DIVISION ONE
FILED: 10/18/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

J. MICHAEL and MELISSA VASSALLO, husband and wife, Plaintiffs/Appellees, v. GFA WEALTH DESIGN, LLC, an Arizona limited liability company, Defendant/Appellant.	No. 1 CA-CV 10-0740 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-051745

The Honorable Stephen J. P. Kupiszewski, Judge *Pro Tempore*

REVERSED; REMANDED

J. Michael and Melissa Vassallo — Peoria
Appellees *In Propria Persona*

Cavanagh Law Firm — Phoenix
By David A. Selden
Jodi Bohr
Taylor C. Young
Attorneys for Defendant/Appellant

J O H N S E N, Judge

¶1 GFA Wealth Design, L.L.C. ("GFA"), appeals from the superior court's judgment enforcing a settlement agreement with J. Michael and Melissa Vassallo.[1] For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

¶2 Mr. Vassallo ("Vassallo") was an employee of GFA from 2006 to 2008, when GFA terminated him. Vassallo and his wife sued GFA, alleging breach of contract, breach of the covenant of good faith and fair dealing, statutory treble damages and unjust enrichment. GFA counterclaimed, alleging breach of fiduciary duty, breach of duty of loyalty and misappropriation of trade secrets.

¶3 At a court-ordered settlement conference, the parties agreed to settle the claims and counterclaims by a payment by GFA to the Vassallos of $15,000. When it came time to document their settlement agreement, however, they could not agree on the tax treatment of the $15,000 settlement payment.

¶4 The Vassallos filed a Motion to Compel/Enforce Settlement Agreement, in which they argued that the parties

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[1] The Vassallos filed no answering brief on appeal. We could consider this a confession of error. *Thompson v. Thompson*, 217 Ariz. 524, 526, ¶ 6, n.1, 176 P.3d 722, 724 (App. 2008). In an exercise of our discretion, however, we will decide the appeal on its merits. *See Gibbons v. Indus. Comm'n*, 197 Ariz. 108, 111, ¶ 8, 3 P.3d 1028, 1031 (App. 1999).

specifically discussed the issue of tax withholding during the settlement conference and agreed that the $15,000 settlement amount would not be subject to tax withholding. GFA responded, asserting that tax liability was not discussed at the settlement conference. GFA argued the law required it to withhold federal and state taxes from whatever portion of the settlement was designated as "wages."

¶5 After oral argument, the superior court granted the motion and ordered GFA to tender the full $15,000. The court also awarded attorney's fees to the Vassallos. GFA timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (2011).

DISCUSSION

A. Standard of Review.

¶6 When the superior court grants a motion to enforce a settlement agreement based on the arguments of counsel and the evidence in the record, it effectively is granting summary judgment on "the existence and terms" of the settlement agreement. *Canyon Contracting Co. v. Tohono O'Odham Hous. Auth.*, 172 Ariz. 389, 390, 837 P.2d 750, 751 (App. 1992); *see also Perry v. Ronan*, 225 Ariz. 49, 52, ¶ 7, 234 P.3d 617, 620 (App. 2010). Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party

is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). In reviewing entry of summary judgment, we review *de novo* whether any genuine issues of material fact exist and whether the superior court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000).

B. GFA's Obligation to Withhold Taxes.

¶7 GFA argues the settlement amount constituted payment of wages from which it was required to withhold taxes. It correctly argues that employers are required to withhold applicable taxes from wages, 26 U.S.C. § 3402(a)(1) (2006), and can face liability if they fail to do so, 26 U.S.C. § 3403 (2006) ("The employer shall be liable for the payment of the tax required to be deducted and withheld . . . .").

¶8 In *Rivera v. Baker West, Inc.*, 430 F.3d 1253 (9th Cir. 2005), the Ninth Circuit held a settlement payment that constituted "back pay" was subject to tax withholding. *Id.* at 1258-60. In that case, a former employee sued his former employer for racial discrimination in employment in violation of Title VII of the 1964 Civil Rights Act. *Id.* at 1255. After a settlement conference, the parties agreed to settle the case for a sum "less all lawfully required withholdings." *Id.* When the employer withheld federal and state taxes from the entire

settlement amount, however, the employee objected. *Id.* at 1255-56.

¶9 On appeal, the *Rivera* court noted that under the Internal Revenue Code, "wages" include "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash," subject only to specific exclusions. *Id.* at 1258 (quoting 26 U.S.C. § 3121(a) (1998)). The court concluded that because the settlement payment was for back pay, it constituted wages subject to tax withholding by the employer. *Id.*

¶10 Under *Rivera*, therefore, to the extent the payment GFA and the Vassallos agreed upon constitutes "wages," GFA is required to withhold state and federal taxes from the payment.

C. Genuine Issues of Material Fact Exist Concerning the Portion of the Settlement Representing Lost Wages and Whether the Payment Was to Be Reduced by the Amount Required to Be Withheld for Taxes.

