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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

**GALLERY COMMUNITY
ASSOCIATION, an Arizona non-profit
corporation,**

Plaintiff,

v.

**K. HOVNANIAN AT GALLERY, LLC, an
Arizona limited liability company; et al.,**

Defendants.

**K. HOVNANIAN AT GALLERY, LLC, an
Arizona limited liability company; et al.;**

Third-Party Plaintiffs

v.

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

Third-Party Defendants.

Case No. CV2020-008714

**DEFENDANTS' REPLY IN SUPPORT
OF THEIR MOTION FOR
SUMMARY JUDGMENT**

(Assigned to the Honorable Michael Kemp)

(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, "Defendants"), by and through undersigned counsel and hereby reply to Plaintiff's Response ("Response") to

1 Defendants’ Motion for Summary Judgment (“Motion”). For reasons stated in the Motion and this
2 Reply, the Motion is well taken and should be granted, and fees and costs awarded to Defendants.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. REPLY TO “BACKGROUND” RESPONSE**

5 Plaintiffs’ Response is riddled with irrelevancies, false statements and innuendos that
6 require correction.

7 First, the case IS at issue. Plaintiff, back on July 27, 2020 (over eight months ago), filed a
8 Complaint against various K Hovnanian (“K Hov”) entities after presumably doing some
9 investigation into the facts, as is required. There is no basis for Plaintiff to now claim it needs
10 more time to explain its case.

11 When provided a list of alleged deficiencies in the common areas of the Gallery
12 Community, Defendant K Hov at Gallery may have graciously agreed to repair certain common
13 area elements to avoid this suit. However, this does not mean nor imply that this entity was the
14 builder/developer of the common areas.

15 As is relevant, Plaintiff claims K Hov at the Gallery owned the property, developed the
16 project and conveyed the common elements thereof to the Association in a quit claim deed. (Resp.,
17 p. 2, 19 and 10). However, nothing Plaintiff has provided in the case shows that K Hov at the
18 Gallery was the builder.

19 Plaintiff, in fact, proceeds to then claim that Defendant K Hov Operations was the general
20 contractor on the construction of the project. *Id.*, 1. 11-12.

21 While Plaintiff repeatedly attempts to shift the burden of proof as to its case onto the
22 Defendants, and as to responding to the summary judgment motion as well, it is clear it is
23 Plaintiff’s burden to prove its case as to who is the Builder/Developer. Here, it appears, from the
24 Plaintiff’s own allegations, that there was no builder/developer, but that K Hov Operations was
25 the builder.

26 Similarly, stating on p. 2 at lines 12-14 that Defendant K Hov Companies of Arizona, LLC
27 “was somehow involved in the development, design, construction and or sale of the Gallery” is
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1 no basis to sue it and sustain a claim. Plaintiff has been called out for this in the summary judgment
2 motion, and the burden is on Plaintiff, not Defendants, to set forth with specificity and evidence
3 why this entity is being sued, just what involvement directly relates to the development, and why
4 it has any liability as the builder or developer stated.

5 Finally, Defendant K Hov Developments of Arizona, LLC is alleged, at p. 2, l. 14-16, to
6 merely be “a member” of K Hov Gallery and K Hov Operations. Again, this states no good reason
7 for this entity to have been sued, and Plaintiff further compounds its wrongful filing by again
8 misstating the burden it has as to why it did so. Plaintiff erroneously states that “Defendants
9 present no evidence that KHov Developments “was not involved in the development, design,
10 construction and or sale of the Gallery”, but K Hov is not required to disprove a negative.

