FORT COLLINS MUNICIPAL COURT 215 N. Mason Fort Collins, CO 80521 Phone (970) 221 6800	
Plaintiffs: Colleen Hoffman, Rick Hoffman, Ann Hunt v. **Defendant :** THE CITY COUNCIL OF THE CITY OF FORT COLLINS, the governing body of a Colorado municipal corporation; and THE ADMINISTRATION BRANCH OF THE CITY OF FORT COLLINS, by and through its City Manager, Darin Atteberry.	▲ COURT USE ONLY ▲
Parties without attorney Colleen Hoffman, pro se 1804 Wallenberg Drive Fort Collins, CO 80526 (970) 484 8723 cohoff@comcast.net Rick Hoffman, pro se 1804 Wallenberg Fort Collins, CO 80526 (970) 484 5154 rick-hoffman@comcast.net Ann Hunt, pro se 1800 Wallenberg Drive Fort Collins, CO 80526 (970) 484 5242 ARH4@COMCAST.NET	Case Number: **2017 CIVIL 01**

PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT PURSUANT TO C.R.C.P. RULE 55(a)

Plaintiffs, Colleen Hoffman, Rick Hoffman and Ann Hunt submit this Motion for Default in the absence of an Answer by the Defendants.

As *pro se* litigants in this matter, the Plaintiffs herein use the plural pronouns (we, us, our) to refer to themselves. Unless otherwise noted, all references to the Plaintiffs in this pleading where a statement of position on any matter is made or inferred indicate a jointly adopted position agreed to by all 3 individual plaintiffs.

INTRODUCTION

On March 20th, 2017 Plaintiff's served the Defendants with a summons and complaint. See Exhibit A.

On April 13th, 2017, this Court issued an Order that stated "This matter will be stayed up to and including April 28th, 2017. The purpose of this stay was, as stated in the Order, to allow the Fort Collins City Council to adopt rules for litigating this matter. The need for rules and procedures for this and other civil cases was stated in the Order to be without question.

On April 18th, 2017, the Fort Collins City Council did adopt, on second reading, Ordinance 52, which had the effect of adopting the Colorado Rules of Civil Procedure into this municipal court. Pursuant to the Fort Collins City Charter, Ordinances adopted by Council go into effect 10 days after adoption. Thus, the C.R.C.P. became effective and binding in this matter on April 28th, 2017.

DEFENDANTS ARE IN DEFAULT AT THIS TIME

Rule 12(a)(1) of the Colorado Rules of Civil Procedure states:

> **A defendant shall file his answer or other response within 21 days after the service of the summons and complaint.**

There is absolutely nothing ambiguous or uncertain about the time requirements for the filing of an answer. The service of the summons and complaint begins the tolling of the time for an answer, and the answer must be filed within 21 days of that event.

Pursuant to Ordinance 52 and the requirements of Article II section 7 of the Fort Collins City Charter, the Colorado Rules of Civil Procedure became effective on April 28th, 2017. There can be no question that the requirement of Rule 12(a)(1) was in effect on that day and that the plain and simple meaning of the Rule was binding on this proceeding.

The plain and simple meaning of Rule12(a)(1) required that an answer be filed on that day the C.R.C.P. took effect, which was April 28th, 2017. There is no other way for the Rule to be read. The summons and complaint had been served 39 days before April 28th. 39 days is greater than 21 days and the Rule clearly states that an answer be filed ***within*** 21 days.

In fact, the date that this court granted a stay upon motion by the defendant, April 13, fell 23 days after service. 23 is a greater number than 21. However, because the C.R.C.P. was not in effect on April 13th, it is reasonable to conclude that the 21 day requirement of Rule 12(a)(1) was not in effect at that time and the Defendants were not in default prior to the stay being issued.

As a practical matter, the Defendants had 39 days prior to the date that the C.R.C.P. became effective and controlling in this matter to prepare and file an answer. Because our complaint was actually filed and shared with the Defendants on March 9th, the Defendants had 11 days in addition to the 39 days to consider their answer.

In conference with the Defendants' attorney prior to filing this motion, the Defendants have not offered any explanation of hardship or incapacity that has prevented them from filing an answer. No other indication of hardship or incapacity is evident. See Exhibit B.

Nonetheless, the Defendant has offered a statement that it still intends to file an answer. However, the rationale that the Defendant has offered to explain why it is not in default at this time is absolutely absurd as will be described in the following paragraphs.

