DATE FILED: August 17, 2018 3:30 PM
FILING ID: CA75241FE5336
CASE NUMBER: 2018CV125

District Court, Larimer County, Colorado Larimer County Justice Center; 201 La Porte Avenue, Suite 100, Fort Collins, CO 80521 Phone: (970) 494-3500	
Plaintiff, *Pro Se*: RORY HEATH AS AN INDIVIDUAL PLAINTIFF AND ON BEHALF OF OTHER CONCERNED RESIDENTS AND PARTIES, **v.** **Defendants**: CITY OF FORT COLLINS CITY COUNCIL; CITY OF FORT COLLINS, RIPLEY DESIGN, INC.; ELIZABETH STREET CO. OWNER, LLC	▲ **COURT USE ONLY** ▲
Andrew S. Priebe, Attorney Reg. #47905 Vahrenwald, McMahill, Massey & Mitchell, LLC 125 S. Howes Street, Suite 1100 Fort Collins, CO 80521 **Attorneys for Defendant Ripley Design, Inc.** Phone Number: (970) 482-5058 FAX Number: (970) 482-5175 E-Mail: andrew@vmmmlaw.com	**Case Number: 18CV125** **Courtroom: 5A**
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED	

COMES NOW Defendant Ripley Design, Inc., a Colorado corporation ("**Ripley**"), by and through its counsel, Vahrenwald, McMahill, Massey & Mitchell, LLC, Andrew S. Priebe appearing, and pursuant to C.R.C.P. Rule 12(b), respectfully submits its Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted (the "**Motion**").

RULE 121 CERTIFICATION

Undersigned counsel hereby advises the Court that he has spoken with the Plaintiff several times, both in person and on the telephone, most recently on August 14, 2018, and was advised that Plaintiff neither supports nor opposes the granting of this Motion. Undersigned counsel has also communicated with counsel for the City of Fort Collins City Council and the City of Fort Collins, and was advised that such parties support the granting of this Motion.

COMPLAINT ALLEGATIONS

Ripley was retained to assist in the design and development of the proposed Union on Elizabeth project, located at 1208 Elizabeth Street, Fort Collins Colorado, 80521 (the "**Proposed**

Project"). (*Complaint, ¶ 1 & 3*). As alleged by the Plaintiff, Mr. Rory Heath ("**Plaintiff**"), Ripley is listed as the "Applicant" for the Proposed Project and is referred to as such in the City of Fort Collins Development Review Application Form (the "**Application**"), and other city documents and hearing agenda items. (*Complaint, ¶ 3*). Similarly, Elizabeth Street Co. Owner, LLC ("**Owner**") is listed as the "Owner" for the Proposed Project and is referred to as such in the Application and other city documents and hearing agenda items. (*Complaint, ¶ 4*). A copy of the Application and a copy of the ownership exhibit submitted by Ripley to the City of Fort Collins in conjunction with the Final Development Plan for the Proposed Project (the "**Ownership Exhibit**") are attached hereto and incorporated herein as **"Exhibit A**" and "**Exhibit B**," respectively. [1] Ripley is a landscape architecture firm specializing in land planning, landscape architecture, urban design, and entitlement, and the Owner is its client with respect to the Proposed Project. Owner is listed as the "Owner/Applicant" on the Ownership Exhibit. (*Exhibit B*).

LEGAL STANDARD

C.R.C.P. 12(b)(5) permits dismissal for "failure to state a claim upon which relief can be granted." Motions under this rule are disfavored and act "as a test of the formal sufficiency of a plaintiff's complaint." *Public Service Co. of Colo. v. Van Wyk*, 27 P.3d 377, 385 (Colo. 2001). "[A]ll averments of material fact must be accepted as true, and all of the allegations in the complaint must be viewed in the light most favorable to the plaintiff." *Id.* at 386. However, "recitals, generalizations, legal conclusions, and conclusions of the pleader" do not suffice. *Kilpatrick v. Miller*, 135 P. 780, 782 (Colo. 1913).

