

<p>Larimer County, Colorado, District Court Larimer County Justice Center 201 La Porte Avenue, Suite 100 Fort Collins, Colorado 80521-2761 (970) 494-3500</p>	<p>DATE FILED: March 27, 2019 2:20 PM FILING ID: 1744B659B5221 CASE NUMBER: 2018CV149</p>
<p>Plaintiff:</p> <p>ERIC SUTHERLAND,</p> <p>v.</p> <p>Defendant:</p> <p>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.</p>	<p>Court Use Only</p>
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<p>DEFENDANTS MILLER AND JOSEY'S RESPONSE TO MOTION PURSUANT TO C.R.C.P. RULE 60(b) TO VACATE ORDER GRANTING DEFENDANTS' MOTION TO DISMISS</p>	

Defendants Miller and Josey (collectively, “County Defendants”) hereby respond to Plaintiff’s Motion to Vacate Order Granting the Motion to Dismiss (“Motion to Vacate”).

INTRODUCTION

Plaintiff seeks relief pursuant C.R.C.P. 60(b). This rule allows a court to set aside a judgment in certain circumstances. Here, Plaintiff seeks to set aside the Court’s Order, dated September 5, 2018, dismissing the claims against County Defendants. In its Order, the Court found that the claims listed in Plaintiff’s *Unamended Complaint* should be dismissed because (1) the Plaintiff lacked standing, (2) the plaintiff had not sufficiently pled his claims, and (3) the claims were moot or inapplicable to the Defendants.

The claims which appear to involve County Defendants are the Second, Third, and perhaps the Seventh, which were specifically dismissed by the Court. However, Plaintiff appears to only be requesting that the First and Twelfth claims be reinstated. To that extent, and because those claims are irrelevant to Defendant’s Josey and Miller, the *Motion to Vacate* should be denied as to the County Defendants. Further, because the Plaintiff has failed to allege grounds under Rule 60(b) warranting reconsideration of the judgment, and because the Court was correct in its initial ruling of dismissal, County Defendants request the *Motion to Vacate* be denied.

LEGAL STANDARDS

The granting or denial of a C.R.C.P. 60(b) motion lies within the sound discretion of the trial court and, absent abuse of that discretion, will not be disturbed on appeal. *E.B. Jones Construction Co. v. City and County of Denver*, 717 P.2d 1009, 1013-1014 (Colo.App. 1986). The basis for relief under Rule 60 is summarized by the Colorado Court of Appeals as follows in the *E.B. Jones* case:

The thrust of C.R.C.P. 60, as we perceive the rule, is to allow a court that has rendered judgment the opportunity to change it when significant new matter of fact or law arises which is extrinsic to it because of not having been presented to the court. Invocation of the rule demands scrupulous consideration of strong policies favoring finality of judgments. Thus, Rule 60 is not a substitute for appeal, but instead is meant to provide relief in the interest of justice in extraordinary circumstances. The moving party must clearly establish the existence of one of the grounds of relief afforded by the Rule. (internal citations omitted).

The grounds for relief under the rule are:

- (1) Clerical error,
- (2) Mistake, inadvertence, surprise, or excusable neglect,
- (3) Fraud,
- (4) Satisfaction of the judgment,
- (5) Any other reason justifying relief from the operation of the judgment.

To set aside a judgment under C.R.C.P. 60(b), the movant bears the burden of establishing by clear and convincing evidence that the motion should be granted. *Borer v. Lewis*, 91 P.3d 375, 380–381 (Colo.2004). When considering whether to grant a motion based on excusable neglect the Court should consider (1) whether the neglect that resulted in entry of judgment by default was excusable; (2) whether the moving party has alleged a meritorious claim or defense; and (3) whether relief from the challenged order would be consistent with considerations of equity. *Craig v. Rider*, 651 P.2d 397, 402 (Colo. 1982).

On a motion for relief from judgment due to excusable neglect, in determining whether the movant has alleged a meritorious claim, the court examines the factual allegations contained in the pleadings, not their legal conclusions. *Sebastian v. Douglas County*, 366 P.3d 601 (Colo. 2016). In general, excusable neglect involves unforeseen circumstances which would cause a reasonably prudent person to overlook a required act in the performance of some responsibility; failure to act because of carelessness and negligence is not excusable neglect for purposes of a motion to set aside a judgment or vacate a judgment on the basis of excusable neglect. *People v.*

Weisbard, 35 P.3d 498 (PDJ, 2000). See also *Colorado Dept. of Public Health and Environment v. Caulk*, 969 P.2d 804 (Colo.App. 1998).

The residuary clause, subsection (5) of Rule 60(b), is not a substitute for appeal. *SR Condominiums, LLC v. K.C. Const., Inc.*, 176 P.3d 866 (Colo.App. 2007). Errors that courts will consider under the residuary clause of the rule of civil procedure governing motions for relief from judgment must be very rare and very serious, because the consideration of less serious errors would undermine the important interest in the finality of judgments. *Harriman v. Cabela's Inc.*, 371 P.3d 758 (Colo.App. 2016).

