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Colorado Supreme Court to Consider Whether Housing Discrimination and Retaliation are Affirmative Defenses in Eviction Proceedings

Last week, the Colorado Supreme Court granted certiorari in just one case, *Claire Miller v. Jesse Amos*, in which the Court will weigh in on an issue of first impression in Colorado: whether "a landlord's discrimination or retaliation under the Colorado Fair Housing Act can be raised as an affirmative defense to a forcible entry and detainer action."

Miller is the rare case in which the Colorado Supreme Court agreed to hear a case stemming from a county court trial that was appealed to the district court, rather than a case tried to the district court and appealed to the Colorado Court of Appeals. This unique posture has caused the *Miller* case to fly under the radar despite it presenting an issue of first impression that could have far reaching implications for residential landlords and tenants.

The facts of *Miller* are straightforward. Miller and her son were tenants of Jesse Amos. Miller and Amos agreed that, rather than pay monetary rent, Miller would "provide pet care and light housekeeping services." Amos eventually initiated eviction proceedings of Miller through a notice to quit "only after [Miller] thwarted [Amos'] sexual advances."

In the county court proceedings, Miller asserted discrimination and retaliation in violation of the Colorado Fair Housing Act (CFHA) as an affirmative defense to Amos's efforts to evict her. Although the county court took evidence and testimony relevant to this defense, the county court concluded that the CFHA is not an affirmative defense in an eviction action and, even if it were, Miller could not assert it without first filing an administrative complaint with the Colorado Civil Rights Division.

As such, the county court entered judgment in Amos' favor and against Miller.

Miller appealed this judgment to the district court, sitting as a court of appeals (the district court did not conduct a new trial). The district court affirmed the county court's conclusion that the CFHA is not an affirmative defense to a residential eviction proceeding. The district court reached this conclusion based first on its reading of the text of the CFHA. The district court noted that, while the CFHA provides affirmative relief to victims of housing discrimination, nothing in its text states that a violation of the CFHA may be asserted as a defense to an eviction proceeding. The district court also found that Colorado law permits "landlords [to] decline to renew or continue a lease for any reason." The district court then went on to state that, although Colorado recognizes retaliatory eviction as a defense to eviction proceedings, that defense is limited to scenarios where the tenant has made a complaint or report regarding the "condition/habitability of the premises" to a governmental body. So, the district court found that because thwarting her landlord's sexual advances was not a complaint regarding the "condition/habitability of the premises" to a governmental body, the defense of retaliatory eviction was unavailable to Miller.

The Colorado Supreme Court will review this conclusion. No reported Colorado appellate opinion has previously addressed the specific question of whether the terms of the CFHA can be asserted as an affirmative defense to an eviction action. If the Colorado Supreme Court reverses the district court and allows for the assertion of such a defense in residential eviction proceedings, such a ruling could have far-reaching implications for residential landlords and tenants.

Most notably, the assertion of such a defense could dramatically prolong the eviction process as discovery into the alleged discrimination and retaliation would likely become necessary prior to proceeding to a hearing on possession. Colorado eviction statutes are designed to allow for expeditious resolution of issues related to a landlord's right to possession of the premises, with such hearings typically happening within approximately two weeks of the filing of the eviction lawsuit. These hearings are usually short and inexpensive as the issues are limited to whether the tenant has violated some term of the rental agreement. Injection of more complex issues such as allegations of discrimination and retaliation, however, could potentially cause hearings to need to be pushed out much farther than the usual

time frame as at least one of the parties would likely seek to conduct discovery on the allegations of discrimination and retaliation, which can take weeks or months. Further, the hearing itself would become much more complex as additional testimony and evidence would need to be presented.

Colorado landlords and tenants alike will want to watch this case closely as its outcome could drastically change their respective rights and obligations. It also bears noting that industry groups may want to consider filing an amicus brief with the Colorado Supreme Court to make their position known to the Court.

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