

DISTRICT COURT, PARK COUNTY, COLORADO
300 Fourth Street
Fairplay, Colorado 80440

Plaintiffs: ELK FALLS PROPERTY OWNERS ASSOCIATION, a Colorado nonprofit corporation, KATHRYN WELLS, THE PAUL J. VASTOLA AND SUZANNE G. NELSON LIVING TRUST, U/A, ROBERT W. PHELPS, and KEVIN O'CONNELL

v.

Defendants: VERA B. DUNWODY, DRAYTON D. DUNWODY, FARM CREDIT OF SOUTHERN COLORADO, ACA, an agricultural credit association, and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PARK, COLORADO

Plaintiffs in Intervention: PETER J. BRAUN and RENAE J. BRAUN

Frederick B. Skillern, #7983
Nathan G. Osborn, #38951
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Case Number: 2010cv65

Div: B

MOTION FOR RECONSIDERATION TO VACATE THE INDISPENSABLE PARTIES ORDER AND DENY DEFENDANTS' VERIFIED MOTION TO JOIN INDISPENSABLE PARTIES OR CLARIFICATION OF INDISPENSABLE PARTIES ORDER

Plaintiffs, Elk Falls Property Owners' Association (the "Association"), Kathryn Wells, The Paul J. Vastola and Suzanne G. Nelson Living Trust, U/A, Robert W. Phelps, and Kevin O'Connell (collectively "Plaintiffs"), through their attorneys Montgomery Little & Soran, P.C., submit this Motion for Reconsideration to Vacate the Indispensable Parties Order and Deny Defendants' Verified Motion to Join Indispensable Parties or

Clarification of Indispensable Parties Order. In support thereof, Plaintiffs state as follows:

Certificate of Conferral: Because of the nature of this Motion, counsel for Plaintiffs has not conferred with counsel for Vera B. Dunwody and Drayton D. Dunwody (the “Dunwodys”). It is anticipated that they oppose the relief sought.

Introduction

1. On September 8, 2010, the Dunwodys filed a Verified Motion to Join Indispensable Parties (“Indispensable Parties Motion”).
2. On September 24, 2010, the Dunwodys filed a Supplement to Motion to Join Persons Needed for Just Adjudication Under C.R.C.P. 105 (“Supplemental Motion”). The Supplemental Motion was a supplement to the Dunwodys’ Indispensable Parties Motion.
3. Plaintiffs filed their Response to the Indispensable Parties Motion on September 24, 2010 (“Response”). The Response is attached hereto as **Exhibit 1** and incorporated herein.
4. The Court granted the Indispensable Parties Motion on September 29, 2010.
5. The Court’s Order Granting Defendants’ Motion to Join Indispensable [sic] Parties (“Indispensable Parties Order”) provides as follows:

The Court, having considered the Defendants’ Verified Motion to Join Indispensable [sic] Parties, and the Plaintiffs’ response thereto, finds that good cause has been shown to join all of the lot owners within the Elk Falls Subdivision who seek to quiet title to an interest in the Disputed Roads. It is therefore ORDERED that the Elk Falls Property Owners Association is hereby ordered to determine all lot owners within the Elk Falls Subdivision who seek to quiet title to an interest in the Disputed Roads, and to join such lot owners as Plaintiffs in this action.

The Indispensable Parties Order Should be Vacated, and the Court Should deny the Dunwodys' Indispensable Parties Motion.

Plaintiffs respectfully request that the Court reconsider its ruling on the Indispensable Parties' Motion because: (a) the Indispensable Parties Order cuts against the wishes of a substantial majority of the Owners; (b) the Indispensable Parties Order is not in accord with the basic intent of CCIOA, e.g., C.R.S. § 38-33.3-302(1)(d); (c) the 141 Owners are not indispensable parties to this action and their interests are adequately represented by the Association; and (d) the Indispensable Parties' Order is contrary to public policy because it is unduly burdensome, inefficient, and excessively costly.

