

DISTRICT COURT, LARIMER COUNTY, COLORADO

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CASE NUMBER: 2018CV149

Court Address: 201 LA Porte Avenue  
Fort Collins, CO 80521

Phone Number: (970) 494-3500

**Plaintiff:**

ERIC SUTHERLAND, *pro se*

v.

**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

**Indispensable Parties:**

THE TIMNATH DEVELOPMENT AUTHORITY, an Urban Renewal Authority; and COMPASS MORTGAGE CORPORATION, an Alabama company doing business in Colorado.

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Case No.: 2018CV149

Courtroom/Division: 3C

**THE CITY OF FORT COLLINS' MOTION FOR RECONSIDERATION OF THE COURT'S STATUS ORDER**

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 reconsider its Status Order Regarding Notice of Appeal (Oct. 29, 2018) (“Status Order”) based on Colorado appellate cases holding that a district court does have jurisdiction to decide issues relating to attorneys’ fees<sup>1</sup> even after the filing of a notice of appeal, as follows:

**Certificate of Conferral:** On November 9, 2018, counsel for the City conferred by email with Plaintiff Mr. Eric Sutherland and counsel for Steve Miller and Irene Josey regarding this Motion. Mr. Sutherland apparently opposes this motion.<sup>2</sup> Counsel for Mr. Miller and Ms. Josey has not responded by the date of this filing. The Status Order was not served on the City; the City’s counsel learned of the Status Order on or about November 5, 2018 when its staff looked at the docket.

## I. **BACKGROUND**

The Court dismissed all of Mr. Sutherland’s claims against the City. See Order Granting Defendants’ Motions to Dismiss as to Defendants City of Fort Collins, Steve Miller and Irene Josey (Sept. 5, 2018).

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<sup>1</sup> The pending motions regarding attorneys’ fees are the City of Fort Collins’ Combined Motion for Attorneys’ Fees and Bill of Costs (Sept. 24, 2018) (“the City’s Motion for Fees”), Plaintiff’s Motion for Hearing of Defendant City of Fort Collins’ Combined Motion for Attorneys’ Fees and Costs (“Plaintiffs’ Motion for Hearing”), and Defendants Josey and Miller’s Verified Motion for Award of Attorneys’ Fees (“Josey and Miller’s Motion for Fees”).

<sup>2</sup> Mr. Sutherland sent an email on November 9 stating “there is reason to agree with your position as to determination of matters unrelated to the final judgment” but he apparently believes that his Motion for Determination of Questions of Law under Rule 56(h) (“Rule 56(h) Motion”) (Oct. 3, 2018) is relevant to the City’s Motion for Fees. The City disagrees. The City believes Mr. Sutherland’s Rule 56(h) Motion goes to the merits and the Court does not have jurisdiction to decide it. See Response to Motion for Determination of Questions of Law Under Rule 56(h) at 3–4; 7–10 (Oct. 24, 2018). At a hearing on the City’s Motion for Fees, Mr. Sutherland can make whatever relevant arguments he wishes to try to demonstrate that his claims against the City are not frivolous. Thus, deciding his Rule 56(h) Motion is not necessary to decide the City’s Motion for Fees.

The City then moved for attorneys' fees on the grounds that Mr. Sutherland's claims against the City were frivolous under C.R.S. § 13-17-102. See City's Motion for Fees. Mr. Sutherland opposed the Motion and the City filed a reply.

Mr. Sutherland requested a hearing on the matter of attorneys' fees. See Plaintiff's Motion for Hearing. The City does not oppose a hearing, given that Mr. Sutherland is entitled to the hearing. See *Pedlow v. Stamp*, 776 P.2d 382, 385 (Colo. 1989) (explaining that "[c]ases decided by the court of appeals applying section 13-17-101 have concluded that a hearing is required under the statute."). Josey and Miller's Motion for Fees was filed on October 12, 2018.

Mr. Sutherland filed a Notice of Appeal on October 23, 2018.

On October 29, 2018, the Court issued a Status Order declining to rule on a number of outstanding motions (including the City's Motion for Fees, Plaintiff's Motion for Hearing and Josey and Miller's Motion for Fees). See Status Order at 2. The Status Order states that Mr. Sutherland's Notice of Appeal divested the Court of jurisdiction to hear any of the motions pending before it. See id.

## **II. DISTRICT COURTS RETAIN JURISDICTION OVER MATTERS OF ATTORNEYS' FEES WHEN THE FINAL JUDGMENT HAS BEEN APPEALED**

The City requests that the Court reconsider its Status Order and revise it to conclude that the Court does have jurisdiction to decide the City's Motion for Fees based on Colorado law allowing district courts to decide requests for attorneys' fees even after a party has filed a notice of appeal.

