CASE ANNOUNCEMENTS
COLORADO SUPREME COURT
MONDAY, APRIL 30, 2018

"Slip opinions" are the opinions delivered by the Supreme Court Justices and are subject to modification, rehearing, withdrawal, or clerical corrections. Modifications to previously posted opinions will be linked to the case number in the petition for rehearing section the day the changes are announced.

Click on the case number to view the opinion in pdf format.

OPINIONS

2018 CO 31

Supreme Court Case No. 16SC970
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 16CA685

Petitioner:

The People of the State of Colorado,

In the Interest of Minor Child:

R.S.

v.

Respondents:

G.S. and D.S.

Dismissal Affirmed
en banc

JUSTICE MÁRQUEZ delivered the Opinion of the Court.
JUSTICE COATS concurs in the judgment.

No. 17SC781, Court of Appeals Case No. 16CA1351
Petitioner:
Edward Lee Mulcahy, Jr.,
v.
Respondent:
Aspen/ Pitkin County Housing Authority, a multi-jurisdictional housing authority.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 17SC803, Court of Appeals Case No. 16CA1025
In re the Marriage of
Petitioner:
Noel Lovett,
and
Respondent:
Stella Lynda Lovett.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 17SC891, Court of Appeals Case No. 15CA1092
Petitioner:
Martin Carlos Betancourt,
v.
Respondent:
The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC209, Court of Appeals Case No. 17CA1344
Petitioner:
A.W.,
v.
Respondent:
The People of the State of Colorado,
In the Interest of Minor Child:
E.S.W.

Petition for Writ of Certiorari DENIED. EN BANC.

2016CA1351 Aspen v Mulcahy 09-14-2017

COLORADO COURT OF APPEALS

Court of Appeals No. 16CA1351 Pitkin County District Court No. 15CV30150
Honorable Christopher G. Seldin, Judge

Aspen/Pitkin County Housing Authority, a Colorado multi-jurisdictional housing authority,

Plaintiff-Appellee,

v.

Edward Lee Mulcahy, Jr.,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division II

Opinion by JUDGE WELLING

Dailey and Hawthorne, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Announced September 14, 2017

Thomas Fenton Smith, Basalt, Colorado, for Plaintiff-Appellee

Haddon, Morgan and Foreman, P.C., Norman R. Mueller, Ty Gee, Adam Mueller, Denver, Colorado, for Defendant-Appellant

DATE FILED: September 14, 2017 CASE NUMBER: 2016CA1351

¶ 1 Defendant, Edward Lee Mulcahy, Jr., appeals the district court's grant of summary judgment in favor of plaintiff, the Aspen/ Pitkin County Housing Authority (the County). We affirm.

I. Background

¶ 2 To combat the rising cost of housing, the County held a lottery in which long term county residents could win an opportunity to purchase residential real property at a price below market value. Mulcahy won one of those opportunities.

¶ 3 After the lottery but before purchasing the property, Mulcahy agreed to abide by the County's Master Deed Restriction Agreement (Master Agreement), which was a condition imposed on all lottery winners. The Master Agreement placed various obligations on Mulcahy including that he be employed in the county and that he use the house as his primary residence. If Mulcahy failed to abide by the Master Agreement, the County could force a sale of the property.

¶ 4 Mulcahy bought the property and began building a house. Nine years later the County received a complaint that Mulcahy had breached the Master Agreement by not working in the county and not occupying the property as his sole residence, among other purported violations.

¶ 5 The County sent Mulcahy two warning letters. The second of those warning letters was dated August 5, 2015, and gave Mulcahy until August 19, 2015, to "provide documentation that [he was] meeting the residency and employment requirements." The second warning letter further advised Mulcahy that if he failed

to respond to the County he would be "sent a Notice of Violation (NOV) and have an opportunity to dispute the violation by requesting a Board Grievance Hearing before the [County] Board of Directors." Mulcahy failed to respond to the County's satisfaction, so on August 25, 2015, the County sent Mulcahy a notice of violation.

¶ 6 Under the Master Agreement, if Mulcahy disagreed with the County's assessment of a violation, he could dispute the merits of the alleged violation at a hearing, but he needed to request a hearing within fifteen days of the notice (i.e., by September 9, 2015). And, the Master Agreement provided that "[i]f no hearing is requested and the violation is not cured within the fifteen (15) day period, the violation shall be considered final and the Owner shall immediately list the Property for sale." The agreement also dictated that the failure to seek a hearing "shall constitute the failure to exhaust administrative remedies for the purpose o judicial review."

¶ 7 Mulcahy never requested a hearing.

¶ 8 Six weeks later, on October 1, 2015, the County sent Mulcahy a final letter demanding that he list his house for sale in accordance with the Master Agreement. He did not do so.

¶ 9 As a result, in December 2015, the County initiated this action asserting two claims for relief. First, the County asserted a breach of contract claim alleging that Mulcahy breached the Master Agreement by not meeting the agreement's residency or employment requirements. The County sought specific performance in the form of an order requiring Mulcahy to list the property for sale in accordance with the terms of the Master Agreement. Second, the County sought a declaratory judgment that the Master Agreement was a valid contract that gave the County the right to

force a sale in the event of a breach.

¶ 10 The district court concluded that Mulcahy's failure to seek a hearing deprived the court of jurisdiction to consider any defense he might have to the County's determination of a violation and entered summary judgment in favor of the County. The district court awarded the County specific performance and ordered Mulcahy's house to be sold, in accordance with the Master Agreement.

II. Analysis

¶ 11 Mulcahy first argues that the district court erred by concluding that the exhaustion doctrine applies to his case. Second, he contends that the district court erred by granting summary judgment on his equitable defenses.

¶ 12 Both issues involve reviewing the district court's grant of summary judgment. We review the grant of summary judgment de novo. Georg v. Metro Fixtures Contractors, Inc., 178 P.3d 1209, 1212 (Colo. 2008). Summary judgment is only appropriate if the pleadings and supporting documentation demonstrate there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c).

