DISTRICT COURT, LARIMER COUNTY, COLORADO 201 LaPorte Avenue Fort Collins, CO 80521	
Plaintiff: ERIC SUTHERLAND, *pro se* v. **Defendants:** THE CITY OF FORT COLLINS, *et al.*	▲ COURT USE ONLY ▲
Counsel for The Timnath Development Authority and Compass Mortgage Corporation: Eric R. Burris, admitted *pro hac vice* BROWNSTEIN HYATT FARBER SCHRECK, LLP 201 Third Street NW, Suite 1800 Albuquerque, NM 87102 Phone: 505.244.0770 Email: eburris@bhfs.com Cole J. Woodward, #50199 BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, CO 80202-4432 Phone: 303.223.1100 Email: cwoodward@bhfs.com *Co-Counsel for The Timnath Development Authority:* Robert G. Rogers, #43578 Casey K. Lekahal, #46531 WHITE BEAR ANKELE TANAKA & WALDRON 2154 E. Commons Ave., Suite 2000 Centennial, CO 80122 Phone: 303.858.1800 Emails: rrogers@wbapc.com; clekahal@wbapc.com	Case Number: 2018CV149 Division: 3C

RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO VACATE ORDER GRANTING TIMNATH DEVELOPMENT AUTHORITY AND COMPASS MORTGAGE CORPORATION'S MOTION FOR ATTORNEYS' FEES PURSUANT TO RULE 60(B)

Defendants The Timnath Development Authority ("TDA") and Compass Mortgage Corporation ("Compass"), by and through their counsel of record, White Bear Ankele Tanaka &

Waldron Attorneys at Law and Brownstein Hyatt Farber Schreck, LLP, hereby submit the following Response in Opposition to Plaintiff's Motion To Vacate Order Granting Timnath Development Authority and Compass Mortgage Corporation's Motion for Attorneys' Fees Pursuant to Rule 60(b) (the "Response").

INTRODUCTION

In his Motion to Vacate Order Granting Timnath Development Authority's and Compass Mortgage Corporation's Motion for Attorney's Fees Pursuant to Rule 60(B) (the "Motion"), Plaintiff asks the Court to revisit the issue of fees and costs in this matter for the third time.[1] The Motion presents no new, different, or evolved material facts or legal arguments that relate to the Court's prior decision on this issue. Plaintiff also makes no attempt to tie the unsupported facts and theories in the Motion to the legal standard that applies to a motion under Rule 60. It lies within the discretion of the Court to deny the Motion on that basis alone.

The Motion asserts that the TDA lacks capacity to sue, which is nonsensical, and explicitly contravened by black letter law. As Plaintiff well knows, Colorado's Urban Renewal Act (Colo. Rev. Stat. § 31-25-104 *et seq*., the "URA") provides that an urban renewal authority "shall be conclusively deemed to have been established" where it provides proof that it filed a certificate of formation with the Colorado Dept. of Local Affairs ("DOLA"). Colo. Rev. Stat. § 31-25-104 (1)(d). Plaintiff is already in possession of that certificate, and attached it to his Motion as an exhibit. Mot. at Ex. 4. Plaintiff is once again making allegations with knowledge that they lack any basis in law or fact, which was the basis for the award of attorneys' fees that is the subject of this Motion.

[1] Plaintiff also filed a Motion for Reconsideration of Grant of Attorneys' Fees and Bill of Costs on September 24, 2018.

In sum, the Motion presents neither a cognizable legal theory entitling Plaintiff to relief, nor any facts in support thereof. Consequently the Motion should be denied.

