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CASE NUMBER: 2014CA1991

City of Fort Collins v. Colorado Oil and Gas Association
Case No. 2014CA001991

APPELLANT CITY OF FORT COLLINS' RESPONSE TO ORDER TO SHOW CAUSE

Exhibit 2

DISTRICT COURT, LARIMER COUNTY, COLORADO

201 La Porte Avenue, Suite 100
Fort Collins, CO 80521
Phone: (970) 494-3500

Plaintiff:

COLORADO OIL AND GAS ASSOCIATION,

v.

Defendant:

CITY OF FORT COLLINS, COLORADO

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COURT USE ONLY

Case Number: 2013CV31385

Division/Courtroom: 5B

**JOINT MOTION FOR CERTIFICATION
OF FINAL JUDGMENT PURSUANT TO C.R.C.P 54(b)**

Plaintiff Colorado Oil and Gas Association ("COGA") and Defendant City of Fort Collins, Colorado, (the "City") by and through their undersigned attorneys, jointly request this

Court to enter an order for a final judgment pursuant to C.R.C.P. 54(b). In support hereof, COGA and the City state as follows:

I. BACKGROUND

1. On August 7, 2014, the Court entered its Order Granting Summary Judgment on Plaintiff's First Claim for Relief and Denying Defendant's Cross Motion for Summary Judgment ("August 7 Order"). On September 17, 2014, the Court entered its Order Granting Plaintiff's Unopposed Motion to Dismiss Second Claim Against Defendant City of Fort Collins Without Prejudice and for Entry of Final Judgment ("September 17 Order"). As set forth in the September 17 Order: "This Order, together with the Court's [August 7 Order] . . . shall constitute a final judgment for purposes of C.R.C.P. 54(b) and 58(a)."

2. On October 13, 2014, the City filed its Notice of Appeal with the Colorado Court of Appeals. The City attached copies of this Court's August 7 Order and its September 17 Order to its Notice of Appeal. A copy of the City's Notice of Appeal was also filed with this Court on October 13, 2014. *See* ICCES filing number 1333DDDADB0EC.

3. On October 17, 2014, the Court of Appeals issued its Advisement of Notice of Appeal stating that the Designation of Record on Appeal was due within 14 days and that the Record on Appeal was due on January 12, 2015.

4. On October 23, 2014, the City filed its Designation of Record on Appeal. A copy of the City's Designation of Record was also filed with this Court on October 23, 2014. *See* ICCES filing number B80CA470D46DF.

5. On November 17, 2014, the City filed its Motion for Stay Pending Appeal with the Court of Appeals pursuant to C.A.R. 8(a).

6. On November 18, 2014, the Court of Appeals issued an Order to Show Cause directing the City to show why this appeal should not be dismissed without prejudice for lack of a final, appealable order within 14 days (December 2, 2014). A copy of the Court of Appeals' Order to Show Cause is attached hereto as **Exhibit A**.

II. REQUEST FOR RULE 54(B) CERTIFICATION

7. COGA and the City both believed that this Court's August 7 Order and its September 17 Order constituted a final judgment for purposes of appeal. For this reason, they did not seek a Rule 54(b) certification of the Court's August 7 Order.

8. However, the Court of Appeals has questioned whether the September 17 Order is a final judgment because the it dismissed COGA's second claim for an injunction against the enforcement of the City's voter approved moratorium without prejudice and/or because the September 17 Order does not contain the express determination "that there is no just reason for delay . . . express direction for the entry of judgment." *See* Order to Show Cause, p. 2.

9. COGA and the City both desire to proceed with an appeal of this Court's August 7 Order as expeditiously as possible. COGA and the City see no reason for delay and request this Court to enter an order certifying its August 7 Order as a final judgment pursuant to C.R.C.P. 54(b) because there is nothing further to litigate in the District Court in light of the rulings contained in the Court's August 7 Order.

