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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

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| **GALLERY COMMUNITY ASSOCIATION, an Arizona non-profit corporation,**<br><br>**Plaintiff,**<br>**v.**<br><br>**K. HOVNANIAN AT GALLERY, LLC, an Arizona limited liability company; K. HOVNANIAN ARIZONA OPERATIONS, LLC, an Arizona limited liability company; K. HOVNANIAN DEVELOPMENTS OF ARIZONA, INC., an Arizona corporation; K. HOVNANIAN COMPANIES OF ARIZONA, LLC, an Arizona limited liability company; JOHN DOES I-X AND JANE DOES I-X, WHITE CORPORATIONS I-X; BLACK PARTNERSHIPS I-X; AND GRAY LIMITED LIABILITY COMPANIES I-X,**<br><br>**Defendants.** | **Case No. CV2020-008714**<br><br>**MOTION TO DISMISS**<br><br>**(Assigned to the Hon. Timothy Thomason)**<br><br>**(Oral Argument Requested)** |

COMES NOW Defendants K. Hovnanian at Gallery, LLC, K. Hovnanian Arizona Operations, LLC, K. Hovnanian Developments of Arizona, Inc., and K. Hovnanian Companies of

Arizona, LLC (collectively the "Defendants"), hereby move for dismissal pursuant to Rule 12(b)(6) for reasons more fully set forth in the accompanying Memorandum of Points and Authorities. Defendants seek their attorney fees and court costs pursuant to A.R.S. §12-341.01(A) and 12-349.

**MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

Plaintiff is an Arizona nonprofit corporation that acts as the property owner's association (the "Association" or "HOA") for the property known as The Gallery in Scottsdale, Arizona. (Complaint at ¶ 1). Plaintiff admits it is governed by the recorded Declaration of Covenants, Conditions, Restrictions and Easements (CC&R's) for Gallery. (*Id.*, at ¶ 4). Those CC&R's require the Association, and not any of these Defendants to repair and maintain the common elements on the Association Property and Common Areas as defined therein and common exterior walls, stucco, façade, roofs, or other surfaces of the Dwelling Units. (*Id.* at ¶ 5).

In a "Quit Claim Deed" dated October 6, 2016 that was recorded, Defendant K Hovnanian at Gallery, LLC, ("KHov Gallery") who had developed the project and was the Declarant, conveyed the common areas to the Association. (*Id.*, ¶ 8). There is no privity of contract anywhere alleged in the Complaint as to any contract the Association has with any of the Defendants including KHov Gallery or the alleged contractor, K Hovnanian Arizona Operations, LLC ("KHov Operations"). (*Id.* at ¶ 10,11). Moreover, there is no stated basis for why K Hovnanian Developments of Arizona, Inc., alleged to simply be a "member" of KHov Gallery and KHov Operations, has any possible liability to Plaintiff at all. (*Id.* at ¶ 11).

Further, Defendant K Hovnanian Companies of Arizona, LLC is simply claimed to be "involved in the development, design, construction, and/or sale of The Gallery and the units. (*Id.*, ¶ 12). How this relates to any liability other than any other innocent bystander is completely left unstated. The pleading as to the other entities is woefully deficient even for notice purposes and states no claim at all.



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The Complaint proceeds to purport to state claims for negligence (Count One) for failure of "Defendants" to design and construct the common areas and elements of The Gallery in a non-negligent and workmanlike manner, along with breach of contract and breach of implied warranty claims.

## II. LAW AND ARGUMENT

Plaintiff's negligence claim must be dismissed as there is no duty of care, and it is barred by the economic loss rule based on long established Arizona precedent discussed further *infra*. Additionally, as will be shown, Plaintiff's Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing claims fail because Plaintiff is not in privity of contract with Defendants. Plaintiff's Breach of Implied Warranty of Workmanship and Habitability claim also fails because only homeowners can bring such claims and the claim is conclusory at best.

