

DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street, Room 256 Denver, CO 80202 (720) 865-8301	DATE FILED: April 22, 2019 3:20 PM FILING ID: B259ADA78A273 CASE NUMBER: 2019CV31165
Plaintiff: EVERGREEN ALLIANCE GOLF LIMITED, L.P., a Delaware limited partnership, d/b/a ARCIS GOLF, v. Defendants: THE CITY AND COUNTY OF DENVER, COLORADO, a municipal corporation of the State of Colorado.	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> Case No.: 2019CV31165 Division: 424
<i>Attorneys for Plaintiff Evergreen Alliance Golf Limited, L.P. d/b/a Arcis Golf</i> Mikaela V. Rivera, #34085 Darrell G. Waas, #10003 Jennifer R. Lake, #53141 WAAS CAMPBELL RIVERA JOHNSON & VELASQUEZ LLP 1350 17 th Street, Suite 450 Denver, CO 80202 Telephone: (720) 351-4700 Facsimile: (720) 351-4745 rivera@wcrlegal.com waas@wcrlegal.com lake@wcrlegal.com	
PLAINTIFF'S REPLY IN SUPPORT OF VERIFIED MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION	

Plaintiff Evergreen Alliance Golf Limited, L.P. d/b/a Arcis Golf (“Arcis”), through undersigned counsel, respectfully submits this Reply in Support of Verified Motion for Temporary Restraining Order and Preliminary Injunction, and in support thereof states as follows:

INTRODUCTION

In response to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (the "Response"), the City completely misconstrues the purpose and the legal basis for the Motion. The City's primary argument is that because Arcis's lease with the George W. Clayton Trust (the "Trust") governs the compensation owed to Arcis in an eminent domain proceeding, the City does not have to respect any of Arcis's other property rights. *See* Resp. at 8-10. This argument misses the point. Arcis is not seeking a separate compensation award from the City, Arcis concedes that the property being occupied must be valued on an undivided basis under Colorado law. Instead, as both the Complaint and the Motion explain, Arcis is seeking injunctive and declaratory relief because the City took possession of property that Arcis has the current, and exclusive, right to occupy. The City took possession without Arcis's permission and without a court order authorizing the City's possession that could have been obtained had the City exercised its powers of eminent domain. The Trust, as the landlord, does not have the legal authority to grant the City permission to occupy property leased by Arcis. *See, e.g.*, Mot. at 4. Contrary to the City's assertions, both the law and the terms of Arcis's lease with the Trust (the "Lease") forbid the City from taking possession of the Property without Arcis's permission and/or without instituting condemnation proceedings. Simply put, all Arcis requests is that the City abide by the well-established protections for leasehold interests afforded by both condemnation and property law.

The City attempts to rely on the protections of condemnation law as a basis for opposing the Motion, yet the City fails to recognize that it has refused to abide by those protections in this case. Indeed, as the City acknowledges, it did not even issue the notice of intent to acquire the

Property required *by statute* to be provided to Arcis until after Arcis filed its Motion. Resp. at 7. Colorado law sets forth established procedures and requirements before a condemning authority to obtain possession of property prior to the determination of compensation. The eminent domain statutes, C.R.S. §§ 38-1-102 and 105, provide that a condemning authority can obtain possession no sooner than 30 days after filing a petition that names all persons with an interest in the property and serving the summons and making a sufficient deposit in the registry of the court. The City attempted to circumvent this procedure by entering into a stipulation with the Trust only and without Arcis's agreement or complying with any of the other statutory requirements for possession. It is in the public's interest to ensure that the government follows the well-established restraints on the exercise of its power of eminent domain and that the City not be permitted to set a dangerous precedent.

ARGUMENT

A. Duty to Confer

As a threshold matter, Plaintiff notes that the City alleges that Plaintiff's counsel failed to confer with counsel for the City regarding its Motion. Resp. at 1. However, Rule 65 only requires "notice to the adverse party." C.R.C.P. 65(a)(1); *see also* West's Colorado Practice Series, *Civil Procedure Forms & Commentary*, 12 Colo. Prac. § 65.21 fn 2 (citing C.R.C.P. 121, § 1-15(8) (Committee Comment)). Plaintiff notified the City before filing its Motion and, thus, complied with C.R.C.P. 65(a)(1). Notably, even though three different City staff were notified, no one from the City responded before the filing of the Motion.

B. Arcis is likely to prevail on the merits of its claims against the City.

The City argues that Arcis is not likely to prevail on the merits of its claims because the City is not required to obtain Arcis's permission prior to taking possession of the Property. Resp. at 8-10. The City cites no legal authority for its position. On the contrary, the City's position is contrary to fundamental property law.

