DISTRICT COURT, LARIMER COUNTY, COLORADO 201 LaPorte Avenue Fort Collins, CO 80521	DATE FILED: October 9, 2018 2:03 PM FILING ID: 330841EC1E024 CASE NUMBER: 2018CV149
Plaintiff: ERIC SUTHERLAND, *pro se* v. **Defendants:** THE CITY OF FORT COLLINS, *et al.*	▲ COURT USE ONLY ▲
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RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF GRANT OF ATTORNEYS' FEES AND BILL OF COSTS

The Timnath Development Authority ("TDA") and Compass Mortgage Corporation ("Compass"), by and through their counsel of record, White Bear Ankele Tanaka & Waldron Attorneys at Law and Brownstein Hyatt Farber Schreck, LLP, hereby submit the following

Response in Opposition to Plaintiff's Motion for Reconsideration of Grant of Attorneys' Fees and Bill of Costs (the "Motion").

INTRODUCTION

Plaintiff Eric Sutherland's ("Mr. Sutherland") Motion alleges that this Court committed a "manifest error of fact and law" when it found Plaintiff's action was "substantially frivolous" and ordered Plaintiff to pay $43,458.55 in attorneys' fees and costs to TDA and Compass. Mot. at 2. The Motion continues Mr. Sutherland's pattern of frivolous filings, and contains no new legal or factual argument. Rather, the Motion relies on condescension and once again heaps unwarranted abuse on this Court for allegedly failing to apprehend the basis of Plaintiff's claims. *Id*. at 2-5. At the same time, Mr. Sutherland's lecture on the supposed evils of tax increment financing reveals that he either knew or should have known that he did not sustain a cognizable injury-in-fact as a result of TDA's efforts to secure a loan from Compass.

Despite his serial protestations to the contrary, Mr. Sutherland's claims against TDA and Compass are a poorly disguised attempt to enforce procedural provisions of Colorado's Urban Renewal Act (the "URA"). Colo. Rev. Stat. § 31-25-101. As Mr. Sutherland acknowledges in his Motion, there is no private cause of action associated with that statute. *Id*. at 8. Mr. Sutherland was well aware of the law and facts that deny him standing when he filed this action. Consequently, the Court's Order granting the Motion for Fees and Costs (the "Order") is well founded under Colorado law.

ARGUMENT

A. Plaintiff's Motion for Reconsideration Contains No New Factual Allegations or Legal Argument.

Motions to reconsider are disfavored under Colorado law, and "a party moving to reconsider must show more than a disagreement with the court's decision." Colo.R.Civ.P. 121 § 1-15(11). Rather, "[s]uch a motion must allege a manifest error of fact or law that clearly mandates a different result or other circumstance resulting in manifest injustice. *Id.* Mr. Sutherland's Motion fails to meet this threshold requirement. It provides the Court with no new factual allegations or legal argument. Instead, the Motion merely rehashes the arguments in favor of standing that Mr. Sutherland presented both in his briefing on the Motion to Dismiss filed by TDA and Compass as well as at the June 27, 2018 hearing on that Motion. Plaintiff's Motion does not purport to advance novel allegations or legal theories material to the Court's Order, and the Court may deny Plaintiff's Motion on that basis.

B. The Court Did Not Err When it Determined that Mr. Sutherland's Claims Four through Eleven and Fourteen through Nineteen are Substantially Frivolous.

Mr. Sutherland's insistence that his claims four through eleven, and fourteen through nineteen were merely "place-holders" does not change the fact that they are frivolous under Colorado law. Mot. at 10. Indeed, Mr. Sutherland acknowledges that these claims were "not recognizable as claims," and that "[t]he language identified as a claim for the placeholders was obviously superfluous and without effect due [sic]." *Id.* These concessions alone are sufficient to support the Court's finding of frivolousness.

C. Plaintiff's Motion Tacitly Acknowledges that His Claims Were an Attempt to Enforce the URA.

Mr. Sutherland has from the outset of this litigation sought to characterize his claims against TDA and Compass as an attempt to enforce his constitutional due process rights, and not the procedural requirements of the URA. Mot. at 7. But Mr. Sutherland's own description of his claims reveals that the failure of due process he alleges is based entirely on an alleged failure by TDA to comply with the URA. *Id.*

Specifically, Mr. Sutherland sought to enjoin Larimer County officials from disbursing tax increment revenue to TDA on the basis that TDA would then use some or all of that revenue to pay back the Compass loan. Unamended Compl. for Dec. Judgment and Equitable Relief ("Compl.") at ¶ 22. Mot. at 6. However, the basis for the request was the allegation the Compass loan is invalid due to TDA's failure to comport with the procedural requirements of the URA, and therefore any disbursements of taxes to repay the Compass loan are unlawful. Compl. at ¶ 15-20; Mot. at 6. So, in order to grant the relief Mr. Sutherland sought in his Complaint, the Court would necessarily have to determine that TDA failed to comply with the URA when it entered into the Compass loan. This was obvious from the outset of the litigation, and no attempt to reframe the issue changes the fundamental problems with Mr. Sutherland's claims.

