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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 07/31/2012  
RUTH A. WILLINGHAM,  
CLERK  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

THE GARDEN LAKES COMMUNITY ) No. 1 CA-CV 11-0283  
ASSOCIATION, an Arizona )  
nonprofit corporation, ) DEPARTMENT C  
)  
Plaintiff/Appellee, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
v. ) Rule 28, Arizona Rules of  
) Civil Appellate Procedure)  
JOSEPH ZIZLSPERGER and JUDY L. )  
ZIZLSPERGER, husband and wife, )  
)  
Defendants/Appellants. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. TJ2010-000251

The Honorable Benjamin E. Vatz, Judge Pro Tempore

**AFFIRMED**

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Maxwell & Morgan P.C. Mesa  
By Charles E. Maxwell  
Brian W. Morgan  
Paul R. Neil  
Attorneys for Plaintiff/Appellee

Weisberg & Meyers, LLC Phoenix  
By Marshall Meyers  
Aaron D. Radbil *pro hac vice*  
Attorneys for Defendants/Appellants

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**S W A N N**, Judge

¶1 Joseph and Judy Zizlsperger appeal the superior court's award of attorney's fees for services rendered by Garden Lakes Community Association's ("Garden Lakes") attorneys in response to the Zizlspergers' contentions that the attorneys violated the Fair Debt Collection Practices Act (the "FDCPA"). Finding no error, we affirm.

*FACTS AND PROCEDURAL HISTORY*

¶2 In October 2009, Garden Lakes sued the Zizlspergers for failure to pay their homeowners' association fees as required by the Covenants, Conditions, Restriction and Easements ("CC&Rs"). A default judgment (the "judgment") was entered against the Zizlspergers for \$318.73 in principal; \$600.00 in attorney's fees; and \$206.00 in costs. The Zizlspergers were further ordered to pay "all reasonable costs and attorney fees incurred by [Garden Lakes] . . . in collecting the amounts listed in this Judgment."<sup>1</sup>

¶3 In an effort to collect on the judgment, Garden Lakes served a writ of garnishment on Mr. Zizlsperger's employer. The Zizlspergers objected, claiming that Garden Lakes did "not have a valid Judgment against [them] or that the Judgment [had] been paid in full." After a hearing, the court affirmed the validity

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<sup>1</sup> Garden Lakes' CC&Rs also provided that "the Member shall be liable for all costs, including attorneys' fees and collection agency fees, which may be incurred by the Association in collecting the [delinquent assessments]."

of the writ of garnishment, but reduced the garnishment rate from 25% to 15%. At the time the writ of garnishment was served, the Zizlspergers owed a net balance of \$2,192.74 on the judgment.

¶14 On November 1, 2010, the Zizlspergers sent a letter accusing Garden Lakes' counsel of violating the FDCPA. The Zizlspergers proposed to settle the FDCPA claim for \$10,000 and an agreement from Garden Lakes' counsel to "cease all collection activities." Garden Lakes' counsel rejected the offer.

¶15 Over the next month, the Zizlspergers and Garden Lakes' counsel engaged in an extensive series of written and verbal communications over the validity of the Zizlspergers' accusations. On December 8, 2010, Garden Lakes moved to confirm the reasonableness of fees incurred pursuant to the judgment. Two days later, the Zizlspergers stated that they were no longer pursuing the FDCPA claim and withdrew their demand for \$10,000. In response to the motion to confirm, the Zizlspergers argued that Garden Lakes was not entitled to its requested fees because the fees were (1) excessive; (2) related to their good faith objections to the writ of garnishment; (3) related to Garden Lakes' counsel's own defense to the Zizlspergers' separate FDCPA claims; and (4) incurred in connection with assessments that were not the Zizlspergers' responsibility. The Zizlspergers

also stated that they still intended to sue regarding the alleged FDCPA violations.

¶16 The court held an oral argument, during which the Zizlspergers admitted that they had not yet filed a FDCPA claim. The court ruled that the

fees for services rendered in response to the FDCPA allegations [were] inextricably intertwined with services rendered in collecting upon the underlying judgment.