The City asserts that "the terms of the lease dictate over common law." *Id.* at 8. However, the terms of the Lease do not give the Trust or any third party the right to enter into a possession agreement to the detriment of Arcis's property interest. Rather, the Lease specifically provides that the Trust "shall secure to Lessee the quiet and peaceful enjoyment of the Leased Premises and the *sole and exclusive possession* of the Leased Premises without objection or interference from Lessor or any party claiming under Lessor." Mot. at Ex. 1 § 25 (emphasis added). There is one section of the lease that deals with eminent domain. However, this section deals with how Arcis will be compensated, not how a condemning authority obtains possession of the property. Nothing in the Lease contradicts or abrogates Arcis's right to exclusive possession. *See id.* § 19. Nothing in the Lease gives the Trust the right to grant a third party, such as the City, possession.

The City also relies on C.R.S. § 38-1-121(5) in support of its argument that Arcis is not entitled to "dictate possession of property." Resp. at 9. C.R.S. § 38-1-121(5) provides that "[n]othing in this section shall be construed to limit the right of the condemning agency to . . . obtain immediate possession of property *as permitted by law* . . ." (emphasis added). However, the law does not permit either the City or the Trust to violate Arcis's exclusive possession of the Property absent either an agreement with Arcis or the institution of condemnation proceedings.

See Sundheim v. Bd. of Cty. Com'rs of Douglas Cty., 904 P.2d 1337, 1350 (Colo. App. 1995), *aff'd*, 926 P.2d 545 (Colo. 1996) (citations omitted) (“[a]bsent some agreement to the contrary, a tenant is entitled to the possession of the leased premises to the exclusion of the landlord.”); *see also Ceja v. Lemire*, 143 P.3d 1093, 1095 (Colo. App. 2006) (a lessee “generally acquires a property right together with the right to use or control the property for the duration of the lease”); *American Coin-Meter of Colo. Springs, Inc. v. Poole*, 503 P.2d 626, 627 (Colo. App. 1972) (citations omitted) (a lease “gives the right of possession of the property leased, and exclusive use or occupation of it for all purposes not prohibited by its terms.”). Since Arcis has the right of exclusive possession under the terms of the Lease, the Trust does not have the authority to grant possession to the City. Arcis is the party that has the power to enter into a possession agreement with the City. *Cf. Sundheim*, 904 P.2d at 1350 (citations omitted) (collecting Colorado cases holding that in cases involving searches of leased premises, “it is the *lessee’s rights* of privacy which are infringed, not those of the landlord.”); *Wilson v. Marchiondo*, 124 P.3d 837, 840 (Colo. App. 2005) (citation omitted) (noting that in premises liability cases, Colorado courts recognize that “[a] landlord who has transferred control of the premises to his tenant is no longer a ‘person in possession’ of the real property . . .”). Because the City’s possession agreement is solely with the Trust, which does not have legal possession of the Property, the City does not currently have a legal right to possession.

The City has cited no case law or other authority permitting it to violate Arcis’s right to exclusive possession of the Property under these circumstances. The General Assembly has established a procedure by which the City could have lawfully obtained possession of the property, C.R.S. §38-1-105. The City could have negotiated in good faith for acquisition, filed a

petition, naming all respondents and waited the requisite 30 days to receive an order from the Court. The City neglected to follow any of the statutory requirements to obtain possession of the property. For the City to legally occupy the Property, it must either enter into a possession agreement with Arcis, or it must properly institute condemnation proceedings.

Laboring to avoid this conclusion, the City cites *Gifford v Colorado Springs*, 815 P.2d 1008 (Colo. App. 1991), which does not address the issue at hand. In *Gifford*, the tenant filed an inverse condemnation for compensation due to the elimination of two of three access points. The court dismissed the claim because no property was actually being taken from the tenant as it still had access to all the property it leased. The tenant in *Gifford* was not excluded from any of the leased property. Here, Arcis's interest is indisputably impacted by the City, which is occupying 35 acres of the leasehold estate. Thus, the City can find no legal authority that supports occupying part of the leased premises without the tenant's permission or obtaining a possession order by complying with the eminent domain statutory procedure.

Based on the foregoing, Arcis has a reasonable probability of success on the merits.

C. The City's occupation poses a danger of real, immediate, and irreparable injury for which there is no adequate remedy at law.

The City asserts that Plaintiff has not demonstrated irreparable harm because, subsequent to the filing of the Motion, the City and Arcis reached an agreement to address the irrigation issues identified in the Motion, and because Arcis has not asserted a trespass claim. Resp. at 10-11. However, the irrigation issues were not the only source of irreparable harm identified in the Motion, and the City's implication that the assertion of a trespass claim is somehow a prerequisite to establishing irreparable harm has no merit. The City has failed to substantively address the case law cited in the Motion holding that interference with property rights constitutes

a danger of irreparable harm in and of itself. *See* Motion at 5. Indeed, one of the cases cited in the Motion did not involve a trespass claim, but rather upheld the granting of a preliminary injunction because the defendant was physically preventing the plaintiffs from using an easement, which, similar to the property interest here, constituted a “right to use specific real property.” *Id.* (citing *Cody Park Property Owners Ass’n, Inc. v. Harder*, 251 P.3d 1, 7 (Colo. App. 2009)).

