IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

TUCSON ESTATES PROPERTY OWNERS ASSOCIATION,
AN ARIZONA NONPROFIT CORPORATION,
Plaintiff/Appellant,

v.

ESTATE OF ROSS E. JENKINS, DECEASED,
AN UNMARRIED MAN, REPUTED OWNER;
ROSS E. JENKINS JR.; PATRICIA BOILEAU; AND KATHRYN JENKINS,
Defendants/Appellees.

No. 2 CA-CV 2019-0023
Filed November 12, 2019

Appeal from the Superior Court in Pima County
No. C20181637
The Honorable Lee Ann Roads, Judge Pro Tempore

AFFIRMED

COUNSEL

Carpenter, Hazlewood, Delgado & Bolen LLP, Tucson
By Jason E. Smith and Kaycee S. Wamsley
Counsel for Plaintiff/Appellant

OPINION

Judge Eckerstrom authored the opinion of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 Tucson Estates Property Owners Association ("Association") appeals from the trial court's award of partial attorney fees and costs. The court ordered that award after entering final default judgment in favor of the Association. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to upholding the trial court's ruling." *Hammoudeh v. Jada*, 222 Ariz. 570, ¶ 2 (App. 2009). The Association is comprised of owners of real property within a subdivision in Pima County. The members are subject to the Association's Covenants, Conditions, and Restrictions ("CC & Rs").

¶3 In April 2018, the Association filed a complaint against the estate of Ross E. Jenkins, a deceased individual who owned property subject to the CC & Rs, as well as Jenkins's named and unnamed heirs and devisees (collectively, the "Estate").[1] The Association sought judicial foreclosure of the property to enforce an assessment lien imposed against the property, the principal balance of which totaled $5,367.56.[2] The Estate never appeared or contested the Association's complaint.

[1]The judgment dismissed all fictitious defendants not named and served, leaving only the Estate of Ross E. Jenkins; Ross E. Jenkins Jr.; Patricia Boileau; Kathryn Jenkins; and Unknown Heirs and Devisees as defendants subject to appeal. *See* Ariz. R. Civ. P. 54(b); *McHazlett v. Otis Eng'g Corp.*, 133 Ariz. 530, 532 (1982) (unserved named defendants and fictitious defendants not parties within meaning of Rule 54(b)).

[2]The trial court entered default judgment totaling $6,719.73, a sum including the principal balance as well as "charges, advances and expenditures" made by the Association.

¶4 In September 2018, the Association applied for an entry of default against the Estate. In November 2018, the Association requested attorney fees in the amount of $3,155.50 and costs in the amount of $985.71. It based its claim on A.R.S. § 33-1807(H)[3] and the CC & Rs, which provide that the Association may collect reasonable monthly assessments against each owner; that delinquent assessments "shall become a lien" upon the property; and that if the Association employs attorneys "to enforce said lien," the property owner and other parties named in such an action "shall pay all reasonable attorney fees and costs incurred." The CC & Rs further specify that "in the event the Association receives judgment against any person for a violation or threatened violation," it "shall also be entitled to recover from such person reasonable legal fees and costs." The Association filed an affidavit based on its attorneys' billing records in support of its application.

¶5 In December 2018, after a hearing at which the Estate did not appear, the trial court ordered default judgment in favor of the Association, but it reduced the fee award to $1,000. The court also reduced the cost award to $631.26. The Association objected and requested the court provide further detail as to the costs and charges it found excessive or unnecessary, which the court provided during the hearing.

¶6 Judgment was entered in December 2018. This appeal followed. The Estate did not file a responsive brief. When an appellant raises a debatable issue in a civil case, we may, in our discretion, treat the failure to file an answering brief as a confession of error. *See McDowell Mountain Ranch Cmty. Ass'n v. Simons*, 216 Ariz. 266, ¶ 13 (App. 2007). "It is, however, our duty to examine the record to determine whether there are debatable issues." *Air East, Inc. v. Wheatley*, 14 Ariz. App. 290, 292 (1971). Because we agree with the Association's assertion that the reduction of fees and costs in similar default judgment cases is a recurring issue in our trial courts, we exercise our discretion to decide this case on its merits.[4] We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

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[3]Section 33-1807(H) provides that "[a] judgment or decree in any action brought under this section shall include costs and reasonable attorney fees for the prevailing party."

[4]This court recently decided a similar case brought by the same firm representing the Association here. *See Vistoso Comm. Ass'n v. Andrade*, No. 2 CA-CV 2018-0196 (Ariz. App. Sept. 18, 2019) (mem. decision).

