

1 WO
2
3
4
5

6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 David H. Cheren; Catherine A. Conrad
10 Cheren,

11 Plaintiffs,

12 v.

13 Compass Bank; BBVA Compass Bank; and
14 Does 1 through 10,

15 Defendants.

No. CV-12-00206-PHX-JAT

ORDER

16 Pending before the Court is a Motion for Award of Attorneys' Fees pursuant to
17 Federal Rule of Civil Procedure 54(d)(2) and Local Rule of Civil Procedure 54.2,
18 submitted by Compass Bank, an Alabama banking corporation doing business as BBVA
19 Compass ("Compass Bank").

20 **I. Background**

21 In 2012, Plaintiffs David H. Cheren and Catherine A. Conrad Cheren ("Cheren")
22 filed a Complaint alleging that Compass Bank breached a mortgage contract and the
23 contract's implied covenant of good faith and fair dealing. (Doc. 1 at 7–8). On
24 November 2, 2012, this Court dismissed Cheren's complaint because he had failed to
25 allege facts sufficient to show a valid mortgage contract under Arizona law. (*See* Doc. 24
26 at 10). But, the Court granted leave to amend. (*Id.* at 14). Additionally, in the same
27 Order, the Court denied Cheren's three motions for sanctions and granted Compass
28 Bank's request for \$1,000 in attorneys' fees for defending against the motions for

1 sanctions. (*Id.*). Cheren filed a First Amended Complaint as a result of this Order. (Doc.
2 27).

3 On June 24, 2013, the Court issued an order denying Cheren’s motion for
4 reconsideration of the grant of attorneys’ fees. (Doc. 37). Additionally the Court refused
5 Defendant’s request that the Court increase its award of attorneys’ fees to \$5,955.50.
6 (*Id.*).

7 Consistent with the Court’s November 2, 2012 Order, Cheren filed a First
8 Amended Complaint. On August 21, 2013, the Court dismissed Cheren’s First Amended
9 Complaint with prejudice. (Doc. 38). As part of his amended complaint, Cheren
10 presented to the Court documents showing a “conditional approval” of a mortgage loan
11 and documents related to the escrow procedures for the purchase of a condominium. (*Id.*
12 at 1–3). However, Cheren failed to produce, or allege the existence of, an actual signed
13 mortgage contract. (*Id.* at 6–10). Thus, the Court again determined that Cheren had
14 failed to allege sufficient facts to show that a mortgage contract existed under Arizona
15 law. (*Id.* at 10). The pending Motion for Award of Attorneys’ Fees followed.

16 **II. Analysis and Conclusions**

17 Under Arizona law, “[i]n any contested action arising out of a contract, express or
18 implied, the court may award the successful party reasonable attorney fees.” A.R.S.
19 § 12-341.01(A). Here, Cheren’s Complaint and First Amended Complaint both alleged
20 that Compass Bank breached a contract and violated its duty of good faith and fair
21 dealing arising out of that contract. (*See* Doc. 1; Doc. 27). Thus, the action “arose out of
22 a contract” and attorneys’ fees are permitted. *See Berthot v. Sec. Pac. Bank of Arizona*,
23 823 P.2d 1326, 1332 (Ariz. App. 1991) (holding that under Arizona law, a successful
24 party to a breach of contract action can recover his or her attorney’s fees even if the result
25 is that there was not a valid contract) (*superseded by statute on other grounds*).
26 Accordingly, the Court will consider whether awarding fees is appropriate in this case
27 and whether the requested fees are reasonable.

28

1 **A. Appropriateness of a Fee Award**

2 In deciding whether to grant attorneys’ fees, Arizona law requires the Court to
3 consider six factors. *See Wilcox v. Wildman*, 744 P.2d 444, 450 (Ariz. Ct. App. 1987).
4 The Court must weigh all the factors and no particular factor is dispositive. *Id.* These six
5 factors are: (1) “[t]he merits of the claim or defense presented by the unsuccessful party”;
6 (2) “[t]he litigation could have been avoided or settled and the successful party’s efforts
7 were completely superfluous in achieving the result”; (3) “[a]ssessing fees against the
8 unsuccessful party would cause an extreme hardship”; (4) “[t]he successful party did not
9 prevail with respect to all of the relief sought”; (5) “the novelty of the legal question
10 presented and whether such claim or defense had previously been adjudicated in this
11 jurisdiction”; and (6) “whether the award in any particular case would discourage other
12 parties with tenable claims or defenses from litigating or defending legitimate contract
13 issues for fear of incurring liability for substantial amounts of attorney’s fees.”
14 *Associated Indem. Corp. v. Warner*, 694 P.2d 1181, 1184 (Ariz. 1985). The Court will
15 now turn to an examination of these factors.

16 **1. The merits of the claim or defense presented by the unsuccessful**
17 **party**

18 Here, Cheren’s First Amended Complaint was with dismissed with prejudice
19 because he failed to allege sufficient facts to show that a mortgage contract existed under
20 Arizona law. (Doc. 38 at 10). Thus, Cheren’s complaint lacked sufficient merit to
21 survive a motion to dismiss. Accordingly, the Court finds that this factor weighs in favor
22 of granting attorneys’ fees.

23 **2. The litigation could have been avoided or settled and the**
24 **successful party’s efforts were completely superfluous in**
25 **achieving the result**

26 Here, Compass Bank’s efforts, specifically the two motions to dismiss, directly
27 resulted in the success of Compass Bank in this case. Further, as Compass Bank is the
28 defendant in this action, they could not have “avoided” the lawsuit because Cheren
initiated the law suit. Accordingly, the Court finds that this factor weighs in favor of

1 granting attorneys' fees.

