

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-094307

04/09/2020

HONORABLE DAVID J. PALMER

CLERK OF THE COURT
K. Tiero
Deputy

SYCAMORE HILLS ESTATES
HOMEOWNERS ASSOCIATION INC

MARK E CHADWICK

v.

JONES SKELTON & HOCHULI P L C, et al.

DONALD WILSON JR.

PIMA COUNTY SUPERIOR COURT
NO ADDRESS ON RECORD
JUDGE PALMER

**UNDER ADVISEMENT RULING
MINUTE ENTRY**

This Court convened oral argument in this matter on March 3, 2020 with respect to two issues; (1) Whether communications between Plaintiff Sycamore Hills Estates Homeowners Association, Inc. (“Sycamore Hills”) and its newly retained legal counsel were subject to the attorney-client privilege and are thus non-discoverable; and (2), whether Defendants should be awarded its attorney’s fees and costs pursuant to A.R.S. 12-341.01, with respect to this Court’s December 11, 2019 ruling granting Defendant’s Jones Skelton and Hochuli, and Diana J. Elston’s (“collectively Jones Skelton”) Motion for Summary Judgment with respect to Count 3 of its July 24, 2019 Motion for Summary Judgment Re: Breach of Contract.

Having considered the written pleadings of the parties, the arguments made and authorities cited therein, and oral arguments of the parties, the Court makes the following findings and orders:

DISCOVERY DISPUTE

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As noted below, Jones Skelton through one of its attorneys Diana Elston, represented Sycamore Hills, in its negotiation of a settlement of a legal dispute with a disgruntled homeowner, which was brought in case No. C20154533, *Zablotny v. Sycamore Hills Estates Homeowner's Association* in Pima County Superior Court.

Sycamore Hills filed the complaint in this matter, urging that Jones Skelton (1) acted negligently, and in breaches of (2) a fiduciary duty, and (3) a contract with Sycamore Hills in its negotiation of the terms of a settlement agreement in that previous lawsuit.

Before the ultimate settlement of that lawsuit, Sycamore Hills subsequently retained the Tucson law firm of Goldschmidt Shupe, who took over the final stages of negotiations and completion of that settlement on or about March 13, 2017.

Sycamore Hills originally filed this lawsuit against Jones Skelton in Pima County Superior Court as Case No. C20185762 on November 27, 2018. Venue in the matter was changed to Maricopa County Superior Court on or about July 12, 2019.

Jones Skelton has filed a Notice of Goldschmidt Shupe being a Non-Party at Fault in this matter.

Defendants seek discovery related to this dispute from Goldschmidt Shupe. Plaintiff objected, first on the grounds of Attorney-Client Privilege. The parties then purportedly agreed to limit such discovery to the time period beginning on November 29, 2016 and ending on March 15, 2017, which was approximately a week after signed off on the Settlement Agreement at issue. Plaintiff further argues that the stipulated time period is binding as to the scope of any discovery to be provided to Defendant by Plaintiff and Goldschmidt Shupe.

Defendants argue that after that time period expired, they became aware of additional communications between Plaintiff and Goldschmidt Shupe regarding the Settlement Agreement as they were in receipt of Minutes from an HOA Board Meeting dated March 18, 2017 that indicated such. They argue that any such information is relevant, regardless of when it occurred.

Defendants further argue that by filing this lawsuit, Plaintiff has placed all such communications at issue, and that such information is therefore not shielded by the Attorney-Client Privilege.

Defendants argue that the court's ruling in *Elia v. Pifer*, 194 Ariz. 74, 977 P.2d 796 (App. 1998) is applicable to this situation. In an analogous factual pattern, the *Elia* court held that a party waives such a privilege when it:

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- (1) asserts the privilege by virtue of an affirmative act, such as filing a lawsuit;
- (2) that through such an affirmative act, such as the filing of a lawsuit as was done here, the asserting party puts the protected information at issue making it relevant to the case; and
- (3) application of the privilege would have denied the opposing party access to information vital to his defense.

See, Id. at 82, 977 P.2d at 985.

In the instant case, Plaintiff retained the Goldschmidt Shupe firm, to discuss the formation and ramifications of the proposed settlement agreement that had largely resulted from Plaintiff working with the Defendants. Goldschmidt Shupe was retained to finish the negotiations of the settlement agreement. Plaintiff argues that Jones Skelton performed in sub-standard fashion with the settlement agreement not containing the terms and result they desired. Thus Plaintiff's discussions regarding that settlement with Goldschmidt are clearly relevant and vital to its malpractice claims against Defendant Jones Skelton. Therefore,

THE COURT FINDS, pursuant to the holding in *Elia*, that any right to invoke the Attorney-Client Privilege has been waived by Plaintiff as to any communications with Goldschmidt Shupe related to the underlying litigation, settlement negotiations or Settlement Agreement between Plaintiff Sycamore Hills and Goldschmidt regarding the Settlement Agreement.

THE COURT FURTHER FINDS that as such communications are not covered by the attorney-client privilege, and are thus discoverable by Defendants.

IT IS THEREFORE ORDERED that Goldschmidt Shupe and Plaintiff Sycamore Hills are to comply with the second subpoena issued by Defendants, dated on or about December 10, 2019, and disclose such information to Defendants as soon as is reasonably possible.

ATTORNEY'S FEES PURSUANT TO DECEMBER 11, 2019 RULING

In the Complaint in this matter, Sycamore Hills claimed that Defendant Jones Skelton was (1) negligent and committed malpractice; (2) breached its fiduciary duty to Sycamore Hills, and (3) breached a contract it had with Sycamore Hills regarding legal representation it undertook on behalf of Sycamore Hills. It specifically argues that Jones Skelton entered into a settlement agreement without appropriate approval from Sycamore's Board of Directors. It specifically alleged that Jones Skelton failed to abide by the terms of certain "oral directions" given by Board

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Members and therefore a claim sounding in contract was appropriately before the Court in this matter, opening the door to an award of attorney's fees.

This Court disagreed in its December 11, 2019 order, finding primarily based on the Court's holding in *Keonjian v. Olcott*, 216 Ariz. 563, 169 P.3d 927 (App. 2007), that Plaintiff's claim against Jones Skelton was not the result of a "failure to perform," but rather a failure to allegedly perform according to the client's instructions. This Court's ruling was that under *Keonjian*, such a scenario does not constitute a non-performance of a specific promise necessary to a breach of contract claim, but rather sounds in tort.

Both parties agree that given the nature of the Court's resolution of the contract question, that under 12-341.01, this court has discretion to award attorney's fees and costs to Defendants based on the resolution of that contract question.

This is an action that was premised in part out of a purported contract, which entitles Defendant Jones Skelton, under these facts, to apply for an award of attorney's fees. *Lacer v. Navajo County*, 141 Ariz. 392, 394, 687 P.2d 400, 402 (App. 1984) ("A party is entitled to an award of its attorney's fees under A.R.S. §12-341.01 if judgment in its favor is based upon the absence of the contract sued upon by the adverse party").

Given the procedural and substantive facts as presented in this matter, and within the Court's discretion,

THE COURT FINDS that an award of Attorney's fees to be paid by Sycamore Hills to Jones Skelton is appropriate.

IT IS ORDERED that not later than 20 calendar days after the entry of this order, Jones Skelton may submit an application for an award of attorney's fees and statement of costs. If an application or statement is submitted that Sycamore Hills wishes to oppose, a response must be filed not later than 20 calendar days after service. Jones Skelton is not permitted to file a reply unless requested to do so by the court.