Generally speaking, the Court, for purposes of a Motion to Dismiss under Rule 12(b)(6), is required to accept all well-pled factual allegations in the Complaint as being true. *Cullen v. Auto-Owners Ins. Co.,* 218 Ariz. 417, 419 (2008). However, it is also well-settled law in Arizona that this Court may *not* accept conclusions of law masquerading as factual allegations; nor can the Court accept unreasonable inferences or unsupported conclusions that are not necessarily implied by whatever well-pleaded facts might be in a Complaint, if any. *Dockery v. Central Ariz. Light and Power Co.,* 45 Ariz. 434, 439 (1935) (only well-pleaded facts are accepted as true, not inferences that are not necessarily implied by such facts); *Sw. Non-Profit Hous. Corp. v. Nowak*, 234 Ariz. 387, 391 (App. 2014) (citing *Jeter v. Mayo Clinic Ariz.,* 211 Ariz. 386, ¶ 4 (App.2005) ("we do not accept as true allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts").

Because Arizona courts evaluate a complaint's well-pled facts, mere conclusory statements are insufficient to state a claim upon which relief can be granted. The inclusion of conclusory statements does not invalidate a complaint, *Long v. Ariz. Portland Cement Co*., 89 Ariz., 89 Ariz. at 369, 362 P.2d at 743, but a complaint that states only legal conclusions, without any supporting



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factual allegations, does not satisfy Arizona's notice pleading standard under Rule 8. *Cullen v. Auto-Owners Ins. Co*., 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008).

**A. Plaintiff's negligence claim must be dismissed because Defendants owed no duty of care and it is barred by the economic loss rule based on long established Arizona precedent.**

***a. Defendant has no duty of care to Plaintiff***

Plaintiff's conclusory assertion that Defendant's owed Plaintiff a "duty of care," is simply a legal conclusion without any specific allegation concerning facts at issue. Whether a duty exists is based upon "the relation between individuals which imposes upon one a legal obligation for the benefit of the other." *Markowitz v. Arizona Parks Bd*., 146 Ariz. 352, 355 (1985) (citing *Coburn v. City of Tucson*, 143 Ariz. 50, 52 (1984), quoting W. Prosser & W. Keeton, THE LAW OF TORTS, § 53 at 356 (5th ed. 1984)). Plaintiff's Complaint is entirely devoid of any allegation relating to the relationship between the Plaintiff on the one hand and any of the Defendants on the other, let alone a special relationship that would give rise to a duty.

A duty of care can also originate in public policy arising from statutes or common law. *US Airways, Inc. v. Qwest Corp*., 238 Ariz. 413, 422, ¶ 33 (App. 2015). Absent either, we typically will not find a duty based in public policy. *See, Gilbert Tuscany Lender, LLC v. Wells Fargo Bank*, 232 Ariz. 598, 602, ¶¶ 19–20 (App. 2013) (noting that prior public policy duty cases were "supported by a state statute or a Restatement section" and declining to impose a duty where no statute or Restatement section applied); *Estate of Hernandez v. Ariz. Bd. of Regents*, 177 Ariz. 244, 253 (1994) (a regulation may give rise to a tort duty premised on public policy where it "is designed to protect the class of persons, in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation"); *Wickham v. Hopkins*, 226 Ariz. 468, 473, ¶¶ 24–27 (App. 2011); *Diaz v. Phoenix Lubrication Serv., Inc*., 224 Ariz. 335, 341, ¶ 25 (App. 2010) (declining to find a duty of care where the plaintiffs "neither cite[d] nor suggest[ed] a statute that might create a duty" and the common law did not create a duty). In the present case, Plaintiff neither cites to, nor alleges, that any statutes or common law establish a duty between a declarant and a HOA that Defendants allegedly breached. As such, Plaintiff's

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negligence claim must be dismissed for failure to state a claim upon which relief can be granted on this ground alone.