**A. *Trial Courts Retain Jurisdiction to Decide Motions for Attorneys' Fees Under the Law In Spite of the Final Judgment Being Appealed.***

Although motions to reconsider are disfavored, *see* C.R.C.P. 121 § 1-15(11), such a motion is merited here. A motion for reconsideration will be granted if “a manifest error of fact or law [] clearly mandates a different result or other circumstances result[] in manifest injustice.” *Id.* Here, the Court accurately stated that “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.” Status Order at 1–2 (quoting *Musick v. Woznicki*, 136 P.3d 244, 246 (Colo. 2006) (emphasis added)). However, requests for attorneys’ fees do not constitute substantive action related to the judgment on appeal and district courts clearly retain authority to decide requests for attorneys’ fees even after a notice of appeal is filed.

In *Baldwin v. Bright Mortgage Co.*, 757 P.2d 1072, 1074 (Colo. 1988), the Colorado Supreme Court held that the question of an award of attorneys’ fees was sufficiently separate from any underlying judgment that an unresolved question of attorneys’ fees would not prevent a judgment on the merits from being final for purposes of appeal. A year later, the Court of Appeals in *Roa v. Miller*, 784 P.2d 826 (Colo. App. 1989), concluded that the *Baldwin* decision also impliedly addressed the related issue whether the trial court continued to have jurisdiction to determine attorneys’ fee issues after a notice of appeal is filed to review the merits judgments. The Court of Appeals in *Roa* held that **a trial court retains jurisdiction to decide a motion for attorneys’ fees during the pendency of an appeal.** That same year, the court in *Koontz v. Rosener*, 787 P.2d 192, 198 (Colo. App. 1989), agreed. The *Koontz* court held that “the filing of the notice of appeal of the merits judgment did not divest the trial court of its continuing

jurisdiction to determine the issues posed by the cost bills and requests for attorneys' fees." *Id.* (emphasis added).

These decisions remain the law in Colorado. "A trial court has continuing jurisdiction to determine attorney fee issues after a notice of appeal is filed to review the merits judgment." *A. Tenenbaum & Co., Inc. v. Colantuno*, 3 P.3d 456, 458 (Colo. App. 1999).<sup>3</sup> Therefore, this Court has jurisdiction to decide the question of attorneys' fees in spite of Mr. Sutherland's Notice of Appeal.

**B. *The Court Will Conserve Judicial Resources and the Parties Will Achieve Finality by Deciding the Motion for Attorneys' Fees Now.***

Deciding the City's Motion for Attorneys' Fees now will conserve the Court's judicial resources. The case has been before the Court for six months. The Court is familiar with the facts of the case, the claims raised, and the arguments made by Mr. Sutherland, the City and other parties. The Court already has ruled that Mr. Sutherland's claims against The Timnath Development Authority and Compass Mortgage Corporation were frivolous. See Order Granting Timnath Development Authority's and Compass Mortgage Corporations' Motion for Attorneys' Fees and Bill of Costs (Sept. 10, 2018). The claims and the issues are fresh in the Court's mind. If the Court were to wait until the appeal was resolved to decide the question of whether Mr. Sutherland's claims against the City were frivolous, it would likely be months or even years from now. The Court would have seen countless cases in between and would be forced to spend significant time reacquainting itself with the issues in this case. The delay would certainly make

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<sup>3</sup> This case was cited with approval by *People v. Liggett*, No. 14-cv-2506, -- P.3d --, 2018 WL 3384668, at \*8 (Colo. App. 2018).

it more difficult and time-consuming for the Court to later decide the City's Motion for Attorneys' Fees.

In contrast, the Court can easily decide the City's motion for attorneys' fees now. The facts and issues are fresh, the motion is fully briefed and the Court could fully resolve this case.

Deciding the City's Motion for Attorneys' Fees also makes logistical sense. For example, if the City prevails on its Motion for Attorneys' and Bill of Costs, then Mr. Sutherland could appeal that decision as well. *See Dawes Agency, Inc. v. Am. Prop. Mortgage, Inc.*, 804 P.2d 255, 257 (Colo. App. 1990) (following the trial court's ruling on attorneys' fees, a party seeking to challenge that ruling on appeal must file a separate appeal rather than relying on the prior notice of appeal filed by the party on the merits of the case). If appropriate, Mr. Sutherland could then consolidate his appeal of the order on attorneys' fees with his current appeal. That would promote efficiency and allow the Court of Appeals to decide all of the related issues in this case at one time.

### **III. CONCLUSION**

In conclusion, the City respectfully requests that the Court grant this Motion, reconsider its Status Order, issue a revised Status Order concluding that pursuant to the cases cited herein the Court has jurisdiction to decide the City's Motion for Attorneys' Fees, and then hold a hearing on that motion at which the City and Mr. Sutherland may be heard on the issue of attorneys' fees and then decide that issue.

DATED this 14th day of November, 2018.

SHERMAN & HOWARD L.L.C.

By: /s/ Amanda Levin Milgrom

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**CERTIFICATE OF SERVICE**

I hereby certify on the 14th day of November, 2018, that a true and correct copy of the foregoing pleading, entitled **THE CITY OF FORT COLLINS' MOTION FOR RECONSIDERATION OF THE COURT'S STATUS ORDER**, was served via ICCES e-filing system, upon the following:

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