COLORADO COURT OF APPEALS

DATE FILED: August 8, 2019
CASE NUMBER: 2017CA2099

Court of Appeals No. 17CA2099
Pitkin County District Court No. 15CV30158
Honorable Anne K. Norrdin, Judge

Centennial Owners' Association, a Colorado nonprofit corporation,

Plaintiff-Appellant and Cross-Appellee,

v.

Aspen Pitkin County Housing Authority, a Colorado quasi-municipal corporation, and City of Aspen, a home rule municipality,

Defendants-Appellees and Cross-Appellants,

and

Pitkin County Board of County Commissioners,

Defendant-Appellee.

ORDER AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE MÁRQUEZ*
Dailey and Pawar, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced August 8, 2019

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Richard Neiley, County Attorney, Laura C. Makar, Assistant County Attorney, Basalt, Colorado, for Defendant-Appellee

*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 Plaintiff, Centennial Owners' Association (CHOA), appeals the district court's order dismissing its claims for mandamus and declaratory relief against defendants, Aspen Pitkin County Housing Authority (APCHA), the City of Aspen (the City), and the Pitkin County Board of County Commissioners (the Board), for lack of subject matter jurisdiction pursuant to the Colorado Governmental Immunity Act (CGIA), §§ 24-10-101 to -120, C.R.S. 2018.

¶ 2 APCHA and the City cross-appeal the district court's order denying defendants' motion to dismiss CHOA's claim for rescission of restrictive deeds held by owners of Centennial Condominiums (Centennial).

¶ 3 We affirm the district court's order and remand the case for further proceedings.

I. Background

¶ 4 This appeal arises out of a dispute between members of CHOA, who own housing units at Centennial, an affordable housing complex in Aspen, Colorado, and APCHA, the City, and the Board.

¶ 5 Pursuant to an intergovernmental agreement (the IGA), the City and the Board created APCHA to serve as an intergovernmental housing authority. *See* Colo. Const. art. XIV, § 18 (authorizing the

General Assembly to enact laws concerning intergovernmental relationships); § 29-1-203(1), C.R.S. 2018 ("Governments may cooperate or contract with one another to provide any function, service, or facility lawfully authorized to each of the cooperating or contracting units . . . . "); Home Rule Charter for the City of Aspen, art. XIII, § 13.5 (1970) ("The council may by resolution enter into contracts or agreements with other governmental units, special districts, or persons for the joint use of buildings, equipment, or facilities, or for furnishing or receiving commodities or services."); *see also* § 29-1-204.5(1), C.R.S. 2018 ("Any combination of home rule or statutory cities, towns, counties, and cities and counties of this state may, by contract with each other, establish a separate governmental entity to be known as a multijurisdictional housing authority . . . .").

¶ 6 In the early 1980s, APCHA planned and contracted with a private builder to develop Centennial for the purpose of providing affordable housing on land owned by Pitkin County for resident employees with low to moderate incomes.

¶ 7 The units were originally sold to members of CHOA (subject to the control of APCHA), who purchased units at Centennial at

various times. APCHA drafted and approved certain deed restrictions that prohibited owners from recouping the total costs associated with any capital improvements paid for by the owners. The restrictions allowed owners to recoup "cost, at present value, of approved, permitted capital improvement, not to exceed ten percent of purchase price, less depreciation" and "cost at present value of approved exempt capital improvements required to meet health and safety standards." Additionally, the restrictions limited the amount owners could obtain for rent or resale to ensure that the condominiums remained affordable.

¶ 8 The deeds were also subject to APCHA's Housing Guidelines (Housing Guidelines), which provided that the member owners would be responsible for maintaining their individual units, and CHOA would be responsible for maintaining common elements of the property. However, CHOA had the power to assess owners as necessary.

¶ 9 In particular, the Housing Guidelines set forth minimum standards regarding a unit's condition upon resale. If a unit did not meet the minimum standards, APCHA could require the cost of necessary repairs to be deducted from the closing sale price. CHOA

was authorized to levy special assessments from owners to cover capital repairs or improvements to common elements of the property, and the owners were responsible for maintaining "their units in good repair, including but not limited to the roof, boiler, water heater, appliances, and fixtures."

