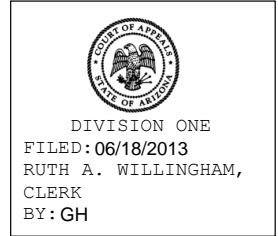


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);  
Ariz.R.Crim.P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



COUNTRY CLUB TOWNHOMES HOMEOWNERS ) 1 CA-CV 12-0268  
ASSOCIATION, INC., )  
) DEPARTMENT B  
Plaintiff/Counterdefendant/ )  
Appellee, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
v. ) Rule 28, Arizona Rules  
) of Civil Appellate  
GREGORY E. GOODMAN, ) Procedure)  
)  
Defendant/Counterclaimant/ )  
Appellant. )  
)  
)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CV201001609

The Honorable Kenton D. Jones, Judge

**AFFIRMED IN PART, VACATED AND REMANDED IN PART**

---

O'Leary Eaton, PLLC Prescott  
by William J. O'Leary  
Michael P. Thieme  
Attorneys for Plaintiff/Counterdefendant/Appellee

Kimminau Law Firm, PC Tucson  
by Christian J. Kimminau  
Attorneys for Defendant/Counterclaimant/Appellant

---

**H O W E**, Judge

¶1 Goodman appeals the Rule 54(b) certification of partial summary judgment awarded in favor of Country Club Townhomes Homeowners' Association ("Country Club"). For the reasons that follow, we affirm in part and vacate and remand in part.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 Goodman owns eight properties within the subdivision known as Country Club Townhomes. Country Club collects fees and other charges from homeowners. Goodman admittedly did not pay the HOA fees on his units for the months of July, August and September of 2010. Since that time, Goodman has continued to withhold HOA fees.

¶3 Country Club sued Goodman, claiming breach of contract and breach of the duty of good faith and fair dealing. Goodman countersued, presenting his own claims of breach of contract and breach of the duty of good faith. After some discovery, Country Club moved for partial summary judgment on October 24, 2011, only on its claim that Goodman failed to pay HOA fees.<sup>1</sup> Country Club asserted that: certain Covenants, Conditions and Restrictions (CC&R's) applied to the townhomes; Country Club was authorized and obligated to enforce the CC&R's; the CC&R's

---

<sup>1</sup> Within the breach of contract claim, Country Club also alleged that Goodman breached by failing to repair damaged balconies and an awning, and failing to remove a recliner from one of the patios.

required Goodman to pay monthly assessments for each unit; Goodman did not pay the assessments from July 2010 to October 2011; and Goodman had admitted that nothing in the CC&R's or in the HOA by-laws permitted him to withhold payment. Country Club asked for (1) judgment in the amount of \$19,880.48 for past due HOA fees; (2) prejudgment interest from October 2010; (3) a determination that no just reason existed for delay and that the judgment was final under Arizona Rule of Civil Procedure ("Rule") 54(b); and (4) attorneys' fees and costs if successful on the motion.

¶4 On December 6, the court granted the motion, noting that Goodman had not responded and that no question of material fact was in dispute for Goodman's withholding HOA fees. The court awarded Country Club past due fees;<sup>2</sup> prejudgment interest from October 2, 2010, until judgment; costs and reasonable attorneys' fees. Further, it stated "FINALLY, and absent objection to [Country Club's] request by [Goodman], the Court finds there to be no reason for delay and that this judgment is

---

<sup>2</sup> The February 28 Judgment and December 6 Ruling conflict regarding the amount of past due fees awarded to Country Club. In its motion for summary judgment, Country Club separately asked for past due fees from July 2010 - September 2010, and from October 2010 - October 2011 (after the filing of the complaint). The December 6 ruling awards \$19,880.48, an amount that appears to include fees from both time periods. The judgment awarded \$16,265.84, and stated that amount was for past due fees for the months of October 2010 - October 2011 only, and did not mention the July - September 2010 time period.

a final judgment pursuant to Rule 54(b) of the Arizona Rules of Civil Procedure."

¶15 Country Club subsequently applied for attorneys' fees of \$11,700 on December 13, 2011. Goodman filed a "Notice of Objections" on December 19, objecting to the award of attorneys' fees and the inclusion of the Rule 54(b) language. He argued that Country Club's success on its partial summary judgment motion did not make it the "prevailing party" in the action, and therefore an attorneys' fee award was premature. Goodman argued that an attorneys' fee award was premature also because other claims remained and the court might have to offset the final judgment if Goodman prevailed on the remaining claims. Goodman argued that these issues created a just reason to delay judgment.

