

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-094307

12/11/2019

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**

The Court convened oral argument on December 10, 2019 on Defendant Jones Skelton and Hochuli's ("Jones Skelton") Motion for Summary Judgment Re: Breach of Contract, which was filed on July 24, 2019. Plaintiff Sycamore Hills Estates Homeowners Association, Inc., ("Sycamore Hills"), filed its Response on September 13, 2019, to which Jones Skelton filed its Reply on October 3, 2019.

Their parties also each filed Supporting Statements of Facts in conjunction with the above-listed pleadings.

In its Complaint, Sycamore Hills alleged three counts: Count 1: Negligence/Legal Malpractice; Count 2: Breach of Fiduciary Duty; Count 3: Breach of Contract.

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The Breach of Contract claim in Count 3 names Defendant Jones Skelton, only. Defendant's Motion for Summary Judgment pertains only to Count 3, and only to Defendant Jones Skelton, which is a Phoenix law firm.

The underlying issue which gives rise to this litigation involves Sycamore Hills retaining Jones Skelton to represent it in a previous lawsuit involving a homeowner within the Sycamore Hills HOA, who alleged the wrongful and/or unauthorized expenditure of Association funds on a certain property improvement project.

The claim made in Count 3 alleges that Jones Skelton breached an "oral" contract or contracts outside the written retainer agreement between Sycamore Hills and Jones Skelton. Those alleged contracts pertained to their legal representation of that HOA within that dispute, and more particularly in regard to its negotiation of the settlement of the dispute on behalf of Sycamore Hills.

Plaintiff argues that oral directions that were given to the Jones Skelton attorney handling the negotiation of the settlement that resulted in the settlement. Plaintiff argues that since these oral directions were not followed by Jones Skelton, that a series of "mini-contracts" were breached, thus forming the basis for its "breach of contract" claim in Count 3. Plaintiff argues that the settlement was unsatisfactory as it was not done according to the terms of the alleged oral contracts.

Jones Skelton argues that pursuant to binding case law that is clearly on point with the issues here, that "claims for professional malpractice are generally tort claims." *Keonjian v. Olcott*, 216 Ariz.563, 566, 169 P. 3d 927, 930 (App. 2007).

Arizona case law addressing this issue, including but not limited to *Keonjian*, essentially states that for a case of alleged professional malpractice to sound in anything other than tort, there must be an established failure to perform.

The key word is 'nonperformance,' and the distinction to be drawn is that between nonfeasance and malfeasance. The fact that an attorney may have carried out a task in a negligent manner, in violation of the duty imposed on him by law to represent his client in accordance with the applicable standard of care, does not change the gravamen of the action from tort to contract.

Id., quoting *Collins v. Miller & Miller, Ltd.*, 189 Ariz. 387, 395, 943 P. 2d 747, 755 (App. 1996).

Moreover, as was noted in the *Keonjian* court's footnote 1, the court in *Collins* declined to hold that "a failure to follow a client's instructions, issued subsequent to and

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separate from a creation of the retainer contract, constitutes a breach of contract.” *Collins* at 395-96, 943 P.2d at 755-56.

Therefore, as was stated by the *Keonjian* court, “regardless of how Keonjian attempts to frame it, the essence of her claim is that [the lawyer] performed negligently, not that he failed to perform at all. Thus, the underlying facts do not entail the nonperformance of a specific promise necessary to a breach of a contract claim.” *Keonjian* at 931.

This Court finds the facts and holding in *Keonjian* to be squarely on point with the instant facts. The Court is unpersuaded by the argument that oral directions of communications given from the Settlement Committee of the Sycamore Hills HOA Board of Directors results in a new contract between the parties here, separate and apart from the retainer agreement signed by the parties.

The Court thus finds that with respect to issues raised in Jones Skelton’s Motion that there are no genuine issues of material fact with respect to Count 3 of the Complaint.

The Court further finds that pursuant to Rule 56, Ariz. R. Civ. P., Defendant Jones Skelton is entitled to Summary Judgment as a matter of law relative to Count 3 of the Complaint.

IT IS ORDERED that not later than 20 calendar days after the entry of this order, Defendant is to submit a proposed form of judgment, which may incorporate by reference what is said here along with Rule 54(b) language.