

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-cv-00865-LTB-BNB

COLORADO CROSS-DISABILITY COALITION, a Colorado non-profit Corporation,  
LAURA HERSHEY,  
CARRIE ANN LUCAS,  
HEATHER REBEKAH RENEE LUCAS, by and through her parent and next friend,  
CARRIE ANN LUCAS  
ADRIANNE EMILY MONIQUE LUCAS, by and through her parent and next friend,  
CARRIE ANN LUCAS,  
ASIZA CAROLYN KOLENE LUCAS, by and through her parent and next friend,  
CARRIE ANN LUCAS, and  
DANIEL WILSON,

Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER, COLORADO,

Defendant and Third Party Plaintiff,

v.

SEMPLE BROWN DESIGN, P.C.,

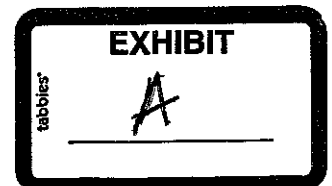
Third Party Defendant.

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**THIRD PARTY COMPLAINT AND JURY DEMAND**

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The City and County of Denver, by and through its attorney, Elizabeth A. Starrs of Starrs Mihm & Caschette LLP, states its Third Party Complaint against Third Party Defendant Semple Brown Design, P.C. as follows:



VENUE AND JURISDICTION

1. Venue and jurisdiction are appropriate pursuant to 28 U.S.C. § 1391(b) and 28 U.S.C. § 1367.

PARTIES

2. The City and County of Denver (“the City”) is a home rule city in the State of Colorado.

3. Semple Brown Design, P.C. (“Semple Brown”) is an architectural design firm with its principal place of business in Denver, Colorado.

GENERAL ALLEGATIONS

4. In 2002, the City submitted a request for proposals for professional services for the renovation of its Newton Denver Municipal Auditorium. The Auditorium, located in the Denver Performing Arts Complex, is owned by the City and leased to various entities as a venue for performing arts. The renovation was a complete renovation of the inside of the Auditorium, including the construction of the Ellie Caulkins Opera House (“the Ellie”) and the Kevin Taylor Restaurant built within the existing outside structure of the Auditorium.

5. Semple Brown represented to the City that it had the requisite expertise and specialization in ADA compliance for the Project. In fact, Semple Brown knew it did not have the requisite expertise and specialization in ADA compliance or, alternatively, was aware that it did not know whether it had the requisite expertise and specialization in ADA compliance.

6. On August 12, 2002, Semple Brown and the City entered into a Design Services Agreement (“the Agreement”) for the Newton Denver Municipal Auditorium (“Auditorium”) Renovation Project (“the Project”). The Agreement, set forth as Exhibit 1, called for the complete renovation of the inside of the Auditorium.

7. Pursuant to the Agreement, in exchange for monetary compensation, Semple Brown agreed to provide comprehensive professional design services, including architectural, engineering, and related technical services including space planning, interior design, theatre design, and other related technical services required to design, construct and deliver to the City a complete, fully functional public improvement, free of material design, architectural, and engineering defects. Exh. 1, Art. II (2.1).

8. The Agreement further required Semple Brown to strictly confirm to and be bound by any and all written standards, criteria, budgetary considerations and memoranda of policy furnished by the City in performing its services, and required Semple Brown to design the Project in strict compliance with all applicable laws, statutes, codes, ordinances, rules and regulations, and industry standards. Exh. 1, Art. II (2.2.7), Art. IX (9.1).

9. The Agreement further required Semple Brown to provide all professional services required by the City in defending all claims against the City which relate to alleged errors and omission of Semple Brown or those performing under it, without additional compensation. Exh. 1, Art. II (2.2.8).

10. The Agreement further required Semple Brown to defend, release, indemnify, and save and hold harmless the City from and against any and all claims, demands, suits, actions, liabilities, costs, expenses, and causes of action in any way resulting from, connected with, or

arising out of the tortious or negligent operations or performance of Semple Brown. Exh. 1, Art. XIV (14.2).

11. Pursuant to the Agreement, Semple Brown agreed to perform all work in accordance with the standards of care, skill and diligence provided by competent professionals who perform work or services of a similar nature to the work or services described in the Agreement. Exh. 1, Art. 23 (23.3).