The Defendant holds that the tolling of the 21 days commencing upon service was halted on the day that Defendants filed a Motion requesting the stay that was granted on April 13th. Yet, the Defendant"s Motion made no request whatsoever to have the granting of a stay retroactively halt the tolling of time then in effect. Certainly, such a request was within the capacity of the Defendants to make. Indeed, the Defendants adequately considered the possibility that the Motion would not be granted and did request that, in that event, the time for an answer could be set by order of the court to occur 21 days after the date that Ordinance 52 went into effect. *See* Defendants' Motion for Stay. However, absolutely no conditions were considered or requested in the event that the Motion would be granted.

Similarly, the Order of this court granting the stay made no mention of any alteration of time or other consideration that would have any bearing whatsoever on the tolling of the time for an answer.

In defense of the absurd theory advanced by the Defendants, Kim Schutt, counsel for Defendants, has explained that "typically" a stay is considered to be retroactive to the date that it was requested of a court, regardless of when a request for a stay is granted. Ms. Schutt would be well advised to understand that "typically" litigants provide some specificity when making requests of courts. Such specificity "typically" includes descriptions of what the maker of a motion wishes the court to Order when granting a motion. As a practical matter, it would be atypical and impossibly confusing for any order granted by any court to bring retroactive effect to its terms and conditions unless such retroactive application is specifically stated.

In further defense of what was already an absurd argument, Ms Schutt has doubled down by stating that the tolling of time *could* be construed to commence

no sooner than the date that the C.R.C.P became effective, or April 28th, and that the Defendants may have up until 21 days after that date to file an answer. Of course, if Ms. Schutt's fanciful interpretation of Rules were to be accepted, then we truly *could* have 28 days from April 28th in which to file a Rule 106 petition with this court alleging abuse of discretion. To embellish her gambit, Ms. Schutt has alleged gamesmanship on our part. We take exception to this characterization and believe that it is more appropriately made upon Defendants.

Further argument to support the conclusion that the Defendants are in default follows from examining how the time for an answer may have been tolled in the hypothetical instance where the adoption of the C.R.C.P was made retroactive to January 1st, 2017. As this court noted in its Order granting the stay, such a request was made of the Fort Collins City Council by the Defendants when Ordinance 52 was originally brought forward for legislative review and action. Of course, Council elected no to include the retroactive application of the C.R.C.P upon consideration of Ordinance 52 on first reading. However, there is no question that, had Ordinance 52 been adopted as the Defendants had proposed, the intended effectivity date of the adoption of the C.R.C.P. would have required that an answer be adopted on April 11th or 21 days after service of process was perfected. This argument is hypothetical, but it does serve the purpose of demonstrating that the Defendants necessarily would have had the expectation of filing an answer much earlier in the process than even the more lenient date of April 28th required.

STANDARD OF REVIEW

A hierarchy of authority must be applied to facts that describe this circumstance. In descending order, the authority for establishing procedures to control litigation of this matter must be 1) the plenary legislative power of the City of Fort Collins to prescribe rules of procedure, see Article VII of the Charter, 2) the judicial authority of this court to prescribe procedure upon request of the parties for good cause shown or *sua sponte* as required to preserve order and obtain right and just resolution of disputes, 3) the Colorado Rules of Civil Procedure as they were adopted effective April 28th, 2017, 4) stipulations as to procedure by agreement amongst the parties subject to approval of this Court and review and authorization, if requested, by Council.

When the facts of the present circumstance are presented within this hierarchical framework, it becomes apparent that the Defendants' position that "typically" orders of the court are retroactive does not even find a place of authority.

Clearly, the Colorado Rules of Civil Procedure are provide the binding authority in this matter.

ERRATA

There is no doubt that this case can be classified as atypical in that we commenced this action into a court that had no rules whatsoever. As previously expressed in our previous two pleadings before this court, we are proceeding in good faith with an intense focus on the best interests of our community placed above our own interests.

In light of these circumstances and with forethought to other proceedings, we feel that it is prudent to depart slightly from the formal process of this Motion to note the following statements made by Ms. Kim Schutt in ~~conference~~ prior to this motion.

> The City could also take the position that your summons was not based in any then-existing rules, and thus is invalid in the first instance.

And

> ..we believe any effort on your part to seek a default against the City prior to that time will be without merit, and indeed frivolous and groundless.

Clearly, Ms. Schutt has opened the door to the possibility that the absence of Rules in this court at the commencement of this action presents issues of constitutional dimension. Since the City finds it appropriate to ~~speculate~~ that our summons and the underlying claims for relief were invalid in the first instance, we reserve the right to make precisely the same claim.

