.

10 As to factor three, whether assessing fees would cause an extreme hardship to Plaintiff,
11 Plaintiff has the funds to pay some or all attorneys' fees without hardship and Plaintiff should
12 be ordered to do so. Even though Plaintiff states it is a non-profit corporation, it does accept
13 HOA monthly fees that can satisfy a judgment for fees and costs. To rule otherwise would give
14 carte blanche to HOA to file meritless suits without repercussions.

15 As to factor four, whether the successful party did not prevail with respect to all relief
16 sought, favors Third-Party Defendants. Third-Party Defendants' relief sought is a dismissal of
17 all claims against them and that is exactly what had occurred. Whether that was through KHov's
18 motion or Third-Party Defendants' motion is irrelevant since all relief sought was achieved in
19 the form of a dismissal in favor of the successful parties, Renco and Desert Vista.

20 As to factor five, the novelty of the legal question presented, it also weighs in favor of
21 Third-Party Defendants. It has long been held that if a party lacks privity in contract, it lacks
22 standing to bring such action. That was legal question presented in KHov's motion and the Court
23 properly ruled consistent with previous opinions that Plaintiff lacked standing. Thus, the legal
24 question presented was not novel, but a long-standing precedent previously adjudicated in prior

1 case law.

2 Lastly, as to factor six, whether an award would discourage other parties from litigating
3 legitimate claims, weighs in Third-Party Defendants' favor. Plaintiff's claims were not
4 legitimate as it lacked standing to bring such claims. As such, the Court's award of attorneys'
5 fees would not discourage parties from litigating *legitimate* claims, which is not the case here.
6 An award of attorneys' fees in favor of Third-Party Defendants would be consistent with the
7 intent of the lawmakers and within the Court's discretion. If a party has legitimate claims, an
8 award of attorneys' fees in this matter will not discourage a party from bringing such claims.

9 **B. Third-Party Defendants Have Met Their Burden to Prove Entitlement to**
10 **Attorneys' Fees and Expert Fees Under A.R.S. § 12-1364.**

11 Plaintiff argues that because Third-Party Defendants were not involved in the PDA
12 process, they are not entitled to fees pursuant to A.R.S. § 12-1364, however Plaintiff's argument
13 is without merit. Not only were Third-Party Defendants never afforded the opportunity to
14 participate in the PDA process prior to litigation, even if they were, it is not a requirement and
15 it only must be shown that the relief obtained by Plaintiff is not more favorable than the offers
16 made by Third-Party Defendants. Here, Plaintiff's Complaint was dismissed thereby taking
17 nothing. This is clearly not more favorable than any offer made by Third-Party Defendants,
18 which Plaintiff refused to accept.

19 Moreover, it is not requirement for a party to make offers to the purchaser before the
20 dwelling action was filed as Plaintiff mistakenly alluded to in its response. This is supported by
21 the language of the statute and the list of factors to be considered. In factor one, it states, "the
22 repairs, replacements or offers made by the seller, **if any**, before the purchaser filed the dwelling
23 action..." (Emphasis added). A.R.S. § 12-1364(B)(1). Thus, Plaintiff's argument that offers
24 must be made prior to litigation is meritless as the Court should consider all factors.

In weighing all those factors, a substantial amount of fees was incurred by Third-Party

1 Defendants in responding to multiple unsuccessful motions, claims and defenses during the
2 duration of the dwelling action. Further, the relation between the fees incurred over the duration
3 of the dwelling action and the value of the relief obtained also supports an award of attorneys'
4 fees because all claims were dismissed against Third-Party Defendants due to Plaintiff lack of
5 standing, which resulted in a substantial amount of unnecessary fees incurred out of Third-Party
6 Defendants' control.

7 **C. CONCLUSION**

8 THEREFORE, Renco and Desert Vista should be awarded their attorneys' fees, costs,
9 and expert fees consist with findings that Third-Party Defendants may recover fees from
10 Plaintiff as this matter arises out of a contract and Renco and Desert Vista are successful parties
11 pursuant to the terms of the parties' Master Subcontract Agreement, case law, and statute A.R.S.
12 § 12-341.01 and PDA statute A.R.S. § 12-1364. In the alternative, Third-Party Defendants
13 should be awarded their attorneys' fees, costs, and expert fees against KHov by way of
14 summarily adjudication due to their lack of response.

15 **DATED** this 16th day of March, 2023.

16 **RAI DUER P.C.**

17
18 By: /s/ Rina Rai
19 Rina Rai
20 Mohamad H. Tokko
21 ***Attorneys for Renco Roofing and Desert Vista,***
22 ***Inc.***
23
24

1 **ORIGINAL** of the foregoing e-filed
This 16th day of March, 2023, with:

2
3 Clerk of the Court
4 **Maricopa County Superior Court**
201 W. Jefferson
Phoenix, Arizona 85003

5 **COPY** of the foregoing e-delivered
6 This 16th day of March, 2023, to:

7 The Honorable Katherine Cooper
8 Maricopa County Superior Court
9 **East Court Building – 711**
101 W Jefferson
Phoenix, AZ 85003

11 **COPIES** of the foregoing e-mailed
This 16th day of March, 2023, to:

12 *(See Attached Service List)*

13 By: /s/ Tracy L. O'Brien

Service List

Gallery Community Association v. K. Hovnanian at Gallery, LLC

CV2020-008714

Craig Nuss Penny Manship Grace Osberg BURG SIMPSON ELDREDGE HERSH & JARDINE, P.C. 8310 South Valley Highway Suite 270 Englewood, CO 80112	<i>Attorneys for Plaintiff</i>	pmanship@burgsimpson.com JHarmon@burgsimpson.com azcourt@burgsimpson.com cnuss@burgsimpson.com gosberg@burgsimpson.com
Dennis Wilenchik Barbara J. Stansil WILENCHIK & BARTNESS 2810 N. Third St. Phoenix, AZ 85004	<i>Attorneys for Defendants/Third-Party Plaintiffs</i>	diw@wb-law.com barbaras@wb-law.com jennifera@wb-law.com marioc@wb-law.com tammys@wb-law.com
Louis Horowitz LORBER GREENFIELD & POLITO, LLP 3930 E. Ray Rd. Ste. 260 Phoenix, AZ 85044	<i>Attorney for Defendants/Third-Party Plaintiffs</i>	LHorowitz@lorberlaw.com erico@lorberlaw.com LTruesdell@lorberlaw.com SVoepel@lorberlaw.com