12. Semple Brown and its subcontractors proceeded to provide the design services under the Agreement. Semple Brown was responsible for the work performed by its subcontractors and Semple Brown provided and/or approved all drawings and specifications, construction documents, and work performed on the Project.

13. However, as later discovered by the City, Semple Brown breached its obligations under the Agreement and has refused to defend, indemnify, and hold harmless the City as required under the Agreement.

14. On September 14, 2005, prior to the October 2005 public opening of the Ellie Caulkins Opera House, members of the Colorado Cross-Disability Coalition (CCDC) toured the Ellie. Following their tour, the CCDC, by letter dated September 16, 2005, notified the City of alleged failures of the renovation to comply with Americans with Disabilities Act Accessibility Guidelines (“ADAAG”). The items complained of included, but were not limited to:

- a. Failure to design access to the orchestra level via a ramp or elevator, instead requiring wheelchair patrons to use a lift unsuitable for individuals in wheelchairs;

- b. Failure to design wheelchair seating in orchestra level on a level base; and
- c. Failure to design wheelchair seating with sufficient room for two or more individuals using wheelchairs to sit together.

15. At the time of the CCDC's tour, construction was not complete and subsequent work addressed and resolved several issues raised by the CCDC.

16. On or about October 13, 2005, the City notified Semple Brown in writing of the CCDC's initial concerns.

17. On November 18, 2005, Semple Brown responded to the City regarding the accessibility issues raised by the CCDC. In its response, Semple Brown took the position that the concerns of CCDC either were to be addressed during completion of the project or did not constitute violations of the law.

18. However, the CCDC continued to be concerned with several issues and, ultimately, on May 5, 2006, filed a complaint against the City in the United States District Court, District of Colorado, Case No. 1:06-cv-00865-LTB, alleging violations of the Americans with Disabilities Act, the Rehabilitation Act, the Colorado Anti-Discrimination Act, and the Colorado Consumer Protection Act, arising from, *inter alia*, the design of the Ellie. The CCDC also filed a complaint with the United States Department of Justice (DOJ) alleging accessibility problems at the Ellie and the Kevin Taylor Restaurant.

19. The alleged defects raised in the CCDC's complaints included, but were not limited to, inadequacies with:

- a. Designated accessible seating locations;
- b. Orchestra level accessible seating location slope/rake;
- c. Emergency egress use for accessible seating location patrons from the orchestra level;
- d. Adequacy of maneuvering clearances for disabled patrons;
- e. Orchestra level cross access, *i.e.*, access from one side of the Ellie to the other;
- f. Accessible box office/will call window for disabled patrons;
- g. Figaro access for disabled patrons;
- h. Removal of mobility devices from the aisles/storage of mobility devices next to accessible seating;
- i. Accessible restrooms;
- j. Accessible bar and patron tables in the Kevin Taylor Restaurant;
- k. Signage; and
- l. Accessible elevators and/or lifts.

20. Pursuant to § 13-20-803.5, C.R.S., the City sent a Notice of Claim to Semple Brown on July 12, 2006. In the Notice of Claim, the City demanded that Semple Brown both investigate the alleged defects at the Ellie and tender a written offer to remedy all identified defects and/or an offer to settle.

21. The City has demanded that Semple Brown provide a defense for and indemnify the City against the claims made by CCRC.

22. As of today, Semple Brown has not remedied the defects alleged by the CCDC nor has Semple Brown tendered a defense or indemnification to the City.

23. The City remains in litigation with CCDC regarding the accessibility of the Ellie and the Kevin Taylor Restaurant. The City has incurred substantial damages caused by the acts or omissions of Semple Brown, including, but not limited to, lost revenue for loss of seating, litigation costs, attorneys' fees, and construction costs. These damages are directly related to the City's efforts to defend and resolve the dispute with CCDC.

FIRST CLAIM FOR RELIEF: BREACH OF CONTRACT

24. The City incorporates the preceding paragraphs as if set forth in full.

25. Semple Brown and the City entered into an enforceable valid contract, the Agreement. The City has performed its obligations under the Agreement.

