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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 03/06/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

KEMOSEME PACIFIC, LLC, an Arizona) 1 CA-CV 11-0154
limited liability company,)
)
Plaintiff/Appellant,)
)
v.)
)
KARI D. BATTLES and WILLIAM C.) Rule 28, Arizona Rules of
BATTLES, wife and husband; JOHN) Civil Appellate Procedure)
W. BUSBY and GAIL H. BUSBY,)
husband and wife,)
)
Defendants/Appellees,)
)
TEXAZ FOOD SERVICES, LLC, an)
Arizona limited liability)
company; SOUTHPOINT CONSOLIDATED)
LIMITED PARTNERSHIP,)
)
Relief Defendants/Appellees,)
)

SHERMAN CAPITAL GROUP, LLC,)
)
Intervenor/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-028010

The Honorable Jeanne Garcia, Judge

VACATED AND REMANDED

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H A L L, Judge

¶1 Kemoseme Pacific, LLC (Kemoseme) appeals from the award of attorneys' fees in favor of John and Gail Busby, Kari and William Battles, TEXAZ Food Services, LLC, Southpoint Consolidated Limited Partnership, and Sherman Capital Group, LLC (collectively Defendants). For the reasons stated below, we vacate the attorneys' fees award and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Kemoseme filed a twelve-count complaint against Defendants, which included a request to appoint a receiver pursuant to Arizona Revised Statutes (A.R.S.) section 12-1241 (2003). All claims except the receivership claim were ordered

to arbitration. After a hearing, the trial court denied Kemoseme's request to appoint a receiver.

¶3 Defendants then filed applications for attorneys' fees citing A.R.S. § 12-341.01(A) (2003) and a provision in the parties' Partnership Agreement. The requested fees included fees some Defendants incurred in obtaining a court order compelling arbitration on the remaining counts. Kemoseme argued that because arbitration on the merits of the complaint was not complete, an award of attorneys' fees would be premature as there was no prevailing party entitled to attorneys' fees under A.R.S. § 12-341.01(A).

¶4 The trial court concluded that the receivership claim was a "separate and independent issue" from the issues in arbitration and awarded attorneys' fees and costs to Defendants as prevailing parties on the receivership claim pursuant to A.R.S. § 12-341.01. Kemoseme timely appealed from these judgments. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2011).

DISCUSSION

A.R.S. § 12-341.01(A) - Arising Out of a Contract

¶5 Kemoseme argues that the court erred in determining that Defendants were entitled to attorneys' fees pursuant to A.R.S. § 12-341.01(A), which authorizes attorneys' fees in cases

arising out of a contract. Defendants contend that Kemoseme waived any argument that its claim did not arise out of a contract by failing to raise that argument in response to the fee applications below. Alternatively, Defendants argue that Kemoseme's claims arose out of the alleged breach of the Partnership Agreement, which entitled them to fees under A.R.S. § 12-341.01(A).

¶6 "Interpretation and application of the attorney fee statute present questions of law subject to *de novo* review. . . . If attorney's fees are available under the statute, we review the award for abuse of discretion." *Dooley v. O'Brien*, 226 Ariz. 149, 152, ¶ 9, 244 P.3d 586, 589 (App. 2010) (internal quotation omitted).

¶7 Defendants argue that in responding to their fee requests, Kemoseme failed to assert that the claims did not arise out of a contract. The majority of Kemoseme's response argues that an award of fees would be premature until arbitration is completed. There is one sentence, however, that can be viewed as raising this argument below. Kemoseme argued that there was no "determination of the type that would allow an attorneys' fee award to be made." We infer from this language that Kemoseme meant an action arising out of a contract was a

"determination of the type that would allow" an award of fees. Accordingly, we find Kemoseme did not waive this issue.

¶18 Although Kemoseme's complaint raised several claims, the only issue the trial court decided was whether to appoint a receiver under A.R.S. § 12-1241. "[Section 12-1241] simply requires the trial court to determine that the property or the rights of the parties need protection." *Gravel Resources of Ariz. v. Hills*, 217 Ariz. 33, 37, ¶ 11, 170 P.3d 282, 286 (App. 2007). The statute itself authorizes the cause of action. See A.R.S. § 12-1241. No contract is required to give rise to a receivership action. *Id.* Nor was Kemoseme's request for a receiver based on any contract provision.

¶19 The trial court noted that Kemoseme's request to appoint a receiver was based on allegations of fraud and mismanagement. Significantly, however, the court acknowledged that the fraud allegations were not before it and would be resolved in arbitration. The fact that the claims subject to arbitration may arise out of a contract for purposes of A.R.S. § 12-341.01(A) is irrelevant in determining whether Defendants were entitled to an award of fees on the single issue before the trial court. We need not decide whether the claims subject to arbitration arise out of contract. The only issue the trial court decided was Kemoseme's petition to appoint a receiver.

