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Pro Per

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

R. L. WHITMER,

Plaintiff.

v.

HILTON CASITAS HOMEOWNERS ASSOCIATION, also known as HILTON CASITAS COUNCIL OF HOMEOWNERS, also known as COUNCIL OF CO-OWNERS, also known as HILTON CASITAS COUNCIL OF CO-OWNERS; and MICHAEL BENGSON, President of the named Respondent;

Defendants.

CV2016-055080

PLAINTIFF'S OBJECTION TO DEFENDANTS' MOTION AND APPLICATION FOR AN AWARD OF ATTORNEY FEES AND COSTS AND TO THEIR PROPOSED FORM OF JUDGMENT

(Assigned to the
Hon. Aimee L. Anderson)

INTRODUCTION

The Court should deny the Defendants' request for an award of attorney fees and costs as pursuant to ARS §12-349 and ARCP Rule 11, because the Defendants' allegations are without evidence and without foundation.

Originally, in their motion to dismiss, the Defendants requested the Court to grant attorney fees and costs pursuant to ARS §12-341.01 and ARS §12-349.

Now in their application the Defendants cite only ARS §12-349, and have added ARS §12-350 and ARCP Rule 11.

Thus Defendants agree that it is obvious that ARS §12-341.01 does not apply in this case as the complaint does not arise from a contract. The Defendants now request the Court to award attorney fees and costs as an award

of sanctions under ARS §12-349 or Rule 11. Their request should be rejected because the Defendants did not produce any evidence proving any of the four prerequisites under ARS §12-349 or evidence justifying sanctions under Rule 11. Because the Defendants did not bring such evidence in their application they are not permitted to bring any evidence in their reply.

The Court should note that its dismissal was based solely on a conclusion that the Superior Courts lacks jurisdiction and the proper venue is an Administrative Court, and there are no findings of facts by the Court which justify an award under ARS §12-349 or Rule 11.

ARGUMENT

Defendants are aware that this case concerns the enforcement of statute and does not arise out of contract, and in accordance with *Brown v. Terravita Cmty. Ass'n, Inc.*[1] (No. 1 CA-CV 14-0455, Ariz. Ct. App. Memorandum Decision Jul. 30, 2015) the Defendants are not entitled to an award under ARS §12-341.01, and therefore they did not apply for an award of attorneys fees and cost under ARS §12-341.01.

Here, as in *Brown*, the Defendants are moving for an award of attorney fees and cost based on ARS §12-349 and Rule 11 even though they did not bring any evidence proving any of the four prerequisites as required by ARS §12-349, ARS §12-350.

ARS §12-349 allows a sanctionable award only if Plaintiff's has engaged in one of the following prerequisites:

> "1. Brings or defends a claim without substantial justification.
> 2. Brings or defends a claim solely or primarily for delay or harassment.
> 3. Unreasonably expands or delays the proceeding.
> 4. Engages in abuse of discovery."

[1] In accordance with A.R.S. Sup.Ct. Rule 111(c), a copy of the memorandum decision is provided herewith for the Court's consideration as per Rule 111(c)(1)(A) and (C).

The Defendants did not bring any evidence to prove any of the four prerequisites, and therefore their application for attorney fees and costs pursuant to ARS §12-349 and ARS §12-350 should be denied.

The Defendants never before alleged that Rule 11 should be applied. It is obvious that none of the elements of Rule 11 apply to this case and the Defendants failed to bring any evidence to support an application of sanctions under Rule 11.

The Defendants' only reasoning for the awards is their contention in their application that the Plaintiff "did not investigate whether the Superior Court has jurisdiction" is false.

Plaintiff brought this action in good faith and following the instructions given by the Arizona Office of Administrative Hearings ("OAH") to the public, and reported to the Governor and the Legislature in 2007. As stated in Exhibit 1 of the Plaintiff's response to the Defendants' motion to dismiss, OAH instructs the public:

> "However, failure by a party to comply with a decision issued by the OAH may result in the other party seeking enforcement of the Administrative Law Judge's decision through a contempt of court proceeding in Superior Court."

The same instructions that the Plaintiff used in filing for his administrative law order in September 2014. Plaintiff being aware that Article 6 Section 14.1 of the Arizona Constitution gives the Superior Court original jurisdiction of "proceedings in which exclusive jurisdiction is not vested by law in another court," and that there is not an Arizona statute that gives jurisdiction to an administrative court to conduct contempt proceedings, in good faith the Plaintiff followed the OAH instructions and filed with this Court.

The Plaintiff securing the 2015 administrative law order and the filing of this complaint seeking to have the HOA comply with statute is only just and

appropriate, and it would not be required if the HOA had been in compliance with its binding obligation under the statute.

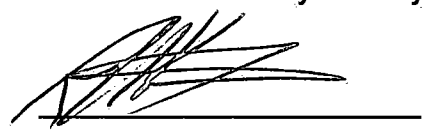
CONCLUSION

The Defendants wrongly request the Court to affirm a fee award under ARS §12-349 and Rule 11, and their contention should be rejected because the Defendants did not provide any evidence of sanctionable acts in order for the Court to make any findings to support such an award.

Because it is an undisputed fact that this complaint does not arise from contract, and ARS §33-1241.01 does not apply in this case, the Defendants' application for attorney fees and costs is without legal foundation.

Therefore, as in *Brown*, the Defendants' application for attorney fees and costs should be denied, as well as their proposed form of judgment.

Dated this 2nd day of May, 2017.



R. L. Whitmer

ORIGINAL filed this
2nd day of May, 2017, with the Court;

and a COPY mailed this same date to:

Augustus Shaw, and Nicole Payne
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Phoenix, AZ 85040

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

WILLIAM M. BROWN, *Plaintiff/Appellant,*

v.

TERRAVITA COMMUNITY ASSOCIATION, INC., an Arizona non-profit corporation, *Defendant/Appellee.*

No. 1 CA-CV 14-0455
FILED 7-30-2015

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

VACATED

COUNSEL

William M. Brown, Scottsdale
Plaintiff/Appellant

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

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Andrew W. Gould joined.

S W A N N, Judge:

¶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. § 12-341.01 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 § 12-341.01 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.

¶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

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

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*

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[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.

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

¶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.

Ruth A. Willingham · Clerk of the Court
FILED: RT