

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-cv-00865-LTB-BNB

COLORADO CROSS-DISABILITY COALITION, a Colorado non-profit Corporation,  
LAURA HERSHEY,  
CARRIE ANN LUCAS,  
HEATHER REBEKAH RENEE LUCAS, by and through her parent and next friend,  
CARRIE ANN LUCAS  
ADRIANNE EMILY MONIQUE LUCAS, by and through her parent and next friend,  
CARRIE ANN LUCAS,  
ASIZA CAROLYN KOLENE LUCAS, by and through her parent and next friend,  
CARRIE ANN LUCAS, and  
DANIEL WILSON,

Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER, COLORADO,

Defendant and Third Party Plaintiff,

v.

SEMPLE BROWN DESIGN, P.C.,

Third Party Defendant.

---

**THIRD PARTY PLAINTIFF THE CITY AND COUNTY OF DENVER'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

---

The City and County of Denver, by and through its attorneys, Elizabeth A. Starrs and Elizabeth J. Hyatt, of Starrs Mihm & Pulkrabek LLP, requests partial summary judgment on its Third Party Complaint as follows:

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7.1

The undersigned certifies that she has not conferred with opposing counsel regarding the relief requested because such conferral is not required on motions under Fed. R. Civ. P. 56. D.C.Colo.LCivR 7.1(A).

I. INTRODUCTION

Semple Brown Design, P.C. (“Semple Brown”), entered into an Agreement to provide design services for the City and County of Denver (“the City”) in the renovation of the Newton Denver Municipal Auditorium. As part of the Agreement, Semple Brown agreed to defend the City against claims arising from design defects resulting from the design services it provided. Nevertheless, Semple Brown has refused to defend and indemnify the City against Plaintiffs’ claims in the present action which state claims based on design defects caused by Semple Brown in the performance of its duties under the Agreement.

The City and County of Denver (“the City”) requests partial summary judgment on its Sixth Claim for Relief (Declaratory Judgment) as set forth in its Third Party Complaint against Semple Brown Design, P.C. Specifically, the City seeks a declaration that under the August 12, 2002 Design Services Agreement for the Newton Denver Municipal Auditorium (“Auditorium”) Renovation Project between the City and Semple Brown Design, P.C. (“SBD”), SBD had and has a duty to defend the City from and against the claims brought by the Plaintiffs in this lawsuit.

## II. UNDISPUTED MATERIAL FACTS

The following facts are not in dispute:

1. Semple Brown Design, P.C. (“Semple Brown”) is an architectural design firm with its principal place of business in Denver, Colorado. See Third Party Complaint (Doc. No. 106) ¶ 3; Third Party Answer (Doc. No. 116) ¶ 3.
  
2. In 2002, the City submitted a request for proposals for professional services for the renovation of its Newton Denver Municipal Auditorium. See Third Party Complaint (Doc. No. 106) ¶ 4; Third Party Answer (Doc. No. 116) ¶ 4. The Auditorium, located in the Denver Performing Arts Complex, is owned by the City and leased to various entities as a venue for performing arts. *Id.* The renovation was a complete renovation of the inside of the Auditorium, including the construction of the Ellie Caulkins Opera House (“the Ellie”) and the Kevin Taylor Restaurant built within the existing outside structure of the Auditorium. *Id.*
  
3. On August 12, 2002, Semple Brown and the City entered into a Design Services Agreement (“the Agreement”) for the Newton Denver Municipal Auditorium (“Auditorium”) Renovation Project (“the Project”). See Third Party Complaint (Doc. No. 106) ¶ 6; Third Party Answer (Doc. No. 116) ¶ 6-11. The Agreement, set forth as Exhibit 1 to the Third Party Complaint and attached hereto as Exhibit 1 for quick reference, called for the complete renovation of the inside of the Auditorium. Exh. 1, Art. I (1.4).<sup>1</sup> The City’s request for proposals and Semple Brown’s May 27, 2002 Proposal to the City are Exhibits A and B to the Agreement and are incorporated into the Agreement. Exh. 1, p.1.

---

<sup>1</sup> Exhibit 1 is a certified copy of the complete Agreement. The original certification is kept at the offices of Starrs Mihm & Pulkrabek LLP.

