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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 02/28/2012
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CLAUDE SHARPENSTEEN, III,) No. 1 CA-CV 11-0265
)
Plaintiff/Appellant,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
CITIZENS TITLE & TRUST,) Rule 28, Arizona Rules
) of Civil Appellate
Defendant/Appellee.) Procedure)
)

Appeal from the Superior Court in Yuma County

Cause No. S1400CV200901511

The Honorable Maria Elena Cruz, Judge
The Honorable Lawrence C. Kenworthy, Judge

FEE AWARD VACATED

Clark & Associates Yuma
By A. James Clark
Attorneys for Plaintiff/Appellant

Garcia, Hengl, Kinsey, Farrar & Villarreal, P.L.C. Yuma
By John S. Garcia
and Brandon S. Kinsey
Attorneys for Defendant/Appellee

K E S S L E R, Judge

¶1 Claude Sharpenstein, III, appeals from the superior court's award of attorneys' fees as a sanction against Sharpenstein upon his voluntary dismissal of his complaint

against Citizens Title & Trust ("Citizens"). For the following reasons, we vacate the award of fees.

FACTUAL AND PROCEDURAL HISTORY

¶2 On October 30, 2009, Sharpensteen filed a complaint against Citizens, alleging breach of contract and seeking an accounting. He alleged on information and belief that he was the beneficiary of escrows and trusts created by his father in connection with real estate developments and land sales; that Citizens was the escrow agent and trustee of the escrows and trusts; and that Citizens had received moneys in connection with the sale of real property, had failed to account for those sales, and had failed to pay Sharpensteen his share.

¶3 In its answer, Citizens admitted it acted as an escrow agent or trustee in connection with the alleged properties, but otherwise denied the allegations. Citizens also contended Sharpensteen's complaint was without substantial justification and for the purpose of harassment, and it therefore was entitled to recover its attorneys' fees under Arizona Revised Statutes ("A.R.S.") section 12-349 (2003) and on other bases the court might deem appropriate.

¶4 Sharpensteen filed a motion to dismiss his own complaint "with prejudice, each party to bear their own costs and attorney's [sic] fees." Citizens responded that the complaint should be dismissed with prejudice, but argued that no

dismissal should be permitted without an award of attorneys' fees in its favor. The superior court denied the motion, stating that "any dismissal should include an award of costs and fees to Defendant."

¶5 Sharpensteen filed a second motion to dismiss, but without prejudice and with each party to bear its own attorneys' fees and costs. Citizens again asserted that the complaint should be dismissed with prejudice, but only after Sharpensteen agreed or was ordered to reimburse Citizens for its attorneys' fees and costs. The superior court denied the second motion to dismiss, again stating that any dismissal should include an award of costs and fees to Citizens.

¶6 Sharpensteen then moved to dismiss with prejudice, noting that he anticipated that Citizens would file an application for attorneys' fees and suggesting that that application be heard at the hearing on the motion to dismiss. Citizens again argued that it was entitled to an award of fees.

¶7 On October 25, 2010, the superior court entered a signed judgment pursuant to Arizona Rule of Civil Procedure 54(b), dismissing the case with prejudice. The order stated it "awarded [Citizens] its reasonable attorney fees" and directed Citizens to file a motion for fees. On November 15, 2010, Citizens filed its "Motion for Award of Attorneys' Fees," seeking an award of fees pursuant to A.R.S. § 12-349(A)(1) and

(A) (2).¹ The case then was reassigned to a different judge, who heard oral argument on the motion.

¶8 At the close of oral argument, the superior court made the following findings on the record:

At the time the defense filed its statement in compliance with rule 26.1, the defense -- or rather the plaintiffs made an attempt to dismiss the matter, that dismissal being with prejudice, and that attempt apparently was rejected by the defendants, the Court finds that it is reasonable to award attorney's fees, but only said fees in costs incurred in responding to the action up until the April 14th, 2010 date where the plaintiff began to make steady efforts to dismiss the matter with prejudice.

On February 28, 2011, the court entered judgment awarding attorneys' fees to Citizens in the amount of \$2,566. Sharpensteen timely appealed.

