Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-000325 06/06/2019

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

TOWN OF FLORENCE

CATHERINE M BOWMAN

v.

FLORENCE COPPER INC, et al.

JOSEPH N ROTH

KRISTIN MACKIN
CLIFFORD L MATTICE
RUSSELL R YURK
JUDGE BRODMAN

RULING ON APPLICATION FOR ATTORNEYS' FEES AND COSTS

The Court reviewed Florence Copper's application for attorneys' fees and costs, the response and reply. The Court reviewed the Town's supplemental pleading filed on June 3, 2019. Oral argument was held on May 29, 2019.

Florence Copper seeks $1,874,731.82 in attorneys' fees and $32,365.55 in costs. The Court will make some initial observations and then address the specifics of the application.

I. INTRODUCTION

The Court has extensive experience in this case. The case was assigned to the complex civil litigation calendar pursuant to former Ariz.R.Civ.P. 8(h). The Court ruled on two sets of cross-motions for summary judgment and on multiple motions involving discovery disputes and challenges to rulings made by the special master. The Court conducted a six-day bench trial. The case has been heavily litigated.

> This litigation arises out of contract. As noted in its January 2, 2019 Ruling:
>
> To summarize the dispute: in 1996 and 2003 the Town supported mining on the Property. By 2010-11, it did not. The issue is whether the parties are bound by the 2003 Development Agreement.

Findings of Fact and Conclusions of Law dated 1/2/2019 (the "Ruling") at p. 2. In the Ruling, the Court noted that "[a] development agreement is a contract" and cited contract interpretation rules. *Id*. The Court interpreted specific provisions in the Development Agreement to conclude that Florence Copper holds a vested right to mine the Property. Without the Development Agreement, Florence Copper would have no claim. This case would "not exist absent the contract." *See SK Builders, Inc. v. Smith*, 246 Ariz. 196, 204-05, ¶ 28 (App. 2019).

The case cited by the Town, *Son Silver West Gallery, Inc. v. City of Sedona*, 2018 WL 6616883 (Ariz. App. Dec. 18, 2018), is distinguishable. There, the parties' relationship was solely defined by the City's zoning ordinances. Here, the relationship between the parties is defined by a duly authorized and recorded contract called the Development Agreement. Development Agreements are, of course, contracts specifically authorized by Arizona statute. *See* A.R.S. § 9-500.05.

The Town cannot unilaterally prevent mining through zoning regulations because, when the Town annexed the Property, it entered into a written Development Agreement that vested the then-existing right to mine for 35 years. Among other issues, the Development Agreement clearly prohibited the Town from unilaterally prohibiting mining by imposing zoning restrictions on the Property. It reads:

> Town shall not apply to the Property any legislative or administrative land use regulations adopted by the Town or pursuant to an initiated measure that would change, alter, impair, prevent, diminish, delay or otherwise impact the development or use of the Property as set forth in the Development Plan except [ ] as specifically agreed in writing by the Owner.

Development Agreement *cited* in Ruling at p. 7. One of the most significant issues in the case was whether the Town and Owner agreed to alter or amend the nonconforming mining rights vested by the Development Agreement. The Court, of course, determined that there was no amendment to the Development Agreement and that the Owner's conduct did not eliminate its vested right to mine the Property as a nonconforming use.

This case was all about the contractual relationship established by the Development Agreement. The fact that it also involved zoning ordinances does not change the contractual nature of the claim. *See Hall v. Elected Officials' Retirement Plan*, 241 Ariz. 33, 45, ¶¶ 34-37 (2016) (even though pensions are "a creature of statute," the relationship between the class members and the plan is governed by contract so attorneys' fees should be awarded against the State under A.R.S. § 12-341.01(A)).

At oral argument, the Town asserted that the case to date only involved enforcement of zoning ordinances, not enforcement of a contract. According to the Town, the enforcement of the Development Agreement will be addressed when the Court considers Florence Copper's counterclaims. This argument is not consistent with the allegations in Count 1 of the Town's complaint or the arguments to date. In Count 1, the Town made determination and interpretation of the Development Agreement an issue by alleging the following:

> 77. The determination of the legal rights and obligations of the parties to the PADA [Pre-Annexation Development Agreement], the PUDs [Merrill Ranch Planned Unit Development], the development plans, and amendments thereto, are questions of law for the Court.
>
> 78. The interpretation of the legal effects of the PADA, the PUDs, the various development plans, and any amendments thereto, are questions of law for the Court.

