IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MONICA D. LABADIE, TRUSTEE OF THE MONICA D. LABADIE REVOCABLE TRUST DATED FEBRUARY 23, 2016,
Plaintiff/Appellee,

v.

RICHARD MENKIN, AN INDIVIDUAL,
Defendant/Appellant.

No. 2 CA-CV 2020-0011
Filed December 18, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pinal County
Nos. CV201602132, CV201602133, CV201602134,
CV201602135, and CV201602136 (Consolidated)
The Honorable Stephen F. McCarville, Judge

AFFIRMED

COUNSEL

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Counsel for Plaintiff/Appellee

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eppich and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 Appellant Richard Menkin appeals the trial court's amended judgment with respect to attorney fees awarded to appellee Monica Labadie, trustee of a revocable trust and the plaintiff in these partition proceedings. For the following reasons, we affirm.

Factual and Procedural Background

¶2 Labadie, as trustee of the Monica D. Labadie Revocable Trust Dated February 23, 2016, filed five partition actions in December 2016, seeking to force the sale of five separate lots located in Pinal County and division of sale proceeds amongst the owners. In these actions, which were consolidated below, Labadie requested that the proceeds be divided based on percentage interests reflected in the owners' respective deeds and asked for an award of attorney fees and costs. After both parties filed motions for summary judgment, the trial court granted summary judgment for Labadie, stating "[t]he facts of this case are not disputed," and ordered that the proceeds be divided in accordance with the interests reflected in the deeds. Labadie filed an application for attorney fees, and the court awarded her $75,763.26, citing both A.R.S. §§ 12-341.01 and 12-349. After the court issued its judgment, the parties entered a partial satisfaction of judgment, stipulating to the dismissal of third parties based on their payment of $10,000.00 toward the attorney fees award.

¶3 Menkin appealed the trial court's judgment and in a memorandum decision, this court vacated the award of attorney fees under § 12-341.01. *Labadie v. Menkin*, No. 2 CA-CV 2018-0113, ¶ 22 (Ariz. App. Mar. 7, 2019) (mem. decision). Concluding the case did not arise out of contract, we remanded this matter to allow the trial court to make any findings of fact that would justify an award of attorney fees pursuant to § 12-349. *Id.* ¶¶ 22, 27.

¶4 In July 2019, Labadie filed a proposed amended form of judgment, which the trial court entered three business days later, with the following factual findings:

> a. Under A.R.S. § 12-350(3), the relevant facts were undisputed and available to all parties, and Menkin nevertheless perpetuated and litigated this case at great cost to the parties without substantial justification;
>
> b. Under A.R.S. § 12-350(4), the relative financial position of the parties supports a fee award.
>
> c. Under A.R.S. § 12-350(5), Menkin litigated this case in whole or in part in bad faith, including through serving voluminous and unnecessary discovery despite the facts of this case never being in dispute;
>
> d. Under A.R.S. § 12-350(6), as set out above, the facts were never reasonably in conflict;
>
> e. Under A.R.S. § 12-350(8), Menkin should reasonably have known following the Parties' settlement conference that his legal theories were unlikely to succeed, but nevertheless refused to settle on reasonable terms and unreasonably perpetuated the litigation.

Menkin timely appealed the amended judgment in August 2019, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Five-day Objection Period

¶5 Menkin first argues the trial court erred by failing "to wait for the five-day objection period to expire, as provided by Rule 58(a)(2)(A)," Ariz. R. Civ. P., depriving him of "an opportunity to object and to be heard on Labadie's proposed form of [a]mended [j]udgment," resulting in prejudice. Labadie counters that the court properly exercised its discretion under the rules of civil procedure, adding that Menkin "fails to show reversible error" and "suffered no prejudice." Although we review the interpretation of the rules of civil procedure de novo, we review the trial

court's exercise of discretion afforded by the rules for abuse of discretion. *See Cuellar v. Vettorel*, 235 Ariz. 399, ¶ 4 (App. 2014) (interpretation of a rule reviewed de novo); *Haroutunian v. Valueoptions, Inc.*, 218 Ariz. 541, ¶ 6 (App. 2008) (exercise of discretion afforded by rules of procedure reviewed for abuse of discretion).

