

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-014275

05/20/2020

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
T. DeRaddo
Deputy

KAREN PARKS

KAREN PARKS
17256 QUAIL RIDGE DR
FOUNTAIN HILLS AZ 85268

v.

VIRGINIA L SAVENELLI

LYN ANNE BAILEY

JUDGE STEPHENS

RULING ON DAMAGES FOR TRESPASS CLAIM
AND JUDGMENT

The Court has considered the testimony and exhibits presented at the trial on damages conducted on May 18, 2020 and the testimony and exhibits presented at the trial on liability conducted on October 1, 2019 and October 2, 2019. The parties subsequently provided the Court with supplemental briefing on the issue of attorneys' fees. The Court previously issued a permanent injunction order in this case. See minute entry dated January 3, 2020. Based on the evidence presented, the Court finds as follows on Plaintiff Karen Parks' request for damages, costs, and attorney fees on the trespass claim.

1. **Costs as the prevailing party under A.R.S. § 12-341:** Plaintiff Karen Parks is entitled to costs in the amount of \$590.20 as the prevailing party.
2. **Taxable costs/expert witness fees under A.R.S. § 12-332:** Plaintiff Karen Parks is awarded taxable costs in the amount of \$2,958.85 related to expert witness fees.
3. **Repair of drainage and catch basin on Defendant Savenelli's property and grading property away from the block wall separating the parties' properties:**

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-014275

05/20/2020

The parties agree these repairs have been made and Plaintiff's engineer has inspected and approved the repairs as made. No further action is required to address the drainage and grading of Defendant Savenelli's property.

4. **Block wall remediation:** The first two sections and two pilasters of the block wall between the parties' properties was damaged as a result of Defendant Savenelli's trespass. Defendant Savenelli shall repair the first two sections of the block wall separating the parties' properties (Lots 9 and 10) including the first two pilasters, by filling the existing cracks, applying stucco as needed, and waterproofing and painting the wall on both sides. In the event the pilasters or block wall should crack within one year from the date of repair, Defendant Savenelli shall replace the pilasters and first two sections of the block wall between the parties' properties at no expense to Plaintiff unless Plaintiff undertook some action that resulted in the cracking of the block wall or pilasters. Alternatively, Defendant Savenelli may elect to immediately replace the first two sections of the block wall separating the parties' properties (Lots 9 and 10) including the first two pilasters.
5. **Property value diminution:** Plaintiff Parks failed to establish any property value diminution as a result of Defendant Savenelli's trespass onto Plaintiff's property.
6. **Ongoing property maintenance costs incurred by Plaintiff Parks:** Plaintiff Parks failed to establish any specific monetary damages she incurred for ongoing property maintenance caused by Defendant Savenelli's trespass onto her property. The two invoices provided at trial (Exhibit 56, Parks 000221 and 000220) show charges billed to Plaintiff by a landscape maintenance company. The work is listed as removing river rock and cleaning out a drainage ditch and cleaning up landscaping, trimming plants, removing weeds, blowing and raking rocks, spreading rocks, and changing drip emitters. Plaintiff Parks failed to establish at trial specific amounts or activities on these invoices which she claimed as damages related to the trespass by Defendant Savenelli.
7. **Damages incurred by Plaintiff Parks since she was unable to complete renovation of her home because she was required to use all available funds to pay her attorneys' fees:** Plaintiff Parks failed to establish any monetary damages related to her home renovation was caused by Defendant Savenelli's trespass onto her property.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-014275

05/20/2020

8. **Plaintiff's attorney fees:** Plaintiff Parks seeks \$25,142.50 to reimburse her for the costs of her attorneys' fees. Plaintiff Parks argues attorneys' fees should be awarded under A.R.S. § 12-341.01 because she is the prevailing party and her claim arises out of a contract, specifically between property owners subject to the CC&Rs for the Morningside at Lakeside Village subdivision, citing to *Tucson Estates Property Owners Association v., McGovern*, 239 Ariz. 51 (App. 2016). Plaintiff Parks also contends that attorneys' fees should be awarded to her under A.R.S. § 12-349 because: (1) Defendant Savenelli asserted a defense (the builder defect defense) without substantial justification and that defense was not supported at trial by Defendant's witnesses; (2) Defendant Savenelli's actions delayed and frustrated an inspection of the property by Plaintiff's expert witness; (3) Defendant Savenelli failed to participate in good faith in a mandatory settlement conference, sending her lawyer, but not personally appearing; and (4) Defendant Savenelli's attorney failed to appear for a deposition or schedule a second date. Defendant Savenelli contends that A.R.S. § 12-341.01 does not apply here because this action did not arise out of contract but is a trespass claim. The homeowner's association was not a party to the litigation. Any contract created by the CC&Rs is between the property owners as a whole and the individual lots owners, not between each property owner, citing to *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631 (App. 2000). Also, Defendant argues Plaintiff is not entitled to attorneys' fees under A.R.S. § 12-349 because her defenses were made in good faith and were not groundless or frivolous. Counsel for Defendant Savenelli and her insurance carrier participated in the settlement conference and made offers that were rejected by Plaintiff. Finally, Defendant Savenelli assert that the Court previously addressed the failure to appear at the deposition by ordering Defendant Savenelli pay the witness \$200.

A.R.S. § 12-341.01 provides, in part, as follows.

In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees.

. . .

The award of reasonable attorney fees pursuant to this section should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense.

A tort claim will arise out of a contract only when the tort could not exist but for the breach or avoidance of contract. This applies to defendants even if they were not parties to that contract. *ML Servicing Co. v. Coles*, 235 Ariz. 562, 334 P.3d 745 (App. 2014).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-014275

05/20/2020

A.R.S. § 12-349 provides as follows.

