
District Court, Jefferson County, Colorado
Case No. 99 CV 2872, Division 6, Courtroom 5B

MOTION TO INTERVENE

LINCOLN PROPERTY COMPANY, N.C., INC., a Colorado corporation,
Plaintiff,

v.

WAGNER ARCHITECTURAL TEAM, LTD., a Colorado corporation,
Defendant,

and

JOSEPH EHMAN and HOUSING FOR ALL, a Colorado corporation,
Plaintiffs-in-Intervention,

v.

LINCOLN PROPERTY COMPANY, N.C., INC., a Colorado corporation, and WAGNER
ARCHITECTURAL TEAM, LTD., a Colorado corporation,

Defendants-in-Intervention

Plaintiffs-in-Intervention Joseph Ehman and Housing for All, by and through their
counsel, Fox & Robertson, P.C., hereby move the Court for leave to intervene in the present case
pursuant to Rule 24 of the Colorado Rules of Civil Procedure. As required by Rule 24(c),
Plaintiffs-in-Intervention have attached hereto a Complaint in Intervention setting forth the
claims for which intervention is sought.

Certification Pursuant to District Court Practice Standard 1-15(8)

The undersigned certifies that she has conferred with counsel for Defendants-in-Intervention prior to file the present motion. Counsel for Lincoln Property Company, N.C., Inc. stated that he wished to reserve judgment concerning whether his client would oppose the present motion. Counsel for Wagner Architectural Team, Ltd. stated that his client would oppose the present motion.

Background

Plaintiff/Defendant-in-Intervention Lincoln Property Company, N.C., Inc. (“Lincoln”) owns The Southwest Crossing Apartments/The Dakota at Governor’s Ranch (“The Dakota”) a multi-family apartment complex in Littleton, Colorado that was built in or about 1997. Lincoln designed and/or constructed The Dakota so that it is not accessible to persons who use wheelchairs, in violation of the Fair Housing Act as amended, 42 U.S.C. § 3604 et seq. and the Colorado Anti-Discrimination Act (“CADA”). C.R.S. § 24-34-501 et seq.

Defendant/Defendant-in-Intervention Wagner Architectural Team, Ltd. (“Wagner”) was the architect that designed The Dakota.

Lincoln brought the present lawsuit against Wagner on or about October 25, 1999, alleging claims of breach of contract, negligence, breach of implied warranty of workmanlike performance, breach of express and implied warranty of fitness, strict liability in tort, fraud - intentional misrepresentation of fact, and negligent misrepresentation.¹ These common-law

¹ By Order dated February 26, 2000, this Court dismissed the claims of breach of implied warranty of workmanlike performance, breach of express and implied warranty of fitness, and strict liability in tort. Lincoln has since moved to amend its complaint to drop its claims of fraud.

claims are all based on Lincoln's allegation that Wagner "negligently and wrongfully . . . fail[ed] to comply with the Federal Fair Housing Act and applicable building codes" in connection with the design of The Dakota. Complaint ¶ 5. Lincoln's Complaint describes a number of specific ways in which The Dakota violates the Fair Housing Act. See id. at ¶ 6. The ways in which Lincoln admits The Dakota violates the Fair Housing Act serve to make the development inaccessible to and/or unusable by people who use wheelchairs. These features also violate the CADA. See C.R.S. § 24-34-502.2.

Plaintiff-in-Intervention Joseph Ehman uses a wheelchair as a result of muscular dystrophy and a spinal cord injury. In the late summer and fall of 1998, he was looking for a two-bedroom, two-bathroom apartment of the type available in The Dakota. He had also agreed to work with Plaintiff-in-Intervention Housing for All ("HFA") to investigate whether various apartments he visited in his search were in compliance with the Fair Housing Act and the CADA. Mr. Ehman visited The Dakota on or about September 12, 1998 and discovered that it was in violation of these statutes. While he was interested in renting at The Dakota 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.

Plaintiff-in-Intervention Housing for All had noticed that Lincoln advertised its apartments as using the universal symbol of accessibility and had begun investigating whether Lincoln's apartments were in fact accessible. It devoted staff time to this investigation and efforts to detect whether housing discrimination was taking place at The Dakota, which took staff time away from other tasks. HFA has also had to divert its scarce resources to undertake

education and outreach efforts 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.

Plaintiffs-in-Intervention seek to intervene in the present lawsuit primarily to ensure that any recovery from Defendants-in-Intervention is applied to the remodeling of apartments at The Dakota so that they are accessible to persons who use wheelchairs. Lincoln filed this lawsuit on or about October 25, 1999. Since that time, Wagner has filed a motion to dismiss which this Court granted in part by Order dated February 26, 2000 and Wagner has filed its Rule 26(a)(1) disclosures. Lincoln has also moved to amend its complaint to drop its allegations of fraud. The undersigned understands that no depositions have been taken and no documents exchanged. Plaintiffs-in-Intervention will abide by any case management order or discovery schedule currently governing this case.

