

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-053929

12/01/2020

HONORABLE THEODORE CAMPAGNOLO

CLERK OF THE COURT
G. Chavez
Deputy

SKY BOLES

SKY BOLES
3307 W ECHO LN
PHOENIX AZ 85051

v.

JASON TARRELL, et al.

MARY T HONE

KATHRYN A BATTOCK
TROY B STRATMAN
MARK ZINMAN
JUDGE CAMPAGNOLO

MINUTE ENTRY

The Court has reviewed and considered Defendant Northern Manor Townhouse Association's Application for Attorneys' Fees and Memorandum of Points and Authorities, Stratman Law Firm's Joinder in Northern Manor Townhouse Association's Application for Attorneys' Fees, Northern Manor Townhouse Association's Statement of Costs and Notice of Taxation of Costs, and the applicable law. No Response was filed.

During the oral arguments hearing on October 9, 2020, the Court ordered that Northern Manor Townhouse Association (the Association) could file an application for attorneys' fees. The Court notes that such Order did not presume that the Association would be entitled to attorneys' fees, and it did not serve as a waiver of the Court's inherent right to determine if an award of attorneys' fees was appropriate.

The Association's only request for an award of attorneys' fees was made pursuant to A.R.S. §12-341.01. Under A.R.S. §12-341.01, the Court may award reasonable attorneys' fees to

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-053929

12/01/2020

the successful party in a disputed action arising out of a contract. Attorney's fees are not recoverable where there is no contractual or statutory basis for their award. *State Farm Mutual Automobile Insurance Company v. O'Brien*, 24 Ariz. App. 18, 21-2 (1975).

Plaintiff did not assert a cause of action for breach of contract. Therefore, the Court must first determine whether some or all of the causes of action arose out of a contract. The fact that Plaintiff did not respond to the Application does not vitiate the Court's duty to determine if this matter arose out of contract.

Plaintiff's Complaint in CV2020-051900 (consolidated) against the Association and Maricopoly, LLC asserted causes of action to quiet title, for declaratory judgment that Maricopoly's action for forcible detainer was improper, wrongful foreclosure, trespassing, bad faith, and unjust enrichment. Plaintiff's Complaint in CV2018-053929 (consolidated) against the Association asserted a cause of action to quiet title. The Association contended that Plaintiff's causes of action arose out of the Declaration of Covenants, Condition and Restrictions (CCR) between the Association and Jason Tarrell, the listed owner of the property. The CCR would be deemed to be a contract between the association and Jason Tarrell. Plaintiff never claimed that she had signed the CCR or had a contract with Defendants. All of Plaintiff's causes of action in both cases arose out of a claim that she had title to the property, and that the foreclosure against another defendant in this case was wrongful based on Plaintiff's claim of title. Plaintiff was not successful on her claims.

Section 12-341.01 does not apply if the contract is a factual predicate to the action, but not the essential basis of it. *Hanley v. Pearson*, 204 Ariz. 147, ¶17 (App. 2003). When a cause of action is based on a statute rather than a contract, the peripheral involvement of a contract does not support the application of the fee statute. *Id.* See also *Keystone Floor & More, LLC v. Arizona Registrar of Contractors*, 223 Ariz. 27, ¶18 (App. 2009 (holding that the sole basis for the substantive result of disciplinary action against a contractor was a violation of statutory and regulatory requirements, and not the underlying contract)).

The modifying phrase "arising out of" refers to a cause or origin, thereby describing an action in which a contract was a factor causing the dispute. *ASH, Inc. v. Mesa Unified School District No. 4*, 138 Ariz. 190, 192 (App. 1983). If the lawsuit was initiated because of a contract, the non-contract cause of action arises out of the contract. *Id.*

In this case, some of Plaintiff's claims arose out of statutes. No statutory request for attorneys' fees was made, other than under A.R.S. §12-341.01. A claim for attorney's fees is forfeited if not made in the pleadings or a Rule 12 motion to dismiss. *King v. Titsworth*, 221 Ariz. 597, ¶10 (App. 2009) (holding that "pleadings" are defined in Rule 7(a) as a complaint, an answer, a counterclaim, a cross-claim, a third-party complaint, a third-party answer, and a reply);

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-053929

12/01/2020

Rule 54(g)(1), ARIZ. R. CIV. P. The purpose of Rule 54(g)(1) is to put the other party on notice that attorney's fees will be sought in a certain way, so that the other party can properly evaluate whether and when to settle. *Halt v. Gama ex rel. County of Maricopa*, 238 Ariz. 352, ¶151 (App. 2015). The Association has forfeited any claim for attorneys' fees other than under A.R.S. §12-341.01.

The remainder of Plaintiff's claims sounded in tort. A tort claim arises out of contract if it could not exist but for the contract. *See, e.g., Caruthers v. Underhill*, 230 Ariz. 513, 526, ¶57 (App. 2012)(holding that the contract must be the essential basis of the action and not merely a factual predicate); *Sparks v. Republic National Life Insurance Co.*, 132 Ariz. 529, 543 (1982). An action arises out of a contract when the contract is "the factor" giving rise to the litigation; it does not arise out of contract if the contract is merely peripheral to the cause of action. *Lewin v. Miller Wagner & Co.*, 151 Ariz. 29, 37 (App.1986).

In this case, the CCR is peripherally involved. Plaintiff did not have a contract with the Association. The CCR was not the essential basis of Plaintiff's claim of wrongful foreclosure and to quiet title. At most, the CCR was a factual predicate for Plaintiff's claim. The basis of Plaintiff's claims was a purported transfer of title from Jason Tarrell that the Court found was not proven. All of her claims flowed from that contention.

The Court finds that Plaintiff's cause of action did not arise out of a contract, as that phrase is interpreted under A.R.S. §12-341.01. Therefore, A.R.S. §12-341.01 is inapplicable in this case, and the Association is not entitled to an award of attorneys' fees.

The superior court has no discretion to deny taxable costs to the successful party, pursuant to A.R.S. §12-341. *Roddy v. County of Maricopa*, 184 Ariz. 625, 627 (App. 1996). The Court finds that the Association was the successful party. The Association has requested the amount of \$73.70. The Association's taxable costs appear to be appropriate under A.R.S. §12-332.

IT IS ORDERED that Defendant Northern Manor Townhouse Association's Application for Attorneys' Fees and Memorandum of Points and Authorities is denied.

IT IS FURTHER ORDERED that costs are awarded to Defendant Northern Manor Townhouse Association in the amount of \$73.70.