

District Court, Jefferson County, Colorado

Court Address:

Jefferson County Court and Administrative Facility
100 Jefferson County Parkway
Golden, CO 80401

Plaintiff: Lincoln Property Company, N.C., Inc.,

Defendant: Wagner Architectural Team, Ltd.,

and

Plaintiffs-in-Intervention: Joseph Ehman
Housing for All

Defendants-in-Intervention: Lincoln Property
Company, N.C., Inc., and
Wagner Architectural
Team, Ltd.,

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Case Number: 99 CV 2872

Div: 6 Ctrm: 5B

**BRIEF IN SUPPORT OF MOTION OF PLAINTIFFS-IN-INTERVENTION
JOSEPH EHMAN AND HOUSING FOR ALL FOR PARTIAL SUMMARY
JUDGMENT AGAINST PLAINTIFF/DEFENDANT-IN-INTERVENTION
LINCOLN PROPERTY COMPANY, N.C., INC.**

Plaintiffs-in-Intervention Joseph Ehman and Housing for All, by and through their attorneys, Fox & Robertson, P.C., hereby file this Brief in Support of Motion for Partial Summary Judgment against Plaintiff/Defendant-in-Intervention Lincoln Property Company, N.C., Inc. (“Lincoln”).

Lincoln owns the apartment development known as The Southwest Crossing Apartments/The Dakota at Governors Ranch (“the Project”). Lincoln admitted in its complaint against Defendant Wagner Architectural Team, Ltd. (“Wagner”) in this matter and in its verified interrogatory responses that the Project failed to comply with the Fair Housing Act. Based on these admissions, Plaintiffs-in-Intervention request that partial summary judgment be entered holding Lincoln liable for the violations of the Fair Housing Act at the Project. Plaintiffs-in-Intervention do not seek any determination of damages or other remedies at this time, which may be resolved during trial of this matter.

STATEMENT OF FACTS

The Project is a 264-unit multifamily apartment complex in Littleton, Colorado. (Lincoln’s Complaint ¶ 1 (attached at Tab 1 hereto).) Lincoln owns the Project. (*Id.* ¶ 2.) Lincoln is the Contractor of Record on the building permits, inspection reports and certificates of occupancy issued for the Project by the Building Department of Jefferson County, Colorado. (Miot Decl. ¶¶ 2, 4-5 and Exs. 1 through 3 (attached at Tab 5 hereto).) On or about October 25, 1999, Lincoln brought the present lawsuit against Wagner, the architect for the Project, alleging that Wagner breached its duty of care to Lincoln in the design of the project. (Lincoln’s Complaint ¶ 5.) Among other things, Lincoln’s Complaint alleges that Wagner provided design

and architectural services for Lincoln and the Project, (id. ¶ 3), and attaches and incorporates by reference the contract between Lincoln and Wagner. (Id. ¶ 4 and Ex. A.) This contract memorializes the agreement between Lincoln and Wagner “for those services required in the design and preparation of Construction Documents for” the Project. (Lincoln’s Complaint, Ex. A at 1.)

The gist of Lincoln’s claim against Wagner in this litigation is that the Project was built in violation of the Federal Fair Housing Act, for which Wagner is responsible. (Lincoln’s Complaint ¶ 5.) Specifically, Lincoln asserts, in its Complaint, that:

[T]he Project is defective and deficient in compliance with the mandates of the Fair Housing Act in the manner following, but not limited to:

- a. Improper and/or inadequate clearance between opposing base cabinets, countertops, appliances and walls;
- b. Improper and/or inadequate width of bathroom doors;
- c. Improper and/or inadequate width of bathroom;
- d. Improper and/or inadequate width of bedroom doors and storage area doors; and
- e. Improper and/or inadequate access to buildings.

(Lincoln’s Complaint ¶ 6.) Lincoln repeated these assertions in its verified response to Wagner’s Pattern Interrogatory No. 50.2. (Objections and Responses to Defendant’s First Set of Interrogatories and Request [sic] for Production of Documents to Plaintiff Lincoln Property

Company, N.C., Inc. (“Verified Interrogatory Responses”) at 31 (excerpts including verification attached at Tab 2 hereto).)

Plaintiff-in-Intervention Joseph Ehman uses a wheelchair as a result of muscular dystrophy and a spinal cord injury. Mr. Ehman visited the Project on or about September 12, 1998 and discovered that he was unable to maneuver about the kitchen and bathroom. While he was interested in renting at the Project and had the financial resources to do so, he was unable to consider that apartment because it was not fully accessible to him. As such, his housing search was prolonged and he was denied the opportunity to live in the apartment of his choice. (Ehman Decl. ¶¶ 1-4 (attached at Tab 3 hereto).)