4. Pursuant to the Agreement, in exchange for monetary compensation, Semple Brown agreed to provide comprehensive professional design services, including architectural, engineering, and related technical services including space planning, interior design, theatre design, and other related technical services required to design, construct and deliver to the City a complete, fully functional public improvement, free of material design, architectural, and engineering defects. Exh. 1, Art. II (2.1).

5. The Agreement further required Semple Brown to “design the Project in strict compliance with all applicable laws, statutes, codes, ordinances, rules and regulations, and industry standards.” Exh. 1, Art. II (2.2.7), Art. IX (9.1).

6. Semple Brown agreed that its design would “comply to all ADA requirements with equal access to all front and back-of-house programmed areas.” Exh. B of Exh. 1 (P. 29 of Appendix to Semple Brown Proposal). Semple Brown also agreed to prepare “drawings and other documents to fix and describe the size and character of the entire Project as to architectural, structural, civil, . . . interior design, *ADA compliance* and such other elements as may be appropriate. Exh. 1, Art. IV (4.1) (emphasis added).

7. The Agreement further required Semple Brown to provide all professional services required by the City in defending all claims against the City which relate to alleged errors and omission of Semple Brown or those performing under it, without additional compensation. Exh. 1, Art. II (2.2.8).

8. The Agreement further requires Semple Brown to defend, release, indemnify, and save and hold harmless the City from and against any and all claims, demands, suits, actions, liabilities, costs, expenses, and causes of action in any way resulting from, connected with, or

arising out of the tortious or negligent operations or performance of Semple Brown. Exh. 1, Art. XIV (14.2). The relevant language of the Agreement reads:

**14.2 Indemnification:** The Design Consultant [Semple Brown] shall defend, release, indemnify and save and hold harmless the City, its officers, agents and employees from and against: (1) any and all damages, . . . and (2) any and all claims, demands, suits, actions, liabilities, costs, expenses (including but not limited to reasonable attorney fees, expert witness fees and all associated defense fees), causes of action, or other legal, equitable or administrative proceedings of any kind or nature whatsoever, of or by anyone whomsoever, regardless of the legal theory(ies) upon which premised, including but not limited to contract, tort, express and/or implied warranty, strict liability, and workers' compensation, in any way resulting from, connected with, or arising out of, directly or indirectly, the tortious or negligent actions or omissions of the Design Consultant or those performing under it in connection with its operations or performance herewith . . .

Exh. 1, Art. XIV (14.2).

9. Pursuant to the Agreement, Semple Brown agreed to perform all work in accordance with the standards of care, skill and diligence provided by competent professionals who perform work or services of a similar nature to the work or services described in the Agreement. Exh. 1, Art. XXIII (23.3).

10. The Agreement is to be construed in accordance with Colorado law and is a complete integration of the agreement between the City and County of Denver and Semple Brown Exh. 1, Art. XXIII (23.7 and 23.19).<sup>2</sup>

11. Semple Brown proceeded to provide services under the Agreement, including all architectural, engineering, interior design, utility coordination, and other design services required for final completion of the renovation of the Ellie Caulkins Opera House and the Kevin Taylor

---

<sup>2</sup> The Agreement was properly amended on May 21, 2004 to reflect changes in the schedule and amount of compensation; however, those amendments did not affect any of the provisions at issue herein.

Restaurant. Third Party Complaint (Doc. No. 106) ¶ 12; Third Party Answer (Doc. No. 116) ¶ 12; Exh. 1, p.1.

12. On September 14, 2005, prior to the October 2005 public opening of the Ellie Caulkins Opera House, members of the Colorado Cross-Disability Coalition (CCDC) toured the Ellie. Following their tour, the CCDC, by letter dated September 16, 2005, notified the City of alleged failures of the renovation to comply with Americans with Disabilities Act Accessibility Guidelines (“ADAAG”). Exh. 2, ¶ 2 (Exh. A of Affidavit of Jack Finlaw). The items complained of included, but were not limited to, the following design defects:

- a. Failure to design access to the orchestra level via a ramp or elevator, instead requiring wheelchair patrons to use a lift unsuitable for individuals in wheelchairs;
- b. Failure to design wheelchair seating in orchestra level on a level base; and
- c. Failure to design wheelchair seating with sufficient room for two or more individuals using wheelchairs to sit together.