STANDARD OF LAW

Rule 60 allows Colorado Courts to revise their judgments when "significant new matter of fact or law arises which is extrinsic to [the judgment] because of not having been presented to the court." *E.B. Jones Const. Co., v. City and C'nty of Denver*, 717 P.2d 1009, 1013 (Colo. App. 1986). In order to obtain relief under Rule 60, "the moving party must clearly establish the existence of one of the grounds of relief afforded by the Rule." *Id*. Here, Plaintiff seeks relief from the Court's September 10, 2019 under Rule 60(b)(2), which allows the Court to provide relief from its earlier judgment in cases of "mistake, inadvertence, surprise, or excusable neglect." Mot. at 6; Colo. R. Civ. P. 60(b).

ARGUMENT

A. Plaintiff's Assertion that TDA is Improperly Constituted is Yet Another Improper Attempt to Enforce the URA.

Despite his various musings regarding the supposed basis for his Motion, Plaintiff is doing nothing more than again seeking to circumvent the fact that taxpayers lack standing to enforce procedural requirements of the URA against an urban renewal authority. Initially, Plaintiff's Unamended Complaint claimed that the TDA was improperly constituted under the URA because its "governing board did not include a representative appointed by the Board of County Commissioners, a school board member and another member to be appointed by the special districts levying property taxes within the URA plan area." Unam. Compl., ¶ 11. The Court dismissed that claim and found it to be substantially frivolous because Plaintiff, as a taxpayer, lacks standing to enforce the URA against an Urban Renewal Authority such as TDA.

Olson v. City of Golden. 53 P.3d 747, 752 (Colo.App. 2002). Order Granting Def.'s Joint Mot. to Dismiss at 3.

Now, Plaintiff incorrectly alleges that TDA failed to comport with the procedural requirements of the URA when the Timnath Town Council designated itself as the governing board of the TDA, and did not change the membership of the governing board in response to 2015 amendments to the URA. Mot. at 10. This claim is premised on the same erroneous theory of law asserted in the *Unameded Complaint*, i.e. that the 2015 amendments to the URA apply retroactively to urban renewal authorities created on or before January 1, 2016 (like TDA). The text of the statute makes clear that there is no such retroactive effect. Colo. Rev. Stat. § 31-25-107(9.7)(b).

The limitations on standing established under *Olson* apply equally to all of the URA's procedural requirements. As with Plaintiff's claims made in the Unamended Complaint, this new claim is substantially frivolous regardless of the veracity of its underlying facts and legal theories because Plaintiff lacks standing to enforce the procedural requirements of the URA under *Olson*.

B. Plaintiff Cannot Make the Required Showing of Mistake, Inadvertence, Surprise, or Excusable Neglect in Support of the Motion Because He Has Been in Possession of All Facts Alleged in the Motion Since the Inception of This Litigation.

In the Motion to Vacate, Plaintiff rehashes the same flawed interpretation of Colorado's law of standing that has been considered and rejected by this Court at least four times. The Motion includes no material facts that could alter the Court's analysis on the issue of fees and costs. Instead, Plaintiff takes this opportunity to heap more abuse on TDA, Compass and this Court. Setting that aside, Plaintiff makes no attempt to connect his flawed discussion of the law of standing with the grounds for relief established by Rule 60. The Motion does not specify which ground for relief provided in Rule 60(b)(2) Plaintiff is trying to invoke, or present facts or

evidence that could satisfy any of those possible bases. These failures are fatal to Plaintiff's Motion.

In an apparent effort to meet his burden under Rule 60, Plaintiff alleges that TDA lacks capacity to sue or be sued. Mot. at 5. While Plaintiff alleges he did not discover this supposed lack of capacity until November of 2018 because TDA engaged in an elaborate subterfuge when it filed and subsequently withdrew counterclaims for abuse of process, he provides no supporting evidence for those allegations.[2] *Id.* at 5-6. Even if Plaintiff's accusations regarding this alleged subterfuge were true, which they are not, they would not establish that the Order is a product of mistake, inadvertence, surprise, or excusable neglect.