6. The Indispensable Parties Order goes against the desires of a substantial majority of the Owners. This action arises from an access dispute involving Elk Falls Subdivision roads. There are 146 different property owners in the Elk Falls Subdivision ("Owners"). Four property owners are named Plaintiffs. One property owner is a Plaintiff in Intervention. There are 141 property owners who are not parties ("141 Owners"). A substantial majority of the Owners, including the 141 Owners, support this litigation and want the Elk Falls Property Owners' Association (the "Association") to represent their interests here. The Association has raised sufficient money to finance this litigation, and numerous Owners have actively assisted in prosecuting this action. The Association brought this action on behalf of the Owners because a substantial majority of the Owners wanted them to do so, Colorado law gives them that authority, and it was efficient and cost effective for the Association to represent the Owners' common interests. *See Exhibit 2, Affidavit of Paul Vastola.*

7. The Indispensable Parties Order contradicts the intent of the CCIOA, C.R.S. § 38-33.3-302(1)(d). C.R.S. § 38-33.3-302(1)(d) provides authority for the

Association to litigate this action on behalf of all Owners (mandating that a homeowner association may institute litigation in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community). The purpose of CCIOA was to eliminate the costly and inefficient process of class action lawsuits, and joining subdivision residents in cases like this. *See Yacht Club III Homeowners Ass'n v. A.C. Excavating*, 94 P.3d 1177, 1180 (Colo. App. 2003) (finding that the purpose of CCIOA is to clarify that an association can sue or defend lawsuits on behalf of homeowners, that CCIOA ends the difficult homeowner standing issue in Colorado, that CCIOA eliminates the necessity of class action lawsuits, and that CCIOA simplifies and makes more practical prompt action in the association's and owners' common interests). Prior to CCIOA, it was difficult for homeowner associations to efficiently litigate construction defect matters, property disputes, or any matter affecting a common interest. The Indispensable Parties Order places the Association in a pre-CCIOA situation. This is not the intent of CCIOA.

8. The Association has instituted procedural safeguards so that none of the 141 Owners are prejudiced. A Motion was made at the 2009 annual meeting to establish access to the Disputed Roads. This Motion was overwhelmingly approved by the Owners. The Motion provided that the Association exhaust mediation/settlement negotiations with the Dunwodys before commencing litigation. The board of directors, voted in by the Owners, was then elected with that charge. After it became apparent that mediation/settlement efforts with the Dunwodys were fruitless, the Association filed this action on behalf of all the Owners. The Association has also provided each Owner, through various means, notice of this litigation and frequent case updates. The

Association has also notified numerous homeowners about their right to join this lawsuit individually. The Association regularly conducts meetings where issues about this action are discussed, and all Owners have notice of these meetings. *See* Exhibit 2.

9. The 141 Owners are not indispensable parties and the Association adequately represents their interests. Being indispensable means that no final judgment can be entered, without injuriously affecting the rights of the absent parties; that a final decree cannot be made without leaving the controversy in a situation where final determination may be inequitable. *Davis v. Maddox*, 169 Colo. 433, 438, 457 P.2d 394, 396-397 (Colo. 1969). The 141 Owners are not prejudiced and any final determination by the Court will not be inequitable to the 141 Owners. The Association has instituted procedural safeguards to ensure that the 141 Owners are not prejudiced. There are also no conflicting interests among the Owners (e.g. every Owner wants access to the Disputed Roads, a substantial majority of the Owners support this litigation, and access to the Disputed Roads benefits all Owners).

Any final determination is also not inequitable because if Plaintiffs prevail, all Owners benefit. Those few Owners who do not support this litigation, do so because they do not want to pay for it, they are ambivalent, they are cooperative with the Dunwodys, or they do not consistently use the Disputed Roads. To that end, any ruling by the Court, whether favorable or unfavorable to Plaintiffs, does not prejudice those Owners in any significant manner. Those Owners can also intervene. There is also no danger of inconsistent decisions or multiple lawsuits because Colorado law gives the Association the authority to adequately represent all Owners, and any future lawsuits will be barred.

10. It is unduly burdensome to mandate that the Association join the 141 Owners, especially when there are no benefits in joining them. Joining the 141 Owners increases costs, decreases efficiency, and does not provide the Court with any additional useful information. The Court does not need 141 Owners, and their 141 different attorneys making the same arguments. It is unnecessary.