*Id.*

13. On or about October 13, 2005, the City notified Semple Brown in writing of the CCDC’s initial concerns. Third Party Complaint (Doc. No. 106) ¶ 16; Third Party Answer (Doc. No. 116) ¶ 16.

14. On November 18, 2005, Semple Brown responded to the City regarding the accessibility issues raised by the CCDC. Third Party Complaint (Doc. No. 106) ¶ 17; Third Party Answer (Doc. No. 116) ¶ 17; Exh. 2, ¶ 3 (Exhibit B of Affidavit of Jack Finlaw). In its response, Semple Brown took the position that the concerns of CCDC either were to be addressed during completion of the project or did not constitute violations of the law. *Id.*

15. However, the CCDC continued to be concerned with several issues and, ultimately, on May 5, 2006, the CCDC and several individuals filed this action against the City in the United States District Court, District of Colorado, Case No. 1:06-cv-00865-LTB, alleging violations of the Americans with Disabilities Act, the Rehabilitation Act, the Colorado Anti-Discrimination Act, and the Colorado Consumer Protection Act, arising from, *inter alia*, the design of the Ellie. (Doc. No. 1). The CCDC also filed a complaint with the United States Department of Justice (DOJ) alleging accessibility problems at the Ellie and the Kevin Taylor Restaurant. Exh. 2, ¶ 4 (Exh. C of Affidavit of Jack Finlaw).

16. The design defects raised in the CCDC's complaints included, but were not limited to, inadequacies with:

- a. Designated accessible seating locations;
- b. Orchestra level accessible seating location slope/rake;
- c. Emergency egress use for accessible seating location patrons from the orchestra level;
- d. Adequacy of maneuvering clearances for disabled patrons;
- e. Orchestra level cross access, *i.e.*, access from one side of the Ellie to the other;
- f. Accessible box office/will call window for disabled patrons;
- g. Figaro access for disabled patrons;
- h. Removal of mobility devices from the aisles/storage of mobility devices next to accessible seating;
- i. Accessible restrooms;
- j. Accessible bar and patron tables in the Kevin Taylor Restaurant;
- k. Signage; and
- l. Accessible elevators and/or lifts.

Doc. No. 1, ¶¶ 25-29, 32-33, 35-36, 38-43, 46-52, 115-116, 124-133, 139-145. The CCDC and individual plaintiffs' current complaint, the Third Amended and Supplemental Complaint, identifies design defects at the Ellie and Kevin Taylor Restaurant as the basis for the majority of their claims. See Doc. No. 99, ¶¶ 13-38, 61-69, 75-76, 79-100.

17. Pursuant to § 13-20-803.5, C.R.S., the City sent a Notice of Claim to Semple Brown on July 12, 2006. Third Party Complaint (Doc. No. 106) ¶ 20; Third Party Answer (Doc. No. 116) ¶ 20. In the Notice of Claim, the City demanded that Semple Brown both investigate the alleged defects at the Ellie and tender a written offer to remedy all identified defects and/or an offer to settle. Exh. 2, ¶ 5 (Exhibit D of Affidavit of Jack Finlaw). Semple Brown did not tender a written offer to remedy all identified defects and did not tender a written offer to settle.

18. The City has demanded that Semple Brown provide a defense for and indemnify the City against the claims made by CCRC. Third Party Complaint (Doc. No. 106) ¶ 21; Third Party Answer (Doc. No. 116) ¶ 21. Semple Brown has refused to do so.

19. As of today, Semple Brown has not remedied the defects alleged by the CCDC nor has Semple Brown tendered a defense or indemnification to the City. Third Party Complaint (Doc. No. 106) ¶ 22; Third Party Answer (Doc. No. 116) ¶ 22.

20. The City remains in litigation with CCDC regarding the accessibility of the Ellie and the Kevin Taylor Restaurant. The City has incurred substantial damages caused by the acts or omissions of Semple Brown, including, but not limited to, lost revenue for loss of seating, litigation costs, attorneys' fees, and construction costs.