11 Next, Plaintiff diverts the court’s attention to its continuing irrelevancies as to the
12 formation of the Association, or assignment of Declarant’s interest , even though there is no issue
13 of any assignment, but then in doing so actually cites to the Articles of Incorporation which require
14 the **Plaintiff**, not Defendant here, to manage, **MAINTAIN**, and administer the common area
15 elements. *Id.*, 1, 23-24. Again, totally misconstruing the CC & R language, Plaintiff asserts it is
16 unknown whether any Defendant other than K Hov at the Gallery is a related entity. However, as
17 that very term is used, it is only relevant to whether the Declarant or a related entity owns or has
18 a recorded option to purchase any lot in the subdivision, is entirely taken out of context by
19 Plaintiff, is of no moment to this lawsuit, and is no justification for any suit to have been brought
20 against any other entity. Similarly, whether any Defendant is a homebuilder is equally of no
21 moment here, nor relevant to any issue. The only issues here relate to common area improvements.

22 More irrelevancies follow in Plaintiff’s Response, including whether the Declaration was
23 made to establish mutually beneficial CC & Rs for Declarant’s benefit or for the benefit of future
24 owners or other holders of interest. No one disputes this language. None of it relates at all to
25 whether the CC&Rs actually did provide for any maintenance or responsibility over the common
26 area elements following construction, or whether Declarant gave any warranty, express or implied,
27 to the Plaintiff HOA when the HOA accepted the common area improvements, paying nothing
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1 for them. The only consideration, in fact, was that the HOA would own the common area items,
2 maintain and repair them after choosing to inspect them before accepting them.

3 Next, using single space lettering on an entire page, Plaintiff at p. 4 purports to set out
4 “rights and duties” of each Party hereto. Noticeably absent, though, from any duty attributed to
5 any Defendant here, is the duty to repair, replace or warrant any common area element conveyed
6 to the HOA for no monetary consideration by the quit claim deed, *i.e.* with no warranties intended.
7 However, part of the HOA duties is included the duty to “reconstruct, repair, replace or refinish
8 any improvement or portion thereof upon the Common Area or any other area placed under its
9 jurisdiction.” *Id.*, p. 4, l. 19-21. This duty to maintain is clear as to the Plaintiff. *Id.*, l. 15-16.
10 Further, **the Association**, not Defendants here, is tasked with the obligation to determine
11 appropriate paint on the exterior of the Dwelling Units and to repair, maintain and replace the
12 exterior walls, stucco, façade, roofs or other surfaces. *Id.*, l. 18-20.

13 Finally, Plaintiff treats us to another one of its irrelevant points by implying that the
14 Declarant has duties as an Owner, without ever pointing out whether the Declarant actually is, or
15 even ever was, an owner of any unit in the subdivision. The ownership of units is entirely
16 irrelevant to this suit by the HOA.

17 Plaintiff then tries to make some strained point about the date when the quit claim deed
18 was recorded versus when the Board control transitioned to other owners from the Declarant. *Id.*,
19 p. 5, l. 13-17. However, simply put, there is no point to this point. The fact is that the “Association”
20 is the association Plaintiff. That entity, the very one suing here, is the entity that accepted the quit
21 claim deed to the common area elements. Whether Defendants allegedly “controlled” the Board
22 at the time is irrelevant. Plaintiff thus tries to make some unknown point out of the fact that it
23 claims “Defendants controlled the Association Board when this conveyance occurred” (Response
24 at p. 5, l. 21-22), but this is a point without any significance attached to it at all. Again,
25 “Defendants” did not control the Association Board members, as stated previously, as the Board
26 members were independent fiduciaries, and even if it had, the Association is legally bound by the
27 prior Board decisions of the very same Association. Admittedly there were probably persons
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1 appointed to the Board by one or more of the Defendants, but it is nowhere shown which
2 Defendant did so, and would not be relevant in any event, since Board members are not being
3 sued who had, and exercised, their fiduciary duties independently. Moreover, Plaintiff accepted,
4 and ratified acceptance of the common area elements under this Quit Claim Deed for over five (5)
5 years without complaint. Nor is there any evidence presented by Plaintiff that any of these Board
6 members were not volunteers themselves, or that they had any more “experience” or “knowledge”
7 relating to construction or engineering than current members of the Board, but again, the suit here
8 is by the Association, not its Board members.

