

<p>DISTRICT COURT, LARIMER COUNTY, COLORADO Court Address: 201 LA Porte Avenue Fort Collins, CO 80521 Phone Number: (970) 494-3500</p>	
<p>Plaintiff: ERIC SUTHERLAND, <i>pro se</i></p> <p>v.</p> <p>Defendant: 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 in this office; IRENE JOSEY, in her capacity as the Larimer County Treasurer and all successors to this office; and</p> <p>Indispensable Parties: THE TIMNATH DEVELOPMENT AUTHORITY, an Urban Renewal Authority; and COMPASS MORTGAGE CORPORATION, an Alabama company doing business in Colorado.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Defendant City of Fort Collins John W. Mill (#22348) Amanda Levin Milgrom (#47871) Sherman & Howard L.L.C. 633 17th Street, Suite 3000 Denver, CO 80202 Phone Number: (303) 297-2900 Email: jmill@shermanhoward.com amilgrom@shermanhoward.com</p> <p>Carrie M. Daggett, #23316 John R. Duval, # 10185 Fort Collins City Attorney's Office 300 LaPorte Avenue Fort Collins, CO 80522-0580 970-221-6520 cddaggett@fcgov.com, jduval@fcgov.com</p>	<p>Case No.: 2018CV149</p> <p>Courtroom/Division: 3C</p>
<p>MOTION TO STRIKE PLAINTIFF'S MOTION FOR DETERMINATION OF QUESTIONS OF LAW UNDER RULE 56(h)</p>	

The City of Fort Collins (the “City”), by and through its counsel, Sherman & Howard L.L.C. and the Fort Collins City Attorney’s Office, respectfully requests that the Court strike Eric Sutherland’s (“Mr. Sutherland”) Motion for Determination of Questions of Law under Rule 56(h) (“Rule 56(h) Motion”) as immaterial and impertinent pursuant to C.R.C.P. 12(f). Mr. Sutherland is merely trying to relitigate issues on which this Court has already ruled.

A party may move to strike any “redundant, immaterial, impertinent, or scandalous matter from” a pleading or motion. Rule 12(f). Here, the City moves to strike Mr. Sutherland’s entire Rule 56(h) Motion as immaterial and impertinent. It may be stricken from the record because it cannot have any “possible bearing upon the subject matter of the litigation.” *Koch v. Whitten*, 342 P.2d 1011, 1015 (Colo. 1959).

Certificate of Conferral. Pursuant to C.R.C.P. 121 § 1-15(8), the City’s counsel certifies that on October 7, 2018, Mr. Mill conferred with Mr. Sutherland regarding this motion. Mr. Sutherland opposes this motion.

I. Plaintiff’s Notice of Appeal Divests this Court of Jurisdiction to Consider the Rule 56(h) Motion.

Mr. Sutherland filed a Notice of Appeal on October 23, 2018, twenty days after filing this Rule 56(h) Motion. By filing his Notice of Appeal, Mr. Sutherland divested this Court of jurisdiction to consider any motion that affects the judgment on appeal, i.e., this current Rule 56(h) Motion.

“Generally, the filing of a notice of appeal shifts jurisdiction to the appellate court, thus divesting the trial court of jurisdiction to conduct further substantive action related to the judgment on appeal.” *Musick v. Woznicki*, 136 P.3d 244, 246 (Colo. 2006). Once a Notice of Appeal has been filed, a trial court retains only a narrow scope of jurisdiction to act on matters

that do not affect the judgment that is on appeal. *See People v. Stewart*, 55 P.3d 107, 126 (Colo. 2002).

Here, the Court no longer has jurisdiction to act on this Rule 56(h) Motion because doing so would affect the judgment (the Court's Order on the City's Motion to Dismiss) that is now on appeal. Therefore, the Court does not have jurisdiction to rule on Mr. Sutherland's Rule 56(h) Motion and so should not consider it.

II. The Motion Is Procedurally Improper.

In addition, Mr. Sutherland's Rule 56(h) Motion is immaterial and impertinent because it is procedurally improper—it falls completely outside the realm of what the Colorado Rules of Civil Procedure contemplate. It is Mr. Sutherland's attempt to relitigate issues already decided by the Court. It should not be a part of the record in any way.

A rule 56(h) motion is a type of summary judgment motion. It is intended to provide the parties and the court with an opportunity to resolve issues of pure law so that the parties can focus on the factual issues in dispute. *See Stapleton v. Pub. Employees Retirement Assoc.*, 412 P.3d 572, 576 (Colo. App. 2013) (quoting *Bd. of Cnty. Comm'rs v. United States*, 891 P.2d 952, 963 n.14 (Colo. 1995)) (resolving such issues “will enhance the ability of the parties to prepare for and realistically evaluate their cases”). It streamlines the case and resolves extraneous issues. It is not intended to replace a motion for post-trial relief or a motion for reconsideration.