¶17 The court awarded Garden Lakes \$7,367.50 in attorney's fees and \$566.66 in post-judgment costs. The Zizlspergers timely appeal. We have jurisdiction pursuant to A.R.S. § 12-2101.

#### DISCUSSION

##### I. ENTITLEMENT TO FEES

¶18 We will not reverse an award of attorney's fees absent an abuse of discretion.<sup>2</sup> *Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, 265, ¶ 18, 99 P.3d 1030, 1035 (App. 2004). An abuse of discretion occurs when a court commits an error of law in the process of reaching a discretionary conclusion. *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 456, 652 P.2d 507, 529 (1982). We find no abuse here.

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<sup>2</sup> In reviewing a superior court's discretionary fee awards, we view the record in the light most favorable to sustaining the court's decision. *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 587, ¶ 31, 20 P.3d 1158, 1168 (App. 2001).

¶9 Relying on *Modular Mining Systems, Inc. v. Jigsaw Technologies, Inc.*, 221 Ariz. 515, 212 P.3d 852 (App. 2009), the Zizlspergers contend that Garden Lakes' attorney's fees for services rendered in responding to the FDCPA allegations were not recoverable because they were "separate and distinct" from those rendered collecting on the judgment.

¶10 In *Modular Mining Systems*, this court held that attorney's fees for defending against a tort claim are properly awarded under A.R.S. § 12-341.01(A) where the tort claim and contractual claim were inextricably interwoven. 221 Ariz. at 521-22, ¶¶ 22-23, 212 P.3d at 859-60. A tort claim and a contract claim are inextricably intertwined when they involve the same factual development and legal research. *Id.* at 522-23, ¶ 24, 212 P.3d at 860-61.

¶11 Unlike *Modular Mining Systems*, though, only one claim -- the contract claim -- is at issue here. Although we agree that FDCPA litigation would involve different factual development and legal research than the contract claim, the Zizlspergers admit that no FDCPA claim had been filed at the time of the hearing. Because no FDCPA claim was ever before any court, the analysis in *Modular Mining Systems* does not apply.<sup>3</sup>

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<sup>3</sup> The Zizlspergers did not file a FDCPA claim until July 12, 2011, more than four months after the court's decision. Any fees incurred in defending that action were therefore not part of the award at issue in this appeal.

Therefore, because the contract and the judgment only awarded fees incurred while collecting on the judgment, the court only had to determine whether the services rendered in responding to the Zizlspergers' accusations of FDCPA violations were sufficiently connected to those incurred in collecting on the judgment. Based on the record before it, the court had sufficient evidence to find the services were intertwined.

¶12 When the Zizlspergers suggested that Garden Lakes' counsel had violated the FDCPA, they proposed to settle the matter for \$10,000 if Garden Lakes "cease[d] all collection activities" (i.e., if Garden Lakes ceased enforcing the judgment). Garden Lakes rejected their offer. The Zizlspergers proceeded to make several inquiries as to the validity of the judgment and Garden Lakes' attempt to enforce it.<sup>4</sup> Garden Lakes answered each of these requests. These communications therefore were services rendered in an attempt to collect on the judgment. The Zizlspergers' attempt to identify which services related to the FDCPA does not change the outcome because no FDCPA claim was pending. Because the Zizlspergers continually challenged the judgment and Garden Lakes' efforts to collect on it, the court had a reasonable basis for awarding fees.

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<sup>4</sup> The court also referenced the Zizlspergers' motion to set aside the judgment, but no such motion is included in the record on appeal.

## II. REASONABLENESS OF FEE AWARD

¶13 The Zizlspergers next argue that the amount awarded was unreasonable. We review the amount of attorney's fees awarded for an abuse of discretion. *ABC Supply, Inc. v. Edwards*, 191 Ariz. 48, 52, 952 P.2d 286, 290 (App. 1996).

