

District Court, Archuleta County, Colorado 449 San Juan Boulevard Pagosa Springs, CO 81147	▲Court Use Only▲
Plaintiff: COLORADO’S TIMBER RIDGE HOME OWNERS ASSOCIATION, a Colorado non-profit corporation, and Defendant(s): COLORADO TIMBER RIDGE RANCH, L.P., a California limited partnership; et al.	
THE LAW OFFICES OF JEFFREY A. LANE, P.C. Jeffrey A. Lane, No.: 11356 Attorney for Defendants Colorado Timber Ridge Ranch, L.P. and George and Jean Taulman 2676 West Alamo Ave. Littleton, CO 80120 Telephone: 720-283-4100 Fax: 303 795 7816 jlane@experience-counts.org	Case No: 09 CV 95 Division:
RESPONSE TO PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT	

Defendant Colorado Timber Ridge Ranch, L.P. (the “Partnership”) responds to plaintiff’s Motion for Summary judgement as follows:

I. STATEMENT OF THE CASE

The Partnership concurs with the Statement of the Case as set forth in plaintiff’s Memorandum Brief.

II. UNCONTESTED MATERIAL FACTS

The Partnership concurs with the statement of Uncontested Material Facts set forth in plaintiff’s Memorandum Brief, with the following exceptions:

1. The Partnership does not agree that it is undisputed that the Property is encumbered by the Declaration as asserted by plaintiff in Paragraph 3. The Partnership disputes that the entire property to be developed as set forth on Exhibit "A" to the Declaration was encumbered by the declaration at the time the Declaration was recorded.

III. STANDARD OF REVIEW

The purpose of C.R.C.P. 56 is to further the prompt administration of justice, expedite litigation by avoiding needless trials, and enable one speedily to obtain a judgment by preventing the interposition of unmeritorious defenses for purpose of delay. *Blaine v. Yockey*, 117 Colo. 29, 184 P.2d 1015 (1947). The rule allowing summary judgment is designed to pierce through the allegations of fact in pleadings and to avoid an unnecessary trial where the matter submitted in support of a motion for summary judgment shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Terrell v. Walter E. Heller Co.*, 165 Colo. 463, 439 P.2d 989 (1968); *Ruscitti v. Sackheim*, 817 P.2d 1046 (Colo. App. 1991). Summary judgment avoids the expense and delay of a trial when all facts are admitted or when a party is unable to support by any competent evidence a contention of fact and provides a method whereby it is possible to determine whether a genuine cause of action or defense thereto exists and whether there is a genuine issue of fact warranting the submission of the case to a jury. *Blaine v. Yockey*, 117 Colo. 29, 184 P.2d 1015 (1947).

The ultimate burden of persuasion in connection with motion for summary judgment always rests on moving party. *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251 (Colo. 1995). The party moving for a summary judgment has the burden of demonstrating clearly the absence of a genuine issue of fact in order to prevail. *O'Herron v. State Farm Mut. Auto. Ins. Co.*,

156 Colo. 164, 397 P.2d 227 (1964); *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000). The moving party has the initial burden of producing and identifying those portions of record and affidavits that demonstrate the absence of any genuine issue of material fact. The party moving for summary judgment may satisfy its initial burden of production by demonstrating that there is absence of evidence in record to support the nonmoving party's case, where party moves for summary judgment on an issue on which he would not bear ultimate burden of persuasion at trial. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987). Once a movant makes a convincing showing that genuine issues are lacking, the rule requires that the opposing party adequately demonstrate by relevant and specific facts that a real controversy exists. *Ginter v. Palmer & Co.*, 196 Colo. 203, 585 P.2d 583 (1978); *Webster v. Mauz*, 702 P.2d 297 (Colo. App. 1985); *Knittle v. Miller*, 709 P.2d 32 (Colo. App. 1985); *Closed Basin Landowners' Ass'n v. Rio Grande*, 734 P.2d 627 (Colo. 1987).

IV. ARGUMENT

A. Plaintiff Has Not Demonstrated That The Timber Meadows Property Is Included In Colorado's Timber Ridge.

In order to prevail on its Motion for Summary judgment plaintiff must show that it is undisputed that the Timber Meadows Property is encumbered by and/or subject to the Declaration. The Declaration itself and the subsequent conduct of the parties makes it clear that there is a material dispute with respect to this issue and therefore plaintiff is not entitled to summary judgment.

The Declaration is not clear that the entire property described is encumbered by and/or subject to the Declaration.

The Declaration is ambiguous at best as to whether or not the entire property to be developed is encumbered by the Declaration at the time of its execution; or if the development

scheme was to develop the property in phases and encumber each phase by the use of Supplemental Declarations.

Section I.A. recites that the Declarant is the owner of the whole of the property described in Exhibit “A” (the “Gomez Ranch Property”) to the Declaration, but it does not specifically provide that the entirety of the Gomez Ranch Property is encumbered by and/or subject to the Declaration. Section I.B. states that the Declaration shall “affect” the Gomez Ranch Property; but it does not say when the restrictions are to attach.