¶ 10 In recent years, CHOA complained that Centennial "suffer[ed] massive physical infirmities," including "potentially toxic mold and other extensive water-related damages" that required immediate repair to ensure safe and sanitary living conditions. After joint investigations and inspections were conducted in an effort to evaluate the scope and costs to repair the alleged problems with the conditions at Centennial, defendants decided that CHOA would be held responsible for any repairs because they fell under "the 'maintenance' expense category."

¶ 11 CHOA then brought this suit. As relief, CHOA sought (1) a writ of mandamus ordering defendants to undertake all necessary capital repairs; (2) a declaration that APCHA and the City had a duty to pay for necessary capital repairs; (3) a declaration that the deed restrictions were unconscionable, void, and of no force; (4) an order reforming or rescinding the deed restrictions; (5) damages and

compensation for inverse condemnation; and (6) monetary damages including pre- and post-judgment interest, attorney fees, costs, and expenses. Defendants filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim under C.R.C.P. 12(b)(1) and 12(b)(5).

¶ 12 The district court reviewed the complaint and concluded that the CGIA barred the claims for mandamus and declaratory relief and that CHOA failed to state a claim for inverse condemnation. However, the court denied the motion to dismiss the claim for rescission.

II. Colorado Governmental Immunity Act

¶ 13 CHOA contends that the district court erred in dismissing its claims for mandamus and declaratory relief because the CGIA does not apply and, therefore, the court had subject matter jurisdiction to hear those claims. We disagree.

¶ 14 But we agree with CHOA that the court did not err in holding that the CGIA does not apply to CHOA's rescission claim.

A. Standard of Review and Applicable Law

¶ 15 The determination of immunity under the CGIA presents an issue of subject matter jurisdiction, which is properly addressed

through a motion to dismiss under C.R.C.P. 12(b)(1). *Fogg v. Macaluso*, 892 P.2d 271, 276 (Colo. 1995). The plaintiff has the burden of establishing jurisdiction under the CGIA. *Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176, 1180 (Colo. 2001).

¶ 16 When the district court determines a jurisdictional issue on a motion to dismiss under C.R.C.P. 12(b)(1) without an evidentiary hearing and accepts all of the plaintiff's assertions of fact as true, the jurisdictional issue may be determined as a matter of law. *Asphalt Specialties, Co. v. City of Commerce City*, 218 P.3d 741, 744 (Colo. App. 2009).

¶ 17 Under the CGIA, public entities are immune from liability in all claims for injury that lie in tort or could lie in tort "regardless of whether that may be the type of action or the form of relief chosen by the claimant," unless the claim falls within an exception to that immunity. § 24-10-106(1), C.R.S. 2018. In contrast, the CGIA does not apply to actions grounded in contract. *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1003 (Colo. 2008).

¶ 18 The form of the complaint is not determinative of the claim's basis in contract or tort. *Id.* Instead, a court must consider the nature of the injury and the relief sought. *Id.*

> When the injury arises either out of conduct that is tortious in nature or out of the breach of a duty recognized in tort law, and when the relief seeks to compensate the plaintiff for that injury, the claim likely lies in tort or could lie in tort for purposes of the CGIA.

Id. (citing *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1176 (Colo. 2000), *superseded by statute on other grounds*, Ch. 168, sec. 1, § 24-34-405, 2013 Colo. Sess. Laws 549-54, *as recognized in Houchin v. Denver Health & Hosp. Auth.*, 2019 COA 50M). "Although the nature of the relief requested is not dispositive on the question of whether a claim lies in tort, the relief requested informs our understanding of the nature of the injury and the duty allegedly breached." *Id.* (citing *Conners*, 993 P.2d at 1170-76); *Conners*, 993 P.2d at 1176 ("[A] court must examine the nature of the injury and remedy asserted in each case to determine whether a particular claim is for compensatory relief for personal injuries and is therefore a claim which lies or could lie in tort for the purposes of the CGIA.").

