DISTRICT COURT, LARIMER COUNTY, COLORADO Court Address: 201 La Porte Avenue Fort Collins, CO 80521 Phone Number: (970) 494-3500	DATE FILED: March 27, 2019 2:18 PM FILING ID: 67AF606749877 CASE NUMBER: 2018CV149
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 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.	**▲COURT USE ONLY▲**
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CITY OF FORT COLLINS'S RESPONSE TO PLAINTIFF'S MOTION TO VACATE ORDER GRANTING MOTION TO DISMISS PURSUANT TO RULE 60(b)

The Defendant City of Fort Collins (the "City"), by and through its counsel, respectfully submits the following Response to Plaintiff's Motion to Vacate Pursuant to Rule 60(b).

INTRODUCTION

Plaintiff, Eric Sutherland, seeks to re-litigate his case under the guise of a Rule 60(b) motion by asking this Court to vacate its dismissal and rewrite his Complaint to include a cause of action under Colorado's Open Meetings Law.[1] Mr. Sutherland provides no basis, in law or fact, to vacate the Court's September 5, 2018 Order dismissing all of his claims against the City. Motions to vacate are not granted absent "clear, strong, and satisfactory proof." *Colo. Dep't of Pub. Health & Env't v. Caulk*, 969 P.2d 804, 809 (Colo. App. 1998). In fact, during the City's cross-examination of Mr. Sutherland at the March 15, 2019 hearing on attorneys' fees, Mr. Sutherland admitted that the Open Meetings Law is not mentioned in his Complaint.[2] And yet, Mr. Sutherland requests that this Court apply the "reset" button on his litigation and afford him the opportunity to assert another frivolous claim against the City at the expense of the City's taxpayers. The Court should deny Mr. Sutherland's unsubstantiated Motion.

FACTS AND PROCEDURAL HISTORY

Mr. Sutherland filed his Complaint in this matter in April of 2018. In his Complaint, Mr. Sutherland alleged that he had standing to bring his claims against the City because his electric utility payments would "undoubtedly be increased by the repayment of unlawfully authorized debt." *See*, Compl, at ¶ 8. This Court rejected Mr. Sutherland's alleged basis for standing in its

[1] Part 4 in Article 6 of Title 24 of the Colorado Revised Statutes.

[2] The City has not obtained a recording or transcript of the March 15, 2019 hearing. But, the City believes its references to the testimony in the hearing in this Response are accurate and, of course, this Court presided over that testimony.

dismissal order, stating that "the injury complained of here is speculative at best" and too remote in time. *See*, Ord. Grant. Mot. to Dismiss, at p. 3. Now, in his Motion, Mr. Sutherland asks the Court to ignore the basis for standing articulated in his Complaint and to instead vacate its dismissal order and rewrite the Complaint to allege a cause of action under the Open Meetings Law.

ARGUMENT

Mr. Sutherland cannot demonstrate excusable neglect. *See Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112, 1116 (Colo. 1986). This alone requires the Court to deny the Motion to Vacate. *Id.* To achieve relief under Rule 60(b) for excusable neglect, Mr. Sutherland must demonstrate that: (1) his neglect was excusable; (2) he has a meritorious claim or defense to the judgment; and (3) relief is consistent with considerations of equity. *Id.* Failure to satisfy any of these three factors is sufficient to deny relief. *Id.*

I. Mr. Sutherland's neglect was not excusable.

Mr. Sutherland's conduct was certainly neglectful, but not excusable. The Colorado Supreme Court has stated that excusable neglect typically involves "unforeseen occurrences such as personal tragedy, illness, family death, destruction of files, and other similar situations." *Farmers Ins. Grp. v. Dist. Court of Second Judicial Dist*., 507 P.2d 865, 867 (Colo. 1973). None of these situations apply to Mr. Sutherland. Mr. Sutherland has not even attempted to show that his neglect was excusable – even though it is his burden to do so. *Guynn v. State Farm Mut. Auto Ins. Co.*, 725 P.2d 1162, 1163 (Colo. App. 1986) ("The party seeking relief has the burden of establishing the grounds for relief from judgment by clear, strong, and satisfactory proof."). Instead, he merely states that he became aware of the alleged applicability of the Open Meetings