ARGUMENT

I. Plaintiffs-in-Intervention are Entitled to Intervene as of Right Pursuant to Colorado Rule of Civil Procedure 24(a)

A party is entitled to intervene in a pending action “1) when the applicant claims an interest relating to the property or transaction which is the subject of the action; 2) the applicant is so situated that the disposition of the action may, as a practical matter, impair or impede his or her ability to protect that interest; and 3) the applicant’s interest is not or may not be adequately represented by existing parties.” Feigin v. Securities America, Inc., 992 P.2d 675, 678 (Colo. App. 1999), cert. granted (Feb. 7, 2000), quoting United Airlines, Inc. v. Schwesinger, 805 P.2d 1209 (Colo. App. 1991).

A. Plaintiffs-in-Intervention Have an Interest in the Property That Is the Subject of the Present Action.

The present action alleges that Wagner provided plans for The Dakota that did not comply with the Federal Fair Housing Act and that, as a result, the project does not comply with that statute. Plaintiffs-in-Intervention are a person who uses a wheelchair who wanted to rent a unit at The Dakota and a fair housing organization that has as its goal the elimination of housing discrimination and the promotion of free choice in housing. Plaintiffs-in-Intervention allege that Defendants-in-Intervention have designed and constructed The Dakota in violation of the Fair Housing Act and an equivalent state statute, the CADA. Defendant-in-Intervention Lincoln has conceded in its pleadings that The Dakota violates the Fair Housing Act and now seeks damages from Wagner, the architect. Plaintiffs-in-Intervention seek to ensure that this same property is, as a result of this lawsuit, made accessible to people who use wheelchairs.

Plaintiffs-in-Intervention have thus properly alleged an interest in the property that is the subject of this lawsuit.

The existence of the interest of a proposed intervenor should be determined in a liberal manner. . . . It is the better practice to apply the rule relating to intervention in such a way that, whenever possible and “compatible with efficiency and due process,” issues relating to the same transaction can be resolved in the same lawsuit and at the trial court level. . . . [T]he “interest” tests [sic] is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.

O’Hara Group Denver, Ltd. v. Marcor Housing Systems, Inc., 595 P.2d 679, 687 (Colo. 1979)

(internal citations omitted). In O’Hara, the seller of a commercial property had sued the buyer for breach of contract when the latter failed to show up at settlement. A bank that alleged a security interest in the contract of sale moved to intervene. The trial court denied the motion and

the Court of Appeals affirmed. The Colorado Supreme Court, however, reversed and ordered that the bank be permitted to intervene. Like the intervenor in O'Hara, Plaintiffs-in-Intervention assert an interest in the property at issue here. That interest – in seeing that the property at issue is in fact made accessible to persons who use wheelchairs – is more direct than that of the bank intervenor in O'Hara, which merely had an interest in a contract for the sale of the property at issue. See also Dillon Companies, Inc. v. City of Boulder, 515 P.2d 627, 628-29 (Colo. 1973) (Rule 24(a)(2) “does not require ‘an interest in the property’ but an ‘interest relating to the property.’”)

Furthermore, while Plaintiffs-in-Intervention are confident that their interest will withstand legal challenge and entitle them to relief, “this first element for intervention looks merely to what interest is claimed by the intervenor, not whether he or she will ultimately be successful.” Higley v. Kidder, Peabody & Co., Inc., 920 P.2d 884, 890 (Colo. App. 1996), cert. denied (Aug. 19, 1996).

B. The Disposition of the Present Action May, as a Practical Matter, Impair or Impede the Ability of Plaintiffs-in-Intervention to Protect Their Interest

Plaintiffs-in-Intervention seek a declaration that The Dakota was designed and constructed in violation of the Fair Housing Act and the CADA. Among the remedies Plaintiffs-in-Intervention seek is an injunction compelling Defendants-in-Intervention to bring The Dakota into compliance with these statutes. Any finding in this litigation concerning the extent to which The Dakota violates the Fair Housing Act and the appropriate remedy for such violation could impair or impede the ability of Plaintiffs-in-Intervention to pursue such matters in separate

litigation against either or both of the Defendants-in-Intervention and to secure sufficient funds to make all of the covered apartments at The Dakota accessible to persons in wheelchairs.

