

DISTRICT COURT, LARIMER (FT COLLINS) COUNTY, COLORADO Court Address: 201 Laporte Avenue, Suite 100, Fort Collins, CO, 80521	DATE FILED: July 19, 2016 1:07 PM CASE NUMBER: 2016CV144 <p style="text-align: center;">⚠ COURT USE ONLY ⚠</p>
Plaintiff(s) VIRGINIA L FARVER v. Defendant(s) CITY OF FORT COLLINS et al.	
Order: Plaintiff's Reply to Defendants' Answer and motion for leave to amend complaint	

The motion/proposed order attached hereto: REVIEWED.

The Plaintiff's Motion to Amend Complaint is denied. The Motion does not contain a certificate of conferral nor is there a proposed Amended Complaint.

Issue Date: 7/19/2016



GREGORY M LAMMONS
 District Court Judge

2016 JUN 30 PM 3:48

<input type="checkbox"/> Small Claims <input type="checkbox"/> County Court <input checked="" type="checkbox"/> District Court <input type="checkbox"/> Probate Court <input type="checkbox"/> Juvenile Court <input type="checkbox"/> Water Court Larimer County, Colorado Larimer County Justice Center 201 La Porte Ave Suite 100 Ft. Collins, CO 80521	
Plaintiff: Virginia L. Farver v Defendant(s): City of Fort Collins Fort Collins City Council Darin Atteberry Fort Collins Utilities Fort Collins Utilities Management and Staff Dennis Sumner Steve Catanach; and Does 1 - 100	▲ COURT USE ONLY ▲ Case Number: 16CV144 Div.: Ctrm: 5B
Attorney or Party Without Attorney: (Name & Address) 1214 Belleview Drive Fort Collins, CO 80526 Phone Number: 970-689-3798 FAX Number: E-mail: Atty. Reg. #:	
Plaintiff's Reply to Defendants' Answer and motion for leave to amend Complaint	

This is Plaintiff's Reply to Defendants' Answer dated June 10, 2016.

In their Answer Defendants allege that the Plaintiff's Complaint fails to comply with C.R.C.P. 8's requirement that litigants provide a "short and plain statement" of their claim. (Answer at 2)

Defendants also stated, "Defendants will instead wait and file a thorough Motion for Summary Judgment to have the Court address the various legal claims and defenses" (Answer at 2)

Plaintiff need not and will not go through Defendants' answers to each individual allegation. Rather Plaintiff will address only those that appear to require a reply.

Speaking of C.R.C.P. 8 (2016), Rule 8. General Rules of Pleading, the rule says:

(a) Claims for Relief. A pleading which sets forth a claim for a relief whether an original claim, counterclaim, cross-claim, or a third-party claim, shall contain: (1) If the court is of limited jurisdiction, a short and plain statement of the grounds upon which the court's jurisdiction depends; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for judgment for the relief to which the pleader claims to be entitled. No dollar amount shall be stated in the prayer or demand for relief. Relief in the alternative or of several different types may be demanded. Each pleading containing an initial claim for relief in a civil action, other than a domestic relations, probate, water, juvenile, or mental health action, shall be accompanied by a completed Civil Cover Sheet in the form and content of Appendix to Chapters 1 to 17, Form 1.2 (JDF 601), at the time of filing. Failure to file the cover sheet shall not be considered a jurisdictional defect in the pleading but may result in a clerk's show cause order requiring its filing.

Plaintiff did provide all 3 parts in her Complaint.

(1) If the court is of limited jurisdiction, a short and plain statement of the grounds upon which the court's jurisdiction depends;

This is in paragraph 5 of the Complaint which says, "Jurisdiction is found in the Governmental Immunity Act, C.R.S. 24-10-109 (2015),"

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

This is in paragraph 3 of the Complaint which says, "#3 The primary issue in this action is whether Defendants can lawfully charge Plaintiff a monthly "manual meter reading charge" for the service of reading Plaintiff's electric meter despite the fact that the Fort Collins City Council never authorized Fort Collins Utilities and the other Defendants to execute or implement the Advanced Meter Fort Collins Project ("AMFC Project" or "Project") to which the manual meter reading charge relates, and the fact that such authorization by the City Council was necessary and required by statute and the City Charter."

(3) a demand for judgment for the relief to which the pleader claims to be entitled.

This is in paragraph 157 of the Complaint which says, "Plaintiff respectfully requests that this Court enter judgment in her favor and against Defendants as follows:" and then describes what Plaintiff asked the Court for.

Defendants appear to be arguing that the Complaint is not brief.

Nothing in C.R.C.P. gives a page limit on a Complaint. Plaintiff was required to include all of these items but the C.R.C.P. doesn't say that Plaintiff cannot include other items as Plaintiff did. The Complaint had both a solid factual basis and legal basis.

