

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2001-006415

06/03/2005

HON. JONATHAN H. SCHWARTZ

CLERK OF THE COURT
W. Bobrowski
Deputy

FILED: 06/10/2005

SUN CITY TAXPAYERS ASSOCIATION INC, LARRY K UDALL
et al.

v.

RECREATION CENTERS OF SUN CITY INC, CHARLES I KELHOFFER
et al.

CHARLES R COHEN

HEARING HELD

8:59 a.m. This is the time set for Oral Argument on Defendant's Request for Attorneys' Fees. Plaintiffs are represented by counsel, Larry K. Udall. Defendant is represented by counsel, Charles I. Kelhoffer and Charles R. Cohen.

Court Reporter, Amy Prellwitz-Fuller, is present.

Arguments are heard.

IT IS ORDERED taking this matter under advisement.

9:46 a.m. Hearing concludes.

LATER:

This matter having been taken under advisement.

IT IS ORDERED denying the application for an award of attorneys' fees of the Defendant.

IT IS FURTHER ORDERED that each party bear their own attorneys' fees.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2001-006415

06/03/2005

IT IS FURTHER ORDERED that the Plaintiffs pay the taxable costs of \$2,530.00. The Court is not awarding the \$140.00 filing fee at the Court of Appeals because the Defendant was not successful in all respects on the Plaintiffs' appeal.

IT IS FURTHER ORDERED that Defendant file a new form of judgment that includes the findings of fact and conclusions of law set forth in the Court's minute entry of March 29, 2005. Defendant will file the form of judgment by June 24, 2005. Before filing the form of judgment, Defendant will submit the form to counsel for Plaintiffs to determine if it may be approved as to form.

The Court has applied the factors set forth in Associated Indemnity v. Warner, 143 Ariz. 567, 694 P. 2d 1181 (1985). The Court finds that the unsuccessful party, the Plaintiffs had a position with merit. The Court of Appeals has decided in this case that the exchange of underground water by the Defendant to the Water Company was a "conveyance" under the terms of the Defendant's Articles of Incorporation. The remaining issue for this Court was to determine whether a substantial portion of the assets of the Defendant had been conveyed in the exchange when the Defendant exchanged rights to underground water for rights to use CAP water (Central Arizona Project) with the Water Company. Plaintiffs' position taken technically has merit. It is beyond cavil that in Arizona the right to pump the amount of water exchanged in this transaction has substantial value. This Court adopted what it considered a more practical approach and viewed the transaction in its entirety. When viewed under the totality of the facts this Court determined that no diminution in the assets of the Defendant had occurred by the exchange. This finding does not mean that the Court found Plaintiffs' position to be without merit. Instead this Court stated on the record that both positions have substantial merit. Therefore the first factor in Associated Indemnity v. Warner argues against an award of attorneys' fees for Defendant.

The second factor is whether the litigation could have been avoided. Plaintiffs assert that if Defendant would have permitted a vote of the membership the lawsuit would have been dismissed. Plaintiffs' position in this regard is not adopted by the Court. Defendant had every right to oppose an election under their reasonable interpretation of the Articles of Incorporation. Although most cases can be settled, since this case involves the voting rights of as many as forty thousand members of the Defendant association it is not as easily settled as other contract/commercial matters. The Court concludes that the litigation could not have been avoided. Each side had a legitimate concern. Eventually both the Court of Appeals and this Court acting as a trier of fact had to make decisions before this controversy could be resolved. Both the Court of Appeals and this Court were writing on a fairly clean slate. There is not a lot of law in this sort of situation. The second factor also argues against an award of attorneys' fees for Defendant.

The third factor is whether assessing fees against the unsuccessful party would cause an undue hardship. Defendant effectively argues that if fees are assessed they must be assessed

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2001-006415

06/03/2005

jointly and severally against all individual Plaintiffs who chose to become litigants in this matter. Therefore an award of fees in the range of \$180,000.00 (the approximate amount requested by Defendant) could be collected against any one Plaintiff. Although the Court has not been provided with any tax returns or financial statements for any of the individual Plaintiffs or the former Plaintiff, the Sun City Taxpayers Association (SCTA), Defendant argued in response that the median annual income of Sun City residents is \$25,000.00. If the Defendant were to obtain a judgment of joint and several liability for approximately \$180,000.00 in attorneys' fees and Defendant were to execute the judgment as the law permits against any individual Plaintiff, the Court determines that an economic hardship would be caused.

The Court however is aware that unlike the circumstances in Associated Indemnity v. Warner, (where the party seeking attorneys' fees was an insurance company bringing a declaratory judgment action on coverage against their insured) the party seeking attorneys' fees in this case is a non-profit corporation. This corporation exists for the purpose of operating recreation facilities in the Sun City communities. The Defendant obtains its funds only from billing dues to approximately forty thousand resident members. These members have had to incur an expense of approximately \$180,000.00 to litigate this case. The Court balances this expense when considering the extreme financial hardship that would occur to an individual Plaintiff if a judgment for a significant amount of attorneys' fees were executed against that Plaintiff. The Court still concludes that the association representing a much larger group of residents is able to bear the burden of this litigation. Since the litigation was not brought without merit it is not unreasonable for the association to pay its own attorneys' fees.

The fourth factor is whether the prevailing party prevailed as to all relief sought. Ultimately, the Defendant prevailed. The key question was whether the Defendant was required to hold an election of its membership to approve the Exchange Agreement. This Court's decision was in favor of the Defendant's position that it was not required to seek a vote of its membership pursuant to the Articles of Incorporation. However, during the course of the litigation the Judge previously on the case granted the Defendant's motion to dismiss. When Plaintiffs appealed, the Court of Appeals reversed the motion to dismiss upholding most of Judge Santana's reasoning but reversing as to the lower Court's holding that no "conveyance" had occurred in the Exchange Agreement. Therefore on appeal the Plaintiffs had been temporarily successful. This factor however still weighs in favor of the Defendant.

The fifth factor is whether an award of attorneys' fees would discourage other claimants from pursuing legitimate claims. An award of approximately \$180,000.00 in attorneys' fees that could be executed against any one complaining member of the recreation association could very well chill another member from bringing a future action on a legitimate claim. As stated above this Court has found that Plaintiffs had a legitimate basis upon which to bring their complaint for declaratory judgment. Case law did not exist simply clarifying the legal questions involved in this matter. This was a novel area of law. No Court had interpreted language similar to the subject language in the articles of incorporation at issue here. Therefore this is not a situation where claimant stubbornly pursued a claim with very little basis and placed upon the Defendant

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2001-006415

06/03/2005

the burden of having to defeat that claim. Although the Defendant did bear the burden of litigating and defeating the Plaintiffs' claim, this case falls in the category of claims that must be brought.