¶ 19 However, the coverage of the CGIA is not limited to claims that are capable of being recast as common law torts by the party bringing the claim. *Colo. Dep't of Transp. v. Brown Grp. Retail, Inc.*,

182 P.3d 687, 690 (Colo. 2008). In particular, "claims for relief developed and historically administered by courts of chancery or equity, rather than courts of law," do not necessarily fall outside the coverage of the act. *Id.* at 691. Rather, the coverage of the CGIA "more broadly encompasses all claims against a public entity arising from the breach of a general duty of care, as distinguished from contractual relations or a distinctly non-tortious statutorily-imposed duty." *Id.*

¶ 20 "[U]ltimately, [the inquiry] turns on the source and nature of the government's liability, or the nature of the duty from the breach of which liability arises." *Id.* at 690 (citing *Robinson*, 179 P.3d at 1003-05). "The essential difference between a tort obligation and a contract obligation is the source of the parties' duties." *Foster v. Bd. of Governors of the Colo. State Univ. Sys.*, 2014 COA 18, ¶ 14 (quoting *Carothers v. Archuleta Cty. Sheriff*, 159 P.3d 647, 655 (Colo. App. 2006)). Tort duties protect against the risk of physical harm to persons or property and are implied by law without regard to any contract, *id.*, whereas contract duties arise from promises made between parties. *Id.*

B. Discussion

1. Claim for Mandamus Relief

¶ 21 In its complaint, CHOA sought a writ mandating that defendants commit funds necessary to fully repair, replace, and remediate Centennial in order to restore the complex "to a safe and habitable condition." In support of its request, CHOA asserted that sections 29-4-201 and 29-4-501, C.R.S. 2018, required defendants to provide funds for the "reconstruction, improvement, alteration, or repair of any project or any part thereof." We disagree.

¶ 22 "Mandamus is an extraordinary remedy which may be used to compel performance by public officials of a plain legal duty devolving upon them by virtue of their office or which the law enjoins as a duty resulting from the office." *Sherman v. City of Colo. Springs Planning Comm'n*, 763 P.2d 292, 295 (Colo. 1988). The elements of a mandamus claim are: (1) the plaintiff has a clear right to the relief sought; (2) the defendant has a clear duty to perform the act requested; and (3) there is no other available remedy. *Id.* Mandamus may be appropriate "where there has been a failure to perform a statutory duty." *Rocky Mountain Animal Def. v. Colo. Div. of Wildlife*, 100 P.3d 508, 517 (Colo. App. 2004) (quoting *Lamm v.*

Barber, 192 Colo. 511, 517, 565 P.2d 538, 542 (1977)). But it is not the appropriate means to compel compliance with a contract. *See Sherman*, 763 P.2d at 295.

a. Nature of Injury and Relief Sought

¶ 23 Despite CHOA's attempt to characterize its mandamus claim as noncompensatory and equitable in nature, the mandamus claim ultimately seeks compensatory relief for injuries resulting from allegedly tortious conduct. *See* § 24-10-103(2), C.R.S. 2018 (defining an "injury" for purposes of the CGIA as "death, injury to a person, damage to or loss of property, of whatsoever kind, which, if inflicted by a private person, would lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant").

¶ 24 CHOA's complaint includes a request that the court require defendants to "commit[] such funds as necessary to fully repair, replace and remediate all identified" work "required to restore Centennial to a safe and habitable condition." The property damage complained of allegedly resulted from "numerous deficiencies in the design and defects in the construction of Centennial" and "cost cutting measures implemented by the developer," which were

known by defendants, "but never disclosed . . . to [CHOA] nor to any individual unit owners when they purchased [units]."

¶ 25 Thus, CHOA's claim is essentially a claim for construction defect and fraud, misrepresentation, or concealment, which all lie in tort. *See* § 13-20-802.5, C.R.S. 2018 (construction defect tort claim is one brought against a construction professional for property damages caused by design or construction defect, and includes actions against the inspector); *CAMAS Colo., Inc. v. Bd. of Cty. Comm'rs*, 36 P.3d 135, 138 (Colo. App. 2001) (claims for fraud and negligent misrepresentation lie in tort).

¶ 26 Because the source of the allegedly breached duty is tortious in nature and the relief sought is compensatory in nature, CHOA's claim for mandamus relief lies in tort or could lie in tort for purposes of the CGIA. *See Robinson*, 179 P.3d at 1003. Accordingly, we conclude that the district court did not err in dismissing CHOA's mandamus claim for lack of subject matter jurisdiction under the CGIA. *See Fogg*, 892 P.2d at 276.

b. City and County Statutes

¶ 27 Though we conclude that CHOA's mandamus claim is barred by the CGIA because it is tortious in nature, CHOA asserts that

such claim is based on a "distinctly non-tortious statutorily-imposed duty." Because non-tortious statutorily imposed duties are not barred by the CGIA, we must determine whether the statutes cited by CHOA impose such duties on defendants. *See Brown*, 182 P.3d at 690-91.

