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

REPLY 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 Reply Brief in Support of Motion for Partial Summary Judgment against Plaintiff/Defendant-in-Intervention Lincoln Property Company, N.C., Inc. ("Lincoln").

Lincoln admitted in its complaint and verified responses to interrogatories that the apartment development known as The Southwest Crossing Apartments/The Dakota at Governors Ranch ("the Project"), which it owns, is in violation of the Fair Housing Act. 42 U.S.C. § 3601 et seq. In its Opposition to Motion for Summary Judgment ("Opposition" or "Opp.") and supporting declarations, Lincoln does not dispute either the facts set forth in the 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. ("Summary Judgment Brief") or the fact that statements in Lincoln's complaint and verified responses to interrogatories were admissions. Instead, Lincoln argues that its admissions may be controverted by evidence, but fails to provide any controverting evidence. It also argues that a decision granting the motion of Plaintiffs-in-Intervention would bind Defendant Wagner Architectural Team, Ltd. ("Wagner") to the substance of Lincoln's admissions. Because Plaintiffs-in-Intervention move for an Order holding that, as a matter of law, Lincoln is bound by its own admissions -- and not a factual finding of the content of those admissions -- this latter argument is without merit as well.

Background

Plaintiffs-in-Intervention set forth in their Summary Judgment Brief the facts necessary to hold Lincoln liable for violations of the FHA at The Project. The discussion below responds to the factual allegations in Lincoln's Opposition.

In January, 1998, the undersigned wrote to Lincoln on behalf of Housing For All ("HFA"), informing Lincoln that The Project was out of compliance with the Fair Housing Act ("FHA"). (See Manly Decl. Ex. A.) There followed an extended period of time in which Lincoln and HFA attempted to negotiate a pre-lawsuit settlement. (Robertson Decl. ¶ 2.) Rather than including its architect, Wagner, in those discussions or awaiting their outcome, in October, 1999, Lincoln elected to sue Wagner. That is, with no claim pending against it, Lincoln filed a complaint in this Court admitting that The Project was in violation of the FHA and asserting that Wagner was liable.

Although Lincoln's Complaint stated that it would have to repair the defects in The Project (id. ¶¶ 11-12), it sought only monetary relief. (Id. at 8.) Because HFA had no indication that Lincoln intended to do anything other than recover money from Wagner, in May, 2000, it sought to intervene in this case primarily to attempt to secure an injunction requiring Lincoln to bring The Project into compliance with the FHA. (See Motion to Intervene (filed May 19, 2000) at 7-8; see also Order (dated Jul. 3, 2000) at 3 ("Lincoln primarily seeks money damages. Ehman and FHA primarily seek equitable relief in the form of an order to bring the building into compliance . . . .").) While Plaintiffs-in-Intervention have requested damages and attorneys'

fees, these amounts will be dwarfed by the sums required to bring The Project into compliance, which sums Lincoln simply asked to recover in cash.

Lincoln could have waited for settlement negotiations with HFA to play out. If negotiations had failed, HFA would have sued Lincoln and Lincoln could have defended on the grounds that The Project was in compliance with the FHA; if negotiations had succeeded and a settlement or consent order required Lincoln to repair The Project, it could then have sued Wagner for contribution. Rejecting these options, Lincoln chose to sue Wagner in the middle of its negotiations with HFA. To do this, it was required to allege that The Project was in violation of the FHA. Without this allegation, it would have had no grounds to file the Complaint in this action. Having chosen this path, Lincoln cannot now be heard to argue against the central allegation of its Complaint. It has admitted that the Project violates the FHA and that admission is binding on it.

Argument

I. Lincoln's Admissions are Conclusive and Binding on Lincoln

Lincoln concedes that "the statements in [its] Pleadings and interrogatories . . . are considered 'admissions' . . . ." (Opp. at 5.) It argues, based on the 1953 case of Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953), that these admissions are not binding, "but may be controverted by evidence and considered in light of that evidence." (Opp. at 5.) This ignores more recent precedent, cited in the Summary Judgment Brief, holding that,

> Judicial admissions are conclusive on the party making them, . . . and generally continue to have effect for a subsequent part of the same proceedings. . . . Generally, any fact whatever may be the subject of a judicial admission, and

> parties may stipulate away valuable rights, provided the court is not required to abrogate inviolate rules of public policy.

Kempter v. Hurd, 713 P.2d 1274, 1279-80 (Colo. 1986) (citations omitted). Under current law, Lincoln may not controvert its judicial admissions.