Colorado has adopted the plausibility standard as articulated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016). Accordingly, a complaint must state a plausible claim for relief in order to survive a motion to dismiss. *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, at 678. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Twombly*, at 556. The "court may only consider matters stated within the complaint itself and may not consider information outside of the confines of that pleading." *Van Wyk*, at 386. Matters outside the pleadings, however, do not include a document referred to in the complaint, notwithstanding that the document is not formally incorporated by reference or

[1] Copies of the Application and Ownership Exhibit were not attached to the Complaint. The Complaint, however, refers to "all pleadings, applications, evidence, exhibits, and other papers presented to or considered by Fort Collins City Council on Feb. 13th, 2018, and the Fort Collins Planning and Zoning Board on Dec. 14th, 2017," and thereby incorporates provisions thereof. (*Complaint, ¶ Designation of Record 1*). A document that is referred to in the Complaint, even if not attached thereto, is not a matter "outside the pleadings" for purposes of assessing what may be considered in adjudicating a motion to dismiss. *Walsenburg Sand & Gravel Co., Inc. v. City Council of Walsenburg*, 160 P.3d 297 (Colo. App. 2007). Copies of the Application and Ownership Exhibit are therefore attached to this Motion as ***Exhibit A*** and ***Exhibit B***, respectively.

attached to the complaint. *Walsenburg Sand & Gravel Co., Inc. v. City Council of Walsenburg*, 160 P.3d 297, 299 (Colo. App. 2007).

A complaint should not be dismissed unless it appears beyond a doubt that a claimant can prove no set of facts in support of the claim which would entitle the claimant to relief. See *Tomar Dev., Inc. v. Friend*, 410 P.3d 578, 581 (Colo. App. 2015). If the plaintiff is not entitled to relief upon any theory of the law, the complaint should be dismissed for failure to state a claim. *Colorado Med. Soc. v. Hickenlooper*, 353 P.3d 396, 401 (Colo. App. 2012).

ANALYSIS:

PLAINTIFF'S REQUEST FOR REVIEW AND REVERSAL OF THE FEBRUARY 13, 2018 DECISION OF THE FORT COLLINS CITY COUNCIL

In the Complaint, Plaintiff requests a judicial review of the Fort Collins City Council's (the "**Council**") actions at the February 13, 2018, 6:00 P.M. meeting (the "**Meeting**"). (*Complaint, ¶ 17 & 18*). Plaintiff claims that during the Meeting, the Council did not follow its own established procedures as outlined in the Fort Collins Municipal Code, and in doing so exceeded its jurisdiction and abused its discretion. (*Complaint, ¶ 18*). Plaintiff also claims that the Council did not adhere to the Fort Collins Land Use Code during the meeting and in making its decision regarding the Proposed Project. (*Complaint, ¶ 18*). Overall, Plaintiff seeks judicial review and reversal of the Council's actions associated with the Meeting and the Proposed Project based on the claim that the Council acted arbitrarily and capriciously, pursuant to C.R.C.P. 57, C.R.C.P. 106 (a) 2, C.R.C.P. 106 (a) 4, and §24-4-106, C.R.S. (*Complaint, ¶ 17 & 18*).

The Plaintiff can prove no set of facts which entitle him to relief against Ripley since Ripley's only involvement with the Council or the Meeting was as Owner's agent.

General common law principals of agency apply to this Motion.

> An agent who enters into a contract on behalf of a disclosed principal does not become a party to the contract and is not subject to liability as a guarantor of the principal's performance unless the agent and third party so agree. Thus, in the absence of such agreement, an agent for a disclosed principal who enters into a contract on the principal's behalf is not subject to liability if the principal fails to perform obligations created by the contract. As a consequence, *the agent is not a necessary party to breach-of-contract litigation between a disclosed principal and the third party to a contract made by the agent on the principal's behalf.*

Restatement (Third) of Agency, §6.1 cmt. c (2006) (emphasis added); *see also Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997 (Colo. 1998).

Additionally, the Colorado appellate courts have repeatedly held that a zoning "applicant" is an indispensable party to a Rule 106(a)(4) action challenging that particular zoning decision made by a governmental body. *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). The "applicant owner" is an indispensable party, as a matter of law, because it has rights established by the zoning decision being challenged. *Hidden Lake Development Co.*, 515 P.2d at 635.

