

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-006034

08/30/2017

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT
D Arrieta
Deputy

LES RODIN

MARK BAINBRIDGE

v.

LAS HADAS VILLAS ASSOCIATION, et al.

BRIAN E DITSCH

WILLIAM J CUROSH
ANTHONY J PALUMBO

MINUTE ENTRY

An application for an award of attorney's fees was filed on behalf of defendant Las Hadas Villas Association, which the court granted in large part because it appeared to be unopposed, not knowing that the parties had stipulated to allow plaintiff Les Rodin additional time to respond. The court's ruling was met with a motion for reconsideration that incorporated the Rodin response to Las Hadas' application. At the court's request, Las Hadas filed both a response to the motion for reconsideration (which Las Hadas did not oppose) and a reply that addressed contentions raised by the Rodin response.

Rodin initiated this action against multiple parties, including Las Hadas. Rodin's complaint asserted that Las Hadas was liable to him for breaching (i) a contract (i.e., the covenants, conditions, and restrictions that pertain to the Las Hadas Villas condominium complex and related recorded documents), (ii) the covenant of good faith and fair dealing that is implied in the CC&R's (and the other recorded documents), and (iii) a fiduciary duty that Las Hadas purportedly owes its members.

The Las Hadas application seeks an award of attorney's fees under A.R.S. §12-341.01(A), which permits such an award to the successful party in any action "arising out of a contract." Between Las Hadas and Rodin, Las Hadas is the successful party, having been granted summary judgment in its favor on Rodin's claims.

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The Rodin response disputes the Las Hadas application in two ways: (i) the Rodin claim is principally a tort claim that does not permit an award of attorney's fees, and (ii) the amount requested by the application is unreasonable.

A claim based on the breach of a duty established by law is not a claim arising out of a contract. *Dooley v. O'Brien*, 226 Ariz. 149, 152, ¶¶11, 12, 244 P.3d 586, 589 (App. 2010); *see also Barmat v. John & Jane Doe Partners*, 155 Ariz. 519, 523, 747 P.2d 1218, 1222 (1987) (recognizing that a claim "sounds in contract" only when "the duty breached is not imposed by law"); *O'Keefe v. Grenke*, 170 Ariz. 460, 472, 825 P.2d 985, 997 (App. 1992) (recognizing that attorney's fees are not available when a claim is based on a duty created by statute). Although under Arizona law, a homeowners association does not owe a fiduciary duty to a member of the association [*Rohde v. Beztak of Arizona, Inc.*, 164 Ariz. 383, 388, 793 P.2d 140, 145 (App. 1990)], it remains necessary to determine whether, as here, the unsuccessful assertion of such a claim permits an award of attorney's fees under section 12-341.01(A) in the same way that the unsuccessful assertion of a contract's existence does [*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")]. Courts in other jurisdictions have recognized that a fiduciary duty owed by a homeowners association to its members is a duty that exists as a matter of public policy, independent of any contract (including any restrictive covenants). *See Colorado Homes, Ltd. v. Loerch-Wilson*, 43 P.3d 718, 721-22 (Colo. App. 2001) (citations omitted). As such, the asserted, albeit ill-conceived, fiduciary duty claim that Rodin asserted warrants treatment as a tort, and not a contract, claim.

Yet, even if one assumes that the purportedly breached fiduciary duty is a tort, the treatment of the Las Hadas application remains unaffected. That is because an award of attorney's fees under section 12-341.01(A) is not foreclosed when a tort claim is intertwined with a claim arising out of a contract. *E.g., Campbell v. Westdahl*, 148 Ariz. 432, 441, 715 P.2d 288, 297 (App. 1985) ("Attorney's fees may be awarded under [§ 12-341.01(A)] for tort claims that are intertwined with contract claims"). Here, and contrary to how the Rodin response memorandum would have it, the claims asserted by Rodin against Las Hadas were predicated principally on the covenants, conditions, and restrictions (and other recorded documents) applicable to the condominium complex, and those recorded documents are recognized as contracts. *E.g., Ahwatukee Custom Estates Mgt. Ass'n v. Turner*, 196 Ariz. 631, 634, ¶5, 2 P.3d 1276, 1279 (App. 2000).¹ Moreover, the Rodin response fails to show how the time charges accompanying the Las Hadas application would have been different, much less significantly

¹ The Rodin complaint (at 6-7, paras. 30-35, 40-44) effectively concedes this point.

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different, if Rodin had pursued only breach of contract and implied covenant claims. Accordingly, Las Hadas is entitled to an award under section 12-341.01(A).

An objection to a request for attorney's fees must be supported by factual detail with reference to the record. *State ex rel. Corbin v. Tocco*, 173 Ariz. 587, 594-95, 845 P.2d 513, 520-21 (App. 1992) ("[A]n opposing party does not meet his burden by asserting broad challenges to the application"). The objections in the Rodin response memorandum (at 6-7) to the reasonableness of the requested fees consist of a few general statements. As such, the objections are insufficient. To assert an objection properly, the Rodin response should have identified specifically each time charge in the Las Hadas application that is purportedly unreasonable instead of merely referring broadly (at 7) to time entries that are not described sufficiently and entries that pertain to governance.

All of that said, it should be remembered that the purpose of section 12-341.01(A) is to mitigate the expense of litigation: section 12-341.01(A) does not establish an entitlement to a dollar-for-dollar recovery. A.R.S. §12-341.01(B); *see Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985); *see also Autenreith v. Norville*, 127 Ariz. 442, 444, 622 P.2d 1, 3 (1981) ("[T]here is no requirement that the trial court grant attorney's fees to the prevailing party in all contested contract actions").

IT IS ORDERED:

1. The motion for reconsideration that was filed on behalf of plaintiff Les Rodin is granted. That part of the July 12, 2017, order awarding attorney's fees – and only that part – is vacated.

2. The application for attorney's fees submitted on behalf of Las Hadas and against Rodin is granted. Las Hadas is awarded \$41,365.00 as an amount that reasonably mitigates the burden of litigation in this matter.²

² This amount is reasonable in the circumstances here whether or not one takes into account the supplemental request for additional fees that accompanied the Las Hadas response to the motion for reconsideration. Accordingly, further briefing regarding that supplemental request is unnecessary. *See generally Hensley v. Eckerhart*, 461 U.S. 424, 438 (1983) (recognizing that "[a] request for attorney's fees should not result in a second major litigation").