

1 WO

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

MERCHANTS BONDING COMPANY
(MUTUAL), an Iowa corporation,

No. CV-12-00501-PHX-JAT

9

10

Plaintiffs,

ORDER

11

12

v.

13

U.S. PREFAB, INC., an Arizona
corporation; and HARRY O. WOODY, an
unmarried man,

14

15

Defendants.

16

17

Pending before the Court is Plaintiff Merchant Bonding Company (Mutual)'s Motion for Partial Summary Judgment. (Doc. 32). Defendants U.S. Prefab, Inc. and Harry O. Woody filed a Response (Doc. 35) and Plaintiff filed a Reply (Doc. 38). The Court now rules on the motion.

18

19

20

I. FACTUAL AND PROCEDURAL BACKGROUND

21

22

For purposes of the Court's resolution of the pending summary judgment motion, the Court considers the relevant facts and background to be as follows.¹

23

24

Sometime in 2005, Defendant U.S. Prefab, Inc., an Arizona general contractor, and its President, Defendant Harry O. Woody ("Woody") approached Plaintiff Merchants Bonding Company (Mutual) seeking a construction bond. (*See* Plaintiff Merchants

25

26

27

28

¹ For purposes of Plaintiff's motion for partial summary judgment, the Court construes all disputed facts in the light most favorable to Defendants. *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004).

1 Bonding Company (Mutual)’s Separate Statement of Facts in Support of Motion for
2 Partial Summary Judgment (“PSOF”), Doc. 33 ¶¶ 1–2; Defendants’ Separate Statement
3 of Facts in Support of Opposition to Motion for Partial Summary Judgment (“CSOF”),
4 Doc. 36 ¶ 1). On September 9, 2005, Defendants executed a “General Application and
5 Agreement of Indemnity with Merchants” (the “Contract”). (PSOF ¶ 2; CSOF ¶ 1).
6 Woody executed the Contract in both his official capacity as President of U.S. Prefab,
7 Inc., and his personal capacity as a guarantor. (The Contract, Doc. 34, Ex. A). The
8 Contract obligated Defendants to reimburse and indemnify Plaintiff for liabilities and
9 losses that Plaintiff incurs arising out of claims made against any bonds issued by
10 Plaintiff on behalf of U.S. Prefab, Inc. (PSOF ¶ 3; CSOF ¶ 1). In 2008, Plaintiff issued
11 the relevant construction bond (the “Bond”) on behalf of U.S. Prefab. (Doc. 34, Ex. E).

12 At some point, two of U.S. Prefab, Inc.’s subcontractors asserted claims against
13 the Bond. (PSOF ¶ 8; CSOF ¶ 2). Plaintiff notified Defendants of the Bond claims, but
14 Defendants neither paid the claims directly nor deposited sufficient funds or assets with
15 Plaintiff to cover the claims as provided for in the Contract. (PSOF ¶¶ 9–10; CSOF ¶ 3).
16 Plaintiff settled the Bond claims by making payments totaling \$149,525.02. (PSOF ¶ 11;
17 DOSF ¶ 4). On January 13, 2011, Plaintiff recovered an offsetting amount of \$54,850.18
18 from a third party. (PSOF ¶ 16).

19 On April 6, 2011, Plaintiff paid a fee of \$150 to First American Title (PSOF ¶ 15),
20 presumably to verify the title to Woody’s residence. Subsequently, Plaintiff executed a
21 Deed of Trust and Assignment of Rents dated April 29, 2011 (the “Deed of Trust”)
22 against Woody’s personal residence in the amount of \$94,674.84. (Doc. 34-1 at 28–34).

23 On October 31, 2011, Plaintiff’s counsel sent Defendants a demand to repay
24 Plaintiff \$95,000.49 in relation to the Contract. (PSOF ¶ 14; DOSF ¶ 14; Doc. 34, Ex.
25 E). Defendants refused and, on March 9, 2012, Plaintiff filed the instant suit alleging
26 breach of contract and fraud. (Doc. 1). During the pendency of Plaintiff’s suit,
27 Defendants moved to amend their Answer to Plaintiff’s Complaint to add a counterclaim
28 alleging that Plaintiff falsely executed the Deed of Trust against Woody’s homestead in

1 violation of Arizona Revised Statute § 33-420(c). (Doc. 22). Subsequently, Plaintiff
2 voluntarily filed a Deed of Release and Full Reconveyance (the “Release”) on February
3 8, 2013 releasing the Deed of Trust and mooting Defendants’ proposed counterclaim.
4 (Docs. 25, 30–31).