DISCUSSION

A. Jurisdiction

¶9 Sharpensteen argues the superior court erred in awarding fees to Citizens but does not challenge the amount awarded. Citizens argues that this Court lacks jurisdiction to consider Sharpensteen's appeal, asserting the October 25 order dismissing the case and awarding fees was a final appealable order pursuant to Rule 54(b) with respect to the award of fees,

¹ Citizens argued that the matter did not arise out of contract and so fees were not available under A.R.S. § 12-341.01 (2003).

leaving only the amount to be resolved by the February 28 order. Citizens contends that by failing to appeal from the October 25 order, Sharpensteen deprived this Court of jurisdiction to consider the propriety of the decision to award fees. We review *de novo* whether a Rule 54(b) judgment actually disposes of at least one separate claim. *Kim v. Mansoori*, 214 Ariz. 457, 459, ¶ 6, 153 P.3d 1086, 1088 (App. 2007).

¶10 We have jurisdiction to determine the propriety of an award of attorneys' fees. Arizona Rule of Civil Procedure 58(g) states that "[e]xcept as provided in Rule 54(b), a judgment shall not be entered until claims for attorneys' fees have been resolved and are addressed in the judgment." Rule 54(b) provides that the trial court "may direct the entry of final judgment as to one or more but fewer than all" claims in a multi-claim action by making "an express determination that there is no just reason for delay" and directing that judgment be entered. For purposes of Rule 54(b), "a claim for attorneys' fees may be considered a separate claim from the related judgment regarding the merits of a cause." Ariz. R. Civ. P. 54(b).

¶11 The State Bar Committee Notes to the 1999 Amendments of Rule 58(g) explain that the rule was intended to provide that normally a judgment should not be entered until all attorneys' fees issues are resolved so that all issues can be addressed in

a single appeal. However, “[i]n the rare case in which a judgment on the merits of a cause would be appropriate prior to resolution of attorneys’ fees, the trial court [could] certify the entry of a ‘merits’ judgment under Rule 54(b).” Ariz. R. Civ. P. 58(g), State Bar Committee Notes, 1999 Amend.

¶12 The State Bar Committee Notes to the 1999 Amendments to Rule 54(b) provide similar guidance. Noting that a decision on attorneys’ fees typically would be made prior to entry of judgment, which would allow all issues to be raised together on appeal, the Notes recognize an exception where good reasons exist “to enter an immediate judgment on the merits of a cause, while leaving attorneys’ fees issues to be addressed later.” Ariz. R. Civ. P. 54(b), State Bar Committee Notes, 1999 Amend. The Notes further explain Rule 54(b) was amended to address that situation and permits a court to “certify the ‘merits’ judgment for immediate entry and appeal” before rendering a decision on attorneys’ fees and to “retain jurisdiction to address the attorneys’ fee issue after the appeal of [the] Rule 54(b)” certified merits judgment. *Id.*

¶13 In sum, the Rules do not contemplate treating attorneys’ fees issues as separate claims certifiable for appeal under Rule 54(b) in the manner asserted by Citizens. To the contrary, the intent behind allowing attorneys’ fees issues to be treated as a separate claim was to give the court “discretion

to enter an immediate, appealable judgment *on the merits*— notwithstanding lingering and unresolved attorney fees issues.” *Kim*, 214 Ariz. at 460, ¶ 9, 153 P.3d at 1089.

¶14 Accordingly, we construe the superior court’s October 25 order, consistent with these Rules, as certifying as final the dismissal of Sharpensteen’s complaint and inviting the parties to address the matter of attorneys’ fees at a later time. Our interpretation of the court’s order is supported by the fact that the parties continued to argue the propriety of the award in their motion, response, and oral argument on attorneys’ fees. Thus, the issue of attorneys’ fees was not resolved until the February 28 order. Sharpensteen’s notice of appeal was therefore timely, and this Court has jurisdiction to consider this appeal.

B. The Propriety of the Attorneys’ Fees Award

¶15 Citizens sought an award of fees under A.R.S. § 12-349(A)(1) and (A)(2), which provide in pertinent part:

[I]n any civil action . . . the court shall assess reasonable attorney fees . . . against an attorney or party . . . if the attorney or party does any of the following:

1. Brings or defends a claim without substantial justification.
2. Brings or defends a claim solely or primarily for delay or harassment.

"Without substantial justification" means that the claim constitutes "harassment, is groundless and is not made in good faith." A.R.S. § 12-349(F). All three elements must be proved by a preponderance of the evidence. *Phx. Newspapers, Inc. v. Dep't of Corrs.*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997). An objective standard is used to determine groundlessness; a subjective standard is applied to determine intent to harass and bad faith. *Id.* We view the evidence in the light most favorable to sustaining the award. *Id.* at 243, 934 P.2d at 807. The trial court must set forth specific reasons for awarding fees pursuant to A.R.S. § 12-349 and make appropriate findings of fact and conclusions of law for each element. A.R.S. § 12-350 (2003); *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, 421, ¶ 28, 224 P.3d 230, 237 (App. 2010).