A. Exhaustion Doctrine

¶ 13 Under the exhaustion doctrine, a court lacks subject-matter jurisdiction over an action when a party fails to utilize an adequate administrative remedy that is available. City & Cty. of Denver v. United Air Lines, Inc., 8 P.3d 1206, 1212 (Colo. 2000). We strictly adhere to the exhaustion doctrine. Colo. Dep't of Pub. Health & Env't v. Bethell, 60 P.3d 779, 784 (Colo. App. 2002) (citing Denver-Laramie-Walden Truck Line, Inc. v. Denver-Fort Collins Freight Serv., Inc., 156 Colo. 366, 371, 399 P.2d 242, 243 (1965)). The exhaustion doctrine has some exceptions, none of which are alleged to be present here. See United Air Lines, Inc., 8 P.3d at 1213

(exhaustion doctrine does not apply when doing so would be futile or when party raises constitutional issues).

¶ 14 Mulcahy did not request a hearing, but he contends that the exhaustion doctrine cannot be invoked by a plaintiff who is not defending a counterclaim or contesting an affirmative defense. We do not agree.

¶ 15 This case presents an almost identical situation to the one in Bethell. In that case, the Colorado Department of Public Health (CDPHE) issued a compliance order to a solid waste disposal company that violated state regulations. Bethell, 60 P.3d at 784. The compliance order contained a notice that the defendant could request a hearing within ten days to dispute CDPHE's determination, but the defendant di not request a hearing. Id. A division of this court affirmed the district court's grant of summary judgment in favor of CDPHE, concluding that the defendant's failure to seek administrative review precluded the district court from considering the defendant's potential defenses. Id. The same is true in this case. Mulcahy received a notice of violation and had the opportunity to contest the County's allegations at a hearing. When he did not, the County's finding of a violation became final pursuant to the terms of the Master Agreement. And because he had an adequate administrative remedy available that he did not pursue, the exhaustion doctrine divests the district court of jurisdiction to consider Mulcahy's challenge to the County's determination of a violation.

¶ 16 Mulcahy argues that Bethell does not apply because in that case the court granted summary judgment against the defendant, precluding him from raising affirmative defenses, and not in favor of CDPHE on its claims. That, however, is a distinction without a difference. Failure to exhaust administrative remedies

deprives the court of jurisdiction to consider the collateral attack on the administrative determination. Thomas v. F.D.I.C., 255 P.3d 1073, 1077 (Colo. 2011). The outcome does not change just because it is the plaintiff instead of the defendant invoking the exhaustion doctrine. Whether it is a plaintiff or defendant invoking it, the exhaustion doctrine serves to prevent a party from circumventing the administrative process. As the court stated in Bethell, "allowing a defendant to assert a defense which could have been, but was not, raised in the underlyin administrative proceeding would constitute an impermissible collateral attack on the administrative order." 60 P.3d at 784-85; see also Coachella Valley Mosquito & Vector Control Dist. v. Cal. Pub. Emp't Relations Bd., 112 P.3d 623, 628 (Cal. 2005) ("The exhaustion requirement applies to defenses as well as to claims for a affirmative relief.").

¶ 17 Mulcahy asserts that the exhaustion doctrine does not relieve the County of its burden to prove that Mulcahy failed to comply with his obligations under the Master Agreement. But the language of the Master Agreement leads us to a different conclusion.

¶ 18 Pursuant to the agreement, "[i]f no hearing is requested and the violation is not cured within the fifteen (15) day period, the violation shall be considered final and the Owner shall immediately list the Property for sale." (Emphasis added.) It is undisputed Mulcahy did not request a hearing, and there is no evidence in the record that Mulcahy cured the violations listed in the notice of violation within fifteen days. Those failures alone constitute a breach of the Master Agreement and trigger the County's right to force a sale of the property. Under these circumstances, no further proof is required to establish a violation as a matter of

law. See Bethell, 60 P.3d at 783.

¶ 19 In Bethell, CDPHE was not required to prove what it already had determined before issuing its compliance order, namely that the defendant had violated state regulations. Id. The defendant's failure to exhaust made such an exercise unnecessary because that determination could only have been challenged in an administrative proceeding. Id. at 784-85. Here, if Mulcahy wanted to dispute the County's determination, he needed to have followed the procedures outlined in the Master Agreement and seek a hearing. Having failed to do so, the issue of whether Mulcahy violated the Master Agreement was conclusively resolved and revisiting that issue is beyond the district court's jurisdictional reach.

¶ 20 In sum, the Master Agreement obligated Mulcahy to seek administrative review of the County's determination that he breached the agreement. Because Mulcahy did not seek a hearing, absent an exception, the exhaustion doctrine bars him from raising any claim or defense to the County's decision. The record contains no material facts to the contrary, so the district court appropriately entered summary judgment in the County's favor

B. Equitable Defenses

¶ 21 Mulcahy next argues that the district court erred by granting summary judgment on his affirmative defenses. Mulcahy raised a number of affirmative defenses in the district court, including the equitable defenses of unclean hands and estoppel.

¶ 22 Mulcahy argues that the district court maintained jurisdiction to consider equitable defenses because the County, and not Mulcahy, invoked the court's

jurisdiction. As discussed above, the exhaustion doctrine imposes a jurisdictional bar that prevented the district court from considering Mulcahy's defenses, as the assertion of those defenses did not fit into a recognized exception. To be persuaded by Mulcahy's argument in this regard would require us to recognize the assertion of equitable defenses as an exception to the exhaustion requirement. We decline to do so.

¶ 23 Exceptions to the exhaustion doctrine arise in situations where the policies underlying the doctrine would not be served by requiring a party to pursue administrative remedies. United Air Lines, Inc., 8 P.3d at 1213. But, for the five reasons set forth below, we conclude that requiring a party to bring equitable defenses in an administrative proceeding supports the policy goals of the exhaustion doctrine.

