

1 U.S. BANKRUPTCY COURT
2 FOR THE DISTRICT OF ARIZONA
3

4 **In re**) In Chapter 11 proceedings
5 **NAMWEST, LLC,**) Case No.: 08-13935
6 **Debtor.**) Adversary No. 08-860
7)
8)
9)

**UNDER ADVISEMENT DECISION RE
ATTORNEY FEES**

10 **NAMWEST, LLC; NAMWEST-TOWN**)
11 **LAKES II, LLC,**)
12 **Plaintiffs,**)
13 v.)
14 **NAMWEST-TOWN LAKES, LLC;**)
15 **THEODORE KOHAN; ARIZONA TEMPE**)
16 **TOWN LAKE, LLC; and BUSINESS TO**)
BUSINESS MARKETS, INC.,)
Defendants.)

17
18 Theodore Kohan (“Kohan”) and Ezri Namvar (“Ezri”) had a trusting friendship
19 and business partnership for many years. In the end, promises were made and promises
20 were broken. Through several counterclaims, Kohan, Business to Business Markets, Inc.
21 (“B2B”), and Arizona Tempe Town Lake, LLC (“ATTL”) (collectively “Kohan Parties”)
22 sought judicial enforcement of Ezri’s promises, but they ultimately could not prove that a
23 contract existed and lost on all claims. Since Namwest, LLC (“Namwest”), Namwest-
24 Town Lakes, LLC (“NTL”), and Namwest-Town Lakes II, LLC (“NTL II”) (collectively
25 “Namwest Parties”) won on all claims they applied for attorneys’ fees. Although the
26 Kohan Parties’ counterclaims arose out of contract, discretionary attorneys’ fees awards
27 are not appropriate under the circumstances.
28

1 **I. Background and Facts**

2 The history leading up to these fee requests is well known to the parties, so the
3 Court incorporates the facts from the under advisement decision dated January 27, 2012
4 (“Under Advisement Decision”). (Dkt. # 213). As a refresher, most of the matters in the
5 underlying Namwest bankruptcy case had been resolved prior to the Under Advisement
6 Decision: ten other jointly administered bankruptcies were dismissed; four other
7 adversary proceedings were dismissed; and this adversary proceeding was dismissed with
8 prejudice aside from the Kohan Parties’ counterclaims.

9 The Kohan Parties’ counterclaims centered on an alleged oral agreement. Triyar
10 Capital, LLC assigned the option to purchase a property known as the “Club Rio
11 Property” to B2B. As president of B2B, Kohan discussed a deal with Ezri in which Ezri
12 would provide 100% financing to purchase the Club Rio Property and possibly other
13 properties in the vicinity and in exchange Kohan would receive a 27% membership
14 interest in a newly formed entity that would own the Club Rio Property and any other
15 properties in the vicinity. Kohan caused B2B to assign the Club Rio Property option to
16 NTL. Kohan claimed he did this based on his oral agreement with Ezri, but an operating
17 agreement was never reached, so Kohan never received a membership interest.

18 Kohan alleged that Ezri breached an oral contract and filed various claims: (1)
19 breach of contract; bad faith (contract), (2) unjust enrichment, (3) fraud; negligent
20 misrepresentation, (4) constructive fraud; breach of fiduciary duty, (5) aiding and
21 abetting breach of fiduciary duty, (6) conversion, and (7) constructive trust; equitable
22 subordination.

23 Lengthy proceedings followed and the Court ultimately found that no oral
24 contract existed. At best, the parties had an agreement to agree. Furthermore, “each of the
25 claims [was] dependent, in no small part, on Kohan showing the existence of the Oral
26 Agreements,” so all of the Kohan Parties’ claims failed, and the Court granted summary
27 judgment in favor of the Namwest Parties. This matter is still on appeal.