### III. ARGUMENT AND LEGAL AUTHORITY

#### A. Summary of Argument

The undisputed material facts establish that the allegations made by Plaintiffs against the City and County of Denver arise out of alleged defects in the design of the Ellie and Kevin Taylor Restaurant. Furthermore, the undisputed material facts establish that Semple Brown agreed to defend in litigation alleging design defects. Accordingly, the City is entitled to declaratory judgment that Semple Brown had and has a duty to defend the City against Plaintiffs' allegations and claims in this case.<sup>3</sup>

#### B. Declaratory Judgment Standard:

Pursuant to 28 U.S.C. § 2201, this Court has the authority to “declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201. The procedures for obtaining declaratory judgment are governed by the Federal Rules of Civil Procedure. Fed. R. Civ. P. 57.

#### C. Summary Judgment Standard:

A plaintiff may move for summary judgment on all or part of a claim against him. *See* Fed. R. Civ. P. 56(a). The motion for summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact regarding the existence of an element of the plaintiff's claim and that the defendant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v.*

---

<sup>3</sup> The City also takes the position that Semple Brown has the duty to indemnify (in addition to defend) the City against the claims brought by the Plaintiffs in this matter. However, because those claims are not resolved, the City does not seek declaratory relief on the issue of indemnification at this time.

*Catrett*, 477 U.S. 317, 322 (1986). A party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth “affirmative evidence” showing there is a genuine issue of material fact for trial. See Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). The substantive law governing the claims at issue dictates whether a fact is material. See *Anderson*, 477 U.S. at 248. Thus, where the substantive law provides that parol evidence cannot vary the terms of an integrated contract, evidence beyond the four corners of the contract is immaterial and should not be considered on summary judgment. See *Applied Genetics, Int’l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1246 (10th Cir. 1990). If the nonmoving party cannot present admissible evidence upon which the jury could reasonably find in its favor, the moving party is entitled to summary judgment. See *Panis v. Mission Hills Bank, N.A.*, 60 F.3d 1486, 1490 (10th Cir. 1995); see also *Adams v. Am. Guar. & Liab. Ins. Co.*, 233 F.3d 1242, 1247 (10th Cir. 2000).

D. Contractual Duty to Defend:

Colorado courts have interpreted the contractual duty to defend in an insurance context. Colorado applies the “traditional duty to defend analysis to the underlying complaint to determine the insurer’s duty to defend.” *Cotter Corp. v. American Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 829 (Colo. 2004) (citing *Thompson v. Md. Cas. Co.*, 84 P.3d 496, 502 (Colo. 2004)).

A duty to defend is broader than a duty to indemnify and protects the defendee’s “legitimate expectation of a defense.” *Cotter Corp. v. American Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 827 (Colo. 2004); see also *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1090 (Colo. 1991). In Colorado, to defeat a duty to defend, an insurer (or here, a contractually

obligated defender) must establish that “there is no factual or legal basis on which the insurer might eventually be held liable to indemnify the insured.” *Hecla*, 811 P.2d at 1090. “The determination of the insurer's duty to defend is separate from the determination of the duty to indemnify, and is based solely on factual allegations contained in the underlying complaint.” *Cotter Corp. v. American Empire Surplus Lines Ins.*, *supra*, 90 P.3d at 827. This is often referred to as “the complaint rule.”

Although there are no published Colorado opinions discussing the duty to defend pursuant to a non-insurance contract clause, the complaint rule set forth by Colorado courts in insurance contract cases equally applies in non-insurance cases. Other jurisdictions have adopted the complaint allegation rule in non-insurance contexts, citing the fact that there is no logical basis not to extend it. *See, e.g., Pancakes of Hawaii, Inc. v. Pomare Properties Corp.*, 944 P.2d 83, 88-91 (Haw. App. 1997) (duty to defend based on management agreement arose when any of the allegations in the underlying complaint potentially included conduct that arose under the management agreement); *Herson v. New Boston Garden Corp.*, 667 N.E.2d 907, 914, fn.9 (Mass. App. 1996) (duty to defend based on contractual indemnity provision broader than duty to indemnify, rejecting argument that in non-insurance contracts, duty to defend is based upon duty to indemnify). *See also, J.R. Simplot Co. v. Chevron Chemical Co.*, 2006 U.S. Dist. LEXIS 70127, \*33-34 (D. Utah, Sept. 27, 2006) (unpublished) (rejecting argument that a different duty to defend analysis should be used in non-insurance contract case applying Utah law).