Plaintiff-in-Intervention Housing for All (“HFA”) is a Colorado non-profit corporation devoted to elimination of discrimination in housing and increasing free and open choices in housing. HFA devoted staff time to investigating housing discrimination at the Project, which took time away from other tasks. HFA has also had to divert resources to undertake education and outreach in an effort to counteract the discrimination of Lincoln and Wagner and to investigate, detect, identify and counteract housing discrimination in the community, including that of Lincoln and Wagner. (Hilton Decl. ¶¶ 1-4 (attached at Tab 4 hereto).)

ARGUMENT

Lincoln has admitted in its Complaint and in its Verified Interrogatory Responses that the Project is in violation of the Fair Housing Act. These statements are judicial admissions and Lincoln is bound thereby. Because it constructed and owns the Project, it is liable for these violations.

I. The Project Is in Violation of the Fair Housing Act.

The Fair Housing Act requires that multifamily dwellings built after March 13, 1991 be designed and constructed to be accessible to individuals with disabilities in specific ways. 42 U.S.C. § 3604(f)(3)(C). Multifamily dwellings covered by § 3604(f)(3)(C) include ground floor units in buildings with four or more units. § 3604(f)(7)(A). As the brochure for the Project shows, the buildings at the Project all contain four or more units, including single-story ground-floor units. (See Miot Decl. Ex. 4)

Dwellings covered by this provision are required, for example, to have “usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.” § 3604(f)(3)(C)(iii)(IV). Lincoln admitted that the Project “is defective and deficient in compliance with the mandates of the Fair Housing Act in the manner following, but not limited to . . . [i]mproper and/or inadequate clearance between opposing base cabinets, countertops, appliances and walls; . . . [i]mproper and/or inadequate width of bathroom doors; . . . [and] [i]mproper and/or inadequate width of bathroom,” (Lincoln’s Complaint ¶ 6, Verified Interrogatory Responses at 31), demonstrating that the Project violates § 3604(f)(3)(C)(iii)(IV). The Fair Housing Act also requires that, in covered multifamily dwellings, “all the doors designed to allow passage into and within all premises within such dwellings [must be] sufficiently wide to allow passage by handicapped persons in wheelchairs.” § 3604(f)(3)(C)(ii). Lincoln’s admission that the Project violates the Fair Housing Act by having “[i]mproper and/or inadequate width of bedroom doors and storage area doors,” (Lincoln’s Complaint ¶ 6, Verified Interrogatory Responses at 31), demonstrates that the Project violates § 3604(f)(3)(C)(ii).

Finally, all covered dwellings must have “an accessible route into and through the dwelling.” § 3604(f)(3)(C)(iii)(I). Lincoln’s admission that the Project violates the Fair Housing Act by having “[i]mproper and/or inadequate access to buildings,” (Lincoln’s Complaint ¶ 6, Verified Interrogatory Responses at 31), demonstrates that the Project violates § 3604(f)(3)(C)(iii)(I).

Lincoln’s admissions in its Complaint and in its Verified Interrogatory Responses are judicial admissions binding on it in this litigation.

A judicial admission is a formal, deliberate declaration which a party or his attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute. Judicial admissions are conclusive on the party making them, and generally continue to have effect for a subsequent part of the same proceedings. Such admissions need not be written when made in court, nor must they be made by a party as his counsel is impliedly authorized to make them.

Kempter v. Hurd, 713 P.2d 1274, 1279 (Colo. 1986) (emphasis added; internal citations omitted).

“Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them.” American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988).

The Colorado Supreme Court held, in Kempter, that a statement made by a party’s attorney in oral argument before that Court constituted a binding judicial admission. Id., 713 P.2d at 1280. More recently, the Court of Appeals held that a party’s interrogatory response constituted a binding judicial admission. Holiday Acres Property Owners Ass’n, Inc. v. Wise, 998 P.2d 1106, 1110 (Colo. App. 2000). Appellant Holiday Acres Property Owners Association was appealing an award of attorneys’ fees against it pursuant to a Colorado statute permitting such an award against a “common interest community.” The Association had, however, stated in

response to interrogatories that it was a common interest community. In light of that, the Court of Appeals held that it was “not necessary . . . to determine as a matter of law whether the Association [was] a common interest community because, by judicial admission, it has proclaimed itself to be such.” Id.; see also Larson v. A.T.S.I., 859 P.2d 273, 276 (Colo. App. 1993) (holding that statement by defense counsel in closing argument was judicial admission), cert. denied, 1993 Colo. LEXIS 787 (Colo. Sept. 27, 1993).