A rule 56(h) motion is particularly improper here, given the procedural posture of this case. On September 5, 2018, this Court dismissed all of Mr. Sutherland's claims against the City and, in doing so, already decided all questions of law in this case. There are therefore no claims

currently pending against the City.¹ The Colorado Supreme Court has stated that “paragraphs seeking to retry a previous action . . . may be stricken.” *Koch v. Whitten*, 342 P.2d 1011, 1015 (Colo. 1959). That is precisely what Mr. Sutherland is attempting to do here with his Rule 56(h) Motion; he is asking the Court to allow him another bite at the apple. But that is not allowed, not under the rules and not under our legal system. His Rule 56(h) Motion should be stricken.

III. Mr. Sutherland Could Have Raised These Legal Issues in His Response to the City’s Motion to Dismiss But Failed To Do So.

Finally, this Court should strike the Rule 56(h) Motion from the record because Mr. Sutherland could have raised these legal arguments previously but did not. In fact, there was a time to raise these issues. In the City’s Motion to Dismiss, the City argued that § 11-57-110 of the Supplemental Public Securities Act (“SPSA”) barred Mr. Sutherland’s claims. In his response to the Motion to Dismiss, Mr. Sutherland should have raised his argument that the SPSA does not apply. But he failed to do so, and he provides no reasonable explanation for why in his Rule 56(h) Motion. His only reason is that he did not think about it until now. *See* Rule 56(h) Motion at 5. He cannot be permitted to correct that omission now.

As the Colorado Supreme Court explained, “what matters is not alone whether the phrase is immaterial, but whether its presence, if it be immaterial, is calculated to be harmful.” *Whitten*, 342 P.2d at 1016. Mr. Sutherland’s Rule 56(h) Motion, if allowed to remain part of the record of this case, will harm the City. First, if the Court does not strike Mr. Sutherland’s Rule 56(h) Motion, and subsequently grants it, then the entire litigation would be reopened. The City would

¹ The sole outstanding item remaining in this case is the question of whether Mr. Sutherland will be required to pay the City’s attorneys’ fees and costs. This Court has jurisdiction to decide the issue of attorneys’ fees. *See Woznicki*, 136 P.3d at 248.

be forced to incur additional fees and costs in its defense, and the Court would have to expend judicial resources continuing to preside over this case. Principles of finality would be swept to the side as the City was forced to relitigate this case for a second time. Second, even if the Court ultimately denies Mr. Sutherland's Rule 56(h) Motion, the pleadings would remain part of the record. Mr. Sutherland has already filed an appeal in this action, and arguably these pleadings could become part of that appellate record. For these reasons, the Rule 56(h) Motion would be sufficiently harmful to the City to warrant the Court striking this Rule 56(h) Motion from the record.

IV. Conclusion.

In conclusion, the City respectfully requests that the Court strike Mr. Sutherland's Rule 56(h) Motion from the record as this Court has been divested of jurisdiction to consider it and it is immaterial and impertinent.

Dated this 24th day of October, 2018.

SHERMAN & HOWARD L.L.C.

By: /s/ Amanda Levin Milgrom

Amanda Levin Milgrom (#47871)

John W. Mill (#22348)

633 17th Street, Suite 3000

Denver, CO 80202

Telephone: (303) 297-2900

Email: jmill@shermanhoward.com

amilgrom@shermanhoward.com

ATTORNEYS FOR DEFENDANT

CITY OF FORT COLLINS

FORT COLLINS CITY ATTORNEY'S OFFICE

By:/s/ John R. Duval

John R. Duval, Esq., #10185
of City of Fort Collins
300 LaPorte Avenue
Fort Collins, CO 80521
970-221-6520

cdaggett@fcgov.com

jduval@fcgov.com

ATTORNEYS FOR DEFENDANT
CITY OF FORT COLLINS

CERTIFICATE OF SERVICE

I hereby certify on the 24th day of October, 2018, that a true and correct copy of the foregoing pleading, entitled, **MOTION TO STRIKE PLAINTIFF'S MOTION FOR DETERMINATION OF QUESTIONS OF LAW UNDER RULE 56(h)**, was served via ICCES e-filing system, upon the following:

Eric Sutherland, *pro se*
3520 Golden Currant Boulevard
Fort Collins, CO 80521
(*By email and US Mail*)

Eric R. Burris, *pro hac vice*
Cole J. Woodward
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202

/s/ Stephanie Hendrickson
Stephanie Hendrickson, Legal Assistant