

LARIMER COUNTY COMBINED COURTS
LARIMER COUNTY COLORADO

2018 AUG 24 PM 2:52
DATE FILED: August 24, 2018
CASE NUMBER: 2018CV149

8th DISTRICT COURT
LARIMER COUNTY JUSTICE CENTER
Court Address: 201 Laporte Avenue
Fort Collins, CO 80521
Phone (970) 494-3500

Plaintiff: Eric Sutherland, *pro se*

v.

Defendants : 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 to 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.

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Party without attorney:
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Case #: 2018CV149
Division: 3C

PLAINTIFF'S RESPONSE TO INDISPENSABLE PARTIES TIMNATH DEVELOPMENT AUTHORITY AND COMPASS MORTGAGE CORPORATIONS COMBINED MOTION FOR ATTORNEYS' FEES AND BILL OF COSTS

Plaintiff, Eric Sutherland (also referred to hear with 1st person pronouns files this Response to the Indispensable Parties Timnath Development Authority and Compass Mortgage Corporation's Combined Motion for Attorneys' Fees and Costs which was filed with this Court on August 3, 2018.

I. INTRODUCTION

1. In this *Response*, I first lay out a narrative of the important details refuting the Indispensable Parties request for relief in terms of an award. I next present the criteria for a determination of the frivolous or groundless nature of the claims and refer back to the narrative to support the conclusion that an award is not proper here.

II. REGARDING PROCESS TO DATE

2. The Indispensable Parties in this action are indispensable parties. No relief requested in this action attempted to enjoin the TDA or Compass Mortgage. The relief requested was targeted at the County Assessor and Treasurer and generally was intended to hold for a declaration of rights of all property owners in the Poudre School district. In this regard there never was any “claim” made against the TDA or Compass Mortgage.

3. The only request for relief that was addressed by the Indispensable Parties in this matter was for a declaratory judgment to the effect that legislation that purported to authorize the issuance of debt was not valid by virtue of a failure to properly take that action in accordance with state law.¹ See First Claim for Relief in my *Unamended Complaint*. It would be improper to make this request of this Court without naming the TDA and Compass Mortgage as indispensable parties, which I did.

4. The only use of property tax increment by an Urban Renewal Authority (URA) that is authorized under law is for the service of valid, lawful debts of the URA and for fulfillment of obligations made to taxing entities that provide county infrastructure. C.R.S. §31-25-107(9)(a)(II) and, generally, § -109. Thus, any debt that may be deemed to be lawfully authorized creates an expectation of repayment

¹ There can be absolutely no doubt that this allegation was true.

with property tax increment. Additionally, the creation of any debt that is not challenged within 30 days is, for all intents and purposes, deemed to be lawfully authorized because a non-claim statute, C.R.S. §11-57-212, prohibits any future action challenging the validity of the authorization. Thus any and all challenges that may be considered in the future, or even the effect of amendments to the URA statutes or any other law that would implicate the legitimacy of URA debt could only be put in play if the legitimacy of the authorization of the creation of debt addressed in this action was brought when it was brought.

5. The Indispensable Parties in this action jumped the gun and waived service of the *Unamended Complaint*. In doing so, the Indispensable Parties seized upon the idea that they and they alone were the subject defendants of the declaratory judgment claim. In reality, they were not the subject defendants of the declaratory judgment claim. Not even close. There is no argument that they had rights to participate in this action, but they were not, in any way, the focus of the action.

6. Thus, when the Indispensable Parties make statements as appear in ¶ 19. of the *Motion for Attorneys Fees*, (“*All of Mr. Sutherland’s claims against the TDA and Compass were dismissed*”), a real sense of misunderstanding is conveyed. As a practical matter, the Indispensable Parties commandeered that part of this proceeding dealing with the declaratory judgment of the validity of the TDA’s legislative action purporting to create debt and this court allowed that to happen.

7. At the present time, the claims against the actual defendants in this matter, the County Treasurer and County Assessor have not been dismissed. A *Motion to Dismiss* has been filed by these Defendant’s but not ruled on. Although I will not be pressing for a decision in my favor in the matter of the *Motion* from the Defendants, it is still a theoretical possibility that relief could be granted in my favor on the First Claim for relief, as it should be in light of all facts presented to

date. The *Response to Defendant's Motion to Dismiss* does lay out several new arguments in support of granting standing that have not previously been made.