9 II. REPLY TO ARGUMENT SUMMARY

10 Plaintiff begins its argument by wrongfully asserting, again, that somehow it is the burden
11 of the Defendants moving for summary judgment to submit evidence in support thereof. However,
12 Plaintiff cites to absolutely nothing in the Rules or case law that supports this fanciful and
13 erroneous presumption. This Court grants summary judgment if no genuine issue of material fact
14 exists and there is only one way to interpret the undisputed material facts and when the proponent
15 is entitled to summary determination as a matter of law. *Pritchard v. State*, 163 Ariz. 427, 433,
16 788 P.2nd 1178, 1184 (1990). In fact, a simple review of Rule 56 itself shows absolutely no
17 reference to whether evidence need be presented at all. The Rule refers to facts set forth, and
18 makes clear once those facts are set forth, here the deficiencies as a matter of law of the Plaintiff’s
19 pleadings and legal theories, the Defendant then must controvert by also setting forth specific facts
20 in dispute. When a moving party meets its initial burden of production by showing that the non-
21 moving party does not have enough evidence to carry its ultimate burden of proof at trial,
22 the burden then shifts to the non-moving party to present sufficient evidence demonstrating the
23 existence of a genuine factual dispute as to a material fact. *Doe v. Roe*, 191 Ariz. 313, 323, ¶ 33,
24 955 P.2d 951, 961 (1998). The non-moving party may not rest on its pleadings; it must go beyond
25 simply cataloging its defenses. To defeat the motion, the non-moving party must call the court’s
26 attention to evidence overlooked or ignored by the moving party or must explain why the motion
27 should otherwise be denied. Here, there are no facts or evidence provided by Plaintiff to do so,
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1 other than mere speculations and conclusions carried on from their Complaint with no basis to
2 rely on any continuance, since they are the Plaintiff in the case and should have done their
3 homework before proceeding to sue, under Rule 11. Summary judgment is appropriate if the facts
4 produced by the NON-MOVING PARTY “have so little probative value, given the quantum of
5 evidence required, that reasonable people could not agree with the conclusion advanced by the
6 proponent.” *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

7 Mere speculative evidence or unsubstantiated doubt as to the material facts is not sufficient
8 to overcome summary judgment. *United Bank of Arizona v. Allyn*, 167 Ariz. 191, 805 P.2d 1012
9 (App. 1990). Nor are unsworn and unproven assertions of fact in a Memorandum to establish that
10 undisputed facts entitle a movant to summary judgment. *Moretto v. Samaritan Health System*, 190
11 Ariz. 343, 346, 947 P.2d 917, 920 (App. 1997). Similarly, allegations by counsel contained in
12 opposing papers “are not sufficient to withstand affidavit testimony of the opposing party offered
13 on summary judgment.” *Princess Plaza Partners v. State*, 187 Ariz. 214, 221, 928 P.2d 638, 645
14 (App. 1995).

15 Thus, there is no issue here about sufficient undisputed admissible evidence at play in the
16 legal issues to be resolved. The very evidence that Defendants rely upon for their Motion has been
17 all admitted to by Plaintiff in relevant part.

18 The “facts” therefore, that are fully supported by the undisputed evidence both parties
19 submit, are that there was a quit claim deed given to the Plaintiff for the property it accepted. No
20 warranty attached to that deed. The law has never directly addressed the implied warranty at law
21 in this very context. The reason is simple. Based on the *Richards v. Powercraft* case that even
22 Plaintiff cites, the implied warranty at law attaching to defective construction in the
23 homeowner/homebuilder context where it has been found, clearly does NOT apply even in that
24 context, to defects that were known, or assumed, by a subsequent purchaser who could have
25 negotiated their repair as part of the purchase process.