A statement in a plaintiff’s complaint can also be a judicial admission. See, e.g., Soo Line R.R. Co. v. St. Louis Southwestern Ry Co., 125 F.3d 481, 483 (7th Cir. 1997) (defendant’s summary judgment sustained based on judicial admissions in plaintiff’s complaint); Schott Motorcycle Supply, Inc. v. American Honda Motor Co., Inc., 976 F.2d 58, 61 (1st Cir. 1992) (same). As the Seventh Circuit noted, “although the rule smacks of legalism, judicial efficiency demands that a party not be allowed to controvert what it has already unequivocally told a court by the most formal and considered means possible.” Soo Line, 125 F.3d at 483. Here, Lincoln’s case rests entirely on its assertion -- in its Complaint and Verified Interrogatory Responses -- that the Project is in violation of the Fair Housing Act. Efficiency -- and fairness -- demand that it not be able to controvert this admission.

II. Lincoln Is Liable for the Project’s Violations of the Fair Housing Act.

_____The Fair Housing Act makes it illegal to “fail[] to design and construct” covered multifamily dwellings in compliance with the accessibility provisions of that statute. 42 U.S.C. § 3604(f)(3)(C). Lincoln was the contractor of record for the Project and therefore “constructed” it. (See Miot Decl. Exs. 1-3.) As such, it is liable for the failures of compliance at the Project.

Lincoln is also liable as the owner of the Project. One court has held, in interpreting § 3604(f)(3)(C),

that the “design and construct” language should be read broadly. When a group of entities enters into the design and construction of a covered dwelling, all participants in the process as a whole are bound to follow the [Fair Housing Act]. To hold otherwise would defeat the purpose of the [Fair Housing Act] to create available housing for handicapped individuals and allow wrongful participants in the design and construction process to remain unaccountable. In essence, any entity who contributes to a violation of the [Fair Housing Act] would be liable.

Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc., 3 F. Supp. 2d 661, 665 (D. Md. 1998); see also Montana Fair Housing, Inc. v. American Capital Development, Inc., 81 F. Supp. 2d 1057, 1069 (D. Mont. 1999) (quoting Baltimore Neighborhoods). As the owner of the Project, Lincoln also has a non-delegable duty to ensure compliance with the Fair Housing Act. See Asbury v. Brougham, 866 F.2d 1276, 1280 n.4 (10th Cir. 1989) (holding, based on the non-delegable duty, that apartment building owner was responsible for the discriminatory acts of his agent and employee); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 552 (9th Cir. 1980) (holding, based on non-delegable duty, that owner was liable for discriminatory acts of agent). As the Ninth Circuit explained last month, in holding that the officers of a corporation were liable for the discriminatory acts of the corporation in violation of the Fair Housing Act, whether or not the officers directed or authorized the particular discriminatory acts:

While we recognize that holding a corporation and its officers responsible even though the acts of subordinate employees were neither directed nor authorized seems harsh punishment of an otherwise innocent employer, we agree with our sister Circuits in finding that preferable to leaving the burden on the innocent victim who felt the direct harm of the discrimination. The overriding societal priority of the [Fair Housing Act] indicates that the owner has the power to control the acts of the agent and so must act to compensate the injured party and

to ensure that similar harm will not occur again. When one of two innocent people must suffer, the one whose acts permitted the wrong to occur is the one to bear the burden.

Holley v. Crank, No. 99-56611, 2001 U.S. App. LEXIS 17031 * 8-9 (9th Cir. Jul. 31, 2001)

(emphasis added; citations omitted) (attached as Tab 6 hereto).

As builder and owner, Lincoln is responsible for the fact that -- as Lincoln itself has admitted -- the Project does not comply with the Fair Housing Act.

CONCLUSION

As demonstrated above, Lincoln has admitted that the Project does not comply with the Fair Housing Act and is bound by those admissions. Lincoln, as builder and owner, is liable for the Project's violations of that statute. For those reasons, Plaintiffs-in-Intervention respectfully request that this Court enter partial summary judgment in their favor and against Lincoln for liability under the Fair Housing Act.

Respectfully submitted,

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