Law sometime in mid-November (two months after the Court dismissed his claims against the City). *See* Mot. to Vacate, at p. 4. But failure to conduct sufficient independent research is not excusable neglect. *See Colo. Dep't of Pub. Health & Env't v. Caulk*, 969 P.2d 804, 810 (Colo. App. 1998) ("Perhaps Defendants should have hired counsel or conducted independent research. In any event, the Court finds that Defendants' actions constitute neglect, but not excusable neglect."). Rather, the failure to properly research a claim and a resulting dismissal is entirely predictable. Mr. Sutherland's conduct is nothing more than carelessness, for which Rule 60(b) provides no relief.

The Court can reject Mr. Sutherland's Motion on this basis alone. *See Plaisted v. Colo. Springs Sch. Dist. No. 11*, 702 P.2d 761, 763 (Colo. App. 1985) ("[T]he finding of no excusable neglect is sufficient to sustain the judgment."). But even if the Court continues the inquiry, the remaining factors necessary to obtain relief under Rule 60(b) are equally inapplicable to Mr. Sutherland.

II. Mr. Sutherland does not have a meritorious claim.

Mr. Sutherland's claims were dismissed on the merits. This is not a situation where a sympathetic defendant failed to respond to a lawsuit and suffered a default judgment even though he could meritoriously defend the claims. Mr. Sutherland is the one who filed this lawsuit and had every opportunity to choose his claims and legal theories. Also, the motion to dismiss his Complaint was fully briefed by him and the City and the Court's order dismissing his case contained specific, thorough, well-reasoned analysis for dismissal. But according to Mr. Sutherland, relief is nonetheless required because of the Court's "errant view of standing." *See* Mot. to Vacate, at p. 2. The Court did not misapply the law of standing. But even if it did,

that is not a proper basis for Rule 60(b) relief. Colorado courts have repeatedly held that Rule 60(b) relief is not justified by "erroneous application of the law." *SR Condos., Ltd. Liab. Co. v. K.C. Constr., Inc.*, 176 P.3d 866, 870 (Colo. Ct. App. 2007); *see also People v. R.L.C.*, 47 P.3d 327, 330 (Colo. 2002) ("A court's power to modify or vacate a final judgment is limited, even if aspects of that final judgment are erroneous."); *King v. Everett*, 775 P.2d 65, 67 (Colo. App. 1989) (same).

In any event, Mr. Sutherland has no valid, meritorious claim under the Open Meetings Law. Mr. Sutherland's Complaint does not mention the Open Meetings Law, C.R.S. §§ 24-6-401, *et. seq*. Because Mr. Sutherland cannot rely on the face of his allegations, he instead argues that paragraphs thirty-five through thirty-seven of his complaint should have been read as a cause of action under the Colorado Open Meetings Law. These paragraphs collectively allege that Ordinance No. 003, authorizing approximately $150 million dollars in broadband revenue bonds, is invalid because certain aspects of the Ordinance's passage failed to comply with the City Charter and City Code. These allegations do not relate to the Opens Meetings Law. The Open Meetings Law grants standing when public bodies conduct public business in secret. *See Doe v. Colo. Dep't of Pub. Health & Env't*, No. 16CA2011, 2018 Colo. App. LEXIS 1077, at *13 (Ct. App. July 26, 2018) (finding standing where a public board adopted a policy in secret). This is the very purpose of the Open Meetings Law, to ensure that "the formation of public policy is public business and may not be conducted in secret." C.R.S. § 24-6-401.