26 Here, it is clear that the same principle should apply to these facts. The Association would
27 have to have been aware of the patent defects complained of by Plaintiff in its Complaint, based
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1 upon the knowledge imputed to the Defendants during the construction process at the time before
2 the turnover. But, because Plaintiff asserts these Defendants at the time of the turnover controlled
3 the Association Board (Response p. 5. L. 20-21), this same knowledge would therefore be imputed
4 to the Association as well. Thus, the Plaintiff would have been equally aware of the defective
5 construction Plaintiff complains these Defendants caused, and thus based on the *Richards*
6 decision, they could not assert the implied warranty, assuming even one existed.

7 Plaintiff then mistakenly relies heavily on the *Lofts at Fillmore* case to find somehow that
8 a Declarant is liable to the Association as a matter of law by virtue of that Covenant, and that the
9 implied warranty of good workmanship somehow arises from that relationship. However, that is
10 not the case. *Lofts* merely stated that the implied warranty arises from construction of the home
11 without regard to the identity of the “vendor”. *Lofts at Fillmore Condo. Ass'n v. Reliance Com.*
12 *Const., Inc.*, 218 Ariz. 574, 577, 190 P.3d 733, 736 (2008). Thus, Plaintiff misses the point.
13 Whether a builder /developer might be liable under a warranty theory in some scenario, begs the
14 issue here of whether simply a declarant under CC&Rs is so liable, or whether other Defendants
15 here can be liable simply by virtue of some relationship with the actual builder.

16 So the issue here is not, as was the issue in *Lofts*, whether those not in privity with the
17 actual Builder, whether an Association or homeowners, can bring a suit against that builder who
18 is not a vendor. The specific issue here is whether a Declarant, here K Hov at the Gallery, by quit
19 claiming its property to an Association, specifically without any warranty, bears any burden under
20 any implied warranty theory at all by virtue of that conveyance, and whether under the
21 circumstances presented there is any implied warranty at all that arises by virtue of that
22 relationship.

23 Significantly, but in a mere footnote in passing, Plaintiff admits at p. 9 of the Response, in
24 footnote 3, that “**neither party in the case (i.e. Lofts at Fillmore) disputed that the association**
25 **could properly bring an implied warranty claim against the developer. Id at 576, n. 2)**”. This
26 is a major point, not some trifling one. As was originally noted by Defendants, the issue was never
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1 directly addressed at all in *Lofts*, and thus the case never actually addressed the only issue we raise
2 here, at all.

3 As has been noted by Defendants, and by Plaintiff in the Response, not only was the issue
4 never raised in *Lofts* as to the developer, but the association there was only formed by individual
5 unit owners, and not a Declarant, and thus the association was formed AFTER the sale of the units
6 by the developer. The builder who owed any warranty, if anyone, was sued and it was
7 unremarkable that any implied warranty may have applied to the builder despite the lack of privity
8 with the newly formed association of owners, since the project was completed. This is critical as
9 well, because that case did not involve the facts of this case, or the issues raised here at all, because
10 there was no issue there of a declarant turning over property to the association and being liable as
11 such involved. Nor was the issue of the developer/builder being liable even raised in *Lofts*. Thus,
12 *Lofts* offers no precedent on the issues raised by our Motion.

13 Therefore, holding that privity is not required to sue a builder was nothing noteworthy as
14 to the decision in *Lofts*. That had been the law in Arizona, as stated earlier, given the *Richards*
15 case, *infra*.