III. REGARDING THE MERITS OF THIS ACTION

8. This action was not frivolous.

9. I and every other taxpayer in the Poudre School District suffers an injury in fact in each and every instance in which any parcel of property within the district does not contribute to the *voter approved FIXED AMOUNT* revenue requirements of the Poudre School District in a manner that is inconsistent with law. The injury is sustained by the imposition of tax rates for each individual *voter approved FIXED AMOUNT* property tax component that is levied by the Poudre School District that are calculated to be higher on an annual basis due to the exclusion of property in TIF areas like the Timnath Development Authority. The facts and logic here are indisputable. Indeed, the facts and logic here were never disputed. See *Section III., Response to Combined Motion to Dismiss*, also *Motion for Reconsideration*.

10. Instead of dealing with the reality of the way that the Poudre School District calculates tax rates and instead of dealing with the reality of higher taxes that result directly from the exclusion of taxable property from the financial responsibility to support the school district, the Indispensable Parties in this matter adopted and stuck to an erroneous defense. The Indispensable Parties urged this Court to hold that *Olson v. City of Golden*, 53 P. 3d 747, 750 (Colo App. 2002) was an impenetrable bar to inquiry of any matter associated with a URA. The *Olson* decision is not such a bar. Rather, the *Olson* decision is a treatise on the requirements of standing and should not be read to be anything else.

11. The Indispensable Parties in this matter also urged this court to view a request for a declaration of rights under the Uniform Declaratory Judgment Law to

be an attempt to enforce the provisions of the Urban Renewal Law, C.R.S. 31-25-101 *et seq.* Indeed, we can easily see the basic constructs of this defense repeated in the *Motion for Attorneys' Fees* in ¶'s 13 and 14.

12. My request for declaratory judgment as to the sufficiency of the authorization for additional debt to be contracted by the Timnath Development Authority was **NOT**, as this Court erroneously concluded, an attempt to enforce compliance with the provisions of the Urban Renewal Law². My request for declaratory judgment was an attempt to have the legislative action that purported to authorize additional debt to be deemed invalid in advance of the closing of a time window created by the non-claim provision in 11-57-212 C.R.S. The difference between enforcement and declaration of rights is substantial. It is not, as the Indispensable Parties will surely argue, a difference without a distinction. It definitely is not a “thinly veiled” attack on the TDA’s compliance with state law as this Court concluded. (See *Order* June 11, 2018, at p.3)

13. A request for declaratory judgment may not be confused with a request to order compliance³ with statute. This is an absolutely absurd notion. The TDA and Compass are free to do whatever they wish whenever they want to do it as far as I am concerned. However, if their actions should not comply with the law and also lead to higher taxes paid by myself and others, then I have a right under the UJDA to request judicial review of the legality of that action. If the declaration of rights finds that rights are implicated, then equitable relief through the courts may also be pursued. Furthermore, although it is not necessary here, a relaxed standard

² See *Response to Motion to Dismiss* p. 8. “This lawsuit does not attempt to enjoin the Indispensable Parties or bring them or their undertakings and activities under the control of the courts in any way, shape or form. Rather, this lawsuit attempts to enjoin the activities of the Assessor and Treasurer.”

³ In this Court’s July 11th Order, the language “attack on Defendant TDA’s compliance with the URA” was used. Frankly, I have no idea what an “attack on compliance” could possibly mean.

has been adopted by the Colorado Supreme Court for declaratory judgment actions. The failure of this Court to recognize the existence of this relaxed standard is an indication of the care used to consider the claim that was brought and the facts associated with it.

14. There can be no question that no opportunity otherwise exists to assail the validity of the authorization of the debt, and thus the legitimacy of payments of diverted property taxes made by a Treasurer to the TDA, at any time in the future. Thus, the action I brought was proper and made at the only time available that a taxpayer who fears future injury may bring such an action.

15. My legally protected right to pay no more tax than is lawfully authorized to meet the lawful expectations of the Poudre School District was never questioned or challenged in this action.

16. The inevitability that I and every other property owner in the Poudre School District would be paying higher taxes as a direct consequence of enabling the Timnath Development Authority to service additional debt repayable with property tax increment was never questioned or challenged in this action.

17. My basis for standing under the broad grants of standing that allow taxpayers to enforce provisions of the Colorado constitution that are applicable to this situation was never challenged or even addressed in any way. Specifically, my rights under Article II section 25 (due process) and Article X sections 8,9 and 10 (proscription on legislation that impairs the financial base of government) were never addressed.

18. My right to ask this court for declaratory judgment of my rights and the rights of all other taxpayers in the Poudre School District to not be made to pay higher taxes because a loan agreement had been improperly authorized was never

challenged in this action. There is nothing underlying this request that may be said to be “thinly veiled” by my request for declaratory judgment under the UJDA.

