District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-3500	DATE FILED: April 19, 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 DENYING MOTION TO VACATE ORDER GRANTING MOTION TO DISMISS

Plaintiff filed a Motion to Vacate Order Granting Motions to Dismiss on March 6, 2019. Having considered the motion, responses, reply, exhibits, and applicable law, the Court finds and orders as follows.

I. Legal Standards

A Court may relieve a party from an order for "(1) [m]istake, inadvertence, surprise or excusable neglect; … or (5) any other reason justifying relief from the operation of judgment". C.R.C.P. 60(b).

The party bringing the Rule 60(b) motion "bears the burden of establishing by clear and convincing evidence that the motion should be granted." *Sebastian v. Douglas Cty., Colorado*, 370 P.3d 175, 177–78 (Colo. App. 2013), *aff'd sub nom. Sebastian v. Douglas Cty.*, 366 P.3d 601 (Colo. 2016).

When considering a Rule 60(b) motion asserting mistake, inadvertence, surprise, or excusable neglect,

> the district court must consider (1) whether the neglect that resulted in entry of judgment 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 equitable considerations such as protection of action taken in

> reliance on the order and prevention of prejudice by reason of evidence lost or impaired by the passage of time.

Taylor v. HCA-HealthONE LLC, 417 P.3d 943, 949 (Colo. App. 2018) (citing *Craig v. Rider*, 651 P.2d 397, 402 (Colo. 1982)). These three factors constitute a balancing test for a court to consider in ruling on a Rule 60(b) motion. *Id.*

"A party's conduct constitutes excusable neglect when the 'surrounding circumstances would cause a reasonably careful person similarly to neglect a duty,' or, put another way, when 'unforeseen circumstances' would cause a 'reasonably prudent person to overlook a required act in the performance of some responsibility'". *Id.* at 952 (citations omitted).

"A movant must support an assertion of a meritorious claim by averments of fact, not simply legal conclusions." *Id.* at 953 (citation omitted).

> In determining whether Rule 60(b) relief would be consistent with equitable considerations, a district court should take into account the promptness of the moving party in filing the Rule 60(b) motion; the fact of any detrimental reliance by the opposing party on the order or judgment of dismissal; and any prejudice to the opposing party if the motion were to be granted, including any impairment of that party's ability to adduce proof at trial in defense of the claim.

Id. (citations omitted).

II. Application of Law

Plaintiff asks the Court to grant him relief from the Court's order dismissing Plaintiff's claims against the City of Fort Collins, Steve Miller,[1] and Irene Josey. Plaintiff argues for relief under the theory of "mistake, inadvertence, surprise, or excusable neglect". Mot. at 3–4. Plaintiff describes his "mistake, inadvertence, surprise, or excusable neglect" by stating that "I first became aware of the broad grant of standing of C.R.S. §24-6-402(9) at some shortly [sic] after filing the *Notice of Appeal* in this case on October 22, 2018". *Id.* at 4. Plaintiff goes on to state: "After researching the law, it became apparent that the grant of standing of the OML was applicable to this case and should operate to guaranty standing. That conclusion was reached sometime in mid November". *Id.*

[1] Plaintiff sued Steve Miller in his capacity as Larimer County Assessor. As of January 8, 2019, Bob Overbeck replaced Steve Miller as the Larimer County Assessor.

Plaintiff then argues that, under C.R.S. § 24-6-402(9) he has standing to pursue his claims against the City of Fort Collins, the Larimer County Assessor, and the Larimer County Treasurer.

The City of Fort Collins argues that Plaintiff has failed to make a sufficient showing under Rule 60(b). The City argues that Plaintiff has not shown that his neglect was excusable, Plaintiff does not have a meritorious claim, and that equity favors denying Plaintiff's motion. The County defendants make similar arguments in their response.

The Court finds that Plaintiff has not made the requisite showing under Rule 60(b). Plaintiff has not demonstrated by clear and convincing evidence that his neglect was excusable, he has a meritorious claim, or that the equities weigh in his favor.

A. Excusable Neglect

Plaintiff has not articulated any way in which his neglect in this case was excusable. In his motion, Plaintiff states that he first became aware of his new theory of standing after his claims had been dismissed and after filed his appeal of this dismissal. Plaintiff has not explained why this neglect is excusable.

To be excusable, Plaintiff would have to show that "the 'surrounding circumstances would cause a reasonably careful person similarly to neglect a duty,' or, put another way, when 'unforeseen circumstances' would cause a 'reasonably prudent person to overlook a required act in the performance of some responsibility'". *Taylor*, 417 P.3d at 952. Plaintiff has not described any "unforeseen circumstances" that delayed his discovery of C.R.S. § 24-6-402. Similarly, Plaintiff has not made any argument that the surrounding circumstances "surrounding circumstances would cause a reasonably careful person similarly to neglect a duty".