Defendants referred to the letter dated January 12, 2016 addressed to Plaintiff and signed by John R. Duval, Deputy City Attorney. Defendants claim, in response to paragraph 3, that the Project was authorized. (Answer at 2). Unfortunately Defendants did not address Plaintiff's legal arguments explaining what was really required before the City could remove the existing electric meters and install smart electric meters and why Mr. Duval's legal arguments in his letter are incorrect. Defendants acknowledged the existence of, but mischaracterized, Plaintiff's paragraphs 67 through 86 and 92 through 110, which set for the legal basis for Plaintiff's arguments and causes of action and explained why the AMFC Project was not properly authorized. (Answer at 8)

Defendants argue, "Plaintiff's arguments are more appropriately made in a motion and not in a 'short and concise statement of the claim for relief' required by the C.R.C.P. 8." (Answer at 8, responding to Paragraphs 93 through 110 of the Complaint).

Nothing in C.R.C.P. prohibits Plaintiff from making legal arguments, such as those in the relevant paragraphs of the Complaint, in her Complaint. Plaintiff will, if appropriate, make those legal arguments again in a motion.

Thus Defendants have not really addressed the legal issues raised by Plaintiff in the Complaint. Perhaps Defendants intend to do so in their Motion for Summary Judgment that they said they intend to file. Plaintiff notes that Defendants have not filed such a motion as of this date nor have Defendants stated the date or approximate date or range of dates in which they intend to file.

Defendants' Answer says, "With regard to Paragraph 5 of the Complaint, the Defendants deny that the Colorado Governmental Immunity Act, C.R.S. section 24-10-109, confers jurisdiction. The Act speaks for itself."

Plaintiff agrees that the Act speaks for itself. The proper interpretation and application of the Act to the circumstances in this action shows that the Act does give this Court jurisdiction. Defendants have not given a single reason why the Act does NOT give this Court jurisdiction. Perhaps Defendants are not required to state their reason in an Answer. In any case on Paragraph 5 as on many other Paragraphs Defendants have not given the Court a legal basis for their argument and thus the Court cannot grant Defendants the outcome they asked for, namely;

"WHEREFORE, all of the Defendants respectfully pray that the Court enter judgment in their favor and against the Plaintiff, and award the Defendants their reasonable attorney's fees, expert witness fees, costs and such further relief as the Court shall deem just and proper." (Answer at 11)

Without a legal basis the Court cannot enter judgment in Defendants' favor or any of the other prayed for relief.

Plaintiff may have misstated the job titles of Dennis Sumner and / or Steve Catanach in one or more places. This does not affect the overall merit of the action.

In case it was not clear from the face of the Complaint, the reason Plaintiff described the history of her Open Records Act request to the City and lengthy correspondence with the City regarding providing or even having responsive records, including the conference call in April 2015 and follow up letter from the City to Plaintiff was to establish the date of her delayed discovery of her injury. The injury, as the Complaint stated, was the monthly manual meter reading charge. It was an injury because of the legal arguments made in the complaint, starting with the fact that the AMFC Project was never authorized by the Fort Collins City Council, as it would have had to be.

Affirmative Defenses

Defendants' Answer states 12 affirmative defenses. However Defendants did not elaborate on any of them, either with a factual basis or a legal basis. As such this Court cannot rely on any of the affirmative defenses as a reason to enter judgment in Defendants' favor. Perhaps Defendants intend to elaborate on their affirmative defenses in their aforementioned Motion for Summary Judgment. Plaintiff will reply to that Motion when she receives it.

Affirmative defenses 2, 3, 4, 5 and 9 each contain the word "may", as in, "Plaintiff may not be the real party in interest." This is not a conclusive statement. By the use of the word "may" Defendants are telling the Court that each of the claimed affirmative defenses "may not" be as written in their Answer. "May" includes and encompasses "may not". If Defendants really believe that one or more of their affirmative defenses is true they will have to re-allege such defenses and replace the word "may" with something definitive so as to make a conclusive statement.

Affirmative defense 1 is a claim without any factual or legal basis.

Affirmative defense 6: Plaintiff asks the Court for leave to amend her Complaint so as to allege her claims with sufficient particularity required by C.R.C.P. 9(b) and C.R.C.P. 9(a)(2) and to make other changes to make the Complaint easier to follow, such as adding a list of exhibits.

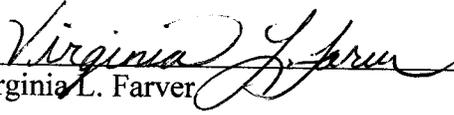
Affirmative defense 7: does not appear to be a defense. The sections of the City Charter, City Code, and state statutes provided the legal basis for Plaintiff's causes of action. Defendants have not disputed any of those legal bases.

Affirmative defense 8: This is a false statement. If Defendants want the Court to agree with this statement they must provide their legal basis for it. Plaintiff believes that Defendants must also address the legal basis for Plaintiff's argument that the Project was not properly authorized.

Affirmative defense 11: Plaintiff addressed this earlier on pages 1 and 2 of this reply.

Dated June 30, 2016

Respectfully submitted.


Virginia L. Farver

Attachment to Order - 2016CV144