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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.	▲ **COURT USE ONLY** ▲
Party without attorney: Eric Sutherland, pro se 3520 Golden Currant Boulevard Fort Collins, CO 80521 Phone Number: (970) 224 4509 E-mail: sutherix@yahoo.com	Case #: 2018CV149 Division: 3C

PLAINTIFF'S RESPONSE TO CITY OF FORT COLLINS' MOTION FOR ATTORNEYS' FEES AND BILL OF COSTS

Plaintiff, Eric Sutherland (also referred to hear with 1st person pronouns files) this Response to the City of Fort Collins' Motion for Attorneys' Fees and Costs which was filed with this Court on September 26, 2018.

I. INTRODUCTION

1. The City of Fort Collins has now filed with this Court a request for the Award of Attorney Fees and Costs, *Motion for Fees*. The City has cited C.R.S. §13-17-102(4) and stated its belief that my case was substantially frivolous. See *Motion for Fees@* p. 4. The City is not correct in this statement.

The City's Motion for Fees has opened the proverbial can of worms. Prior to this *Motion,* I had presumed, as had the investors that purchased $146 million in bonds, that the Supplemental Public Securities Act or SPSA, C.R.S. §11-57-201 *et seq* had been properly applied to the issuance of Electric Utility Enterprise Bonds. However, the significance of a request for an award of $34,754 prompted a re-examination of all details of this matter and that that examination produced the conclusion that the Electric Utility Enterprise Board, or "EUEB", could not have and also did not properly apply the SPSA to the bonds.

Because the City refused to co-operate in any way in an examination of this reasonable finding, I filed with this Court my *Motion for Determination of Questions of Law Under Rule 56(h)* on October 3, 2018. This *Motion* requests a determination of the following three questions of law.

> 1.) Is the EUEB an 'issuing authority' for the purposes of Part 2 of Article 57 of Title 11, the Supplemental Public Securities Act or "SPSA" of the Colorado Revised Statutes as that term is defined in C.R.S. 11-57-203 (2).
>
> 2.) Is any part of the SPSA including C.R.S. § 11-57-210 and § -212 applicable to the issuance of debt authorized by Ordinance 003 of the City of Fort Collins Electric Utility Enterprise Board or "EUEB"?

3.) Did the EUEB know or should the EUEB have known that it was not an 'issuing authority' under the SPSA? (*Motion for Determination* at p. 2.)

As of the date of the filing of this *Response*, no response to the *Motion for Determination* has been filed by the City.

The effect of a determination on these questions of law consistent with the argument that I have presented would be extremely impactful on this proceeding and also on matters extrinsic to this proceeding. As it pertains to this proceeding, the situation may be simplified by simply noting that I relied upon the applicability of the non-claim statute of the SPSA, §11-57-212, and the City relied upon the &11-57-210 in the making of our respective cases. Thus, the basis of the arguments of both the Plaintiff and the Defendant dissolve underneath both parties if the SPSA is found to have not been properly applied.

Because the time for filing this *Response* comes before the *Motion for Determination* is ripe for decision by this Court, this *Response* must necessarily be crafted to defeat the *Motion for Fees* under two scenarios.[1]

The overarching factor in this entire matter can't be overlooked. The City of Fort Collins ignored its own laws when purporting to authorize the creation of $146 million in debt. It has since admitted that it ignored its own laws. See *City's Motion to Dismiss* at p. 11, 12. (Article V section 19.3(b) of the Fort Collins City Charter requires ordinances of the EUEB to be adopted in the same manner as ordinances of the City Council. Article II section 6 of the Fort Collins City Charter requires that final passage of ordinance shall be at a regular city

[1] The City of Fort Collins was asked whether or not it would oppose a motion to expand the time available for this *Response* to allow the questions of law that had been placed before this Court to be decided. The City stated that it would oppose such a motion. Rather than file for an expansion of time, I am simply dealing with the situation as desecribed.

council meeting. Yet, the City admits that the Bond Ordinance was adopted a regular meeting of the Board and points to the minutes of that meeting, not a meeting of the Council.) This arrogant disregard for its own laws, which had been protested by public comment made by myself on the occasion of 'final passage' of the Bond Ordinance, has created enormous problems.

II. DEFENDANT CITY'S CLAIM OF "SUBSTANTIALLY FIRVOLOUS"

The City of Fort Collins holds that my claims were substantially frivolous for three reasons. Each reason is dealt with below in turn. In two of the three reasons given by the City, the questions of law regarding the applicability of the SPSA are significant factors.