19. In stark contrast to what I was attempting with this lawsuit, only two things actually happened; 1) The Indispensable Parties erroneously asserted that I was attempting to enjoin them in order that some provision of the Urban Renewal Law could be enforced and 2) this Court agreed with every single misapprehended issue and position of the Indispensable Parties.

20. In short, the Indispensable Parties crafted a very simple defense to defend against something that was not happening and insisted that I had no standing to do something that I was not doing ... and this Court bought it.

21. I was very much aware of the limitations of standing to enforce the provisions of the Urban Renewal Law. See *Motion for Attorneys’ Fees* ¶ 16. I stated that very early in the process and never disguised knowledge of it. However, this action was not an enforcement of the Urban Renewal Law. It was a request for my rights under other laws that are impacted by the activities of an Urban Renewal Authority by virtue of higher tax rates being applied to property that I own. In this regard, I have a right not to be adversely impacted by lawless actions of the TDA and I was attempting to assert that right.

22. I am in total agreement with the Indispensable Parties to the extent that if I had brought an action to enforce the provisions of the Urban Renewal Law, I would not have had standing and it would have been frivolous, but that is not what happened. I brought a request for a declaration of my rights under the UJDA that simply requested a declaration that a loan agreement that is not properly authorized in accordance with state law be deemed to be invalid⁴. An invalid loan is not

⁴ There can be absolutely no question that the legislation purporting to authorize the new debt was invalid because the TDA had not reformed its Board of Commissioners in a manner consistent with recent amendments to the Urban Renewal Law. Even in this regard, the

eligible to be repaid with property tax increment. My taxes need never be higher than necessary because property taxes on property in the Timnath Development Authority will be exempted from paying toward annual totals as a consequence of illegitimate actions of the TDA in the form of an invalid loan.

IV. REGARDING A FINDING OF FRIVOLOUSNESS

23. There is no way for this Court to conclude that this action was frivolous when it has so completely and thoroughly misapprehended the facts, the cause of action and the ultimate public benefit that was intended to be gained.

24. A finding for a frivolous action requires a determination that I knew or should have known that I could not prevail. Alternatively, the standard proposed by the Indispensable Parties may be applied. (*no rational argument based on the evidence or law supports the claim.*) In either case, the argument for an award of fees and costs made by the Indispensable Parties fails.

25. Even at this point, after all argument from opposing Council and the brief writings of this Court in its Orders have been reviewed multiple times, I still believe that I should have been granted standing and that a declaratory judgment should have issued to the effect that the TDA did not properly authorize the creation of debt. As explained above, there is a rational basis underlying every single component of this belief. Furthermore, the arguments that defeated my attempts are erroneous and have been leveled solely for the purposes of misdirecting the inquiry of this Court into the issues I had raised.

26. I have confessed and explained the lackluster and jumbled nature of my *Unamended Complaint*. Had it not been for unfortunate life incidents, I would

(cont'd.)..

Indispensable Parties attempted a specious argument based upon the purported existence of some “trigger” mechanism. No such “trigger” mechanism invoking the need for reformation of the Board may be found anywhere in the statute.

have cleaned it up with an amendment. The Indispensable Parties action of waiving service to ply their erroneous defense made the possibility of amendment that much harder because of the necessity of requesting leave of the Court to amend after that happened. However, the substantive elements of all fully developed claims were clear.

V. CRITERIA FOR EVALUATION UNDER §13-17-103

27. When evaluating a request for attorneys' fees, Colorado law requires courts to consider certain factors in determining whether to assess fees and the amount of fees to be assessed against any offending attorney or party. C.R.S. § 13-17-103.

Those factors are:

(a) The extent of any effort made to determine the validity of any action or claim before said action or claim was asserted;

I have been looking at Tax Increment Financing for nearly a decade. I have consulted with attorneys. The opportunities to arrest the corruption associated with TIF are not numerous, but the action I took was legitimate in all ways and should have provided relief. By contrast, it has been obvious that the Timnath Development Authority had no concept of how the tax rates that deliver the tax revenue it receives are calculated.

(b) The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid within an action;

The *Unamended Complaint* only contained two claims that could possibly be construed to have a nexus with the rights and expectations of the Indispensable Parties. Those two claims were valid. Those claims in the *Unamended Complaint* that were not fully developed were patently so and could not be mistaken as justiciable claims.

(c) The availability of facts to assist a party in determining the validity of a claim or defense;

There were ample facts to assert the claims made. These facts were never disputed. Rather, they were just ignored by the Indispensable Parties and this Court.

