District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-3500	DATE FILED: April 2, 2019 CASE NUMBER: 2018CV149
Plaintiff: Eric Sutherland v. **Defendants:** The City of Fort Collins, et al.	**▲ COURT USE ONLY ▲** Case Number: 2018CV149 Courtroom: 5B

ORDER GRANTING FORT COLLINS'S MOTION FOR ATTORNEYS' FEES AND BILL OF COSTS

The Court has reviewed The City of Fort Collins's Motion for Attorneys' Fees and Bill of Costs, dated September 26, 2018. The Court held a hearing on this motion on March 15, 2019. Having reviewed the motion, response, reply, exhibits, and applicable law, the court finds and orders as follows.

On April 26, 2018, Eric Sutherland filed a Complaint for Declaratory Judgment and Equitable Relief. Plaintiff sought a declaratory judgment from the Court finding that bonds issued by the Fort Collins Electric Utility Enterprise Board ("EUEB") were invalid.

On September 5, 2018, this Court dismissed all of Plaintiff's claims against the City of Fort Collins, Steve Miller, and Irene Josey. The City of Fort Collins now seeks an award of attorneys' fees and costs pursuant to C.R.S. § 13-17-102.

I. Legal Standards

In a civil action, a court may award attorney fees if the opposing party "brought or defended an action, or any part thereof, that lacked substantial justification." C.R.S. § 13-17-102(4). An action "lacked substantial justification" if it was "substantially frivolous, substantially groundless, or substantially vexatious." *Id.* Attorney fees may only be awarded against an unrepresented party when "the party clearly knew or reasonably should have known that his action or defense, or any part thereof, was

substantially frivolous, substantially groundless, or substantially vexatious." C.R.S. § 13-17-102(6).

"A claim is substantially frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense." *City of Aurora ex rel. Util. Enter. v. Colorado State Eng'r*, 105 P.3d 595, 620 (Colo. 2005), *as modified on denial of reh'g* (Feb. 14, 2005).

If a party "requests a hearing concerning the award of fees and costs… then the district court must hold a hearing." *In re Marriage of Aldrich*, 945 P.2d 1370, 1379–80 (Colo. 1997). If, however, a party objects to the amount of fees requested but does not request a hearing, the court is not required to hold a hearing. *Id.*

When determining whether to award attorney fees and, if so, what amount to award, the court examines a list of factors:

> (a) The extent of any effort made to determine the validity of any action or claim before said action or claim was asserted;
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> (b) The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid within an action;
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> (c) The availability of facts to assist a party in determining the validity of a claim or defense;
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> (d) The relative financial positions of the parties involved;
>
> (e) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith;
>
> (f) Whether or not issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict;
>
> (g) The extent to which the party prevailed with respect to the amount of and number of claims in controversy;
>
> (h) The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court.

C.R.S. § 13-17-103(1).

II. Application of Law

1. Mr. Sutherland's Action was Substantially Frivolous

Mr. Sutherland's action was substantially frivolous for two principal reasons: (A) Mr. Sutherland filed numerous "claims for relief" that were clearly not recognizable legal claims; and (B) Mr. Sutherland brought this action knowing that he has not suffered an injury and may never suffer an injury as a result of Defendants' alleged actions.

A. Claims for Relief

Mr. Sutherland's claims four through eleven and fourteen through nineteen are not recognizable claims for relief and, in some cases, not even complete sentences. For example, the fourth claims states in full, "Poudre Valley Fire Protection District agreement." His fifth claim states in full, "Timnath Ranch agreement." His sixth claims states in full, "Timnath Farms Metropolitan districts agreement."

Mr. Sutherland "reasonably should have known" that claims four through eleven and fourteen through nineteen were substantially frivolous. *See* Pl.'s Resp. to Fort Collins Mot. To Dismiss at 2 (Mr. Sutherland acknowledges that "Claims numbered Fourteen through Nineteen… were not sufficiently expressed and should be dismissed"). It was substantially frivolous for Mr. Sutherland to file claims that clearly do not allege any recognizable claim for relief and, in some instances, contain nothing more than the name of an agreement.

B. Injury-in-fact

Mr. Sutherland did not suffer any injury-in-fact, as required by Colorado standing law, before he commenced this action. "To satisfy the injury-in-fact prong of the *Wimberly* standing test (as set forth in *Brotman*), the injury must be direct and palpable." *Olson*, 53 P.3d at 750, *citing Cloverleaf Kennel Club, Inc. v. Colorado Racing Commission*, 620 P.2d 1051 (Colo. 1980). Here, Mr. Sutherland's claimed injury centers on his beliefs that (1) Poudre School District will raise taxes in the future due to lost revenue and (2) Fort Collins will raise electric rates in the future due to lost revenue. Mr. Sutherland acknowledges that neither of these injuries are certain to occur and that it cannot be known for some time whether they will come to pass. *See, e.g.*, Response to Fort Collins Mot. To Dismiss at 5. An injury that "cannot be determined until a remote time in the future is not sufficiently direct and palpable to support a finding of injury-in-fact." *Olson*, 53 P.3d at 750. Mr. Sutherland reasonably should have known that it

was substantially frivolous to file this action knowing that he had not suffered an injury, as required by Colorado standing law.