C. The Present Parties Will Not Adequately Represent the Interests of the Plaintiffs-in-Intervention

Lincoln seeks to recover damages from Wagner under theories of breach of contract and negligence. While Lincoln explicitly alleges that Wagner's conduct is a violation of the Fair Housing Act, Lincoln chose not to assert a claim under that statute or the CADA. Where the interests of the intervenor and the plaintiff "are to a large degree coincident," intervention is appropriate if the intervenor "has available to it several arguments which could not be asserted" by the plaintiff. O'Hara, 595 P.2d at 542. In the present case, Plaintiffs-in-Intervention may avail themselves of arguments under the Fair Housing Act and the CADA that Lincoln may not be able to assert under theories of breach of contract or negligence.

Furthermore, Lincoln's primary goal in this litigation – the recovery of funds – does not fully coincide with that of Plaintiffs-in-Intervention – ensuring that the apartments are made accessible. Lincoln alleges generally that it "has been compelled to . . . evaluate and/or correct and repair defects" in The Dakota and that it will be required to incur expenses to correct defective improvements and damaged property. Complaint ¶¶ 11-12. Nowhere in the Complaint or elsewhere has Lincoln undertaken to make precisely those alterations required to bring The Dakota into compliance with the accessibility provisions of the Fair Housing Act and the CADA. Lincoln, naturally, represents its own interests and not those of disabled apartment-seekers in the Denver area. As such, Plaintiffs-in-Intervention can be certain that the required alterations will be made only by participating directly in the present litigation. As the Colorado Supreme Court

explained, in permitting individual investors to intervene in a securities action brought by the Securities Commissioner:

the law mandates that the Commissioner's primary responsibility is to protect the public from securities' [sic] fraud. His discretionary authority to attempt to obtain recompense for defrauded investors is only ancillary and secondary to that principal responsibility. Consequently, there may be occasions when the Commissioner's interest in performing his primary responsibility may not coincide with a defrauded investor's interest in achieving full compensation for the harm done to him or her.

Feigan, 992 P.2d at 680.

In sum, Plaintiffs-in-Intervention have asserted an interest in the property at issue here that will not be represented by Lincoln and the present litigation could impair or impede the ability of Plaintiffs-in-Intervention to protect their interest. It is appropriate to permit Plaintiffs-in-Intervention to intervene as of right pursuant to Rule 24(a).

II. Plaintiffs-in-Intervention Should be Permitted to Intervene Pursuant to Colorado Rule of Civil Procedure 24(b)

Colorado Rule of Civil Procedure 24(b) "provides for permissive intervention when an applicant's claim and the original cause of action present common questions of law or fact, so long as the intervention will not unduly delay or prejudice the rights of the original parties." In re Marriage of Paul, 978 P.2d 136, 139 (Colo. App. 1998). This Court has "considerable discretion" in deciding whether to allow permissive intervention. Id.

The claims of Plaintiffs-in-Intervention present common issues of law – the requirements of the Fair Housing Act with respect to The Dakota – and fact – the dimensions of the apartments at The Dakota – with the original cause of action. It is the understanding of Plaintiffs-in-Intervention that this case is at a very early stage. No depositions have been taken and no

documents exchanged. While Wagner's motion to dismiss has been granted in part, this motion concerned only state-law counts and issues, not raised by Plaintiffs-in-Intervention.

Furthermore, Plaintiffs-in-Intervention will comply with any pending case management order or discovery schedule. Permitting the Plaintiffs-in-Intervention to intervene at this time to ensure that any recovery goes to making the apartments at issue accessible to persons with disabilities would not unduly delay or prejudice the rights of either party.

Conclusion

For the reasons set forth above, Plaintiffs-in-Intervention respectfully request that this Court grant their motion to intervene and accept for filing the attached Complaint in Intervention.

Respectfully submitted,

FOX & ROBERTSON, P.C.

Amy F. Robertson, #25890
Timothy P. Fox, #25889
910 - 16th Street, Suite 610
Denver, CO 80202
303-595-9700

Dated: May 19, 2000

Attorneys for Plaintiffs-in-Intervention

Certificate of Service

I hereby certify that on May 19, 2000, copies of the foregoing Motion to Intervene with attached Complaint in Intervention and proposed Order Granting Motion to Intervene were served on the following individuals by placing them in first-class mail, postage prepaid:

John H. Lonnquist, Esq.
3200 Cherry Creek South Drive
Denver, CO 80209

John C. Manly, Esq.
Freberg & Manly
8001 Irvine Center Drive
Suite 1500
Irvine, CA 92618

Jeffrey B. Stalder, Esq.
Benton J. Barton, Esq.
Hall & Evans, L.L.C.
1200 17th Street
Suite 1700
Denver, CO 80202-5817
