

kschutt@wicklaw.com

From: kschutt@wicklaw.com
Sent: Tuesday, March 27, 2018 11:56 AM
To: 'RoryHeath1@gmail.com'
Cc: 'John Duval (jduval@fcgov.com)'
Subject: Heath v. City of Fort Collins

DATE FILED: May 8, 2018 10:20 AM
FILING ID: 4A8D979F31605
CASE NUMBER: 2018CV125

Good morning, Mr. Heath - I have been retained as outside counsel to represent the City defendants in the Rule 106 action you have filed in the Larimer County District Court. I am sending this email to confer regarding your failure to name the applicant as a party to the proceeding. Under Colorado law, it is an indispensable party.

Please advise whether you will immediately amend your Complaint to name the applicant. Otherwise, the City will have no choice but to file a motion to dismiss with the Court.

Please consider this email my good faith attempt to confer regarding this issue, as required by C.R.C.P. 121, Section 1-15.

Thank you,

Kimberly B. Schutt, Esq.



Wick & Trautwein, LLC
323 S. College Avenue, Suite 3
Fort Collins, CO 80524
P: 970-482-4011 * 866-686-1410
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kschutt@wicklaw.com

From: kschutt@wicklaw.com
Sent: Friday, March 30, 2018 8:21 AM
To: 'Rory Heath'
Subject: RE: Heath v. City of Fort Collins

Good morning, Mr. Heath:

We believe the following cases support the conclusion that the applicant is an indispensable party: *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).

Since we had not heard from you, we have a motion prepared and ready to file today. Please let us know as soon as possible whether you will voluntarily amend your Complaint to name the applicant, otherwise we will have no choice but to proceed with the filing of the motion in order to protect the deadline.

Thank you,

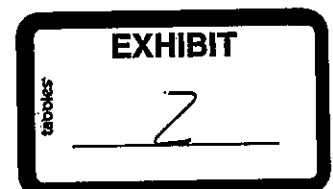
Kimberly B. Schutt, Esq.



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From: Rory Heath <roryheath1@gmail.com>
Sent: Friday, March 30, 2018 6:44 AM
To: kschutt@wicklaw.com
Subject: Re: Heath v. City of Fort Collins



Good morning Kimberly,

My apologies I am just now responding to this, today is the first day that I checked emails as I have spent the week out of range/service, out of state, celebrating my first anniversary.

Thank you for the proactive communication and conferring as per C.R.C.P. 121, Section 1-15. In your email you stated that under Colorado law, the applicant, in this instance, would be considered an indispensable party; could you share with me the Colorado law that you are referencing?

Thank you,

-Rory Heath

On Tue, Mar 27, 2018 at 11:55 AM, <kschutt@wicklaw.com> wrote:

Good morning, Mr. Heath - I have been retained as outside counsel to represent the City defendants in the Rule 106 action you have filed in the Larimer County District Court. I am sending this email to confer regarding your failure to name the applicant as a party to the proceeding. Under Colorado law, it is an indispensable party.

Please advise whether you will immediately amend your Complaint to name the applicant. Otherwise, the City will have no choice but to file a motion to dismiss with the Court.

Please consider this email my good faith attempt to confer regarding this issue, as required by C.R.C.P. 121, Section 1-15.

Thank you,

Kimberly B. Schutt, Esq.



Wick & Trautwein, LLC

323 S. College Avenue, Suite 3

Fort Collins, CO 80524

kschutt@wicklaw.com

From: kschutt@wicklaw.com
Sent: Friday, March 30, 2018 2:13 PM
To: 'Rory Heath'
Subject: RE: Heath v. City of Fort Collins

Thank you for confirming the date of service, Mr. Heath. I will consult with my clients regarding whether they wish to seek an extension of the deadline or not, and I will let you know when I have a response.

Thank you,

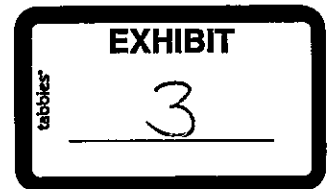
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From: Rory Heath <roryheath1@gmail.com>
Sent: Friday, March 30, 2018 11:47 AM
To: kschutt@wicklaw.com
Subject: Re: Heath v. City of Fort Collins



Kimberly,

That is the correct date of service. I understand the deadline constraint that could put you within. In light of conferring on this subject, and as I will need time to review the cases you cited as well as other research on the topic, I am fine with the filing of an unopposed motion asking for an extension of time and an extension of the possible deadline that you mentioned. I would ask that your calculated deadline date of April 3rd be included and stated within the filed motion.

