

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-031553

06/16/2025

HONORABLE MICHAEL J. HERROD

CLERK OF THE COURT
L. Gilbert
Deputy

OLEG BORTMAN

KIM ROBERT MAEROWITZ

v.

FIRST SERVICE RESIDENTIAL ARIZONA L L C, et al. ERIN E MCMANIS

JUDGE HERROD

UNDER ADVISEMENT RULING

The Court has before it, following oral argument on 6/13/2025, *Defendant's 4/8/2025 Application for Attorneys' Fees; Plaintiffs' 4/9/2025 Objection; and Defendant's 4/15/2025 Response.*

The Court also has before it *Defendants' 4/8/2025 Notice of Lodging Judgment; Defendants' 4/8/2025 Statement of Costs; and Plaintiffs' 4/9/2025 Objections to Defendants' Proposed Form of Judgment.*

1. Factual Background

Plaintiffs' First Amended Complaint made claims for defamation, interference with prospective economic advantage, breach of contract, breach of covenant of good faith and fair dealing, and injunctive relief.

The relationship between the parties arises out of the Safari Drive Condominium Association, the operation of the Association, the election of board members and officers of the

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association, and the conduct of members and board members. The condominium association is governed by Covenants, Conditions, and Restrictions, as well as rules and regulations.

Plaintiffs are Oleg Bortman and Jimbo, LLC. Jimbo owns a commercial condominium in the property. Bortman is the designated representative for Jimbo. The commercial condominium is occupied by The Brokery which is a real estate brokerage company.

The defamation claim was for libel and slander alleged to have been done by the board, board members, and the association manager(s) that were allegedly made in an Association newsletter.

There were also allegations of oral defamatory comments by a board member. The interference with prospective economic advantage claim involved the same events as the defamation claims.

The breach of contract claim alleged breaches of the Board Members Code of Conduct based on the same statements in the defamation count and the intentional interference count.

The breach of covenant of good faith and fair dealing claim arose out of the same claimed defamatory statements.

The claim for injunctive relief sought to prevent disparaging comments about Plaintiffs. The only contract mentioned in the First Amended Complaint is the Board Members Code of Conduct.

The Court granted a motion to dismiss by Defendants. As part of that Order, the Court found that the Board Members Code of Conduct was not a contract that applied to Plaintiffs.

2. Attorneys' Fees Claim

Defendants are seeking attorneys' fees under A.R.S. § 12-341.01 and A.R.S. § 12-349.

A. § 12-341.01

Defendants allege that the claims arose out of contract because the parties are bound together by the CC&Rs that govern the Association. None of the claims involved were to enforce the CC&Rs or violations of the CC&Rs. The only contract mentioned in the First Amended Complaint is the Board Members Code of Conduct.

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Plaintiff argues that the First Amended Complaint sounded primarily in tort. Plaintiff also argues that the claim for breach of the Board Members Code of Conduct is not intertwined with the tort claims.

Even though the Court found that the Board Members Code of Conduct did not apply, the Court may still award attorneys' fees on the basis of A.R.S. § 12-341.01. However, the award of attorneys' fees is discretionary.

Even if appellee had taken the position that there was no contract and had prevailed on that basis, it still would have been entitled to attorney's fees under A.R.S. § 12-341.01. The law in Arizona is contrary to appellant's position that the court must find as a matter of law that there was a contract between the parties before fees can be awarded. *Mullins v. S. Pac. Transp. Co.*, 174 Ariz. 540, 543, 851 P.2d 839, 842 (Ct. App. 1992). Under the *Shirley* (*Shirley v. Hartford Accident & Indemnity Company*, 125 Ariz. 70, 607 P.2d 389, 390 (1979)) and *Lacer* (*Lacer v. Navajo County*, 141 Ariz. 392, 687 P.2d 400 (App.1984)) cases, when a contract is alleged by a plaintiff and the defendant successfully proves that there was no contract, the action is still one arising out of contract under A.R.S. § 12-341.01, entitling the defendant to attorney fees. We are therefore of the opinion that we erred in holding that the action arose solely out of a tort claim and that A.R.S. § 12-341.01(A), which allows attorney fees to a successful party in a claim arising out of contract, did not apply. **(Case citations added)**. *Colberg v. Rellinger*, 160 Ariz. 42, 51, 770 P.2d 346, 355 (Ct. App. 1988).