¶ 24 First, applying the exhaustion requirement to affirmative defenses that could have been raised in front of the agency prevents interruption and fragmentation of the administrative process. Id. Mulcahy's equitable defenses are inextricably linked to resolution of whether he violated the Master Agreement. Mulcahy's equitable defenses involve the same facts the County must consider when determining whether he breached the Master Agreement. Allowing Mulcahy to raise these defenses at this point would interrupt the administrative process and require that the district court hear only a small piece of the case without the benefit of a complete factual record, which would have been developed had a hearing been requested and held.

¶ 25 Second, the exhaustion doctrine is based on the premise that an agency should be allowed to use its expertise to develop a factual record. Id. at 1212. The factual

record upon which the County based its decision in this case could have just as easily included facts related to his defenses of unclean hands or estoppel. Even if Mulcahy's defenses were not successful before the County, the development of a record would have facilitated judicial review of the County's decision. See McKart v. United States, 395 U.S. 185, 194 (1969) ("[J]udicial review may be hindered b the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise."). The district court had no record upon which it could review whether the County appropriately exercised its discretion.

¶ 26 Third, the exhaustion requirement allows an agency an opportunity to correct its own errors, thereby preserving the agency's autonomy. Id. For example, in his unclean hands defense, Mulcahy asserts that he is entitled to relief because he received conflicting communications from County officials. Assuming these allegations are true, if these facts were brought to the County's attention at an administrative hearing, the County would have been able to rectify that situation not only for Mulcahy, but for future participants in the program as well. But by not requesting a hearing, the County had no such opportunity.

¶ 27 Finally, the exhaustion requirement preserves judicial resources by ensuring that courts only intervene if the administrative process does not provide an adequate remedy. United Air Lines, Inc., 8 P.3d at 1213. Clearly, requiring a defendant to bring equitable defenses asserted here in an administrative proceeding preserves judicial resources by airing these contentions at the agency level, furthering the purpose of exhaustion. Mulcahy does not identify a single issue he sought to raise before the district court that the County was ill-equipped or powerless to address.

¶ 28 In short, none of the policies underlying the exhaustion doctrine are frustrated by requiring that the equitable defenses of unclean hands and estoppel be raised in an administrative proceeding. In fact, requiring Mulcahy to do so is consistent with Bethell's edict that the exhaustion doctrine applies not only to claims but to defenses. 60 P.3d at 784-85. Accordingly, the district court did not err by applying the exhaustion doctrine to each of Mulcahy's defenses.

¶ 29 There is, however, one aspect of Mulcahy's equitable defense that could lead u to conclude that the exhaustion requirement does not apply, namely Mulcahy's contention that the County purposefully sent the "final letter" knowing he was ou of the country. According to Mulcahy, beginning in July 2015, the County repeatedly assured him that he would have time to come into compliance with the Master Agreement's employment and residency requirements, but then without additional notice the County sent a final letter demanding a sale of the home in October 2015, when the County knew he would be out of the country. This argument differs from the other aspects of Mulcahy's equitable defenses in that it involves the adequacy of the administrative process and the fundamental fairness of the proceeding, issues which implicate due process and would, therefore, be exempt from the exhaustion requirement. United Air Lines, Inc., 8 P.3d at 1213. But the facts, even viewed in a light most favorable to Mulcahy, do not support his contention of a due process violation.

¶ 30 In his affidavit in opposition to summary judgment, Mulcahy states that he was out of the country when County officials "sent the 'Final Letter'" (i.e., the October 1, 2015, letter). Further, he states that County officials knew he was out of the country because on October 8, 2015, they sent the final letter via email in

addition to having mailed it on October 1. But the October 1 final letter was not the document that triggered the administrative process. Instead, it was the August 25, 2015, notice of violation that started the clock on Mulcahy's fifteen-day period to demand a hearing to contest the violations. The final letter merely demanded that Mulcahy list the property for sale as outlined in the Master Agreement, saying nothing about the ability to request an administrative hearing.

¶ 31 In other words, under the Master Agreement, a party's deadline to request a hearing is triggered not by a final letter demanding the property be sold, but by a notice of violation. The County sent the notice of violation, which included information regarding the administrative hearing requirement, on August 25, 2015. Therefore, Mulcahy's deadline to request a hearing was September 9, 2015, three weeks before the County sent the final letter, which was nothing more than the County requesting Mulcahy to take certain action now that the fact of a violation had been conclusively determined.

¶ 32 Moreover, the facts in the record do not create an issue of disputed fact as to whether Mulcahy was out of the country when the County sent the August 25th notice of violation. The record contains no competent evidence that, when viewed in a light most favorable to Mulcahy, establishes that he left the country prior to the notice of violation being sent or that the County acted inequitably with respect to issuing the notice of violation. Mulcahy does argue that he was out of the country when the County sent the notice of violation by making such an assertion in one paragraph of his response to the County's motion for summary judgment. But a genuine issue of material fact cannot be established simply by arguing the issue; instead he must set forth specific facts by affidavit or otherwise show a genuine

dispute of fact. People in Interest of A.C., 170 P.3d 844, 846 (Colo. App. 2007). One unaverred argument in a brief does not meet this standard. And the evidence in the record does not show that there is a genuine dispute of material fact that the County purposefully sent the August 25th notice of violation when Mulcahy was out of the country. Accordingly, the district court did not err by granting summary judgment in favor of the County.

III. Conclusion

¶ 33 The judgment is affirmed.

JUDGE DAILEY and JUDGE HAWTHORNE concur

IT IS FURTHER ORDERED that Mulcahy shall provide APCHA, within 30 days of the date of this Order, the information required under Paragraph 9 of the Deed Restriction so that APCHA may determine the allowable sale price;

IT IS FURTHER ORDERED that APCHA is the prevailing party and therefore entitled to fees and costs pursuant to ¶¶ 22 and 24 of the Deed Restriction;

IT IS FURTHER ORDERED that APCHA shall submit its request for fees and costs in accordance with Rule 121 § 1-22.

Issued Date: June 3, 2016

District Court, Pitkin County, Colorado 506 East Main Street, Suite 300 Aspen, CO 81611

Plaintiff(s): ASPEN PITKIN COUNTY HOUSING AUTHORITY

Vs.

