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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Michael Petramala,
10 Plaintiff,
11 v.
12 City of Phoenix, *et al.*,
13 Defendants.

No. CV-20-00300-PHX-JJT

ORDER

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15 At issue is *pro se* Defendants Heinz Troska and the Heinz Troska Living Trust's
16 (collectively, "Troska") Motion to Dismiss or, in the Alternative, Motion for More Definite
17 Statement (Doc. 42, MTD), to which *pro se* Plaintiff Michael Petramala filed a Response
18 (Doc. 44, Resp.) and Troska filed a Reply (Doc. 45, Reply). The Court finds this matter
19 appropriate for resolution without oral argument. *See* LRCiv 7.2(f).

20 **I. BACKGROUND**

21 Plaintiff filed a Complaint against Troska, who Plaintiff alleges owns and/or
22 manages U.S. Department of Housing and Urban Development ("HUD") Section 8 housing
23 that Plaintiff rented, and Defendant City of Phoenix, which provided Plaintiff housing
24 assistance for some period of time. (Doc. 1, Compl.) Although it is not entirely clear, it
25 appears that Plaintiff lived in the subject housing from sometime in 2019 to sometime in
26 January 2020, when it appears the City terminated his housing assistance and/or he was
27 evicted by Troska. The Court denied Plaintiff's Motion for Temporary Restraining Order
28 sought against the City (Doc. 35), and subsequently Plaintiff voluntarily dismissed his

1 claims against the City (Doc. 41). Although Plaintiff filed two complaints after the initial
2 Complaint, he later withdrew them, so the initial Complaint remains the operative pleading.
3 (*See* Doc. 41.)

4 In the Complaint, Plaintiff alleges he has a respiratory disability and that Troska
5 refused to prohibit smoking in residential units adjacent to Plaintiff's, such that Plaintiff
6 had to breathe second-hand smoke from other units. Plaintiff also alleges that Troska
7 refused to allow him to renew his lease when it expired or rent units to him at other
8 addresses because Troska did not want to rent to disabled people. Plaintiff raises eight
9 claims against Troska, under (1) the Americans with Disabilities Act, 42 U.S.C. §§ 12101-
10 213 ("ADA") and the Rehabilitation Act, 29 U.S.C. § 1331, for failure to provide
11 reasonable accommodation; (2-5) the Fair Housing Act, 42 U.S.C. § 3604 ("FHA"), for
12 refusal to rent to him on account of his disability; (6) A.R.S. § 33-1321, for failing to return
13 his security deposit; (7) state law breach of contract and detrimental reliance, for failing to
14 timely provide him with a nonrenewal notice; and (8) 42 U.S.C. § 1983, for civil rights
15 violations. (Compl. ¶¶ 6-33.) Troska now moves to dismiss the claims under Federal Rule
16 of Civil Procedure 12(b)(6) or for a more definite statement under Federal Rule of Civil
17 Procedure 12(e).

18 **II. LEGAL STANDARD**

19 Because the Court will resolve Troska's Motion under Rule 12(b)(6), the Court need
20 not conduct an analysis under Rule 12(e). When analyzing a complaint for failure to state
21 a claim for relief under Rule 12(b)(6), the well-pled factual allegations are taken as true
22 and construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568
23 F.3d 1063, 1067 (9th Cir. 2009). A plaintiff must allege "enough facts to state a claim to
24 relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
25 Legal conclusions couched as factual allegations are not entitled to the assumption of truth,
26 *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and therefore are insufficient to defeat a
27 motion to dismiss for failure to state a claim. *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1108
28 (9th Cir. 2010).