As shown on Exhibit A, Ripley is listed as the "Applicant," and Owner is listed as the "Owner" for the Proposed Project and both are referred to as such in the Application, and other city documents and hearing agenda items. However, Owner, rather than Ripley, is clearly designated as the "Owner/Applicant" in the Ownership Exhibit, *Exhibit B*. This agency relationship is also outlined and disclosed in the "Certification" section at the bottom of the Application, which states with emphasis added:

> I certify the information and exhibits submitted are true and correct to the best of my knowledge and that in filling this application, *I am acting with the knowledge, consent, and authority of the owners of the real property*, as those terms are defined in Section 1-2 of the City Code (including common areas legally connected to or associated with the property which is the subject of this application) *without whose consent and authority the requested action could not lawfully be accomplished.* Pursuant to said authority, I hereby permit City officials to enter upon the property for the purpose of inspection, and if necessary, for posting of public notice on the property.

Ripley is in the business of land planning, design and development, and one of its primary services is facilitating the development review process for its clients, including the submission and processing of applications with municipal bodies. Ripley is an agent for the Owner, a disclosed principal, as unequivocally indicated by Ripley's signature under the Certification section of the Application, which outlines the required agency authority, and the Ownership Exhibit, which lists Owner as the "Owner/Applicant." Owner, not Ripley, is the "applicant owner," as used in *Hidden Lake*, as Ripley is merely facilitating the application process on behalf of the true "applicant owner," the Owner of the real property. Therefore, the Complaint is void of allegations sufficient to support a claim against an agent in Ripley's position.

Furthermore, Ripley is not a necessary party to this action pursuant to C.R.C.P. 19(a)(1), which states "[a] person who is properly subject to services of process in the action shall be joined as a party in the action if: (1) In his absence complete relief cannot be accorded among those already parties . . .." The Court in the present matter, in its Order Regarding Defendant's

Motion to Dismiss, dated May 14, 2018, states that "Colorado case law clearly demonstrates that the applicant owner of the project is an indispensable party to this action. That applicant owner has a right to protect its interest in the decision being challenged by Plaintiff." [2] Here, Ripley has no independent right or interest to protect, which is being challenged by Plaintiff. That right and interest belongs to the Owner alone. Also, Ripley is not a necessary party to this action because its absence as defendant does not impact the Court's ability to completely adjudicate the matters in the Complaint. In fact, Ripley adds nothing as a party to the action which is not already more adequately and properly accounted for by naming the Owner as defendant.

Taking all averments of material fact as true, Plaintiff cannot establish a claim for relief against Ripley as a defendant.

CONCLUSION

There is no facial plausibility to Plaintiff's claims against Ripley as a defendant in this action. The material facts in this litigation, when taken as true, which are detrimental to Plaintiff's claims against Ripley as a defendant are as follows: (1) Defendant is not the owner of the real property associated with the Proposed Project; (2) Ripley is a mere agent of the Owner, a disclosed principal, whose role was to act for and under the authority of Owner throughout the land planning and development review process; and (3) Owner is the "Applicant/Owner" with regard to the Proposed Project. Based upon these material facts, Plaintiff has no grounds for asserting any claims against Ripley as defendant in this action as Ripley is not an indispensable, necessary, or appropriate party.

WHEREFORE, Ripley requests that the Court GRANT Ripley's Motion to dismiss all claims against it and that the Court order Ripley be removed as a party to this action. Ripley requests its attorney's fees and requests such other and further relief as the Court deems just and proper under the circumstances.

DATED this 17th day of August, 2018.

Respectfully submitted,

VAHRENWALD, McMAHILL, MASSEY & MITCHELL, LLC

By: Andrew S. Priebe

Andrew S. Priebe, Reg. No. 47905
Attorney for Defendant, Ripley Design, Inc.

[2] In resolving a motion to dismiss for failure to state a claim upon which relief can be granted, a court may consider matters of which the court may take judicial notice, such as public records and pleadings. *Pena v. American Family Mutual Insurance, Co.*, 2018 COA 56.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of August, 2018, a true and correct copy of the above and foregoing document was served on the following:

Mr. Rory Heath
Plaintiff
2831 Ridgeglen Way
Colorado Springs, CO 80918
Via First Class Mail

City of Fort Collins
John Duval
Attorney for the Defendant City of Fort Collins
Via e-service

Kimberly B. Schutt
Wick and Trautwein, LLC
Outside counsel for the Defendant City of Fort Collins
Via e-service

Elizabeth St Owner CO, LLC
999 Shady Grove, Suite 600
Memphis, TN 38120
Attn: Rodney J. King
Via First Class Mail

Julia M Sampley

Julia Sampley, Legal Assistant