Defendant(s): EDWARD L MULCAHY JR. Case 2015CV30150

ORDER ON PENDING MOTIONS

This matter is before the Court on the Motion for Summary Judgement filed by Plaintiff Aspen Pitkin County Housing Authority ("APCHA"); the Cross-Motion for Judgment on the Pleadings filed by Defendant Edward Lee Mulcahy, Jr.; and Mulcahy's Motion for Leave to Amend Answer.

I. FINDINGS OF FACT

1. The case is one for breach of contract. In its first cause of action, APCHA seeks a decree of specific performance directing Mulcahy to list his home located at 53 Forge Road in Aspen ("Property") for sale in accordance with the terms of an affordable housing deed restriction recorded March 7, 2006 at Reception No. 521577 of the Pitkin County records ("Deed Restriction"). APCHA also seeks a declaratory judgment that the Deed Restriction is valid, that Mulcahy is in violation of it, and that he must sell the home as provided in the deed restriction. APCHA also seeks attorney fees.

2. Among other things, the Deed Restriction requires—via incorporation of the APCHA Employee Housing Guidelines as amended—that Mulcahy be employed in

Pitkin County by a Pitkin County employer for a minimum of 1500 hours per year. *See http://www.apcha.org/2014%20Guidelines.pdf* (January 2014 Affordable Housing Guidelines) at Part III § 1, ¶ 2.[1]

3. Mulcahy admits the Property is subject to the Deed Restriction. He also admits, among other things, that he has not complied with the employment requirements of the Deed Restriction, though he evidently is making efforts to do so through employment with High Mountain Taxi and the Aspen School District. He argues, however, that this does not matter because APCHA filed its claim too late, in violation of the statute of limitations. He also claims exceptions to the requirement that he exhaust administrative remedies, and raises certain equitable defenses.

4. For its part, APCHA argues that Mulcahy is barred from raising any defenses to its claims because Mulcahy failed to avail himself of an administrative process designated in the Deed Restriction for resolution of the sorts of disputes presented here. See Deed Restriction, Ex. 3 at p. 8 of 17, ¶ 21.

5. APCHA evidently began investigating Mulcahy's compliance with the Deed Restriction in May of 2015. *See* Ex. 5, ¶ 2. On July 17, 2015 APCHA's Julie Kieffer sent Mulcahy a "1st Compliance Letter" informing him, among other things, that he needed to demonstrate compliance with residency and employment requirements of the Deed Restriction by July 31, 2015. *See id.,* Appx. A at 2. This letter erroneously referred him to Part II, § 3 of the APCHA Guidelines, which refer to rental rather than purchased housing. It told him that he had "14 calendar days from the date of this 1st Compliance Letter to respond and 60 calendar days . . . to fully resolve this issue. If you fail to respond to the APCHA you will be sent a Notice of Violation (NOV) and have an opportunity to dispute the violation by requesting a Board Grievance Hearing before the APCHA Board of Directors." *Id.*

6. According to Kieffer, Mulcahy did not provide sufficient documentation in response to the 1st Compliance Letter to determine he was in compliance with the Deed Restriction. *See* Ex. 5, ¶ 5. Kieffer therefore sent him a "2nd Compliance Letter" dated August 5, 2015. The content of this letter appears to be identical to

[1] Neither party attaches, or cites to, the applicable version or section of the Guidelines. Given the time frasme at issue, however, the 2014 version appears to govern.

the 1st Compliance Letter, including the erroneous direction to Part II § 3 of the APCHA Guidelines, a statement in the final paragraph that the 2nd Compliance Letter was actually a 1st Compliance Letter, and what appeared to be a restart of the clock on the 60 days allowed to fully resolve the issue. *See* Ex. 5, Appx. B.

7. Mulcahy again did not provide sufficient information in response to the 2nd Compliance Letter, and on August 25, 2015 Kieffer issued an NOV to Mulcahy. *See* Ex. 5, Appx. C. The NOV set a deadline of September 9, 2015 to either: (1) list the Property for sale; (2) document his compliance with residence and employment requirements of the Deed Restriction; or (3) request a hearing in front of the APCHA board of directors.

8. Mulcahy asserts he did not receive the NOV until after the September 9, 2015 deadline had passed because he was traveling in Africa at the time. Mulcahy asserts that Kieffer knew he was out of the country when she sent the NOV and would be unable to receive it prior to the September 9, 2015 deadline, but his grounds for this assertion are only an email dated October 8, 2015. *See* Ex. D. He does not provide any evidence asserting or demonstrating that Kieffer knew he was out of town when she sent the NOV.

9. Notwithstanding the passage of the September 9, 2015 deadline, Kieffer continued to communicate with Mulcahy concerning evidence that might establish his compliance with the employment requirements of the Deed Restriction. *See* Ex. E-F.

10. In his affidavit, Mulcahy alleges that APCHA held up issuance of a Certificate of Occupancy for the Property, and that its action in this regard was motivated by animus and a concern that if a CO issued, APCHA may not be able to remove him from the Property. *See* Ex. I, ¶ 16. This action, however, took place in the spring of 2016.

II. SUMMARY JUDGMENT STANDARD

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10. In his affidavit, Mulcahy alleges that APCHA held up issuance of a Certificate of Occupancy for the Property, and that its action in this regard was motivated by animus and a concern that if a CO issued, APCHA may not be able to remove him from the Property. *See* Ex. I, ¶ 16. This action, however, took place in the spring of 2016.

II. SUMMARY JUDGMENT STANDARD

11. Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." C.R.C.P. 56(c). The moving party bears the initial burden of showing no genuine issue of material fact exists; the burden then shifts to the nonmoving party to establish a triable issue of fact. All doubts must be resolved against the moving party; at the same time, the nonmoving party must receive the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts. Summary judgment is a drastic remedy, to be granted only when there is a clear showing that the controlling standards have been met. Even where it is "extremely doubtful" that a genuine issue of material fact exists, summary judgment is inappropriate. *Westin Operator, LLC v. Groh*, 347 P.3d 606, 611 (Colo. 2015).