Even if Lincoln were permitted to controvert its admissions with evidence, it did not do so here and this is fatal to its opposition to summary judgment. Rule 56(e) of the Colorado Rules of Civil Procedure requires that a party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of the opposing party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Lincoln has not submitted an affidavit or any other evidence that sets forth specific facts showing that there is a genuine issue concerning whether The Project is in violation of the Fair Housing Act. Although it still owns the property and has had almost three years to obtain such evidence, it does not submit an affidavit from an architect, a contractor or even a lay person -- or any other evidence -- attesting to measurements or other physical conditions at The Project that would rebut its specific admissions 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; see also Objections and Responses to Defendant's First Set of Interrogatories and [Requests] for Production of Documents to Plaintiff Lincoln Property Company, N.C., Inc. at 31.) In the absence of any specific facts showing that The Project complies with the FHA, Lincoln's opposition fails.[1]

Lincoln also argues without support that this case is, in fact, two cases, and that it is not bound by its admissions in the Complaint because admissions in one proceeding "'may be explained or contradicted'" in a separate proceeding. (Opp. at 6 (quoting Cent. Trust Co. v. Culver, 23 Colo. App. 317, 327, 129 P. 253, 257 (1912).) Whether this case is one proceeding or two, Lincoln has neither explained nor contradicted its admissions, making this principle irrelevant. Furthermore, Lincoln provides no support for its assertion that this case is in fact two separate proceedings. It is a single case that Lincoln initiated and into which Plaintiffs-in-Intervention intervened. As this Court recognized in its Order granting the Motion to Intervene,

[1] Instead of submitting admissible evidence controverting its admissions, Lincoln submitted declarations from two of its attorneys, neither of whom makes any assertion concerning the dimensions or other physical conditions at The Project. Rather, these declarations purport to attest to (1) one attorney's thought process in deciding to file suit, (Manly Decl. ¶¶ 2-4); (2) HFA's role in the litigation, including that attorney's interpretation of HFA's motives; (id. ¶ 5), and (3) the course of discovery among the parties. (Hochfelsen Decl. ¶¶ 2-4.) "[A] genuine issue of material fact cannot be raised simply by allegations of pleadings or argument of counsel. Rather, . . . an adverse party must by affidavit or otherwise set forth specific facts showing there is a genuine issue for trial." Brown v. Teitelbaum, 830 P.2d 1081, 1084-85 (Colo. App. 1991) (citations omitted).

"the central purpose of Rule 24 . . . is to avoid multiplicity of suits and to settle all related controversies in one action." Order (dated Jul. 3, 2000) at 3 (emphasis added) (citing Senne v. Conley, 133 P.2d 381 (Colo. 1943)).

II. A Decision Granting the Present Motion for Partial Summary Judgment Against Lincoln Would Not Be Binding on Wagner.

Lincoln argues that a decision against it on this motion would be binding on Wagner as well, either as the law of the case or based on principles of collateral estoppel. It is not clear whether this is an argument reductio ad absurdum or an attempt to join in the benefits of any decision in favor of Plaintiffs-in-Intervention. In either event, Plaintiffs-in-Intervention clarify that they do not ask this Court to bind Wagner with Lincoln's admissions. Both of Lincoln's theories to this effect are incorrect: A holding that Lincoln is bound by its own admissions will neither be the law of the case nor will it constitute collateral estoppel against Wagner.

A. A Decision Granting this Motion Would Not Establish the Law of the Case as to the Status of The Project.

Lincoln asserts that a decision by this Court granting the present motion would establish the law of the case with respect to the status of The Project and that this would be binding on Wagner as well. This misconstrues the effect of both Lincoln's admissions and an Order, if one is entered, granting partial summary judgment to Plaintiffs-in-Intervention. Lincoln's admissions are "conclusive on the party making them" and have the effect of "dispensing with proof" of the facts admitted. Kempter, 713 P.2d at 1279 (emphasis added). As such, Plaintiffs-in-Intervention are not asking this Court to determine, as a matter of fact, that The Project is in violation of the FHA; rather, we are asking that this Court determine, as a matter of law, that

Lincoln has stipulated to such facts and should no longer be permitted to contest them. While this holding -- that Lincoln is legally bound by its admissions -- would be the law of the case, there would be no factual determination binding on Wagner. Indeed, the "law of the case" doctrine is only applicable to "decisions of law, rather than to the resolution of factual questions." Governor's Ranch Prof'l Ctr., Ltd. v. Mercy of Colo., Inc., 793 P.2d 648, 650 (1990) (quoting Moore's Federal Practice § 0.404[1] (1988)).

The situation that now obtains in this case is not unusual: it is analogous to a situation in which two parties to a litigation are willing to stipulate to facts that a third party contests. As one court has held, "[s]tipulations are a form of judicial admission which are binding on the parties who make them. However, a stipulation does not bind those who are not a party to such stipulation." USI Properties East, Inc. v. Simpson, 938 P.2d 168, 175 (Colo. 1997) (citing Montgomery Ward & Co. v. City of Sterling, 185 Colo. 238, 245, 523 P.2d 465, 469 (1974) (other citations omitted)). In Montgomery Ward, for example, the condemnors and the owner/lessor had stipulated to the value of the land condemned. Based on that stipulation, the trial court rejected the lessee's offer of proof as to value. Id. at 241, 523 P.2d at 467. The Colorado Supreme Court reversed, holding that the lessee "was not a party to the stipulation between the condemnors and the lessor" and should have been permitted to introduce evidence as to value. Id. at 245, 523 P.2d at 469. In the present case, Wagner may put on evidence -- if such exists -- that The Project complies with the FHA; Lincoln, as a result of its judicial admission, may not. As such, partial summary judgment as requested by Plaintiffs-in-Intervention is appropriate.

