COLORADO COURT OF APPEALS

DATE FILED: December 13, 2018
CASE NUMBER: 2018CA121

Court of Appeals No. 18CA0121
Larimer County District Court No. 16CV30362
Honorable Susan Blanco, Judge

Loveland Eisenhower Investments LLC, a California limited liability company,

Plaintiff-Appellee,

v.

City of Loveland, Colorado,

Defendant-Appellant.

ORDER REVERSED

Division VII
Opinion by JUDGE J. JONES
Navarro and Márquez*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 13, 2018

Waas Campbell Rivera Johnson & Velasquez LLP, Darrell G. Waas, Kathryn I. Hopping, Denver, Colorado, for Plaintiff-Appellee

Berg Hill Greenleaf Ruscitti LLP, Mary Sue Greenleaf, Josh A. Marks, Boulder, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2018.

¶ 1 Loveland Eisenhower Investments, LLC (LEI), a real estate development company, sued the City of Loveland and the Greeley and Loveland Irrigation Company (Irrigation Company) after the City refused to allow LEI to use certain water rights to meet the requirements of a development plan and annexation agreement approved by the City. The City moved to dismiss LEI's claims as barred by the Colorado Governmental Immunity Act (CGIA). The district court denied the motion. The City appeals the court's refusal to dismiss two of LEI's claims — those for breach of contract and breach of the implied covenant of good faith and fair dealing. Because we conclude that, despite their labels, both claims could have been brought as tort claims, we further conclude that they are barred by the CGIA. And so we reverse.

I. Background

¶ 2 For developers in Loveland to receive water services once their projects are completed, the City's municipal code requires such developers to contribute water rights to the City that can be used or converted for municipal use. LEI planned on building a mixed-use development that would be partially located in Loveland. It anticipated satisfying the water contribution requirement by giving

the City its 31.25 "Chubbuck Inches" (priority water rights delivered by the Chubbuck ditch system operated by the Irrigation Company) and informed the City of its right to that water. Relying on the City's representations that Chubbuck Inches were acceptable, LEI spent over half a million dollars developing a master plan for the project. The City approved that master plan in 2008. After LEI made additional efforts to facilitate the project, the City and LEI entered into an Annexation and Development Agreement (Annexation Agreement) in April 2010. This agreement gave LEI vested property rights and allowed it to move forward with the development.[1]

¶ 3 But, unbeknownst to LEI, in January 2010, the City had entered into a settlement agreement with the Irrigation Company that prohibited it from converting any more Chubbuck Inches for municipal use. This meant that the City would no longer accept Chubbuck Inches in satisfaction of the water contribution requirement. It wasn't until 2014, however, that the City told LEI of

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[1] We take the facts in this case from LEI's complaint and filings in connection with the motion to dismiss and motions for summary judgment. Nothing we say should be construed as an indication that those facts have been conclusively established.

the settlement agreement, and the City didn't amend its code to reflect the change until 2016. (LEI alleges that the previous code expressly contemplated acquisition of Chubbuck Inches, and that it relied on that code in proceeding with the project.)

¶ 4 LEI sued the City for breach of contract, breach of the implied covenant of good faith and fair dealing, and other claims not relevant to this appeal.[2] Both of these claims are expressly premised on the terms of the Annexation Agreement. LEI alleges that the City knew of LEI's intent to use Chubbuck Inches for the development and represented that it would accept those water rights; that the City knew that LEI was unaware of the settlement agreement; and that the City nevertheless entered into the Annexation Agreement, which, LEI contends, obligates the City to acquire the Chubbuck Inches.

¶ 5 The City moved to dismiss LEI's claims as barred by the CGIA. The district court denied this motion, reasoning that the CGIA

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[2] LEI also asserts claims against the Irrigation Company for intentional interference with contractual relations and intentional interference with prospective business advantage.

doesn't apply because the claims seek relief for prospective injuries and are rooted in contract, not tort.

II. Discussion

¶ 6 The City contends that the district court erred by denying its motion to dismiss LEI's claims for breach of contract and breach of the implied covenant of good faith and fair dealing. We are constrained to agree.

¶ 7 The CGIA provides public entities with immunity from liability for "all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief" the claimant chooses. § 24-10-106(1), C.R.S. 2018. This bar has two elements: (1) the claimant must allege an "injury" and (2) the claim must lie in tort or could lie in tort. *Open Door Ministries v. Lipschuetz*, 2016 CO 37M, ¶ 15.

¶ 8 Whether the CGIA bars a claim is an issue of law that we review de novo. *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1003 (Colo. 2008).