(d) The relative financial positions of the parties involved;

This action was brought to provide relief to all taxpayers within the Poudre School District. The financial position of the Plaintiff in terms of avoided injury was a small fraction of the larger tax burden that would be shared throughout the school district.

In contrast, the TDA receives millions of dollars attributable to the property tax levies of other public entities every year. Approximately half of the entire principle balance of \$20 million plus interest associated with the loan in question would be paid by property tax increment. Thus, the financial reward for avoiding a declaration that the loan authorization was invalid was substantial. The amount of fees requested reflects that fact.

That said, the simple fact that the Indispensable Parties elected to rack up tens of thousands of dollars in attorneys fees rather than simply reform the Board of Commissioners in compliance with the Urban Renewal Statutes may not be overlooked in this matter. The cost to the Timnath Development Authority to reform its Board as required and adopt legislation in a manner consistent with law would have been trivial. Such a reformation would have also been good public policy and would have eliminated the circumstances that the TDA and Town of Timnath now complain of in a lawsuit against me, 2018CV030567.

Indeed, the simple fact that the TDA has not taken this very, very simple and required step speaks volumes about the sincerity of complaints that the business activity it had planned with Compass regarding an expansion of its indebtedness. The TDA had stated that a rate lock had been extended to July 20th. If that were true, the TDA could easily have reformed its Board and adopted a proper loan authorization prior to the July 20th deadline to take advantage of the interest rate that had been locked in. This conclusion does presume that a reformed Board that included county, school district and special district representatives would authorize the loan. That presumption is reasonable. The reformed Board would have included the 5 members of the Timnath Town Council that all originally voted for the authorization to create debt and that number would constitute a majority on the reformed Board.

There can be no doubt that simply confessing to the claims that had been made and proceeding in a manner consistent with law, which is what I had reasonably expected would happen (although not the basis for this action), would have cost the Indispensable Parties a fraction of the money spent on attorneys.

(e) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith;

There have been no allegations of bad faith by the Indispensable Parties nor could there be. The Indispensable Parties have accused me of ulterior motives, but these accusations are baseless.

(f) Whether or not issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict;

As in (c) above, there were no disputes about the facts involved. The facts indicating the methodology for calculating tax rates applied to the assessed value of my property were ignored by the Indispensable Parties. The resulting increase in taxes paid were ignored by the Indispensable Parties. The Indispensable Parties have stated that “material facts surrounding this action were never in dispute.” (¶. 18 *Motion for Attorneys’ Fees.*) This is true. The material facts were not in dispute and militated for grant of standing in this matter.

(g) The extent to which the party prevailed with respect to the amount of and number of claims in controversy;

Prevailing in a matter in which a Court of law ignores facts and argument and simply rubber stamps an erroneous defense based upon misinterpreting authority and misapprehending the nature of claims is not prevailing to a significant extent.

(h) The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court.

This condition does not appear to be applicable to this matter.

ATTORNEYS FEES ARE UNREASONABLE

28. The fees claimed by the attorneys are unreasonable for an indispensable party in a declaratory judgment action. The entire legal strategy of the Indispensable Parties consisted of adopting an erroneous interpretation of an authority and simply reciting it over and over again despite the obvious reality that it did not apply to the action that I had brought to Court. There is no way to tell how many of the billable hours detailed by the Indispensable Parties were devoted to a desperate search for something other than the hollow defense that was provided.

COSTS ARE UNREASONABLE

29. The bill of costs claimed by the Indispensable Parties are unreasonable. All costs associated with the hearing must be eliminated because the hearing was held at the behest of the Indispensable Parties and did not produce any result that would have been different from a judgment on the pleadings. All costs associated with research must be deemed exaggerated due to the simple nature of the legal issues involved in this proceeding and the very basic form and content of the pleadings and argument presented. There is no telling how much of the cost associated with legal research was devoted to a futile effort to craft a defense that did not rely upon misinterpretation of authority and mischaracterization of the claims presented.

WHEREFORE, Plaintiff requests that that this Court deny the Indispensable Parties Motion to Attorneys' Fees and Costs in this matter.


Eric Sutherland

Dated August 24, 2018

I hereby certify that on this 24th Day of August, 2018, a true and correct copy of the foregoing *Plaintiff's Response to Indispensable Parties Timnath Development Authority and Compass Mortgage Corporations Combined Motion for Attorneys' Fees and Bill of Costs* was filed with the Court. Also, a true and correct copy of the foregoing will be served via email to the following no later than August 24th, 2018.

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