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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Macy’s, Inc.,  
  
Plaintiff,  
  
vs.  
  
H & M Construction Company, Inc., et al.,  
  
Defendants.  

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H & M Construction Company, Inc.,  
  
Third-Party Plaintiff,  
  
vs.  
  
S.A. Comunale Co., Inc., et al.,  
  
Third-Party Defendants.

No. CV-17-00990-PHX-SPL

**ORDER**

On March 9, 2007, Plaintiff Macy’s, Inc. entered into a contract with H & M Construction Company Inc. (“HMC”) in connection with the construction of a distribution center in Goodyear, Arizona. (Doc. 1 ¶ 8.) The agreement provided that “Contractor shall furnish all services, materials [etc.] ... to undertake and complete in a thoroughly first-class and workmanlike manner all work indicated in the Drawings, Specifications and General and Special Conditions under the direction and to the satisfaction of Architect and Owner.” (Doc. 1 ¶ 9.) Under the agreement, H & M Architects/Engineers Inc. (“HMA”) was named as the project “Architect.” (Id.) Macy’s

1 alleges that under the agreement, HMC and HMA would hire subcontractors, but would  
2 remain “responsible for all aspects of supervising, designing, managing, installing,  
3 constructing, repairing, inspecting and testing of various elements of the Goodyear wish-  
4 fulfillment center.” (Doc. 1 ¶ 10.)

5 During construction, a fire suppression water-sprinkler system was installed in the  
6 distribution center. Macy’s alleges that at the time of installation, the sprinkler heads had  
7 not been properly “wrench-tightened,” and as a result, on October 12, 2015, “one  
8 sprinkler head fell off and released the water from the sprinkler system onto goods stored  
9 in the distribution center.” (Doc. 1 ¶ 15.) The water damaged 44,490 pairs of shoes that  
10 were being held for sale in the center and resulted in a net loss of \$3,789,272.25. (Doc.  
11 ¶ 16.)

12 On April 4, 2017, Macy’s filed a complaint bringing a claim of negligence claim  
13 against HMC and HMA. (Doc. 1.) HMA has moved to dismiss the complaint pursuant to  
14 Rule 12(b)<sup>1</sup> of the Federal Rules of Civil Procedure (Doc. 23), to which HMC has joined  
15 in part (Doc. 47). As follows, the Court will grant the motion in part, and will dismiss the  
16 complaint with leave to amend.

17 **A. Failure to State a Claim**

18 First, viewing the allegations in the light most favorable to Macy’s, the Court finds  
19 that the complaint fails to sufficiently state a claim of negligence against HMA.<sup>2</sup> *See*  
20 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550  
21 U.S. 544, 570 (2007)); *Moss v. United States Secret Service*, 675 F.3d 1213, 1228 (9th  
22 Cir. 2012); *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). In the

23 <sup>1</sup> HMA moves to dismiss the complaint for failure to state a claim under Rule  
24 12(b)(6) and for failure to file a written statement in accordance with Ariz. Rev. Stat. §  
25 12-2602(A). *See Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) (a failure to  
exhaust non-judicial conditions is treated as a matter in abatement, which is subject to an  
unenumerated 12(b) motion to dismiss.).

26 <sup>2</sup> “To establish a claim for negligence, a plaintiff must prove four elements: (1) a  
27 duty requiring the defendant to conform to a certain standard of care; (2) a breach by the  
28 defendant of that standard; (3) a causal connection between the defendant’s conduct and  
the resulting injury; and (4) actual damages.” *Gipson v. Kasey*, 150 P.3d 228, 230 (Ariz.  
2007) (citing *Ontiveros v. Borak*, 136 Ariz. 500, 504 (1983)).

1 complaint, Macy's does not allege any individual instances of negligent conduct by  
2 HMA. Rather, "unaware of the exact nature of the relationship between, on the one hand,  
3 H & M Construction and H & M Architects/Engineers, and on the other, the  
4 Subcontractor Defendants and the part each of them played respectively in the  
5 construction of the addition to the existing distribution center in Goodyear," the  
6 complaint sets forth allegations against HMA interchangeably with HMC. (Doc. 1 ¶ 5;  
7 *see also e.g.*, Doc. 1 ¶¶ 10, 13-14, 18-22.) Because the complaint does contain any factual  
8 content to distinguish the conduct that is alleged to have been committed by HMA, or the  
9 capacity in which it is sued, it is insufficient to state a claim for relief against it. *See*  
10 *Twombly*, 550 U.S. at 556.