5 Plaintiff filed the instant motion for partial summary judgment (Doc. 32) on Count
6 I (Breach of Contract) of the Complaint (Doc. 1 at 4–5), on which the Court now rules.

7 **II. LEGAL STANDARD FOR SUMMARY JUDGMENT**

8 Summary judgment is appropriate when “the movant shows that there is no
9 genuine issue as to any material fact and that the moving party is entitled to summary
10 judgment as a matter of law.” Fed. R. Civ. P. 56(a). A party asserting that a fact cannot
11 be or is genuinely disputed must support that assertion by “citing to particular parts of
12 materials in the record,” including depositions, affidavits, interrogatory answers or other
13 materials, or by “showing that materials cited do not establish the absence or presence of
14 a genuine dispute, or that an adverse party cannot produce admissible evidence to support
15 the fact.” *Id.* at 56(c)(1). Thus, summary judgment is mandated “against a party who
16 fails to make a showing sufficient to establish the existence of an element essential to that
17 party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*
18 *Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

19 Initially, the movant bears the burden of pointing out to the Court the basis for the
20 motion and the elements of the causes of action upon which the non-movant will be
21 unable to establish a genuine issue of material fact. *Id.* at 323. The burden then shifts to
22 the non-movant to establish the existence of material fact. *Id.* The non-movant “must do
23 more than simply show that there is some metaphysical doubt as to the material facts” by
24 “com[ing] forward with ‘specific facts showing that there is a *genuine* issue for trial.’ ”
25 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (quoting
26 Fed. R. Civ. P. 56(e) (1963) (amended 2010)). A dispute about a fact is “genuine” if the
27 evidence is such that a reasonable jury could return a verdict for the nonmoving party.
28 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-movant’s bare

1 assertions, standing alone, are insufficient to create a material issue of fact and defeat a
2 motion for summary judgment. *Id.* at 247–48. Further, because “[c]redibility
3 determinations, the weighing of the evidence, and the drawing of legitimate inferences
4 from the facts are jury functions, not those of a judge, . . . [t]he evidence of the non-
5 movant is to be believed, and all justifiable inferences are to be drawn in his favor” at the
6 summary judgment stage. *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144,
7 158–59 (1970)); *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999) (“Issues of
8 credibility, including questions of intent, should be left to the jury.”) (internal citations
9 omitted).

10 **III. ANALYSIS**

11 Plaintiff moves (Doc. 32) for partial summary judgment on Count I (Breach of
12 Contract) of the Complaint (Doc. 1 at 4–5). Plaintiff presents evidence (PSOF; Doc. 34)
13 and argues (Doc. 32 at 5–9) that there is no genuine dispute of material fact that
14 Defendants breached the Contract between the Parties and are obligated to indemnify and
15 reimburse Plaintiff in full for Plaintiff’s losses. Specifically, Plaintiff argue that that it is
16 beyond dispute that as of June 14, 2013, Plaintiff has suffered losses totaling \$105,211.40
17 (excluding interest). (Doc. 32 at 8–9; PSOF ¶¶ 16–17). Plaintiff’s alleged \$105,211.40
18 loss has three components: (1) \$94,674.84 for reimbursement of payments made to settle
19 Bond claims against Defendants, (2) \$10,386.56 for attorneys’ fees and costs through
20 June 14, 2013, and (3) \$150 for a payment to First American Title in conjunction with
21 Plaintiff’s filing of the Deed of Trust. (PSOF ¶¶ 11, 15–16).

22 In Response, Defendants accept (*see* Doc. 35; CSOF ¶¶ 1–5) most of Plaintiff’s
23 proffered facts and conclusions, including that Defendant breached the Contract by
24 failing to reimburse \$94,674.84 to Plaintiffs. Defendants, however, oppose Plaintiff’s
25 claims related to the execution and release of the Deed of Trust, including the \$150 title
26 fee and an unidentified portion of the \$10,386.56 for attorneys’ fees and costs.² (Doc. 35
27

28 ² The \$10,386.56 figure aggregates all of Plaintiff’s attorneys’ fees and costs as of
June 14, 2013. Although Defendants accept (Doc. 35 at 2–4) that, under the contract,

1 at 1–2). Specifically, Defendants argue that there is a genuine dispute of material fact
2 whether Plaintiff had the legal authority under the contract to file the Deed of Trust
3 against Woody’s homestead, and, if so, whether Plaintiff properly exercised its discretion
4 in doing so. (Doc. 35 at 2–5). Consequently, Defendants dispute the \$150 title fee and
5 the total of \$10,386.56 in attorneys’ fees and costs. (*Id.*).