Specifically, the Motion does not state how TDA's alleged counterclaim subterfuge could have prevented Plaintiff from discovering prior to November of 2018 that the TDA was improperly constituted. Indeed, it shows quite the opposite – that this information has been available to Plaintiff for nearly eleven months. In this regard, the Motion alleges that TDA has been improperly constituted since August 2015. Mot. at 13. The meeting minutes that Plaintiff relies upon to indicate that the TDA is not constituted in accordance with his incorrect interpretation of the URA are dated May 8, 2018. Those minutes are a public record, and are available via the Town of Timnath's website.[3] Despite this, Plaintiff has made no allegations to show why he could not have known these facts before now. As such, given the level of interest this issue has obviously garnered with Plaintiff, one is left with the distinct impression that

[2] These same claims were ultimately adjudicated in *Town of Timnath et al v. Sutherland*, 2018CV30567, where TDA and the Town of Timnath obtained money damages as well as injunctive relief barring Mr. Sutherland from future *pro se* litigation in the 8th Judicial District.
[3] Agendas and Meetings Page, Town of Timnath, https://timnath.org/government/agendas-and-minutes/ (last visited April 1, 2019).

Plaintiff has been in possession of all facts that underlie his erroneous theory that the TDA lacks capacity to sue or be sued since at least May 8, 2018, just twelve days after he filed his Unamended Complaint. Considering Plaintiff cannot make the required showing of mistake, inadvertence, surprise, or excusable neglect in order to obtain relief under Rule 60(b), his Motion should be denied.

C. Plaintiff's Assertion That His Unamended Complaint Stated a Claim Under Colorado's Open Meeting Law is Both False and Immaterial.

The Motion to Vacate also features a novel but ineffective attempt to convert Plaintiff's claim that TDA failed to comport with the Colorado's Urban Renewal Act (Colo. Rev. Stat. § 31-25-101 *et seq.*) into a claim under Colorado's Open Meeting Law (Colo. Rev. Stat § 24-6-401). Mot. at 8-9. Even if this was procedurally possible at this stage in this action, which it is not, it would violate the Permanent Injunction that issued against Plaintiff in *Town of Timnath et al v. Eric Sutherland*, 2018CV30567 on March 28, 2019. That Order bars Plaintiff from entering any new claims in the 8th Judicial District without representation by an attorney or prior leave of the Court. Ex. A, Perm. Inj., ¶ 1. In that regard, it is not sufficient that Plaintiff simply file a motion asking for leave to amend his claims. Rather, recognizing the harm that Plaintiff has inflicted with his serial, frivolous *pro se* litigation, the Permanent Injunction sets forth specific procedures that Plaintiff must follow before he can initiate any *pro se* claims in any court in Larimer County. *Id.*, ¶ 1-2. Plaintiff has been subject to and aware of these requirements since December 13, 2018, when the trial court in 2018CV30567 entered a Temporary Restraining Order that is substantively identical to the March 28 Permanent Injunction. Ex. B, T.R.O. Plaintiff has not even attempted to meet these requirements.

Furthermore, the Unamended Complaint contains no reference to Colorado's Open Meeting Law of any kind. Plaintiff's untimely and baseless attempt to amend his claims eight months after they were dismissed warrants no consideration from the Court. It similarly has no bearing on the Court's analysis of Plaintiff's Motion under Rule 60.

CONCLUSION

Based on the foregoing, Defendants Timnath Development Authority and Compass Mortgage Corporation request that this Court deny Plaintiff's Motion.

DATED this 1st day of April, 2019.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

Original signature on file at offices of Brownstein Hyatt Farber Schreck pursuant to C.R.C.P. 121 § 1-26

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Attorneys for The Timnath Development Authority and Compass Mortgage Corporation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of April, 2019, a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO VACATE ORDER GRANTING TIMNATH DEVELOPMENT AUTHORITY AND COMPASS MORTGAGE CORPORATION'S MOTION FOR ATTORNEYS' FEES PURSUANT TO RULE 60(B)** was filed with the Court and served via Colorado Courts E-filing System on all counsel of record and *pro se Plaintiff* as follows*:*

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