In addition, the City argues that Arcis has an adequate remedy at law because Plaintiff is “entitled to, at most, an abatement of rent under their lease and/or an apportionment hearing with the Trust regarding the compensation due them because of the City’s taking.” Resp. at 11. However, the City once again fails to recognize that Arcis is not contesting the amount of any condemnation award, as no such award currently exists.¹ Rather, Arcis is challenging the right of the City to occupy the Property without instituting condemnation proceedings or entering into a possession agreement with Arcis.

D. Injunctive relief will not disserve the public interest and the balance of the equities favors the injunction, which will preserve the status quo.

In asserting that an injunction would disserve the public interest, the City argues that property rights are not being threatened or destroyed because Arcis can be made whole by sharing in any condemnation award that is made to the Trust. Resp. at 12. However, Arcis’s ability to share in a yet-to-be-determined condemnation award has no bearing on whether Arcis’s property rights (i.e. its right to exclusive possession of the Property under the terms of the Lease) are currently being threatened or destroyed. Similarly, the City’s allegation that Arcis has

¹ Arcis reserves the right to contest the amount of the condemnation award if and when such an award is made.

stopped paying rent has no bearing on the balance of the equities between the City and Arcis. *See Resp.* at 12-13. Any issues concerning rent payments are to be resolved between Arcis and the Trust, and have no effect on the analysis of whether the City is legally occupying the Property.

Finally, the City boldly asserts that an injunction will not maintain the status quo because the City has already undertaken major work on the Property. *Id.* However, the entire basis of Arcis's Motion is that the City has no legal right to commence such work. The status quo to be preserved is the position the parties should have been in absent the City's wrongful taking, not the position the parties are currently in as a result of the City's wrongful taking. *See Larimer Cty. Canal No. 2 Irrigating Co. v. Larimer & Weld Reservoir Co.*, 143 P. 270, 272 (Colo. App. 1914) ("In such cases, injunction is conditionally granted against the taking of possession until compensation is paid or condemnation proceedings instituted."). The City should not be rewarded for ignoring its obligations under both property and condemnation law simply because it decided to begin work on the Property before it obtained legal possession. Allowing the City to proceed with its project under these circumstances would set a dangerous precedent providing a road map for condemning authorities to circumvent the statutory requirements for possession. Thus, injunctive relief is actually in the public interest.

E. A substantial bond is not necessary.

The City has provided no evidence to support its damages calculations. *See Kaiser v. Market Square Discount Liquors, Inc.*, 992 P.2d 636, 643 (Colo. App. 1999) (indicating that a trial court must make findings concerning the appropriate amount of the security bond); *Apache Village, Inc. v. Coleman Co.*, 776 P.2d 1154, 1155 (Colo. App. 1989) ("The amount of security

is discretionary with the court so long as it bears a reasonable relationship to the potential costs and losses”). The Court has the authority to require only a nominal bond, which is appropriate here given that the City can remedy its failure to obtain Arcis’s permission to occupy the Property at any time. *See Kaiser*, 992 P.2d at 643 (upholding trial court’s requirement of a \$1 nominal bond because trial court found that defendants would not suffer any compensable loss). Moreover, the alleged potential losses identified by the City consist entirely of delay penalties, which could have been avoided (and can still be avoided) if the City had simply followed the requirements for legally obtaining possession of the Property.

CONCLUSION

The City does not dispute that it has not met the statutory prerequisites for possession pursuant to the eminent domain statute. If the City can avoid these prerequisites with impunity, free from fear of being enjoined, other condemning authorities would be emboldened to ignore the statutory requirements when they desire to take possession before they are legally entitled to do so. The statutory requirements exist to safeguard property rights protected by both the Constitution of the United States and the Colorado Constitution and an injunction is the appropriate relief to ensure they are not ignored.

For the reasons set forth above, Arcis respectfully requests that the Court enter an order enjoining the City from taking possession of the Property until it has either entered into a possession agreement with Arcis or has instituted condemnation proceedings.

Respectfully submitted this 22nd day of April, 2019.

WAAS CAMPBELL RIVERA JOHNSON &
VELASQUEZ LLP

By: /s/ Mikaela V. Rivera

Mikaela V. Rivera
Darrell G. Waas
Jennifer R. Lake

*Attorneys for Plaintiff Evergreen Alliance
Golf Limited, L.P. d/b/a Arcis Golf*

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2019, a true and correct copy of the foregoing **PLAINTIFF'S REPLY IN SUPPORT OF VERIFIED MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** was filed and/or served electronically via Colorado Courts E-Filing as follows:

Kristin M. Bronson, Denver City Attorney
Renee A. Goble
Edward Gorman
Priscilla Tomescu
Denver Assistant City Attorneys
Municipal Operations Section
201 W. Colfax Avenue, Sept. 1207
Denver, CO 80202-5332

Renee.goble@denvergov.org
Edward.gorman@denvergov.org
Priscilla.tomescu@denvergov.org

Attorneys for Defendant

/s/ Karen A. Gomes
Karen A. Gomes