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THE SUPERIOR COURT OF ARIZONA

COUNTY OF NAVAJO

Gordon Gross and Liliana Gross, husband and wife *et al.*,

Plaintiffs,

vs.

The Shores at Rainbow Lake Community Association, an Arizona nonprofit corporation,

Defendant.

Case No.: S0900CV202200042

OBJECTION TO APPLICATION FOR ATTORNEY FEES

Defendant objects to Plaintiffs' Application for Attorney Fees and requests the Court deny the same because (1) Plaintiffs did not include a request for attorney fees in their Motion for Partial Summary Judgment, and (2) Plaintiffs prevailed as to one 18-word sentence in the 2021 Amendment while Defendant prevailed as to the entire balance of the 2021 Amendment, prevailed as to Plaintiffs' claims of improper conduct during voting and prevailed as to Plaintiffs' allegations of monetary damages. The Court should find under the totality of the

litigation, Defendant prevailed or that Plaintiffs'' claim for over $96,000 is unreasonable and unsupported.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On January 7, 2022 and again on February 17, 2022 (*see* Plaintiffs' October 4, 2022 Application for Fees, Exhibit A, p. 14/48, p. 47/48, Plaintiffs twice demanded Defendant to execute a Quitclaim Deed by which the entire 2021 Amendment would be deemed "invalid and unenforceable as a matter of law." On September 14, 2022, the Court determined Plaintiffs were not entitled to the relief they demanded and Defendant was absolutely correct to withhold its signature from the requested Quitclaim Deeds.

In the Court's September 14, 2022 order, the Court provided a decision on the cross-motions for summary judgment and determined Defendant prevailed as to most of the contested portions of the 2021 Amendment. The Court also stated in the exercise of its discretion that Defendant would not recover the attorney fees sought in its Cross-Motion. *See* September 14, 2022 Ruling on Motion and Cross Motion, p. 13 ("The Court, in its discretion, denies Defendants' request for attorney fees.")

Because the Court has no discretion to award fees to a non-prevailing party, by its exercise of discretion in denying Defendant's request for fees as stated in the September 14, 2022 Ruling on Motion and Cross Motion, the Court must have deemed Defendant the prevailing party. The fact Defendant is the prevailing party is more apparent now that Plaintiffs agreed to the entry of a final judgment by which Plaintiffs' claims for voting irregularities and Plaintiffs' claim for monetary damages are also resolved in Defendant's favor.

II. LEGAL ANALYSIS

A. Plaintiffs' Motion Did Not Seek Award of Fees.

As stated in Defendant's October 24, 2022 Objection to Form of Judgment, the Arizona

courts have long required parties to assert their claim for attorney fees *at each stage of the litigation.* This prevents a party seeking relief as did Plaintiffs and Defendant in their Cross-Motions for Summary Judgment and then waiting for a decision before putting the issue of attorney fees before the Court. The *Wagenseller* Court explained this requirement as follows:

> These exceptions [to the American rule that each party pay its own fees] are commonly intended (1) to encourage private enforcements of public laws by victims, (2) to discourage non-meritorious litigation, (3) to encourage a just claim or a just defense, or (4) to promote settlement of disagreements out of court. . . . unless each party is on notice before each stage of the lawsuit that its opponent intends to ask for attorney's fees, the last purpose cannot be served. To this end, and to spare courts from considering each case twice – once on the merits and once on the question of fees – Local Superior Court Rule 3.7(e) and Appellate Rule 21(c) require notice of the fee request before trial or submission of the appeal respectively

[Emphasis supplied]. If Plaintiffs' Motion included a claim for attorney fees, Defendant would have addressed that claim in its Response – thus putting the issue squarely before the Court and avoiding the Court having to consider the case twice.

Although Maricopa Superior Court Local Rule 3.7 mentioned in *Wagenseller* has been amended since the *Wagenseller* decision, so too has Rule 54(g) of the Arizona Rules of Civil Procedure. Thus, the reasoning still holds true. This was explained in *King v. Titsworth*:

> The policy underlying our fee-shifting statutes also supports our holding here. Our Supreme Court has stated that one of the purposes of fee-shifting statutes is to "promote settlement of disagreements out of court" and that "[u]nless each party is on notice *before* each stage of the lawsuit that its opponent intends to ask for attorney[s'] fees, [that] purpose cannot be served." * * * Accordingly, if we were to uphold the trial court's award of fees in this case, the Kings would have been unfairly deprived of the opportunity to "accurately assess the risks and benefits of litigating versus settling."

[Emphasis supplied]. *King v. Titsworth*, 221 Ariz. 597, 600 (App. 2009).

In *King v. Titsworth*, King waited until after the court ruled before requesting attorney fees. Here, Plaintiffs filed a Motion for Partial Summary Judgment without including as one of their claims for relief a request for attorney fees, and filed their request

for attorney fees in the following month. This Court is now being asked to consider this case a second time, on the issue of attorney fees.

B. Defendant is the Prevailing Party.

Prior to the Courts Ruling, Plaintiffs demanded Defendant execute a Quitclaim Deed and Notice of Invalidity stating the entire 2021 Amendment "is invalid and unenforceable as a matter of law." *See* Plaintiffs' October 4, 2022 Application for Fees, Exhibit A, p. 14/48, p. 47/48. Under the Ruling, Defendant was never obligated to execute the offered Quitclaim Deeds.