¶16 Country Club replied that Goodman's Notice of Objections should be struck because Goodman had waived his right to object to the relief granted in the December 6 ruling by failing to respond to the motion for partial summary judgment. The court signed the judgment on February 24, 2012. The same day, the court ruled that Goodman's Notice of Objections was an untimely attack on the December 6 ruling. The court further noted that Goodman's Notice of Objections addressed "the awarding of attorneys['] fees and Rule 54(b) language being included in the Judgment without any substantive objection being

raised in regard to the content of the proposed form of Judgment.”

¶7 Goodman timely appeals, and we have jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) section 12-120.21(A)(1) (West 2013).<sup>3</sup>

#### DISCUSSION

¶8 Goodman argues that the trial court erred in certifying an award of partial summary judgment as final under Rule 54(b) and for prematurely awarding attorneys’ fees. We affirm the trial court’s Rule 54(b) certification of the partial summary judgment; however, we vacate the trial court’s award of attorneys’ fees.

##### I. Jurisdiction

¶9 Goodman argues that Rule 54(b) certification was improper because the court did not fully resolve the breach of contract claim, citing “when a plaintiff is suing to vindicate one legal right and alleges several elements of damage, only one claim is presented and [Rule 54(b)] does not apply.” *Sisemore v. Farmers*, 161 Ariz. 564, 566, 779 P.2d 1303, 1305 (App. 1989). We interpret this as an argument that the grant of summary judgment did not dispose of an entire claim, and therefore this Court

---

<sup>3</sup> We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

lacks jurisdiction over the appeal. We find no error because we find that the claim at issue was severable from the rest of the action.

¶10 We have an independent duty to determine whether we have jurisdiction. *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997). The right to an appeal is generally limited to final judgments that dispose of all claims in an action or to certain statutorily designated interlocutory judgments. *Sisemore*, 161 Ariz. at 565, 779 P.2d at 1304. Rule 54(b) gives this Court jurisdiction to hear an appeal if the judgment is final, i.e., it disposes of at least one separate claim of a multi-claim action. *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304, 812 P.2d 1119, 1122 (App. 1991). "A claim is separable from others remaining to be adjudicated when the nature of the claim already determined is 'such that no appellate court would have to decide the same issues more than once even if there [a]re subsequent appeals.'" *Sw. Gas Corp. v. Irwin ex rel. Cnty. of Cochise*, 229 Ariz. 198, 202, ¶ 12, 273 P.3d 650, 654 (App. 2012). We review the trial court's determination whether multiple claims exist for an abuse of discretion. *Id.*

¶11 The issue presented to the trial court was whether Country Club was entitled to summary judgment for Goodman's failure to pay HOA fees. Once decided, another court would not

have to reach this same issue. Goodman either paid or did not pay the HOA fees, and was bound by contract or was not, and the passage of time will not change these facts. The presence of other claims does not make a Rule 54(b) determination inappropriate. *Curtiss-Wright Corp v. Gen. Elec. Co.*, 446 U.S. 1, 9 (1980). The trial court did not abuse its discretion in finding that this claim was severable from the others in terms of the factual and legal issues involved.<sup>4</sup>

## II. Rule 54(b) Certification

¶12 Goodman also argues that Rule 54(b) certification was improper because although the judgment stated "there is not just reason for delay," the trial court did not make the findings that Rule 54(b) requires to designate a judgment as final and appealable. We find no error.

¶13 Although Rule 54(b) allows a trial court to designate a judgment as final and appealable upon an express determination

---

<sup>4</sup> Goodman also claims that because "future" unpaid assessments arising from November 2011 until the present are unadjudicated, Rule 54(b) certification is improper. In making its ruling, the court noted that "nothing in this judgment should be construed as determining what amounts, if any, are owed by [Goodman] to [Country Club] for the month of November 2011 and for any subsequent months." An action by Country Club for future assessments owed is irrelevant and the possibility of such a future action does not make 54(b) certification improper. See *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 9, 795 P.2d 827, 835 (App. 1990) (affirming Rule 54(b) certification on rent due and noting that the possibility of future actions for unpaid rent did not make final judgment improper). We find no abuse of discretion.

that no just reason for delay exists, a trial court is not required to make any findings supporting its Rule 54(b) determination. Where findings of fact and conclusions of law were not requested, made or stated, this Court views the record as though the trial court had found every controverted issue of fact necessary to support judgment, and if reasonable evidence would support such findings, hold that it did so correctly. *Contractor & Min. Serv. & Supply, Inc. v. H&M Tractor & Bearing Corp.*, 4 Ariz. App. 29, 31, 417 P.2d 542, 544 (App. 1966); *Dillig v. Fisher*, 142 Ariz. 47, 51, 688 P.2d 693, 697 (App. 1984). Country Club asked the trial court in its motion for partial summary judgment on October 24, 2011, to include Rule 54(b) language in its judgment, and Goodman did not respond to the motion or object to the request for Rule 54(b) language before the court granted the motion six weeks later on December 6, 2011.

