

IN THE UTAH COURT OF APPEALS

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Draper City, a Utah municipal corporation,)	MEMORANDUM DECISION
)	(Not For Official Publication)
)	
Plaintiff and Appellee,)	Case No. 20061151-CA
)	
v.)	
)	F I L E D
)	(March 15, 2007)
<u>Peter Morton Coats</u> , Custodian)	
for Audrey Caroline Coats)	2007 UT App 94
under the Utah Uniform)	
Transfers to Minors Act;)	
Caroline Hayes Coats; Susan)	
Devall; Cavalry Investments,)	
L.L.C.; and CAVC of Colorado,)	
L.L.C.,)	
)	
Defendants and Appellant.)	

Third District, Salt Lake Department, 050918905
The Honorable Timothy R. Hanson

Attorneys: Stephen G. Homer, West Jordan, for Appellant
 Todd J. Godfrey, Michael Z. Hayes, and Stephanie
 Bell, Salt Lake City, for Appellee

Before Judges Bench, Orme, and Thorne.

PER CURIAM:

Appellant Peter Morton Coats appeals the denial of a motion to dismiss and the grant of a certificate of immediate occupancy. This case is before the court on a sua sponte motion to dismiss the appeal for lack of jurisdiction.

Appellee Draper City (the City) correctly notes that only the December 6, 2006 Order on Defendants' Motion to Dismiss was certified by the court under rule 54(b) of the Utah Rules of Civil Procedure. The separate order granting the City's motion for an order of immediate occupancy was not certified under rule 54(b) and was not eligible for certification. An order of immediate occupancy is an interlocutory ruling granting a right of occupancy and can be reviewed by the district court pending

the disposition of the condemnation case. See Cornish Town v. Koller, 817 P.2d 305, 308-09 (Utah 1991).

Rule 54(b) allows a trial court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment." Utah R. Civ. P. 54(b). The certification order in this case did not contain the requisite language. Furthermore, the certified order denying the motion to dismiss did not resolve a separate claim and left all parties and claims pending before the district court. The district court certified the order as "a final judgment on the issue" concerning the retroactive application of Senate Bill 117, which became effective during the condemnation action. As the basis for denying a motion to dismiss, the district court ruled that the bill did not apply retroactively to deprive the City of authority to use eminent domain for the construction of a public recreational trail. The ruling on that issue was not eligible for certification under rule 54(b). See Webb v. Vantage Income Prop., 818 P.2d 1, 2 (Utah 1991) (dismissing an appeal where certification was based upon disposition of a "significant issue," rather than upon a separate claim).

We invited the parties to address whether this court should allow the appeal to proceed as an interlocutory appeal if the court determines it was improperly certified. See Utah R. App. P. 5(a) ("A timely appeal from an order certified under Rule 54(b), Utah Rules of Civil Procedure, that the appellate court determines is not final may, in the discretion of the appellate court, be considered by the appellate court as a petition for permission to appeal an interlocutory order."). Coats did not respond to the sua sponte motion, and the City opposes consideration of the appeal as an interlocutory appeal. Accordingly, we do not consider application of the exception contained in rule 5(a). See Utah R. App. P. 5(a).

We dismiss the appeal for lack of jurisdiction because the order denying the motion to dismiss was not eligible for certification under rule 54(b) of the Utah Rules of Civil Procedure. Our dismissal is without prejudice to a timely appeal taken after entry of a final appealable judgment.

Russell W. Bench,
Presiding Judge

Gregory K. Orme, Judge

William A. Thorne Jr., Judge