

District Court, Larimer County, State of Colorado Court Address: 201 La Porte Ave, Suite 100, Fort Collins, CO 80521		FILED IN COMBINED COURTS LARIMER COUNTY, CO 18 MAY -1 PM 4:23
Rory Heath as an individual plaintiff and on behalf of other concerned residents and parties <i>Plaintiffs, Pro Se</i> v. City of Fort Collins City Council , a municipal governing body, and the ^{City} City of Fort Collins <i>Defendants</i>		▲ COURT USE ONLY ▲ Case Number: 18CV125 Division: 5A Courtroom:
RECEIVED MAY 01 2018 CITY ATTORNEY		
Plaintiffs' Opposition to Defendant's Motion to Dismiss		

COMES NOW a Plaintiff, Rory Heath, as an individual plaintiff and on behalf of other concerned residents and parties, respectfully asks that the court deny the Defendant's Motion to Dismiss. In support hereof, the Plaintiffs' state as follows:

- On 3/27/2018, retained counsel for the defendant e-mailed a plaintiff, Rory Heath, vaguely citing only "Colorado Law," that required naming the applicant as a party to the proceeding. Specifically, Defense Counsel also asserted in the email that "Under Colorado Law, it (presumably the applicant) is an indispensable party"

Plaintiff Rory Heath believes this course of action was done as a means of leveraging him into action of naming the applicant as a defendant. This possible course of action was not one that Rory Heath wished to pursue for fear of the possible negative financial ramifications that could come with explicitly naming the applicant, or anyone else, as a defendant.

Rory Heath further believed that his complaint was one made with the intention of seeking Judicial Review of final agency action, and not a review of any actions of the applicant. Furthermore, Rory Heath believed that Judicial Review was needed of the process by which the Agency arrived at their decision, as well as review of the decision itself. Both issues and assertions that he fully intends to argue, further flesh out with specifics and present to the court within his opening brief.

- On 3/30/2018, Plaintiff Rory Heath, having just returned from celebrating his First Wedding Anniversary out of service/ out of range, responded to defense counsel's email, asking for specific reference as to the "Colorado Law" that considered the applicant to be an indispensable party.
- On 3/30/2018, in reply, defense counsel only listed the following cases as those that supported it's conclusion, no mention was made as to how counsel applied these cases to it's conclusion: *Black Canyon Citizens Coalition, Inc.*, 80 P.3d 932, 933 (Colo. App. 2003); *Thorne v. Bd. Of County Com'rs of Fremont County*, 638 P.2d 69, 71 (Colo. 1981); *Norby v. City of Boulder*, 577 P.2d 277, 280 (Colo. 1978); *Hidden Lake Development Co. v. District Court*, 515 P.2d 632, 635 (Colo. 1973); *Hennigh v. County Com'rs*, 450 P.2d 73 (Colo. 1969).

4. On 3/30/2018, following a further email exchange, defense counsel stated that it would check with its "Clients" regarding the possibility of filing an unopposed motion asking for an extension of time.
5. On 4/2/2018, through a further series of email exchanges, defense counsel stated that the City was ok with filing the previously discussed motion. As this would be a motion representing the intentions of both sides, Plaintiff Rory Heath asked that he be able review the final motion before it is filed. Defense counsel informed Plaintiff Rory Heath that such practice was not customary, and assured him that it would

"simply represent to the Court that the City was served on March 13th and that our deadline for filing a responsive pleading under Rule 106 and Rule 12 would ordinarily be April 3rd; that the City believes the plaintiff has failed to name an indispensable party, and that additional time is needed for you to research the issue so that you can either amend your complaint voluntarily or the City will proceed with a motion to dismiss if we have to have the Court resolve the issue. I will indicate that I have conferred with you on these issues and you have consented to the enlargement of time, such that no party will be prejudiced by the brief enlargement of the deadline."

Such was not the only assertions made in that motion. Defense counsel also implicitly misrepresented the communication with Plaintiff Rory Heath in paragraph 5, in its explicit assertion of creating a new 21 day deadline after a possible amended complaint. A possible new timeline that was not specifically discussed in any email exchange. As a result of not sharing the final motion before filing, and in implying an agreement on a new timeline after a possible amended complaint was filed, paragraph 6 (Stating Conferment) of that same motion was and is, a false statement.

6. On 4/10/2018, plaintiff Rory Heath e-mailed the defense stating that "With the extent to which you've shared with me the contents of the eventual motion, it is difficult for me to ascertain the exact arguments and assertions to be made based purely on the cases to be cited. With that inherent limitation in mind, it's difficult for me to properly address an unknown."

Plaintiff then closed out the email by asking "As such, please let me know what suggestions and possible remedies you may have for this issue."

Defense curtly responded that she believed the matter to be pretty straightforward, and that she read my email as not agreeing to amend my complaint, and would proceed with filing the motion and that I could "respond as you see fit.... We will provide you with a copy of the motion once it is filed with the Court."

7. Throughout no part of the plaintiff's communication with the defense was it ever specifically enumerated or explained how this handful of cases properly applied to the issue at hand and the defense's looming threat of filing a motion to dismiss. In fact, the defense only offered up this handful of cases upon the plaintiff's request and not as a forthcoming action on the part of the defense.

Furthermore, the plaintiff believes that these email exchanges and the mis-characterization by the defense of the plaintiff's understanding and wishes, to not be indicative of "a good faith effort," but rather perfunctory and cursory in nature; only "going through the motions," so to speak, in the hope of appearing as in conferment to the Court.