28

1 Claiming that they were the successful parties, the Namwest Parties filed
2 applications for attorneys' fees totaling \$637,762.83 pursuant to A.R.S. § 12-341.01.¹
3 NTL II requested \$155,454 in fees and \$1,193.70 in costs for three different law firms:
4 Stewart & Bourque, P.C. requested \$124,581.50; Carmichael & Powell requested \$7,400;
5 and Law Office of Thomas H Casey, Inc. requested \$23,472.50. Namwest requested a
6 total of \$414,515.48 for two law firms: Jennings, Strouss, & Salmon, P.L.C. requested
7 \$218,084.98 and Chester & Shein, P.C. requested \$189,430.50. NTL requested
8 \$63,802.69 in fees and \$2,796.96 in costs for Schlesinger Conrad, PLLC.

9 **II. Analysis**

10 “Under the American Rule, the prevailing litigant is ordinarily not entitled to
11 collect a reasonable attorneys' fee from the loser. This default rule can, of course, be
12 overcome by statute.” *Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec.*
13 *Co.*, 549 U.S. 443, 448 (2007). As such, “[p]roperty interests are created and defined
14 by state law,' and '[u]nless some federal interest requires a different result, there is no
15 reason why such interests should be analyzed differently simply because an interested
16 party is involved in a bankruptcy proceeding.’” *Travelers* at 451 (quoting *Butner v.*
17 *United States*, 440 U.S. 48, 57 (1979)). Here, A.R.S. § 12-341.01 gives the Court the

18
19 ¹ A.R.S. § 12-341.01 reads:

20 A. In any contested action arising out of a contract, express or implied, the court may
21 award the successful party reasonable attorney fees. If a written settlement offer is
22 rejected and the judgment finally obtained is equal to or more favorable to the offeror
23 than an offer made in writing to settle any contested action arising out of a contract, the
24 offeror is deemed to be the successful party from the date of the offer and the court may
25 award the successful party reasonable attorney fees. This section shall in no manner be
26 construed as altering, prohibiting or restricting present or future contracts or statutes that
27 may provide for attorney fees.

28 B. The award of reasonable attorney fees pursuant to subsection A should be made to
mitigate the burden of the expense of litigation to establish a just claim or a just defense.
It need not equal or relate to the attorney fees actually paid or contracted, but the award
may not exceed the amount paid or agreed to be paid.

 C. The court shall award reasonable attorney fees in any contested action upon clear and
convincing evidence that the claim or defense constitutes harassment, is groundless and is
not made in good faith. In making the award, the court may consider any evidence it
deems appropriate and shall receive this evidence during a trial on the merits of the cause,
or separately, regarding the amount of fees it deems in the best interest of the litigating
parties.

 D. The court and not a jury shall award reasonable attorney fees under this section.

1 discretion to award reasonable attorneys' fees related to claims arising out of contract. *In*
2 *re Larry's Apartment, LLC*, 249 F.3d 832, 836 (9th Cir. 2001).

3 *A. Attorneys' Fees When an Appeal is Pending*

4 In the Ninth Circuit, courts can grant attorneys' fees after appeals are filed.
5 *Cazares v. Barber*, 959 F.2d 753, 755-56 (9th Cir. 1992). The Kohan Parties incorrectly
6 rely on *In re Elegant Custom Homes, Inc.* No. CV 06-2574-PHX-DGC, 2007 WL
7 1991673, at *1 (D. Ariz. July 5, 2007). Although the court extended the time for parties
8 to file for attorney's fees until after the appeal, the court did not deny attorneys' fees
9 because an appeal was pending; the court denied attorneys' fees because the movant did
10 not file a required Statement of Consultation. *Id.* *In re Elegant Custom Homes, Inc.* does
11 not restrict this Court from considering applications for attorneys' fees while an appeal is
12 pending, so the Court will consider the Namwest Parties' fee applications now.

13 *B. Claims Arising out of Alleged Contracts*

14 Courts can only award attorneys' fees under A.R.S. § 12-341.01 when the
15 underlying claim arises out of contract. A claim arises out of contract when the contract is
16 the essential basis for the claim not only the factual predicate. *Chaurasia v. Gen. Motors*
17 *Corp.*, 126 P.3d 165, 173 (Ariz. Ct. App. 2006) (citing *Cashway Concrete & Materials v.*
18 *Sanner Contracting Co.*, 158 Ariz. 81, 83 (Ariz. Ct. App. 1988)). The statute permits
19 recovery for a non-contract action, like a tort claim, if that action could not arise but for
20 the breach of contract. *Marcus v. Fox*, 723 P.2d 682, 684 (Ariz. 1986) (citing *Sparks v.*
21 *Republic National Life Insurance Co.*, 647 P.2d 1127 (Ariz. 1982)); *Kennedy v. Linda*
22 *Brock Automotive Plaza, Inc.*, 856 P.2d 1201, 1203 (Ariz. Ct. App. 1993). Courts
23 examine the nature of the action and the surrounding circumstances to determine if a
24 claim arises out of contract. *Marcus*, 723 P.2d at 684.