A1. City's belief that Sutherland knew injuries were too speculative: SPSA IS FOUND TO HAVE BEEN **PROPERLY** *APPLIED.*

In the event that this Court finds that the SPSA was properly applied, my argument to defeat the City's assertion that my case was substantially frivolous because any potential injury was to speculative is exactly what has been stated previously.

There appears to be a difference of opinion upon the likelihood of the broadband utility failing, which would require the electric utility ratepayers to pay higher rates for electric energy. However, this difference of opinion does not rise to the level of a disputed fact. The simple reality here is that the City has admitted that there is a possibility that higher electric energy rates will be necessary. See *City's Motion To Dismiss* at p. 6. It is axiomatic that any and all prognostication as to likelihood of injury is speculative.

However, my case for standing clearly laid out a novel theory of law, which I held to be a matter of fist impression. That theory of law stated that the Uniform Declaratory Judgment Act, or "UJDA", C.R.S. § 13-51-101 *et seq,* must be

liberally construed to allow for judicial review of a request for declaratory judgment regardless of the indirectness of potential injury in any situation where, as here, such inquiry would be barred by statute in the future. This theory of law was explained with fine detail and supporting authority. See *Plaintiff's Response to City of Fort Collins' Motion to Dismiss* at p. 5-10 This theory of law was not addressed, let alone refuted, by the City in the City's *Reply* in support of its MTD.

This Court is barred from awarding attorneys fees in any situation where, as here, a party has made a good faith attempt to establish a new theory of law. See C.R.S. §13-17-102(7). *No attorney or party shall be assessed attorney fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Colorado.* The City of Fort Collins has never addressed, let alone disputed, that I made a good faith attempt to establish a new theory of law. In pre-motion conference on the City's *Motion for Fees* , I raised this defense and was treated to absolute silence by counsel for the City. Furthermore, I genuinely believe that our courts in Colorado should adopt a standard for declaratory judgment actions brought to avoid a bar imposed by a non-claim statute as I have described.

A2. City's belief that Sutherland knew injuries were too speculative: SPSA IS FOUND TO HAVE BEEN **IMPROPERLY** *APPLIED.*

In this section, I will do something that the City of Fort Collins is loath to do. I will be honest.

In the event that this Court finds in favor of my interpretation of the applicability of the SPSA to the Bond Ordinance, my case for standing is shot to hell. I believe and relied upon the City of Fort Collins representation that the SPSA had been applied and, thus, the non-claim statute of § 11-57-212 barred any inquiry regarding the legitimacy of the issuance of the bonds in the future. I regret that I was taken in by this representation. I now see that I was in error.

However, even when the obvious conclusion about the inapplicability of the SPSA is made, my case can not be construed as substantially frivolous. I presented a rational argument based upon the evidence and law that I believed to be true at the time I filed the lawsuit. The later revelation of the inapplicability of the SPSA does not change this reality.

B. City's Assertion that Claims 13-19 were not sufficiently plead.

(the treatment of this issue is unaffected by the determination of the applicability of the SPSA.)

Here again, the City and I appear to be in agreement. Claims 14-19 were placeholders that imprudently written into the *Umamended Complaint* with the intent that they would be later expanded or deleted upon the fling of an amended Complaint. The insufficiency and 'rushed' nature of the Claims may be attributed to. the necessity of beating the time bar of the non-claim statute, §11-57-212. The Timnath Development Authority and Compass Bank waived service and Answered the *Unamended Complaint,* thus foreclosing the opportunity for me to amend the *Umamended Complaint* without leave of the Court. Although I considered motioning this Court several times for leave to amend, circumstances never created an optimal time to do this. Furthermore, all parties and this Court had no trouble distinguishing the placeholder claims as insufficiently plead. They were obviously and transparently placeholders that failed in any way, shape or form to amount to claims.

The Thirteenth Claim was sufficiently plead. However, this Claim did become moot upon the purchase of the bonds. It was not substantially frivolous at any time.

There is no dispute here that it would have been in good form to have requested leave of the Court to delete the placeholders. At the same time, it is absurd to suggest that the placeholders amounted to a significant burden or

disadvantage to the City of Fort Collins. If such a burden was incurred, then the request for costs and attorneys fees should have been specific enough to allow an award based solely on the expense incurred to deal with the placeholders. This approach, of course, was not taken by the City in its *Motion for Fees.*

B1. City's belief that Sutherland knew §11-57-210 operated as a bar to inquiry: SPSA IS FOUND TO HAVE BEEN **PROPERLY** *APPLIED.*

In the event that this Court finds that the SPSA was properly applied, my argument to defeat the City's assertion that my case was substantially frivolous because any potential injury was to speculative is exactly what has been stated previously.