As noted in the Court's September 5, 2018 Order, a plaintiff has standing if he or she "(1) incurred an injury-in-fact (2) to a legally protected interest, as contemplated by statutory or constitutional provisions." *Brotman v. East Lake Creek Ranch, L.L.P.*, 31 P.3d 886, 890 (Colo. 2001). To determine standing, a court considers "whether the plaintiff has asserted a legal basis upon which a claim for relief may be predicated." *Olson v. City of Golden*, 53 P.3d 747, 750 (Colo. App. 2002). As further noted by the Court, Rule 8(a) of the Colorado Rules of Civil Procedure requires a "short and plain statement of the claim showing that the pleader is entitled to relief." The allegations contained in a complaint must be more than merely speculative and must provide plausible grounds for relief. *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016).

ARGUMENT

Plaintiff argues that he is entitled to relief under Rule 60(b) for two primary reasons: (1) that subsequent to the Court's Order to dismiss, Plaintiff developed an alternative legal interpretation of standing, and (2) that the Court was simply incorrect with regard to its ruling.

In order to obtain relief under Rule 60(b), Plaintiff must demonstrate that his relief is allowable under one of the grounds in the rule. Here, the Plaintiff appears to hang his argument

on the element of excusable neglect. However, nowhere in his pleadings does Plaintiff describe what neglect resulted in an invalid ruling, or the reasons why the neglect was excusable. Rather, Plaintiff simply states that he “became aware of the broad grant of standing...on October 22, 2018.” This does not amount to neglect, and there is no basis to believe it was excusable. Instead, it is simply the Plaintiff’s realization that, upon additional legal research, he would have liked to have made an alternative legal argument at some earlier point in the case. His failure to act on this argument does not amount to excusable neglect. See *Weisbard*. At best, Plaintiff argues that he may have an additional legal theory that he could have presented. However, this is not the excusable neglect contemplated by the first prong of the *Craig* case. The Plaintiff has failed to “clearly establish the existence of one of the grounds of relief afforded by the Rule.” See *E.B. Jones*.

Plaintiff believes he is entitled to relief because the Court erroneously ruled that he lacked standing. However, allegations that a court has erroneously applied the law do not bring a party within subsection (5) of C.R.C.P. 60(b). Here, Plaintiff is not allowed circumvent filing an appeal by seeking Rule 60(b) relief and is not entitled to relief under the narrowly construed residuary clause of the rule. See *Harriman*.

In addition to his failure to demonstrate excusable neglect, Plaintiff’s substantive argument regarding standing is without merit. Plaintiff spends the bulk of his *Motion to Vacate* arguing that the Court incorrectly interpreted standing under the Open Meetings Law, C.R.S. 24-6-402(9). However, it is clear from the Court’s Order on July 11, 2018, and the Court’s Order on September 5, 2018, both of which Defendants incorporate herein, that the Court carefully considered standing, and ruled that Plaintiff did not possess it. Unlike many other default judgments which give rise to Rule 60 motions, here there is a legal determination as to the merits

of the complaint by the Court. The appropriate mechanism to seek relief therefore would be to file an appeal.

Standing is conveyed by neither the remote possibility of a future injury nor an injury that is overly “indirect and incidental” to the defendant's action. *Brotman v. E. Lake Creek Ranch, L.L.P.*, 31 P.3d 886, 890–91 (Colo.2001). Here, Plaintiff argues that there may be some unfavorable tax implications at some unknown point in the future. Further, County Defendants have no discretion with regard to the validity of the taxes involved, but rather simply perform the ministerial duties assigned to their offices. The injury Plaintiff claims is too remote and speculative to warrant relief, particularly with regard to County Defendants. The underlying claims that Plaintiff asserts are without merit, thus failing the second prong of the excusable neglect analysis related in *Craig*. The third and final prong is a balancing of the equities. Here, equity does not favor allowing Plaintiff to re-litigate a series of claims which have already been ruled to be without merit.

It is unclear in Plaintiffs *Unamended Complaint*, or in Plaintiff’s *Motion to Vacate* specifically what claims he believes remain. The claims against Josey and Miller seem to have to do with the collection and distribution of the taxes. However, the Court has already determined that the claims seeking to invalidate the taxes should be dismissed. As a result, the claims seeking to challenge the collection of the tax fails with the dismissal of the challenge to the tax itself. The issue as to whether to enjoin the collection or distribution of the taxes is moot.

CONCLUSION

Plaintiff fails to meet his burden of demonstrating that he is entitled to relief under one of the grounds in Rule 60(b). He has not demonstrated excusable neglect and instead simply stated that he would have liked to have presented an alternative legal argument earlier in the case. The

Court has previously ruled on the substantive validity of Plaintiff's claims, and as a result, the Motion to Vacate should be denied.

WHEREFORE, County Defendants respond to and ask the Court to deny Plaintiff's Motion to Vacate.

Dated: March 27, 2019

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing DEFENDANTS MILLER AND JOSEY'S RESPONSE TO MOTION PURSUANT TO C.R.C.P. RULE 60(b) TO VACATE ORDER GRANTING DEFENDANTS' MOTION TO DISMISS was served on the following using the Colorado Courts E-Filing System and by placing in the U.S. Mail, postage prepaid, on the 27th day of March, 2019:

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