2 **3. Assessing fees against the unsuccessful party would cause an**
3 **extreme hardship**

4 In a sworn statement, David Cheren argues that the imposing attorneys' fees
5 would be an extreme hardship because his only source of income is Social Security and
6 disability insurance payments. Further, David Cheren argues that "as a result of the
7 recent recession [Cheren and his wife] have lost [their] home in a 'short sale,' do not own
8 any real estate, have little equity in either of [their] 2 vehicles, have no savings or
9 retirement funds and have no source or expectation of income." Finally, David Cheren
10 states that he will be forced to declare bankruptcy if the Court grants Compass Bank's
11 Motion for Attorneys' Fees.

12 In reply, Compass Bank argues that David Cheren, in his 2011 loan application to
13 Compass Bank, reported that he had a net worth of \$4,012,000 and a monthly income of
14 \$47,717.76. However, Compass Bank provides no citations to the record in support of
15 these statements. Accordingly, the Court will accept the truth of David Cheren's sworn
16 statement and finds that this factor weighs in favor of denying attorneys' fees.

17 **4. The successful party did not prevail with respect to all of the**
18 **relief sought**

19 Here, the Court dismissed all the counts of Cheren's First Amended Complaint
20 with prejudice. Thus, Compass Bank was completely successful in the litigation.
21 Accordingly, the Court finds that this factor weighs in favor of granting attorneys' fees.

22 **5. The novelty of the legal question presented and whether such**
23 **claim or defense had previously been adjudicated in this**
24 **jurisdiction**

25 Cheren's Complaint and First Amended Complaint pleaded claims for breach of
26 contract and the implied covenant of good faith and fair dealing. Those claims are not
27 novel to Arizona law. *See e.g. K-Line Builders, Inc. v. First Federal Sav. & Loan Ass'n*,
28 677 P.2d 1317, 1320 (Ariz. Ct. App. 1983) (examining the requirements for an
enforceable contract); *Kuehn v. Stanley*, 91 P.3d 346, 354 ¶¶ 29–30 (Ariz. Ct. App. 2004)

1 (examining the covenant of good faith and fair dealing in contracts). Accordingly, this
2 factor weighs in favor of granting attorneys' fees.

3 **6. Whether the award in this case would discourage other parties**
4 **with tenable claims**

5 Here, Cheren attempted to bring a claim for breach of contract by creating a
6 "contract" out of documents that clearly only granted "conditional approval." (Doc. 38 at
7 1-3). Thus, granting attorneys' fees in this case will not discourage parties with actual
8 contracts from bringing claims. Accordingly, the Court finds that this factor weighs in
9 favor of granting attorneys' fees.

10 Having examined all of the factors, the Court finds that five out of six factors
11 weigh in favor of granting attorneys' fees. Accordingly, the Court concludes that
12 attorneys' fees are justified in this case. The Court will now examine whether the
13 requested fee is reasonable.

14 **B. Reasonableness of Fee Award**

15 The Court may award the successful party in a contract action reasonable
16 attorneys' fees. A.R.S. § 12-341.01(a). When analyzing attorneys' fees for
17 reasonableness, the Court must determine that: (1) the hourly billing rate is reasonable;
18 and (2) the hours expended on the case are reasonable. *Schweiger v. China Doll Rest.,*
19 *Inc.*, 673 P.2d 927, 931-32 (Ariz. Ct. App. 1983). This Court's Local Rule lists 12
20 factors that courts should consider when determining whether the amount of attorneys'
21 fees is reasonable. L. R. Civ. 54.2(c)(3). These factors are:

- 22 (A) The time and labor required of counsel;
23 (B) The novelty and difficulty of the questions presented;
24 (C) The skill requisite to perform the legal service properly;
25 (D) The preclusion of other employment by counsel because
26 of the acceptance of the action;
27 (E) The customary fee charged in matters of the type
28 involved;
(F) Whether the fee contracted between the attorney and the
client is fixed or contingent;
(G) Any time limitations imposed by the client or the
circumstances;
(H) The amount of money, or the value of the rights,
involved, and the results obtained;
(I) The experience, reputation, and ability of counsel;

- (J) The “undesirability” of the case;
- (K) The nature and length of the professional relationship between the attorney and the client;
- (L) Awards in similar actions; and
- (M) Any other matters deemed appropriate under the circumstances.

Id. Once a party submits an itemized list of fees with sufficient detail and establishes entitlement to fees, the burden then shifts to the party challenging the fees to show that the fees are unreasonable. *See Nolan v. Starlight Pines Homeowners Ass’n*, 167 P.3d 1277, 1286 ¶ 38 (Ariz. Ct. App. 2007).

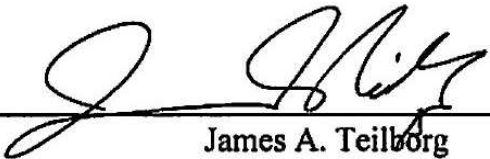
Here, Compass Bank has submitted an itemized list of fees for this case, (Doc. 41 at Ex. C), along with explanations for why the fees sought are reasonable under Local Rule 54.2. (Doc. 41 at 8–10). The burden therefore shifts back to Cheren to show that these fees are unreasonable. *See Nolan*, 167 P.3d at 1286 ¶ 38. In his response to the motion for attorneys’ fees, Cheren does not argue that the fees are unreasonable in any way. (*See* Doc. 42). Accordingly, the Court finds that the fees requested are reasonable in this case.

III. Conclusion

Accordingly,

IT IS ORDERED that Compass Bank’s Motion for Award of Attorneys’ Fees (Doc. 40) is granted; Compass Bank is awarded attorneys’ fees in the amount of \$40,432.50 from Plaintiffs.

Dated this 17th day of December, 2013.



James A. Teilborg
Senior United States District Judge