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11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
12 **IN AND FOR THE COUNTY OF MARICOPA**

13 GALLERY COMMUNITY
14 ASSOCIATION, an Arizona non-profit
15 corporation,

16 Plaintiff,

17 vs.

18 K. HOVNANIAN AT GALLERY, LLC,
19 an Arizona limited liability company; et
20 al.

21 Defendants.

22 K. HOVNANIAN AT GALLERY, LLC,
23 an Arizona limited liability company; et
24 al.

25 Third-Party Plaintiffs,

26 v.

27 ARTISTIC STAIRS, LTD., an Arizona
28 limited liability company; et al.

 Third-Party Defendants.

Case No. CV2020-008714

Assigned to Hon. Michael Kemp

**PLAINTIFF'S REQUEST FOR RULE
56(d) RELIEF AND EXPEDITED
HEARING; AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

(Oral Argument Requested)

1
2 Pursuant to Ariz. R. Civ. P. 56(d), Plaintiff Gallery Community Association
3 (“Plaintiff” or “Association”), by and through undersigned counsel, respectfully requests
4 the Court defer considering Defendants’/Third-Party Plaintiffs’ Motion for Summary
5 Judgment (“*Motion*”) and allow time for Plaintiff to obtain affidavits or take discovery
6 before a response to the *Motion* is required.

7 Plaintiff further requests the Court schedule an expedited hearing concerning the
8 relief requested herein.

9 This Request is urged for the reason that Plaintiff is unable to obtain, within the
10 time periods prescribed by Ariz. R. Civ. P. 56(c)(2), affidavits or take discovery to
11 support its opposition to the *Motion*. Additional time is needed to obtain evidence
12 essential to opposing the Motion because:

- 13 • Although Defendants’ counsel recently provided copies of plans upon an
14 informal request from Plaintiff’s counsel, no formal discovery has taken
15 place in this case yet. Affidavit of Penny J. Manship (“Manship Aff.”) ¶ 4.
- 16 • The parties previously agreed that initial disclosures under Rule 26.1(a)
17 would be exchanged after the case is at issue, and the case is not at issue
18 because several third-party defendants named by Defendants/Third-Party
19 Plaintiffs in their Third-Party Complaint have yet to appear or been
20 defaulted. Manship Aff. ¶ 4.
- 21 • On March 12, 2021, Plaintiff’s counsel proposed to Defendants’ counsel
22 amending the previous agreement to provide initial disclosures after the case
23 is at issue, to agreeing to April 12, 2021 as a deadline for initial disclosures
24 for all parties currently in the case. Plaintiff’s counsel has not received a
25 response to this proposal. Manship Aff. ¶ 5.
- 26 • The parties have not engaged in an early meeting pursuant to Rule 16(b) to
27 discuss preparation of a Joint Report and proposed Scheduling Order. Also
28 on March 12, 2021, Plaintiff’s counsel proposed setting a date for an early

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meeting and offered several dates of availability on or before March 23rd.
Again, Plaintiff’s counsel has not received a response to this proposal.
Manship Aff. ¶ 6.

This Request is supported by the accompanying Memorandum of Points and Authorities, and the Affidavit of Penny J. Manship, filed in accordance with Ariz. R. Civ. P. 56(d)(1)(A), and all other documents on file in this action, and upon such evidence and argument that the Court may consider at a hearing. This Request is further supported by the Rule 7.1(h) Good Faith Consultation Certificate, which is filed contemporaneously herewith.

RESPECTFULLY SUMMITTED this 22ND day of March, 2021.

BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 While the Association believes that Defendants’ *Motion* should be denied outright
3 because Defendants failed to present any evidence in support thereof (see Plaintiff’s
4 Response to Motion for Summary Judgment), in the event the Court determines it will
5 consider the merits of the *Motion*, the Association requests appropriate relief from the
6 Court to conduct discovery necessary to support its Response.

7 **I. NO DISCOVERY HAS BEEN CONDUCTED**

8 Although Defendants’ counsel recently provided copies of plans upon an informal
9 request from Plaintiff’s counsel, no discovery has taken place in this case yet. Manship
10 Aff. ¶ 4. The parties previously agreed that initial disclosures under Rule 26.1(a) would
11 be exchanged after the case is at issue, and the case is not at issue because several third-
12 party defendants named by Defendants/Third-Party Plaintiffs in their Third-Party
13 Complaint have yet to appear or been defaulted. Manship Aff. ¶ 4. On March 12, 2021,
14 Plaintiff’s counsel proposed to Defendants’ counsel amending the previous agreement to
15 provide initial disclosures after the case is at issue, to agreeing to April 12, 2021 as a
16 deadline for initial disclosures for all parties currently in the case. Plaintiff’s counsel has
17 not received a response to this proposal. Manship Aff. ¶ 5.

18 Moreover, the parties have not engaged in an early meeting pursuant to Rule 16(b)
19 to discuss preparation of a Joint Report and proposed Scheduling Order. Also on March
20 12, 2021, Plaintiff’s counsel proposed setting a date for an early meeting and offered
21 several dates of availability on or before March 23rd. Again, Plaintiff’s counsel has not
22 received a response to this proposal. Manship Aff. ¶ 6.

23 **II. ASSOCIATION REQUIRES DISCOVERY TO OBTAIN EVIDENCE**
24 **NECESSARY TO OPPOSE DEFENDANTS’ *MOTION***

25 The Affidavit of Penny J. Manship sets for the factors required under Ariz. R. Civ.
26 P. 56(d)(1)(A). Manship Aff. ¶ 7:

- 27 • At a minimum, the Association requires Defendants’ initial disclosures that will
28 identify potential witnesses and Defendants’ documents relevant to the claims in

1 this case. In particular, the Association requires discovery regarding the roles of
2 each Defendant with respect to the development, design, construction, and/or sale
3 of The Gallery. The evidence needed by the Association is within the Defendants
4 possession, custody, or control.

- 5 • The Association believes that the evidence will reveal what involvement each
6 Defendant had at the Project, including their potential roles as builder-vendors or
7 builders at The Gallery. This information is believed to be contained within initial
8 disclosures and may require propounding interrogatories, requests for admission,
9 and taking depositions of Defendants 30(b)(6) deponents.
- 10 • Association estimates at least six months will be needed to complete this discovery.
11 This amount of time is necessary because typically, in construction defect cases
12 such as this, 30(b)(6) depositions are not taken until expert liability reports are
13 prepared so that the parties are fully informed regarding the alleged defects at the
14 project when such depositions are taken. The Association's liability experts only
15 recently conducted intrusive testing and there is currently no deadline for their
16 expert reports because a scheduling order has not been proposed or entered.

17 **III. CONCLUSION**

18 Plaintiff respectfully requests that the Court defer considering Defendants' Motion
19 for Summary Judgment so that the parties may engage in necessary discovery and that the
20 Court extend the deadline for Plaintiff's Response to the Motion for at least six months.

21 RESPECTFULLY SUBMITTED this 22ND day of March, 2021.

22 BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC

23 By: /s/ Penny J. Manship

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