¶11 In their motion to enforce the settlement agreement, the Vassallos argued that because the settlement payment did not constitute wages, no withholding was required. In response, GFA pointed out that the complaint had prayed for wages and commissions allegedly due Vassallo. GFA represented that it had offered to designate some of the settlement payment as attorney's fees and to characterize two-thirds of the remainder as a statutory penalty. *See* A.R.S. § 23-355 (2011). GFA stated

that the Vassallos had ignored its offer to withhold taxes only from the remaining portion of the settlement.

¶12 We agree that, because the Vassallos' complaint sought compensation for lost wages and other compensation, some portion of the settlement payment may be properly characterized as payment of wages for purposes of tax withholding. *See generally United States v. Burke*, 504 U.S. 229, 237 (1992) (in determining the characterization of a settlement payment for tax purposes, the inquiry should focus on the nature of the underlying claim) *superseded by statute on other grounds*, Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605, 110 Stat. 1838*; Rivera*, 430 F.3d at 1257 (when settlement agreement does not specify the purpose of the payment, court looks to payor's intent to classify settlement payment for tax purposes); *Domeny v. Comm'r*, 99 T.C.M. (CCH) 1047, at *4 (2010) (when the "purpose of the compensation" is ambiguous, courts look to the "intent of the payor"). In this case, GFA and the Vassallos did not ask the superior court to decide what portion of the settlement payment represented wages, and it did not do so.

¶13 As for how GFA's withholding obligation with respect to the amount of the settlement that constitutes wages was to be satisfied, there was a genuine issue of material fact in the record before the superior court. The Vassallos claimed that the parties discussed tax withholding at the settlement

conference and specifically agreed that GFA would not withhold any taxes from the $15,000 payment. *See generally Dashnaw v. Pena*, 12 F.3d 1112, 1116 (D.C. Cir. 1994) (per curiam) (rejecting employee's argument that employer was required to "gross up" his backpay award to cover required withholding) *superseded in part on other grounds*, 29 U.S.C. § 633a(d) (2006). GFA presented evidence that there was no discussion about taxes at the settlement conference.

¶14 Because material issues of fact exist both with respect to the amount of the settlement that constituted wages and how GFA's withholding obligation was to be satisfied under the settlement agreement, the superior court erred by entering judgment in the Vassallos' favor. *See* Ariz. R. Civ. P. 56(c); *Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987) ("Where material facts concerning the existence or terms of an agreement to settle are in dispute, the parties must be allowed an evidentiary hearing." (emphasis omitted)), *cited with approval in Brake Masters Sys., Inc. v. Gabbay*, 206 Ariz. 360, 365, ¶ 13, 78 P.3d 1081, 1086 (App. 2003).[2]

¶15 Accordingly, we reverse the judgment and remand for further proceedings, including a determination of the amount of

[2] We see nothing in the record to indicate that at any time since the settlement conference either side has argued the conference did not result in a settlement. Whether the dispute over withholding means the parties did not agree on the material terms of a settlement therefore is not before us.

the settlement that should be characterized as wages and the parties' agreement (if any) on how GFA's withholding obligation should be satisfied.

D. Attorney's Fees Issues.

¶16 Because we are reversing the judgment in favor of the Vassallos, we likewise reverse the attorney's fees award in their favor. Nevertheless, we will address certain legal issues GFA raises with respect to the fees award because those issues may arise on remand.

¶17 GFA argues the court erred by awarding fees to the Vassallos because they did not submit to the court a copy of their fee agreement with their counsel. A party seeking attorney's fees need not provide the court with a copy of the retainer agreement; it need only offer proof, by affidavit or otherwise, of the terms of the agreement. *See State v. Mecham*, 173 Ariz. 474, 485, 844 P.2d 641, 652 (App. 1992) ("The application for fees should set out the agreed hourly billing rate so that the opposing party can challenge the reasonableness of that fee."); *Jerman v. O'Leary*, 145 Ariz. 397, 403, 701 P.2d 1205, 1211 (App. 1985); *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983).

¶18 GFA also argues that computerized research costs are not recoverable as taxable costs. Although computerized research costs do not constitute a taxable cost pursuant to

A.R.S. § 12-341 (2011), they may be recovered as an element of an attorney's fees award. *Ahwatukee Custom Estates Mgmt. Ass'n v. Bach*, 193 Ariz. 401, 404, 973 P.2d 106, 109 (1999).

CONCLUSION

¶19 We reverse the judgment and remand for further proceedings consistent with this decision. We deny GFA's request for its attorney's fees on appeal because it cites no legal authority for such an award. *See Ezell v. Quon*, 224 Ariz. 532, 539, ¶¶ 30-31, 233 P.3d 645, 652 (App. 2010) (a request for attorney's fees on appeal "must state the claimed basis for the award"). We do award GFA its costs of appeal, however, contingent on its compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Judge

/s/
PATRICIA K. NORRIS, Judge