Discussion

¶7 The Association argues the trial court erred by awarding only a portion of the attorney fees and costs it requested. Specifically, the Association asserts that, "[a]bsent an opposing affidavit setting forth reasons why the billing rate or hours expended are unreasonable," it "is entitled to its attorneys' fees and costs incurred in this matter" because it submitted a fees affidavit in accordance with *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183 (1983). The Association further argues the court had no reasonable basis for reducing its fees by nearly seventy percent. And, it contends the court's determinations that some of the requested fees were excessive "constitute clear error."

¶8 "[A]n award of attorneys' fees is left to the sound discretion of the trial court and we will not overturn such an award unless the trial court abused its discretion." *A. Miner Contracting, Inc. v. Toho-Tolani Cty. Improvement Dist.*, 233 Ariz. 249, ¶ 40 (App. 2013). "To find an abuse of discretion, there must either be no evidence to support the superior court's conclusion or the reasons given by the court must be 'clearly untenable, legally incorrect, or amount to a denial of justice.'" *Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, ¶ 17 (App. 2006) (quoting *State v. Chapple*, 135 Ariz. 281, 297 n.18 (1983)).

¶9 "We review de novo issues of statutory application and contract interpretation." *Am. Power Prods., Inc. v. CSK Auto, Inc.*, 242 Ariz. 364, ¶ 12 (2017). Our purpose in interpreting a contract is to determine and give effect to the parties' intent. *See Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152 (1993).

¶10 "CC & Rs constitute a contract between the subdivision's property owners as a whole and individual lot owners." *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, ¶ 5 (App. 2000). "[I]t is well-settled in Arizona that '[c]ontracts for payment of attorneys' fees are enforced in accordance with the terms of the contract.'" *McDowell*, 216 Ariz. 266, ¶ 14 (quoting *Heritage Heights Home Owners Ass'n v. Esser*, 115 Ariz. 330, 333 (App. 1977)). "Unlike fees awarded under A.R.S. § 12-341.01(A), the court lacks discretion to *refuse* to award fees under the contractual provision." *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 575 (App. 1994) (emphasis added). However, "a contractual provision providing for an award of *unreasonable* attorneys' fees will not be enforced." *McDowell*, 216 Ariz. 266, ¶ 16 (emphasis added).

¶11 Relying chiefly on the reasoning in *McDowell*, the Association asserts that "there is a presumption that attorneys' fees and costs incurred by the Association are reasonable" and that, after it submits a fee application in compliance with *China Doll*, it is "entitled to receive its full attorneys' fees" absent a "showing by opposer that fees were clearly excessive." The Association asks us to adopt a rule that would limit the trial court's threshold discretion to evaluate the reasonableness of a fee application in the absence of an opposing party's objection. We disagree that our jurisprudence requires such an outcome.

¶12 *China Doll* provides parties and trial courts with "specific guidance" for "calculating a reasonable fee," and its reasoning contemplates the computation of fees in the most common context—a dispute over fees between litigants. 138 Ariz. at 186-87. But no reasoning in that decision divests a trial court of its broad discretion to assess the reasonableness of fees in the absence of an opposition. Rather, the opinion expressly recognizes that a trial court, in assessing the reasonableness of an attorney's hourly rate, is not bound by the fee agreement between the lawyer and client—something that would be apparent in even an uncontested affidavit. *Id.* at 188. And although *China Doll* authorizes a trial court to adjust a fee award "upon the presentation of an opposing affidavit setting forth reasons" why the fees are unreasonable, *id*., it does not address the court's authority when no opposition has been filed, *see id*. at 187.

¶13 Nor does *McDowell* limit the trial court's authority to consider the reasonableness of fees in the absence of an opposition. There, after citing with approval cases emphasizing the "broad discretion" enjoyed by our trial courts in assessing the reasonableness of fee requests, we held that "the trial court's discretion is more narrowly circumscribed when the parties contractually agree that the prevailing party shall be awarded *all* its attorneys' fees." 216 Ariz. 266, ¶ 21 (emphasis added). Under that circumstance, we agreed that once a prevailing party submits a facially valid fee application in comportment with the *China Doll* requirements, it "establish[es] its prima facie entitlement to fees in the amount requested" and the opposing party "ha[s] the burden to show that they were clearly excessive."[5] *Id.* ¶ 20. That decision did not address a court's discretion

[5] Although *McDowell* involved an entry of default, it "was not a simple 'default' case" because the prevailing party had sought an injunction earlier in the case and the opposing party had filed a letter objecting to the fees and requesting an evidentiary hearing regarding those fees, which the trial court denied. 216 Ariz. 266, ¶¶ 4, 9, 21 & n.5.

when the authorizing fee provision is expressly qualified by the requirement of reasonableness.

