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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

**JIE CAO and HAINING "FRAZER" XIA,
a married couple; STONE XIA, an
individual,**

Plaintiffs;

vs.

**PFP DORSEY INVESTMENTS, LLC, a
Delaware limited liability company;
DORSEY PLACE CONDOMINIUM
ASSOCIATION, an Arizona nonprofit
corporation;**

Defendants.

Case No.: CV2019-055353

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS PFP DORSEY
INVESTMENTS, LLC AND DORSEY
PLACE CONDOMINIUM
ASSOCIATIONS' APPLICATION FOR
ATTORNEYS' FEES AND COSTS**

(Oral Argument Requested)

(Assigned to the Honorable Daniel Martin)

Plaintiffs Jie Cao, Haining "Frazer" Xia, and Stone Xia (collectively "Plaintiffs") hereby file their joint opposition to Defendant PFP Dorsey Investments, LLC's ("PFP Dorsey") and Defendant Dorsey Place Condominium Association's ("Dorsey Place") (PFP Dorsey and Dorsey Place as the "Defendants") Applications for Attorneys' Fees and Costs. According to Rule 54(g), Ariz. R. Civ. P., a party must claim their attorneys' fees in their pleadings or their motion to dismiss. Defendants each failed to request their attorneys' fees under Rule 54(g) and cannot seek an award of its attorneys' fees after the fact. *See Balestrieri v. Balestrieri*, 232 Ariz. 25, 26, ¶ 1

1 (App. 2013). Plaintiffs file this opposition, which is supported by the following Memorandum of
2 Points and Authorities and the entire record before the Court.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. ARGUMENT**

5 **a. Defendants Forfeited Attorneys’ Fees by Failing to Request Them In**
6 **Their Motion to Dismiss.**

7 Under Rule 54(g)(1), Ariz. R. Civ. P., a “claim for attorney’s fees must be made in the
8 pleadings or in a Rule 12 motion filed before the movant’s responsive pleading.” (Emphasis
9 added). Specifically, Rule 54(g)(1), Ariz. R. Civ. P. provides Compliance with this section is
10 mandatory. *In re Restated Trust of Crystal H. West*, 249 Ariz. 355, ___, ¶ 9, 470 P.3d 161, 164
11 (App. 2020); *see also Dabrowski v. Bartlett*, 245 Ariz. 504, 516, ¶ 39 (App. 2019) (“Because the
12 [party] did not correctly request fees under A.R.S. § 12-341.01(A), the superior court did not
13 abuse its discretion by refusing to award them. *See* Ariz. R. Civ. P. 54(g)(1) . . .”).

14 If a defendant does not request attorneys’ fees at the time it seeks dismissal, the defendant
15 forfeits its claim for attorneys’ fees. *Balestrieri v. Balestrieri*, 232 Ariz. 25, 26, ¶ 1 (App. 2013)
16 (J. Johnsen) (“We hold in this appeal that a defendant who files a motion to dismiss pursuant to
17 Arizona Rule of Civil Procedure 12(b) in lieu of an answer forfeits his claim for attorney’s fees if
18 he does not ask for fees at the time he moves to dismiss. The defendant here did not request fees
19 until after the superior court granted his motion to dismiss. We vacate the award of fees because
20 the defendant’s request was untimely.”). In *Balestrieri*, the defendant moved to dismiss pursuant
21 to Rule 12(b), but did not include a request for attorneys’ fees. *Id.*, at ¶ 2. The superior court
22 granted the motion to dismiss, and then the defendant filed a motion for attorneys’ fees, which the
23 superior court granted. *Id.* The Court of Appeals vacated the superior court’s award of attorneys’
24 fees because the defendant did not request them in his motion to dismiss pursuant to Rule 54(g)(1).

1 Here, neither PFP Dorsey nor Dorsey Place requested their attorneys’ fees in their motions
 2 to dismiss (each filed August 13, 2020). While Dorsey Place requested their attorneys’ fees in its
 3 Reply in Support of its Motion to Dismiss (filed October 5, 2020), PFP Dorsey did not (filed
 4 October 5, 2020). However, the party is deemed to have waived their attorneys’ fees when it is
 5 not requested in the motion to dismiss, even when the fees are requested in the reply. *See Yellow*
 6 *Jacket Drilling Services, LLC v. City of Sedona*, 2017 WL 1740287, *4, ¶¶ 16-17 (App. May 4,
 7 2017) (requesting attorneys’ fees only in a reply to a motion to dismiss is not sufficient); *see also*
 8 *Eastwood Park Homeowners Association v. Cathey*, 2015 WL 9258616, *3, ¶ 10 (App. December
 9 17, 2015) (requesting attorneys’ fees in a notice of appearance does not satisfy the purpose of
 10 Rule 54(g)). In *Yellow Jacket*, the defendant appealed the Superior Court’s denial of an attorneys’
 11 fee application. *Yellow Jacket*, at *4, ¶ 16. The defendant argued that *Balestrieri* only precluded
 12 fee claims made after a Rule 12(b) motion is granted. *Id.*, at ¶ 17. However, the Court of Appeals
 13 disagreed and stated that “*Balestrieri* clearly requires that a fee claim be made in the Rule 12(b)
 14 motion itself.” *Id.* Therefore, the Defendants have each forfeited any claim to attorneys’ fees under
 15 Rule 54(g)(1) and the Court must deny the applications for attorneys’ fees.

