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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JACOB GITMAN, *Plaintiff/Appellant*,

v.

PATRICK SIMPSON, et al., *Defendants/Appellees*.

No. 1 CA-CV 20-0536
FILED 5-11-2021

Appeal from the Superior Court in Maricopa County
No. CV2019-009187
The Honorable Michael W. Kemp, Judge

VACATED AND REMANDED

COUNSEL

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By Logan V. Elia and Olen Lenets
Counsel for Plaintiff/Appellant

Law Offices of Paul Weich, Tempe
By Paul M. Weich
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge Paul J. McMurdie delivered the Court's decision, in which Judge Cynthia J. Bailey and Judge Lawrence F. Winthrop joined.

M c M U R D I E, Judge:

¶1 Jacob Gitman appeals the superior court's award of attorney's fees under A.R.S. § 12-349 jointly against Gitman and his counsel. Because the court failed to make the specific findings required by A.R.S. § 12-350, we vacate the court's order granting attorney's fees and remand for additional findings.

FACTS AND PROCEDURAL BACKGROUND

¶2 In October 2019, Gitman filed a complaint in Maricopa County alleging defamation and seeking a declaratory judgment against several defendants. As relevant to this appeal, Gitman asserted claims against: (1) Patrick Simpson, author of an allegedly defamatory article, (2) Morningside Mortgage, an allegedly inactive Florida corporation that owned the website where the article was published, (3) Grant Stern and Richard Sragowicz, officers of Morningside Mortgage, (4) the website thesternfacts.com *in rem*, and (5) John Doe, an unidentified person or entity (collectively "Appellees"). The complaint alleged Simpson had authored an article on thesternfacts.com defaming Gitman and that the other defendants had authored, edited, or posted the defamatory claims from the article on various sites across the internet. The unidentified John Doe defendant was alleged to have provided monetary inducement, compensation, or assistance to facilitate the defamation. Gitman also alleged that he owned property, conducted business, and was attempting to open an aluminum smelting plant in Arizona. The defamatory statements were allegedly directed at and had impaired and impeded his business interests in Arizona.

¶3 In response to the complaint, Appellees moved to dismiss, claiming, *inter alia*, (1) the court did not have personal jurisdiction over the defendants, (2) Maricopa County was not the appropriate venue for the action, and (3) the complaint failed to state a claim. Appellees also sought attorney's fees under A.R.S. § 12-349, claiming the action was commenced without substantial justification or solely or primarily for delay or

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harassment. Appellees argued that Gitman's complaint itself demonstrated that it lacked substantial justification and was designed to harass. They claimed Gitman selected the least convenient venue to bring the action and alleged, without providing evidence, that Simpson intentionally tried to harm Gitman's Arizona business interests. They also argued that Gitman's belief that an unidentified "John Doe" asked Simpson to write the article to harm Gitman's Arizona project "sheds light on the harassing nature of [the] groundless Complaint that [was] not made in good faith."

¶4 In response, Gitman argued in part that personal jurisdiction could be appropriately exercised over Appellees because they had purposefully availed themselves of the privilege of conducting business in Arizona by using an Arizona web hosting service to register thesternfacts.com.

¶5 The superior court dismissed the complaint for lack of personal jurisdiction and improper venue under Arizona Rules of Civil Procedure 12(b)(2) and (3) but did not find sufficient grounds to dismiss for failure to state a claim under Rule 12(b)(6). The court concluded Gitman had failed to make a prima facie case for personal jurisdiction after it determined that the defendants' responsibility for an article posted to a website registered in Arizona was the only contact they had in the state. The court also addressed Gitman's claim that Simpson had directed his defamatory remarks at Arizona. The court explained:

The article makes no mention of the aluminum plant or the State of Arizona or Maricopa County. There is no evidence Defendants were even aware of Plaintiff seeking to build an aluminum plant in Arizona. No applications had been submitted by Plaintiff to build the plant at the time the article was posted.

¶6 The court also found independent grounds to dismiss the claim for improper venue under Rule 12(b)(3) and *forum non conveniens*. The court explained that Florida was a more convenient forum for the action because Gitman and all but one of the defendants resided there. The court further explained that, in Arizona, La Paz County was a more appropriate forum than Maricopa because La Paz is where Gitman had proposed to open the aluminum smelting plant.

¶7 The court did not dismiss for failure to state a claim after it concluded that although Gitman was unlikely to prevail at trial, it was not

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inconceivable that some relief could be granted. Later, the court awarded attorney's fees jointly against Gitman and his counsel, stating:

The Court has reviewed Defendants' Application For Attorney's Fees, Expenses and Sanctions, Plaintiff's Response and Defendants' Reply.

