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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

R.L. WHITMER,

No. CV2016-055080

Petitioner,

v.

**MOTION TO
DISMISS**

HILTON CASITAS HOMEOWNERS
ASSOCIATION, also known as
HILTON CASITAS COUNCIL OF
HOMEOWNERS, also known as
COUNCIL OF CO-OWNERS, also
known as HILTON CASITAS
COUNCIL OF CO-OWNERS; and
MICHAEL BENGSON, President of
the Hilton Casitas Homeowners
Association,

Respondents.

Respondents Hilton Casitas Homeowners Association (the "Association") and Michael Bengson, ("Bengson" and collectively with the Association, the "Respondents") by and through counsel undersigned, hereby move to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction pursuant to Ariz. R. Civ. P. 12(b)(1); failure to state a claim upon which relief may be granted pursuant to Ariz. R. Civ. P. 12(b)(6); and failure to bring an action against a proper party.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. Introduction.**

3 Petitioner's Complaint identifies one cause of action against the Respondents: contempt
4 of an administrative law decision (the "Administrative Decision"). Petitioner also requested
5 the Court to hold an Order to Show Cause hearing to determine whether the Respondents are
6 in contempt of the Administrative Decision (the "Evidentiary Hearing"). The Evidentiary
7 Hearing is currently set for March 16, 2017 at 9:00a.m.
8

9 **2. The Superior Court lacks jurisdiction to enforce the Administrative Decision.**

10 A fundamental factor courts must consider before hearing a case is whether the court
11 has jurisdiction over the matter. Ariz. Rev. Stat. §12-123 states that the Superior Court:
12

13 Shall have original and concurrent jurisdiction as conferred by the
14 constitution, and concurrent jurisdiction with justices of the peace of
15 misdemeanors where the penalty does not exceed a fine of two thousand five
16 hundred dollars or imprisonment for six months.

17 Petitioner, in his Complaint, does not explicitly assert that the Court has jurisdiction
18 over this matter. In his Complaint, Petitioner asserts that Ariz. Rev. Stat. §12-861 and Ariz. R.
19 Civ. P. 65(j) provides govern. Petitioner's citations are erroneous and do not confer
20 jurisdiction to the Arizona Superior Court. In fact, the Court does not have jurisdiction.

21 In order to show that this Court has jurisdiction, the Petitioner first cites Ariz. Rev. Stat.
22 §12-861, which states:
23

24 A person who willfully disobeys a lawful writ, process, order or judgment *of*
25 *a superior court* by doing an act or thing therein or thereby forbidden, if the
26 act or thing done also constitutes a criminal offense, shall be proceeded
27 against for contempt.

28 Based on the Petitioner's Complaint, Petitioner is seeking to enforce the Administrative

1 Decision, not an “order or judgment of a superior court.” Also, the acts allegedly violating the
2 Administrative Decision do not “constitute a criminal offense.” As such, Ariz. Rev. Stat. §12-
3 861 does not confer jurisdiction upon this court to hear a contempt action regarding the
4 Administrative Decision.
5

6 While the Superior Court is conferred jurisdiction to review, in an appeal capacity, final
7 administrative decisions pursuant to Ariz. Rev. Stat. §41-1092.08(H) and Ariz. Rev. Stat. §12-
8 901, et. al., Ariz. Rev. Stat. §32-2199.02, the Statute that governs Administrative Hearings,
9 states, in relevant part,
10

11 The order issued by the administrative law judge is enforceable through
12 contempt of court proceedings and is subject to judicial review as prescribed
by section 41-1092.08.