¶ 28 We first reject CHOA's contention that the statutes governing city and county housing authorities, namely sections 29-4-229, C.R.S. 2018, and 29-4-506, C.R.S. 2018, impose a general duty on the City, the Board, and APCHA to provide safe and sanitary housing that is affordable for persons of low income. We instead conclude that the city and county housing authorities have discretionary powers that allow for affordable housing projects to be developed. These powers are to be distinguished from any duty that sections 29-4-229 and 29-4-506 may impose on the city and county housing authorities to fix rental amounts for affordable housing projects that have been developed. And, we do not construe the statutes at issue as imposing a broadly sweeping duty to provide safe and sanitary housing where, as here, title to the condominium units has been transferred to individual owners. In reaching this conclusion, we consider sections 29-4-229 and 29-4-506 within the

context of the statutory scheme. *See People v. Dist. Court*, 713 P.2d 918, 921 (Colo. 1986) ("Where possible, the statute should be interpreted so as to give consistent, harmonious, and sensible effect to all its parts.").

i. The Statutory Scheme

¶ 29 When interpreting a statute, "our primary purpose is to ascertain and give effect to the General Assembly's intent." *Cowen v. People*, 2018 CO 96, ¶ 12 (quoting *Pineda-Liberato v. People*, 2017 CO 95, ¶ 22). We start by examining the plain meaning of the statutory language. *Id.* We give consistent effect to all parts of the statute and construe each provision in harmony with the overall statutory design. *Id.* at ¶ 13. If the language in a statute is clear and unambiguous, we give effect to its plain meaning and look no further. *Id.* at ¶ 12.

¶ 30 First, section 29-4-102(1)(d), C.R.S. 2018, the legislative declaration, provides that the "clearance, replanning, and reconstruction of areas in which unsanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations . . . are public uses and purposes for which public money may be spent and private property acquired." *See also* § 29-

4-202(1)(d), C.R.S. 2018 (using the identical language). Section 29-4-104, C.R.S. 2018, then provides cities with the powers necessary to undertake projects in the clearance, replanning, and reconstruction of unsanitary or unsafe housing conditions. For example, under section 29-4-104, cities have the power and authorization to construct housing projects within the city; to "contract debts for the construction of any housing project within the city"; to acquire, hold, and dispose of any property in connection with any housing project of the city; "[t]o insure or provide for the insurance of any housing project of the city"; and "[t]o borrow money and accept grants from the federal government for or in aid of the construction of a housing project of the city," among other powers. § 29-4-104(1)(a)-(g)(I).

¶ 31 Next, section 29-4-202 states that a housing authority shall be established for each city to remedy unsanitary or unsafe dwelling accommodations and that "clearance, replanning, and reconstruction" of such areas are "public uses and purposes for which public money may be spent." § 29-4-202(1)(a), (d), (e). Those city housing authorities also have the powers necessary to carry out the purposes of the provision, such as the power "[t]o determine

where unsafe, unsanitary, or substandard dwelling or housing conditions exist"; "[t]o prepare, carry out, and operate projects and to provide for the construction, reconstruction, improvement, alteration, or repair of any project"; "[t]o lease or rent any of the dwellings or other accommodations . . . embraced in any project"; and "[t]o sell, exchange, transfer, assign, or pledge any property, real or personal, or any interest therein to any person, firm, corporation, the city, or a government," among other powers. § 29-4-209(1)(b), (d), (i), (*l*), C.R.S. 2018.