11. Joining the 141 Owners also presents practical and ethical concerns for Plaintiffs and counsel for Plaintiffs. Most notably, it is costly and inefficient to join the 141 Owners. This ruling also may have a chilling effect on the litigation because a substantial majority of the Owners want the Association to litigate on their behalf, and do not want to be named as parties. There are also significant conflict of interest and attorney-client privilege concerns because some of the 141 Owners are friends with the Dunwodys and are assisting the Dunwodys in this action. Plaintiffs cannot effectively and ethically litigate when named Plaintiffs are sabotaging their efforts, and providing privileged information to the Dunwodys. Finally, joining 141 additional parties, and their respective attorneys, will make this case unmanageable for the Court as well as counsel.

WHEREFORE, Plaintiffs request that the Court vacate the Indispensable Parties Order, and deny the Dunwodys' Indispensable Party Motion. A proposed order is attached.

Clarification Re: Indispensable Parties Order

If the Court does not vacate the Indispensable Parties Order and deny the Indispensable Parties Motion, Plaintiffs respectfully request that the Court clarify the Indispensable Parties Order and make additional findings of fact so that Plaintiffs can act in accordance.

1. Plaintiffs are unclear about certain provisions of the Indispensable Parties Order and the basis of the Court's ruling. To wit: it is unclear whether the Court is finding that the Association does not have standing here, the Indispensable Parties Order does not provide guidance on how to join all the 141 Owners, it is unclear whether Plaintiffs must join all the 141 Owners or Plaintiffs are only required to join "all lot owners within the Elk Falls Subdivision who seek to quiet title to an interest in the Disputed Roads," it is unclear what is required of Plaintiffs if they are ordered to join "those lot owners who seek to quiet title to an interest in the Disputed Roads," there is no direction as to how the case should be captioned, there is no finding that the 141 Owners are indispensable parties, there is no finding why the 141 Owners are indispensable parties, there is no finding why the Association cannot adequately represent the 141 Owners pursuant to the authority granted by C.R.S. § 38-33.3-302(1)(d), the Indispensable Parties Order does not specify whether it applies to both of Plaintiffs' causes of action or just the Quiet Title, C.R.C.P. 105 cause of action, and there is no finding whether C.R.S. § 38-33.3-302(1)(d) applies.

WHEREFORE, and in the alternative to vacating the Indispensable Parties Order and denying the Indispensable Parties Motion, Plaintiffs respectfully request that the Court clarify its Indispensable Parties Order and make additional findings of fact as follows:

(1) clarify whether all the 141 Owners must be joined, or if Plaintiffs are only required to join those who seek to quiet title in the Disputed Roads;

(2) clarify what it means to join all Owners who "seek to quiet title in the Disputed Roads";

(3) provide appropriate guidance to Plaintiffs on how to join those parties who are ordered to be joined;

(4) clarify how the Parties should caption the case in the future;

(5) make a finding as to whether the Elk Falls Subdivision is a common interest community under CCIOA;

(6) make a finding as to whether C.R.S. § 38-33.3-302(1)(d) applies here;

(7) make a finding as to whether the Association has standing to pursue this action;

(8) make a finding as to whether the 141 Owners are indispensable parties;

(9) make a finding regarding why the 141 Owners are indispensable parties if the Court determines they are indispensable parties;

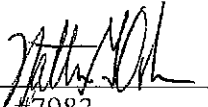
(10) make a finding as to whether the Association can adequately represent the interests of all Owners in this action; and

(11) clarify whether the Indispensable Parties Order applies to both of Plaintiffs' causes of action, or only to Plaintiffs' Quiet Title C.R.C.P. 105 cause of action.

Dated: October 8, 2010.

Respectfully submitted,

MONTGOMERY LITTLE & SORAN, P.C.

By s/ Nathan G. Osborn 
Frederick B. Skillern, #7983
Nathan G. Osborn, #38951

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2010, a true and correct copy of the foregoing was duly served to the following via LexisNexis:

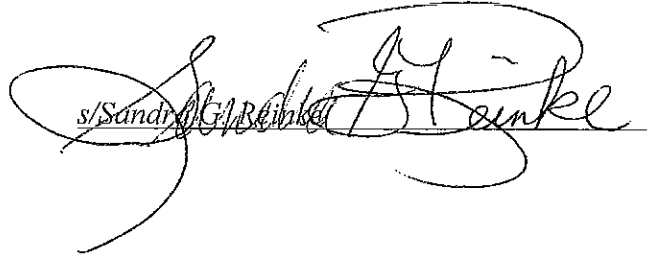
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