

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 02/25/10
PHILIP G. URRY, CLERK
BY: JT

ISAAK GOLTSMAN, an individual,)
) 1 CA-CV 09-0287
)
Plaintiff/Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) Not for Publication -
ALMQUIST & GILBERT, P.C., an) (Rule 28, Arizona Rules
Arizona professional) of Civil Appellate Procedure)
Corporation; WALTER HARLEN)
GILBERT; ROBERT D. ALMQUIST,)
)
)
Defendants/Appellees.)

Appeal from the Superior Court of Maricopa County

Cause No. CV 2008-016750

The Honorable L. Grant, Judge

AFFIRMED

Isaak Goltsman Phoenix
In Propria Persona

Lewis Brisbois Bisgaard & Smith, LLP Phoenix
By James K. Kloss
and Jodi L. Skeel
Attorneys for Appellees

T H O M P S O N, Judge

¶1 Isaak Goltsman (plaintiff) appeals the trial court's
dismissal of his complaint and award of attorneys' fees to

Almquist & Gilbert, P.C., Walter Harlen Gilbert, and Robert D. Almquist (defendants). For the following reasons, we affirm.

¶2 Atomic Submarine, L.L.C. (Atomic), through plaintiff, as guarantor, signed a lease agreement with Sunnyslope Village Center (SVC). The lease had an exclusive provision that provided that no other sandwich shop could lease in the shopping center during the term of Atomic's lease. SVC later retained Almquist to file a forcible entry and detainer (FED) action against Atomic for failure to timely pay rent. That lawsuit was settled, and Atomic agreed to waive the exclusive provision of the lease agreement. Around the time of the settlement, Atomic's attorney asked Almquist if SVC was negotiating with other sandwich shops. Almquist allegedly stated that SVC was not. Another sandwich shop later leased space from SVC.

¶3 Atomic then sued SVC for negligent misrepresentation and breach of the implied covenant of good faith and fair dealing, among other claims, because of the alleged misrepresentations by Almquist. Goltsman was added as a plaintiff, although the trial court determined that he did not have standing and could not enter that lawsuit as a plaintiff. Gilbert and Almquist were counsel for SVC. The complaint was dismissed.

¶4 The new owner of the shopping center, Sunnyslope Village Investment (SVI) sued plaintiff for non-payment of rent.

Almquist represented SVI. SVI obtained a default judgment against Atomic and plaintiff, as guarantor. Plaintiff appealed, and the judgment was affirmed.

¶15 Plaintiff then filed this lawsuit, which alleges that plaintiff discovered that the FED action was not "legally" dismissed. Defendants assert that such may have been an oversight but that the FED action was abandoned and ultimately dismissed by court order due to the settlement. Plaintiff also alleges that an amendment to the lease agreement, which was part of the settlement with SVC, was not filed with the court or signed by the judge. Defendants allege that these issues were raised and ruled upon in the first lawsuit and appeal. Defendants moved to dismiss the complaint in this case and argued that (1) plaintiff's complaint was barred by res judicata because it was identical to a previous lawsuit, (2) plaintiff's complaint was barred by the statute of limitations, and (3) plaintiff could not sustain a cause of action against defendants because they had no duty to Atomic or plaintiff. The trial court granted the motion to dismiss and awarded attorneys' fees and costs to defendants. Plaintiff appealed.

¶16 Plaintiff first argues on appeal that his claim was not barred by the statute of limitations. According to plaintiff, he discovered the "violations of his rights" in November 2007 and filed his complaint in 2008. It appears from

the complaint that the underlying events giving rise to this lawsuit, which were the subject of a prior lawsuit, occurred in 2002 and 2003. Plaintiff alleges that he did not discover that the FED case filed in 2002 was not "legally dismissed" until 2007. Under Arizona Revised Statutes (A.R.S.) § 12-542 (2009), there is a two-year statute of limitations for actions based on personal injury. From the face of the complaint, it is difficult to determine if it is based on the allegation that the FED case was not "legally dismissed" or based upon the alleged misrepresentations made by Almquist regarding the exclusive provision of the lease, which led to the prior lawsuit by Atomic against SVC. Either way, plaintiff "should have" been aware of these events by 2003, when the FED action was settled and dismissed.¹ See *Long v. Buckley*, 129 Ariz. 141, 142, 629 P.2d 557, 558 (App. 1981) (citation omitted) (cause of action accrues when plaintiff knows or should have known of defendant's conduct, and statute of limitations begins to run at that time).

¹ The answering brief has a section regarding alleged claims of fraud being barred by the statute of limitations. This claim does not appear to be raised in the opening brief in terms of the statute of limitations. Rather, plaintiff asserts that defendants conspired with their clients in the previous lawsuit to plan and conduct fraud by using "fraudulently submitted evidences [sic]" in his argument regarding his assertion that defendants owed him a duty when representing SVC in another lawsuit. Therefore, we do not address this argument in terms of the statute of limitations.

¶7 Plaintiff next asserts that defendants, as counsel for the other party to a previous lawsuit against plaintiff, owed him a duty "for intentional torts." According to plaintiff, the previous lawsuit filed against him by defendants (as counsel) "was not based on the proper evidence and resulted" in an "improper" judgment holding plaintiff "wrongfully accountable for paying rent and" other charges. We agree with defendants that they had no duty to plaintiff, who was not their client, while representing SVC in the other lawsuits. See *Capitol Indem. Corp. v. Fleming*, 203 Ariz. 589, 591, ¶ 6, 58 P.3d 965, 967 (App. 2002) (citation omitted) (case law does not recognize a duty by an attorney to a non-client who is not "at least derivatively" an intended beneficiary of the attorney-client relationship).

¶8 Finally, plaintiff asserts that the trial court erred in granting attorneys' fees and costs to defendants because they previously filed a "groundless and illegitimate" complaint against him in another lawsuit. Such is not grounds for reversing the trial court's grant of attorneys' fees and costs to defendants in this lawsuit.²

² The answering brief addresses the trial court's ruling regarding *res judicata*. However, because plaintiff does not raise that issue on appeal, and because we affirm on other grounds, we decline to address it.

¶9 For the foregoing reasons, we affirm. Defendants seek attorneys' fees and costs on appeal under A.R.S. §§ 12-341 (2009), 12-342 (2009), and 12-349 (2009) and ARCAP 21(c). Defendants assert that this lawsuit was not filed in good faith. We agree and award defendants their reasonable attorneys' fees and costs upon compliance with ARCAP 21.

_____/s/_____
JON W. THOMPSON, Judge

CONCURRING:

_____/s/_____
PATRICIA A. OROZCO, Presiding Judge

_____/s/_____
DIANE M. JOHNSEN, Judge