

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore**

Civil Action No. 15-cv-00079-RM

DEVELOPERS SURETY AND INDEMNITY COMPANY,

Plaintiff,

v.

EVAN ASBY,
JACQUELINE ASBY,
ROBERT M. SEIDEL,
MELANIE F. SEIDEL, and

Defendants.

ORDER

This matter is before the Court on the following three filings (collectively, “Papers”): (1) Plaintiff Developers Surety and Indemnity Company and Defendants Robert M. Seidel and Melanie F. Seidel’s (collectively, “Settling Parties”) Stipulated Motion for Entry of Judgment by Confession (“Stipulated Motion”) (ECF No. 52); (2) Stipulation to Dismiss all Claims and Cross-Claims against Defendants Evan Asby and Jacqueline Asby Without Prejudice (“Stipulation”) (ECF No. 55); and (3) Joint Status Report (ECF No. 56). Collectively, the Papers seek to dismiss the claim and crossclaim against the Asby Defendants without prejudice, and to effectuate the settlement of Plaintiff Developers’ claim against the Seidel Defendants.

Upon consideration of the Papers, the applicable rules and case law,¹ the Court file, and being otherwise fully advised, the Court **FINDS** and **ORDERS** as follows:

- (1) That upon the filing of the Stipulation to Dismiss all Claims and Cross-Claims against Defendants Evan Asby and Jacqueline Asby Without Prejudice (ECF No. 55),
 - (a) Plaintiff Developers Surety and Indemnity Company's claim against Defendants Evan Asby and Jacqueline Asby is dismissed without prejudice; and
 - (b) Defendants Robert M. Seidel and Melanie F. Seidel's crossclaim against the Asby Defendants is dismissed without prejudice;
- (2) That the Stipulated Motion for Entry of Judgment by Confession (ECF No. 52) is **GRANTED**, in resolution of Plaintiff Developer's sole remaining claim in this action;
- (3) That Plaintiff Developers Surety and Indemnity Company's Motion for Summary Judgment (ECF No. 47) is **DENIED AS MOOT**;
- (4) That the Clerk of the Court shall enter **JUDGMENT** in favor of Plaintiff Developers Surety and Indemnity Company and against Defendants Robert M. Seidel and Melanie F. Seidel, jointly and severally, in the amount of \$85,000.00, with interest to accrue thereon from the date of the entry of this Order at the legal rate prescribed by 28 U.S.C. § 1961(a);

¹ The Settling Parties cite to Fed. R. Civ. P. 41(a)(1)(A)(ii) – for dismissal of *actions* – in support of their Stipulated Motion as to Developers' dismissal of its *claim* against the Asby Defendants. There is, however, uncertainty in the Tenth Circuit whether Fed. R. Civ. P. 21 or 41 applies to the dismissal of a party from an action involving more than one defendant. See *Van Leeuwen v. Bank of Am., N.A.*, 304 F.R.D. 691, 692–97 (D. Utah 2015); see also *Gobbo Farms & Orchards v. Pool Chem. Co.*, 81 F.3d 122, 123 (10th Cir. 1996) (Rule 41 “speaks of dismissal of an action, not just a claim within an action. [Plaintiff] offers no authority, and we have found none, to support its contention that Rule 41(a) applies to dismissal of less than all claims in an action.”). Regardless, the Court agrees that, in most instances (such as the Stipulated Motion at issue), it is immaterial whether it acts under Rule 21 or 41. 9 Charles Alan Wright et al., *Federal Practice and Procedure* § 2362 (3d ed. 2008).

- (5) That pursuant to Plaintiff Developers Surety and Indemnity Company and Defendants Robert M. Seidel and Melanie F. Seidel's agreement, Plaintiff Developers Surety and Indemnity Company shall forbear from execution on the judgment for 30 days from the date of entry of judgment; and
- (6) That Plaintiff Developers Surety and Indemnity Company and Defendants Robert M. Seidel and Melanie F. Seidel shall pay his, her, and its own respective attorney fees and costs.

DATED this 22nd day of February, 2016.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Raymond P. Moore", written over a horizontal line.

RAYMOND P. MOORE
United States District Judge