D. It is Settled Law that Taxpayers Lack Standing to Enforce the URA.

No matter how he tries to avoid the fact, Mr. Sutherland's claims have at all times been frivolous because he is barred from seeking a determination that the TDA failed to comply with the procedural requirements of the URA under *Olson v. City of Golden*. 53 P.3d 747, 752 (Colo.App. 2002). The *Olson* court dismissed a taxpayer's attempt to enforce the provisions of the URA for lack of standing on three independent grounds. First, it found that the increase in

taxes alleged by the taxpayer was too speculative to support the taxpayer's claim of standing, as it was premised on a number of intermediary actions by governmental entities that might or might not actually take place. *Id.* Second, it rejected the taxpayer's argument in light of prudential limits on standing, rooted in separation of powers, which prohibit the judicial branch from usurping the constitutional powers of the other co-equal branches of government. *Id.* at 750. Third, it found that the plain language of the URA statute indicated that the Legislature did not intend to grant taxpayers standing to enforce its terms. *Id.* at 752.

The Court correctly found that all three of the grounds for dismissing the taxpayer's claims identified by the *Olson* court are present in this action as well. *See* Order at 3-4. The tax increase alleged by Mr. Sutherland is speculative in the sense that an increase will only occur if the Poudre School District takes the necessary steps to increase its mill levy rate. That act has not taken place, and may never take place. Even if Poudre School District takes the necessary steps to increase its mill levy rate at some point in the future, that increase might be attributable to factors other than the TDA's collection of TIF revenues. Thus, Plaintiff's alleged injury is speculative in nature, and does not constitute an injury-in-fact. Mr. Sutherland was aware of the holding from *Olson* when he filed his Complaint. Compl. at ¶ 33. This fact supports the Court's finding that the Complaint is substantially frivolous under Colorado law.

Plaintiff's Motion makes no attempt to refute the core holding of *Olson*, which states that the plain language of the URA does not grant a legally protected interest to taxpayers, and thus they lack standing to enforce its provisions. *Olson*, 53 P.3d at 752-53. The injury alleged by Plaintiff here is a taxpayer injury that, by Plaintiff's own admission, could equally be alleged by any taxpayer within the Poudre School District's jurisdiction. The *Olson* court found "no

legislative intent to grant taxpayers the right to enforce [the URA]." *Id.* at 752. In the absence of a legally protected interest, Mr. Sutherland cannot establish standing with respect to the claims made in the Complaint.

Finally, the *Olson* court recognized that prudential limitations on standing rooted in separation of powers come into play when a claimant asserts standing based solely on his or her status as a taxpayer. *Olson*, 53 P.3d at 750 (citing *Wemberly v. Ettenberg*, 570 P.2d 535, 538 (Colo. 1977). These prudential limitations on standing deny Mr. Sutherland standing under the facts presented here. To allow taxpayers to enforce the provisions of the URA would intrude upon the exclusive province of the legislature, which chose not to create a private right of action associated with the URA. Given Mr. Sutherland's knowledge of the ruling in Olson, the Court did not create a "manifest error of fact or law" warranting the relief Sutherland requests in his Motion.

E. Plaintiff's Argument that a Litigant Need Not Allege an Injury in Fact In Order to Bring Claims under the Uniform Declaratory Judgment Act is Unsupported by Colorado Law.

Throughout this litigation, Mr. Sutherland has asserted that under Colorado law a litigant need not allege an injury-in-fact in order to bring claims under Colorado's Uniform Declaratory Judgment Act. Colo. Rev. Stat. § 13-51-101 *et seq.*; Mot. at 10-11. In fact, case law interpreting that statute makes it clear that in order to satisfy constitutional standing requirements, litigants seeking a declaratory must allege a non-speculative injury-in-fact. *See* U.S. Const., Art. III, § 2; *Mt. Emmons Min. Co. v. Town of Crested Butte*, 690 P.2d 213, 240 (Colo. 1984).

In *Mt. Emmons*, the Colorado Supreme Court recognized that a party seeking a declaratory judgment "need not risk the imposition of fines or imprisonment or the loss of property or profession in order to secure adjudication of uncertain legal rights." *Mt. Emmons*

Min. Co, 690 P.2d at 240. However, litigants "must still demonstrate that the challenged statute or ordinance will likely cause tangible detriment to conduct or activities that are presently occurring or are likely to occur in the near future," in order to establish standing. *Id.*

In this case, the injury alleged by Mr. Sutherland is too speculative to satisfy this requirement. As discussed in § C *supra,* the causal link between TDA's decision to enter into the Compass Loan and any potential future increase in the mill levy by Poudre School District is highly attenuated and cannot satisfy the standing requirement defined in *Mt. Emmons*. Even under the relaxed injury-in-fact requirement described in *Mt. Emmons,* Mr. Sutherland has failed to allege facts that could grant him standing in this matter.

F. The Court has Already Reduced its Award to Adjust for Time Spent Developing Counterclaims.

The Motion erroneously alleges that the Order granted TDA and Compass fees and costs in connection with counterclaims filed against Mr. Sutherland in this action. In fact, the Court made substantial reductions in TDA and Compass' request for fees and costs after determining that it would "not award fees for these abandoned counterclaims." Order at 6. The Court "reduced some hours and halved some hours depending on how the entry related to the counterclaims." *Id.* In light of this fact, there is no basis for further reduction of the Court's award to TDA and Compass.

CONCLUSION

Based on the foregoing, Defendants Timnath Development Authority and Compass Mortgage Corporation request that this Court deny Plaintiff's Motion.

DATED this 9th day of October, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

Original signature on file at offices of Brownstein Hyatt Farber Schreck pursuant to C.R.C.P. 121 § 1-26

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of October, 2018, a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO PLAINTIFF'S FIRST AMENDED MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION TO DISMISS** was filed with the Court and served via Colorado Courts E-filing System on all counsel of record and *pro se Plaintiff* as follows*:*

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