¶6 "A judgment may not be entered until 5 days after the proposed form of judgment is served, unless . . . the court waives or shortens the 5-day notice requirement for good cause." Ariz. R. Civ. P. 58(a)(2)(A)(ii). And if a deadline is fewer than eleven days, weekends and holidays are excluded from the calculation of the deadline. Ariz. R. Civ. P. 6(a)(2).

¶7 Labadie argues that even if the court erred by entering the judgment two days early, Menkin "fails to show reversible error, . . . and regardless . . . suffered no prejudice." "To justify the reversal of a case, there must not only be error, but the error must have been prejudicial to the substantial rights of the party." *Creach v. Angulo*, 189 Ariz. 212, 214 (1997) (quoting *Creach v. Angulo*, 186 Ariz. 548, 550 (App. 1996)). Menkin claims such prejudice because he was unable "to timely file an objection." Labadie, however, cites *United Bank of Arizona v. Allyn*, 167 Ariz. 191, 197 (App. 1990), arguing Menkin's challenges to the merits of the judgment were inapposite because only objections to the form of the amended judgment are proper. *See id.* (noting Rule 58 allows for objections "to the form of judgment only"). We note that after Labadie filed her application for attorney fees, Menkin responded on the merits, objecting and explaining why an award of attorney fees was unwarranted. The court had therefore considered Menkin's substantive arguments but nevertheless granted Labadie's application for attorney fees. Labadie argues that Menkin "has not identified any new objection that he had not presented previously and/or that the trial court had not considered."

¶8 Menkin, however, asserts two objections not previously considered: (1) the fee award in the amended judgment should have reflected the amount already paid by Menkin, and (2) the court's reasoning in support of the award was insufficient. On the first point, the judgment was amended only to "make the necessary factual findings" to support the attorney fee award. *See Labadie*, No. 2 CA-CV 2018-0113, ¶ 27. Entering judgment for an amount less than that actually awarded would be contrary to this purpose, and the parties had already stipulated on the record that the $10,000 payment was in partial satisfaction of the award.

¶9 On Menkin's second point, as we explain below, we do not find the trial court's supporting reasons to be insufficient. As previously noted, the court had already considered Menkin's substantive arguments before the proposed amended judgment was filed. We therefore agree with Labadie that Menkin has demonstrated no prejudice from the court's curtailment of the notice period, and we accordingly find no reversible error on this ground.

Adequacy of § 12-349 Findings

¶10 Menkin challenges the trial court's attorney fee award under § 12-349, first arguing its "'reasons' were insufficient to qualify as 'findings' under A.R.S. § 12-350," relevant case law, and our memorandum decision regarding the first appeal in this case. Labadie counters that the court's reasons "more than met this requirement" "consistent with § 12-350."

¶11 We review the evidence supporting a fee award under § 12-349 in a light favorable to sustaining it and will affirm unless it is clearly erroneous. *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, ¶¶ 30-31 (App. 2010). Section 12-350 requires that the trial court "set forth the specific reasons for the award" under § 12-349. The court is only required to make "findings . . . specific enough" to allow this court to "test the validity of the judgment." *Rogone v. Correia*, 236 Ariz. 43, ¶ 22 (App. 2014). As long as the trial court does so, we will look to the record to confirm the award. *See, e.g.*, *Harris v. Reserve Life Ins. Co.*, 158 Ariz. 380, 383 (App. 1988) (inferring, based on trial court's allocation of attorney fee obligations among parties, trial court weighed parties' relative financial position under § 12-350(4)). No requirement exists, however, for special language or format when making such findings. *See Phx. Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 243 (App. 1997) (sufficient findings to justify award of fees under § 12-349 in minute entry denying motion to amend).

¶12 Here, the trial court made express findings in its amended judgment that, "consistent with A.R.S. § 12-350," fees under § 12-349 were appropriate in this case. The court specified the subsections of § 12-350 that supported the award and recited the language of these subsections. Further, in her notice of lodging the proposed amended judgment, Labadie had informed the court and Menkin that the proposed judgment "specifically lists the bases found by this Court for fees under A.R.S. § 12-349 as set out in the briefing before this Court." The amended judgment contains sufficient information to allow an appellate court to "test the validity of the judgment"; it is therefore not subject to reversal on this basis. *See Rogone*, 236 Ariz. 43, ¶ 22.

