

<p>Larimer County, Colorado, District Court Larimer County Justice Center 201 La Porte Avenue, Suite 100 Fort Collins, Colorado 80521-2761 (970) 494-3500</p>	<p>DATE FILED: August 3, 2018 11:41 AM FILING ID: 4D2F6A9D9E2DF CASE NUMBER: 2018CV149</p>
<p>Plaintiff:</p> <p>ERIC SUTHERLAND,</p> <p>v.</p> <p>Defendants:</p> <p>THE CITY OF FORT COLLINS, a home rule municipality in the State of Colorado; STEVE MILLER, in his capacity as the Larimer County Assessor and all successors in this office; IRENE JOSEY, in her capacity as the Larimer County Treasurer and all successors to this office; and Indispensable Parties: THE TIMNATH DEVELOPMENT AUTHORITY, an Urban Renewal Authority; and COMPASS MORTGAGE CORPORATION, an Alabama company doing business in Colorado.</p>	<p>Court Use Only</p>
<p>Jeannine Haag, Reg. No. 11995 David P. Ayraud, Reg. No. 28530 George H. Hass, Reg. No. 897 Larimer County Attorney's Office 224 Canyon Ave., Suite 200 Post Office Box 1606 Fort Collins, Colorado 80522 Telephone (970) 498-7450 jeanninehaag@larimer.org wressue@larimer.org</p>	<p>Case No. 18 CV 149</p> <p>Courtroom 5B</p>
<p align="center">DEFENDANTS STEVE MILLER AND IRENE JOSEY'S MOTION TO DISMISS THE COMPLAINT</p>	

Defendants Steve Miller, in his capacity as the Larimer County Assessor, and Irene Josey, in her capacity as the Larimer County Treasurer appear and move to dismiss the Plaintiff's Complaint for all claims made against these defendants, with prejudice, and without the opportunity to amend.

I. Certificate of Compliance with C.R.C.P. 121 Section 1-15(8)

The undersigned certifies that he has conferred with Plaintiff via email communication and explained the basis for this motion and requesting voluntary dismissal of the complaint. The Plaintiff refused.

II. Introduction

Plaintiff began this litigation against Defendants Josey and Miller, together with the Timnath Development Authority (TDA) challenging various actions in connection with urban renewal debt issued by the TDA and repayment of that debt. Plaintiff seeks to enjoin the collection and distribution of the taxes intended to service debt issued by TDA.

Plaintiff also stated some claims against the City of Fort Collins which do not pertain to Miller or Josey.

On July 11, 2018, this Court granted the Motion to Dismiss Plaintiff's claims against the Timnath Development Authority and Compass Mortgage Corporation. A motion to dismiss the claims against the City of Fort Collins is pending.

Plaintiff's claims against Josey and Miller appear in the Complaint as follows:

SECOND CLAIM FOR RELIEF: With this claim, Plaintiff asks the court to issue an injunction to Miller and Josey from collecting and disbursing property taxes associated with Resolution 4 of the TDA. (attached as Exhibit B to Defendant Compass Mortgage's Motion to Dismiss filed June 5, 2018). See Complaint Paragraph 14.

THIRD CLAIM FOR RELIEF: While not naming Josey and Miller specifically, Plaintiff seems to make some vague claim about an intergovernmental agreement that Plaintiff doesn't specifically identify, alleging that the unidentified agreement violates the "URA statutes" in an unidentified way. This claim seems to be against "Larimer County".

SEVENTH CLAIM FOR RELIEF: This is a vague claim alleging the assessment of ag (assumed to mean agricultural) land does not comply with the requirements of statute. Once again, the plaintiff neither identifies the statute nor the violation.

These Defendants will not burden this motion with additional background information except as specifically related to Defendants Josey and Miller. The Court’s attention is invited to its July 11 Order for the basic facts of the case.

III. Standard of Review

The standard to be applied when considering a motion to dismiss was stated by the Colorado Supreme Court in *Warne v. Hall*, 373 P.3d 588 (Colo. 2016) The Court quoted with approval from *Ashcroft v. Iqbal*, 556 U.S. 662, (2009):

[T]he factual allegations of the complaint must be enough to raise a right to relief “above the speculative level,” and provide “plausible grounds to infer an agreement,” the Court characterized that standard as being underlain by two working principles: First, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions,” and second, “only a complaint that states a plausible claim for relief survives a motion to dismiss,” (Citations omitted)(p.591)

This plausibility standard is now the law in Colorado for reviewing motions to dismiss a complaint. This court applied that standard in its July 11 Order.

