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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Anna Leafty,

10 Plaintiff,

11 v.

12 Aussie Sonoran Capital LLC, et al.,

13 Defendants.
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No. CV-15-00655-PHX-DLR

ORDER

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16 Before the Court is Defendant's Motion for Attorneys' Fees. (Doc. 41.) Pursuant
17 to A.R.S. § 12-341.01(A), Defendant seeks \$8,490.00 in attorneys' fees incurred in
18 obtaining a dismissal order. (*Id.* at 1-2.) The motion is fully briefed and neither party
19 requested oral argument. The relevant factual background is detailed in the Court's
20 August 12, 2016 order granting Defendant's motion to dismiss (Doc. 40) and will not be
21 repeated here. For the following reasons, Defendant's motion is denied.

22 **I. Waiver**

23 Preliminarily, Plaintiff argues that Defendant waived its entitlement to attorneys'
24 fees by not demanding them in its responsive pleading. (Doc. 42 at 4-6.) Plaintiff's
25 argument is misguided because a motion to dismiss is not a "pleading" within the
26 meaning of the Federal Rules of Civil Procedure. Rule 7(a) defines "pleading" as:

27 (1) a complaint; (2) an answer to a complaint; (3) an answer
28 to a counterclaim designated as a counterclaim; (4) an answer
to a crossclaim; (5) a third-party complaint; (6) an answer to a
third-party complaint; and (7) if the court orders on, a reply to

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an answer.

Rule 7 distinguishes between “Pleadings” and “Motions and Other Papers.” *See* Fed. R. Civ. P. 7(a)-(b). Rule 12 also distinguishes between pleadings and motions, providing that “[e]very defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required,” but a party “may assert . . . defenses by motion.” Fed. R. Civ. P. 12(b).

More importantly, however, Defendant was not required to demand attorneys’ fees at the pleading stage. Federal courts sitting in diversity apply state substantive law and federal procedural law. *See Hanna v. Plumer*, 380 U.S. 460, 465 (1965). Although here state law governs Defendant’s entitlement to fees, the Federal Rules of Civil Procedure “establish the method by which a federal litigant must obtain attorneys’ fees[.]” *Port of Stockton v. W. Bulk Carriers KS*, 371 F.3d 1119, 1120 (9th Cir. 2004). Pursuant to Rule 54(d), requests for attorneys’ fees must be made by motion unless the substantive law requires those fees to be proven as an element of damages at trial. *Id.* at 1120-21. When attorneys’ fees are considered a form of special damages, Rules 54(d) and 9(g) require that they be specifically pled.

Plaintiff does not argue that attorneys’ fees under § 12-341.01 are an element of damages that need to be proven at trial, nor has the Court found authority directing that result. Section 12-341.01(A) allows the Court to “award the successful party reasonable attorney fees,” which indicates that the right to fees does not accrue until the case has been decided. Because attorneys’ fees in cases arising out of contract fall within Rule 54(d)’s general purview, not its limited exception, Defendant has not waived its entitlement to attorneys’ fees.

II. A.R.S. § 12-341.01(A)

Section 12-341.01 provides that “[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees.” A claim arises under contract when “the claim could not exist ‘but for’ the breach or avoidance of contract.” *Harris v. Maricopa Cty. Super. Ct.*, 631 F.3d 963, 974 (9th

1 Cir. 2011) (internal quotation and citation omitted). When determining whether a claim
2 arises out of contract, the Court is not limited to the form of the pleadings and, instead,
3 looks to the nature of the action and the surrounding circumstances. *Marcus v. Fox*, 723
4 P.2d 682, 684 (Ariz. 1986). The mere existence of a contract somewhere in the
5 transaction, however, does not bring a claim within the purview of § 12-341.01. “The
6 statute does not apply if the contract is only a factual predicate to the action but not the
7 essential basis of it.” *Kennedy v. Linda Brock Auto. Plaza, Inc.*, 856 P.2d 1201, 1203
8 (Ariz. Ct. App. 1993).