¶ 32 The statutes governing county housing authorities mirror those governing city housing authorities. *See* § 29-4-501(1)(c) (legislative declaration stating "[t]hat it is in the public interest to authorize the organization of county housing authorities to provide housing facilities for agricultural and other low income workers and their families"); § 29-4-503, C.R.S. 2018 (providing the procedures regarding the creation of a county housing authority); § 29-4-505, C.R.S. 2018 (providing county housing authorities with the powers necessary to carry out and effectuate the purposes of the affordable housing provisions, including "[t]o exercise any of the public powers granted to city housing authorities under part 2 of this article").

ii. Sections 29-4-229 and 29-4-506

¶ 33 Section 29-4-229, entitled "Low rentals," provides the following:

> It is the purpose and intent of this part 2 to authorize and impose a duty on the authority to provide safe and sanitary dwelling accommodations at such rentals that persons of low income can afford to live in such dwelling accommodations. To this end, the authority from time to time shall reduce its rents and other charges for such dwelling accommodations to the extent that it deems such action expedient; but the authority shall not reduce its rents or other charges if such action is in violation of any contract between the authority and an obligee or would result in an insufficiency of revenues from the project to meet the costs of the operation and maintenance thereof, to meet all obligations of the authority as same mature, and to create reasonable reserves for such contingencies as the authority determines.

Id.

¶ 34 Section 29-4-506, entitled "Policy of authority," provides the following:

> (1) It is declared to be the policy of this state that each authority shall manage and operate its projects in an efficient manner so as to enable it to fix the rentals or payments for dwelling accommodations at low rates consistent with providing adequate dwelling accommodations for persons of low income.

Id. Subsection (2) then provides that an authority "shall fix the rentals or payments for dwellings in its projects at no higher rates than it finds to be necessary in order to produce revenues . . . sufficient to cover" expenses, such as "costs of management, operation, maintenance, and improvement[s,]" taxes, "reasonable and proper reserves," and payments for any "indebtedness incurred in connection with the project." § 29-4-506(2).

¶ 35 Thus, according to the plain language of the statutes governing city and county housing authorities, housing authorities were authorized to tax and spend public money to provide safe and sanitary housing for persons of low income. § 29-4-102; § 29-4-104; § 29-4-202; § 29-4-501. Further, they were given the powers necessary to do so. § 29-4-104; § 29-4-209; § 29-4-505. But they were also provided with discretion in employing those powers.

¶ 36 And, the plain language of sections 29-4-229 and 29-4-506 addresses rentals and policy. They create a duty to fix or reduce rental payments in order to maintain the low-rent character of the affordable housing projects, but nothing in those statutes can be construed as imposing a duty to provide ongoing repair and

maintenance for a unit to which a housing authority does not fix, charge, or collect rental payments. While CHOA focuses on the first sentence of section 29-4-229 as creating a broad duty "to provide safe and sanitary dwelling accommodations," the statute must be read as a whole. *See Dist. Court*, 713 P.2d at 921. The statute, titled "Low rentals," speaks to reducing rents to preserve the affordable character of dwelling accommodations developed to meet the needs of persons of low income. § 29-4-229. Section 29-4-506 addresses the policy of the housing authorities to fix rent to low rates to provide persons of low income with affordable housing.

¶ 37 Because the units at Centennial were all purchased by individual owners, sections 29-4-229 and 29-4-506 cannot be construed as creating a duty in perpetuity to repair and maintain such units. *See People v. Garcia*, 2016 COA 124, ¶ 9 ("[Courts] avoid constructions that would lead to an illogical or absurd result, along with those which would be at odds with the overall legislative scheme."). This is particularly so given that the housing authorities are required to fix rental payments to an amount that covers the costs of maintenance and repairs. *See* § 29-4-229; § 29-4-506. Further, the deeds to the individual units, along with the Housing

Guidelines, provide that the individual owners would be responsible for maintenance, and the owners entered into that agreement at the time of sale.

¶ 38 We therefore conclude that, under the statutes governing city and county housing authorities, the City, the Board, and APCHA do not have a duty to maintain or repair Centennial.

c. Multijurisdictional Statute

¶ 39 We next conclude that the statute governing multijurisdictional housing authorities, § 29-1-204.5, does not impose any duty on APCHA to maintain or repair Centennial. *See also* §§ 29-1-201, -203, C.R.S. 2018 (authorizing local governments to collaborate for purposes of providing any function lawfully authorized and to make the most efficient use of their powers and responsibilities).

¶ 40 Section 29-1-204.5(1) provides that "[a]ny combination of home rule or statutory cities, towns, [and] counties . . . may, by contract with each other, establish a separate governmental entity to be known as a multijurisdictional housing authority." Such an authority "may be used . . . to effect the planning, financing, acquisition, construction, reconstruction or repair, maintenance,

management, and operation of housing projects or programs pursuant to a multijurisdictional plan: (a) To provide dwelling accommodations at . . . purchase prices within the means of families of low or moderate income." § 29-1-204.5(1)(a). Further, section 29-1-204.5(3)(a) provides that "[t]he general powers of" multijurisdictional housing authorities "shall include the following powers: (a) To plan, finance, acquire, construct, reconstruct or repair, maintain, manage, and operate housing projects and programs pursuant to a multijurisdictional plan within the means of families of low or moderate income."