III. APCHA's Motion for Summary Judgment

12. APCHA seeks a decree of specific performance ordering Mulcahy to list the Property for sale at a price to be determined by APCHA and an order requiring Mulcahy to provide APCHA with sufficient documentation to establish construction costs. Presumably if the first of these requests is granted the second would be one Mulcahy would embrace, since it is entirely in his interest to provide APCHA with an orderly and documented explanation of all costs he is entitled to under the Deed Restriction and Guidelines.

13. A decree of specific performance is designed to remedy a past breach of contract by fulfilling the legitimate expectations of the wronged promisee. *See Ballow v. PHICO Ins. Co.*, 878 P.2d 672, 680 (Colo. 1994). A suit for specific performance is an equitable action. The right to specific performance is not absolute. Whether the remedy should be granted depends upon the equities of the case, and rests within the sound discretion of the trial court. *Schreck v. T & C Sanderson Farms, Inc.*, 37 P.3d 510, 514 (Colo. App. 2001).

14. Contracts must be reasonably certain to justify a decree of specific performance. Courts cannot make contracts for parties and then order them specifically performed. Thus, the indefiniteness of a contract is an adequate reason to refuse specific performance. The contract itself must make the precise act to be done clearly ascertainable. It is fundamental that to enable the court to decree specific performance, the terms of the contract must be clear, definite, certain, and complete. *See id.* (citations omitted).

15. Specific performance is a remedy for breach of contract. Thus, the party seeking such relief must first prevail on a cause of action for breach of contract. "It has long been the law in Colorado that a party attempting to recover on a claim for breach of contract must prove the following elements: (1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff. The "performance" element in a breach of contract action means "substantial" performance. Substantial performance occurs when, "although the conditions of the contract have been deviated from in trifling particulars not materially detracting from the benefit the other party would derive from a literal performance, [the defendant] has received substantially the benefit he expected and is, therefore, bound to pay." *W. Distrib. Co. v. Diodosio,* 841 P.2d 1053, 1058 (Colo. 1992).

16. Mulcahy does not dispute APCHA's recitation of undisputed facts, and the Court concludes that they are sufficient to establish: (1) the existence of a contract; (2) performance by APCHA through the act of conveying the Property to Mulcahy; and (3) harm to APCHA from violation of the Deed Restriction, which is designed to advance the sustainability of a diverse working community in Aspen. The remaining question, to which the parties devote essentially all of their argument, is whether or not Mulcahy failed to perform the contract or was excused from doing so.

17. On this question, APCHA claims the Court lacks subject matter jurisdiction to consider any arguments from Mulcahy that he in fact performed because, by failing to appeal the NOV to the APCHA Board, he failed to exhaust his administrative remedies as the Deed Restriction requires.

18. The Court of Appeals has specifically held that APCHA has authority to hold a hearing to review an NOV. *See Meyerstein v. City of Aspen*, 282 P.3d 456, 467 (Colo. App. 2011). The Deed Restriction here specifically authorizes administrative enforcement of its terms, *see* Ex. 3, ¶¶ 20-21. Indeed, it specifically sets forth the NOV process, including an owner's right to request a hearing within 15 days and a requirement that "[i]f no hearing is requested and the violation is not cured within the fifteen (15) day period, the violation shall be considered final and the Owner shall immediately list the Property for sale . . . ." *Id.* at ¶ 21.

19. The same paragraph also states: "[t]he failure to request a hearing shall constitute the failure to exhaust administrative remedies for the purpose of judicial review."

20. The Colorado Supreme Court has held that governmental entities are authorized to incorporate administrative dispute resolution mechanisms into their contracts. *See City and County of Denver v. District Court*, 939 P.2d 1353, 1365 (Colo. 1997). The appellate bench analyzes such provisions as it does other alternative dispute resolution provisions such as those providing for arbitration. *See id.* at 1364. The Supreme Court in that case held that a district court abused its discretion by holding that certain contractual disputes were not covered by the ADR provision at issue there. *See id.* at 1368.

21. A district court must compel ADR unless the court can say with positive assurance that the ADR clause is not susceptible of any interpretation that encompasses the subject matter of the dispute. There is a presumption in favor of ADR, and the Court must resolve doubts about the scope of the ADR clause in favor of the ADR mechanism. *See id.*

22. The Court concludes that the underlying dispute here falls within the scope of the administrative enforcement and review provisions embodied in the Deed Restriction. The Deed Restriction is clear on its face and plainly encompasses precisely the sort of dispute presented here. Mulcahy does not argue that the provisions for administrative enforcement and review are invalid, and the Court concludes that they are.

23. Mulcahy acknowledges that obtaining affordable housing is a privilege, not a right. The Property he acquired here came with burdens that are atypical in a free-market transaction: restrictions on residency, employment, and rental of the Property, to name a few. These burdens on the purchaser, however, are balanced by a purchase price that is dramatically lower than one would find in the free market in Aspen. This trade-off is at the core of any contract for APCHA housing, and is the *sine qua non* of the bargain struck by both parties to the transaction. Mulcahy does not argue that he entered into the contract involuntarily, and the Court concludes that the Deed Restriction is a binding and valid component of the contract for sale whereby Mulcahy took title to the Property.

24. There is no dispute that Mulcahy failed to request a hearing from the APCHA Board in the time permitted by ¶ 21 of the Deed Restriction. Mulcahy argues, among other things, that his failure to do so should be excused because he was traveling in Africa at the time the NOV was sent, and because Kieffer was "stringing him along" with representations about what did and did not matter in his case.

25. The Court concludes, however, that Mulcahy received adequate notice from the 1st and 2nd Compliance Letters to make him aware that an NOV was coming. Mulcahy does not argue that he in fact provided evidence of employment sufficient to establish compliance with the APCHA Guidelines. The 1st and 2nd Compliance Letters, though not models of precision, nonetheless put Mulcahy on notice that APCHA was pursuing enforcement actions against him, and set forth a timeframe during which such enforcement actions would take place.