C. Mr. Sutherland's Arguments are not Persuasive

In his response, and at the hearing, Mr. Sutherland argued that his action was a legitimate challenge to Fort Collins's issuance of bonds. Mr. Sutherland argued that the bonds issued by the EUEB were not issued by the Fort Collins City Council. Mr. Sutherland argued that this violated Fort Collins's own city charter. Mr. Sutherland further argued that, in order to challenge the bonds, he was required to file a lawsuit within 30 days. Mr. Sutherland argued that he had no way of knowing whether he would suffer an injury within that 30-day limit, but that the law should be construed to allow his suit to go forward despite the uncertainty of his injury. Mr. Sutherland argued that, at the very least, his suit presented a novel legal theory and that it would be improper to find that his action was substantially frivolous.

The Plaintiff's arguments are not persuasive. The Court finds that Mr. Sutherland is well-aware of the standing limits imposed by Colorado law. In fact, Mr. Sutherland cited one principle standing case, *Olson v. City of Golden*, in his complaint. Compl. at ¶33. In fact, he testified at the hearing that he knew he may lack standing.

Therefore, Plaintiff was well-aware at the time he filed this lawsuit that he would have standing only if he had suffered an injury-in-fact. Additionally, Plaintiff testified that he has filed nine civil actions against the City of Fort Collins and other governmental entities in northern Colorado. He admitted that he had not prevailed in any of those lawsuits. He has had at least one lawsuit dismissed for lack of standing.[1] This again shows that Plaintiff knew or should have known that he lacked standing to bring the current suit.

Plaintiff's argument that he asserted a novel theory of law is also not persuasive. A generous reading of Plaintiff's complaint shows that, out of the nineteen claims asserted, only two are sufficiently pled. Plaintiff's claims one and twelve arguably set forth a claim for relief with the requisite specificity. Claim one is not applicable to the City of Fort Collins. Claim twelve sets forth Plaintiff's claim that the bonds issued by the EUEB were not properly issued according to the Fort Collins City Charter. There is no properly pled claim setting forth Plaintiff's novel legal theory regarding standing. Plaintiff has repeatedly characterized his claim as one for declaratory judgment. *See,*

[1] 2016CV235 Eric Sutherland v. Thompson School District R2-J.

e.g., Pl.'s Resp. to Fort Collins's Mot. to Dismiss at 4. However, Plaintiff never sought declaratory judgment to reconcile the nonclaim statute with Colorado standing law.

Therefore, Court finds Plaintiff's arguments unpersuasive. The Court finds that Plaintiff knew or reasonably should have known that his lawsuit was substantially frivolous.

2. C.R.S. § 13-17-103(1) Factors

The court further finds as follows:

A. Efforts made to determine the validity of the claims before asserting them

Plaintiff claims that he made an effort to determine the validity of his claims prior to filing his complaint. At the hearing, Plaintiff primarily argued that he had presented a novel theory of law in his complaint and argued that his claim should have been heard despite the uncertainty of whether Plaintiff would ever suffer an injury. Plaintiff argued that the nonclaim statute required him to file a suit challenging the City's action within 30 days. Plaintiff argued that it was impossible to know whether he would suffer an injury within the 30-day timeline, but that he was required to file suit to avoid the nonclaim statute. This explanation seems to go to Plaintiff's twelfth claim for relief.

The Court finds that Plaintiff did not explain this rational in his complaint or properly seek declaratory relief regarding his rights under the nonclaim statute. Additionally, Plaintiff did not offer an explanation at the hearing of any efforts to determine the validity of any of his other claims for relief.

B. Efforts made to reduce the number of claims or dismiss those found not to be valid

Mr. Sutherland brought many claims that are clearly not legally recognizable claims for relief. Mr. Sutherland did not move to dismiss any of these claims before they were dismissed by the Court on a motion from the opposing party. Therefore, Mr. Sutherland made no reasonable effort to reduce the number of his claims or dismiss those that lacked merit.

C. Availability of facts to assist a party in determining the validity of a claim

All of the facts necessary to determine the validity of Mr. Sutherland's claims were available to him prior to the filing of this action. Mr. Sutherland has made no

allegation that he was unable to obtain the necessary facts prior to commencing this action.

D. Relative financial positions of the parties

No information regarding this factor was provided by either party.

