NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
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BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

NATIONAL HEALTH FINANCE, DM, L.L.C., an Arizona limited liability company, Plaintiff/Appellant, V. HOLLY N. DESPAIN and JOHN DOE DESPAIN; THOMAS ERHARD and JANE DOE ERHARD, Defendants/Appellees.	No. 1 CA-CV 11-0489 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-091065

The Honorable John R. Ditsworth, Judge

AFFIRMED

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By Peter M. Williams
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By Roger W. Riviere
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T I M M E R, Judge

¶1 Plaintiff National Health Finance, DM, L.L.C. ("NHF"), appeals the superior court's judgment awarding Holly N. Despain and Thomas Erhard (collectively, "Defendants") attorneys' fees for their successful defense of this health care provider lien case. NHF argues the court erred by awarding any fees to Defendants and misapplied Arizona Rule of Civil Procedure ("Rule") 54(b) in entering judgment. For the following reasons, we disagree and therefore affirm.

BACKGROUND

¶2 In May 2005, Rolan and Ruby Johnston were physically injured in a vehicle accident.[1] Despain was driving the other car involved in the accident, and Erhard was the named insured of that car. The Johnstons received medical treatment for their injuries, and they eventually settled their legal claims against Defendants arising from the accident.

¶3 Meanwhile, the Johnstons' treatment providers sold and assigned to NHF the Johnstons' accounts receivable. In connection with the outstanding accounts, NHF recorded notices and claims of health care provider liens ("Liens") on July 21 and August 4, 2005, pursuant to Arizona Revised Statutes ("A.R.S.") section 33-932 (West 2012).[2] NHF mailed notices of

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[1] The Johnstons were also in a car accident in April 2005.

[2] Absent material revisions after the relevant date, we cite a statute's current Westlaw version.

the Liens to the Johnstons and their attorney, Michael Middleton.

¶4 In August 2009, NHF sued the Johnstons seeking payment for the outstanding medical bills. In November, NHF filed a first-amended complaint adding several defendants and claims. Significantly, NHF sued Despain and Erhard, alleging they had notice of the Liens and violated A.R.S. §§ 33-931 to -934 (West 2012) ("Lien Statutes") by failing to remit payment to NHF upon settlement of the Johnstons' claims. Defendants filed an answer denying liability and asserted a cross-claim against the Johnstons and Middleton for indemnity arising out of the parties' settlement agreement.

¶5 NHF obtained a default judgment against the Johnstons. Defendants subsequently moved for summary judgment arguing the court should dismiss the claims against them because NHF never provided them notice of the Liens as required by the Lien Statutes. The court agreed, granted Defendants summary judgment, and entered a Rule 54(b) judgment in April 2011 dismissing all claims against them (the "merits judgment"). NHF did not appeal the merits judgment. Defendants later moved for an award of attorneys' fees, which NHF opposed. The court subsequently entered a second Rule 54(b) judgment awarding Defendants attorneys' fees and costs of more than $10,000 (the "fee judgment"). This timely appeal followed.

DISCUSSION

I. Fee award

¶6 NHF does not contest the amount of attorneys' fees awarded but argues the superior court erred by awarding any fees to Defendants. First, NHF contends the court erred by basing the award on "the contract fee statute." NHF argues A.R.S. § 12-341.01 (West 2012) was an improper basis for the award because the claims against NHF were statutory and not based on contract. We will affirm the trial court if it was correct for any reason. *City of Phoenix v. Geyler*, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985).

¶7 The court awarded Defendants attorneys' fees pursuant to A.R.S. § 12-341. Section 12-341, however, applies to *costs* not attorneys' fees. *Compare* A.R.S. § 12-341 ("The successful party to a civil action shall recover from his adversary all costs expended or incurred therein unless otherwise provided by law."), *with* A.R.S. § 12-341.01(A) ("In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees."). Thus, the court erred in referring to § 12-341 as a basis for an award of fees. Nevertheless, the error is harmless if the court otherwise had a basis for awarding fees. *Glaze v. Marcus,* 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986) ("We will affirm the trial court's decision if it is correct for any reason, even

if that reason was not considered by the trial court.") (citation omitted).

¶8 The Lien Statutes expressly provide the trial court discretion to award fees to the prevailing party. A.R.S. § 33-934(B). Accordingly, because the court clearly intended to award Defendants their fees, and that award had a statutory basis, we will not reverse the award due to the court's incorrect citation to authority for granting fees. *Glaze*, 151 Ariz. at 540, 729 P.2d at 344. In light of our decision, we address NHF's remaining arguments only insofar as they concern A.R.S. § 33-934(B).[3]

¶9 NHF argues Defendants were not entitled to a fee award because they were not the prevailing parties. NHF asserts it prevailed because it obtained a default judgment against the Johnstons and ultimately obtained more relief than Defendants, especially as claims against Defendants remain pending. This argument lacks merit. Defendants clearly prevailed on the claims NHF raised against *them* when the superior court entered summary judgment on those claims. *See Drozda v. McComas*, 181 Ariz. 82, 85, 887 P.2d 612, 615 (App. 1994) ("Typically, determining the 'prevailing party' for purposes of awarding fees