I hope this works as a good remedy for the situation that you described.

Thanks,

-Rory

On Fri, Mar 30, 2018 at 11:08 AM, <kschutt@wicklaw.com> wrote:

Mr. Heath –

To our knowledge, the City was served on March 13th, which makes the deadline Tuesday, April 3rd. If you have a different understanding of the date of service, please let me know and provide me with a copy of your return of service.

Thank you,

Kimberly B. Schutt, Esq.



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From: Rory Heath <rorytheath1@gmail.com>
Sent: Friday, March 30, 2018 10:48 AM

To: kschutt@wicklaw.com
Subject: Re: Heath v. City of Fort Collins

Kimberly,

Thank you for the clarification and expounding of my question. In light of the deadline that you mentioned, what date do you calculate to be your deadline?

-Rory Heath

On Fri, Mar 30, 2018 at 8:21 AM, <kschutt@wicklaw.com> wrote:

Good morning, Mr. Heath:

We believe the following cases support the conclusion that the applicant is an indispensable party: *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).

Since we had not heard from you, we have a motion prepared and ready to file today. Please let us know as soon as possible whether you will voluntarily amend your Complaint to name the applicant, otherwise we will have no choice but to proceed with the filing of the motion in order to protect the deadline.

Thank you,

From: kschutt@wicklaw.com
Sent: Monday, April 02, 2018 12:13 PM
To: 'Rory Heath'
Cc: 'John Duval (jduval@fcgov.com)'
Subject: RE: Heath v. City of Fort Collins

Good morning, Mr. Heath –

The City is willing to file an unopposed motion for enlargement of the deadline for one week, to Tuesday, April 10th, in order to give you additional time to review the case law I provided and hopefully voluntarily file an amended complaint to add the applicant as a party defendant. I anticipate having that motion ready for filing in just a little while. I will be representing that the motion is unopposed, based upon our email exchange on Friday.

Please contact me once you have reviewed the case law so we can further discuss your plan for proceeding. One thing to note as you review these cases: it used to be that failure to name an indispensable party within the (former) 30-day deadline for filing a Rule 106 action was fatal to the entire action proceeding, resulting in dismissal with prejudice. Rule 106 was later amended to allow for the addition or substitution of parties, with that amendment “relating back” to the original filing date. However, an applicant is still considered an indispensable party under the cited legal authority and the case cannot proceed as a matter of law without its participation in these proceedings.

From: Rory Heath <roryheath1@gmail.com>
Sent: Friday, March 30, 2018 11:47 AM
To: kschutt@wicklaw.com
Subject: Re: Heath v. City of Fort Collins

Kimberly,

That is the correct date of service. I understand the deadline constraint that could put you within. In light of conferring on this subject, and as I will need time to review the cases you cited as well as other research on the topic, I am fine with the filing of an unopposed motion asking for an extension of time and an extension of the possible deadline that you mentioned. I would ask that your calculated deadline date of April 3rd be included and stated within the filed motion.

I hope this works as a good remedy for the situation that you described.

Thanks,

-Rory



kschutt@wicklaw.com

From: kschutt@wicklaw.com
Sent: Monday, April 02, 2018 1:07 PM
To: 'Rory Heath'
Cc: 'John Duval (jduval@fcgov.com)'
Subject: RE: Heath v. City of Fort Collins

Mr. Heath - It is usually not a customary practice to share a draft of a motion with an opposing party prior to filing it. I can assure you that the motion will 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.

Kimberly B. Schutt, Esq.



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From: Rory Heath <roryheath1@gmail.com>
Sent: Monday, April 02, 2018 12:58 PM
To: kschutt@wicklaw.com
Subject: Re: Heath v. City of Fort Collins



Kimberly,

Sounds good. Thank you for the further background on it, I'll make sure and look through each in light of that. In regards to the unopposed motion, if I could just review it real quick before you file it, so that I am able to see the final document that we had previously agreed upon. I'm sure it represents the same information as we had e-mailed about on Friday, but I'd still like to review it before it's filed, assuming that's within reason.

Thanks,

-Rory Heath

On Mon, Apr 2, 2018 at 12:13 PM, <kschutt@wicklaw.com> wrote:

Good morning, Mr. Heath –

The City is willing to file an unopposed motion for enlargement of the deadline for one week, to Tuesday, April 10th, in order to give you additional time to review the case law I provided and hopefully voluntarily file an amended complaint to add the applicant as a party defendant. I anticipate having that motion ready for filing in just a little while. I will be representing that the motion is unopposed, based upon our email exchange on Friday.