26. Although Mulcahy complains that the Compliance Letters did not inform him of the time available to respond to the NOV, that deadline is contained within the Deed Restriction itself: 15 days. The Court concludes that Mulcahy was aware of APCHA's pending enforcement proceedings when he elected to travel to Africa. He cannot blame his travel choices on APCHA, and he cannot use them as an excuse to avoid compliance with the plain language of the Deed Restriction.

27. Since Mulcahy failed to avail himself of the administrative review process provided for in the Deed Restriction, the Court concludes that it cannot consider any defenses to the APCHA claims regarding his violation of the Deed Restriction. *See, e.g., City and County of Denver v. United Air Lines*, 8 P.3d 1206, 1213-1216 (Colo. 2000) (applying exhaustion doctrine in context of contractual administrative claims process like that here); *Liberty Bankers Life Ins. Co. v. First Citizens Bank & Trust Co.*, 2014 COA 151 (barring counterclaims for failure to exhaust).

District Court, Pitkin County, Case Number 2015CV30150 Aspen Pitkin County Housing Authority Vs. Edward L Mulcahy Jr. ORDER ON PENDING MOTIONS

28. The Court concludes that the Deed Restriction clearly provides for the Property to be listed for sale under circumstances such as these. This element of the claim for specific performance is therefore satisfied. The Court further concludes that it is equitable to hold parties to the promises they make in contracts, and that this is particularly true here where the contract at issue is designed to advance the public's interest in maintaining a diverse and stable population and workforce in Aspen and Pitkin County. APCHA's claims for specific performance must therefore be granted unless Mulcahy can establish some basis to excuse his compliance with the administrative review requirements. For the reasons discussed below, the Court concludes Mulcahy has failed to do so. The Court will therefore grant the request for an Order of specific performance directing Mulcahy to list the Property for sale.

IV. Mulcahy's Cross Motion for Judgment on the Pleadings

29. Mulcahy's Cross-Motion raises a variety of arguments in an effort to avoid APCHA's claims on Summary Judgment and dismiss the underlying Complaint: (1) the statute of limitations; (2) exceptions to the exhaustion requirement; (3) unclean hands and estoppel; and (4) cure. The Court has considered all of Mulcahy's arguments; to the extent an argument is not specifically discussed below it has been considered and rejected for the following reasons.

A. Statute of Limitations

30. Mulcahy first argues that § 13-80-101, C.R.S. bars APCHA's action here. The Court concludes that this argument could have been presented to APCHA through the administrative review process, and is therefore barred for the reasons discussed above. *See generally Thomas v. Farmers Ins. Exch.,* 857 P.2d 532, 534 (Colo. App. 1993).

31. Even if this conclusion were mistaken, however, the Court disagrees with Mulcahy because it concludes the action for specific performance APCHA asserts here arose only after Mulcahy failed to avail himself of the administrative review process established in the Deed Restriction, and because the Deed Restriction imposed continuing obligations on Mulcahy with regard to residence and employment.

32. Mulcahy argues that APCHA should have known he was no longer employed in Pitkin County when the Aspen Skiing Company's decision to fire him was published in a local newspaper. The Court, however, disagrees with this analysis because Mulcahy could have gotten another job without APCHA realizing it. APCHA handles thousands of individuals who benefit from its affordable housing program. It is not reasonable to assume the agency was following Mulcahy's comings and goings.

33. Moreover, and more importantly, Mulcahy's position ignores the fact that the administrative review process established a protocol for Mulcahy to demonstrate his compliance with the Deed Restriction. Given that the Deed Restriction itself sets forth a specific process for determining the existence of breach, only after that process was complete, and Mulcahy had been given the opportunity to demonstrate his compliance, would the claim for specific performance asserted here arise. Stated otherwise, any action for breach of contract by APCHA prior to offering the right to a hearing would have been premature under the Deed Restriction, at least on these facts.

34. Finally, the Court concludes that the Deed Restriction imposes a continuing obligation on Mulcahy to remain employed in Pitkin County. Because that obligation is continuing, a breach at any time within the three-year limitation

period would give rise to a cause of action for breach. *See, e.g., Neuromonitoring Assoc. v. Centura Health Corp.*, 351 P.2d 486, 493 (Colo. App. 2012).

B. Exceptions to Exhaustion

35. Mulcahy next argues that the exhaustion requirement does not apply here because: (1) the statute of limitations is a legal issue for decision by the Court; (2) review would have been futile; and (3) his case raises constitutional questions.

36. As noted above, a limitations issue is not outside the scope of an arbitrator's authority. *See, e.g., Thomas v. Farmers Ins. Exchange,* 857 P.2d 532, 534 (Colo. App. 1993); *Wagner Const. Co. v. Pacific Mechanical Corp.*, 157 P.3d 1029, (Cal. 2007). The Colorado Supreme Court views the sort of administrative review process at issue here as a form of arbitration. *See Denver v. District Court*, 939 P.2d at 1365. Thus, the Court doubts Mulcahy's view of the law is correct. Even if it were, however, the Court has already concluded that the statute of limitations does not bar APCHA's claim here. Accordingly, the Court rejects this argument.

37. The Court also rejects the argument that review would have been futile. The futility exception is not applicable here because the record indicates that APCHA was in fact working with Mulcahy to determine what he would need to do to avoid the sale of his home. The review process presented Mulcahy with an opportunity to present the facts of his case and perhaps seek some sort of schedule for compliance from APCHA. The fact that he was in violation of the Deed Restriction and failed to take the steps necessary to plead his case cannot be used as an argument for futility. There is no indication that APCHA applies a categorical rule in these circumstances, and so the futility argument is not well taken. *See Liberty Bankers*, 2014 COA 151, ¶ 21.