8. On 4/10/2018, defense filed a motion to dismiss with the Court, once again making a false statement in paragraph 1 that "The attempts to confer included providing the same case law set forth below, which was also set forth in the City's motion for enlargement of time to file its responsive pleading."

This was not true, as the Motion to Dismiss now included *HICKS, v. JOONDEPH* 32 P.3d 248 (2009) in paragraph 5; a case NOT previously referenced or mentioned in the Motion For Enlargement of Time, and certainly not in communication with the plaintiff. As such, defense has made a false statement in the hopes of further bolstering its argument, at the expense of the truth. A fact of which the plaintiff does not believe conveys, nor proves a conferment, thus negating the Rule 121 Certification contained within the defense's Motion to Dismiss.

9. At no part of the Motion to Dismiss has the defense given suitable or really, any proof as to the establishment of the applicant as an indispensable party that would be so unjustly wronged by not being included as a party to the action. The defense hasn't even made any efforts to definitively state the name of the person(s) or entity that they allege to be an indispensable party. Effectively asking for a "homerun" early dismissal, without giving even the slightest indication as to the why or who the indispensable party is.
10. However, the plaintiffs do find it interesting that the defense would take such strong action, wielding the threat of dismissal, to include a party in the action, when the city is already named as a party. This posits the question: what benefits does defense counsel stand to gain by so strongly wishing to include another party?
11. To the best of the plaintiffs' knowledge, at no time has there been a motion filed by anyone seeking to intervene in this case.
12. This was not a zoning decision, but an approval of a Final Development Project and a larger request to review agency action in it's interpretation of the respective Land Use Code.
13. In the Motion to Dismiss, no specific statement is given to tie together the varied conclusions of the cited case law to this case.
14. Defense counsel has also taken great liberties in it's summary of an out of context quote from *HICKS, v. JOONDEPH* 32 P.3d 248 (2009) that quotes *Hidden Lake Development Co. v. District Court*, 515 P. 2d 632 - Colo: Supreme Court 1973, a case that ruled before the revision to 106 (b); a change even cited in the footnotes of the defendant's motion.
15. As per Rule 106(b) "A timely complaint may be amended at any time...to add, dismiss or substitute parties..."
16. A situation similar to this dilemma is addressed in the footnotes of The Colorado Supreme Court's ruling of *Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670 (Colo. 1982). As found referenced in footnote 6, "...the failure to join indispensable parties within the 30 day time limit established by the C.R.C.P. 106(b) need no longer result in dismissal." This footnote could be interpreted to apply to the general timeline of a civil action.
 - a. Furthermore, *Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670 (Colo. 1982) is even explicitly annotated in the Colorado Court Rules 2017 for Rule 106, as found on p. 594. The same quote as above is also contained within the text. On this, the ruling and distinction is clear: a failure to join alleged indispensable parties within the old 30 day time limit (now 28 days) need no longer result in dismissal. As it stands, we are only at the beginning stages of the overall timeline of the case, presently still addressing responsive pleadings to the initial complaint.
17. Defense's Motion to Dismiss puts forth a severely lacking fact pattern, in a pleading meant to be final. In doing so, the defense has made an argument before the court that presents a false dilemma, i.e. that not dismissing this case outright would be an injustice to the applicant, when, in truth, there is a very explicit path for the applicant, or any other party, to seek to be named as a party in an action, Rule 24. Because of this fact, this is not a dilemma, nor is it a fatal flaw.
18. Lastly, Rory Heath, a plaintiff, respectfully, and with great concern, asks that great caution and cognizance be given to the possibility that granting the defense's motion, in any part, would unnecessarily dismiss a civil action without giving proper time for a party to seek to join the action under Rule 24, and certainly before the plaintiffs are able to properly represent and expound their case before the court. This would be to the detriment of the rights of the plaintiffs in this case.

In summary, the defense has not put forth a complete nor a compelling argument as to why this case should be dismissed so early, simply because they believe an alleged indispensable party is presently not named as a party to the action.

Defense's argument becomes especially weak when considering the fact that there exists a specific Court Rule, Rule 24, with the explicit intention of giving a party a route by which they may plead with the court to include them in an action. Special note should also be given to the defense's false statements made in regard to deferment and presenting new cases in their motion not previously cited or shared with the Plaintiffs.

The following is asserted by Plaintiff Rory Heath:

- That conferment was not attained
- That defense counsel did not specifically state the name of whom should be added as a party to the action
- That defense counsel did not establish "the applicant" as being an indispensable party
- That there still exists a path whereby a person or entity may seek to be added to an action, Rule 24
- That the cases cited by the defense, were at times outdated by newer rulings, without dispositive application and generally, without argument as to how they should be applied to the defense's argument. Thus, leaving no clear indication as to how to interpret this smattering of caselaw so hastily mentioned.

Therefore, based upon the facts laid out above, the Plaintiffs respectfully ask the court, and your honor, that the Defendant's Motion to Dismiss be denied.

Thank you greatly for the Court's time spent reviewing this today.

With thanks,



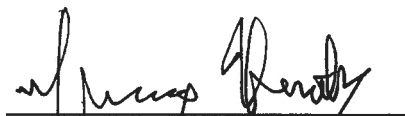
Rory Heath, *Pro Se Plaintiff*

Dated: May 1st, 2018

Certificate of Service

I, Rory Heath, certify under perjury, do attest that on 5/1/2018, I hand-delivered a copy of this filing, Plaintiffs' Opposition to Defendant's Motion to Dismiss, re: Case Number 18CV125 to:

City Attorney of Fort Collins
300 Laporte Ave
Fort Collins, CO 80521



Rory Heath, Pro Se Plaintiff