¶14 Goodman argues, however, that he did indeed object to the inclusion of the Rule 54(b) language when he filed the "Notice of Objections" on December 19, 2011. This notice was untimely, however. Rule 56(c) provides that a party opposing a motion for summary judgment has thirty days to respond. Goodman's notice was filed twenty-six days after the response was due, and thirteen days after the court ruled, much too late to qualify as a request for findings supporting the Rule 54(b)



determination. Moreover, Goodman's notice was apparently prompted not by the court's inclusion of Rule 54(b) language in its ruling, but by Country Club's request for attorneys' fees, which it filed on December 13, 2011, six days before Goodman's notice.

¶15 Goodman nevertheless argues that his notice was timely because the court's December 6 ruling was an invitation to object to the ruling. But the court's ruling was no invitation to object. Thirteen days after the time for responding to the motion for partial summary judgment had expired, the court granted the motion, noting the absence of a response: "FINALLY, and absent objection to [Country Club's] request by [Goodman], the Court finds there to be no reason for delay and that this judgment is a final judgment pursuant to Rule 54(b) of the Arizona Rules of Civil Procedure." Noting the absence of a response was not inviting an untimely response. This is confirmed by the lack of a due date for a response and the court's direction to Country Club to draft a proposed judgment. If the court was giving Goodman one last chance to object to the motion, it would have set a new due date for a response and waited to order the drafting of a proposed judgment until it could consider a possible response. The trial court's striking of the notice as an untimely attack on its December 6 ruling is even further confirmation that the court's order did not allow

for an untimely response. Goodman's interpretation of the December 6 order is unreasonable.

¶16 Because Goodman did not timely object to the trial court's inclusion of Rule 54(b) language in its ruling, the trial court had no duty to make express findings on the matter.

### **III. The Award of Attorneys' Fees**

¶17 Goodman argues that because the prevailing party in the entire action has yet to be determined, the court should not have awarded Country Club its attorneys' fees and costs. We agree.

¶18 The trial court may award attorneys' fees to the "successful party" in a "contested action arising out of contract." A.R.S. § 12-341.01(A). The trial court must exercise its discretion to determine which party is the "successful party." *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 569, ¶ 9, 155 P.3d 1090, 1093 (App. 2007). In litigation involving multiple claims, the successful party is the net winner. *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 13, ¶ 22, 261 P.3d 784, 788 (App. 2011). Where multiple claims are litigated with varied success, courts may use a "percentage of success" test or a "totality of the litigation" test to determine which party is the successful party. *Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 38, 800 P.2d 20, 25 (App. 1990).

¶19 Here, while the issue of the unpaid HOA fees has been determined, other claims remain at issue. Even though Country Club was successful on one claim, the successful party on the other claims has not yet been determined. If Goodman is ultimately the net winner, the trial court will have to order Country Club to return the fees awarded. Therefore, we find that the award of attorneys' fees was premature. The trial court shall make a determination of the successful party and an award of attorneys' fees once all claims have been litigated.<sup>5</sup> The portion of the judgment awarding attorneys' fees to Country Club is vacated and remanded for further proceedings consistent with this decision.

#### **IV. Request for Attorneys' Fees on Appeal**

¶20 In the exercise of our discretion, we decline to grant attorneys' fees on appeal.

---

<sup>5</sup> Goodman also argued that the attorneys' fees awarded were unreasonable. Because we have vacated the attorneys' fees award, this issue is no longer before us.

**CONCLUSION**

¶21 For the foregoing reasons, we affirm the trial court's award of partial summary judgment, but vacate the portion awarding attorneys' fees and remand for further proceedings consistent with this decision.

\_\_\_\_\_/s/\_\_\_\_\_  
RANDALL M. HOWE, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
PATRICIA K. NORRIS, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
ANDREW W. GOULD, Judge