In my *Response to City of Fort Collins Motion to Dismiss,* I argued 1) that the §11-57-210 does not operate as a bar to inquiry in a manner similar to §-212. I also argued that §-210 is either facially unconstitutional or unconstitutional as applied. See *Response* at p. 10-12. Both arguments are reasonable and would meet any criteria for determining whether or not there was a rational basis for the action brought.

Article III of the Colorado Constitution proscribes one branch of government from intruding into the sphere of another branch. *Hickenlooper v. Freedom from Religion,* 338 P. 3d 1002, Colo. 2014. In this case, the City's recital in its bonds in the style prescribed by §11-57-210 did not exist at the time the lawsuit was filed. The recital may only be seen to exist or have any effect whatsoever on and after the date of sale of the bonds, which did not happen until after the lawsuit had been filed. Thus, the recital thought by the city to guaranty the validity of the bonds was could only be construed to operate so as to nullify a claim for relief that had already been properly entered into the courts. Clearly, the recital is unconstitutional as applied. If not, then the legislative branch of government, the

General Assembly, has intruded into the sphere of the judical branch of government.

Also, Article XX section 6 of the Colorado Constitution creates a distinct separation of powers between the state and Home Rule municipalities. *Town of Telluride v. Thirty FourVenture,* 3 P 3d. 30 Colo. 2000. Here, a state law, §11-57-210 is viewed by the City as having legislated in an arena, the procedure for adopting legislative enactments of a Home Rule city, that is exclusively of local control. The General Assembly may not legislate in this arena.

In both of the two preceding paragraphs, constitutional provisions controlling the separation and allocation of powers can clearly be seen to eliminate any possibility that the recital found in the bonds could be deemed to be a jurisdictional bar. The General Assembly simply does not have the power or authority to legislate in a manner that the city thinks it does. Of course, it is not necessary to reach any conclusion on these matters of law in the *Motion* now before the court. Suffice it to say, there was a rational basis for my rejection of the City's position holding that §11-57-210 precluded invalidation of the issuance of the bonds. The City never addressed, let alone refuted, my position on this issue.

B1. City's belief that Sutherland knew §11-57-210 operated as a bar to inquiry: SPSA IS FOUND TO HAVE BEEN **IMPROPERLY** *APPLIED.*

In the event that this Court finds in favor of my interpretation of the applicability of the SPSA to the Bond Ordinance, the City's belief in the invincibility of language recited in a Bond is shot to hell.

So to is any immunity for members of the Electric Utility Enterprise Board. So to is any hope of investors of acquiring a lien against city utility revenues in the event of non payment. Etc.

As previously stated, much is riding on the outcome of the *Motion for Determination of Questions of Law* that is presently before this Court. There can be little doubt that a Court of law in the state of Colorado must, at the minimum, answer the first two questions in the negative. C.R.S. §11-57-203(1) defines "Act of Issuance" as "*an ordinance, resolution, or decision to issue a security* ***pursuant to delegated authority*** *adopted by the issuing authority or officer of a public entity for the purpose of issuing a security or an amendment to such ordinance, resolution, or decision adopted by the issuing authority after the issuance of a security.*" (C.R.S. §11-57-203(1), emphasis added. Here, the EUEB failed to act ***pursuant to delegated authority*** in both state and local law.

III. CONCLUSION

No part of this action was substantially frivolous. Contrary to the City of Fort Collins' assertions, a rational basis can be found to underlie every single element of the action that I brought. This action may not have been perfectly litigated, or even litigated in good form, but it was not frivolous. By contrast, the actions of the City of Fort Collins taken it absolute disregard of its own laws as well as the laws of the state of Colorado are objectionable and injurious to the public interest in many ways.

WHEREFORE, Plaintiff requests that that this Court deny the City of Fort Collins' Motion for Attorneys' Fees and Costs in this matter.

Dated October 17, 2018

Eric Sutherland

I hereby certify that on this 17th Day of October, 2018, a true and correct copy of the foregoing *Plaintiff's Response to City of Fort Collins' 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 October 17th, 2018.

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By _____