25 Even when there is no contract, the claim can still arise out of contract if a
26 plaintiff alleges a contract and the defendant successfully proves there is no contract.
27 *Lacer v. Navajo County*, 687 P.2d 400, 402 (Ariz. Ct. App. 1984). Tort claims can arise
28 out of the alleged contract when the breached duty arose out of contract not out of law.

1 *Colberg v. Rellinger*, 770 P.2d 346, 352 (Ariz. Ct. App. 1989) (citing *Barmat v. Doe*, 747
2 P.2d 1218 (Ariz. 1987)).

3 The essential basis for each claim was that Kohan attained a 27% membership
4 interest by oral contract, but on this essential point, the proof failed. The Court stated,
5 “Each claim is dependent, in no small part, on Kohan showing the existence of the Oral
6 Agreements.” (Under Advisement Decision p. 18). Since each claim was based on an
7 alleged oral agreement, the claims arose out of contract even though the contract did not
8 exist. Accordingly, the Court can award attorneys’ fees at its discretion.

9 *C. Discretionary Power to Award Attorneys’ Fees*

10 Even if a claim arises out of contract, there is no presumption that the successful
11 party is entitled to attorneys’ fees as an award is discretionary. *Associated Indem. Corp.*
12 *v. Warner*, 694 P.2d 1181, 1183, 84 (Ariz. 1985). The Court in *Associated Indem. Corp.*
13 *v. Warner* articulated the factors that help courts determine if discretionary attorneys’
14 fees are reasonable in the circumstances:

- 15 1. The merits of the claim or defense presented by the unsuccessful party.
- 16 2. The litigation could have been avoided or settled and the successful
17 party's efforts were completely superfluous in achieving the result.
- 18 3. Assessing fees against the unsuccessful party would cause an extreme
19 hardship.
- 20 4. The successful party did not prevail with respect to all of the relief
21 sought.

22 In addition to these factors, we would include: the novelty of the legal
23 question presented, and whether such claim or defense had previously
24 been adjudicated in this jurisdiction. We also believe that the trial court
25 should consider whether the award in any particular case would
26 discourage other parties with tenable claims or defenses from litigating or
27 defending legitimate contract issues for fear of incurring liability for
28 substantial amounts of attorney's fees.

Id. at 1184.

1 *1. The merits of the unsuccessful party’s claim or defense*

2 Although the Court granted summary judgment against him on all claims,
3 Kohan’s claims were not entirely meritless: promises were made and broken between the
4 parties; Kohan believed a contract existed based on his communications and past business

1 relationships with the defendants; and he relied on a similar Arizona case, *Ellingson v.*
2 *Sloan*, about an oral agreement in Tempe to build his arguments. Since the bases for the
3 claims were not frivolous despite the outcome, the claims' merits were not so lacking that
4 attorney's fees should be awarded on this factor.

5
6 *2. The litigation could have been avoided or settled and the successful party's*
7 *efforts were completely superfluous in achieving the result*

8 Kohan had ample opportunity to settle, but it is not abundantly clear in light of the
9 subsequent litigation that he should have done so, even though he eventually lost on all
10 claims. Any party considering settlement needs to assess their chances of success in the
11 pending litigation. The Kohan Parties clearly felt strongly that they could prove that there
12 was an oral agreement at trial. In hindsight perhaps the Kohan Parties should have settled,
13 but settlement was not a clear choice when it was presented.