6 In Reply, Plaintiff argues that Defendants interpret the plain language of the
7 Contract too narrowly and, in actuality, the Contract grants Plaintiff broad discretion in
8 the steps Plaintiff takes to enforce the Contract, including executing the Deed of Trust.
9 (Doc. 38 at 5–8). Plaintiff supports (*id.*) its argument with citation to and interpretation
10 of four paragraphs of the Contract:

- 11 • Paragraph SECOND obligates Defendants to reimburse Plaintiff for “loss and
12 expense of whatsoever kind or nature,” including expenses related to Defendants’
13 failure to comply with the Contract and Plaintiff’s subsequent enforcement
14 actions. (The Contract, Doc. 34, Ex. A ¶ 2).
- 15 • Paragraph FOURTEENTH obligates Defendant to collateralize Plaintiff against
16 liability related to the Bond. (*Id.* ¶ 14).
- 17 • Paragraph FIFTH grants Plaintiff the right “to take such other steps as in the
18 discretion of [Plaintiff] may be *advisable* or *necessary* to secure its release or to
19 secure itself from loss” related to contracts guaranteed by the Bond. (*Id.* ¶ 5
20 (emphasis added)).
- 21 • Paragraph SEVENTH appoints Plaintiff as Defendants’ attorney-in-fact with the
22 right to issue any “document *necessary* or *desired* to carry into effect the purposes
23 of” the Contract. (*Id.* ¶ 7 (emphasis added)).

24 Plaintiff further argues that under the plain language of the Contract provisions listed
25 above, Plaintiff’s execution of the Deed of Trust was a reimbursable “exercise” of

26 Plaintiff is entitled to some (and perhaps most) of those attorneys’ fees and costs, because
27 Plaintiff has not provided detailed billing records, Defendants (and the Court) cannot
28 disambiguate what portion of the claimed fees and costs relates to Plaintiffs’ execution
and subsequent release of the Deed of Trust. Consequently, Defendants must oppose the
aggregate amount.

1 Plaintiff's right "to secure itself against the losses Defendants chose to ignore." (Doc. 38
2 at 7–8).

3 Plaintiff neglects to consider, however, that even if the Court accepts Plaintiff's
4 interpretation of the plain language of the Contract,³ the Contract does not give Plaintiff
5 the unbounded right to pursue any course of action or to issue any document for the
6 purpose of securing itself against losses related to the Bond. Paragraph FIFTH explicitly
7 limits Plaintiff's actions to those that are "advisable or necessary" to secure itself from
8 loss. (The Contract, Doc. 34, Ex. A ¶ 5). Similarly, Paragraph SEVENTH explicitly
9 limits Plaintiff's ability to issue "any document" as Defendants attorney-in-fact to those
10 documents that are "necessary or desired" to effectuate the purposes of the Contract
11 (which, here, would be securing Plaintiff's against loss). (*Id.* ¶ 7). Additionally,
12 although the Contract grants Plaintiff discretion to determine what is "necessary,"
13 "advisable," or "desirable," Arizona contract law requires Plaintiff to exercise its
14 discretion within the bounds of "good faith and fair dealing." *See, Wells Fargo Bank v.*
15 *Ariz. Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund,*
16 38 P.3d 12, 29 ¶ 59 (Ariz. 2002) (en banc) ("Arizona law implies a covenant of good
17 faith and fair dealing in every contract.").

18 Here, however, Plaintiff points to no direct evidence demonstrating that Plaintiff's
19 execution of the Deed of Trust was "advisable or necessary" and "necessary or desired."
20 (*See* Docs. 32, 38). Instead, Plaintiff appears to expect the Court to infer that executing
21 the Deed of Trust was necessary, advisable, or desirable because Defendants had thus far
22 ignored or refused Plaintiff's requests for reimbursement. (*See id.*). In contrast,
23 Defendant requests that the Court infer that Plaintiff's execution of the Deed of Trust was
24 not necessary, advisable, or desirable because, upon challenge by Defendants, Plaintiff

25
26 ³ The Court notes that, at this time, the Court takes no position regarding whether
27 or not Plaintiff has, as a matter of law, correctly interpreted the plain language of the
28 Contract. Further, the Court cautions the Parties that nothing in this Order shall be
construed as a finding or determination that the Parties intended the Contract to entitle, or
that the Contract actually entitles, Plaintiff to (1) execute a Deed of Trust against
Woody's homestead, or (2) receive reimbursement for expenses incurred in so doing.

1 voluntarily released the Deed of Trust. (Doc. 35 at 3–4 (describing the Deed of Trust as
2 improvident and imprudent, and arguing that Plaintiff incurred these expenses
3 “voluntarily and unnecessarily to secure itself with collateral that the Plaintiff
4 appropriated but abandoned when its actions were challenged”).