In light of the Court's ruling on April 1, 2020, the Court will award attorney's fees (\$8,800.00) and costs (\$284.18) for a total of \$9,084.18 pursuant to A.R.S. § 12-349(1). The Court specifically finds the Complaint was filed without substantial justification. However, the Court, in its discretion will not order any additional damages.

Even without a finding under A.R.S. § 12-349(1), Defendants were the prevailing party when the Court granted the Motion to Dismiss and are entitled to attorney's fees and costs. The award is jointly against Plaintiff[] and Plaintiff's counsel with an interest rate of 4.25.¹

¶8 Gitman moved for reconsideration, arguing in part that the fee award was not supported by sufficient findings and was partly premised on an inaccurate statement of the law. He also argued there was ample precedent to support his belief that the superior court would exercise jurisdiction over thesternfacts.com *in rem* and against John Doe, who he claimed may be an Arizona resident.

¶9 Also, Gitman argued he was justified in bringing his claim in Arizona because, in *Calder v. Jones*, 465 U.S. 783, 785–86, 89–90 (1984), the United States Supreme Court upheld a California court's exercise of personal jurisdiction over a defendant who, acting in Florida, knowingly caused an injury in California. In support of this argument, Gitman attached several tweets posted to the internet by Simpson in which he repeated the article's claims about Gitman while tagging Arizona newspapers and addressing Arizonans.

¹ Gitman correctly points out that Appellees were not entitled to fees as the prevailing party in a defamation action. *See DVM Co. v. Stag Tobacconist, Ltd.*, 137 Ariz. 466, 468 (1983) ("It is a generally accepted rule that attorney's fees are not recoverable unless they are expressly provided for either by statute or contract."); *Bank of New York Mellon v. Dodev*, 246 Ariz. 1, 11, ¶ 35 (App. 2018).

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¶10 The court denied Gitman’s motion for reconsideration and entered a final judgment under Rule 54(c). Gitman appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶11 We view the evidence in a manner most favorable to sustaining an attorney’s fees award under A.R.S. § 12-349. *Phx. Newspapers, Inc. v. ADOC*, 188 Ariz. 237, 243 (App. 1997). “Under A.R.S. § 12-349(A)(1), the superior court ‘shall’ award reasonable attorney fees against an attorney or party who ‘[b]rings or defends a claim without substantial justification.’ A claim lacks substantial justification when it is groundless and not made in good faith.” *Goldman v. Sahl*, 248 Ariz. 512, 531, ¶ 66. (App. 2020) (alteration in original) (citing A.R.S. § 12-349(F)). We will affirm the superior court’s finding that a claim lacked substantial justification so long as it is not clearly erroneous. *Id.* at ¶ 65. But “the application of the fee statute is a question of law subject to de novo review.” *Phx. Newspapers*, 188 Ariz. at 244.

¶12 Before attorney’s fees can be awarded under A.R.S. § 12-349(A)(1), the party requesting the fees is required to establish two elements by a preponderance of the evidence. First, their opponent’s claim or defense was groundless, and second, it was made in bad faith. *Phx. Newspapers*, 188 Ariz. at 244 (determining preponderance-of-the-evidence standard applied to a prior version of A.R.S. § 12-349). “Groundlessness” is assessed by an objective standard – whether a reasonable person would view the claim or defense as groundless. *Gilbert v. Bd. of Med. Examiners*, 155 Ariz. 169, 180 (App. 1987). But a litigant’s “good faith” is subjective. The court must determine “whether the particular litigant was aware that a particular pleading should not have been brought.” *Id.*

¶13 The court is required to set forth the specific reasons for an award of attorney’s fees and must make appropriate findings of fact and conclusions of law to support each element. *Fisher ex rel. Fisher v. Nat’l Gen. Ins.*, 192 Ariz. 366, 370, ¶ 13 (App. 1998). Courts “must be careful in administering § 12-349 and similar statutes not to discourage the assertion of fairly debatable positions.” *Lynch v. Lynch*, 164 Ariz. 127, 132–33 (App. 1990). Section 12-350 provides:

In awarding attorney fees pursuant to § 12-349, the court shall set forth the specific reasons for the award and may include the following factors, as relevant, in its consideration:

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1. The extent of any effort made to determine the validity of a claim before the claim was asserted.
2. The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid.
3. The availability of facts to assist a party in determining the validity of a claim or defense.
4. The relative financial positions of the parties involved.
5. Whether the action was prosecuted or defended, in whole or in part, in bad faith.
6. Whether issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict.
7. The extent to which the party prevailed with respect to the amount and number of claims in controversy.
8. The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court.