The term “Property” is defined in Section II.A.20. as “the land known as “Colorado’s Timber Ridge” as described on the final plat of that name recorded in Archuleta County, Colorado.” This is so despite the fact that no final plat had been recorded at the time the Declaration was executed. The Declaration does not define the “Property” in a metes and bounds description as the Gomez Ranch Property is described in Exhibit “A” to the Declaration.

There are also indications in the Declaration itself that the Gomez Ranch Property was to be developed in phases. Section XII.A.1. specifically refers to the Declarant’s right to add contiguous properties or phases to the scheme “of this Declaration.” Section XII.A.2. specifically gives the Declarant the right to record a Supplementary Declaration “which shall extend the coverage of this Declaration to such property.” Furthermore, the only development rights reserved by the Declarant are those set forth in Section XV with respect to the right to develop 76 lots in Phase I. It is obvious that the overall scheme of development was to include additional parcels of property as “phases” and subject that property to the Declaration by the use of Supplemental Declarations.

It is undisputed that the Timber Meadows Property was never included in the Colorado’s Timber Ranch development by any Supplemental Declaration and in the absence of any clear

and unambiguous language in the Declaration indicating that the entire Gomez Ranch Property was to be encumbered by and/or subject to the Declaration, this Court cannot assume that it was to be so bound and enter summary judgment in favor of plaintiff. This issue is a disputed material fact which must be resolved at trial.

The Conduct of the Partnership Indicates that the Gomez Ranch Property was to be developed in phases.

It is clear from the subsequent conduct of the Partnership and the HOA that the Colorado's Timber Ridge Subdivision was to be developed in phases. Section XII of the Declaration specifically grants the Declarant the right to make additional phases of the development subject to the provisions of the Declaration. Section XII further gives the Declarant the right to subject additional phases for a period of ten years by the recording of a Supplementary Declaration.

Furthermore, that is exactly how the development of the Property through the first four phases progressed. Within months of the recording of the Declaration the Declarant recorded the First Supplemental Declaration and the Second Supplemental Declaration (Exhibit "2"). These documents by their own terms subject the additional phases to the Declaration. The Supplemental Declarations complied with all of the requirements of the CCIOA and in particular provided for the number of lots to be developed in each phase and limited the time period of the development. No such Supplemental Declaration was ever recorded regarding the Timber Meadows Property and as a result, the property was never brought within the Colorado's Timber Ridge Subdivision and was never encumbered by the Declaration. As a result, the Partnership is

free to develop this portion of the Gomez Ranch Property in any manner that it would like and plaintiff is certainly not entitled to summary judgment on its claims.

B. There Is No Requirement That A Time Limit For The Exercise Of Development Rights With Respect To The Timber Meadows Property Be Set Forth In The Declaration Or That The Declaration Set Forth The Number Of Lots To Be Developed.

Plaintiff argues that the partnership cannot record a plat or convey any of the Timber Meadows Property because are no development rights reserved in the Declaration. It bases this argument on the fact that there is no time limit for development set forth in the Declaration; that such a limit is mandated by the CCIOA; and that in the absence of such a time limit case law indicates that any development rights are void *ab initio*. Plaintiff also argues that the CCIOA mandates that the developer disclose the number of lots to be developed in conjunction with any reservation of development rights.

However, this argument is valid only if the property to be developed is encumbered by and/or subject to the provisions of the Declaration. For the reasons set forth above, the Declaration is not clear and unambiguous that the entire Gomez Ranch Property is to be encumbered on the recording of the Declaration; and if this is indeed the case, then the failure to comply with the CCIOA with respect to a time limit and specification of the number of lots is immaterial. If the development scheme was to encumber the Gomez Ranch in phases, then the requirements of the CCIOA could be met by the recording of Supplemental Declarations, just as was done by the Developer in phases one through four.

V. CONCLUSION

Plaintiff is entitled to summary judgment only if there are no disputed issues of material fact and if judgment should enter as a matter of law. There are disputed issues of material fact,

the most significant being whether or not the entire Gomez Ranch Property was encumbered by and/or subject to the Declaration at the time it was recorded, or if the property was to be developed in phases and each phase was to be encumbered as a Supplemental Declaration was recorded. If the latter is true, then the Timber Meadows Property is unencumbered and the partnership is free to develop the land in any way it chooses. The Declaration is ambiguous with respect to this issue and therefore the court can look to the intent and conduct of the parties. Such intent and conduct involves issues of fact that must be determined at trial.

Therefore, for the reasons set forth herein, the Court must deny plaintiff's Motion for Summary judgment.

Dated September 15, 2010.

LAW OFFICES OF JEFFREY A. LANE, PC

/s/ Jeffrey A. Lane
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CERTIFICATE OF MAILING

I hereby certify that on the 15th day of September, 2010, I e-filed via Lexis Nexis, a true and correct copy of the above and foregoing **RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**, and e-served and/or mailed a copy of the same upon:

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