

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

SHANE OSTEN, *Plaintiff/Counter-Defendant/Appellee*,

v.

COLIN J. SCHROEDER, *et al.*, *Defendants/Counter-Claimants/Appellants*.

No. 1 CA-CV 16-0603
FILED 2-20-2018

Appeal from the Superior Court in Maricopa County
No. CV2013-015517
The Honorable Roger E. Brodman, Judge

AFFIRMED

COUNSEL

Murphy, Karber, Cordier, PLC, Phoenix
By Robert M. Karber
Counsel for Plaintiff/Appellee

Clark Hill, PLC, Scottsdale
By Robert G. Anderson, Ryan J. Lorenz
Counsel for Defendants/Appellants

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Paul J. McMurdie and Judge James B. Morse Jr. joined.

S W A N N, Judge:

¶1 Valerie Schroeder, Collin Schroeder, and the Schroeder Trust (collectively, the “Schroeders”) appeal the superior court’s denial of their application for attorney’s fees after the conclusion of litigation concerning quiet title claims, counterclaims, and a settlement agreement. Finding no abuse of discretion or error of law, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 This litigation arises from a dispute over easement rights on 153rd Way, a strip of land that abuts parcels of land owned by the Schroeders and Shane Osten.

¶3 The Schroeders claimed they had express and prescriptive easement rights over a twenty-five-foot strip on the western boundary of Osten’s portion of 153rd Way for ingress and egress. The Schroeders also claimed that they had a prescriptive easement over 153rd Way itself. On multiple occasions, Osten attempted to obstruct access to 153rd Way, denying the validity of the putative easement.

¶4 In April 2013, under A.R.S. § 12-1103(B), the Schroeders tendered Osten five dollars and requested that he execute a quitclaim deed acknowledging validity of the easement. After the parties unsuccessfully tried to resolve the dispute through counsel, the Schroeders tendered another five dollars, a quitclaim deed, and a demand letter asking that Osten execute the deed. Osten responded by questioning the validity of the easement and demanding that the Schroeders cease and desist from further use of his property. Osten also tendered three separate checks in the amount of five dollars each, and corresponding quitclaim deeds proclaiming that his parcel is not burdened with easement rights in favor of any of the Schroeders’ properties. The Schroeders responded with another demand letter, a quitclaim deed, and five dollars reasserting rights to an easement over 153rd Way.

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¶5 In November 2013, Osten filed a complaint against the Schroeders, who answered and asserted counterclaims. After 19 months of litigation in which the only judicial resolution was the temporary grant of a preliminary injunction to Osten, the parties entered settlement negotiations. Following five months of discussions and numerous draft agreements, the Schroeders became concerned after learning of Osten's efforts to sell his property ("parcel B") and asked opposing counsel what it would mean for the settlement agreement. Osten's counsel replied that he did not know why "Osten's efforts to [sell] . . . are relevant to this discussion" and that he had "no objection to proceeding with the litigation as scheduled."

¶6 On December 4, 2015, the court held a telephonic status conference concerning the settlement agreement. The Schroeders' counsel told the court, "[from] my perspective, the case is settled substantially" and a stipulation could follow in a matter of days. Osten's counsel agreed and stated that the parties were "so close to settlement." The court scheduled a status conference for January 2016 and stated, "if you file documentation regarding settlement, we'll vacate the hearing and it won't be necessary. In the event you have not reached a resolution . . . we can certainly make arrangements [for a three-day trial]."

¶7 On December 7, 2015, Osten sold his property. Three days later, the Schroeders questioned the practicality of a settlement agreement, given that Osten no longer has an interest in the subject property. The Schroeders filed a motion to dismiss Osten's claims for lack of standing. Osten moved to strike the Schroeders' motion and argued that the settlement agreement should be enforced.

¶8 In April 2016, the court ordered that the parties formalize the settlement agreement as previously exchanged, and that Osten attempt to obtain the written approval of the new owners of parcel B to any provision benefitting or encumbering their parcel within 30 days of the date of the order. In the event that Osten could not obtain the new owners' voluntary approval, the court forecast that it "would likely find that the settlement agreement reached on December 4, 2015 is unenforceable due to the failure of a material term."

¶9 In May 2016, the court ruled the settlement agreement unenforceable because Osten could not secure the new owners' approval. Both parties applied for attorney's fees and moved for entry of judgment. The Schroeders also filed a motion to dismiss the three counterclaims against Osten, which included a quiet title claim for an implied easement

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over and across the western portion of parcel B, a quiet title claim to the prescriptive easement across the same western portion of parcel B, and a declaratory judgment that utilities had terminated by prescription.

