

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-008681

04/23/2024

HONORABLE DANIELLE J. VIOLA

CLERK OF THE COURT
N. Johnson
Deputy

SHELBY BUSCH

BRYAN JAMES BLEHM

v.

KELLI SUE BUTLER, et al.

DAVID ANDREW GAONA

ANNA GRIFFIN CRITZ
JOSEPH EUGENE LA RUE
KEVIN MORROW
DOCKET CV TX
JUDGE VIOLA

Defendant's Application for Attorneys' Fees – Granted in part

The Court has reviewed and considered Defendant's Application for Attorneys' Fees filed April 19, 2024, the Response, and Reply. The Court further considered Defendant Butler's Statement of Costs. The application follows the filing of a challenge to the candidacy of Kelli Butler for Arizona House of Representatives District 4. The Plaintiff, Shelby Busch, filed a Notice of Voluntary Dismissal following full briefing on Defendant's Motion to Dismiss. The Court ordered expedited briefing on the Defendant's request for an award of attorneys' fees under A.R.S. § 12-349 and Rule 11(b)¹ of the Arizona Rules of Civil Procedure.

A.R.S. § 12-349 and Rule 11

Arizona Revised Statutes section 12-349 places a preponderance of the evidence burden on the party seeking fees. *Donlan v Macgurn*, 203 Ariz. 380, 387 (App. 2007). Butler requests sanctions

¹ Rule 11(c)(3) requires that a motion for sanctions under Rule 11 be made separately from any other motion. Butler did not separately file a Rule 11 Motion. Accordingly, the Court declines to award fees or sanctions under Rule 11.

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under A.R.S. § 12-349 in her Motion based on the following: 1) defending a claim without substantial justification; and 2) bringing or defending a claim solely or primarily for delay or harassment.

Under A.R.S. § 12-349(F), a claim “without substantial justification” is one that “is groundless and is not made in good faith.” The terms “groundless” and “frivolous” have been found to be “...equivalent terms, and a claim is frivolous ‘if the proponent can present no rational argument based upon the evidence or law in support of the claim.’” *Rogone v Correia*, 236 Ariz. 43, 335 P.3d 1122 (2014), citing *Evergreen W., Inc. v Boyd*, 167 Ariz. 614, 621, 619 (1991).

Claims Without Substantial Justification

Butler asserts the Verified Complaint was groundless and not made in good faith. According to Defendant, the Complaint rested on a false premise that the Arizona Constitution requires a legislative candidate to reside in the district they seek to represent for a specific amount of time.

A claim is frivolous “if the proponent can present no rational argument based upon the evidence or law in support of that claim.” *Rogone*, 236 Ariz. at 50. Here, Busch/Blehm pursued the candidate challenge alleging a residency requirement when the plain language of the Arizona Constitution does not contain a residency requirement. Butler encouraged Busch/Blehm to dismiss the claim based on the express language of the Arizona Constitution. *See* Motion at 2. Busch/Blehm failed to meet and confer. Busch/Blehm later failed to dismiss the claim or notify Butler that it would be dismissed until after the Motion to Dismiss was fully briefed.

Claims Intended to Harass or Delay

Butler further asserts that Busch/Blehm brought claims against her for the sole purpose of delay or harassment. The Court acknowledges that Busch voluntarily dismissed the challenge before the initial return hearing and without the need for a hearing. The Court finds Butler had not established by a preponderance of the evidence that the challenge was filed *solely or primarily* for delay or harassment. Butler asserts the timing of the events in this case make clear that Busch/Blehm were motivated mainly by political animosity. The Court is unable to draw that conclusion based on the sparse record in this case.

Other Considerations

In awarding attorney fees pursuant to § 12-349, the court is required to set forth the specific reasons for the award. *See* A.R.S. § 12-350.