A. Present Injury

¶ 9 The City argues initially that the district court erred in concluding that the CGIA doesn't apply to LEI's claims because they

seek relief for prospective, rather than present, injury. According to the City, LEI alleges a present injury because it alleges that by virtue of the City's actions, either its project scope is substantially reduced or, because its Chubbuck Inches are worthless, it must acquire replacement water rights to proceed with the project as planned. LEI counters that the district court correctly concluded that it hasn't yet been injured because it hasn't yet paid for replacement water rights. The City is correct.

¶ 10 As noted, pursuant to section 24-10-106(1), for a claim against a public entity to be barred, the plaintiff must have alleged an "injury." An injury in this context means "death, injury to a person" or "damage to or loss of property" of any kind. § 24-10-103(2), C.R.S. 2018. The Colorado Supreme Court has interpreted the CGIA as barring only claims seeking relief for present injury, not those seeking to prevent future, or prospective, harm. *See Open Door Ministries*, ¶ 18 ("[T]he statutory language is clear: the CGIA applies only to claims that allege that an injury has already occurred.").

¶ 11 In *Open Door Ministries*, the Denver Zoning Authority had issued Open Door a permit that allowed it to provide housing to

people in need at a particular location even though the area was zoned for different use. *Id.* at ¶ 4. After the house began operating, Jesse Lipschuetz, who lived next door, requested that the Board of Adjustment for Zoning Appeals revoke the permit. *Id.* at ¶ 5. He filed an administrative appeal in district court after the board denied his request and added Open Door as a party. *Id.* at ¶ 6. Open Door filed cross-claims against the City of Denver for promissory estoppel and declaratory judgment to prevent revocation of the permit. *Id.* at ¶ 7. The supreme court held that these cross-claims weren't barred by the CGIA because they sought relief only for prospective injury, not for an injury that had already occurred. *Id.* at ¶ 12. The court determined that Open Door hadn't yet suffered an injury because it was still operating pursuant to a valid permit. *Id.* at ¶ 26. And it wouldn't suffer any injury unless Lipschuetz's lawsuit was successful — there was no past or ongoing injury that Open Door's cross-claims, if successful, would remedy. The district court determined that *Open Door Ministries* controls this case. But we conclude that *Open Door Ministries* is distinguishable.

¶ 12 The City's actions in this case, according to the complaint and LEI's filings, have already harmed LEI, in two alternative ways.

First, the City's refusal to accept Chubbuck Inches prevents LEI from moving forward with the project as planned: LEI has alleged that, without the practical ability to convert its Chubbuck Inches to municipal use (because doing so is too expensive), it is "left with a substantially reduced project inconsistent with the concept plan approved by the City." This is a reduction in the value of its development that has already occurred because of the City's settlement agreement with the Irrigation Company. Second, LEI alleges that as a result of the City's actions, if it doesn't substantially reduce the scope of its project, it must acquire replacement water rights "at very substantial cost and expense." The fact LEI hasn't yet obtained replacement water rights doesn't alter the fact that it is presently unable to use the Chubbuck Inches as intended and proceed forward with its project as planned. *Cf. City of Lafayette v. Barrack*, 847 P.2d 136, 137 (Colo. 1993) (city's notification to homeowners that it intended to terminate water services caused present injury because the threat of termination reduced the market value of the homeowners' properties).[3]

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[3] The fact LEI hasn't yet acquired replacement water rights may

¶ 13 We also observe that LEI's complaint seeks awards of damages on the two claims at issue. And LEI alleges that the Irrigation Company "has caused" it damages by entering into the settlement agreement. LEI's damages for the Irrigation Company's actions would seem to be, at least in part, the same damages it seeks from the City.

¶ 14 In sum, we conclude that LEI's claims against the City seek recovery for a present injury.

B. Tort Claims

¶ 15 The City also argues that the district court erred in determining that LEI's claims aren't barred because they are "rooted in contract and not tort." Again, we agree with the City.

¶ 16 As noted, public entities are immune from liability for claims that lie in tort or could lie in tort, regardless of the type of claim or form of relief sought. § 24-10-106(1). Where a claim could arise in

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affect the precise measure of its damages, but it doesn't make its damages incapable of estimation. And more importantly, it doesn't mean LEI hasn't already been injured. *See* § 24-10-103(2), C.R.S. 2018 (defining "injury" for purposes of the CGIA); *Dove v. Delgado*, 808 P.2d 1270, 1273-74 (Colo. 1991) (distinguishing between injury and damages; uncertainty as to precise amount of damages doesn't affect when an injury occurs); *see also McDowell v. United States*, 870 P.2d 656, 661 (Colo. App. 1994).

both tort and contract, it's barred; the claim isn't barred only if it could arise *solely* in contract. *Robinson*, 179 P.3d at 1004; *see Berg v. State Bd. of Agric.*, 919 P.2d 254, 258 (Colo. 1996); *Carothers v. Archuleta Cty. Sheriff*, 159 P.3d 647, 655 (Colo. App. 2006).