Unjustified actions; attorney fees, expenses and double damages; exceptions; definition

A. Except as otherwise provided by and not inconsistent with another statute, in any civil action commenced or appealed in a court of record in this state, the court shall assess reasonable attorney fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars against an attorney or party, including this state and political subdivisions of this state, if the attorney or party does any of the following:

1. Brings or defends a claim without substantial justification. . .

3. Unreasonably expands or delays the proceeding. . .

C. Attorney fees shall not be assessed if after filing an action a voluntary dismissal is filed for any claim or defense within a reasonable time after the attorney or party filing the dismissal knew or reasonably should have known that the claim or defense was without substantial justification. . .

F. For the purposes of this section, "without substantial justification" means that the claim or defense is groundless and is not made in good faith.

Plaintiff Parks seeks attorneys' fees for her representation by counsel during the period March 27, 2017 through February 13, 2019. Plaintiff Parks represented herself at both trials. The Court finds Plaintiff Parks failed to establish any legal basis for awarding attorneys' fees under A.R.S. §12-341.01. The complaint does not reference the CC&Rs as a basis for Plaintiff's trespass claim but instead references only Plaintiff's property rights. Trial Exhibit 1 is a letter from Plaintiff's attorney to Defendant Savenelli dated March 30, 2017. In that letter, Plaintiff's attorney describes how improper water drainage had damaged Plaintiff's property and states Arizona law is clear that an uphill landowner may not cause or permit water to drain across the property of a downhill neighbor unless such drainage is part of an established drainage plan. At trial, Plaintiff used the drainage plan submitted to the Town of Fountain Hills for the subdivision of Morningside at Lakeside Village which provided for drainage to the back of the property and into the wash. No reference was made to the CC&Rs as the basis for the claim for trespass at any time. Article 9 of the Second Amendment to Declaration of Covenants, Conditions, and Restrictions for Morningside at Lakeside Village discusses the creation of party wall rights and duties and assigns responsibility for paying for repair of walls if damaged or destroyed through the act of an adjoining owner. See Trial Exhibit 7. Nevertheless, the basis for liability on the trespass claim was Arizona property law and not the obligations of the parties under the CC&Rs. See *Taft v. Ball, Ball Brosamer, Inc.*, 169 Ariz. 173 (App. 1991) and *SWC Baseline & Crismon*

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-014275

05/20/2020

Investors v. August Ranch, 228 Ariz. 271 (App. 2011). The trespass claim here did not arise out of a contract because the tort existed regardless of any provision in the CC&Rs. *ML Servicing Co. v. Coles*, 235 Ariz. 562, 334 P.3d 745 (App. 2014). Thus, A.R.S. § 12-341.01 does not apply to this case and is not a basis for awarding attorneys' fees to Plaintiff.

Regarding the claim for attorneys' fees under A.R.S. § 12-349, Plaintiff Parks did not establish that Defendant Savenelli's defenses were groundless or not made in good faith. Plaintiff Parks did not establish that Defendant Savenelli failed to participate in good faith in settlement discussions. Regarding the allegation that Defendant Savenelli's actions delayed and frustrated an inspection of the property by Plaintiff's expert witness, even if true, this fact alone does not warrant a finding that Defendant Savenelli unreasonably expanded or delayed the proceedings. In any event, no testimony on this issue was presented at the damages trial. In the pretrial statement, Defendant Savenelli described the contested issues for trial including that Defendant did not create the conditions that caused damage to the wall. Defendant Savenelli contended any damages were the result of defective design, were not a man-made condition, and that any damage was not structural to the common wall. Defendant Savenelli contended at trial that there was no damage to any other property. Defendant argued at trial that the spalling paint on the common wall occurred throughout the community and required only painting to remedy. The pretrial statements of both parties indicated settlement efforts were unsuccessful. In her pretrial statement, Plaintiff Parks stated the consequential damages she was seeking included costs of legal representation, landscaping and repair, and the loss of property value. As the Court determined above, these damages were not supported by the evidence presented. Thus Defendant Savenelli did not fail to participate in good faith in settlement discussion since Plaintiff was requesting damages for those items.

For the reasons stated:

IT IS ORDERED granting judgment in favor of Plaintiff Karen Parks and against Defendant Virginia Savenelli on the trespass claim.

IT IS FURTHER ORDERED granting judgment in favor of Plaintiff Karen Parks and against Defendant Virginia Savenelli in the amount of \$590 for costs and \$2,958.85 for taxable costs/expert witness fees. These amounts shall accrue interest at the rate of 4.25% per annum from the date of judgment until paid in full.

IT IS FURTHER ORDERED Defendant Virginia Savenelli shall repair the first two sections of the block wall separating the parties' properties (Lots 9 and 10) including the first two pilasters, by filling the existing cracks, applying stucco as needed, waterproofing the wall, and painting the wall on both sides. In the event the pilasters or block wall crack within one year from the date of repair, Defendant Savenelli shall replace the pilasters and first two sections of

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-014275

05/20/2020

the block wall between the parties' properties at no expense to Plaintiff unless Plaintiff caused or took some action that resulted in the cracking of the block wall and/or pilasters. Alternatively, Defendant Savenelli may elect to immediately replace the first two sections of the block wall separating the parties' properties (Lots 9 and 10) including the first two pilasters. Repair or replacement of the block wall shall be completed within 30 days from the date this order is entered.

No further matters remain pending. Judgment is entered under Rule 54(c), Ariz.R.Civ.P.

Dated this 20th day of May, 2020.

HONORABLE SHERRY K. STEPHENS
JUDICIAL OFFICER OF THE SUPERIOR COURT