14 Furthermore, the Namwest Parties concede that their efforts in litigating these
15 claims were all meaningful and necessary to achieve the overall outcome of the case.
16 Over the course of this and other proceedings the Namwest Parties repeatedly tried to
17 defeat the Kohan Parties 27% claimed interest. However, that issue did not fully come to
18 a head, nor was it fully decided, until this Court ruled on the motion for summary
19 judgment. Thus, the time and effort spent to determine this important issue was a
20 necessary part of a larger legal battle. In other words, this was not a superfluous matter.
21 This factor does not weigh in favor of an award.

22
23 *3. Whether assessing fees against the unsuccessful party would cause extreme*
24 *hardship*

25 Awarding these applications for attorneys' fees would appear to cause extreme
26 hardship for the Kohan Parties and would be essentially punitive rather than
27 compensatory. The fees requested in this case are nearly \$640,000. Kohan has \$300,000
28 cash, one condominium worth \$600,000 encumbered by a note and deed of trust of

1 \$580,000, and another condominium worth \$400,000 that is his homestead. Kohan has
2 personal liability in excess of \$1,000,000 and several lawsuits pending. B2B has \$2,000
3 in cash and \$100,000 in liabilities. ATTL has no assets. Kohan supports his two minor
4 children and his parents. Kohan asserts that he will be forced to seek bankruptcy
5 protection if such high attorneys' fees are awarded against him.

6 Although Kohan has bragged about his financial wherewithal, Kohan's financial
7 position, like that of many working in real estate, has significantly declined over the
8 years, and his attorneys work on a contingency basis. Since the requested fees are so
9 considerable, an award would cause extreme hardship.

10
11 *4. Whether the successful party prevailed with respect to all of the relief it sought*

12 The Kohan Parties concede this factor, and both parties agree that the Namwest
13 Parties prevailed on all claims.

14
15 *5. The novelty of the legal question presented*

16 The law in this area is not novel. Both parties cited Arizona authorities that were
17 on-point, and Arizona agreements-to-agree jurisprudence dates back 89 years. However,
18 the law cannot be viewed in a vacuum; the facts of a particular case must be applied to
19 the established law. The Court grappled with the complex facts here even though the
20 legal question was not novel. On balance, this factor weighs against an award.

21
22 *6. Whether the award in any particular case would discourage other parties from*
23 *litigating tenable claims or defenses for fear of incurring liability for substantial*
24 *amounts of attorneys' fees*

25 Parties with oral agreements, like Kohan's, are likely to be discouraged from
26 pursuing litigation because oral agreements are more difficult to prove than written
27 agreements. The Namwest Parties argue that only those with groundless claims would be
28 deterred. However, Kohan truly believed that he had a tenable claim not a groundless

1 one. In similar circumstances where oral promises have been broken, others who believe
2 they have oral contracts will fear crushingly expensive repercussions if a court does not
3 find that those promises are judicially enforceable. This factor weighs against an award.

4 As most of the factors weigh against an award in these circumstances, the
5 Namwest Parties' applications for attorneys' fees are denied. The Kohan Parties'
6 factually complex claims were not meritless. Although Kohan had opportunities to settle,
7 the litigation was not superfluous because the facts were so complex. The \$640,000 fees
8 requested would create an extreme hardship, and if the Namwest Parties were granted this
9 award, others in Kohan's position would be discouraged from bringing tenable claims out
10 of fear of similar hardship.

11 *D. Reasonableness of Requested Fees*

12 Even if attorneys' fees were appropriate in this case, the Namwest Parties' fee
13 applications are woefully deficient. The Court cannot determine if the fees would be
14 reasonable based on the requests the Namwest Parties submitted.

15 The only fees that can be awarded are those incurred for work performed
16 exclusively in order to provide a defense against claims for which fees are permitted.
17 *Harris v. Maricopa Cnty. Super. Ct.*, 631 F.3d 963, 973 (9th Cir. 2011). General fees
18 cannot be awarded, and the burden of proof is on the movant. *Id.* at 971. "In order for the
19 court to make a determination that the hours claimed are justified, the fee application
20 must be in sufficient detail to enable the court to assess the reasonableness of the time
21 incurred." *Schweiger v. China Doll Restaurant, Inc.*, 673 P.2d 927, 932 (Ariz. Ct. App.
22 1983). It is also "insufficient to provide the court with broad summaries of work done and
23 time incurred." *Id.* Some things courts should consider are the qualities of the advocate,
24 character of the work to be done, the work actually performed, the billing rate, the
25 number of hours billed, and the result. *Id.* at 931. It is not unreasonable to grant fees
26 awards for multiple attorneys working on the same case if their efforts are not
27 duplicative. *See S & R Props. v. Maricopa Cnty.*, 875 P.2d 150, 164 (Ariz. Ct. App.
28 1993) (finding that consultations between multiple attorneys and paralegals in a law firm