¶10 In August 2016, the court dismissed with prejudice the Schroeders' counterclaims against Osten, as an individual, and dismissed without prejudice the Schroeders' counterclaims against the property. The court also dismissed all of Osten's claims, "not on the merits - but on the undisputed fact that Osten does not have standing to bring any claims." As for attorney's fees, the court declined to award additional fees to either party.¹

¶11 In the court's ruling declining an award of fees, it found that the parties did not contemplate an award of fees in the settlement agreement and that their unreasonable behavior led to the litigation. The court also found that Osten's damage was "self-inflicted" because he sold his property before reaching a settlement agreement with the terms recorded and he was unable to bind the new property owners to the agreement. As for the Schroeders, the court determined that they were not "without responsibility for this debacle" because they "had second thoughts" about the settlement agreement, had used the sale of the property to back out of the agreement, and did not make an effort to make the case "go away" by trying to get the new owners of parcel B to agree. Based on the circumstances, the court held that neither party was the prevailing party and denied attorney's fees to both parties. The Schroeders appeal.

DISCUSSION

¶12 The Schroeders argue on appeal that the superior court (1) erred in denying an award of attorney's fees under § 12-1103(B) on the quiet title claims; (2) erred in declining to award attorney's fees under § 12-341.01 on the settlement litigation; and (3) erred in denying an award of attorney's fees under §§ 12-349 and 12-350.

¹ The court awarded the Schroeders \$501 in damages and \$4,140.50 for reasonable attorney's fees related to obtaining a judgment on a trespass claim. Neither the trespass claim nor associated attorney's fees are at issue on appeal.

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I. AS TO SCHROEDERS' COUNTERCLAIMS, BECAUSE THE SCHROEDERS VOLUNTARILY DISMISSED THEIR COUNTERCLAIMS, THERE IS NO RIGHT TO APPEAL THE DENIAL OF FEES.

¶13 Although the parties have not addressed the issue in their briefs, this court has a duty to review its jurisdiction and to dismiss the appeal if jurisdiction is lacking. *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304 (App. 1991). Generally, an appeal may arise only from a final judgment. *McMurray v. Dream Catcher USA, Inc.*, 220 Ariz. 71, 74, ¶ 4 (App. 2009). A voluntary dismissal without prejudice is not a final, appealable order. *Kool Radiators, Inc. v. Evans*, 229 Ariz. 532, 534-35, ¶¶ 8, 10 (App. 2012). Section 12-2101 does not confer upon the court of appeals the authority "to review an order awarding attorney's fees made in conjunction with a dismissal of a complaint without prejudice." *Id.*

¶14 Here, the Schroeders moved to voluntarily dismiss counts one through three of their counterclaim. Two of the claims, which are a subject of this appeal, were for quiet title over 153rd Way. The court dismissed the Schroeders' counterclaims "without prejudice on the merits" and "any individual claim against Osten . . . dismissed with prejudice." Because the Schroeders' quiet title claims were against the property and were dismissed without prejudice, they are not final judgments from which the Schroeders can appeal. Accordingly, we do not address the Schroeders' request for attorney's fees for those counterclaims.

II. THE COURT DID NOT ERR IN DENYING AN AWARD OF ATTORNEY'S FEES UNDER A.R.S. § 12-1103(B).

¶15 The sole quiet title action left for this court to consider for purposes of attorney's fees relates to Osten's claim for quiet title over 153rd Way. The Schroeders argue that the court erred in denying their application for attorney's fees on the remaining quiet title claim. We disagree. To recover attorney's fees in a quiet title action, a party must fulfill all requirements set forth in § 12-1103(B). *Long v. Clark*, 226 Ariz. 95, 96, ¶ 5 (App. 2010). Under § 12-1103(B), 20 days before a quiet title action, the putative plaintiff must request that the putative defendant execute a quitclaim deed and tender five dollars for the execution and delivery of the deed.² The purpose of this statute is "to mitigate the burden of the expense

² There is no dispute that the Schroeders fulfilled the preliminary requirements for attorney's fees under § 12-1103(B) by requesting that Osten execute a quitclaim deed and by tendering five dollars.

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of litigation to establish a just claim or defense.” *Mariposa Dev. Co. v. Stoddard*, 147 Ariz. 561, 565 (App. 1985).