Nearly in the same breath, Ms. Schutt has introduced the threat of financial judgment against us by stating that *any* Motion for Default will be considered frivolous. We believe our Motion has been brought with good cause shown and is far from frivolous. Nonetheless, the chilling effect of Ms. Schutt's words should not escape the attention of this court.

ENTRY OF DEFAULT IS APPROPRIATE AND NECESSARY AT THIS TIME

The Defendants are clearly in default. C.R.C.P. Rule 55(a) states:

> **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead ~~or~~ otherwise defend as provided by these rules ~~and~~ that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

The fact that Defendants have failed to plead as provided by Rule 12(a)(1), which has been duly adopted by the Fort Collins City Council, has been made to appear by virtue of this Motion and the record of this proceeding.

Default in this matter is appropriate and necessary regardless of any subsequent filing of an answer by Defendants, which may be filed before or after the filing of this Motion.

WHEREFOR, we respectfully request that this court instruct the clerk to enter the default for the Defendants in this matter and grant the affirmative relief prayed for upon commencement of this action.

Respectfully submitted ***with verification*** this 12th day of May, 2017.

Colleen Hoffmann	Rick Hoffmann	Ann Hunt
Colleen Hoffman	Rick Hoffman	Ann Hunt

1804 Wallenberg Dr.

Ft. Collins, CO 80526

Address of Lead Plaintiff

I, Colleen Hoffman, being over the age of eighteen years and duly sworn, hereby attest and swear 1) that I am a resident of the City of Fort Collins; 2) that I have prepared and read the foregoing **PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT PURSUANT TO C.R.C.P. RULE 55(a)** and the facts stated therein and exhibits added in appendage thereto are true and accurate to the best of my knowledge and belief; and 3) that I am authorized to file this pleading on behalf of co-plaintiffs Rick Hoffman and Ann Hunt.

_____
Colleen Hoffman

STATE OF COLORADO)
COUNTY OF LARIMER) SS.

Subscribed and sworn to before me this _____ day of _____, 2017 by Colleen Hoffman.

_____
Notary Public

My Commission expires: _____

Witness my and hand and official seal

EXHIBIT A

RECEIVED
City Clerk's Office
3-20-2017

Municipal Court, Fort Collins, Colorado 215 N. Mason, Fort Collins, Co 80521 In the County of Larimer	RECEIVED MAR 20 2017 FORT COLLINS MUNICIPAL COURT COURT USE ONLY
Plaintiffs: Colleen Hoffman, Rick Hoffman, Ann Hunt v. **Defendant:** THE CITY COUNCIL OF THE CITY OF FORT COLLINS, the governing body of a Colorado municipal corporation; and THE ADMINISTRATION BRANCH OF THE CITY OF FORT COLLINS, by and through its City Manager, Darin Atteberry.	Case Number: Division:

MUNICIPAL COURT CIVIL SUMMONS

TO THE ABOVE NAMED DEFENDANT: CITY COUNCIL OF THE CITY OF FORT COLLINS

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court an answer or other response to the attached Complaint and Request for Injunctive Relief. Your answer or other response is not prescribed by any established rules for civil procedure and there appears to be no deadline for the filing of such an answer; however, the Colorado Rules of Civil Procedure and the Colorado Rules of County Court Procedure may provide guidance that is later deemed applicable to this matter or may alternatively be viewed as reasonable and prudent for the adjudication of this matter. Under these rules, an answer or other response is required within 21 days of service of this summons.

IN THE EVENT that you fail to answer or respond to this summons, a default judgment may be entered against you.

Dated: March 20, 2017

Clerk of Court/Clerk

Colleen Hoffman, Rick Hoffman, Ann Hunt
Signature of Plaintiff

Colleen Hoffman, Rick Hoffman, Ann Hunt
Name of Plaintiff

c/o 1804 Wallenberg, Fort Collins, CO 80526
Address of Plaintiff

(970) 484 8723
Plaintiff's Phone Number

A copy of the COMPLAINT AND REQUEST FOR INJUNCTIVE RELIEF must be served with this Summons.

I, Carol Fuller Reed, affirm that I have provided service of this Summons to the City Clerk of the City of Fort Collins, Co.