9 Plaintiff brought various statutory and tort claims, all of which were premised on
10 the allegation that she had validly rescinded her home loan before a 2011 trustee’s sale of
11 her property. (Doc. 21.) Defendant argues that “[t]his case would not exist but for the
12 2007 loan and [Plaintiff’s] breach thereof.” (Doc. 43 at 6.) The Court agrees. Although
13 Plaintiff’s claims took the form of statutory and tort actions, they each were based on
14 Plaintiff’s contention that her home loan and accompanying deed of trust were void
15 because she had exercised her rescission rights under the Truth In Lending Act (TILA).
16 Thus, the success of Plaintiff’s claims depended on a judicial determination that
17 Plaintiff’s mortgage contracts were unenforceable. *See Mullins v. S. Pac. Transp. Co.*,
18 851 P.2d 839, 842 (Ariz. Ct. App. 1992) (explaining that fees are not precluded when
19 successful party proves the non-existence of a contract).

20 Having determined that this action arises out of contract, the Court has broad
21 discretion to apportion fees. *Associated Indem. Corp. v. Warner*, 694 P.2d 1181, 1184
22 (Ariz. 1985). In exercising its discretion, the Court considers: (1) the merits of the
23 unsuccessful party’s claim or defense; (2) the chances that litigation could have been
24 avoided or settled and whether the successful party’s efforts were superfluous in
25 achieving the result; (3) whether assessing fees against the unsuccessful party would
26 cause an extreme hardship; (4) whether the successfully party prevailed with respect to
27 all relief sought; (5) the novelty of the questions presented; and (6) whether a fee award
28 would discourage other parties with tenable claims or defenses from litigating or

1 defending legitimate contract issues for fear of incurring liability for fees. *Id.*

2 Several of the *Warner* factors weigh in favor of a fee award. Defendant could not
3 have avoided litigation, it prevailed with respect to all relief sought, and its efforts were
4 not superfluous to achieving that result. Additionally, Plaintiff does not contend that a
5 fee award would impose a hardship.

6 Nevertheless, the Court declines to award fees because the remaining *Warner*
7 factors counsel against an award. Recent developments in the law governing TILA
8 rescissions prompted Plaintiff to pursue her claims. *See Jesinoski v. Counrtywide Home*
9 *Loans*, -- U.S. --, 135 S.Ct. 790 (2016). In granting Defendant's motion to dismiss, the
10 Court concluded that Plaintiff was collaterally estopped from re-litigating the validity of
11 the trustee's sale or raising claims that necessarily assert an interest in the property
12 because (1) she litigated the validity of the trustee's sale, along with the rescission issue,
13 in a previous state court action and (2) the Arizona Court of Appeals ruled that the
14 completion of the trustee's sale extinguished Plaintiff's interest in and claims related to
15 the property. (Doc. 40 at 3-4.) As a result, the Court did not pass on the merits of
16 Plaintiff's claims or her arguments concerning the effects of *Jesinoski*.

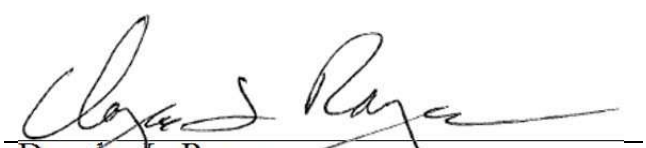
17 Further, the Court notes that TILA does not contain a provision allowing
18 successful defendants to recover attorneys' fees. Although TILA does not explicitly bar
19 defendants from seeking fee awards under other applicable state statutes, TILA's fee
20 shifting provision is designed to encourage plaintiffs to bring legitimate claims. *See*
21 *Boksa v. Keystone Chevrolet Co.*, 553 F. Supp. 958, 962 (N.D. Ill. 1982) (footnote
22 omitted) ("To a certain extent TILA itself may encourage an 'industry' of bringing suits
23 for damages and attorneys' fees, but that reflects a deliberate congressional choice with
24 which this Court may not interfere."). Because all TILA rescission claims necessarily
25 arise out of contract, awarding fees in cases such as this could undermine that purpose by
26 deterring future litigants from pursuing potentially meritorious claims based on changes
27 in relevant law. For these reasons,

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IT IS ORDERED that Defendant's Motion for Attorneys' Fees (Doc. 41) is **DENIED.**

Dated this 14th day of February, 2017.



Douglas L. Rayes
United States District Judge