16 Plaintiff repeatedly claims in its Response beginning at page 12, that all Defendants are
17 “builder/vendors”, while ignoring its own allegations to the contrary in its Complaint, and even
18 in the Response itself, as stated above, as to the nature of the Defendant entities. Plaintiff has no
19 information from which it could have brought the Complaint to satisfy Rule 11 of any involvement
20 of any entity in the actual construction complained of beyond the “builder” or general contractor.
21 But, clearly that builder is NOT the developer or seller (vendor), since nothing was sold as to the
22 common area at all. Again, in *Lofts*, by contrast, this was NOT the situation. There, the project
23 was sold to individual owners including the common areas, BEFORE the Association was ever
24 formed, or existed. The developer and builder could easily foresee that any suit would be brought
25 against them by an association formed by these same owners/purchasers over the common area
26 conveyed as part of the individual sales to said owners. Here, by contrast to the facts and issues
27 raised in *Lofts*, the builder had no such warranty obligation to an Association formed solely by
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1 the Declarant, for its benefit, except as to that party with which it contracted. That the Declarant
2 later conveyed the Property to that Association prior to the turnover, is further proof positive that
3 none of it was conveyed to the Owners, or built for them. Thus, once again, while privity with the
4 builder has never been the issue raised here and is a straw man argument focused on by Plaintiff,
5 specifically given the obvious holding in *Richards*, which allowed subsequent purchasers without
6 notice or privity to assert an implied warranty at law, the issue here is whether an association,
7 formed by the Developer/Declarant *before turnover*, that then retains and contracts with a builder
8 for its benefit, can sue either the builder or the developer/declarant under some implied warranty
9 theory at law, after accepting the common area tender with notice of the alleged defects. That
10 issue has nothing to do with the *Lofts* facts, or that decision based on different facts, and issues
11 that are either irrelevant here or that were never raised there. Again, in *Lofts*, not only was the
12 association not formed until after the project was completed, but there was no turnover of the
13 property or deed grant without warranty, no acceptance of the project by the association at that
14 time, no notice therefore of the defects claimed by the builder claimed to be affiliated with the
15 Declarant, and the issue never raised as to whether any implied warranty claim could be raised
16 against a developer/declarant that deeded the property to the association that accepted it, without
17 any expectation of any warranty from the declarant, and knowing it was its responsibility to
18 maintain the common area. In *Lofts*, the builder was also the vendor/developer selling the common
19 area as part of the individual unit sales. The association they later formed included the transfer of
20 that common area, along with the obvious implied warranty claim those individual unit owners
21 clearly had, and the sole issue was whether the builder who was in privity with the developer
22 through contract, could escape liability simply because it was not in direct privity with that
23 association. Again, this has nothing to do with this case or the facts or issues presented here.

24 Plaintiff then goes on to try to lamely justify the breach of contract claim, by diverting
25 attention to more irrelevancies and fanciful theories, never once admitting the obvious- there is
26 no contract and no breach of any contract by any of the Defendants that has been clearly alleged
27 let alone shown in response to the summary judgment motion. Plaintiff incredibly claims, for
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1 instance, that because the Declarant somehow allegedly owned units in the subdivision, that
2 Declarant was a party to the Declaration as an Owner, but this ludicrous statement entirely begs
3 the issue as to what duties were owed thereby, because the answer is none. None of the Defendants
4 obviously contest that the Declarant is a party to the CC & Rs, so this point of Plaintiff is entirely
5 irrelevant. The only issue is just what contractual duty did the Declarant have under the
6 Declaration,(even assuming it to be a contract) to the Association that was breached? Again, the
7 answer is none, and Plaintiff entirely evades this simple point. Thus, again, missing the mark
8 completely here as well, Plaintiff goes off on another irrelevant tangent just as it did on the implied
9 warranty issue, as to whether CC&Rs could support a breach of contract claim against a Declarant.
10 Of course, they could in some other jurisdiction possibly, but not under the facts or law of this
11 case. There is simply nothing at all in the Declaration that Plaintiff has even alluded to that would
12 constitute a breach of any duty therein by the Declarant here.

13 Further, not one Arizona case cited to by Plaintiff has ever held that the Declaration does
14 constitute some contract between the Association and the Declarant, in any event.

15 **III. CONCLUSION**

16 Based on the foregoing, the Defendants have demonstrated that Plaintiff has failed to
17 establish a prima facie case for its claims and judgment in favor of Defendants should be awarded,
18 along with costs.

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20 **RESPECTFULLY SUBMITTED** this 16th day of April, 2021.

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/s/ Hilary Myers _____