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The record does not specifically address Busch/Blehm's efforts to determine the validity of the challenge before filing. On its face, however, the Arizona Constitution does not contain a residency requirement that the candidate live in the district they seek to represent for at least one year. The Verified Complaint alleged that the Arizona Constitution imposes a residency requirement. It does not. Butler presented Busch/Blehm with information that the residency requirement did not exist. Instead of voluntarily dismissing the claim, Busch/Blehm filed a Response to the Motion and Butler filed a Reply. Only after the filing of the Reply did Busch/Blehm voluntarily dismiss the challenge. The Court accepts Busch/Blehm's claim that counsel was unable to file the notice of dismissal due to technical issues. Regardless, Busch/Blehm failed to notify opposing counsel of the pending dismissal which resulted in the filing of an unnecessary Reply. As a result, in the circumstances of this case, the voluntary dismissal was not filed within a reasonable time after Busch/Blehm knew or reasonably should have known the claim or defense was without substantial justification.

Considering all the above findings and factors, the Court concludes that an award of attorneys' fees under § 12-349(A)(2) and expenses is appropriate as against Blehm and Busch. Sanctions awarded under § 12-349 (A) may include "reasonable attorneys fees, [and] expenses." The superior court is given "wide latitude in assessing the amount" of sanctions." *Fowler v. Great Am. Ins. Co.*, 124 Ariz. 111, 114 (App. 1979). Ultimately, sanctions should reflect the additional expenses caused by the sanctionable conduct. *Taliferro v. Taliferro*, 188 Ariz. 333 (App. 1996). The Court declines to exercise its discretion to award double damages as no such damages were requested.

In determining the reasonableness of a request for fees, the following factors are relevant:

1. The qualities of the advocate: his/her ability, training, education, experience, professional standing and skill;
2. The character of the work to be performed: its intricacy, importance, etc.;
3. The work actually performed: the skill, time and attention given to the work;
4. The result;
5. The billing rate: the court need not determine the reasonable hourly rate prevailing in the community for similar work; rather, the rate charged is the best indication of reasonableness in the particular case; however, if the opposing side sets forth reasons for objecting to the hourly rate, the court has the discretion to utilize a lower rate; and
6. The number of hours expended: generally, the successful party is entitled to a reasonable fee for items of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance his/her client's interests.

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Schweiger v. China Doll Restaurant, 138 Ariz. 183, 187-88 (App. 1983); *Schwartz v. Schwerin*, 85 Ariz. 242 (1959)).

Here, Butler requests fees in the amount of \$9,797.50. The Court concludes the fee request in general is supported by the quality of counsel, the nature and extent of the work performed, the result, and the hours worked. *See* Declaration of D. Andrew Gaona. The work was not complicated. The briefing was short and succinct. The litigation spanned a total of three days before the voluntary dismissal. Of course, this matter is an expedited proceeding which necessitated the work to be performed in an accelerated manner.

Here, Busch/Blehm do not challenge the billing rates, but they do assert the lawyers engaged in duplicative billing or duplicative effort. Here, the Motion to Dismiss was two and a half pages in length and the Reply was just over three pages. Of course, the lawyers engaged in work other than researching and preparing briefs, but the case was filed on April 15th and dismissed on April 18th. While Butler contended dismissal was warranted based on false statements in the Verified Complaint, multiple counsel spent several hours researching residency requirements and legal issues related to the claim. Without question, Butler presented the Court with competent legal briefing in support of her claims on an expedited basis. The Court is unable, however, to determine exactly how much time was spent by each attorney on the various tasks identified, including research, and drafting of the motion and reply, because the time entries were not separately identified as to task. Busch/Blehm note the same issue in responding to the fee application. Accordingly, the Court will use its discretion to reduce the fees to account for duplication and/or unnecessary effort.

Conclusion

IT IS ORDERED granting Butler's Application for Attorneys' Fees and awarding reasonable attorneys' fees jointly and severally against Shelby Busch and Bryan Blehm of \$4,500 and taxable costs (expenses) of \$298.05 in favor of Butler.

The matter having been voluntarily dismissed and the issue of attorneys' fees having been resolved, no further matters remain pending, and this judgment is entered under Rule 54(c).



DANIELLE J. VIOLA
JUDGE OF THE SUPERIOR COURT