

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11/03/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOHN VAN SICKLE,) 1 CA-CV 11-0008
)
Plaintiff/Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication
) - Rule 28, Arizona
R.H. SERVICES, L.L.C.,) Rules of Civil
) Appellate Procedure)
Defendant/Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-019607

The Honorable J. Kenneth Mangum, Judge

AFFIRMED

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By Joseph J. Glenn
Attorneys for Plaintiff/Appellee

Tempe

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By G. David DeLozier, Jr.
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Cave Creek

N O R R I S, Judge

¶1 This timely appeal arises out of a commercial lease dispute between tenant, defendant/appellant R.H. Services, L.L.C., and landlord, plaintiff/appellee John Van Sickle. Emphasizing it won in court-ordered arbitration and the landlord

subsequently stipulated to dismiss his superior court appeal with prejudice,¹ thus recovering nothing, tenant argues the superior court should have found it to be the successful party under Arizona Revised Statutes ("A.R.S.") § 12-341.01 (2003)² and awarded it attorneys' fees.

¶2 A superior court has considerable discretion to determine which party is successful under A.R.S. § 12-341.01. *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 572, ¶ 25, 155 P.3d 1090, 1096 (App. 2007). Here, we see no abuse of discretion and thus affirm the superior court's refusal to award fees to tenant. *Id.* (reviewing successful-party finding for abuse of discretion).

¶3 Although the arbitrator awarded fees to tenant, appeals from arbitration are de novo. Ariz. R. Civ. P. 77(c). After tenant's motion for summary judgment and landlord's response -- raising issues including unpaid rent, damage to the property, and the effect of the use of a portion of the security deposit -- the superior court denied tenant's motion, finding genuine issues of material fact. Thus, when the parties elected to stipulate to the dismissal of landlord's claims, their

¹The stipulation explicitly left open the issue of which party would be responsible for attorneys' fees and costs.

²Although the parties use the term "prevailing" party, we note A.R.S. § 12-341.01(A) permits an award of attorneys' fees and costs to the "successful" party.

respective rights and obligations under the lease had yet to be determined. In a practical sense, each had experienced one win and one loss, and there was no net winner. Although we agree with tenant a party can be successful under A.R.S. § 12-341.01 even if it does not succeed on the merits, see *Fulton Homes*, 214 Ariz. at 572, ¶ 24, 155 P.3d at 1096, under these circumstances the superior court did not abuse its discretion in determining neither party succeeded and declining to award fees and costs under A.R.S. § 12-341.01.³

¶4 Tenant raises two other arguments, neither of which is properly before us.

¶5 First, tenant asserts it was entitled to fees under Arizona Rule of Civil Procedure ("Rule") 77(f). Rule 77(f) permits an attorneys' fees award when a party appealing an arbitration award does not achieve a result at least 23% more favorable than the award. Although, in requesting fees, tenant noted it had succeeded in arbitration, this passing reference did not constitute a request for fees under Rule 77(f). If

³On appeal, tenant suggests it was entitled to a fee award because it may have been rendered insolvent due to the litigation costs it incurred in the superior court. In the superior court, however, tenant took contradictory positions regarding insolvency -- first asserting, "it is [tenant's] position that it is not insolvent, and is a going concern," then asserting, "[landlord] has [tenant] on the brink of insolvency based on [landlord] making [tenant] expend money to defend a frivolous claim."

tenant intended to seek fees under Rule 77(f), it needed to make that request clear, so landlord would have an opportunity to raise the hardship defenses recognized under the Rule. Ariz. R. Civ. P. 77(f) ("court shall order . . . the appellant pay . . . costs and fees unless the court finds on motion that the imposition of the costs and fees would create such a substantial economic hardship as not to be in the interests of justice."). Tenant therefore waived the issue, and we decline to address it on appeal. See *Hamm v. Y & M Enters.*, 157 Ariz. 336, 338, 757 P.2d 612, 614 (App. 1988).

¶16 Second, tenant asserts an attorneys' fees award was mandatory under the lease. Although tenant raised this argument in the superior court, it waived the argument in this appeal by asserting it for the first time in its reply brief. See *Dawson v. Withycombe*, 216 Ariz. 84, 111, ¶ 91, 163 P.3d 1034, 1061 (App. 2007). Even if we were to address this issue, the lease provides an award of fees to the "prevailing party," and, as discussed above, the superior court explicitly found neither party had succeeded.

¶17 For the foregoing reasons, we affirm the superior court's order denying attorneys' fees to tenant. As the successful party in this appeal, landlord is entitled to recover

his costs, subject to his compliance with Arizona Rule of Civil Appellate Procedure 21(c). See A.R.S. § 12-342(A) (2003).

 /s/
PATRICIA K. NORRIS, Judge

CONCURRING:

 /s/
MICHAEL J. BROWN, Presiding Judge

 /s/
PHILIP HALL, Judge