13 Petitioner’s Complaint is not an appeal from an administrative law decision. Petitioner
14 is seeking to enforce the Administrative Decision. Pursuant to Ariz. Rev. Stat. §32-2199.02,
15 the proper venue for a contempt of court hearing is the Administrative Courts, pursuant to
16 Ariz. Rev. Stat. §32-2199.02, not the Superior Court.
17

18 The Superior Court is not conferred jurisdiction by the constitution or state statute and
19 it is clear that the Court lacks jurisdiction over this matter.
20

21 Moreover, in order to establish jurisdiction by the Superior Court, Petitioner cites to
22 Ariz. R. Civ. P. 65(j), which does not exist. Respondents presume Petitioner intended to cite
23 Ariz. R. Civ. P. 65(f) – Procedure for Obtaining Sanctions; Order to Show Cause.
24

25 Rule 65(f) does not provide the Court with jurisdiction over this matter either. Rule
26 65(f)(1) states:

27 The court may issue sanctions for civil contempt, or for criminal contempt
28 as allowed by law, against a party or person who violates *an injunction*.

1 (emphasis added)

2 Petitioner in the caption of his Complaint and in his prayer for relief is seeking to
3 enforce the Administrative Decision. Petitioner does not have a Superior Court injunction
4 order that he is seeking to enforce. As such, Ariz. R. Civ. P. 65 does not apply and the Court
5 lacks jurisdiction. Therefore, because the Court does not have jurisdiction Petitioner's
6 Complaint should be dismissed.
7

8 **2. Petitioner's Complaint must be dismissed for failure to state any legally**
9 **actionable claims.**

10 Even if the Superior Court has jurisdiction to hear the Petitioner's Complaint, the
11 Administrative Decision on its face does not provide a private cause of action for a contempt
12 order or sanctions against the Association and Bengson in the Superior Court.
13

14 The statute referenced in Petitioner's Complaint, Ariz. Rev. §33-1243(D), does not
15 have a specific remedy for violation of the Statute. Therefore, Ariz. Rev. §33-1243(D) does
16 not permit sanctions against the Association, Bengson, or the Association's counsel as a
17 remedy for violating Ariz. Rev. §33-1243(D).
18

19 Based on the foregoing, summary dismissal of the Petitioner's Complaint should be
20 granted in the Respondents' favor.
21

22 **3. Bengson, in his individual capacity as a director, is not a proper party and as**
23 **such, should be dismissed.**

24 Petitioner's Complaint at p. 4 states:

25 Petitioner THEREFORE, requests a hearing, and hereby submits his
26 REQUEST by VERIFIED COMPLAINT FOR AN ORDER TO SHOW
27 CAUSE to . . . insure that in the future Hilton Casitas' board and officers
28 obey the administrative law order. . .

In his Complaint, the Petitioner collectively refers to the Association and Bengson,

1 individually and collectively, as the “Respondents” or “the board of directors.” In doing so,
2 the Petitioner fails to differentiate between the Association, as a non-profit corporation with
3 rights and duties and the executive body of the non-profit Association, the Board of Directors
4 and the individual board members. This differentiation is a key aspect of this Motion to
5 Dismiss and is the central reason as to why the Petitioner’s Complaint must be dismissed
6 against Bengson, individually, as board president.
7

8 The Association is an Arizona nonprofit corporation. Bengson, is an owner within the
9 Association who was elected by the members of the Association.
10

11 Rule 17(a), Ariz. R. Civ. P., specifies, “[e]very action shall be prosecuted in the name
12 of the real party in interest.” Boards of directors for corporations have no ability to exercise
13 legal rights independent of the corporation which they oversee. As such, Bengson,
14 individually, is not a proper party for purposes of the relief sought by Petitioner because
15 Bengson, as president of the Association, is not a “person” or an “entity” to which relief may
16 be granted.
17

18 Additionally, in having named Bengson, individually, solely for his capacity as a
19 director, Petitioner’s Complaint is legally defective in seeking relief against Bengson in
20 addition to his claims against the real party in interest (i.e., the Association). This is because
21 in this case, Petitioner has made no allegations of any independent wrongdoing by Bengson,
22 or other allegations that establish actionable claims against them separately from the
23 Association as the known principle in his Complaint.
24

25 It is a well-established principle of corporate law that the corporate entity provides a
26 liability shield for individuals and directors acting on behalf of the corporation in that capacity.
27
28