But Mr. Sutherland does not allege that the meeting was conducted in secret nor does he allege any issue with the meeting's notice, minutes, recording, or any other actionable allegation under the Open Meetings Law. Indeed, Mr. Sutherland cannot allege that the meeting was

conducted in secret because he attended the meeting in question on April 3, 2018. *See* **Exhibit A**, Meeting Minutes, at p. 1 ("Eric Sutherland stated these meetings do not meet City Charter requirements."). Further, during the March 15, 2019 hearing, Mr. Sutherland admitted that he attended the hearing on April 3, 2018 of the City Council and the Electric Utility Enterprise Board and agreed that he "clearly had notice" of the meeting in response to the City's cross examination questions. Mr. Sutherland simply alleges – without any supporting facts or argument – that he has an actionable claim under the Open Meetings Law. This argument is not enough to resurrect his dismissed complaint: "simply referencing a statutory cause of action is insufficient to demonstrate an injury in fact." *Weisfield v. City of Arvada*, 2015 COA 43, ¶ 33. The statutory grant of standing does not relieve Mr. Sutherland of the obligation to demonstrate how the Open Meetings Law was allegedly violated. *See id. cf.* 5A *Colo. Prac., Handbook on Civil Litigation* § 1:8 (2018 ed.) ("[E]ven if a statute 'grants' standing" a plaintiff still must "demonstrate an actual or imminently threatened injury.") Mr. Sutherland's position that the mechanics of passing a certain ordinance were improper cannot reasonably be read as a distinct statutory cause of action under the Open Meetings Law. Therefore, Mr. Sutherland's alleged cause of action under the Open Meetings Law is meritless.

III. Equity favors denying Plaintiff's Motion to Vacate.

No reasonable equitable theory supports vacating the Court's dismissal of Mr. Sutherland's claims. His Motion to Vacate is just part-and-parcel of his excessive motions practice[3] to attempt to resurrect his failed claims against the City. When determining whether to set aside a dismissal

[3] A litigation strategy which included attempts to appeal, correct the record, and receive a determination of law – all of which failed.

order, courts consider: (1) the promptness of the moving party, (2) detrimental reliance from the opposing party, and (3) prejudice to the opposing party. *See Taylor v. HCA-HealthONE LLC*, 2018 COA 29, ¶ 66. None of these considerations favor Mr. Sutherland. For example, Mr. Sutherland was not prompt in seeking his Motion; rather, he waited six months until the eleventh-hour deadline to file a Rule 60(b) motion. *See id.* (where the moving party filed her Rule 60(b) motion on the same day as the dismissal order).

Further, the City has relied on the finality of the dismissal order – the City has already filed a motion for an award of attorneys' fees based on the frivolousness of Mr. Sutherland's claims and the City has, at Mr. Sutherland's request, participated in a hearing on the award of fees. The City has answered all other motions Mr. Sutherland has submitted in this matter and the taxpayers should not have to continue bearing the burden of Mr. Sutherland's frivolous attack on the credibility of these proceedings. *People v. R.L.C.*, 47 P.3d 327, 330 (Colo. 2002) ("If judgments could easily be set aside, public confidence in the courts would be undermined."). Mr. Sutherland's failure to include in his Complaint a claim for an alleged violation of the Open Meetings Law (which he knew or should have known of at the time) is not grounds to vacate the Court's Order dismissing all of Mr. Sutherland's claims against the City. Accordingly, his Motion should be denied.

CONCLUSION

For the foregoing reasons, the City requests that this Court deny Mr. Sutherland's Motion to Vacate.

Dated this 27th day of March, 2019.

SHERMAN & HOWARD L.L.C.

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CERTIFICATE OF SERVICE

I certify that on the 27th day of March, 2019, a true and correct copy of the foregoing **CITY OF FORT COLLINS'S RESPONSE TO PLAINTIFF'S MOTION TO VACATE ORDER GRANTING MOTION TO DISMISS PURSUANT TO RULE 60(b)** was filed via Colorado Court's E-Filing system, and was served on the following:

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