Carol F Reed
March 20, 2017

EXHIBIT B
PAGE 1

From: Colleen Hoffman [mailto:cohoff@comcast.net]
Sent: Wednesday, May 03, 2017 6:24 AM
To: 'K. Schutt'; jduval@fcgov.com
Cc: rick-hoffman@comcast.net; 'Ann Hunt'
Subject: RE: Hoffman and Hunt v. City of Fort Collins Case No. 2017-CIVIL01

Good morning Ms. Schutt,

In the absence of an "Answer to Complaint" within the 21 day period from March 20, 2017, will you be accepting of a Default Judgment against the City Council and the City Administration at this time?

From: K. Schutt [mailto:kschutt@wicklaw.com]
Sent: Wednesday, May 3, 2017 9:52 AM
To: 'Colleen Hoffman' <cohoff@comcast.net>; jduval@fcgov.com
Cc: rick-hoffman@comcast.net; 'Ann Hunt' <arh4@comcast.net>
Subject: RE: Hoffman and Hunt v. City of Fort Collins Case No. 2017-CIVIL01

Good morning, Ms. Hoffman –

The court-ordered stay of proceedings suspends the 21-day period from running as of the time we filed our motion seeking that stay. We filed that motion on March 27th. Therefore, we have calculated the City's deadline to file a responsive pleading to be May 12th, which is 14 days after the stay ended as of April 28th. Accordingly, the City would take the position that it is not in default, and intends to file its responsive pleading by that deadline.

From: Colleen Hoffman [mailto:cohoff@comcast.net]
Sent: Thursday, May 04, 2017 6:26 AM
To: 'K. Schutt'; jduval@fcgov.com
Cc: rick-hoffman@comcast.net; 'Ann Hunt'
Subject: RE: Hoffman and Hunt v. City of Fort Collins Case No. 2017-CIVIL01

Good Morning Ms. Schutt,

We are not accepting of your tolling of time to file an answer in this case.

The C.R.C.P. is presumed to be in effect at this time and the C.R.C.P. clearly states that an answer is filed within 21 days of service. See C.R.C.P. Rule 12 (a) (1). It is reasonable to expect that the tolling of time was halted during the stay. It is also reasonable to hold that in the absence of rules that existed prior to April 28 2017, there was no fixed deadline for filing an answer. Even though 21 days had passed since service by the time the stay was ordered, we would not allege that the deadline had lapsed prior to the stay being effected.

However, there is no reasonable way to conclude, as you have, that the tolling of time for an answer was halted by a retroactive order of the court to be effective in March. If ~~you had wished~~ such a result, you should have requested that the court grant such a result. There is no precedent that would allow for an interpretation that an order of any court is retroactive to a prior date unless such condition is clearly stated.

We do not wish to engage in selective application of the Rules that your client was responsible for enacting and which we, with good cause, opposed. Our opposition was predicated, as you know, on the desire to preclude situations such as this.

EXHIBIT B
PAGE 2

From: K. Schutt [mailto:kschutt@wicklaw.com]
Sent: Thursday, May 4, 2017 10:39 AM
To: 'Colleen Hoffman' <cohoff@comcast.net>; jduval@fcgov.com
Cc: rick-hoffman@comcast.net; 'Ann Hunt' <arh4@comcast.net>
Subject: RE: Hoffman and Hunt v. City of Fort Collins Case No. 2017-CIVIL01

Dear Ms. Hoffman –

I do not agree with your reasoning here, as it appears to be contradictory. We believe we are calculating the deadline in a reasonable way given how a stay of proceedings typically works. As noted in my prior email, it essentially freezes the case as of the time the relief is sought, if granted (which it was here). The City could certainly take the position that, since there were no applicable rules in effect until April 28th (which you acknowledge below), that the 21 days did not even begin to run until that time, so that our answer is not due until March 19th. The City could also take the position that your summons was not based in any then-existing rules, and thus is invalid in the first instance.

However, as I have made clear in all of my communications with you and in our filings with the Court, it is the City's desire to have this case decided on its merits rather than getting caught up in technicalities and gamesmanship around the rules, or lack thereof. I made that quite clear in my first phone call with you as well. We would hope that would be the plaintiffs' goal here as well, if they truly seek a meaningful review of the City Council's decision on their appeal.

Accordingly, we intend to proceed with having our responsive pleading filed by May 12th, and we believe any effort on your part to seek a default against the City prior to that time will be without merit, and indeed frivolous and groundless.

Kimberly B. Schutt, Esq.
Wick & Trautwein, LLC
(970)482-4011
http://www.wicklaw.com/