Complaint at ¶¶ 77-78. The cross-motions for summary judgment involved detailed analysis of the Development Agreement and required the Court to address the Town's interpretation of the Development Agreement. *See, e.g.*, Ruling at p. 6 ("As a result of the clear and unambiguous language in the Development Agreement, the Prior Ruling rejected the Town's argument that the Development Agreement limited mining to its existing or historic use.") Thus, despite its recent protest, the Town understood that the Development Agreement is integral to this dispute.

There is no question that Florence Copper was the successful party. The Court adopted Florence Copper's interpretation of the Development Agreement and resolved all key issues in the litigation in Florence Copper's favor.

As a result, the instant dispute arises out of a contract and Florence Copper may recover its attorneys' fees as the successful party under A.R.S. § 12-341.01(A). To further cement Florence Copper's claim, the Development Agreement itself provides that a party who has to take legal action to enforce its right under the contract is entitled to recover attorneys' fees in accordance with § 12-341.01. Application at 2:18-20. Florence Copper is entitled to fees under the terms of the contract **and** A.R.S. § 12-341.01(A).

The Town argues that a fee award is limited to $10,000 as a matter of law under A.R.S. § 12-348(E)(4).[1] The Court disagrees. Arizona law is clear that "nothing in A.R.S. section 12-348 bars an award of fees against the state under another statute or under equitable grounds." *Kadish v. Arizona State Land Dept*., 177 Ariz. 322, 328 (App. 1983); *see also Mohave Co. v. Ariz. Dept. of Water Resources,* 242 Ariz. 492, 493, ¶ 6 (App. 2017) (§ 12-348(E)(4)'s $10,000 cap doesn't apply to fees awarded under another statute). Here, the Court's award of attorneys' fees is based on A.R.S. § 12-341.01(A) and the terms of the Development Agreement. *See also Hall, supra; Barth v. Cochise County*, 213 Ariz. 59, 64, ¶ 19 (App. 2006) (public entities that are successful parties in breach of contract actions may recover attorneys' fees under A.R.S. § 12-341.01(A)).

II. ANALYSIS OF WARNER FACTORS

Considering all relevant factors, an award of attorneys' fees is appropriate. The Court makes the following findings as to relevant factors. *Associated Indemnity Corp. v. Warner,* 143 Ariz. 567 (1985).

1. *Whether the unsuccessful party's claim or defense was meritorious*. So far, the Town has been wholly unsuccessful in this litigation. Florence Copper has been successful in demonstrating that it has a vested right to mine copper in the BHP mine overlay area. Florence Copper's claim is worth millions of dollars.

2. *Whether the litigation could have been avoided or settled and whether the successful party's efforts were completely superfluous in achieving the results*. A.R.S. § 12-341.01(A) provides that the Court may consider a "written settlement offer" that is equal to or more favorable than the final judgment. Although the Town complains that Florence Copper had an inflated view of the amount of attorneys' fees it could recover, the Town presents no evidence that the Town ever made any reasonable written offer to settle this litigation. Florence Copper's litigation efforts were therefore necessary to achieve the result. Florence Copper could not have avoided or settled this litigation because the Town made clear that it would accept nothing less than shutting down Florence Copper's business. This factor strongly cuts in favor of an award of fees to Florence Copper.

3. *Whether a fee award would be an extreme hardship.* The Court was not persuaded that a fee award would be an "extreme" hardship to the Town. From Florence Copper's standpoint, this was a "bet the company" case involving millions of dollars. The Town has devoted a significant litigation budget and has aggressively litigated the case. But even if there was some evidence of hardship, the hardship is outweighed by other factors. The Town decided to

1. At oral argument, the Town admitted that if fees are recoverable under A.R.S. § 12-341.01(A), the $10,000 cap does not apply.

aggressively engage in multimillion dollar litigation against Florence Copper in the face of a Development Agreement which, in the Court's mind, contradicts the Town's position. The Town took a risk, lost, and should bear the consequences of this litigation decision.

4. *Whether the successful party prevailed with respect to all of the relief sought*. Florence Copper prevailed with respect to all relief sought.

5. *Whether the matter presented a novel legal question*. The matter presented some novel legal questions but, on the whole, the case was interpretation of a disputed contract. Although the Development Agreement contained a few ambiguities, the Court did not believe the final resolution was a particularly close call. Nothing about the nature of the questions presented cuts against an award of attorneys' fees.