During the July 19, 2022 hearing, Plaintiffs repeatedly claimed the entire 2021 Amendment was invalid. During oral argument, Plaintiffs' attorney explained how providing 10-day prior notice of a new tenant would cause undue hardship for his clients. Plaintiffs' attorney argued each section of the 2021 Amendment and provided a reason why Plaintiffs considered each section to be invalid for one reason or another

The Court found the entire 2021 Amendment was valid, with the exception of a one-sentence, 18-word portion found at Section 2.30(A). Plaintiffs were not the prevailing party as to Section 2.30(B), (C) and (D).

Plaintiffs were clear in their demand for the entire 2021 Amendment to be tossed aside. In their Quitclaim Deeds, their Complaint and Amended Complaint or in their Motion, Plaintiffs demanded a total repeal of the 2021 Amendment, and nothing less. Stated another way, Plaintiffs' position left Defendant with only one choice to defend the 2021 Amendment duly passed by 67% of the homeowners.

More recently, Plaintiffs' elected to drop their claims of voter impropriety and for monetary damages as alleged in the Complaint and Amended Complaint and to seek a Rule 54(C) judgment. This election to drop all other claims alleged in the pleadings extends Defendant's measure of success – and further reduces any chance of Plaintiffs being the prevailing party. Simply put, the Court's determination that Plaintiffs are not the prevailing party will be a proper exercise of the Court's discretion.

In *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983), the U.S. Supreme Court held "the most critical factor is the degree of success obtained." The Arizona courts follow the same rule. *Schwartz v. Farmers Ins. Co.*, 166 Ariz. 33, 38 (App. 1990) ("The trial court may rightfully utilize a 'percentage of success factor' or a 'totality of the litigation' test[.]"). Because Defendant prevailed on the 3 out of 4 of the provisions Plaintiffs claimed were invalid and because Defendant prevailed on the issues of voter irregularities and prevailed as to Plaintiffs' claim for monetary damages, the degree of Defendant's success is greater than the degree of Plaintiff's success.

Because each Quitclaim Deed Plaintiffs tendered sought far greater relief than the Court determined was due, Defendant would have violated its contractual and its

Plaintiffs' limited success on one of many issues and claims alleged in the pleadings or asserted in the Motion, when compared to Defendant's much greater degree of success, is insufficient to label Plaintiff the prevailing party.

C. Amount of Fees is Unreasonable

Plaintiffs seek over $96,000 of fees in a case where no disclosure statements were served, no discovery conducted and nothing other than the filing of Cross-Motions has occurred. In the three pages of text found in Plaintiffs' attorney's October 4, 2022 Declaration, there is no discussion of anything unusual about this case that would explain $96,000 of attorney fees in preparing a Motion, Response or Reply.

There is the issue of the number of attorneys Plaintiffs have working on the case. There are 250 conferences and tele-conferences described in the invoices and other documents attached to the Declaration. But even with 250 conferences between attorneys does not describe why Plaintiffs' attorney fees are in excessive of $96,000.

The Court has seen dozens if not hundreds of fee applications and is considered an expert on the question of attorney fees. The Court may apply its own knowledge and

experience in determining a reasonable and proper fee. This rule was described by the Arizona Supreme Court as follows:

> In actions for an attorney's fee, while expert testimony as to the value of such services is admissible, and should be given due weight, it is not conclusive on the court, for the latter is itself an expert on that question and may consider its own knowledge and experience in determining a reasonable and proper fee, and in light of such knowledge, may form an independent judgment and determination of the reasonable compensation to be allowed * * * nor need the Court award the fees asked for by the attorney merely because he is the only one who testified on the subject.

Hammond v. A.J. Bayless Markets, 58 Ariz. 58, 65 (1941).

If the Court finds Plaintiffs to be the prevailing party and if the Court finds their post-motion request for fees timely, the Court should weigh (1) Plaintiffs' limited success as to the issues litigated, (2) Plaintiffs' only written demand being the Quitclaim Deeds which demanded full and total release of the 2021 Amendment, (3) Plaintiffs' 250 conferences and tele-conferences to discuss their Motion, Response and Reply and then apply the Court's expertise to determine a reasonable attorney fees, which Defendant respectfully recommends to be no higher than 1/5 or $19,200.

III. CONCLUSION

With Plaintiffs' judicial admission and agreement to dismiss Plaintiffs' claims arising out of the alleged voting irregularities and Plaintiffs' claims for monetary damages, the order determining the issues raised in Cross-Motions for Partial Summary Judgment can now be recognized as final under Rule 54(c).

Plaintiffs' level of success after measuring the totality of the claims asserted is less than Defendant's level of success. There is no question that Plaintiffs were not entitled to Defendant's signature on the Quitclaim Deeds under which the entire 2021 Amendment would be deemed invalid as a matter of law. The Court found 3 out of 4 of the sections of the 2021 Amendment to be valid. The Plaintiffs' claims for voting improprieties and for monetary damages are gone.

Defendant achieved greater success in regard to the separate issues Plaintiffs alleged. Although Plaintiffs now claim one of the issues was more important than the others, none of Plaintiffs' issues were withdrawn and Defendant was never offered a Quitclaim Deed by which only 18 words of the 2021 Amendment would be stricken.

The Court would be correct to deny Plaintiffs' request for attorney fees. The Court should state by a separate order that in the exercise of the Court's discretion, Plaintiffs' request for fees is denied.

If the Court finds Plaintiffs' 18 words of success makes them the prevailing party, the 3 out of 4 sections of the Amendment found to be valid, the claim of voting impropriety and claim for monetary damages makes Plaintiffs' success rate 20%, and a reasonable fee of $19,200 would be adequate.

DATED this 24th day of October, 2022.

JENNINGS HAUG KELEHER McLEOD LLP

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Copy of the foregoing mailed
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