1 (1) As our Supreme Court has stated, “The law of agency is based on the principle of *qui facit*
2 *per alium, facit per se*, i.e., one acting by another is acting for himself.” *Gustafson v.*
3 *Rajkovich*, 76 Ariz. 280, 263 P.2d 540 (1953). An incorporated entity is a separate and distinct
4 legal entity from those who operate it.
5

6 To overcome this legal protection, the corporate veil must be pierced. *Dietel v. Day*,
7 16 Ariz. App. 206, 492 P.2d 455 (1972) (“As a general rule, a corporation will be treated as a
8 legal entity until sufficient reason appears to disregard the corporate form.”). Indeed, “it must
9 be noted that a legitimate purpose of incorporation is to avoid personal liability and if the
10 corporate fiction is too easily ignored and personal liability imposed, then incorporation is
11 discouraged.” *Id.* Moreover, “[w]here the corporation is operated and maintained for the
12 purpose for which it was incorporated and not as a mere shield of the stockholders, the
13 corporate form should not be disregarded.” *Id.*
14
15

16 None of Petitioner’s Complaint allegations establish independent actions Bengson that
17 are beyond the scope of his duties, actions or obligations as agent acting on behalf of the
18 Association.
19

20 Likewise, there are no independent allegations made of any wrongdoing by Bengson
21 that could establish an independent basis of liability or actionable claim against him.

22 Therefore, the Petitioner’s Complaint should be dismissed as to Defendant Michael
23 Bengson for failure to state a claim upon which relief can be granted pursuant to Ariz. R. Civ.
24

25 (1) *Ferrarell v. Robinson*, 11 Ariz. App. 473, 465 P.2d 610 (1970) (one who acts as an agent
26 of a fully disclosed principal in a contractual transaction is not a party to the transaction and
27 thus incurs no personal liability for the principal’s breach of that agreement.); *see also*
28 Restatement (Second) of Agency, § 320 (1958); *Lumbermen’s Ins. Co. v. Heiner*, 74 Ariz.
152, 245 P.2d 415 (1952).

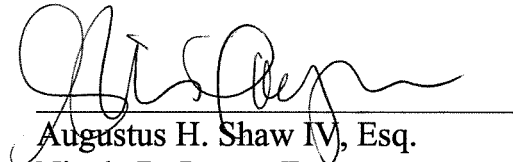
1 P. 12(b)(6).

2 **4. Conclusion.**

3 Based on the foregoing, the Respondents respectfully submit that the Court lacks
4 subject matter jurisdiction over this matter; the Petitioner has failed to present any allegations
5 establishing a claim upon which relief can be granted; and Defendant Michael Bengson is not
6 a real party in interest. As such, the Petitioner's Complaint should be dismissed entirely.
7 Moreover, because Defendant Michael Bengson is not a real party in interest he should be
8 dismissed from this matter entirely. Respondents further request an award of their costs and
9 attorneys' fees incurred herein against Petitioner, including any other relief the Court may
10 deem proper, pursuant to A.R.S. §§12-341.01, 12-349, and 12-350.

11
12
13 DATED this 28th day of February 2017.

14
15 **SHAW & LINES, LLC**

16
17 

18 Augustus H. Shaw IV, Esq.

19 Nicole D. Payne, Esq.

20 4523 E. Broadway Rd.

21 Phoenix, Arizona 85040

22 *Attorneys for Respondents*

23
24
25
26
27 ...

1 ORIGINAL submitted for electronic filing
2 this 28th day of February, 2017, with:

3 Clerk of the Maricopa County Superior Court

4 ORIGINAL hand-delivered
5 this 28th day of February, 2017, to:

6 Hon. Aimee Anderson
7 Maricopa County Superior Court,
8 Northeast Regional Court Center
9 18380 North 40th Street
10 Phoenix, Arizona 85032

11 COPY of the foregoing mailed
12 this 28th day of February, 2017, to:

13 R.L. Whitmer
14 6333 North Scottsdale Road, Casita 21
15 Scottsdale, Arizona 85250
16 *Petitioner, Pro Per*

17 By: 