¶ 41 Plainly, these provisions are discretionary and concern multijurisdictional housing authorities' powers, not duties. Thus, section 29-1-204.5 does not create a "distinctly non-tortious statutorily-imposed duty" requiring the City, the Board, or APCHA to provide funds for Centennial's repairs. *Brown*, 182 P.3d at 690-91.

d. The IGA

¶ 42 We likewise reject CHOA's contention that the IGA imposed a contractual duty on APCHA to repair Centennial. Nothing in the IGA can be construed as such a duty. The IGA authorizes APCHA

"[t]o plan for . . . a project to provide low, moderate, [and] middle income housing" to replace an existing complex with units "that w[ould] be condominiumized for the free market." Moreover, the deed restrictions and the Housing Guidelines indicate that the homeowners are responsible for the cost of capital repairs. We therefore conclude that the IGA does not oblige APCHA to make repairs, but, rather, only authorizes it to do so, among other things, upon either party's request.

2. Claims for Declaratory Relief

¶ 43 CHOA's contention that its claim for declaratory judgment, which mimics its mandamus claim, is for equitable relief, and therefore could not lie in tort, is also unavailing.

¶ 44 Relying on the identical factual allegations, CHOA requested that the district court declare that "defendants have a legal and/or equitable duty to finance, in whole or in part, all necessary repairs to Centennial in order to restore the buildings to safe, sanitary and healthy conditions for dwelling by low income residents of Pitkin County." As previously discussed, defendants do not have such a duty to finance repairs to Centennial.

¶ 45 And CHOA's attempt to frame its request for damages resulting from the alleged construction defects and fraud, misrepresentation, or concealment does not render its claim as one for equitable, noncompensatory relief for purposes of the CGIA. *See Robinson*, 179 P.3d at 1003 ("[T]he form of the complaint is not determinative of the claim's basis in tort or contract."); *see also Brown*, 182 P.3d at 692 ("The nature of the relief requested is not dispositive of coverage by the Act, and the mere fact that a claim for relief seeks a declaration of liability resulting from tortious conduct rather than actual damages for the tortious conduct itself has no impact with regard to coverage."). Though CHOA phrased its claim as one for declaratory relief, defendants' liability for the damages to Centennial would depend on proof of negligence. *See Foster*, ¶¶ 23-24 ("[T]he duty . . . allegedly breached is one implied by law — a duty to act with reasonable care — not one that arises from promises made between the parties."); *see also* § 13-20-804, C.R.S. 2018 ("construction defect negligence claim" statute).

¶ 46 Because CHOA's claim for declaratory relief lies in tort or could lie in tort, the district court lacked subject matter jurisdiction to hear the claim under the CGIA and, therefore, the district court

did not err in dismissing that claim. *See Brown*, 182 P.3d at 691 (claims that could succeed upon a demonstration of the government's liability for tortious conduct are barred by the CGIA).

3. Claim for Rescission

¶ 47 In its cross-appeal, APCHA and the City contend that the district court erred in denying their motion to dismiss the claim for rescission, because that claim was subject to the CGIA. We disagree.

¶ 48 In regard to its claim for rescission, CHOA requested that the court refuse to enforce the deed restrictions that limited the owners' ability to recoup capital improvement costs. Although the district court held that CHOA's request for a declaration that the deed restrictions were unconscionable and its request to reform the deeds were barred by the CGIA, it found that CHOA's request that the court rescind the deed restrictions was not subject to the CGIA. The court determined that the claim for reformation arose out of a duty to disclose, which is a fraud-based tort duty, but that the claim for rescission arose out of a contract-based duty. Because the court concluded that a claim seeking to void deed restrictions on the grounds that they were contrary to public policy cannot lie in

tort, it denied defendants' motion to dismiss with respect to that claim.