16 **b. Under the Factors of A.R.S. § 12-341.01 PFP Dorsey is Not Entitled to**
 17 **Fees.**

18 Defendants are seeking an award of its attorneys’ fees under A.R.S. § 12-341.01. Fee
 19 awards pursuant to A.R.S. § 12-341.01 are permissive and the trial court has broad discretion in
 20 fixing the amount of attorneys’ fees, if any. *Pettay v. Insurance Marketing Services*, 156 Ariz.
 21 365, 368 (App. 1987) (*citing Associated Indemnity Corporation v. Warner*, 143 Ariz. 567, 570
 22 (1985)). Because an award of fees in a case falling within the statute is discretionary, there is no
 23 presumption or requirement that the trial court grant attorneys’ fees to the prevailing party in all
 24 contested contract actions. *Id.* at 1184.

1 Under *Warner*, the Court is to consider several factors in granting attorneys' fees, namely:
2 (1) the merits of the claim or defense presented by the unsuccessful party; (2) whether the litigation
3 could have been avoided or settled and whether the successful party's efforts were completely
4 superfluous in achieving the result; (3) whether accessing fees against the unsuccessful party
5 would cause an extreme hardship; (4) whether the successful party prevailed with respect to all of
6 the relief sought; (5) novelty of the legal question presented; and (6) whether such claim or defense
7 had previously been adjudicated in this jurisdiction. *Warner*, 143 Ariz. at 570. Here, whether the
8 successful party's efforts were completely superfluous in achieving the result, the novelty of the
9 legal question presented, and whether such claim had been previously adjudicated, each weigh
10 heavily in favor of not awarding attorneys' fees in this matter.

11 **i. Merits of the Claim, Novelty, and Lack of Previous Adjudication**
12 **Weigh Heavily in Favor of Plaintiffs.**

13 The Complaint and the Response to the Motion to Dismiss brought forth an issue that has
14 not been litigated in courts in Arizona, nor has undersigned counsel found any other court in this
15 country that have resolved whether the model rule, which A.R.S. § 33-1228 is based upon, applies
16 to situations in which a majority owner in a condominium elects to terminate the condominium
17 and forces the minority to sell its unit(s) to the majority. The statute is unclear as to whether it
18 permits a majority owner to force the sale of a minority owner *to itself*.

19 When a trial court has discretion over an award of attorneys' fees, proper consideration is
20 whether invocation of the processes of law were really necessary. *Miller v. Uhrick*, 146 Ariz. 413
21 (App. 1985); *see also Emergency Med. Transp., Inc. v. City of Tempe*, 157 Ariz. 260, 264 (App.
22 1988). Here, it was necessary for Plaintiffs to bring this action because these claims have not been
23 litigated in this jurisdiction. Further, the Plaintiffs' property was taken away from them and there
24 was no other recourse, but to file an action. As such, the merits of the claim, novelty, and lack of
25 previous adjudication in any court weigh heavily in favor of the Plaintiffs.

1 This litigation could have been avoided had the defendants taken the proper steps under
2 the statute and the condominium's bylaws and declaration. Under these documents, a special
3 meeting requires that the documents to be voted on at the special meeting be provided to the
4 parties prior to the meeting and if they are changed to be voted on and modified with unanimous
5 consent. The Defendants in this action did not take such steps and instead modified the documents
6 without a meeting. Further, had the defendants taken steps to have a vote of the minority,
7 excluding PFP Dorsey from the vote to terminate the condominium, this litigation would have
8 been unnecessary. As such, the merits of the claim, novelty, and lack of previous adjudication in
9 any court weigh heavily in favor of the Plaintiffs.

10 Further, an award of attorneys' fees does create an unnecessary hardship on the Plaintiffs
11 even above and beyond what has already occurred – the unlawful taking of the Plaintiffs' property
12 without their consent.