1 A dismissal under Rule 12(b)(6) for failure to state a claim can be based on either
2 (1) the lack of a cognizable legal theory or (2) insufficient facts to support a cognizable legal
3 claim. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). “While a
4 complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, a
5 plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more
6 than labels and conclusions, and a formulaic recitation of the elements of a cause of action
7 will not do.” *Twombly*, 550 U.S. at 555 (citations omitted). The complaint must thus contain
8 “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
9 face.’” *Ashcroft*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). “[A] well-pleaded
10 complaint may proceed even if it strikes a savvy judge that actual proof of those facts is
11 improbable, and that ‘recovery is very remote and unlikely.’” *Twombly*, 550 U.S. at 556
12 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

13 **III. ANALYSIS**

14 **A. Count 1: Failure to Reasonably Accommodate**

15 Plaintiff alleges that Troska’s refusal to prohibit smoking in residential units
16 adjacent to Plaintiff’s was an actionable violation of the ADA and Rehabilitation Act. To
17 begin with, Plaintiff’s factual allegation of a disability consists entirely of the statement
18 that the second-hand smoke “harmed [Plaintiff] due to a respiratory disability.” (Compl.
19 ¶ 7.) An essential element of a claim of housing discrimination based on a disability under
20 the ADA, Rehabilitation Act, or FHA is that the claimant is “handicapped” under the
21 relevant Act.¹

22 The FHA defines a “handicapped” person as one who has a “physical or
23 mental impairment which substantially limits one or more of such person’s
24 major life activities,” as well as someone who is “regarded as having such an
25 impairment.” 42 U.S.C. § 3602(h)(1), (3). “Major life activities” mean
26 functions such as caring for oneself, performing manual tasks, walking,
seeing, hearing, speaking, breathing, learning and working. 24 C.F.R.
§ 100.201(b).

27 ¹ For the Court’s purposes here, Plaintiff’s claim of failure to accommodate in housing
28 based on a disability is the same under the ADA, the Rehabilitation Act, and the FHA; the
difference, not relevant here, is that such a claim under the FHA does not require the subject
housing to be under a federal assistance program.

1 *Hall v. Meadowland Ltd. P’ship*, 7 F. App’x 687, 689 (9th Cir. 2001). While Plaintiff
2 conclusorily alleges he is has a “respiratory disability,” the Complaint lacks any non-
3 conclusory factual allegations from which the Court could infer that Plaintiff is
4 “handicapped” under the Acts, that is, “substantially limited” due to an apparent respiratory
5 condition. *See id.* Indeed, in his Response to Troska’s Motion to Dismiss, Plaintiff asserts
6 that he was discriminated against on the basis of a “mental disability,” which appears
7 nowhere in the Complaint. (Resp. at 3.)

8 Next, Plaintiff bases his claim of failure to reasonably accommodate a disability on
9 Troska’s refusal to prohibit Plaintiff’s neighbors from smoking in their apartments (*e.g.*
10 Compl. ¶ 7), but that refusal in and of itself is not actionable. The FHA provides that, with
11 regard to common areas of a multi-unit dwelling, a landlord must make reasonable
12 accommodations to allow a “handicapped” person equal opportunity to enjoy a dwelling.
13 42 U.S.C. § 3604(f)(3)(B). Such an accommodation does not extend to a prohibition on
14 others’ activities in their private units. The FHA also provides that a landlord must not
15 refuse to allow a tenant to make reasonable modifications to his own private unit to
16 accommodate his “handicap,” but such modifications are at the cost of the tenant and must
17 be returned to the pre-modification state when the tenant vacates the unit. 42 U.S.C.
18 § 3604(f)(3)(A). Plaintiff does not allege that, for example, Troska refused to allow him to
19 install air filtration in his own unit.

20 For these reasons, Plaintiff fails to adequately state a claim for failure to reasonably
21 accommodate a disability in housing. If a defect in a complaint can be cured, the plaintiff
22 is entitled to amend it before a claim is dismissed. *See Lopez v. Smith*, 203 F.3d 1122, 1130
23 (9th Cir. 2000). Here, the Court finds that the defects in Plaintiff’s claim, as discussed
24 above, could possibly be cured by amendment, and Plaintiff may thus amend his Complaint
25 if he so chooses. Because Plaintiff already filed First and Second Amended Complaints—
26 even though he later withdrew them—any next amended Complaint shall be titled “Third
27 Amended Complaint” for the sake of clarity.

