DISTRICT COURT, LARIMER COUNTY, STATE OF COLORADO 201 LA PORTE AVENUE, SUITE 100 FORT COLLINS, CO 80521-2761 (970) 494-3500	DATE FILED: July 11, 2018 CASE NUMBER: 2018CV149
Plaintiff(s): Eric Sutherland v. Defendant(s): The City of Fort Collins; Steve Miller, in his capacity as the Larimer County Assessor; Irene Josey, in her capacity as the Larimer County Treasurer; The Timnath Development Authority and Compass Mortgage Corporation.	⮝ FOR COURT USE ⮝ Case No.: 18CV149 Courtroom: 5B

ORDER GRANTING DEFENDANTS TIMNATH DEVELOPMENT AUTHORITY AND COMPASS MORTGAGE CORPORATION'S JOINT MOTION TO DISMISS

On June 27, 2018, the Court held a hearing on Defendant Timnath Development Authority ("TDA") and Defendant Compass Mortgage Corporation's ("CMC") joint motion to dismiss. The Court has considered the filings, testimony, and evidence and orders the following:

On April 26, 2018, Eric Sutherland filed a Complaint for Declaratory Judgment and Equitable Relief. Plaintiff seeks a declaratory judgment from the Court finding that any repayment of debt would be an unlawful violation of the Urban Renewal Authority Act. C.R.S. §13-25-101, et seq. Plaintiff asks the Court to enjoin the Larimer County Assessor and the Larimer County Treasurer from "calculating or disbursing property tax increment for the purposes of repaying any part" of the debt.

The parties agree that the TDA was adopted by the Town of Timnath in 2004 and was amended in 2007 and 2015. On March 27, 2018 the TDA approved the issuance of a loan not to exceed $20,000,000 to fund capital improvements within the urban renewal area.

TDA and CMC move to dismiss the Complaint on multiple grounds: 1) Plaintiff lacks standing to enforce the Urban Renewal Authority Statute; 2) the claims are not applicable to actions taken by the TDA; 3) the claims are insufficiently pled; 4) the claims are time barred.

Applicable Law

A motion to dismiss for failure to state a claim tests the sufficiency of a plaintiff's complaint and is looked on with disfavor. *Allen v. Steele*, 252 P.3d 476, 481 (Colo. 2011). A complaint must contain sufficient factual allegations to raise a right to relief above the level of speculation to the level of plausibility. *Warne v. Hall*, 373 P.3d 588, 595 ¶ 24 (Colo. 2016).

On a motion to dismiss, a court must accept as true all averments of material fact in a complaint. *Id*. at 591 ¶ 9. However, legal conclusions and conclusory allegations are not entitled to be assumed true. *Id*.; *id*. at 596 ¶ 27. A court must only consider the complaint's contents, but it may examine documents referred to in the complaint without converting the motion into one for summary judgment. *Yadon v. Lowry*, 126 P.3d 332, 335-36 (Colo.App. 2005). Ultimately, a claim that is not plausible on its face will be dismissed for failure to state a claim. *Warne*, 373 P.3d at 595.

A plaintiff has standing if he or she "(1) incurred an injury-in-fact (2) to a legally protected interest, as contemplated by statutory or constitutional provisions." *Brotman v. East Lake Creek Ranch, L.L.P.*, 31 P.3d 886, 890 (Colo. 2001). To determine standing, a court considers "whether the plaintiff has asserted a legal basis upon which a claim for relief may be predicated." *Olson v. City of Golden*, 53 P.3d 747, 750 (Colo. App. 2002).

Olson held that, because the judicial branch of the government is precluded from assuming the powers of another branch, courts could not overlook limitations on standing to "redress otherwise nonjusticiable wrongs." *Id*., *citing Dodge v. Department of Social Services*, 600 P.2d 70, 73 (Colo. 1979). A plaintiff must demonstrate a legal interest that entitles him or her to judicial redress. *Id*.

The Colorado Supreme Court has held that there are three factors to consider in making the determination of whether a plaintiff has demonstrated such a legal interest: (1) whether the statute specifically creates such a right in the plaintiff; (2) whether there is any indication of legislative intent to create or deny such a right; and (3) whether it is

consistent with the statutory scheme to imply such a right. *Id.*, *citing Cloverleaf Kennel Club, Inc. v. Colorado Racing Commission*, 620 P.2d 1051 (Colo. 1980).

Application of Law

Standing

The *Olson* Court found that the URA does not confer the right on taxpayers to enforce its provisions. *Olson*, 53 P.3d at 752. Though Plaintiff contends that his action is not intended to enforce the Urban Renewal Statutes, it is evident that the suit is, in fact, a thinly veiled attack on Defendant TDA's compliance with the URA for which Plaintiff lacks standing to proceed.

"…[I]f the General Assembly had intended that taxpayers to have a right of enforcement, it would have provided directions, such as staying the project during litigation or requiring bonds to protect the taxpayers' interest if the project continued during litigation." *Olson*, 53 P.3d at 752. Plaintiff asserts standing as a taxpayer, though he clearly lacks standing and any right to enforce the URA.

Injury-in-Fact

"To satisfy the injury-in-fact prong of the *Wimberly* standing test (as set forth in *Brotman*), the injury must be direct and palpable." *Olson*, 53 P.3d at 750, *citing Cloverleaf Kennel Club, Inc. v. Colorado Racing Commission*, 620 P.2d 1051 (Colo. 1980). As in *Olson*, the injury complained of here is speculative at best. That case was brought by a plaintiff who claimed that her status as a taxpayer granted her the authority to bring suit to enforce the URA. The Court of Appeals found that the plaintiff had not demonstrated a palpable injury-in-fact. Similarly, here, Plaintiff's claimed injury centers on his belief that Poudre School District will raise taxes in the future due to lost revenue. An injury that "cannot be determined until a remote time in the future is not sufficiently direct and palpable to support a finding of injury-in-fact." *Id.*

Claims one and three are dismissed because the Plaintiff: 1) does not have standing; and, 2) has failed to allege injury-in-fact.

Sufficiency of Pleadings

Rule 8(a) of the Colorado Rules of Civil Procedure requires a "short and plain statement of the claim showing that the pleader is entitled to relief." The allegations contained in a complaint must be more than merely speculative and must provide plausible grounds for relief. *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016).

Plaintiff lists his claims in headings titled from "First Claim for Relief" through "Nineteenth Claim for Relief."[1]

Claim two and Claims four through nineteen are: 1) inapplicable to TDA and CMC; 2) are insufficiently pled or 3) both.

For example, the fourth claim states in full, "Poudre Valley Fire Protection District agreement." The "claim" is not recognizable as a claim, does not set forth to whom it applies and is not even a complete sentence.

The Court grants the motion to dismiss as to TDA and CMC on claims two and four through nineteen.

Statute of Limitations

It appears that some claims, if sufficiently pled and if the Plaintiff has standing, would have been barred by the statute of limitations; however, due to the insufficiency of the pleadings that determination is moot.

Dated: July 11, 2018.

BY THE COURT:

Gregory M. Lammons
District Court Judge

[1] The Plaintiff does not clearly set forth which claims apply to which of the five Defendants that he has sued.