¶14 Opposition in the trial court generally is a precondition to any appellate challenge to a trial court's fee award. Accordingly, we have affirmed a trial court's assessment of a reasonable fee award on grounds that the opposing party failed to challenge a facially valid *China Doll* affidavit. *E.g.*, *Cook v. Grebe*, 245 Ariz. 367, ¶¶ 12-15 (App. 2018) (rejecting cursory, non-specific challenge as inadequate); *City of Tempe v. State*, 237 Ariz. 360, ¶¶ 32-33 & n.9 (App. 2015) (same). And, we have affirmed trial court *reductions* in fees in part on grounds that they were triggered by detailed oppositions. *In re Indenture of Trust Dated Jan. 13, 1964*, 235 Ariz. 40, ¶¶ 46-50 (App. 2014) (upholding trial court's reduced fee award when opponent squarely and specifically challenged fee request); *Miner Contracting*, 233 Ariz. 249, ¶¶ 41, 43 (same). But, in each of those cases, we recognized the broad discretion of trial courts to assess the reasonableness of a fee request. *Cook*, 245 Ariz. 367, ¶¶ 14-15; *Indenture of Trust Dated Jan. 13, 1964*, 235 Ariz. 40, ¶ 41; *Miner Contracting*, 233 Ariz. 249, ¶ 40.

¶15 However, despite having addressed scores of challenges to trial courts' computations of attorney fee awards, we have never held a trial court's discretion to assess the threshold reasonableness of a fee request to be constrained by a party's non-appearance or by its failure to expressly oppose a *China Doll* affidavit.[6] Rather, in the context of a reasonableness assessment, we have exclusively cited inadequate opposition to affirm trial court awards. Thus, our past jurisprudence can be properly understood to limit appellate challenges to trial court fee awards rather than to limit trial court discretion.

¶16 That jurisprudence has not addressed whether we should impose similar limits on the trial court's threshold discretion to compute an award when the contractual provision entitles a party to only "reasonable" fees and no party has appeared to oppose a fee request. We now conclude that, when enforcing a contract that provides for reasonable attorney fees and costs, a trial court retains broad discretion to evaluate the reasonableness of requested attorney fees and costs when the non-prevailing party has not appeared, even if the prevailing party has filed affidavits and fee applications in accordance with *China Doll*.

[6]*See, e.g.*, cases previously discussed, *supra* ¶ 14.

¶17 To conclude otherwise would frustrate the intent of the contracting parties who have specified that the fees be reasonable: it would remove any means for a fee request to be evaluated for reasonableness in those cases where no party appears to dispute it.[7] Upholding a trial court's discretion thus enforces the parties' intent, the purpose of contractual interpretation. *See Taylor*, 175 Ariz. at 152.[8]

¶18 Our conclusion also advances sound public policy considerations. The application requirements set forth in *China Doll* are meant to "enable the court to assess the reasonableness of the time incurred." *Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 23 (App. 2004). Surely the trial court's duty to make such an assessment is greater, not reduced, when no party has appeared to object to a fee request, as often occurs in all default judgments. *Cf. Daou v. Harris*, 139 Ariz. 353, 361 (1984) (in default judgment sounding in tort, trial court's well-considered damages award not abuse of discretion, for "if a court merely awards a plaintiff what is prayed for in the complaint, that 'may not attain that level of judicial discretion which will pass appellate muster'" (quoting *Mayhew v. McDougall*, 16 Ariz. App. 125, 130 (1971))); *Mayhew*, 16 Ariz. App. at 130 (default judgment hearing "calls for the exercise of judicial discretion" rather than merely awarding entire request). Any other rule would entitle prevailing litigants who have filed a fee affidavit to all the attorney fees they claim whenever an opposing party has failed to appear. We fear this would incentivize some prevailing parties to overreach in their fee applications. Such litigants could proceed secure in the knowledge that the trial court is bound to accept their representations so long as their applications facially conform to the structural requirements of *China Doll*.[9] And, in some cases,

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[7] This situation is distinct from *McDowell*, where the contract provided for *all* attorney fees, language which constrained the trial court's exercise of its discretion. 216 Ariz. 266, ¶¶ 1, 4, 21.