¶16 Neither the October 25 order nor the February 28 order identifies the basis for the court's award of fees or makes any findings to support such an award under A.R.S. § 12-349. At oral argument, the court found that it would be "reasonable" to award fees up to the point that Sharpsteen first attempted to have the matter dismissed. The court made no specific findings as to any element that Citizens had to prove to support an award of attorneys' fees as sanctions under the statute.

¶17 Moreover, the only argument Citizens presented in support of its request for fees was that Sharpsteen knew or

should have known before filing the complaint that his case lacked a good-faith basis and that the documents he was seeking from Citizens to support his case did not exist. This assertion is based on the uncontradicted affidavit of a Citizens's employee, who avowed that Sharpensteen had been to Citizens's office numerous times seeking records, at which time she had told him that the records and other information were no longer in existence and that he should look in the office of the county recorder. Accepting the truth of the matters stated in the affidavit, Citizens did not present any evidence that Sharpensteen subjectively intended to harass Citizens or that his action was brought in bad faith. At most, the affidavit shows that Citizens, whom Sharpensteen contended had wrongly withheld distributions from him, told him that the documents had been destroyed. Citizens presents no argument and points to no other evidence in the record to support that the action was brought for purposes of delay, with a subjective intent to harass, or in bad faith. For this reason, the record does not support an award of fees pursuant to A.R.S. § 12-349.

¶18 Citizens argues in the alternative that this Court should affirm the award of fees under Arizona Rule of Civil Procedure 11(a). Although Sharpensteen argues Citizens did not seek fees pursuant to Rule 11, Citizens mentioned Rule 11 as an

alternative basis for a fee award in its response to Sharpensteen's third motion to dismiss and during oral argument.

¶19 Rule 11(a) provides in pertinent part:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

When a document is signed in violation of Rule 11(a), the Rule requires the court to "impose [on] the person who signed it, a represented party, or both, an appropriate sanction, which may include" an award of attorneys' fees. Under Rule 11, good faith is determined using the objective standard of "what a professional, competent attorney would do in similar circumstances." *Linder v. Brown & Herrick*, 189 Ariz. 398, 407, 943 P.2d 758, 767 (App. 1997). The court must make specific findings to justify a sanction under Rule 11. *Wells Fargo Credit Corp. v. Smith*, 166 Ariz. 489, 497, 803 P.2d 900, 908 (App. 1990).

¶20 The superior court here did not find a Rule 11 violation, made no findings of fact that would support such a finding, and, as already noted, made no finding at all as to its

bases for awarding attorneys' fees. The record shows that Citizens was involved as the escrow agent or trustee with respect to the sale of property as alleged by Sharpsteen. The only conduct alleged in support of Rule 11 sanctions is that Sharpsteen refused to accept at face value Citizens's employee's statement that it no longer had documents Sharpsteen sought and that Sharpsteen should have searched records at the county recorder, where he would not have found a trust listing him as a beneficiary. Given these facts and arguments, the award of fees as a sanction, if made pursuant to Rule 11, was not supported by the record.² Thus, we vacate the award of fees. We need not address Sharpsteen's other arguments for reversing the fee award.

¶21 In his reply, Sharpsteen seeks an award of attorneys' fees on appeal pursuant to A.R.S. § 12-349(A)(3), which requires the court to impose attorneys' fees if an attorney or party "[u]nreasonably expands or delays the proceeding." Sharpsteen offers no argument as to how Citizens

² Citizens argues that the superior court's orders regarding the three motions to dismiss make it overwhelmingly apparent that fees should be awarded. None of those orders included findings to support sanctions or indicated that sanctions were appropriate. Moreover, the court's order denying Sharpsteen's second motion to dismiss and stating that Citizens should receive a fee award indicated that the court thought an award of fees was appropriate under A.R.S. § 12-341.01 as a matter arising out of contract; it did not mention an award as sanctions. Citizens has expressly stated that A.R.S. § 12-341.01 was not a proper basis for an award of fees.

unreasonably delayed this appeal. We therefore deny the request for attorneys' fees.

CONCLUSION

¶22 An award of attorneys' fees as sanctions must be justified by specific findings by the superior court. The court here made no such findings. In addition, we find that the record does not support such an award. We therefore vacate the unsupported award of attorneys' fees.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
PETER B. SWANN, Judge