¶ 17 We must consider whether a claim is grounded in contract or tort on a case-by-case basis, closely considering the pleadings and undisputed evidence. *Robinson*, 179 P.3d at 1004; *see CAMAS Colo., Inc. v. Bd. of Cty. Comm'rs*, 36 P.3d 135, 138 (Colo. App. 2011). The primary inquiry is the source of the obligation: contract obligations "arise from promises made between parties," while "[t]ort obligations generally arise from duties imposed by law, and tortious conduct is a breach of a duty imposed by law, not by contract." *Carothers*, 159 P.3d at 655-56; *accord Foster v. Bd. of Governors of the Colo. State Univ. Sys.*, 2014 COA 18, ¶ 14. In this regard, "the CGIA is less concerned with what the plaintiff is arguing and more concerned with what the plaintiff could argue." *Robinson*, 179 P.3d at 1005.

¶ 18 LEI alleges that it informed the City of its contractual right to Chubbuck Inches; the City was aware that LEI didn't have any other water rights that it could contribute; the City represented that

it could accept and convert Chubbuck Inches for municipal use; and the City, knowing that LEI wasn't aware of the settlement agreement with the Irrigation Company, didn't inform LEI that it would have to contribute different water rights and later executed the Annexation Agreement anyway. (Indeed, in connection with the parties' summary judgment motions, LEI asserted that despite these facts, "the City enticed LEI to enter into the [Annexation] Agreement and continue development of its project until December of 2014 . . . .") So, although LEI alleges that the City breached the Annexation Agreement by refusing to accept Chubbuck Inches, it also alleges that the City entered into the Annexation Agreement knowing that, contrary to the terms of that agreement, it couldn't and wouldn't accept the Chubbuck Inches, and knowing that LEI wasn't aware of the settlement agreement or its import. These allegations could support a claim for negligent misrepresentation or fraud, and therefore LEI's claims "could lie in tort." *See Allen v. Steele*, 252 P.3d 476, 482 (Colo. 2011) (identifying the elements of negligent misrepresentation); *Ackmann v. Merchs. Mortg. & Tr. Corp.*, 645 P.2d 7, 13 (Colo. 1982) (identifying the elements of fraudulent concealment).

¶ 19 The Colorado Supreme Court's holding in *Robinson v. Colorado State Lottery Division* supports this conclusion. In *Robinson*, the plaintiff sued the Colorado State Lottery Division, asserting a variety of claims, including breach of contract and breach of the implied covenant of good faith and fair dealing. *See Robinson*, 179 P.3d at 1002. Her claims arose from the lottery's continued sale of scratch tickets after advertised prizes had already been awarded. *Id.* Looking to the nature of the alleged injury rather than the form of the complaint, the supreme court held that Robinson's claims were supported by allegations of misrepresentation or fraud and could therefore lie in tort. *Id.* at 1005-06. This was so because the claims were based on an alleged misrepresentation of fact — that the prizes could still be won — and the allegation that the lottery knew the represented prizes couldn't be won. *Id.* at 1005. The court observed that claims of fraud and negligent misrepresentation, on the one hand, and breach of contract, on the other hand, can exist in conjunction with one another. Where such claims overlap, the CGIA bar the claims, even if purportedly brought in contract. *Id.* at 1004.

¶ 20 So it is in this case. To repeat, the claims are based on the allegation that the City agreed to do something it knew or should have known it could not do. And this was because of a concealed fact — the settlement agreement. Because LEI could have brought these claims in tort, the CGIA bars them.[4]

¶ 21 We acknowledge, as have other divisions of this court, that application of the CGIA can have harsh consequences for plaintiffs. *E.g.*, *Ceja v. Lemire*, 143 P.3d 1093, 1097 (Colo. App. 2006), *aff'd*, 154 P.3d 1064 (Colo. 2007). But we must apply it as written and as construed by the supreme court.

III. Conclusion

¶ 22 We reverse that portion of the district court's order denying the City's motion to dismiss LEI's claims for breach of contract and breach of the implied covenant of good faith and fair dealing.

JUDGE NAVARRO and JUDGE MÁRQUEZ concur.

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[4] *Berg v. State Board of Agriculture*, 919 P.2d 254 (Colo. 1996), on which LEI relies, is distinguishable. In that case, the plaintiff alleged that the defendant made a promise that it didn't keep. There was no allegation of conduct pre-dating the promise that induced any action by the plaintiff, nor was there any allegation of a misrepresentation or concealment of fact.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: September 27, 2018

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