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

R.L. WHITMER,

Petitioner,

v.

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.

Case No. CV2016-055080

**RESPONSE TO PETITIONER'S
MOTION VACATE JUDGMENT
AND GRANT A NEW TRIAL**

Hilton Casitas Homeowners Association and Michael Bengson, President of the
Hilton Casitas Homeowners Association (collectively, the "Respondents"), by and
through counsel undersigned, hereby respond to Petitioner's Motion to Vacate Judgment
and Grant a New Trial (hereafter, the "Motion"). For the reasons more fully explained
herein, Petitioner's Motion must be denied. Furthermore, Respondents request an award
of attorney's fees and costs against Petitioner for having to respond to this baseless
motion.

1 **I. Procedural Background.**

2 Petitioner filed a Verified Complaint for an Order to Show Cause on December
3
4 19, 2016. Respondents filed a Motion to Dismiss on February 28, 2017. The Motion to
5 Dismiss was fully briefed on March 16, 2017. The Court issued a Minute Entry on
6 March 21, 2017 (hereafter, the “Order”) granting the Respondents’ Motion to Dismiss
7 with a detailed explanation regarding its decision that the Court lacked jurisdiction to
8 hear the case. On March 23, 2017, Petitioner filed a Motion for Reconsideration under
9 Rule 7.1(E). The Motion to Reconsider was fully briefed on April 18, 2017. The Court
10 issued a Minute Entry on May 16, 2017 stating the Petitioner failed to present newly
11 discovered evidence that would change the Court’s prior ruling and therefore denied
12 Petitioner’s Motion to Reconsider. The Court issued a final judgment in this matter on
13 May 16, 2017, (hereafter, the “Judgment”) which is the subject of Petitioner’s current
14 Motion.
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16
17

18 **II. Legal Arguments.**

19 **a. Petitioner fails to meet the requirements under Rule 59(a)(1)(H)**
20 **and therefore Petitioner’s Motion should be denied.**

21 Rule 59(a), Arizona Rules of Civil Procedure, governs a party’s ability to request
22 a new trial. Rule 59(a) provides that a:
23

24 court may, on motion, grant a new trial on all or some of the issues –and
25 to any party—on any of the following grounds materially affecting the
26 party’s rights . . .

26 H. the verdict, decision, findings of fact, or judgment is not justified by
27 the evidence or is contrary to law.
28

1 In examining Rule 59(a)(1)(H), which Petitioner relies on in filing his Motion, it
2 is clear that Petitioner does not meet the prerequisites to obtain a new trial.

3 Rule 59(a)(1)(H) states that in order to grant a new trial, the petitioner must show
4 that “the verdict, decision, findings of fact, or judgment is not justified by the evidence
5 or is contrary to law.”
6

7 Petitioner’s Motion, which is simply a regurgitation of his previously denied
8 Motion to Reconsider, is devoid of any new legal justifications, arguments or evidence
9 that would afford this Court the ability to vacate the Judgment against Petitioner and set
10 a new trial.
11

12 Since Petitioner’s Motion simply rehashes his Motion to Reconsider, the Court
13 should hold, as it did regarding the Motion to Reconsider, that the Petitioner “failed to
14 present newly discovered evidence that would change this Court’s prior ruling, failed to
15 show that this Court’s prior ruling was manifestly unjust; or presented any evidence of
16 an intervening change in controlling law has occurred.”
17

18 Therefore, Petitioner’s Motion must be denied as it fails to comply with Rule
19 59(a)(1)(H), Ariz. R. Civ. P.
20

21 **b. A request for a new trial is improper.**
22

23 This matter was resolved via a Motion to Dismiss for lack of subject matter
24 jurisdiction. No verdict was ever entered in this case. There was no decision regarding
25 the underlying allegations. There was no finding of facts in this case because the matter
26 was dismissed based on lack of subject matter jurisdiction. Moreover, no evidence was
27 presented or evaluated regarding the underlying allegations due to the Court’s
28

1 determination that it lacks jurisdiction to hear the matter. Finally, the Petitioner has
2 presented no new law or legal arguments that the Court's Judgment was contrary to law.