¶14 The judgment specifically awarded Garden Lakes "all reasonable costs and attorney fees incurred" collecting on the judgment. Garden Lakes' fee affidavit, as required, disclosed "the type of legal services provided, the date the service was provided, the attorney providing the service . . . and the time spent in providing the service." *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983). It also provided "sufficient detail to enable the court to assess the reasonableness of the time incurred." *Id.*

¶15 Because Garden Lakes established its entitlement to fees and met the minimum requirements in its application and affidavit, the burden shifted to the Zizlspergers to demonstrate the impropriety or unreasonableness of the requested fees. *State ex rel. Corbin v. Tocco*, 173 Ariz. 587, 594, 845 P.2d 513, 520 (App. 1992); see also *McDowell Mountain Ranch Cmty. Assoc. v. Simons*, 216 Ariz. 266, 270-71, ¶ 20, 165 P.3d 667, 671-72 (App. 2007) (after party seeking fees establishes prima facie entitlement to fees in the amount requested, party opposing fees must show they were clearly excessive). "[A]n opposing party

does not meet [that] burden merely by asserting broad challenges to the application. It is not enough . . . simply to state, for example, that the hours claimed are excessive and the rates submitted too high." *Tocco*, 173 Ariz. at 594, 845 P.2d at 520 (citation omitted).

¶16 The Zizlspergers only specifically challenged the fees for appearing at the garnishment hearing, and generally argued the remaining fees were unreasonable. The court denied fees for the garnishment hearing, but determined the majority of requested fees were reasonable. See *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 302, 681 P.2d 390, 454 (App. 1983) ("Where there is conflicting evidence as to disputed facts or the reasonable inferences to be drawn from those facts, this court has held it will not substitute its opinions for the findings of the trial court."). Because the Zizlspergers' "broad challenges to the application" failed to prove the fees were unreasonable, the court had sufficient grounds to award Garden Lakes' counsel its requested fees. See *Tocco*, 173 Ariz. at 594, 845 P.2d at 520. Although we may not have awarded all of the requested fees, we cannot say the court's ultimate decision "exceed[ed] the bounds of reason."



See *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985) (citation omitted).<sup>5</sup>

### III. ALLEGED CIRCUMVENTION OF THE FDCPA

¶17 Finally, the Zizlspergers argue the court erred when it awarded fees without finding that their FDCPA claim was brought in bad faith and for the purpose of harassment. See 15 U.S.C. § 1692k(a)(3) ("On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs."). Although the court awarded fees without making the finding set forth in § 1692k(a)(3), no such finding was required. As discussed above, no FDCPA claim was pending when the court issued its order.<sup>6</sup> The superior court therefore was not bound to follow the conditions set forth under § 1692k(a)(3) before awarding fees.

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<sup>5</sup> The Zizlspergers also claim, without citation to legal authority, that the court erred because it did not explain why it found the fees requested were reasonable. Here, the court "reviewed and considered" the fee affidavit, pleadings, and oral arguments before issuing its decision. The court's finding of reasonableness was sufficient. Arizona law does not require the court to define the concept of reasonableness in its order.

<sup>6</sup> Indeed, every case cited in support of the Zizlspergers' assertions involved a plaintiff who *had already* filed a FDCPA claim and not merely alleged FDCPA violations. See, e.g., *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699 (9th Cir. 2010); *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926 (9th Cir. 2007).

CONCLUSION

¶18 For the foregoing reasons, we affirm the court's award of attorney's fees. Because the Zizlspergers are not the successful party on appeal, we deny their request for attorney's fees. Garden Lakes has requested fees pursuant to Section 7.9 of the CC&Rs, the judgment, and ARCAP 21. Garden Lakes is the prevailing party on appeal and is thus entitled to its appellate fees and costs upon compliance with ARCAP 21. See A.R.S. § 12-341.01.

/s/

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PETER B. SWANN, Judge

CONCURRING:

/s/

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PATRICIA K. NORRIS, Presiding Judge

/s/

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DONN KESSLER, Judge