[3] NHF argues the court erred in applying the factors set forth in *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985). Because these factors apply only to fees awarded pursuant to A.R.S. § 12-341.01(A), we do not consider this argument.

and costs is quite simple. Plaintiff sues defendant . . . ; if plaintiff is awarded a judgment, plaintiff has prevailed, and if defendant successfully defends and avoids an adverse judgment, defendant has prevailed.") (quoting *Mountain States Broad. Co. v. Neale,* 783 P.2d 551, 555 (Utah Ct. App. 1989)). NHF's success against other defendants in this case is immaterial for purposes of determining whether Defendants prevailed on the claims raised against them.[4] Additionally, as explained hereafter, *see infra* ¶¶ 12-14, no claims remain pending against Defendants. Consequently, because Defendants entirely prevailed on all NHF's claims, the court did not abuse its discretion in ruling Defendants were the prevailing parties and awarding them attorneys' fees.

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[4] The cases relied on by NHF are inapposite because they concern the various methods courts employ to determine a prevailing party when both the plaintiff and defendant partially succeed on their respective claims or defenses. That is not the case here because NHF did not prevail in any way against Defendants. *See Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 14, ¶ 24, 261 P.3d 784, 789 (App. 2011) ("Partial success does not preclude a party from 'prevailing' and receiving a discretionary award of attorneys' fees."); *Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 38, 800 P.2d 20, 25 (App. 1990) ("In the instant case there are multiple-claims brought against a defendant, with varied success, and both parties seek an award of their attorney's fees pursuant to A.R.S. § 12-341.01.A. . . . The trial court may rightfully utilize a 'percentage of success factor' or a 'totality of the litigation' test . . . to determine who was the successful party."); *Trollope v. Koerner*, 21 Ariz. App. 43, 47, 515 P.2d 340, 344 (1973) ("We hold that since the appellants' recovery of $791.75 exceeded that of appellees' compulsory counterclaim recovery of $500, the 'net judgment' being in appellants' favor for $291.75, the trial court erred by not awarding the 'successful' appellants their costs.").

¶10 NHF briefly argues the court erred by awarding fees because Defendants could be indemnified for their attorneys' fees pursuant to the settlement agreement with the Johnstons and Middleton. We are unaware of any authority requiring a fee-claimant to pursue other sources of recovery as a prerequisite for obtaining a fee award, and NHF fails to cite any. We therefore reject NHF's argument.

¶11 In sum, the superior court did not err by awarding attorneys' fees to Defendants.

II. Finality of judgment

¶12 NHF next argues the court erred in certifying the fee judgment as final pursuant to Rule 54(b). We review the court's certification decision for an abuse of discretion. *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 9, 795 P.2d 827, 835 (App. 1990).

¶13 NHF contends that although the merits judgment disposed of its claim brought under the Lien Statutes, common law causes of action remain. We disagree. First, NHF is barred from relitigating this issue under the doctrine of collateral estoppel. After the court granted Defendants' motion for summary judgment, they moved for entry of final judgment on all claims asserted against them. NHF responded in opposition, but the court entered the merits judgment with Rule 54(b) language on April 29, 2011, stating Defendants had prevailed "on the only

causes of action asserted against them." NHF did not appeal that ruling. The fee judgment repeats this ruling, but because NHF failed to appeal the merits judgment, it is barred from relitigating the issue. *See Funk v. Ossman*, 150 Ariz. 578, 580-81, 724 P.2d 1247, 1249-50 (App. 1986).

¶14 Second, even assuming collateral estoppel does not apply, the court's ruling is supported by the record. According to the first-amended complaint and NHF's disclosure statement, the only claim asserted against Defendants, in addition to the statutory lien claim, is an allegation of "intentional interference with commercial dealings" by failing to remit the settlement funds pursuant to an "agreement for payment" between NHF and others, including Defendants, arising from A.R.S. § 33-931. In its disclosure statement, NHF again described the basis for the agreement as one "for recovery under A.R.S. [§] 33-931." Neither NHF's response to the motion for summary judgment nor its response to the motion for entry of judgment on all claims sets forth an alternative basis for the alleged agreement between NHF and Defendants. Thus, once the superior court ruled that NHF had failed to establish a lien claim against Defendants, NHF's claim for interference with commercial dealings based on that lien similarly failed.

¶15 In sum, the court did not abuse its discretion in certifying the fee judgment as final pursuant to Rule 54(b).

ATTORNEYS' FEES ON APPEAL

¶16 Defendants request an award of attorneys' fees on appeal pursuant to A.R.S. § 33-934(B), among other bases. We award Defendants their fees pursuant to this provision subject to their compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶17 For the foregoing reasons, we affirm.

/s/
Ann A. Scott Timmer, Judge

CONCURRING:

/s/
Michael J. Brown, Presiding Judge

/s/
Margaret H. Downie, Judge