6. *Whether the award would discourage other parties with tenable claims or defenses from litigating them*. The Court does not believe an award would discourage parties with tenable claims from pursuing them. On the other hand, any party that undertakes litigation pursuant to rights granted under a development agreement should be aware that, if it loses, it will be subject to attorneys' fees. An assessment of fees could serve as a deterrent to governmental overreaching. *See Corrigan v. City of Scottsdale*, 149 Ariz. 538, 542-43 (1986) (Arizona Supreme Court allows monetary damages against a city in a wrongful zoning case, noting that damages provide a "deterrent impact" to "obvious excesses resulting from multiple regulation").

Thus, the *Warner* factors cut in favor of an award of fees to Florence Copper. Having determined that a fee award is appropriate, the question is the amount. The Court finds that the attorneys' hourly rates are consistent with the Phoenix community, and the Court finds that Florence Copper's counsel provided sufficient explanation to satisfy *China Doll* standards.

The Town argues that Florence Copper should not be awarded attorneys' fees for efforts on issues like eminent domain, the failed removal to federal court and the counterclaim. As an initial matter, the fact that Florence Copper was unsuccessful in the federal court removal matter does not prevent an award of fees. Arizona law is clear that "partial success does not preclude a party from prevailing and receiving a discretionary award of attorneys' fees." *Berry v. 352 E.Virginia, LLC*, 228 Ariz. 9, 14, ¶ 24 (App. 2016); *see also Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 189 (App. 1989) ("where a party has accomplished the result sought in the litigation, fees should be awarded for time spent even on unsuccessful legal theories"). Based on the "totality of the litigation" test, Florence Copper is the clear winner.

In addition, in *Modular Mining Systems, Inc. v. Jigsaw Technologies, Inc*., 221 Ariz. 515, 522, ¶ 22 (App. 2009), the court held that a trial court acted within its discretion when it awarded the prevailing party all of its fees "incurred in litigating interwoven and overlapping contract and

tort claims." The court stated "it is well established that a successful party on a contract claim may recover not only attorneys' fees expended on the contract claim, but also fees expended in litigating an interwoven tort claim." *Id*. at ¶ 23. The court noted that both the trade secret claim and the breach of employment contract claims were based on the same set of facts and involved common allegations.

Florence Copper already excluded some fees incurred in reacting to the eminent domain issue. Reply at 6:13-14. To the extent fees remain on eminent domain, the *lis pendens* and the counterclaim, the Court agrees with Florence Copper that these claims were inextricably interwoven with the contract claims. The central issues in this case all revolved around the rights established by the Development Agreement. The Court finds that all legal issues were intertwined and overlapping.

A trial court may, of course, award a party some but not all of its requested fees. *Lee v. IMG Inv. Mgt., LLC*, 240 Ariz. 158, 161, ¶ 13 (App. 2016). In addition, unsuccessful parties should not be required to pay for tasks that take an unreasonable amount of time, nor should they be required to pay for unnecessary or unproductive tasks. *Hawk v. P.C.Vill. Ass'n, Inc.,* 233 Ariz. 94, 100, ¶ 22 (App. 2013); *In re Guardianship of Sleeth*, 226 Ariz. 171, 176, ¶ 25 (App. 2010).

The Court reviewed the Town's spreadsheet containing objections to time entries. The Court finds that the fee applications are sufficiently documented and meet *China Doll* requirements. Although Osborn Maledon performed the vast majority of the work (Osborn Maledon's fees represent 84% of the total fee request), fees applications spanned four different firms. The Court finds there is minimal block billing but some duplicative billings. There are certain inefficiencies resulting from the use of so many firms. The Court finds that a 10 percent reduction is appropriate. As a result, the Court awards Florence Copper $1.7 million for reasonable attorneys' fees. (The Court rounded up to $1.7 million to account for post-trial motions.) The Court's experience is that a fee award of $1.7 million is consistent with fees requests in other complex, large-dollar and similarly-litigated cases.[2]

IV. CONCLUSION

Taking into account the *Warner* factors and the equities of the situation, the Court awards Florence Copper its attorneys' fees in the amount of $1.7 million pursuant to the terms of the contract and A.R.S. § 12-341.01(A). The Court finds this amount to be a fair and reasonable amount for attorneys' fees in this case.

2. The fees award is reasonable when compared to the Town's legal fees. At oral argument, the Court learned that the Town has spent approximately $1.5 million in attorneys' fees. The Town also employs in-house counsel who has participated in the case.

Florence Copper is awarded its costs in the amount of $32,365.55.

IT IS ORDERED that Florence Copper is awarded $1,700,000 in reasonable attorneys' fees, with said amount accruing interest at the rate of 6.50% from the date of this Order.

IT IS FURTHER ORDERED that Florence Copper is awarded $32,365.55 in costs, with said amount accruing interest at the rate of 6.50% from the date of this Order.