

District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-3500	DATE FILED: September 10, 2018 CASE NUMBER: 2018CV149  <p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p><b>Plaintiff:</b> Eric Sutherland</p> <p>v.</p> <p><b>Defendants:</b> The City of Fort Collins, et al.</p>	
<p><b>ORDER GRANTING TIMNATH DEVELOPMENT AUTHORITY’S AND          COMPASS MORTGAGE CORPORATIONS’ MOTION FOR ATTORNEYS’ FEES          AND BILL OF COSTS</b></p>	

The Court has reviewed the TDA’s and Compass’s Motion for Attorneys’ Fees and Bill of Costs, the Response, the Reply, 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 sought 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.

On July 11, 2018, this Court dismissed all of Plaintiff’s claims against the Timnath Development Authority (“TDA”) and Compass Mortgage Corporation (“Compass”). Defendants TDA and Compass now seek an award of attorneys’ fees and costs pursuant to C.R.S. § 13-17-102.

**I. Legal Standards**

In a civil action, a court may award attorney fees if the opposing party “brought or defended an action, or any part thereof, that lacked substantial justification.” C.R.S. § 13-17-102(4). An action “lacked substantial justification” if it was “substantially frivolous, substantially groundless, or substantially vexatious.” *Id.* Attorney fees may only be awarded against an unrepresented party when “the party clearly knew or

reasonably should have known that his action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious.” C.R.S. § 13-17-102(6).

“A claim is substantially frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense.” *City of Aurora ex rel. Util. Enter. v. Colorado State Eng'r*, 105 P.3d 595, 620 (Colo. 2005), *as modified on denial of reh'g* (Feb. 14, 2005).

If a party “requests a hearing concerning the award of fees and costs... then the district court must hold a hearing.” *In re Marriage of Aldrich*, 945 P.2d 1370, 1379-80 (Colo. 1997). If, however, a party objects to the amount of fees requested but does not request a hearing, the court is not required to hold a hearing. *Id.*

When determining whether to award attorney fees and, if so, what amount to award, the court examines a list of factors:

- (a) The extent of any effort made to determine the validity of any action or claim before said action or claim was asserted;
- (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;
- (c) The availability of facts to assist a party in determining the validity of a claim or defense;
- (d) The relative financial positions of the parties involved;
- (e) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith;
- (f) Whether or not issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict;
- (g) The extent to which the party prevailed with respect to the amount of and number of claims in controversy;
- (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.

C.R.S. § 13-17-103(1).

## II. Application of Law

### 1. Mr. Sutherland's Action was Substantially Frivolous

Mr. Sutherland's action was substantially frivolous for three principal reasons: (A) Mr. Sutherland was aware that he had no standing when he filed his complaint; (B) Mr. Sutherland filed numerous "claims for relief" that were clearly not recognizable legal claims; and (C) Mr. Sutherland brought this action knowing that he has not suffered an injury and may never suffer an injury as a result of Defendants' alleged actions.

#### A. Standing

Plaintiff in this action, Mr. Sutherland, "clearly knew or reasonably should have known" that the action he filed was substantially frivolous. C.R.S. § 13-17-102(6). Mr. Sutherland brought this action primarily as an attempt to enforce the provisions of the URA. *See* Order Granting TDA's Motion to Dismiss at 3. Colorado law is clear that taxpayers do not have standing to enforce the provisions of this statute. *Olson v. City of Golden*, 53 P.3d 747, 752 (Colo. App. 2002). Mr. Sutherland was aware of this prohibition when he filed his complaint. *See* Complaint at ¶33. Despite being aware of this bar to standing, Mr. Sutherland filed a complaint alleging nineteen claims for relief against TDA, Compass, the Larimer County Treasurer, Larimer County Assessor, and the City of Fort Collins. It was substantially frivolous for Mr. Sutherland to allege nineteen claims for relief against these Defendants with the knowledge that he lacked standing.

#### B. Claims for Relief

Mr. Sutherland's claims four through eleven and fourteen through nineteen are not recognizable claims for relief and, in some cases, not even complete sentences. For example, the fourth claims states in full, "Poudre Valley Fire Protection District agreement." His fifth claim states in full, "Timnath Ranch agreement." His sixth claims states in full, "Timnath Farms Metropolitan districts agreement." These "claims" are not recognizable as claims, do not set forth to whom they apply and are not even complete sentences. Mr. Sutherland "reasonably should have known" that claims four through eleven and fourteen through nineteen were substantially frivolous. *See* Response to Fort Collins Mot. To Dismiss at 2 (Mr. Sutherland acknowledges that "Claims numbered Fourteen through Nineteen... were not sufficiently expressed and should be dismissed"). It was substantially frivolous for Mr. Sutherland to file claims

that clearly do not allege any recognizable claim for relief and, in some instances, contain nothing more than the name of an agreement.