10. The trial court retains jurisdiction to issue an order certifying summary judgment as final pursuant to C.R.C.P 54(b) after a notice of appeal has been filed. *See Muzick v. Woznicki*, 136 P.3d 244, 251-52 (Colo. 2006); *Mortgage Investment Corp. v. Battle Mountain Corp.*, 56 P.3d 1104, 1106 (Colo. App. 2001), *rev'd on other grounds*, __ P.3d __ (Colo. 2003).

WHEREFORE, COGA and the City jointly request this Court to enter an order containing and express determination that there is no reason for delay and direct the entry of judgment based upon this Court's August 7 Order. A proposed order is filed with this Joint Motion.

Dated this 2nd day of December, 2014.

SULLIVAN GREEN SEAVY LLC

By: /s/ John T. Sullivan
Barbara J. B. Green, No. 15022
John T. Sullivan, No. 17069

CITY OF FORT COLLINS

By: /s/ John R. Duval
Carrie M. Daggett, No. 23316, Interim City Attorney
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Colorado Oil and Gas Association v. City of Fort Collins
Case No. 2013CV31385

**JOINT MOTION FOR CERTIFICATION OF FINAL JUDGMENT PURSUANT TO
C.R.C.P 54(b)**

Exhibit A

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: November 18, 2014 CASE NUMBER: 2014CA1991
Larimer County 2013CV31385	
Plaintiff-Appellee: Colorado Oil and Gas Association, v.	Court of Appeals Case Number: 2014CA1991
Defendant-Appellant: City of Fort Collins Colorado, and	
Intervenor-Appellants: Citizens for a Healthy Fort Collins, Sierra Club, and Earthworks.	
ORDER to show cause	

TO: THE PARTIES

Upon consideration of the notice of appeal by proposed intervenor Citizens for a Healthy Fort Collins, the motion to intervene, and the request for an extension of time to respond, the Court DEFERS ruling and ENTERS the following Order:

From the notice of appeal filed by City of Fort Collins, it appears that appellant is seeking review of a district court order granting summary judgment on August 7, 2014. However, it also appears that this court lacks jurisdiction over this appeal because a final, appealable judgment resolving all claims between all

Exhibit A

parties has not yet entered. *See* C.A.R. 1(a)(1); § 13-4-102(1), C.R.S. 2014; *see also* C.R.C.P. 54(b); *Harding Glass Co. v. Jones*, 640 P.2d 1123 (Colo. 1982).

Specifically, the district court order of September 17, 2014 dismissed the second claim without prejudice. Dismissal of a claim without prejudice does not constitute a final judgment for purposes of appeal because the factual and legal issues underlying the dispute have not been resolved. C.R.C.P. 41(a)(2); *District 50 Metro. Recreation Dist. v. Burnside*, 157 Colo. 183, 186-87, 401 P.2d 833, 835 (1965); *Brody v. Bock*, 897 P.2d 769, 777 (Colo. 1995). Moreover, allowing the appeal of claims dismissed with prejudice while other claims have been dismissed without prejudice may permit an appeal that is an end-run around the final judgment rule since the claims voluntarily dismissed without prejudice may be renewed. *See e.g. Emmitt v. Dickey*, 188 F. App'x 681, 683 (10th Cir. 2006); *Rabbi Jacob Joseph Sch. v. Province of Mendoza*, 425 F.3d 207, 210 (2d Cir. 2005).

To the extent that the order of September 17, 2014 is to construed as a C.R.C.P. 54(b) certification of the August 7, 2014 district court order, it does not contain the required express determination “that there is no just reason for delay and . . . express direction for the entry of judgment.” Where the express language required by the rule does not appear in the order, the appeal must be dismissed. *See* C.R.C.P. 54(b); *Blackburn v. Skinner*, 156 Colo. 41, 42, 396 P.2d 968, 969

(1964). Therefore, the Court ORDERS appellant to show cause, in writing and within 14 days, why this appeal should not be dismissed without prejudice for lack of a final, appealable order.

Failure to respond to this Order within 14 days will result in the dismissal of the appeal without further notice to the parties.

The Court will address the motion to intervene if the jurisdictional issue raised in this Order is resolved.

BY THE COURT

jb/sa