5 Indeed, Plaintiff’s own description of its voluntary release of the Deed of Trust is
6 instructive:

7 out of an abundance of caution, [Plaintiff] filed a Deed of
8 Release and Full Reconveyance (the “Release”) on February
9 8, 2013 releasing the Deed of Trust . . . against real property
10 owned by [Woody] in the amount of \$94,674.84. As a result
11 of recording the Release, Woody’s Motion to Amend Answer
12 to State a Counterclaim is now moot. More specifically,
13 Woody’s allegations arising out of A.R.S. § 33-420(c), which
provides that liability attaches if the defendant refuses to
release or correct the document or record within 20 days from
the written request from the owner, are now moot since
[Plaintiff] filed the Release prior to the effective date of any
written demand on the part of Woody.

14 (Doc. 25 at 1–2 (internal citation omitted)).⁴ Plaintiff’s voluntary Release does not
15 establish an undisputed fact regarding whether or not Plaintiff’s execution of the Deed of
16 Trust was “advisable or necessary” and “necessary or desired” within the meaning of the
17 Contract. However, if construed in the light most favorable to Defendants, Plaintiff’s
18 Release does create a legitimate and justifiable inference that the Deed of Trust was not
19 “advisable or necessary” and “necessary or desired.”

20 In the summary judgment context, the Court is required to construe all disputed
21 facts in the light most favorable to the non-movant, *Ellison*, 357 F.3d at 1075, and draw

22
23 ⁴ Arizona Revised Statute § 33-420(c) provides that

24 A person who is named in a document which purports
25 to create an interest in, or a lien or encumbrance against, real
26 property and who knows that the document is forged,
27 groundless, contains a material misstatement or false claim or
28 is otherwise invalid shall be liable to the owner or title holder
for the sum of not less than one thousand dollars, or for treble
actual damages, whichever is greater, and reasonable attorney
fees and costs as provided in this section, if he wilfully
refuses to release or correct such document of record within
twenty days from the date of a written request from the owner
or beneficial title holder of the real property.

1 all legitimate and justifiable inferences in favor of the non-movant. *Liberty Lobby*,
2 477 U.S. at 255. Consequently, the Court finds that the evidence in the record
3 demonstrates a genuine dispute of material fact whether Plaintiff’s execution of the Deed
4 of Trust was “advisable or necessary” and “necessary or desired.” Thus, there is a
5 genuine dispute of material fact whether or not Plaintiff is entitled to reimbursement for
6 attorneys’ fees and costs related to the execution and release of the Deed of Trust.
7 Accordingly, Plaintiff is not entitled to partial summary judgment with regard to the \$150
8 title fee and the portion of the \$10,386.56 in attorneys’ fees and costs related to the
9 execution and release of the Deed of Trust. Furthermore, because Plaintiff provides no
10 mechanism for the Court to identify which portion of the \$10,386.56 in attorneys’ fees
11 and costs relates to the Deed of Trust, the Court must deny partial summary judgment for
12 the entire aggregate amount.

13 //
14 //
15 //
16 //
17 //
18 //
19 //
20 //
21 //
22 //
23 //
24 //
25 //
26 //
27 //
28 //


1 **IV. CONCLUSION**

2 Accordingly,

3 **IT IS ORDERED** that Plaintiff Merchant Bonding Company (Mutual)'s Motion
4 for Partial Summary Judgment (Doc. 32) on Count I of the Complaint is GRANTED in
5 part and DENIED in Part, consistent with the reasoning set out above.

6 **IT IS FURTHER ORDERED** that partial summary judgment on Count I is
7 granted to Plaintiff and against Defendants in the amount of \$94,674.84 (the aggregate
8 amount of unreimbursed claims against the Bond paid by Plaintiff), plus interest. The
9 remaining damages sought in Count I and all of Count II shall proceed to trial. Within 5
10 days of the conclusion of trial Plaintiff shall submit a proposed form of judgment which
11 includes the damages awarded in this Order, including a calculation of pre- and post-
12 judgment interest, plus any damages awarded at trial, again including any necessary
13 interest calculation. *See* LRCiv 58.1(b). Defendant may object to the proposed form of
14 judgment as provided in LRCiv 58.1(a) (incorporating the time limits of LRCiv 52.1).
15 Any motion for attorneys' fees, costs, or expenses must be filed within the time set forth
16 in Fed. R. Civ. P. 54(d)(2), and in the form set forth in LRCiv 54.2.

17 Dated this 25th day of March, 2014.

18
19
20
21 
22 James A. Teilborg
23 Senior United States District Judge
24
25
26
27
28