U.S. BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re **NAMWEST, LLC,** **Debtor.**	In Chapter 11 proceedings Case No.: 08-13935 Adversary No. 08-860
NAMWEST, LLC; NAMWEST-TOWN LAKES II, LLC, **Plaintiffs,** v. **NAMWEST-TOWN LAKES, LLC; THEODORE KOHAN; ARIZONA TEMPE TOWN LAKE, LLC; and BUSINESS TO BUSINESS MARKETS, INC.**, **Defendants.**	**UNDER ADVISEMENT DECISION RE ATTORNEY FEES**

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

I. Background and Facts

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

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

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

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

Claiming that they were the successful parties, the Namwest Parties filed applications for attorneys' fees totaling $637,762.83 pursuant to A.R.S. § 12-341.01.[1] NTL II requested $155,454 in fees and $1,193.70 in costs for three different law firms: Stewart & Bourque, P.C. requested $124,581.50; Carmichael & Powell requested $7,400; and Law Office of Thomas H Casey, Inc. requested $23,472.50. Namwest requested a total of $414,515.48 for two law firms: Jennings, Strouss, & Salmon, P.L.C. requested $218,084.98 and Chester & Shein, P.C. requested $189,430.50. NTL requested $63,802.69 in fees and $2,796.96 in costs for Schlesinger Conrad, PLLC.

II. Analysis

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

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[1] A.R.S. § 12-341.01 reads:

> A. In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees. If a written settlement offer is rejected and the judgment finally obtained is equal to or more favorable to the offeror than an offer made in writing to settle any contested action arising out of a contract, the offeror is deemed to be the successful party from the date of the offer and the court may award the successful party reasonable attorney fees. This section shall in no manner be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney fees.
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> 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.
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> 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.
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> D. The court and not a jury shall award reasonable attorney fees under this section.

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

A. Attorneys' Fees When an Appeal is Pending

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

B. Claims Arising out of Alleged Contracts

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

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

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

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

C. Discretionary Power to Award Attorneys' Fees

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

> 1. The merits of the claim or defense presented by the unsuccessful party.
> 2. The litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result.
> 3. Assessing fees against the unsuccessful party would cause an extreme hardship.
> 4. The successful party did not prevail with respect to all of the relief sought.
> In addition to these factors, we would include: the novelty of the legal question presented, and whether such claim or defense had previously been adjudicated in this jurisdiction. We also believe that the trial court should consider whether the award in any particular case would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear of incurring liability for substantial amounts of attorney's fees.

*Id.*at 1184.

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

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

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

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

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

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

3. Whether assessing fees against the unsuccessful party would cause extreme hardship

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

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

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

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

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

5. The novelty of the legal question presented

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

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

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

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

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

D. Reasonableness of Requested Fees

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

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

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

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

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

- The Jennings, Strouss, & Salmon fee application dates back to September 12, 2008, and the Chester & Shein fee application dates back to October 15, 2008. However, Kohan did not file his counterclaims until May 11, 2009.
- The Jennings, Strouss, & Salmon fee application contains an entry on May 19, 2009 that states, "Receive and begin analysis of Kohan counterclaims. . ." The Court does not see how the fifteen pages of fees listed before that entry can directly relate to the Kohan Parties' counterclaims.
- The Jennings, Strouss, & Salmon fee application includes dozens of entries referencing the Boucherian adversary proceeding. It is unclear to the Court if these fees are directly related to the Kohan adversary proceeding, the Boucherian adversary proceeding, or the bankruptcy in general.
- The Chester & Shein fee application includes a fee for a January 6, 2012 minute entry that does not exist in the Kohan adversary proceeding.
- The Chester & Shein fee application includes fees for status calls regarding the bankruptcy generally.
- The Schlesinger Conrad fee application contains fees related to Boucherian.
- 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.

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

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

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

III. Conclusion

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

Dated: December 27, 2012

CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

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

All interested parties