38. Mulcahy next argues that APCHA's procedure raises constitutional questions that exempt him from the exhaustion requirement. He contends that APCHA's procedures preclude valuing the sweat equity he put into building his own house, and that this constitutes an unconstitutional taking under the federal and Colorado constitutions. As an initial matter, the Court notes that Mulcahy agreed to abide by the Deed Restriction and APCHA Guidelines when he availed himself of the privilege of affordable housing. Generally speaking, the takings clause does not apply when the claim asserted is governed by the rights and remedies defined in the contract. *See, e.g., Century Expl. New Orleans, Inc. v. United States,* 103 Fed. Cl. 70, 78 (2012) (collecting Federal Circuit and Court of Claims decisions on this issue*); Cty. of Ventura v. Channel Islands Marina, Inc.*, 159 Cal. App. 4th 615, 625, 71 Cal. Rptr. 3d 762, 768 (2008).

This is because the scope of a property interest for Fifth Amendment purposes is defined, and delimited, by the rights and obligations the contract confers. *See Del-Rio Drilling Programs, Inc. v. United States,* 146 F.3d 1358, 1364 (Fed. Cir. 1998). One cannot, in other words, bring a takings claim alleging deprivation of rights under a contract when the contract provides no such rights.

39. Here, to the extent that Mulcahy is asserting such an argument, the Court concludes that his property interest for takings purposes did not include the right to be free from the administrative review process specified in the Deed Restriction. Accordingly, APCHA's requirement that he comply with that process did not effect a taking under the U.S. or Colorado Constitutions.

40. To the extent that Mulcahy's takings argument instead revolves around a valuation that APCHA has not yet assigned, the issue is not ripe. APCHA is not claiming in this proceeding that Mulcahy must sell the Property for any particular price. Rather, it is requesting a declaratory judgment ordering Mulcahy to provide it with the information required by the Deed Restriction to calculate the value of the Property. See Ex. 3 at 4 of 17 ¶¶ 8-9; *id.* at internal Ex. B. Since there has been no final decision from APCHA concerning value of the Property, a takings claim cannot yet lie. *See, e.g., Quaker Court LLC v. Board of Cty. Comm'rs,* 109 P.3d 1027, 1034 (Colo. App. 2004).

41. Mulcahy next asserts that APCHA has acted inequitably, and that the doctrine of unclean hands therefore bars its action here. "[A] party engaging in improper or fraudulent conduct relating in some significant way to the subject matter of the cause of action may be ineligible for equitable relief. The unclean hands doctrine is intended to protect the integrity of the court, and simply means that equity refuses to lend its aid to a party who has been guilty of unconscionable conduct in the subject matter in litigation." *Premier Farm Credit, PCA v. W-Cattle,* LLC, 155 P.3d 504, 519 (Colo. App. 2006) (internal quotations omitted).

42. Mulcahy asserts that Kieffer's communications with him were sufficiently confusing to amount to inequitable conduct. The Court agrees that the compliance letters were ambiguous, but disagrees that Mulcahy has identified a material issue of fact with regard to improper or fraudulent conduct. Mulcahy signed a Deed Restriction that clearly sets forth the process and timeframes for Notices of Violation. Mulcahy was just as much a party to that contract as APCHA, and just as capable of reading it. The Court finds it surprising that someone facing the potential loss of his home would neglect to do so—particularly after APCHA sent him two letters letting him know an NOV was coming if he did not present evidence

of his compliance with the Deed Restriction. Despite being on notice that an NOV was coming, however, Mulcahy evidently decided to travel to Africa where it was not possible to reach him. Mulcahy cannot lay the consequences of this choice at APCHA's door.

43. Mulcahy has also admitted in this proceeding that he did not comply with the employment requirements of the Deed Restriction. Thus, even if he had acted timely to request a hearing—which he did not—it appears APCHA would have had to make an exception to the Guidelines for Mulcahy.[2] The Court is not in a position to order contracting parties to waive their rights to enforce the contract's terms.

44. Mulcahy's final argument, articulated in his Surreply, is that APCHA should be estopped from enforcing the Deed Restriction. Like unclean hands, estoppel is an equitable defense. Although it can be invoked against the government to prevent manifest injustice, *see Jafay v. Bd. of Cty. Comm'rs of Boulder Cty.,* 848 P.2d 892, 903 (Colo. 1993), it is not so freely invoked against governmental agencies as it is against private parties.

45. The Court does not perceive any manifest injustice here. Instead, the Court perceives a simple enforcement action whereby APCHA is pursuing its rights under the Deed Restriction after giving Mulcahy ample notice of its intentions, his rights, and the consequences of failing to pursue them. Although there was some sloppiness in preparing the compliance letters, there is nothing in the record to suggest manifest injustice. To the contrary, the Court concludes it would be inequitable for those who benefit from the tremendous advantages of affordable housing to not hold up their end of the bargain by working in the community as they agreed to do. A contrary holding would undermine the entire purpose of APCHA's program, which is to ensure the continued viability of a vibrant, diverse community in Aspen despite the fact that global capital flows make it impossible for most working people to afford free market housing there. The fact that large numbers of people are waiting in line to take advantage of the bargain APCHA offers reinforces the Court's conclusion that Mulcahy's equitable arguments are not well taken.

V. Mulcahy's Motion to Amend

46. Mulcahy has also requested leave to amend his Answer to assert two counterclaims against APCHA: one for outrageous conduct, and one for negligent

[2] In light of his admission to this violation, it is unnecessary for the Court to address the other violations APCHA claims.

infliction of emotional distress. The Court has considered the Motion, the Response, and Mulcahy's "Surreply," which is actually just a Reply for which no leave to file is required. The Court agrees with Mulcahy that leave to amend is freely granted and that in this case the proposed amendment would be permitted if it were not futile.

47. The Court agrees with APCHA, however, that the asserted counterclaims for outrageous conduct and negligent infliction of emotional distress are in fact futile because both lie in tort and are therefore barred by the Colorado Governmental Immunity Act, § 24-10-101, C.R.S. *See, e.g., Green v. Qwest Servs. Corp.*, 155 P.3d 383, 385 (Colo. App. 2006) (noting that outrageous conduct is a tort); *Goodson v. Am. Standard Ins. Co. of Wisconsin,* 89 P.3d 409, 416 (Colo. 2004) (noting that negligent infliction of emotional distress is a tort). The GIA bars claims against a governmental entity such as APCHA that lie in tort or could lie in tort. *See, e.g., Adams ex rel. Adams v. City of Westminster,* 140 P.3d 8, 10 (Colo. App. 2005).