3
4 Petitioner filed a Motion for Reconsideration the Court's Order granting the
5 Respondents' Motion to Dismiss. Petitioner's current Motion attempts to re-litigate the
6 arguments in Petitioner's Motion for Reconsideration.

7
8 The proper means for Petitioner to have the Court re-evaluate the Judgment is to
9 file a Motion to Reconsider or an Appeal. The Petitioner has previously filed a Motion
10 for Reconsideration the Order, which was denied. Therefore, Petitioner's only option at
11 this point is to appeal the Court's Judgment or file a new complaint and/or petition with
12 the Arizona Department of Real Estate regarding the new allegations of the
13 Association's breach of Arizona law.
14

15 **c. Petitioner is attempting to re-litigate arguments previously**
16 **presented to this Court in the Motion to Dismiss and the Motion**
17 **for Reconsideration briefs.**

18 Petitioner does nothing more that re-assert irrelevant and baseless claims that
19 were raised in prior pleadings and briefs before this Court in the Motion to Dismiss and
20 the Motion for Reconsideration. Petitioner asserts the same arguments the Court
21 considered in his Response to Respondents' Motion to Dismiss and in his Motion for
22 and Reply in Support of his Motion for Reconsideration.
23

24 Finally, as previously argued Petitioner has the right to seek redress by filing an
25 appeal of the Judgment with the Court of Appeals or a new complaint and/or petition
26 regarding the alleged 2016 violations with the Arizona Department of Real Estate.
27 Petitioner clearly fails to meet the elements necessary to vacate the Judgment.
28

1 **d. Attorney fees and costs award should not be vacated.**

2 As a starting point, it is important to note that pro per litigants, such as the
3 Petitioner, are held to the same standards as attorneys regarding procedures, statutes,
4 rules, and legal principles. *Higgins v. Higgins*, 194 Ariz. 266, 270, ¶ 12, 981 P.2d 134,
5 138 (App.1999). As such, the Petitioner should be held responsible for knowing and
6 understanding the relevant Statutes and Rules of Civil Procedure regarding the award of
7 attorney's fees and costs.
8

9
10 Based on the above, the Respondents were and are entitled to a full award of
11 attorney's fees and costs pursuant to relevant statutory law and the Arizona Rules of
12 Civil Procedure.
13

14 Pursuant to A.R.S. §12-349:

15 In any civil action commenced or appealed in a court of record in this state,
16 the court *shall* assess reasonable attorney fees, expenses. . ." Emphasis
17 added.

18 In addition, Rule 11(a), Ariz. R. Civ. P. Provides, in part:

19 The signature ...of a party constitutes a certificate by the signer that the
20 signer has read the pleading, motion, or other paper; that to the best of the
21 signer's knowledge, information, and belief formed after reasonable inquiry
22 it is well grounded in fact... and is not interposed for any improper
23 purpose, such as to harass or to cause unnecessary delay or needless
24 increase in the cost of litigation.

25 Based on the undisputed facts applied to the above law, it is clear that the
26 Respondents are entitled to an award of all of their fees and costs incurred.

27 It is clear that the Petitioner did not fully research or analyze whether his claims
28 could be heard before the Superior Court prior to filing his action. This may be seen by

1 the fact that the Petitioner submitted evidence (the letter received from the Office of
2 Administrative Hearings attached to Petitioner's Motion to Reconsider) that he did not
3 investigate whether the Superior Court has jurisdiction to hear his claims until after the
4 Respondents filed their Motion to Dismiss.
5

6 This fact, in concert with the Petitioner's other actions and filings, supports an
7 award of *all* fees and costs incurred by the Respondents.
8

9 Moreover, Petitioner in his Motion cites to the proper Arizona Revised Statutes
10 that he should have followed in attempting to proceed with the underlying complaint.