IV. Argument

The Plaintiff’s Claims Are Moot. The Second Claim for Relief is based upon, and derivative of, the alleged impropriety of TDA’s March 27, 2018 Resolution (Resolution 4) authorizing the issuance of debt. Plaintiff requested the Court to Declare the debt unlawful. The Court dismissed this claim with the July 11 Order. The claims against Josey and Miller have to do with collecting the taxes necessary to repay the debt. The Court, having dismissed the underlying claim regarding issuance of the debt because the Plaintiff lacked standing to make

that claim, renders Plaintiff's request for an injunction against collecting taxes to pay the debt, moot.

The Supreme Court in *Crowe v. Wheeler*, 165 Colo. 289, 439 P.2d 50 (1968) described mootness:

A case is moot when a judgment, if rendered will have no practical legal effect upon an existing controversy, and we add that as we view the complaint and petition, there is no justiciable controversy alleged as between the plaintiffs and the defendants. (p. 295)

Plaintiff's request to enjoin collecting and distributing the tax revenue is no longer justiciable because that claim is derivative of the challenge to the underlying debt. The claim seeking an injunction from collection of the tax falls along with the dismissal of Plaintiff's challenge to the debt itself.

Similarly, the Third and Seventh claims for relief are moot as they also seemingly allege impropriety in the urban renewal process. The Third and Seventh claims also cannot exist as a stand-alone claim.

Plaintiff's claims do not meet the Standards of C.R.C.P. Rule 8: Josey and Miller incorporate the Court's prior ruling about sufficiency of the pleadings in its July 11, Order. In addition to the Third and Seventh claims being moot, they should also be dismissed because they don't state a plausible claim. Those claims don't describe statutory non-compliance in any manner sufficient to answer.

Plaintiff has no standing: Miller and Josey incorporate the Court's standing ruling of July 11. The Plaintiff has no standing to enjoin the collection and distribution of the tax for all the reasons the Court mentioned in the July 11, Order. The standing ruling applies to the Second, Third and Seventh claims.

To underscore the standing ruling, Plaintiff admits at paragraph 1 of his complaint that he is not a resident of Timnath and does not allege being subject to the tax which he seeks to enjoin. This is a fatal standing defect under the standing requirements the Court employed in its July 11, Order.

V. The Doctrine of Futility requires dismissal of Plaintiff's claims without permission to amend the Complaint

Josey and Miller readily acknowledge that amendments to pleadings should be liberally allowed in the interest of justice. However, the ability to amend a complaint has limits. Among those limits is the doctrine of futility. The Colorado Appellate Courts have considered the doctrine of futility often. *Benton v. Adams*, 56 P.3d 81 (Colo. 2002) the Supreme Court said:

Whether leave to amend should be allowed or not depends upon the facts and circumstances. Grounds for trial court denial of a motion to amend pleadings include undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies in the pleadings via prior amendments, undue prejudice to the opposing party, and futility of amendment. (p. 86)

In *Bristol Co, LP v. Osman*, 190 P.3d 752 (Colo. App. 2007), the Court of Appeals said this in particular about the doctrine of futility:

The doctrine of futility justifies denying the amendment when the amendment would not survive a motion to dismiss, merely restates the same facts as the original complaint, or reasserts a claim already dismissed by the trial court. The trial court does not abuse its discretion when it denies a motion to amend which is futile. However, the trial court should allow amendment of the complaint when it will cure a deficiency that otherwise would justify dismissal. (citations and internal quotes omitted)(p. 759)

The Court dismissed Plaintiff's claims challenging the TDA debt issuance because the Plaintiff lacks standing to make that claim. The facts pertaining to Plaintiff's standing are established. Those facts cannot change with an amendment to the complaint. Any amendment to the complaint will necessarily show again that Plaintiff has no standing and would require another dismissal. Any amendment to the complaint would only amount to restating the same

standing facts and lead to the same ruling rearguing the standing issue. This is a clear application of the doctrine of futility. No amendment should be permitted.

VI. Requested Relief

The Defendants Josey and Miller request that the Second, Third, and Seventh claims for relief be dismissed and that the court further order that the Plaintiff cannot amend the Complaint.

Dated: August 3, 2018

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing DEFENDANTS STEVE MILLER AND IRENE JOSEY'S MOTION TO DISMISS THE COMPLAINT was served on the following using the Colorado Courts E-Filing System or by placing in the U.S. Mail, postage prepaid, on the 3rd day of August, 2018:

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