§ 12-350 Factors

¶13 Menkin next argues "the record does not support an award of attorney's fees" under § 12-349. As noted above, we review the evidence supporting fee awards under § 12-349 in a light "most favorable to sustaining the award" and will affirm unless the award was clearly erroneous. *Bennett*, 223 Ariz. 414, ¶ 31 (quoting *Phx. Newspapers, Inc.*, 188 Ariz. at 243).

¶14 Section 12-350 sets out a non-exhaustive list of relevant factors for considering an award of attorney fees under § 12-349, which include, inter alia, whether an action was "prosecuted or defended . . . in bad faith," whether "issues of fact . . . were reasonably in conflict," and "[t]he extent to which [a] party prevailed with respect to the amount and number of claims in controversy." § 12-350(5-7). The trial court made specific findings regarding the "availability of facts," the relative financial position of the parties, bad faith, facts in conflict, and refusal to settle as supporting the attorney fee award. *See* § 12-350. We address each ground in turn.

Availability of the Facts

¶15 Under § 12-350(3), fees may be justified when a party possessed the facts to determine the validity of the relevant claims or defenses yet made unnecessary demands for discovery. In its summary judgment ruling, the trial court stated, "[t]he facts of this case are not disputed." Menkin concedes there was no dispute regarding Labadie's ownership of the relevant properties and her percentage of ownership interests, and he did not object to Labadie's right to partition the properties. In fact, Menkin admits that the "only dispute" in this case was a legal one—how the proceeds "were to be divided." Menkin also concedes that his legal arguments required only "limited written discovery," but he nevertheless made a number of substantial discovery requests, which apparently engendered additional demands by way of deficiency letters and corresponding supplemental disclosures by Labadie over information that lacked relevance.[1] The trial court weighed this factor as supporting the fee

[1]As repeatedly noted by the trial court, and by this court on appeal, the percentage of ownership, not how it was acquired, was the only relevant question at issue, and therefore any discovery beyond the deeds, which were apparently provided and undisputed, was unnecessary. *Labadie*, No. 2 CA-CV 2018-0113, ¶ 13.

award, and we find no clear error in its doing so. *See Bennett*, 223 Ariz. 414, ¶ 31.

Financial Positions of the Parties

¶16 Section 12-350(4) provides that an award of attorney fees may be based on the "relative financial positions of the parties." Menkin argues the trial court erred in citing this factor because the record does not support a finding of financial disparity between the two parties. Labadie responds that Menkin's claim of "significant [financial] strain" is without merit, noting properties and businesses owned by him. Labadie provided tax and business documents below detailing Menkin's "many valuable, debt-free property holdings," at least one of which he had recently purchased for over $800,000, and a retail store franchise opening in Wyoming "[a]t the time of the . . . attorney fee proceedings." As he did below, Menkin points to properties owned by Labadie "free and clear of any encumbrances," potential income from her part-ownership of "several other investment properties," and large inheritances from "her mother and maternal grandmother." We review the court's assessment of the testimony and exhibits for clear error. *Bennett*, 223 Ariz. 414, ¶ 31. Because the record contains evidence supporting the trial court's assessment of financial disparity, based on Menkin's ownership of considerable assets compared to Labadie's rental properties, part ownership in a commercial property with Menkin and others, and inheritances of unknown value, we cannot say the court's findings are unsupported and clearly erroneous. *Id.*

Bad Faith

¶17 Under § 12-350(5), fees may also be awarded where a party litigates, "in whole or in part, in bad faith." In the amended judgment, the trial court found bad faith in the "serving [of] voluminous and unnecessary discovery despite the facts of this case never being in dispute." Menkin challenges this reasoning as "not supported by the record," but Labadie points out that Menkin "never disputed the facts, and he never produced any authority" to support his legal arguments when the court nevertheless based its ruling on "the plain language of the deeds and the statute," which "was apparent from the beginning." Menkin argued below that Labadie should not receive any proceeds from the partition sales because she did not pay money to purchase her interests, but cited no controlling authority, which, in fact, is to the contrary.

¶18 Under Arizona's partition statute, proceeds of properties are divided according to the respective interests of the parties in the properties.