[8] Further supporting our conclusion is our supreme court's recent opinion in *Am. Power Prods.*, 242 Ariz. 364, ¶ 26. There, the court allowed the trial court on remand to "decide if, or by how much," the prevailing party's "fee award should be reduced." This suggests, albeit in dicta, that a trial court retains threshold discretion when faced with a contract providing for "reasonable attorneys' fees." *Id.* ¶¶ 3, 8, 19.

[9] *China Doll* advises parties to set forth the billing rate charged by the attorney in the matter, the hours reasonably expended, and to "identify the legal services performed, the attorney that performed the legal services and the date on which the services were provided." 138 Ariz. at 189.

as here, the cost of litigating the reasonableness of fees might exceed the amount in dispute—a circumstance under which the court's discretionary review of the fee request would be especially logical.

¶19 We therefore conclude the trial court acted squarely within its discretion when it scrutinized the Association's request for fees and costs and determined the request was unreasonable. After such scrutiny, the court appropriately did not entirely refuse to award fees. Rather, it rejected a fee amount it deemed excessive or unreasonable, based on the Association's affidavit and the court's colloquy with the Association during the default judgment hearing. The court expressly found the fee request unreasonable as inflated, excessive, and charging the non-prevailing party for errors attributable only to the Association. The court cited, as "just some of the things" it found unreasonable in the request, the charge of $462.50 to draft the complaint; the charge of $338 to review the CC & Rs and ledger; and $182 in phone calls to two individuals. It further noted the Association had billed the Estate nearly $150 in fees associated with its motions to extend time.[10] The court found it unreasonable "to ask [the Estate] to pay for [the Association's] lack of getting something done in a certain time period" or for errors made by the Association or its staff.

¶20 The trial court also provided specific reasons for its decision to award partial costs. Specifically, it cited "duplicitous" costs, such as listing multiple charges for service by publication for each defendant, when a plaintiff need only "publish once as to all the defendants," as well as entering multiple charges for filing a unique default application for each named defendant.

¶21 The above findings do not offend the terms of the governing CC & Rs, which state only that the Association is entitled to "all *reasonable* attorney fees and costs incurred." (emphasis added.) And, because "[t]he amount of fees is peculiarly within the trial court's discretion," we "are

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Throughout the opinion, the court in *China Doll* notes that a party's claim to billing rates and billable hours "may be considered unreasonable" and that certain time, such as that spent on unsuccessful claims, "may not be compensable." *Id.* at 188.

[10]This included $38 to review the file and draft a motion to extend, $52 to review the order denying the motion, which "was a very short order," then another $52 to file "yet, another motion to extend time" to rectify the "failures in the first motion."

hesitant to second-guess the trial court."[11] *Acosta*, 179 Ariz. at 574. Even were we inclined to assess particular amounts differently, we defer to the trial court's "superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id.* (quoting *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571 (1985)). Thus, we affirm the court's reduction of attorney fees and costs.

Request for Attorney Fees and Costs on Appeal

¶22 The Association requests attorney fees and costs on appeal pursuant to the CC & Rs, as well as A.R.S. §§ 12-341, 12-341.01, and 33-1807(H). To the extent the Association anchors its request on the statutory provisions, it is not entitled to fees and costs because it is not the prevailing party.

¶23 As observed above, the CC & Rs specify that the Association shall be entitled to "all reasonable attorney fees and costs incurred" to enforce "the collection of any amounts due pursuant to" that agreement. The trial court's order determined that the "amounts due" were $1,000 in attorney fees and $631.26 in costs. Given our affirmance of that award, the appeal did not seek to collect the "amounts due" as ultimately determined by the trial court and this court. Rather, it sought a larger amount. While we agree that the Association's argument was non-frivolous, the contract language does not entitle the Association to attorney fees or costs to unsuccessfully challenge the "amounts due." We therefore deny the request for fees and costs on appeal on grounds that they are not contemplated by the contract language.[12]

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[11] We recognize the trial court specifically identified only about $1,000 in fee reductions. However, unlike litigants objecting to fee awards, trial courts are generally not required to itemize their fee determinations. *See, e.g.*, *Indenture of Trust Dated Jan. 13, 1964*, 235 Ariz. 40, ¶¶ 48-49 (affirming trial court's reduced fee calculation, even though court did not specifically indicate its reasons for reaching its award calculation).

[12] We note that the Association would be entitled to collect its fees and costs on appeal had it prevailed and had we agreed that the "amounts due" were ultimately a larger amount than the trial court computed. This is perhaps why the Association suggested in its opening brief that the agreement here contained an implied prevailing party provision.

Disposition

¶24 For the foregoing reasons, we affirm.