C. Injury-in-fact

Mr. Sutherland did not suffer any injury-in-fact, as required by Colorado standing law, before he commenced this action. “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)). Here, Mr. Sutherland’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. Mr. Sutherland acknowledges that neither of these injuries are certain to occur and that it cannot be known for some time whether they will come to pass. *See, e.g.*, Response to Fort Collins Mot. To Dismiss at 5. 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.” *Olson*, 53 P.3d at 750. Mr. Sutherland reasonably should have known that it was substantially frivolous to file this action knowing that he had not suffered an injury, as required by Colorado standing law.

**2. C.R.S. § 13-17-103(1) Factors**

The Court further finds as follows:

A. Efforts made to determine the validity of the claims before asserting them

There is no indication that Mr. Sutherland made any effort to determine the validity of any of his claims before he asserted them. Mr. Sutherland argues that he has “been looking at Tax Increment Financing for nearly a decade.” Response at 9. While this may be so, Mr. Sutherland does not allege that he made any effort to ensure that any of his legal claims were valid.

B. Efforts made to reduce the number of claims or dismiss those found not to be valid

Mr. Sutherland brought many claims that are clearly not legally recognizable claims for relief. Mr. Sutherland did not move to dismiss any of these claims before they were dismissed by the Court on a motion from the opposing party. Therefore, Mr. Sutherland made no effort to reduce the number of his claims or dismiss those that lacked merit.

C. Availability of facts to assist a party in determining the validity of a claim

All of the facts necessary to determine the validity of Mr. Sutherland's claims were available to him prior to the filing of this action. Mr. Sutherland has made no allegation that he was unable to obtain the necessary facts prior to commencing this action.

D. Relative financial positions of the parties

No information regarding this factor was provided by either party.

E. Bad faith

TDA and Compass allege that the allegations were frivolous, and that Mr. Sutherland "knew that he lacked standing to bring his claims...." This is an allegation of bad faith. After considering the pleadings and testimony provided at the June 27, 2018 hearing, the Court finds that the Plaintiff brought the action in bad faith.

F. Issues of fact in conflict

There are no issues of fact in conflict in this matter. Mr. Sutherland sought a ruling that certain bonds are invalid because the proper procedures were not followed. Mr. Sutherland does not have standing to bring these claims and there is no factual dispute as to Mr. Sutherland's standing.

G. Extent the party prevailed with respect to the claims

In this Court's order dated July 11, 2018, all of Mr. Sutherland's claims were dismissed as they related to TDA and Compass. Thus, TDA and Compass prevailed entirely with respect to the claims against them in this action.

H. Amount and conditions of an offer of judgment or settlement

No party in this case offered judgment or settlement.

**3. Award**

Mr. Sutherland contests the reasonableness of attorneys' fees and costs requested by TDA and Compass. While he objects generally to the amount requested, Mr. Sutherland provides no specific objections to the calculation of fees and costs or the

amount of time spent by TDA's and Compass's attorneys on this matter. Further, he did not request a hearing on the reasonableness of the fees and costs asserted.

The Court has reviewed the affidavit of Eric R. Burris, the Time Detail Report and the Cost Detail Report. In the absence of contradictory evidence, the Court finds the Time Detail Report and the Cost Detail Report to be reasonable in time spent; however, the Court does not find the hourly rates to be consistent with this legal community.

In the affidavit, at paragraph nine, the affiant asserts that rates are consistent with those in Denver, Colorado; however, this case was brought in Larimer County, Colorado. Larimer County sits outside of Denver and outside of the Denver metropolitan area. The rates charged are excessive for this legal community.

Hourly rates for the seven individuals in the Time Detail Report are reduced to the following: White - \$325, Burris \$300, Solieman - \$275; Kirkbridge - \$235, Woodward - \$225, Lalonde - \$120 and Salazar - \$100. Further, the Court makes further reductions for work completed on counterclaims which Defendants voluntarily dismissed. The Court will not award fees for these abandoned counterclaims; therefore, the Court reduced some hours and halved some hours depending on how the entry related to the counterclaims.

### **Order**

Defendants' Motion for attorneys' fees and costs is granted. This Court awards TDA and Compass attorneys' fees in the amount of \$43,458.55 and costs in the amount of \$2,155.00. Judgment is entered in favor of Timnath Development Authority and Compass Mortgage Corporation and against Eric Sutherland in the amount of \$45,613.55.

Dated: September 10, 2018.

BY THE COURT:



Gregory M. Lammons  
District Court Judge