1 is not duplicative work). The burden shifts to the opposing party to specifically challenge
2 fees only if an application meets the minimum requirements of *Schweiger*. *State ex rel.*
3 *Corbin v. Tocco*, 845 P.2d 513, 520 (Ariz. Ct. App. 1992).

4 The fee applications requesting \$637,762.83 are unreasonable because it is
5 unclear if the time incurred was performed exclusively to defend these claims. Since the
6 application is not in sufficient detail for the Court to determine its reasonableness, the
7 Namwest Parties did not meet the minimum requirements of *Schweiger*, so the burden of
8 proof does not shift to the Kohan Parties.

9 Many of the fees the Namwest Parties listed do not appear to be directly related to
10 these claims and are not sufficiently described for the Court to easily determine their
11 nature:

- 12 • The Jennings, Strouss, & Salmon fee application dates back to September 12,
13 2008, and the Chester & Shein fee application dates back to October 15, 2008.
14 However, Kohan did not file his counterclaims until May 11, 2009.
- 15 • The Jennings, Strouss, & Salmon fee application contains an entry on May 19,
16 2009 that states, “Receive and begin analysis of Kohan counterclaims. . .” The
17 Court does not see how the fifteen pages of fees listed before that entry can
18 directly relate to the Kohan Parties’ counterclaims.
- 19 • The Jennings, Strouss, & Salmon fee application includes dozens of entries
20 referencing the Boucherian adversary proceeding. It is unclear to the Court if
21 these fees are directly related to the Kohan adversary proceeding, the Boucherian
22 adversary proceeding, or the bankruptcy in general.
- 23 • The Chester & Shein fee application includes a fee for a January 6, 2012 minute
24 entry that does not exist in the Kohan adversary proceeding.
- 25 • The Chester & Shein fee application includes fees for status calls regarding the
26 bankruptcy generally.
- 27 • The Schlesinger Conrad fee application contains fees related to Boucherian.
- 28 • The Stewart & Bourque fee application contains entries related to an appeal in
2011, but the Under Advisement Decision is dated January 27, 2012.
- The Thomas H. Casey fee application relates entirely to an appeal in 2011.
- The Thomas H. Casey fee application includes oral arguments in California.

25 Also, the Namwest Parties used six different law firms and twenty-three different
26 timekeepers in this case. This is markedly different than the consultations between
27 attorneys in one law firm in *S & R Properties*. The Namwest Parties have not
28

1 demonstrated that the work performed by their various firms and timekeepers was not
2 duplicative.

3 The Namwest Parties allegedly incurred one million dollars in legal fees related to
4 all of its claims, issues, and sub-issues in a multitude of lawsuits, but they are requesting
5 the bulk from the Kohan Parties. If attorneys' fees were appropriate in the circumstances,
6 the Court would not award them here because much of the fees requested are not directly
7 associated with the claims that arose out of the alleged contract.

8 **III. Conclusion**

9 Although the Court has the discretion to grant attorneys' fees because the claims
10 arose out of contract, the Court denies the Namwest Parties' applications for attorneys'
11 fees. The Kohan Parties' factually complex claims had merit. The \$640,000 fees
12 requested would create an extreme hardship that would discourage others who believe
13 they have oral contracts from bringing tenable claims. Furthermore, the fees requested are
14 unreasonable, and the Court cannot determine if they are directly tied to the claims.
15 Counsel for the Kohan Parties is to submit a form of order.

16
17 Dated: December 27, 2012

18
19 
20 CHARLES G. CASE II
21 UNITED STATES BANKRUPTCY JUDGE

22 COPY of the foregoing mailed by the BNC and/or
23 sent by auto-generated mail to:

24 All interested parties
25
26
27
28