***b. Plaintiff's negligence claim is barred by the economic loss rule and well-established Arizona law***

In *Flagstaff Affordable Hous. Ltd. P'ship v. Design All., Inc*., 223 Ariz. 320, 328, 2223 P.3d 664, 672 (2010), the Arizona Supreme Court adopted the economic loss rule as it relates to claims of construction design or workmanship issues as to contractors. It even extended this Rule to design professionals. The doctrine clearly limits a party to contractual remedies when the injury is solely economic (including damage to the property that is the subject of the contract) and allows tort recovery ***only*** if there is some alleged physical injury to persons, or ***other*** property than the property involved, such as personal property. Thus, the Supreme Court determined that for policy reasons in construction defect cases involving only pecuniary losses related to the building that was the subject of the contract, there was "no strong policy reasons to impose common law tort liability in addition to contractual remedies." *Id*. at 325, ¶ 26, 223 P.3d at 669. The Court held that, given these considerations, "in construction defect cases, 'the policies of the law generally will be best served by leaving the parties to their commercial remedies' when a contracting party has incurred only 'economic loss, in the form of repair costs, diminished value or lost profits.'" *Id*. at 326, ¶ 28, 223 P.3d at 670 (quoting *Salt River Project*, 143 Ariz. At 379, 694 P.2d at 209). The Court ruled that the ELR would not prohibit tort recovery "when economic loss is accompanied by physical injury to persons or other property," which is obviously not the case alleged here. *Id*. at 326-27, ¶33, 223 P.3d at 670-71; *Cook v. Orkin Exterminating Co*., 227 Ariz. 331, 335, 258 P.3d 149, 153 (Ct. App. 2011). This application of the economic loss rule is consistent with other Arizona cases preceding that decision. *See e.g.*, *Nastri v. Wood Brothers Homes*, 142 Ariz. 439, 444-45, 690 P.2d 158, 163-64 (Ct. App. 1984), where the Court dismissed the negligence claim for defective construction where a contract was alleged.

The damage claimed in our case, involves only alleged construction defect issues in the common areas of the development and the common property of the homeowners. There is no

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claim for damage to any other property, or any personal injury as is required by the court in *Flagstaff Affordable Housing* and *Cook v. Orkin*. Furthermore, in *Woodward v. Chirco*, 141 Ariz. 514, 687 P.2d 1269 (1984) our Supreme Court held that the purchaser of a home, could sue in both contract and for injuries sustained due to the builder's failure to construct the house in a workmanlike manner.

In the case here, the Plaintiff is not a purchaser of a home, and no homeowners are suing. The homeowners, rather than the HOA, have standing to sue under their respective contracts or written warranties. Notwithstanding that there is not contract between the HOA and the Defendants, there is still no negligence claim allowed in Arizona unless the claim is for damage to other property or for personal injury. The economic loss doctrine applies with equal if not greater force to the HOA. It would make no sense to allow an HOA to have greater rights to sue in tort than the homeowners. Plaintiff lawyers would simply sue on behalf of an "association" of homeowners in every instance in tort to open up the availability of tort damages and avoid Arizona public policy.

Further, the *Nastri* Court explained that the available action in contact was only for "defects in the structure itself, as such defects render the home less than the purchaser bargained for," whereas the available tort claim allowable would only be for "damage to personal property or personal injury" caused by the defective construction. 142 Ariz. 439 (Ct. App. 1984). Another case directly on point is *Crowder v. Vandendeale*, 564 S.W.2d 879 (Mo.1978). In that opinion, as the *Nastri* court noted, the Missouri court recognized an implied warranty of habitability in a new home. However, the court there similarly concluded that recovery for property damage caused by latent structural defects was not actionable in negligence. The court in *Nastri* agreed, and cited to the reasoning:

> A duty to use ordinary care and skill is not imposed in the abstract. It results from a conclusion that an interest entitled to protection will be damaged if such care is not exercised. Traditionally, interests which have been deemed entitled to protection in negligence have been related to safety or freedom from physical harm.

142 Ariz. 439 (Ct. App. 1984). The *Nastri* Court thus dismissed the negligence count. Where personal injury is involved, a duty in negligence has been found. However, where mere deterioration or loss of a bargain is claimed, the concern is with a failure to meet some standard of quality. This standard of quality must be defined by reference to that which the parties expressly agreed upon. 564 S.W.2d at 882. (emphasis in original). That would be the contract, which expressly sets forth the defined duties and pre-empts any tort claim in Arizona arising out of the same claims. Thus, even if Plaintiff could establish the elements of a negligence claim, which they cannot, Arizona does not recognize such cause of action in construction defect cases, as is the case here. This is particularly so where the Plaintiff, as here, also alleges a breach of contract claim is applicable. Plaintiff cannot have it both ways, and is estopped from now changing positions, having already pled the existence of the alleged contract claim over defects.