11 The complaint further fails to sufficiently allege the existence of a duty of care to  
12 support a claim of negligence against HMA. *See Gipson*, 150 P.3d at 230 ("Whether the  
13 defendant owes the plaintiff a duty of care is a threshold issue; absent some duty, an  
14 action for negligence cannot be maintained."); *Sullivan v. Pulte Home Corp.*, 354 P.3d  
15 424, 430 (Ariz. Ct. App. 2015) ("A cause of action for negligence requires the existence  
16 of a duty of care, which is a determination that a defendant is under a legal obligation to  
17 conform to a particular standard of conduct to protect others against unreasonable risks of  
18 harm."); *Flagstaff Affordable Housing Ltd. Partnership v. Design Alliance, Inc.*, 223 P.3d  
19 664, 671-72 (Ariz. 2010). While the complaint alleges that all the defendants "were under  
20 a duty to exercise ordinary and reasonable care to avoid reasonably foreseeable injury to  
21 Macy's" (Doc. 1 ¶¶ 20, 26), it does not allege the relationship between HMA and Macy's  
22 that imposes a legal obligation on HMA to exercise a certain degree of care to avoid or  
23 prevent injury to Macy's. In its response brief, Macy's argues that HMA assumed a duty  
24 of care under the contract which named HMA as the "Architect." (Doc. 26 at 4.) This fact  
25 does not establish that HMA contractually owed a duty of care to Macy's - there is no  
26 allegation that HMA was a party to the contract. Without more, negligence on the part of  
27 the Architect or any other non-contracting party (such as the subcontractors) in executing  
28 their responsibilities under the terms of the contract is only relevant to whether HMC

1 breached its contractual duty of care to Macy's and is liable for their negligent actions.

2 Macy's next argues that HMA has a duty arising under the contract because HMA  
3 is a corporate subsidiary of HMC. (Doc. 25 at 4.) While this allegation, were it to be  
4 alleged in the complaint, might be relevant to whether HMC is liable for HMA's  
5 negligent conduct, it fails to establish that HMA had a legal obligation to Macy's to  
6 perform under a standard of care. Macy's alternatively argues that HMC "entered into a  
7 contract on behalf of both corporate entities to construct Macy's distribution facility."  
8 (Doc. 53 at 2.) Effectively, Macy's maintains that HMA may be sued to the same extent  
9 HMC may be sued under an alter ego theory. This argument however, is a legal  
10 conclusion that is not alleged or supported by any facts in the complaint. *See Iqbal*, 556  
11 U.S. at 679 ("While legal conclusions can provide the framework of a complaint, they  
12 must be supported by factual allegations"). "A basic axiom of corporate law is that a  
13 corporation will be treated as a separate entity unless there is sufficient reason to  
14 disregard the corporate form." *Loiselle v. Cosas Management Group, LLC*, 228 P.3d 943,  
15 950 (Ariz. Ct. App. 2010) (quoting *Standage v. Standage*, 711 P.2d 612, 614 (Ariz. Ct.  
16 App. 1985)). *See also Deutsche Credit Corp. v. Case Power & Equip. Co.*, 876 P.2d  
17 1190, 1195 (Ariz. Ct. App. 1994) (Arizona recognizes a presumption of corporate  
18 separateness). To demonstrate that HMC and HMA are not separate entities and  
19 overcome the presumption of corporate separateness, Plaintiff must show "both (1) unity  
20 of control and (2) that observance of the corporate form would sanction a fraud or  
21 promote injustice." *Gatecliff v. Great Republic Life Ins. Co.*, 821 P.2d 725, 727 (Ariz.  
22 1991). *See also DBT Yuma, LLC v. Yuma County Airport Authority*, 340 P.3d 1080, 1082  
23 (Ariz. Ct. App. 2014) (a plaintiff must allege facts showing that the unity of control  
24 between the two entities "was so pronounced that 'the individuality or separateness' of  
25 the two 'had ceased to exist.'") (quoting *Ferrarell v. Robinson*, 465 P.2d 610, 613 (Ariz.  
26 Ct. App. 1970)). Macy's complaint makes no such showing.