13 **ii. Defendants' Actions Were Superfluous in Achieving the Result.**

14 The Defendants merely filed a Motion to Dismiss, a Reply in Support of their Motion to
15 Dismiss, and attended an oral argument. Each of these actions was taken separately, when the
16 Defendants could have filed a joint motion to dismiss or one of the parties could have easily joined
17 the other's motion to dismiss. Instead, each Defendant filed their own motion, even though the
18 arguments were nearly identical.

19 PFP Dorsey billed 131.34 hours for a total amount of \$20,673.80 in which it is seeking to
20 be awarded. Dorsey Place billed 231.50 hours for a total amount of \$34,177 in which it is seeking
21 to be awarded. The Defendants billed over 360 hours in time to file a motion to dismiss. The
22 Defendants worked together in performing their work on this case, as reflected in their legal bills,
23 but did not attempt to reduce their costs in any manner. Therefore, the factor of whether the
24 Defendants' actions were superfluous weighs heavily in the Plaintiffs' favor. As such, Plaintiffs'
25 respectfully request that the Court deny the Defendants' Application for Attorneys' Fees.

1 **c. PFP Dorsey’s Attorneys’ Fees Are Not Reasonable.**

2 In evaluating the *China Doll* factors in determining a reasonable amount of attorneys’ fees,
3 there are four factors, which include the qualities of the advocate, the character of the work, the
4 work actually performed, and the result. *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183,
5 187 (App. 1983). Here, the work actually performed is at issue. Here, very little work was actually
6 required to be performed, as this was dismissed by a motion to dismiss. Yet, PFP Dorsey billed
7 131.34 hours totaling an amount of \$20,673.80 and Dorsey Place billed 231.50 hours totaling an
8 amount of \$34,177.

9 As stated previously, for being dismissed under a motion to dismiss, that were nearly
10 identical in character, the work actually performed took an unreasonable amount of time. As the
11 Court of Appeals has held, “Unsuccessful parties should not be required to pay for tasks that take
12 opposing counsel an unreasonable amount of time.” *Hawk v. PC Village Ass’n, Inc.*, 233 Ariz. 94,
13 100, ¶ 22 (App. 2013). Here, the Defendants’ decision to spend 360 hours on its motion to dismiss
14 is an unreasonable amount of time to perform such a task.

15 For example, of PFP Dorsey’s billed time, all of this time except for 2.6 hours on October
16 13, 2020, was billed under “Fact Investigation/Devel.” As this matter was at the motion to dismiss
17 stage, fact investigation is unnecessary considering the Court accepts the factual circumstances as
18 pled in the complaint.

19 Further, Dorsey Place did not become a defendant in this action until March 27, 2020.
20 However, Dorsey Place has applied for attorneys’ fees in the amount of \$1,115.50 that were
21 completed for previous defendants in this case, Lorner Polger, Matt Quinn, and Michael A.
22 Schern. When Carpenter Hazlewood represented Lorner Polger, Matt Quinn, and Michael A.
23 Schern, Dorsey Place was not a defendant in this action. In fact, Carpenter Hazlewood’s
24 representation of these defendants ended on January 29, 2020 when the Court granted their motion
25 to withdraw as counsel. Yet, Carpenter Hazlewood is now seeking \$1,115.50 in attorneys’ fees
26

1 from December 9, 2019 through February 3, 2020 through Dorsey Place’s ruling on the motion
2 to dismiss for work that was completed prior to Dorsey Place even being a defendant in this action.
3 This type of work should not be borne by Plaintiffs, as it was completed for defendants in this
4 case that have been dismissed by stipulation. Further, Carpenter Hazlewood is seeking \$6.70 in
5 costs from a filing fee on January 3, 2020, prior to Dorsey Place being named as a defendant. This
6 cost should be excluded from any award.

7 Therefore, as the Defendants’ time spent on this matter was excessive and unnecessary,
8 Plaintiffs request the Court deny their Application for Attorneys’ Fees.

9 **II. CONCLUSION**

10 Defendants forfeited their ability to request attorneys’ fees, as they did not request them in
11 their Motions to Dismiss that were filed on August 13, 2020. Under *Balestrieri*, the Defendants
12 have forfeited and waived their claim to attorneys’ fees. Plaintiffs respectfully request the Court
13 deny each of the Defendants’ Application for Attorneys’ Fees and Costs as stated herein.

14 **RESPECTFULLY SUBMITTED** January 19, 2021.

15 **WILENCHIK & BARTNESS, P.C.**

16 */s/ Ross P. Meyer*

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2 **COPY** electronically transmitted by the Clerk of
3 the Court via AZTurboCourt.com
4 to the Honorable Daniel Martin

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