B. A Decision Granting this Motion Would Not Constitute Collateral Estoppel Against Wagner.

Lincoln also argues that a decision in favor of Plaintiffs-in-Intervention here would constitute collateral estoppel against Wagner. As an initial matter, collateral estoppel only applies to "later, independent proceedings." In re Marriage of Mallon, 956 P.2d 642, 645 (Colo. App. 1998); see also S.O.V. v. People in Interest of M.C., 914 P.2d 355, 359 (Colo. 1996). As explained above, the claims of Lincoln against Wagner and those of Plaintiffs-in-Intervention against Lincoln are being adjudicated as part of the same proceeding. Collateral estoppel would not apply.

In any event, the prerequisites do not exist to support collateral estoppel against Wagner based on a decision against Lincoln. Lincoln correctly recites the test for collateral estoppel. Issue preclusion exists where:

> (1) the issue precluded is identical to an issue actually litigated and necessarily adjudicated in the prior proceeding; (2) the party against whom estoppel is sought was a party to or was in privity with a party to the prior proceeding; (3) there was a final judgment on the merits in the prior proceeding ; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

Indus. Comm'n v. Moffat County Sch. Dist. RE No. 1, 732 P.2d 616, 619-20 (Colo. 1987), quoted in Opp. at 3-4. At least one essential element would be missing in this case.

Wagner is not in privity with Lincoln for estoppel purposes. As the Tenth Circuit held in a case that applied Colorado law and that was relied on by Lincoln in its Opposition (see Opp. at 4 n.2), "[p]rivity requires, at a minimum, a substantial identity between the issues in controversy and showing the parties in the two actions are really and substantially in interest the same."

Lowell Staats Mining Co., Inc. v. Phila. Elec. Co., 878 F.2d 1271, 1275 (10th Cir. 1989) (emphasis added); see also S.O.V., 914 P.2d at 360 (holding that "[p]rivity . . . requires both a substantial identity of interests and a working or functional relationship . . . in which the interests of the [one party] are presented and protected by" the other) (internal quotations omitted.) Far from the identity of interests required to establish privity for collateral estoppel purposes, the interests of Lincoln and Wagner are directly opposed to one another: Lincoln has sued Wagner; Wagner is defending the suit.

III. Standing

Lincoln makes no mention of standing in its Opposition. In the Declaration of Steven I. Hochfelsen in Opposition to Motion for Summary Judgment, Mr. Hochfelsen argues, based on an incorrect recitation of the history of discovery in this matter,[2] that the present motion should be continued or denied on the ground that Plaintiffs-in-Intervention have not established that they have standing to sue. Lincoln has failed to demonstrate how the depositions of Plaintiffs-in-Intervention would produce facts that would preclude summary judgment.

Should this Court determine that the depositions of Plaintiffs-in-Intervention are essential to the resolution of their motion for partial summary judgment, rather than denying that motion,

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[2] Mr. Hochfelsen asserts that Plaintiffs-in-Intervention "are attempting to avoid any discovery." (Hochfelsen Decl. ¶ 3 (emphasis in original).) This statement is incorrect. Plaintiffs-in-Intervention have responded to all of Lincoln's outstanding interrogatories and document requests and have repeatedly made themselves available for deposition, only to learn that the dates were inconvenient for either Lincoln's or Wagner's counsel. Plaintiffs-in-Intervention stand ready to make themselves available for deposition on any date that is available to all three parties. (See Robertson Decl. ¶¶ 4-15.)

Plaintiffs-in-Intervention request that the Court order a continuance to permit those depositions to be conducted.

IV. Conclusion

Lincoln filed suit against Wagner based entirely on its claim that The Project was in violation of the FHA and that Wagner should indemnify it for that violation. In opposing partial summary judgment based on the admissions in its Complaint and verified responses to interrogatories, Lincoln now asserts that "this action was filed with the intent that the action would determine once and for all whether the Dakota Ranch Project was in compliance" and that it is "seeking indemnity to the extent [its allegations of noncompliance] are true." (Opp. at 1, 6 (emphasis in original).) Lincoln apparently misconstrues the role of a complaint in the Colorado civil justice system. Rule 11(a) of the Colorado Rules of Civil Procedure states, "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact . . . ." Lincoln chose to proceed against Wagner and did so by filing a Complaint in this Court declaring that The Project was out of compliance with the Fair Housing Act. In so doing, Lincoln's attorney was certifying to this Court that, to the best of his knowledge, information and belief, this assertion was well grounded in fact.

Respectfully submitted,

FOX & ROBERTSON, P.C.

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Dated: September 10, 2001

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Certificate of Service

I hereby certify that on September 10, 2001 copies of Reply 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. and the Declaration of Amy F. Robertson in Support of Motion of Plaintiffs-in-Intervention For Partial Summary Judgment were served by first class mail, postage prepaid, on:

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