E. Sample Brown Has a Duty to Defend the City Against the Claims of Plaintiffs

As set forth above in Section II, virtually all of the claims brought by Plaintiffs in the Third Amended and Supplemental Complaint deal with design defects. The majority of the claims initially brought by Plaintiffs dealt with design defects. The design defects alleged by Plaintiffs constitute claims “resulting from, connected with, or arising out of, directly or indirectly, the tortious or negligent actions or omissions of the Design Consultant or those performing under it in connection with its operations or performance” of the Agreement. Therefore, under the plain language of the Agreement, Semple Brown had and has the duty to defend the City against the claims of Plaintiffs in this action.

#### CONCLUSION

For the reasons set forth above, the City requests this Court enter a declaration that under the Design Services Agreement, Semple Brown had and has the duty to defend the City against the claims of Plaintiffs in this lawsuit.

**DATED** this 11th day of July, 2008.

Respectfully submitted,

*/s/ Elizabeth J. Hyatt*

---

Elizabeth J. Hyatt  
Elizabeth A. Starrs  
STARRS MIHM & PULKRABEK LLP  
707 17<sup>th</sup> Street, Suite 2600  
Denver, CO 80202  
Telephone: 303-592-5900  
Facsimile: 303-592-5910  
Email: [ehyatt@starrslaw.com](mailto:ehyatt@starrslaw.com)  
[estarrs@starrslaw.com](mailto:estarrs@starrslaw.com)

*Attorneys for City and County of Denver*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 11, 2008, I electronically filed the foregoing **THIRD PARTY PLAINTIFF THE CITY AND COUNTY OF DENVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT** via CM/ECF which will send notification of such filing to the following:

**Amy Robertson**  
Fox & Robertson, P.C.  
910 16<sup>th</sup> Street, Suite 610  
Denver, CO 80202  
Email: [arob@foxrob.com](mailto:arob@foxrob.com)

**Timothy P. Fox**  
Fox & Robertson, P.C.  
910 16<sup>th</sup> Street, Suite 610  
Denver, CO 80202  
Email: [tfox@foxrob.com](mailto:tfox@foxrob.com)

**Kevin W. Williams**  
Legal Program Director  
Colorado Cross-Disability Coalition  
655 Broadway  
Suite 775  
Denver, CO 80203  
Email: [kwilliams@ccdconline.org](mailto:kwilliams@ccdconline.org)

**Timothy M. Schulte**  
Jackson Kelly, PLLC-Denver  
1099 18th Street  
#2150  
Denver, CO 80202  
Email: [tmschulte@jacksonkelly.com](mailto:tmschulte@jacksonkelly.com)

**Andrew S. Ford**  
Jackson Kelly, PLLC-Denver  
1099 18th Street  
#2150  
Denver, CO 80202  
Email: [asford@jacksonkelly.com](mailto:asford@jacksonkelly.com)

**Debra R. Knapp**

Denver City Attorney's Office-Municipal Operations  
201 West Colfax Avenue  
Department 1207  
Denver, CO 80202  
Email: [debra.knapp@denvergov.org](mailto:debra.knapp@denvergov.org)

**Mary E. Toornman**

Denver City Attorney's Office-Municipal Operations  
201 West Colfax Avenue  
Department 1207  
Denver, CO 80202  
Email: [mary.toornman@ci.denver.co.us](mailto:mary.toornman@ci.denver.co.us)

**Robert G. Wheeler**

Assistant City Attorney  
Department of Law  
Municipal Operations Section  
201 W. Colfax Ave., Dept. 1207  
Denver, CO 80202  
Email: [robert.wheeler@denvergov.org](mailto:robert.wheeler@denvergov.org)

*/s/ Elizabeth J. Hyatt*

---

Elizabeth J. Hyatt