A.R.S. § 12-1218(C). Menkin, however, relied solely on cases from other states to argue that the proceeds should be divided based on "acquisition costs."[2] Menkin also raised a number of questionable legal defenses including entitlement to his claimed purchase price amounts, an unwritten "estate plan" affecting the unambiguous and duly recorded deeds granting property interests to Labadie, and that the relevant deeds were his "will substitute" in his undocumented estate plan.

¶19 Based on this record, the trial court concluded Menkin had defended in bad faith. Menkin disputes that finding, asserting the court "should have considered Labadie's own actions which prolonged the litigation and increased costs." But we presume the court considered the entire record when Menkin made the same argument below. *See Fuentes v. Fuentes,* 209 Ariz. 51, ¶ 18 (App. 2004) (presumption that trial court "fully considered" evidence prior to issuing decision); *see also Able Distrib. Co. v. James Lampe, Gen. Contractor*, 160 Ariz. 399, 409 (App. 1989) ("We presume that after admitting this evidence, the trial court considered it."). Based on the evidence supporting summary judgment, Menkin's unjustified positions, and the court's familiarity with the course of the litigation, we see no clear error in its finding of bad faith.

Facts in Conflict

¶20 The trial court could also consider whether determinative issues of fact were "reasonably in conflict." § 12-350(6). In its summary judgment ruling, the court noted that "[t]he facts of this case are not disputed." Menkin contends that although the "only dispute" in the case centered on how to divide the proceeds, a primarily legal issue, "some discovery was in order to determine what evidence existed" because "the transactions underlying the acquisition of the properties occurred" about ten years earlier and involved individuals who were "not parties to the litigation." But the court's summary judgment ruling and Menkin's admissions in his answers regarding relevant facts—including Labadie's ownership interests in at least one of the properties, her right to seek partition, the propriety of partition-by-sale, and the clear language of the deeds—demonstrate there was no meaningful issue of fact. As noted above, Menkin nevertheless made substantial discovery requests over the

[2]*See McNamara v. Mossman*, 230 P.3d 1286, 1289 (Colo. App. 2010); *Gapihan v. Hemmings*, 995 N.Y.S.2d 368 (N.Y. App. Div. 2014); *Cooney v. Shepard*, 988 N.Y.S.2d 728 (N.Y. App. Div. 2014); *Currie v. Jane*, 109 A.3d 876, ¶ 29 (Vt. 2014).

course of ten months to show that Labadie expended no cost in acquiring the properties in question, a fact that Menkin concedes on appeal was never in dispute. The trial court reasonably weighed these facts in favor of a fee award and, again, we find no clear error in its determination.

Settlement Offers

¶21 Finally, the trial court could also consider the amount of any settlement offer compared to ultimate relief obtained by the party against whom fees were sought. § 12-350(8). Menkin contends the record does not support an award based on this factor because "Labadie is not better off having rejected [Menkin's] offers" after the parties participated in a settlement conference and a global mediation. Labadie specifically asserts, and Menkin does not dispute, that at the settlement conference, the settlement judge "advised . . . there was no basis for [Menkin's] claims," the "unambiguous" deeds controlled the interests, and that the trial court would rule otherwise was "extremely unlikely." Nevertheless, no settlement was reached, and litigation continued in the trial court for four months, followed by an additional fourteen months in post-judgment proceedings. In the amended judgment, the court stated that following the settlement conference, "Menkin should reasonably have known . . . that his legal theories were unlikely to succeed," but he "refused to settle on reasonable terms and unreasonably perpetuated the litigation." Although Menkin points out that Labadie too refused to settle, he has not demonstrated that the court clearly erred in its assessment.

Attorney Fees and Costs on Appeal

¶22 Labadie requests her attorney fees and costs incurred on appeal pursuant to § 12-349 and Rule 21, Ariz. R. Civ. App. P.[3] In our discretion, we decline to award fees; however, as the prevailing party on appeal, we award Labadie her costs upon her compliance with Rule 21.

Disposition

¶23 For the foregoing reasons, the trial court's award of attorney fees is affirmed.

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[3]Labadie also requests her attorney fees related to Menkin's motion for reconsideration. Because we have granted the motion to the extent of correcting several nondispositive errors arising, in part, from some lack of clarity in the briefing by both sides, we deny Labadie's request.