¶14 Gitman argues that the superior court erred by failing to make specific findings as required by A.R.S. § 12-350. A court is not required to address the factors enumerated under A.R.S. § 12-350, but its findings must be specific enough to allow a reviewing court to test the validity of the judgment. *Rogone v. Correia*, 236 Ariz. 43, 50, ¶ 22 (App. 2014).

¶15 Here, the superior court's findings in support of the award merely recited the standard that "the Complaint was filed without substantial justification." The court did not explicitly state that the claim was both groundless and not made in good faith and did not identify any evidence relied upon in forming its conclusion.

¶16 Appellees argue the superior court's bare-bones finding complies with A.R.S. § 12-349 and that the very same finding was upheld as sufficient in *Harris v. Rsrv. Life Ins. Co.*, 158 Ariz. 380, 382-83 (App. 1988). However, in *Harris*, the appeal concerned the sufficiency of the evidence supporting a fee award rather than the specificity of the court's findings. *Id.* at 383. There, the court held that sufficient evidence existed for an award under A.R.S. § 12-349 when it was revealed in a deposition that the plaintiff,

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a life insurance beneficiary, had been aware before filing the claim that the insured had misrepresented his existing liver condition on his insurance application. *Harris*, 158 Ariz. at 381–83. The case is inapposite here.

¶17 Our supreme court has acknowledged the heightened findings requirements imposed by A.R.S. § 12-350. *State v. Richey*, 160 Ariz. 564, 565 (1989). In *Richey*, the supreme court considered an award made under another fee award statute that, unlike A.R.S. § 12-350, did not explicitly require specific findings. 160 Ariz. at 564–65. At the time, the statute provided that “[r]easonable attorney’s fees shall be awarded by the court in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and not made in good faith.” A.R.S. § 12-341.01(C) (1978). The court recognized the potential for overlap between awards made under A.R.S. § 12-341.01(C) and -349 and held that findings supporting an award of fees under A.R.S. § 12-341.01(C) should be held to the same specificity requirements as those made under A.R.S. § 12-349. *Richey*, 160 Ariz. at 565. The court ultimately concluded that the superior court’s “simple finding that the defendant’s defense was frivolous” was insufficient to support an award under A.R.S. § 12-341.01(C). *Id.* (quotations omitted).

¶18 “Proper specific findings of fact and conclusions of law that demonstrate the application of the statute’s language greatly assist an appellate court on review.” *Richey*, 160 Ariz. at 565. Under A.R.S. § 12-350, the court need not detail each fact that supports its ruling but must identify the basis for finding that the claim or defense was both groundless and *not made in good faith*. See, e.g., *James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot.*, 177 Ariz. 316, 320, n.5 (App. 1993) (findings were specific enough for review when the court found that defendants’ general denial was made with no valid reason and to cause unnecessary delay resulting in a needless increase in the cost of litigation to the plaintiff, but reviewing court encouraged trial courts to “make more detailed findings to assist us in conducting our review on appeal”); *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, 421–22, ¶¶ 29–30 (App. 2010) (findings were specific enough to allow for review when the court found that plaintiff’s claims were “in the nature of harassment” and that he had unreasonably expanded the proceedings by failing until the time of trial to notify the parties of the claims or defenses he was no longer pursuing).

¶19 This case illustrates the importance of sufficient factual findings. Without requiring the fee award’s proponents to present any evidence, the court implicitly found that they had met their burden to prove that the complaint was groundless and made in bad faith. This finding came

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after the court explicitly concluded that the complaint did not fail to state a claim, and so the sanction must have been based upon Gitman's choice of forum and venue. Bad faith can be inferred from circumstantial evidence, *Boone v. Superior Court*, 145 Ariz. 235, 240 (1985), but to comply with the specific-findings requirement, the court must at least identify the evidence it has relied upon to conclude that the litigant acted in subjective bad faith. The superior court made no findings concerning Gitman or his counsel's subjective bad faith, impeding our review for clear error. The superior court erred by failing to make specific findings as required under A.R.S. § 12-350. We, therefore, vacate the court's order awarding attorney's fees.²

CONCLUSION

¶20 We vacate the superior court's award of attorney's fees and remand for further proceedings consistent with this decision.



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

² Because we conclude the superior court's findings were insufficient under A.R.S. § 12-350, we need not address Gitman's remaining arguments regarding the sufficiency of the evidence supporting the award.