1 **B. Counts 2–5: Disparate Treatment under the FHA**

2 In Counts 2 through 5, Plaintiff alleges that Troska refused to renew the lease on
3 Plaintiff’s apartment and refused to rent other units he owns or manages to Plaintiff because
4 Plaintiff is disabled. These claims suffer from the same deficiency as the Court discussed
5 above regarding whether Plaintiff is “substantially limited” and thus “handicapped” under
6 the FHA. Moreover, the FHA’s prohibition of disparate treatment in housing, as Plaintiff
7 seems to allege here, applies only to certain dwellings; the prohibition does not apply to
8 dwellings of four or fewer residential units in which the landlord or owner resides. The
9 Complaint does not contain any non-conclusory factual content from which the Court can
10 determine if the FHA’s prohibition applies to the dwellings Plaintiff identifies. 42 U.S.C.
11 § 3603(b)(2). Indeed, in his Response to Troska’s Motion, Plaintiff states his dwelling was
12 a house divided into three units. (Resp. at 1.) For these reasons, the Court will dismiss
13 Counts 2 through 5, but Plaintiff may file a Third Amended Complaint if he can remedy
14 these defects. *See Lopez*, 203 F.3d at 1130.

15 **C. Count 8: Section 1983**

16 Plaintiff also contends that Troska violated his civil rights, which Plaintiff claims is
17 actionable under 42 U.S.C. § 1983. To state a § 1983 claim, a plaintiff must first allege
18 state action. Determining whether a person or entity is subject to suit under § 1983 is the
19 “same question posed in cases arising under the Fourteenth Amendment: is the alleged
20 infringement of federal rights fairly attributable to the [government]?” *Sutton v. Providence*
21 *St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999) (citing *Rendell-Baker v. Kohn*, 457
22 U.S. 830, 838 (1982)). For a court to answer this question in the affirmative, a plaintiff
23 must show that two requirements are met: (1) the deprivation to the plaintiff “must result
24 from a governmental policy,” and (2) “the party charged with the deprivation must be a
25 person who may fairly be said to be a [governmental] actor.” *Id.*

26 Plaintiff’s allegations do not meet either requirement. The Complaint contains no
27 non-conclusory allegations that Troska’s refusals are part of a governmental policy.
28 Moreover, on the face of the Complaint, Troska is not a governmental actor. Accordingly,

1 Plaintiff fails to allege a state action sufficient to raise a § 1983 claim. *See id.* at 836–43.
2 Because Plaintiff cannot cure these defects by amendment, the Court will dismiss Count 8
3 with prejudice.

4 **D. Counts 6–7: State Law Claims**

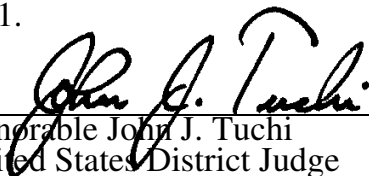
5 The Court agrees with Troska (MTD at 2) that, in the absence of claims under federal
6 law, the Court lacks jurisdiction over Plaintiff’s state law claims. Thus, if Plaintiff cannot
7 state a federal question claim, the Court will dismiss the remaining state law claims for lack
8 of subject matter jurisdiction.

9 **IT IS THEREFORE ORDERED** granting Defendants’ Motion to Dismiss or, in
10 the Alternative, Motion for More Definite Statement (Doc. 42). Count 8 is dismissed with
11 prejudice.

12 **IT IS FURTHER ORDERED** that, on or before April 12, 2021, Plaintiff may file
13 a Third Amended Complaint if he can cure the defects in Counts 1–5 as identified in this
14 Order. Any amended complaint shall not contain Count 8 and shall not contain claims
15 against the City of Phoenix, which Plaintiff voluntarily dismissed in this action.

16 **IT IS FURTHER ORDERED** that, if Plaintiff fails to timely file a Third Amended
17 Complaint, the Clerk of Court is directed to enter a final judgment of dismissal and close
18 this case.

19 Dated this 26th day of March, 2021.

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21 _____
22 Honorable John J. Tuchi
23 United States District Judge
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