CASE ANNOUNCEMENTS
COLORADO SUPREME COURT
MONDAY, DECEMBER 9, 2019

"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

2019 CO 99

Supreme Court Case No. 16SC269
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 13CA392

Petitioner:

Paul Lacey Rail,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed
en banc

JUSTICE MÁRQUEZ delivered the Opinion of the Court.
JUSTICE GABRIEL dissents, and **JUSTICE HOOD** joins in the dissent.

No. 19SC688, Court of Appeals Case No. 17CA2333
Petitioner:
Gregory Wayne Brown,
v.
Respondent:
The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 19SC691, Routt County District Court Case No. 18CV30114
Petitioner:
Jordan Brown,
v.
Respondent:
The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 19SC692, Court of Appeals Case No. 19CA699
Petitioner:
Edward L. Mulcahy, Jr.,
v.
Respondent:
Aspen Pitkin County Housing Authority.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 19SC693, Court of Appeals Case No. 18CA988
Petitioner:
Hazhar Sayed,
v.
Respondent:
The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

DISTRICT COURT, PITKIN COUNTY, COLORADO Court Address: 506 East Main, Suite E, Aspen, CO, 81611	DATE FILED: March 6, 2019
Plaintiff(s) ASPEN PITKIN COUNTY HOUSING AUTHORITY v. **Defendant(s)** EDWARD L MULCAHY, JR	⚠ COURT USE ONLY ⚠ Case Number: 2015CV30150 Division: 5 Courtroom:

Order: Proposed Order to Vacate Stay of Judgment

The motion/proposed order attached hereto: GRANTED.

This matter is before the Court on APCHA's Motion to Lift Stay and Mulcahy's Motion to Vacate Judgment under Rule 60(b). The Rule 60(b) Motion alleges, among other things, that "Mulcahy, who was unrepresented at the trial court level and, at the time, unaware of the procedural rights he should have been entitled to, only recently discovered APCHA's flagrant disregard of these procedural requirements while working with undersigned counsel in the appellate process." Accordingly, it requests that this Court vacate the judgment in the case, which has now been affirmed by the Court of Appeals. The request to vacate the judgment rests on alleged due process violations flowing from Mulcahy allegedly being denied discovery prior to resolution of APCHA's Motion for Summary Judgment and Mulcahy's Cross-Motion for Judgment on the Pleadings.

The Court has reviewed the Rule 60 briefing, the Court of Appeals Opinion, and the file—including the underlying briefing on the merits of the Motions the Court addressed in its own Order on Pending Motions filed June 3, 2016. Having returned to the underlying record, the Court concludes the premise underlying the Rule 60(b) Motion—that Mulcahy was unaware of his procedural rights—is inconsistent with representations made in Mulcahy's filings prior to entry of judgment.

Mulcahy's Motion to Amend his Answer filed April 20, 2016 makes this fairly plain. That Motion makes clear Mulcahy understood that the case could involve both a case management conference and discovery. *See* Mulcahy's Motion to Amend at ¶ 12 (noting that "a case management conference has not even been held"); *id.* at ¶ 13 (recognizing right to discovery and that it had not yet commenced); *id.* at ¶ 16 (stating that the scope of discovery would be substantially the same if Motion to Amend were granted). His Reply in connection with the Motion to Amend (erroneously entitled Surreply) similarly acknowledges that discovery is a component of litigation, and acknowledged it had not yet begun. At no point, however, did Mulcahy request discovery in order to respond to APCHA's Summary Judgment Motion.

To the contrary, his Cross-Motion filings in response to the Summary Judgment Motion expressly argued that the issues presented were legal in nature and that there were no issues of material fact. APCHA argues in its Response to the Rule 60 Motion that Mulcahy "implicitly" indicated there were no issues of material fact. In reality, however, Mulcahy's filings were explicit on the issue. *See, e.g.*, Mulcahy's Response and Cross Motion at filed 3/24/2016 at 1, ¶ 1 (stating that Mulcahy does not contest APCHA's facts set forth in the Complaint and Motion for Summary Judgment); *id.* at 6-7 (noting that "[j]udgment on the pleadings is appropriate when a case's material facts are not in dispute," and is "proper only if the material facts are undisputed . . ."); *id.* at 10 (admitting that he last met the employment requirement in 2010, stating that "the present controversy involves purely legal questions," and contending that "[h]is only defense" to the employment and residency violations would be that they would soon be corrected.) He made these arguments in support of his contention that exhaustion did not prevent the Court from examining these legal questions.

When a litigant—pro se or otherwise—tells the Court there are no material issues of disputed fact, it is not for the Court to ignore such an assertion, assume the litigant doesn't understand its case, and tell it to adopt a different strategy. The Court is neutral. It cannot litigate a pro se party's case for it. Nor is there any concern here that Mulcahy lacked an understanding of his right to discovery, because he specifically referenced that right in his own filings. Mulcahy clearly understood a right to discovery existed, but nonetheless chose to assert the case involved no issues of material fact and only issues of law. His briefs were articulate and well researched, and his Answer in particular strongly suggested he was consulting an attorney for assistance. Moreover, the dispositive motion strategy he adopted was rational, even if ultimately unsuccessful.

Because Mulcahy told the Court there were no issues of material fact, and that the dispositive motions addressed matters of law, he cannot now attack the final judgment affirmed on appeal by claiming that he lacked discovery. The time to have asked for discovery was when the dispositive motions were pending. *See, e.g., Waddell v. Hendry Cty. Sheriff's Office*, 329

F.3d 1300, 1310 (11th Cir. 2003) (concluding that failure to seek discovery pursuant to Rule 56(f) doomed Rule 60 Motion,. and that "[i]t was Plaintiffs' tactical decisions, not fraud by Defendants, that prevented Plaintiffs from fully presenting their case."); *Dreyer v. Yelverton*, 291 F. App'x 571, 578 (5th Cir. 2008) (noting that Rule 56 does not require discovery prior to summary judgment rulings); *Ortega de Pinon v. I.N.S.*, 87 F. App'x 20, 21 (9th Cir. 2003) (noting that denial of discovery in immigration proceeding did not violate due process). *Abraham v. Great Western Energy, LLC*, 101 P.3d 446, 454 (Wyo. 2004), cited by Mulcahy, is consistent with this line of authority, as it involved actual requests for discovery. The Court has reviewed the other cases Mulcahy cites but is not persuaded they justify departing from this line of authority.

Accordingly, the Court denies the Rule 60(b) Motion, and grants APCHA's motion to lift the stay.

Issue Date: 3/6/2019

Christopher Seldin

CHRISTOPHER GILES SELDIN
District Court Judge