Please contact me once you have reviewed the case law so we can further discuss your plan for proceeding. One thing to note as you review these cases: it used to be that failure to name an indispensable party within the (former) 30-day deadline for filing a Rule 106 action was fatal to the entire action proceeding, resulting in dismissal with prejudice. Rule 106 was later amended to allow for the addition or substitution of parties, with that amendment “relating back” to the original filing date. However, an applicant is still considered an indispensable party under the cited legal authority and the case cannot proceed as a matter of law without its participation in these proceedings.

From: Rory Heath <roryheath1@gmail.com>
Sent: Friday, March 30, 2018 11:47 AM
To: kschutt@wicklaw.com
Subject: Re: Heath v. City of Fort Collins

Kimberly,

That is the correct date of service. I understand the deadline constraint that could put you within. In light of conferring on this subject, and as I will need time to review the cases you cited as well as other research on the topic, I am fine with the filing of an unopposed motion asking for an extension of time and an extension of the possible deadline that

you mentioned. I would ask that your calculated deadline date of April 3rd be included and stated within the filed motion.

I hope this works as a good remedy for the situation that you described.

Thanks,

-Rory

kschutt@wicklaw.com

From: kschutt@wicklaw.com
Sent: Tuesday, April 03, 2018 9:57 AM
To: 'Rory Heath'
Cc: 'John Duval (jduval@fcgov.com)'
Subject: Heath v. City of Fort Collins
Attachments: Order RE_ Defendants' Unopposed Motion for Enlargement of Time to File Responsive Pleading.pdf

Good morning, Mr. Heath: Judge Odell entered the order granting our unopposed motion for enlargement of time. Attached is a courtesy copy of the order, which should also be mailed to you by the Court.

Please contact me as soon as you have had a good opportunity to assess the case law provided to you on Friday, and advise whether you will be voluntarily amending your Complaint to add the applicant before the extended deadline of April 10th. Otherwise, we will plan to proceed with the filing of our motion to dismiss.

Thank you,

Kimberly B. Schutt, Esq.



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kschutt@wicklaw.com

From: kschutt@wicklaw.com
Sent: Tuesday, April 10, 2018 10:08 AM
To: 'roryheath1@gmail.com'
Cc: 'John Duval (jduval@fcgov.com)'
Subject: RE: Heath v. City of Fort Collins

Good morning, Mr. Heath –

I believe the matter is pretty straightforward. As indicated in my prior telephone and email communications in a good faith effort to confer on this issue, you have failed to name an indispensable party (as aptly supported by the numerous case citations provided to you 9 days ago) and the remedy is for you to voluntarily amend your complaint to address that legal shortfall by naming the applicant owner as an additional defendant in the Rule 106 action. Since that has not occurred by today's answer deadline and I read your email as not agreeing to do so, we will proceed with filing the motion to protect that deadline and you can respond as you see fit.

We will provide you with a copy of the motion once it is filed with the Court.

Kimberly B. Schutt, Esq.



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From: roryheath1@gmail.com <roryheath1@gmail.com>
Sent: Tuesday, April 10, 2018 8:34 AM



To: <kschutt@wicklaw.com> <kschutt@wicklaw.com>
Subject: Re: Heath v. City of Fort Collins

Good Morning Kimberly,

Thank you for proactively reaching out to confer before filing your previously mentioned motion. I greatly appreciate it and the work done last week in filing the motion expanding time.

I've reviewed the referenced cases and their summaries. 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.

As such, please let me know what suggestions and possible remedies you may have for this issue.

With thanks,

-Rory Heath

On Apr 3, 2018, at 9:57 AM, <kschutt@wicklaw.com> <kschutt@wicklaw.com> wrote:

Good morning, Mr. Heath: Judge Odell entered the order granting our unopposed motion for enlargement of time. Attached is a courtesy copy of the order, which should also be mailed to you by the Court.

Please contact me as soon as you have had a good opportunity to assess the case law provided to you on Friday, and advise whether you will be voluntarily amending your Complaint to add the applicant before the extended deadline of April 10th. Otherwise, we will plan to proceed with the filing of our motion to dismiss.

Thank you,

Kimberly B. Schutt, Esq.

<image001.jpg>

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<Order RE_ Defendants' Unopposed Motion for Enlargement of Time to File Responsive Pleading.pdf>