That claim is based on a statute, A.R.S. § 12-1241, and does not arise out of a contract.¹ Therefore, the trial court improperly awarded attorneys' fees to Defendants pursuant to A.R.S. § 12-341.01(A).

CROSS-ISSUE ON APPEAL

Fees Pursuant to Partnership Agreement

¶10 Defendants cite the attorney fee provision in the parties' Partnership Agreement as an alternative basis for affirming the fee award. As they did below, Defendants contend the following provision in the Partnership Agreement entitles them to fees:

In the event any Partner brings an action at law or other proceeding against any other Partner to enforce any of the terms, covenants and conditions hereof, or by reason of any breach or default hereunder, the party prevailing in any such action or proceeding shall be paid all reasonable attorneys' fees by the non-prevailing party, and in the event any judgment is secured by such prevailing party, all such attorneys' fees shall be determined by the court and not by jury and shall be included in any such judgment.

¶11 Defendants also argue that Kemoseme failed to respond to this argument below or in its opening brief and, therefore, cannot object on appeal. Kemoseme contends that it did not

¹ Having decided that the fee award was erroneous, we need not decide whether the award of attorneys' fees under A.R.S. § 12-341.01(A) was premature.

elaborate on its statement that the Partnership Agreement did not give rise to an award of fees because the plain language of the Partnership Agreement clearly did not apply. Kemoseme's statement that attorneys' fees were not available pursuant to the Partnership Agreement hardly constitutes a "legal argument." See ARCAP 13(a). However, Kemoseme argued below and on appeal that an award of attorneys' fees was premature because neither party prevailed on the merits. Like A.R.S. § 12-341.01(A), the Partnership Agreement allows an award of fees to the prevailing party. Thus, we conclude Kemoseme raised an objection, albeit sparse, to the award of fees pursuant to the Partnership Agreement. Additionally, we may exercise discretion to address the merits of an issue instead of relying on the procedural doctrine of waiver. See *Standard Chartered, PLC v. Price Waterhouse*, 190 Ariz. 6, 39-40, 945 P.2d 317, 350-51 (App. 1996).

¶12 To be entitled to attorneys' fees under the Partnership Agreement, Kemoseme's action must have been one to "enforce the terms, covenants and conditions" of the Partnership Agreement or an action for "any breach or default" of the Partnership Agreement. Kemoseme's complaint alleged fraud relating to a separate Settlement Agreement entered into six years after the Partnership Agreement, not the Partnership

Agreement itself. The complaint also alleged a violation of the Arizona Securities Act and sought a constructive trust, accounting, declaratory judgment, and punitive damages as well as asserting a claim for intentional interference with business relations. None of these claims involve the terms of or a breach of the Partnership Agreement.

¶13 The action also alleged that Busby and Battles breached fiduciary duties owed to Kemoseme. We need not determine whether these claims give rise to attorneys' fees under the Partnership Agreement because the single claim before the trial court was the request to appoint a receiver. As Defendants and the trial court acknowledged, this issue was separate and discrete from the remainder of the claims in the complaint. The sole issue before the trial court was not an action to enforce the terms of the Partnership Agreement or for any breach of that Agreement. Accordingly, we conclude that § 12.9 of the Partnership Agreement did not entitle Defendants to an award of their attorneys' fees related to the receivership proceeding.

¶14 Defendants next argue on appeal that they were entitled to attorneys' fees to the extent the fee award was based on Kemoseme's failure to abide by the arbitration requirement in the Partnership Agreement. They contend their

motions to compel arbitration justify the fee award pursuant to § 12.9 of the Partnership Agreement.

¶15 In their affidavits for attorneys' fees, Defendants included fees related to their motions to compel arbitration as part of their overall fee request. Defendants' combined fee request totaled \$117,716.50 and the trial court granted Defendants a combined fee award in the amount of \$81,993.00. It is unclear from the minute entry and judgments awarding Defendants their attorneys' fees what amount, if any, of the awarded fees related to the fees incurred in pursuing the arbitration proceedings. Although we have determined that Defendants were not entitled to a fee award for the receivership proceeding, they may nonetheless be entitled to the portion of their fees attributable to their successful motions to compel arbitration. Therefore, without expressing an opinion as to the merits of the matter, we remand for the trial court to determine whether Defendants are entitled to an award of the attorneys' fees related to the arbitration issue.

ATTORNEYS' FEES ON APPEAL

¶16 Defendants request an award of attorneys' fees on appeal for the same reasons argued in support of the fees awarded below. Because Defendants did not prevail on appeal, we deny their request.

CONCLUSION

¶17 For the foregoing reasons, we vacate the award of attorneys' fees to Defendants and remand for further proceedings.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Presiding Judge

/s/
JOHN C. GEMMILL, Judge