**B. Plaintiff's breach of contract and breach of implied covenant of good faith and fair dealing claims fail because plaintiff is not in privity of contract with defendants.**

Plaintiff's Count Two, Breach of Implied Covenant of Good Faith and Fair Dealing, and Count Four, Breach of Contract Claim, should also be dismissed because these are contract claims and the Plaintiff is not in privity of contract with any of the Defendants, and has no contract with them. The "duty of good faith and fair dealing arises by virtue of that contractual relationship," *See, Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986); *see also*, *Johnson Int'l, Inc. v. City of Phoenix*, 192 Ariz. 466, 967 P.2d 607 (App. 1998) ("Implied covenants of good faith and fair dealing presume the existence of a valid contract"), which cannot exist here without such a contractual relationship. The purported "contract" that Plaintiff mistakenly bases its claims on is Declaration of Covenants, Conditions, & Restrictions for Gallery. Complaint at ¶ 25, 39. However, it is well established under Arizona law that CC&Rs "constitute a contract between the property owners as a whole and the individual lot owners." *Cypress on Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, ¶ 31, 57 P.3d 1168, 1177 (App. 2011); *see also*, *College Book Centers, Inc. v. Carefree Foothills Homeowners' Ass'n,* 225 Ariz. 533, 241 P.3d 897 (App. 2010) (holding that "restrictive covenants are a contract between the subdivision's property owners as a

whole and individual lot owners."). These cases clearly demonstrate that the CC&Rs create a contract between the HOA and the homeowners and has nothing to do with the Declarant.

Because it is well established that breach of contract and breach of implied covenant of good faith and fair dealing claims must be based on a valid contract between the parties, and the Plaintiff is not in privity of contract with any of the Defendants, the Plaintiff's breach of contract and breach of implied covenant of good faith and fair dealing claims must be dismissed. *See e.g.*, *Thomas v. Montelucia Villas*, LLC, 232 Ariz. 92, 302 P.3d 617 (2013) (holding, "to bring an action for the breach of the contract, the plaintiff has the burden of proving the existence of the contract…"); *Norman v. State Farm Mut. Auto. Ins. Co.,* 201 Ariz. 196, 33 P.3d 530 (App. 2001) (holding, "there is no breach of the implied covenant of good faith in a contract if there is no contract.").

Furthermore, there is no breach of contract or breach of the duty of good faith and fair dealing where there is no loss of the benefit of the bargain. There is such "bargain" here and no consideration was even alleged with respect to the purported conclusory "contract" the claims are based on. Here, the Declaration, which is not a contract between the Plaintiff and Defendants as discussed *supra*, is not performed at all with respect to any Defendants, other than to issue the Quit Claim Deed. We understand the principle that a breach of an express covenant in a contract is not a necessary prerequisite to an action for bad faith, and understand also that a Plaintiff may simultaneously bring an action both for breach of contract and for bad faith, and need not prevail on the contract claim in order to prevail on the bad faith claim, but that is only provided Plaintiff proves a contract exists. *Id*. That cannot be proven here, the Declaration was not "manipulated" or carried out in bad faith, since, again, there was nothing required, no consideration, and no representations or warranties therein that could be carried out in bad faith.

**C. Plaintiff's Breach of Implied Warranty of Workmanship and Habitability Claim also fails because Plaintiff is not a homeowner, and the claim is conclusory at best.**

In Plaintiff's Breach of Implied Warranty of Workmanship and Habitability Claim, Plaintiff conclusively alleges that "Defendants" impliedly warranted that "they" would perform



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their work in a "workmanlike manner." Complaint at ¶ 33-35. No such implied warranty exists as to a Declarant or business in a community context. One has only been found as to homeowner claims against builder/vendors in Arizona. There is no notice or specific pleading as to how all Defendants somehow made any such implied promise, or why they would ever do so. Assuming, solely for the sake of argument, that the contractor was KHov Operations, as is alleged in ¶ 10 of the Complaint, it is entirely unclear what contract this entity had with the Plaintiff, if any, or how it impliedly warranted anything to Plaintiff, as opposed to the individual homeowners. As for any other Defendant, the Complaint is entirely devoid of any basis at all to simply lump all these Defendants into these allegations, even in a notice pleading.

The implied warranty of habitability and fitness has been recognized in Arizona, but only as to homeowners. *See*, *Richards v. Powercraft Homes, Inc.* 139 Ariz. 242, 678 P.2d 427 (1984), stating, that the "purpose of implied warranty of workmanship and habitability is to protect innocent purchasers and hold home builders accountable for their work." No case has expressly discussed the issue present here in Arizona. Plaintiff is not alleged to be a homeowner, and in fact, distinguishes itself from the homeowners. Any construction contract for the common area elements of the subdivision is not necessarily subject to the conclusory allegations in the Complaint as to implied warranties. And, more importantly, such an implied warranty would not extend to the HOA, that was not in privity with any of the Defendants. Rather, and significantly, any construction would have been expressly performed for the Declarant, KHov Gallery, and not for the HOA. The HOA could not make intended third-party beneficiary claims and has not done so, nor has it cited to anything establishing such a basis for a claim in the Declaration either.