48. Mulcahy argues in his Reply that because he appears pro se, he should be free to amend to assert claims sounding in breach of contract. The Motion to Amend, however, did not identify any contract claims, and Mulcahy does not identify which sections of the Deed Restriction APCHA has violated. Nor does he explain how any such claim for breach of contract would survive in light of his failure to exhaust his administrative remedies.

49. The APCHA conduct Mulcahy has identified in support of his proposed new claims is all derivative of the enforcement action. In other words, his counterclaims would not exist if APCHA had not brought the enforcement action. The Court therefore concludes that they fall within the scope of the administrative review provision embodied in ¶ 21 of the Deed Restriction, and that Mulcahy has failed to exhaust his administrative remedies with respect to these claims by failing to request a hearing pursuant to ¶ 21. *See Denver v. District Court,* 939 P.2d at 1368. The Court also observes that Mulcahy's claims appear to amount to a claim of waiver of APCHA's ability to enforce its rights, but there is no allegation that the terms of ¶ 33 of the Deed Restriction have been satisfied in connection with such a claim of waiver.

50. "While courts may take into account the fact that a party is appearing pro se, pro se parties are bound by the same rules of civil procedure as attorneys licensed to practice law." *Cornelius v. River Ridge Ranch Landowners Ass'n,* 202 P.3d 564, 572 (Colo. 2009). Here, Mulcahy has failed to justify his request for amendment to assert violations of the Deed Restriction, and he also raises such a basis for the Motion to Amend for the first time on Reply. This, then, provides an alternative

basis for the Court's holding. *See Maralex Resources, Inc., v. Chamberlain*, 320 P.3d 399, 404 n.3 (Colo. App. 2014) (declining to address issues first raised in a reply brief).

VI. CONCLUSION

51. The Court is not unsympathetic to Mulcahy's plight. It is certainly easy to appreciate how Mulcahy would be distraught at the notion of having to sell a home he has built with his own two hands. The Court, however, must base its decisions on the law, and the Deed Restriction here contains clear requirements that Mulcahy did not satisfy. To the extent that it is appropriate to make exceptions for cases like Mulcahy's, under the Deed Restriction that is a job for the APCHA Board, not the Court. Yet Mulcahy failed to avail himself of that opportunity by electing to travel and place himself out of reach when APCHA was actively pursuing an enforcement action against him. Under these circumstances, and on the record presented, the Court does not perceive a material issue of fact to preclude summary judgment in APCHA's favor.

IT IS THEREFORE ORDERED that summary judgment shall enter in favor of APCHA and against Mulcahy on APCHA's claim for specific performance directing Mulcahy to list the Property for sale;

DISTRICT COURT, PITKIN COUNTY, COLORADO

DATE FILED: August 8, 2016 Case Number: 2015CV30150

Plantiff(s) ASPEN PITKIN COUNTY HOUSING AUTHORITY

v.

Defendants(s) EDWARD L MULCAHY, JR.

Order: Pro Se Defendant Edward Lee Mulcahy Jr. Motion to Reconsider and To Alter Judgment and Brief

The motion/proposed order attached hereto: DENIED.

This matter is before the Court on Mr. Mulcahy's Motion to Reconsider. The Court has considered the Motion, the Response, the Reply and the file.

Mulcahy takes issue with the Court's reasoning in its Order dated June 3, 2016, essentially arguing the same positions he previously argued but with specific reference to portions of the Court's Order with which he disagrees. He stresses, among other things, that he has not admitted a violation of the work requirement, and that APCHA'S Ms. Kieffer knew he was traveling to Africa.

The Court, however, did not resolve the case on Mulcahy's compliance or noncompliance with the work requirement, or on any if the other substance that could have been presented to the APCHA board under the administrative review requirement of the Deed Restriction. The crux of the Court's Order was that it

cannot usurp the role of an administrative agency to reviews matters reserved to the agency. As noted in the Order, the Court of Appeals has specifically upheld APCHA'S right to hold hearings to review Notices of Violation like the one at issue here. This is a fundamental principle of jurisdiction that Mulcahy asks the Court to ignore, but the Court concludes there are no grounds for doing so.

As noted in the Order, the Court concludes the statute of limitations does not bar APCHA'S action. Mulcahy's arguments to the contrary do not persuade the Court, as it concludes the Neuromonitoring Assoc. decision is on point.

Nor has Mulcahy persuaded the Court that APCHA review would have been futile. To the contrary, even drawing all inferences in in Mulcahy's favor, Kieffer was continuing to work with him even after the Compliance Letters were sent in an effort to secure compliance with the Deed Restriction, and there is no indication that members of the APCHA Board would not have given him a fair hearing. While Mulcahy may prefer review by the Court, he agreed otherwise in the Deed Restriction.

The issues that gave the Court pause in this case were Mulcahy's unclean hands and estoppel defenses. Even drawing all favorable inferences for Mulcahy, however, the Court cannot conclude that APCHA engaged in improper, fraudulent or unconscionable conduct, or that the result gives rise to manifest injustice. Even taking as true Mulcahy's assertion that Kieffer knew Mulcahy was traveling in Africa when she sent the NOV, the Court does not perceive inequitable conduct by APCHA. Mulcahy received two different Compliance Letters, and the Deed Restriction itself clearly put him on notice of the timeframes governing NOVs. The fact that APCHA declined to suspend its enforcement action to accommodate Mulcahy's travel schedule does not amount to inequitable conduct.

In the end, Mulcahy asks the Court to adjudicate in the first instance arguments that, by his own contact, he agreed to present to the APCHA Board. The Court concludes it lacks jurisdiction to do so, and therefore declines the Motion to Reconsider.

Issue Date: 8/8/2016

CHRISTOPHER GILES SELDIN

District Court Judge