27 Despite these numerous defects, the Court is unable to conclude that Macy's claim  
28 against HMA cannot be cured with the addition of other facts. Therefore, Macy's will be

1 given an opportunity to file an amended complaint. *See Lopez v. Smith*, 203 F.3d 1122,  
2 1127 (9th Cir. 2000) (en banc) (“a district court should grant leave to amend even if no  
3 request to amend the pleading was made, unless it determines that the pleading could not  
4 possibly be cured by the allegation of other facts”) (quoting *Doe v. United States*, 58 F.3d  
5 494, 497 (9th Cir. 1995)).

6 **B. Failure to Comply with Ariz. Rev. Stat. § 12-2602**

7 Next, Defendants move to dismiss the claims against them for failure to comply  
8 with Ariz. Rev. Stat. § 12-2602. They argue that because they are licensed professionals,  
9 expert testimony is required to establish that they had breached the relevant standard of  
10 care, and Macy’s was required to file a written statement under Ariz. Rev. Stat. § 12-  
11 2602(A).

12 In short, Macy’s complaint asserts claims against licensed professionals for  
13 purposes of the statute. *See* Ariz. Rev. Stat. § 12-2601(3) (“‘Licensed professional’  
14 means a person, corporation, professional corporation, partnership, limited liability  
15 company, limited liability partnership or other entity that is licensed by this state to  
16 practice a profession or occupation under title 20 or 32 or that is admitted to the state  
17 bar.”); Ariz. Rev. Stat. § 32-1101 *et. seq.* (regulating contractors). Because Macy’s  
18 complaint alleges that “H & M Construction and H & M Architects/Engineers negligently  
19 constructed the extension and enlargement of the Macy’s Goodyear distribution center in  
20 that their design, installation, construction, testing, inspection and supervision of the  
21 sprinkler system-which fell below the standard of due care - caused Macy’s to sustain  
22 damages” (Doc. 1 ¶ 18), Macy’s was required to “certify in a written statement that  
23 [was] filed and served with the [complaint] whether or not expert opinion testimony is  
24 necessary to prove the licensed professional’s standard of care or liability for the claim.”  
25 Ariz. Rev. Stat. § 12-2602(A). *See* Ariz. Rev. Stat. § 12-2602(1)(b) (“‘Claim’ means a  
26 legal cause of action... based on the licensed professional’s alleged breach of contract,  
27 negligence, misconduct, errors or omissions in rendering professional services”).

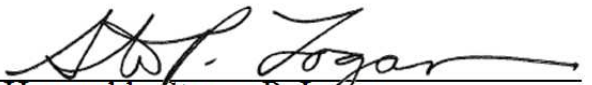
28 Macy’s failure to file its written statement, however, is not grounds for dismissal.

1 See Ariz. Rev. Stat. § 12-2602(F) (“The court, on its own motion or the motion of the  
2 licensed professional, shall dismiss the claim against the licensed professional without  
3 prejudice if the claimant fails to file and serve a preliminary expert opinion affidavit after  
4 the claimant or the claimant's attorney has certified that an affidavit is necessary or the  
5 court has ordered the claimant to file and serve an affidavit.”) (emphasis added); *Warner*  
6 *v. Southwest Desert Images, LLC*, 180 P.3d 986, 994 (Ariz. Ct. App. 2008). Instead,  
7 Macy’s shall be required to attach and file a separate written statement in accordance  
8 with § 12-2602 to its amended complaint. Any disputes regarding whether expert opinion  
9 testimony is necessary may be addressed at that time in the manner provided under § 12-  
10 2602(D). Accordingly,

11 **IT IS ORDERED:**

- 12 1. That the Motion to Strike (Doc. 56) is **denied**;
- 13 2. That the Motion to Dismiss (Doc. 23) is **granted in part** on the grounds stated  
14 above;
- 15 3. That the claim against H & M Architects/Engineers Inc. is **dismissed with**  
16 **leave to amend**;
- 17 4. That Plaintiff shall have until **April 20, 2018** to file a First Amended  
18 Complaint in accordance with this Order and the local and federal rules; and
- 19 5. That if Plaintiff fails to file a First Amended Complaint on or before **April 20,**  
20 **2018**, Defendant H & M Architects/Engineers Inc. will be dismissed with prejudice  
21 without further notice; and
- 22 6. That if Plaintiff timely files a First Amended Complaint, Defendants shall have  
23 **fourteen (14) days** to file an answer and otherwise respond as provided by Rule 12 of the  
24 Federal Rules of Civil Procedure.

25 Dated this 31st day of March, 2018.

26   
27 Honorable Steven P. Logan  
28 United States District Judge