

District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-3500	DATE FILED: September 5, 2018 CASE NUMBER: 2018CV149 ▲ COURT USE ONLY ▲
Plaintiff: Eric Sutherland v. Defendants: The City of Fort Collins, et al.	
Case Number: 2018CV149 Courtroom: 5B	
ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AS TO DEFENDANTS CITY OF FORT COLLINS, STEVE MILLER AND IRENE JOSEY	

The Court has reviewed the City of Fort Collins’s Motion to Dismiss, dated July 18, 2018 and Steve Miller and Irene Josey’s Motion to Dismiss, dated August 3, 2018. Having reviewed the motions, responses, replies, exhibits, and applicable law, the Court finds and orders as follows.

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.

On July 11, 2018, this Court dismissed all of Plaintiffs claims against the Timnath Development Authority and Compass Mortgage Corporation. The remaining Defendants now seek to dismiss all of Plaintiffs’ claims brought against them.

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

A. 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 Timnath Development Authority's compliance with the URA for which Plaintiff lacks standing to proceed.

“...[I]f the General Assembly had intended that taxpayers 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.

B. 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 beliefs that (1) Poudre School District will raise taxes in the future due to lost revenue and (2) Fort Collins will raise electric rates 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.*

Plaintiff argues that he was required to file his suit now, even though his claimed injuries are speculative and may not actually occur, because of the requirement of C.R.S. §11-57-212. Plaintiff argues that, under the current state of the law, he is unable to bring his claims now because his injury is too speculative, but if he waits until his injury has occurred, he will be barred from bringing suit by C.R.S. § 11-57-212. Plaintiff argues that this is an unconstitutional limit on his ability to protect his rights. To remedy this alleged defect in the law, Plaintiff seeks a determination that C.R.S. § 11-57-212 allows a Plaintiff to bring a claim even when the claimed injury is uncertain to occur. This Court follows settled standing law requiring that an injury be direct and palpable to sustain a claim.

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

C. 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

Claims two; four through eleven; and thirteen through nineteen are: 1) inapplicable to the Defendants; 2) are insufficiently pled; or 3) moot.

For example, the sixth claim states in full, “Timnath Farms Metropolitan districts 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 the city of Fort Collins, Irene Josey, and Steve Miller on claims two; four through eleven; and thirteen through nineteen.

D. 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.

E. C.R.S. § 11-57-210

Finally, as far as claim twelve is a challenge to the order issuing the contested bonds, C.R.S. §11-57-210 conclusively establishes the validity of the bonds and bars Plaintiff’s twelfth claim from being brought.

Order

Defendants’ Motions to Dismiss are granted.

Dated: September 5, 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.