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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-016054 05/08/2012

HONORABLE ARTHUR T. ANDERSON

CLERK OF THE COURT
L. Nixon
Deputy

NICK TAVILLA, et al. MATTHEW P MILLEA

v.

JAMES F OTOOLE COMPANY INC, et al. E SCOTT DOSEK

NICK & DONNA TAVILLA
3038 EAST AVALON DRIVE
PHOENIX AZ 85016-7506

RULING

The Court has had under advisement Defendants', James F. O'Toole Co., James and Lisa O'Toole (collectively "O'Tooles"): Motion for Summary Judgment. Having read and considered the Motion, Tavillas' Response, the Reply, and Statements of Facts, and having heard oral argument, the Court issues the following ruling.

The O'Tooles move for summary judgment on all three counts (Count 1: Negligence; Count 2: Breach of Contract; Count 3: Breach of Covenant of Good Faith and Fair Dealing) based on the statute of limitations. First Amended Complaint.[1]

[1]Plaintiffs did not respond to Defendants' argument that a two-year statute of limitations applies to Plaintiffs' claims, including their breach of contract claim. *See* A.R.S. § 12-542; *cf. Sato v. Van Denburgh*, 123 Ariz. 225, 227 (1979) (cause of action for accountant's negligent performance of professional services sounds in tort); *Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519 (1987) (professional malpractice actions do not arise out of contract for purposes of award of attorneys' fees under A.R.S. § 12-341.01(A)). Thus, the Court finds Plaintiffs have conceded the issue. *See also Keonjian v. Olcott*, 216 Ariz. 563, 566-67 (App. 2007) (claims for professional malpractice are generally tort claims).

I.

A threshold issue for the application of the statute of limitations is when a cause of action accrues. Plaintiffs contend that "a cause of professional negligence during litigation does not accrue until the appeals in the matter are exhausted." Response pg. 1. The Tavillas premise their argument that the statute of limitations *has not run* on an accrual date of October 28, 2008 – when the Supreme Court denied the petition for review in the appeal of the underlying EMC matter (the "EMC action")[2]. This accrual date might be correct if (i) the "course of litigation" exception applied to claims against public adjusters, and (ii) the alleged negligence actually occurred during the "course of litigation." The Court finds to the contrary on both bases.

A legal malpractice claim accrues when (1) the plaintiff knew or should have known of the attorney's negligent conduct, and (2) the plaintiff's damages are ascertainable, not speculative or contingent. *Cannon v. Hirsch Law Office, P.C.,* 222 Ariz. 171, 180-82 (App. 2009); *Glaze v. Larsen,* 207 Ariz. 26, 29 (2004); *see also Commercial Union Ins. Co. v. Lewis & Roca,* 183 Ariz. 250, 254-56 (App. 1995. At that point, the harm is "irremedial" or "irrevocable" and cannot be avoided by future appeal or court proceedings. *Glaze, id.* at 30 n.1. In contrast, when alleged negligent conduct occurs during the course of litigation, accrual of a legal malpractice action is deferred until the appellate process is completed. *Amfac Distrib. Corp. v. Miller,* 138 Ariz. 152, 154 (1983); *Commercial Union Ins., id.* at 256. The purpose of this exception is to allow for the alleged malpractice to be cured by subsequent action in the litigation. *Cannon, id.* at 179.

First, there is no basis in Arizona law to extend the course of litigation exception to public adjusters. The Court agrees with Defendants that *In re Creasy*, 198 Ariz. 539 (2000) is inapposite. *Creasy* might stand for the proposition that a former attorney practices law by acting as a public adjuster; it does not stand for the proposition that a public adjuster practices law. *See id.* at 541-42. *But cf. CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.,* 198 Ariz. 173, 176 (App. 2000) (applying *Commercial Union* to negligence claim against accountant).

Second, *assuming arguendo,* that the Court extends the course of litigation exception, it does not apply here. Plaintiffs' primary claim is that Defendants caused the loss of Plaintiffs' right to appraisal under the insurance policy, which forced them to incur expenses of litigation and attendant losses. The harm to Plaintiffs from this alleged negligence became ascertainable *no later than* May 15, 2003 when the trial court denied Plaintiffs' Motion to Remand for Appraisal.[3] That denial carried direct, harmful consequences because it foreclosed the remedy of

[2] *Nichola and Donna Tavilla, husband and wife, et.al. v. Employers Mutual Casualty and Ins, Co,.* CV 2001-019327.

[3] The Court of Appeals' decision does not reflect that the trial court's denial of Tavillas' Motion to Remand for Appraisal (May 15, 2003 minute entry) was raised on appeal in CA-CV 06-0764.

appraisal, which Plaintiffs acknowledge is a faster, cheaper alternative to a lawsuit. (Resp. at 5.) *See Best Choice Fund, LLC v. Low & Childers, P.C.*, 228 Ariz. 502, 507-08 (App. 2011); *Keonjian v. Olcott*, 216 Ariz. 563, 566 (App. 2007). The possibility that they might have prevailed in the EMC action in spite of Defendants' negligence is irrelevant. The clock started ticking on the claim even though Plaintiffs' damages "could have been eliminated or substantially minimized by future events." *See Best Choice Fund*, *id.* at 508.

Based on the foregoing,

IT IS ORDERED granting Defendants' Motion for Summary Judgment.

IT IS FURTHER ORDERED denying Defendants' Motion to Strike Plaintiffs' Second and Third Supplemental Disclosure Statements and Plaintiffs' Motion to Strike Paragraphs 12, 64 and 65 from Defendants' Separate Statement of Facts as moot.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.