

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-005775

07/01/2019

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. *Defendant Brubaker's Motion to Dismiss*, filed May 8, 2019;
- B. *Plaintiffs' Response In Opposition to Defendant Michael Brubaker's Motion to Dismiss*, filed June 6, 2019; and
- C. *Defendant Brubaker's Reply Supporting Motion to Dismiss*, filed June 10, 2019.

Although Defendant Brubaker has requested oral argument, he 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 Defendant Brubaker's request for oral argument.

Defendant Brubaker argues that Plaintiff has failed to state claims for relief against him in his 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).

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THE COURT FINDS as follows:

1. Claims 1, 2, and 3 are predicated upon a contract, specifically the Declaration and Bylaws of the neighborhood association, as well as contracts between Defendant Brubaker and the association. No contract is alleged to exist between Plaintiff and Defendant Brubaker. And, to the extent that that Plaintiff seeks relief individually for a contract between Defendant Brubaker and the association, the contract and warranty claims asserted are derivative claims that must be asserted on behalf of the association, after the prerequisite to filing suit have been met. No allegations have been made that Plaintiff has completed the prerequisites to filing a derivative claim against Mr. Brubaker. Therefore, Claims 1, 2 and 3 fail to state a claim for relief.
2. Claim 4 is a fraud claim that must be pled with particularity pursuant to Rule 9(b), *Arizona Rules of Civil Procedure*. It is not. Dismissal of this claim is warranted.
3. Claim 7 asserts a claim for breach of fiduciary duty. Fiduciary duties are owed to the association, not to Plaintiff. No authority has been cited to the contrary. Dismissal of Claim 7 is warranted.
4. Claim 8 seeks a permanent injunction for failure to enforce the Declaration and Bylaws of the association. These claims are properly asserted against other Defendants, and not Defendant Brubaker. Dismissal of this claim is warranted.
5. Claims 5 and 6 state claims for relief against Defendant Brubaker.
6. Given the early stage of the proceedings, it is appropriate to grant Plaintiff leave to amend her Complaint to assert claims against Defendant Brubaker pursuant to Rule 15(a), *Arizona Rules of Civil Procedure*.

Good cause appearing,

IT IS ORDERED granting in part *Defendant Brubaker's Motion to Dismiss*, filed May 8, 2019. Claims 1, 2, 3, 4, 7 and 8 of Plaintiff's Complaint against Defendant Brubaker are hereby dismissed without prejudice.

IT IS FURTHER ORDERED denying *Defendant Brubaker's Motion to Dismiss*, filed May 8, 2019 as to Claims 5 and 6.

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IT IS FURTHER ORDERED granting Plaintiff leave until **July 17, 2019**, to file a First Amended Complaint.

IMPORTANT NOTICE REGARDING ONLINE PROFILE

Judge Coury maintains an online profile that answers many questions about courtroom and division procedures. Litigants and their attorneys should familiarize themselves with the online profile. You can find the online profile at the following link:

<http://www.superiorcourt.maricopa.gov/JudicialBiographies/judges/profile.asp?jdgID=272&jdgUSID=9683>.