11 Petitioner states:

12
13 In 2016, the Arizona Legislature by passing Senate Bill 1530 substituted
14 the Arizona Department of Real Estate in A.R.S. Title 32, Chapter 20 for
15 the Department of Fire, Building, and Life Safety and left the OAH in place
as the venue for administrative law proceedings. *See* Motion p. 4, l. 1-4.

16 Petitioner admits to having knowledge of Ariz. Rev. Stat. Title 32, Chapter 20,
17 which provides the Petitioner with adequate and appropriate means for the relief he
18 seeks here. Petitioner however, failed to follow the instructions that direct Petitioner to:
19

20 petition the department [Arizona Department of Real Estate] for a hearing
21 concerning violations of condominium documents or planned community
22 documents or violations of the statutes that regulate condominiums or
23 planned communities. The petitioner shall file a petition with the
24 department and pay a filing fee in an amount to be established by the
25 commissioner. The filing fee shall be deposited in the condominium and
26 planned community hearing office fund established by section 32-2199.05.
On dismissal of a petition at the request of the petitioner before a hearing is
scheduled or by stipulation of the parties before a hearing is scheduled, the
filing fee shall be refunded to the petitioner. Ariz. Rev. Stat. §32-2199.01.

27 As such, Petitioner's claim that he filed this action in good faith is not supported
28 by the statements and evidence provided by Petitioner himself. Petitioner argues that he

1 relied on the direction of the Arizona Office of Administrative Hearings website for
2 instructions on how to proceed; however, the Arizona Office of Administrative Hearings
3 website clearly states that it does not and cannot provide legal advice:
4

5 The Office of Administrative Hearings may not give legal advice to you,
6 although it will do everything it can to provide you with a fair and impartial
7 hearing. *Do I Need A Lawyer?* Arizona Office of Administrative Hearings,
8 <http://www.azoah.com/QLawyer.html> (last visited June 5, 2017).

9 Therefore, Petitioner's argument that he reasonably relied on the Arizona Office
10 of Administrative Hearings' website holds no water due to the disclaimer listed above
11 that the information listed on the Arizona Office of Administrative Hearing's website is
12 not legal advice and as previously present, was written in 2007 (ten years ago).

13 Additionally, the undersigned certifies that the fees requested herein are
14 reasonable and were necessarily incurred in securing the Judgment and responding to
15 Petitioner's Motion. The total fees requested constitute fair and reasonable fees, and are
16 in compliance with the requisite elements set forth in *Schweiger v. China Doll*
17 *Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (App. 1983). Respondents' undersigned
18 counsel has previously submitted the requisite affidavit and exhibit detailing the specific
19 work performed, billing rates, time billed and the intricacy of legal work performed.
20 work performed, billing rates, time billed and the intricacy of legal work performed.
21

22 Additionally, Respondents' counsel avows that efforts expended in this action (as
23 set forth in specific detail in the undersigned's affidavit detailing all such fees) are in
24 compliance with the requisite ethical standards, and pursued as efficiently as possible to
25 minimize the fees incurred.
26
27
28

1 **III. Conclusion.**

2 This Court properly granted Respondents' Motion to Dismiss and entered
3 judgment in Respondents' favor. No bases or law exist or have been pled to warrant
4 said judgment vacated. Respondents further request this Court enter an award of
5 attorney's fees and costs in the amount of not less than \$2,500.00 for having to respond
6 to Petitioner's Motion.
7

8 DATED this 16th day of June, 2017.

9
10 **SHAW & LINES, LLC**

11 
12 Augustus H. Shaw IV, Esq.
13 Nicole D. Payne, Esq.
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15 Phoenix, Arizona 85040
16 Attorney for Respondents

17 ORIGINAL submitted for electronic filing
18 this 16th day of June, 2017, with:

19 Clerk of the Maricopa County Superior Court

20 COPY of the foregoing mailed
21 this 16th day of June, 2017, to:

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25 *Petitioner, Pro Per*

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By: 