

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2016-007058

07/14/2016

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT  
D Arrieta  
Deputy

ADVOCATES FOR INDIVIDUALS WITH  
DISABILITIES FOUNDATION INC

PETER STROJNIK

v.

DAVID DIETLEIN, et al.

LINCOLN M WRIGHT

MINUTE ENTRY

A motion to dismiss (Ariz. R. Civ. P. 12(b)(6)) was filed on behalf of defendants David and Jane Doe Dietlein. The motion (at Exs. A, B) relies substantially on an unauthenticated appraisal and an affidavit, without which the motion cannot be granted. In doing so, the motion seemingly overlooks that such matters may not be considered.

A motion to dismiss is not a procedure for resolving disputes about the facts or merits of a case. *Coleman v. City of Mesa*, 230 Ariz. 352, 363, ¶46, 284 P.3d 863, 874 (2012). Instead, the narrow question presented by a motion to dismiss for failure to state a claim is whether facts alleged in a complaint are sufficient “to warrant allowing the [plaintiff] to attempt to prove [its] case.” *Id.* at 363, ¶46, 284 P.3d at 874 (emphasis added). Dismissal is permitted only when a “plaintiff[] would not be entitled to relief under any interpretation of the facts” stated in the complaint. *Fid. Sec. Life Ins. Co. v. State Dep’t of Ins.*, 191 Ariz. 222, 224, ¶4, 954 P.2d 580, 582 (1998) (emphasis added). When deciding a motion to dismiss, a court must accept all material facts alleged in the complaint as true [*Acker v. CSO Chevira*, 188 Ariz. 252, 255, 934 P.2d 816, 819 (App. 1997) (citing *Lakin Cattle Co. v. Engelthaler*, 101 Ariz. 282, 284, 419 P.2d 66, 68 (1966))], view those facts “in the light most favorable to the nonmoving party [*Mirchandani v. BMO Harris Bank, N.A.*, 235 Ariz. 68, 69, ¶2, 326 P.3d 335, 336 (App. 2014)],

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and “indulge [the nonmoving party] all reasonable inferences” that the pleaded facts permit [*Cullen v. Auto–Owners Ins. Co.*, 218 Ariz. 417, 419, ¶7, 189 P.2d 344, 346 (2008)].

The case law addressing the effect of facts asserted in memoranda of law that are beyond those alleged in the complaint suggests that such matters may not be considered when deciding a 12(b)(6) motion [*see e.g., Fonte v. Board of Managers of Continental Towers Condominium*, 848 F.2d 24, 25 (2d Cir.1988), and certainly may not be considered when such facts contradict what is alleged in the complaint [*see Orthmann v. Apple River Campground, Inc.*, 757 F.2d 909, 915 (7th Cir.1985) (court of appeals reviewing dismissal under 12(b)(6) could consider facts not contained in complaint, “provided [they were] not inconsistent with the allegations of the complaint”); *cf. Goldman v. Summerfield*, 214 F.2d 858, 859 (D.C. Cir.1954) (“[S]tatements of fact in [legal] memoranda cannot ordinarily be given the dignity of a pleading or deposition, even though no effort is made to controvert them”).

**IT IS ORDERED** denying the Rule 12(b)(6) motion to dismiss that was filed on behalf of defendants David and Jane Doe Dietlein.

**IT IS FURTHER ORDERED** that no new motions of any sort may be filed in this matter until the court enters a scheduling order as contemplated by Ariz. R. Civ. P. 16(b).