26. Semple Brown breached its obligations under the Agreement, including, but not limited to, the following particulars:

a. Semple Brown failed to perform its contractual obligations in a workmanlike matter or with the degree of professional skill and care required of reasonable professionals performing work or services of a similar nature to the work or services described in the Agreement;

b. Semple Brown's design of the Ellie and the Kevin Taylor Restaurant failed to meet applicable state, federal and local requirements and standards;

c. Semple Brown's design failed to meet the Project requirements, including compliance with all laws, rules, and regulations;

d. Semple Brown failed to defend and indemnify the City.

27. Semple Brown's breaches were and are material breaches.

28. Semple Brown's breaches have caused the City damages in an amount to be proven at trial.

SECOND CLAIM FOR RELIEF: BREACH OF THE COVENANT OF GOOD FAITH  
AND FAIR DEALING

29. The City incorporates the preceding paragraphs as if set forth in full.

30. The Agreement contains an implied covenant of good faith and fair dealing.

31. Semple Brown's refusal to provide a defense and/or indemnification to the City is a breach of the covenant of good faith and fair dealing.

32. The City has been damaged by Semple Brown's breach of the covenant of good faith and fair dealing, in an amount to be proven at trial.

THIRD CLAIM FOR RELIEF: PROFESSIONAL NEGLIGENCE

33. The City incorporates the preceding paragraphs as if set forth in full.



34. Semple Brown is a professional organization and has a duty to act in a manner consistent with the standards of conduct and care required of professionals providing architectural, engineering, interior design, utility coordination, and other design services;

35. Semple Brown negligently designed the Ellie and the Kevin Taylor Restaurant.

36. Semple Brown's negligence was not consistent with the standards of conduct and care required.

37. Semple Brown's negligence has caused the City damages, in an amount to be proven at trial.

FOURTH CLAIM FOR RELIEF: NEGLIGENT MISREPRESENTATION

38. The City incorporates the preceding paragraphs as if set forth in full.

39. Semple Brown gave false information to the City.

40. Semple Brown gave such information to the City in the course of the business transaction in which Semple Brown had a financial interest.

41. Semple Brown gave the information to the City for the use of the City in a business transaction.

42. Semple Brown was negligent in communicating the information.

43. Semple Brown gave the information with the intent or knowing that the City would act in reliance on the information.

44. The City relied on the information supplied by Semple Brown.

45. This reliance caused damage to the City in an amount to be determined at trial.

FIFTH CLAIM FOR RELIEF: FALSE REPRESENTATION

46. The City incorporates the preceding paragraphs as if set forth in full.

47. Semple Brown made false representations of past or present facts to the City.

48. These facts, including that Semple Brown had expertise and specialization in ADA compliance, were material.

49. Semple Brown made false representations to the City knowing them to be false or, alternatively, with knowledge that they did not know whether these representations were true or false.

50. Semple Brown made false representations to the City with the intent that the City would rely upon these representations.

51. The City did, in fact, rely upon Semple Brown's representations.

52. The City's reliance upon Semple Brown's representations was justified under the circumstances.

53. The City's reliance upon Semple Brown's false representations caused injuries, damages, and losses to the City in an amount to be proven at trial.

SIXTH CLAIM FOR RELIEF: DECLARATORY JUDGMENT

54. The City incorporates the preceding paragraphs as if set forth in full.

55. The City seeks a declaration that under the Agreement, SBD had and has a duty to defend, release, indemnify, and save and hold harmless the City from and against any and all claims (including the claims brought by the CCDC), liabilities, suits, demands, actions, costs, and expenses (including but not limited to reasonable attorneys' fees, expert witness fees and all associated defense fees) which arise out of alleged design defects in the Ellie and/or the Kevin Taylor Restaurant.

PRAYER FOR RELIEF

The City requests declaratory relief and compensatory damages, including all available pre- and post-judgment interest, attorneys' fees, and costs, and any other relief deemed just and appropriate.

THE CITY DEMANDS A JURY ON ALL ISSUES SO TRIABLE

**DATED** this 13<sup>th</sup> day of March, 2008.

Respectfully submitted,

/s/ Elizabeth A. Starrs

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