

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-005775

09/16/2019

HONORABLE CHRISTOPHER COURY

CLERK OF THE COURT
L. Stogsdill
Deputy

DEBBIE WESTERMAN

PATRICK R MACQUEEN

v.

MICHAEL BRUBAKER, et al.

MARK E LINES

RULING

The Court has reviewed and considered the following:

- A. *Plaintiff's First Amended Verified Complaint*, filed July 17, 2019;
- B. *Defendants' Motion to Dismiss Plaintiff's Amended Complaint*, filed July 30, 2019;
- C. *Plaintiff's Response In Opposition to Defendants' Motion to Dismiss Plaintiff's Amended Complaint*, filed August 26, 2019; and
- D. *Defendants' Reply Supporting Motion to Dismiss Plaintiff's Amended Complaint*, filed August 28, 2019.

Although Defendants have requested oral argument, they have also agreed to withdraw this request if the Court does not believe that it would be helpful. Because the Court does not believe that oral argument would be helpful, the Court declines Defendants' request for oral argument.

Plaintiff Debbie Westerman ("Plaintiff") filed her First Amended Verified Complaint against Defendants Michael Brubaker ("Brubaker") and Bridgewood Nine 30 Property Owners

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Association, Inc. (“Bridgewood POA”) (collectively, “Defendants”) on July 17, 2019. Defendants filed their Answer to Plaintiff’s First Amended Verified Complaint on July 23, 2019 before filing their Motion to Dismiss Plaintiff’s First Amended Complaint on July 30, 2019.

Claims 1, 4, and 5 are not at issue. Defendants move to dismiss only Claims 2, 3, 6, and 7 of Plaintiff’s First Amended Verified Complaint. When reviewing a motion to dismiss for failure to state a claim, allegations in the complaint that are well-pled are taken as admitted. *Aldabbagh v. Arizona Department of Liquor Licenses & Control*, 162 Ariz. 415, 417 (App. 1989). In addition to well-pled facts, the Court is entitled to consider all reasonable interpretations of such facts. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 420 (2008).

THE COURT FINDS as follows:

1. Plaintiff is correct that Defendants’ motion should have been filed under Ariz.R.Civ.P. 12(c). However, the Court in its discretion can test the sufficiency of the pleadings and, in the interest of justice and judicial economy, has determined that Defendants need not re-file their motion. The Court will evaluate the motion pursuant to Rule 12(c), *Arizona Rules of Civil Procedure*.
2. Claim 2 is a claim for tortious breach of the implied covenant of good faith and fair dealing asserted against Defendant Bridgewood POA. Citing *Rawlings v. Apodaca*, 151 Ariz. 151, 158 (1986), and *McAlister v. Citibank*, 171 Ariz. 209, 213 (App. 1992), Defendant Bridgewood POA argues that a special relationship must be found to pursue tort relief and that no special relationship exists between Plaintiff and Defendant Bridgewood POA. In *Rawlings*, the Supreme Court of Arizona found that “a tort action for breach of the implied covenant is more often recognized where the contract creates a relationship in which the law implies special duties not imposed on other contractual relationships. These relationships are characterized by elements of public interest, adhesion, and fiduciary responsibility.” *Rawlings*, 151 Ariz. at 158.

“These types of contracts create special, partly noncommercial relationships, and when the provider of the service fails to provide the very item which was the implicit objective of the making of the contract, then contract damages are seldom adequate, and the cases have generally permitted the plaintiff to maintain an action in tort as well as in contract.” *Id.* at 159, *citing* W. PROSSER & W. KEETON, § 92 at 660–61.

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In *Plaintiff's Response In Opposition to Defendants' Motion to Dismiss Plaintiff's Amended Complaint*, filed August 26, 2019, Plaintiff asserts a special relationship exists based on an adhesion theory. Plaintiff, however, argues that the breach of the implied covenant of good faith and fair dealing claim is based on contract, not tort. Because no fiduciary relationship or special relationship exists, and because the contract is not one of adhesion, tort remedies are not recoverable. Claim 2 will be dismissed to the extent that tort remedies are sought. To the extent that Plaintiff seeks remedies in contract, the motion is denied.

3. Claim 3 is a claim for breach of express/implied warranty predicated upon a contract, specifically the Declaration and Bylaws of the neighborhood association, as well as contracts between Plaintiff and the association. Bridgewood POA is not a homebuilder or developer capable of assuring Plaintiff against structural defects to her unit. The pleadings are devoid of any allegations that Defendant Bridgewood POA made warranties or assumed such warranty liability. Claim 3 fails to state a claim for relief.
4. Claim 6 asserts a claim for breach of fiduciary duty against Defendant Bridgewood POA. Although Defendant Bridgewood POA and Plaintiff are parties to a contract, no fiduciary duty is owed to Plaintiff simply from the existence of a contractual relationship between a homeowner and the homeowners' association. *See Rohde v. Beztak of Arizona, Inc.*, 164 Ariz. 384, 388 (App. 1990). No controlling authority has been cited to the contrary. Dismissal of this claim is warranted.
5. Claim 7 seeks a permanent injunction for failure to enforce the Declaration and Bylaws of the association. This claim is properly asserted against Defendant Bridgewood POA and dismissal is unwarranted at this juncture, although the Court believes this is more likely a remedy than a stand-alone claim.

Good cause appearing,

IT IS ORDERED granting in part *Defendants' Motion to Dismiss Plaintiff's First Amended Complaint*, filed July 30, 2019. Claims 3 and 6 of Plaintiff's First Amended Complaint against Defendant Bridgewood POA are hereby dismissed. Additionally, Claim 2 is dismissed to the extent that it arises in tort and seeks tort damages.

IT IS FURTHER ORDERED denying *Defendants' Motion to Dismiss Plaintiff's First Amended Complaint*, filed July 30, 2019 as to Claim 7.