In *Sparks v. Republic Nat. Life Ins. Co.*, the Arizona Supreme Court addressed the award of attorneys' fees in cases involving both tort and contract claims.

First, defendants argue the award was improper because the tort claims of bad faith and misrepresentation under the Insurance Code dominated the case, and § 12-341.01 allows recovery of attorney's fees only in contract cases. In support, defendants rely heavily on *Amphitheater Public Schools v. Eastman*, 117 Ariz. 559, 574 P.2d 47 (App.1977). Plaintiffs maintain that the tort claims were actions "arising out of a contract" and therefore, the statute applies.

The language employed in subsection (A) makes clear that attorney's fees are recoverable only in cases "arising out of a contract." The language is broad enough, however, that it could be argued, as plaintiffs do here, that attorney's fees may be recoverable in tort cases which find their basis in contract. Such an argument was rejected in *Amphitheater*, supra. In that case, the plaintiff had left her car with an instructor in an auto mechanics program conducted by the defendant school for an assessment of needed repairs. The instructor asked a student to notify the plaintiff's son that he should pick up his mother's car that

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day. The instructor stated in front of fifteen other students that he would leave the keys in the ignition. The car was later stolen. Plaintiff, the successful party, sought attorney's fees under § 12-341.01 on the theory that her claim arose out of a contract of bailment. The Court of Appeals, Division Two, responded to this argument by stating: "Her complaint contains one count in negligence and another alleging breach of the bailment contract in the negligent failure to care for her car. Regardless of the label on the second count, the essence of her claim is negligence, and the statute has no application."

Id. at 560, 574 P.2d at 48.

The continued validity of this holding was cast in serious doubt by our decision in *Wenk v. Horizon Moving & Storage Co.*, 131 Ariz. 131, 639 P.2d 321 (1982). In *Wenk*, plaintiffs brought an action against a moving and storage company to recover the value of some lost items of furniture. Plaintiffs alleged both a breach of a bailment contract and negligence in the loss of their property. The trial court awarded damages in favor of plaintiffs based upon conclusions of law that there was 1) a common-law bailment and 2) the moving company had failed to exercise ordinary and reasonable care in handling the items. Plaintiffs' request for attorney's fees pursuant to § 12-341.01 was denied and plaintiffs appealed the denial of attorney's fees. In effect, we held that attorney's fees could be awarded based upon the common-law bailment.

It is apparent from the *Wenk* case that attorney's fees may be awarded pursuant to s 12-341.01(A) based upon facts which show a breach of contract, the breach of which may also constitute a tort. The fact that the two legal theories are intertwined does not preclude recovery of attorney's fees under § 12-341.01(A) as long as the cause of action in tort could not exist but for the breach of the contract..

Sparks v. Republic Nat. Life Ins. Co., 132 Ariz. 529, 542–43, 647 P.2d 1127, 1140–41 (1982).

In this instance, the alleged breach of contract is not a breach which could also constitute a tort. While the statements alleged could have been tortious, the tort of defamation has nothing to do with the Board Members Code of Conduct. Therefore the tort action and the contract action were not intertwined. Either of them could have stood independently.

The Court agrees with Plaintiffs that this case sounded primarily in tort.

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B. § 12-349

Defendants also seek recovery of attorneys' fees under § 12-349. Section 12-349(A) provides:

- A. Except as otherwise provided by and not inconsistent with another statute, in any civil action commenced or appealed in a court of record in this state, the court shall assess reasonable attorney fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars against an attorney or party, including this state and political subdivisions of this state, if the attorney or party does any of the following:
1. Brings or defends a claim without substantial justification.
 2. Brings or defends a claim solely or primarily for delay or harassment.
 3. Unreasonably expands or delays the proceeding.
 4. Engages in abuse of discovery.

Defendants argue that Plaintiff engaged in abuse of discovery by trying to propound discovery while the motion to dismiss was pending, and by bringing the case after Defendants expressed the opinion, before the case was filed, that there was no cognizable claim. Plaintiffs argue that there are no facts in the Declaration to support an award of attorneys' fees under § 12-349.

Even if true, sanctions are not appropriate because although the Court dismissed the case on a motion to dismiss, the claims were arguable until the parties fully developed the claims in the proceedings on the motion to dismiss.

IT IS ORDERED denying the Application for Attorneys' Fees.