Typically, Declarations and Declarants do not grant warranties on turnover to the HOA upon the pre-determined time when they exit and turnover the Common Areas to the HOA, and nothing is claimed or cited to in the Complaint to the contrary. That is why they simply "quit claim" the property with no warranties, as the Plaintiff recognizes here. Thus, even were the law of implied warranty to apply here, which it has not, there is nothing alleged in the Quit Claim Deed which would establish any liability under the Declaration.

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The law of implied warranty has only been extended to original homeowners and subsequent owners under specific conditions, as a matter of public policy, to deter shoddy workmanship of fly by night builders serving the public, and has not been extended beyond that limited sphere in Arizona to any commercial type work. *See, e.g., Yanni v. Tucker Plumbing, Inc.,* 233 Ariz. 364, 312 P.3d 1130 (App. 2013) (holding "that lack of contractual privity precluded homeowners from asserting claims against subcontractors for breach of warranty of workmanship and habitability."); *Richards v. Powercraft Homes, Inc*., 139 Ariz. 264, 266–67, 678 P.2d 449, 451–52 (Ct. App. 1983), approved in part, vacated in part, on other grounds,139 Ariz. 242, 678 P.2d 427 (1984). Subsequent owners may bring claims for implied warranties, excepting those who have notice of the alleged defects when taking title.

Even if such an implied warranty did exist here, which it does not, Plaintiff would be analogous to a subsequent owner with notice, since the original "owner" would be KHov Gallery as Declarant, and the contractor would be KHov Operations. Plaintiff claims that KHov Gallery DID have notice of the shoddy workmanship alleged when it took title. *See e.g.*, *Maycock v. Asilomar Dev., Inc*., 207 Ariz. 495, 88 P.3d 565 (App. 2004) (holding, "prior homeowner's knowledge of a construction defect was imputed to subsequent owners for purposes of the statute of repose governing claims against builders."). Thus, it has long been the law of this State that a subsequent owner with notice does not have the benefit of claiming an implied warranty, even if one exists. *See, e.g.*, *Richards v. Powercraft Homes*, supra.

Furthermore, Arizona courts evaluate a complaint's well-pled facts and Plaintiff's conclusory statements here are insufficient to state a claim upon which relief can be granted. Plaintiff simply states without providing more detail that "in designing and performing their work at The Gallery, the Defendants impliedly warranted that they would perform their work in a workmanlike manner. The Defendants did not perform their work at The Gallery in a workmanlike manner. By failing to perform their work in a workmanlike manner, the Defendants breached the implied warranty of workmanship and habitability… The Defendants' breaches of the implied warranty damaged the Association and its members in an amount to be proven at



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trial." Complaint at ¶ 33-36. Clearly, such an implied warranty does not apply to any Defendant, let alone all of them. Plaintiff does not state what "work" was allegedly not performed in a workmanlike manner, what the alleged "breaches" of the implied warranty are, and what possible damages were caused by the alleged breaches. Furthermore, Plaintiff does not explain the basis for the alleged implied warranty in the first place. While the inclusion of conclusory statements does not necessarily invalidate a complaint, *Long v. Ariz. Portland Cement Co.*, 89 Ariz., 89 Ariz. at 369, 362 P.2d at 743, a complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy Arizona's notice pleading standard under Rule 8. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008). Here, Plaintiff has stated only legal conclusions without any supporting factual allegations and as such, the breach of implied warranty claim should be dismissed.

## III. CONCLUSION

For the foregoing reasons, Plaintiff's Complaint fails to state a claim for which relief may be granted and must be dismissed. Defendants request their reasonable attorneys' fees and costs under A.R.S. §12-341.01(A), 12-341.01(C), and 12-349 on the grounds that the Complaint was filed without substantial justification.

**RESPECTFULLY SUBMITTED** this 17th day of August, 2020.

**WILENCHIK & BARTNESS, P.C.**

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