¶ 49 Colorado courts recognize a strong policy of freedom of contract. "Contracts between competent parties, voluntarily and fairly made, should be enforceable according to the terms to which they freely commit themselves." *Calvert v. Mayberry*, 2019 CO 23, ¶ 21 (quoting *Ravenstar, LLC v. One Ski Hill Place, LLC*, 2017 CO 83, ¶ 12). However, a contract is unenforceable by either party if it is against public policy. *Id.*; *see also Fed. Deposit Ins. Corp. v. Am. Cas. Co. of Reading*, 843 P.2d 1285, 1290 (Colo. 1992) ("It is a long-standing principle of contract law that a contractual provision is void if the interest in enforcing the provision is clearly outweighed by a contrary public policy."); *Menzel v. Niles Co.*, 86 Colo. 320, 324, 281 P. 364, 365 (1929) ("A contract which is contrary to public policy is void because it *is contrary* to public policy, and neither party to the contract is estopped from questioning it merely because the other party has parted with a property right or rendered service in reliance upon it.").

¶ 50 Public policy "is that rule of law which declares that no one can lawfully do that which tends to injure the public, or is

detrimental to the public good." *Calvert*, ¶ 22 (quoting *Russell v. Courier Printing & Publ'g Co.*, 43 Colo. 321, 325, 95 P. 936, 938 (1908)). "In addition, public policy must be clearly mandated such that the acceptable behavior is concrete and discernible as opposed to a broad hortatory statement of policy that gives little direction as to the bounds of proper behavior." *Rocky Mountain Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 525 (Colo. 1996) ("Statutes by their nature are the most reasonable and common sources for defining public policy.").

¶ 51 In support of its claim for rescission, CHOA alleged that the deed restrictions and Housing Guidelines "violate[d] Colorado state law and legislatively decreed public policies for the reasons detailed" in the complaint; did not "represent or give effect to the true intent or agreements of the Parties;" did not "represent or give effect to the legal duties and obligations of the Parties;" and were "ambiguous, and arbitrarily applied, with respect to the defendants' legal obligations to ensure the provision of safe, sanitary and affordable housing for lower income citizens in th[e] community." CHOA sought reformation or rescission of the deed restrictions to allow owners to recoup the total costs of repair upon resale. They argued

that the Housing Guidelines were not "based on any rational or objective criteria" and served as a "disincentive and financial impediment to undertaking the necessary capital repairs." As a result, CHOA argued that the deed restrictions were "contrary to public policy" and the "legislative intent of Colorado's Affordable Housing Law."

¶ 52 Because CHOA's claim for rescission arises solely in contract, it could not lie in tort, and therefore is not barred by the CGIA. *See Foster*, ¶¶ 15, 25. CHOA's claim for rescission was based on its allegations that the deed restrictions violated the legislative intent behind the affordable housing statutes, in which the General Assembly "declared that the lack of safe, sanitary and affordable housing for persons of low income [was] a matter of public interest." CHOA also alleged that the deed restrictions were contrary to the policy behind the housing authority provisions, in which the General Assembly "declared that the lack of affordable, safe and sanitary housing for families of low income 'constitute[d] a menace to the health, safety and welfare of citizens of [Colorado].'" Thus, the rescission claim is not based on the allegations of construction defect, fraud, misrepresentation, or concealment, and is instead

rooted solely in contract. *Cf. Conners*, 993 P.2d at 1176 (considering the policy behind the applicable statute in determining that the plaintiff's claims were equitable and noncompensatory in nature and, therefore, were not barred by the CGIA); *Meyerstein v. City of Aspen*, 282 P.3d 456, 463 (Colo. App. 2011) (remanding for the trial court to consider a claim challenging deed restrictions that limited rental amounts as contrary to public policy).

¶ 53 We therefore conclude that the district court did not err in denying defendants' motion to dismiss with respect to the rescission claim.

III. Conclusion

¶ 54 We affirm the district court's order granting defendants' motion to dismiss CHOA's claims for mandamus and declaratory relief and denying defendants' motion to dismiss CHOA's claim for rescission. The case is remanded for further proceedings.

JUDGE DAILEY and JUDGE PAWAR concur.

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: Steven L. Bernard
Chief Judge

DATED: December 27, 2018

Notice to self-represented parties: *The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at* *http://www.cobar.org/Portals/COBAR/repository/probono/CBAAppProBonoProg_PublicInfoApp.pdf*