¶16 The prevailing party who fulfills the statutory requirements may be awarded attorney’s fees under § 12-1103(B). *Scottsdale Mem’l Health Sys. Inc. v. Clark*, 164 Ariz. 211, 215 (App. 1990) (holding that in determining whether to award attorney’s fees in a quiet title action under § 12-1103(B), the court may consider the same factors that are considered in awarding attorney’s fees under § 12-341.01 in an action arising under contract). The court has full discretion to determine who is the successful party for purposes of awarding attorney’s fees. *Kaman Aerospace Corp. v. Ariz. Bd. of Regents*, 217 Ariz. 148, 157, ¶ 35 (App. 2007) (construing § 12-341.01). We review a denial of attorney’s fees for abuse of discretion and will not disturb the superior court’s ruling, as long as there is a reasonable basis in the record upon which the superior court could have denied attorney’s fees. *Scottsdale Mem’l*, 164 Ariz. at 216.

¶17 Here, Osten sold his property before the claims were resolved and thereby voluntarily divested himself of standing to litigate the claims. As a result, the court dismissed all of Osten’s claims “not on the merits – but on the undisputed fact that Osten does not have standing to bring any claims.” Because there was no determination regarding the merits of the claims, the court could properly conclude that there was no prevailing party. The court therefore did not abuse its discretion by denying an award of attorney’s fees. *See Baseline Fin. Servs. v. Madison*, 229 Ariz. 543, 546, ¶ 17 (App. 2012) (declining to award attorney’s fees under § 12-341.01 when summary judgment was reversed and the matter was remanded, meaning that neither party had yet prevailed on the merits).

III. THE COURT DID NOT ERR IN DENYING AN AWARD OF ATTORNEY’S FEES UNDER A.R.S. § 12-341.01.

¶18 The Schroeders contend that the court erred in denying their request for attorney’s fees under § 12-341.01. We reject this argument. Section 12-341.01 applies to actions arising out of contract and is generally inapplicable to statutory causes of action. *Midtown Med. Group v. Farmers Ins. Group*, 235 Ariz. 593, 596, ¶ 17 (App. 2014). Quiet title is a statutory cause of action and the exclusive basis for the recovery of attorney’s fees arises in such actions under § 12-1103(B). *Chuk v. Katich*, 27 Ariz. 182, 184 (1925); *Lange v. Lotzer*, 151 Ariz. 260, 261 (App. 1986). Our Legislature has set forth specific requirements for an award of fees in quiet title actions, and § 12-341.01 cannot serve as a “ubiquitous fountain of relief” when the specific statutory requirements are not met. *Lange*, 151 Ariz. at 262. Because

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the claims in this case did not arise out of contract and there is an alternative statutory basis for relief for a quiet title action, such as the one herein, the court correctly denied attorney's fees under § 12-341.01.

¶19 Even if § 12-341.01 applied to the request for attorney's fees arising out of the dispute over the purported settlement agreement, we would find no abuse of discretion. See *Tucson Estates Prop. Owners Ass'n v. McGovern*, 239 Ariz. 52, 54, ¶ 7 (App. 2016) ("We generally review the denial of attorney fees [under § 12-341.01] for an abuse of discretion . . ."). "[A] trial court exercises its broad discretion to determine whether a party was successful in the litigation [for purposes of § 12-341.01]." *Hall v. Read Dev., Inc.*, 229 Ariz. 277, 279, ¶ 7 (App. 2012). Here, the court found that both parties "took unreasonable actions," the parties could have "resolved [the litigation] in December 2015," and neither party "prevailed in all respects." We recognize that while the Schroeders may have prevailed on a trespass claim and Osten temporarily on a preliminary injunction, it was within the court's discretion to decide that neither party prevailed.

IV. THE COURT DID NOT ERR IN DENYING AN AWARD OF ATTORNEY'S FEES UNDER A.R.S. §§ 12-349-50.

¶20 The Schroeders next argue that the court erred in denying attorney's fees under §§ 12-349-50. We disagree. There is a basis for an award of attorney's fees under § 12-349 when the action is groundless, harassing, and is not made in good faith. *Phoenix Newspapers, Inc. v. Dep't of Corrs.*, 188 Ariz. 237, 243 (App. 1997). Section 12-350 governs the computation of an award under § 12-349 and requires the court "set forth specific reasons for the award."

¶21 The court did not cite § 12-349 in its order denying fees. But it made ample findings revealing its judgment that both sides had acted unreasonably in pursuing the case, and those findings alone are sufficient to support the denial of fees on any discretionary basis, including § 12-349. Therefore, we discern no error.³

³ The Schroeders concede that they "ordered less than a complete transcript of all Superior Court proceedings." We are required to assume that the missing portions of the record support affirmance. *Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995).

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CONCLUSION

¶22 For the reasons set forth above, we affirm. In the exercise of our discretion, we deny both parties' requests for attorney's fees on appeal.



AMY M. WOOD • Clerk of the Court
FILED: AA