E. Bad faith

Plaintiff argues that he brought this lawsuit against Fort Collins because (1) he believes the bonds issued by the City are invalid and (2) he believes the City's broadband project will fail, resulting in a rise in electricity rates. Plaintiff argues that he had valid concerns prompting him to sue on these two bases.

Fort Collins argues that Plaintiff brought this lawsuit in bad faith. Fort Collins argued that Plaintiff had his opportunity to object to the bonds at the EUEB meeting and took advantage of that opportunity. Fort Collins argued that Plaintiff knew or should have known that he did not have standing to bring this lawsuit and brought suit only to delay the issuance of the bonds and disrupt the City's broadband project. Fort Collins argued that Plaintiff has brought similar lawsuits in the past and the fact that Plaintiff has not prevailed in any of these prior suits. Finally, Fort Collins pointed out that Plaintiff has recently been barred from bringing suits pro se in the Eighth Judicial District.

The Court finds that Plaintiff brought this action in bad faith. Plaintiff opposed Fort Collins's construction of a broadband internet network. Plaintiff opposed this network at the EUEB meeting when the bonds were issued and he voiced his opposition to the construction again at the March 15, 2019 hearing. The Court finds that Plaintiff's suit against Fort Collins was brought for the purpose of delaying and/or harassing the City in its attempt to construct the voter-approved broadband network.

In reaching this conclusion, the Court relies in part on the fact that Plaintiff has filed past lawsuits against governmental entities in similar circumstances. These include lawsuits challenging mill levy overrides where additionally money would go to the construction of new schools and Plaintiff's claims against the Timnath Development Authority and Compass Mortgage Corporation in this case challenging the creation of debt by the Timnath Development Authority. Plaintiff has shown a pattern of challenging measures by the City of Fort Collins and surrounding areas that would or could raise taxes or utility rates. Plaintiff has not succeeded on any of his claims. A different judge in the Eighth Judicial District recently found that "Mr. Sutherland's

frivolous and vexatious litigation activity constitutes a serious abuse of civil process". That Court entered a permanent injunction barring Plaintiff from filing suits pro se in the Eighth Judicial District in case number 2018CV30567.

The Court considers all of these factors in reaching its conclusion that Plaintiff brought this suit in bad faith.

F. Issues of fact in conflict

There are no issues of fact in conflict in this matter. Mr. Sutherland sought a ruling that certain bonds are invalid because the proper procedures were not followed. Mr. Sutherland does not have standing to bring these claims and there is no factual dispute as to Mr. Sutherland's standing.

G. Extent the party prevailed with respect to the claims

In this Court's order dated September 5, 2018, all of Mr. Sutherland's claims were dismissed as they related to the City of Fort Collins. Thus, Fort Collins prevailed entirely with respect to the claims against it in this action.

H. Amount and conditions of an offer of judgment or settlement

No party in this case offered judgment or settlement.

3. Award

At the hearing, Fort Collins requested $54,662.59 in attorney fees and $2,295.77 in costs. Plaintiff did not challenge the reasonableness of the rates charged by the attorneys for Fort Collins, but Plaintiff did challenge the amount of time necessary to defend against Plaintiff's lawsuit. Plaintiff additionally challenged the necessity of extensive legal research.

The Court finds that the amount of time expended by the attorneys for the City was reasonable. Plaintiff's complaint purported to assert nineteen claims for relief touching on issues of municipal law, election law, and the issuance of bonds. The Complaint raised complex legal issues, even if Plaintiff didn't ultimately have standing to pursue any of his claims for relief. Defendant's counsel testified that he had to read, confer and sometimes respond to over eighty emails sent by the Plaintiff. Attorneys for Fort Collins had an ethical duty to represent their clients and inform themselves of the nature of the case and updates regarding other parties. Both researching the issues involved and maintaining awareness of the case status involved a substantial amount of

time. The Court finds that the amount of time spent by the attorneys in their representation of Fort Collins in this matter was reasonable.

The Court does not find that the rates charged by the attorneys are reasonable. While the rates charged by the attorneys may be reasonable in Denver, this case was brought in Larimer County. The Court therefore reduces the rates for Fort Collins's attorneys so that they are on par with the rates charged in this legal community. The Court awards fees based on the following rates: Mill - $325; Milgrom - $235. Applying those hourly rates, the Court awards Fort Collins $37,947.50 in attorney fees.

The Court finds the costs requested by Fort Collins to be reasonable. Therefore, the Court awards Fort Collins $2,295.77 in costs.

Order

The Court enters judgment in favor of the City of Fort Collins and against Eric Sutherland in the amount of $37,947.50 in attorney fees and $2,295.77 in costs for a total of $40,243.27. Interest shall accrue at the statutory rate of 8% per annum.

Dated: April 2, 2019.

BY THE COURT:

Gregory M. Lammons
District Court Judge