In the absence of any explanation of unforeseen or surrounding circumstances, the Court finds that Plaintiff has not shown by clear and convincing evidence that his neglect was excusable. Therefore, the Court finds that this factor weighs against granting Plaintiff's motion.

B. Meritorious Claim

Plaintiff similarly has not demonstrated by clear and convincing evidence that his underlying claim is meritorious.

1. Claim against TDA, Compass, and the County Defendants

Plaintiff argues that C.R.S. § 24-6-402(9) gives him standing to bring the claims originally brought against the Defendants. Plaintiff's original claim against Timnath Development Authority (TDA), Compass Mortgage Corporation, and the County Defendants alleged that the TDA is not a properly constituted Urban Renewal Authority, and, therefore, could not lawfully create debt. *See* Compl. at ¶¶11–20. Plaintiff now argues in his current motion that, "no requirement of [the open meeting law] could have been met" because TDA "did not act as a formally constituted body of a political sub-division". Mot. at 5–6.

First, the Court finds that it appears that Plaintiff is attempting to assert a new claim for relief against the County Defendants, rather than assert a newfound legal theory that would support his claim to standing on his initial claim for relief. Plaintiff's original complaint does not allege that TDA violated any provision of the open meeting law. Plaintiff's claim in his current motion that the TDA violated the law is a new claim for relief that wasn't previously presented to this court. Rule 60(b) does not afford parties an opportunity to raise entirely new claims for relief after their original claims have been dismissed.

Second, even if the Court considers Plaintiff's new theory of standing to be an appropriate attempt to show that he had legal standing to bring his initial claims for relief, Plaintiff still hasn't shown by clear and convincing evidence that his claim is meritorious. Plaintiff argues that TDA didn't comply with the open meeting laws because it "did not act as a formally constituted body of a political sub-division when purporting to authorize a loan of $20 million", and therefore, could not have met the requirements of the open meeting law. Mot. at 5–6 (footnote omitted).

First, the Court notes that the open meeting law applies more broadly than simply to "formally constituted bod[ies]". The open meeting law defines a "[l]ocal public body" as "any board, commission, authority, or other advisory, policy-making, rule-making, *or* formally constituted body of any political subdivision…". C.R.S. § 24-6-402(1)(a)(I) (emphasis added).

Second, Plaintiff has not articulated any way in which TDA violated the open meeting law. Plaintiff has not alleged that the meeting was not properly noticed, that the meeting was closed to the public, that minutes were not taken, or that any other provision of C.R.S. § 24-6-402 was violated. Thus, Plaintiff has failed to articulate any way in which he was "denied or threatened with denial" of any of his rights under the open meeting law.

Therefore, the Court finds that Plaintiff has not shown by clear and convincing evidence that his claim against TDA, Compass Mortgage Corporation, and the County Defendants is meritorious. The Court finds that this factor weighs against granting Plaintiff's motion.

2. Claim against the City of Fort Collins

Similarly, Plaintiff's motion appears to be articulating a new claim for relief against the City of Fort Collins, rather than presenting a novel theory of standing to support Plaintiff's original claims for relief. Plaintiff's original claim for relief against Fort Collins alleged that the Fort Collins Electric Utility Enterprise Board (EUEB) authorized the sale of revenue bonds when the EUEB had no authority to do so and such authorization violated the Fort Collins City Charter. Compl. ¶¶35–39.

From the beginning, Plaintiff has argued that the Fort Collins Electric Utility Enterprise Board (EUEB) improperly authorized the issuance and sale of revenue bonds *See* Compl. ¶¶35–39. Plaintiff has asserted this argument primarily on the basis that Fort Collins's City Charter and City Code require revenue bonds to be issued by the City Council. *Id.* Plaintiff has then argued that the bonds in question were issued by the EUEB acting alone and not by the City Council. *See Id*. Plaintiff argues that the bonds were issued without authority and should not be given any legal effect.

The Court has previously found that Plaintiff does not have standing to bring his claim that the EUEB's issuance of the revenue bonds violated the Fort Collins City Charter and/or City Code. *See* Order Granting Defendants' Motions to Dismiss as to Defendants City of Fort Collins, Steve Miller and Irene Josey.

Now, Plaintiff asserts that his rights under the open meeting law were denied and he has standing to ask the Court to declare the results of the meeting null and void. Plaintiff now appears to argue that, by definition, the EUEB "is only formally constituted when it acts 'by and through' the City Council". Mot. at 8. Plaintiff argues that the EUEB meeting in question was not a properly noticed meeting of the City Council, and, therefore, violated the requirements of the open meeting law. *Id.* at 7–8.

This argument is a new legal argument that was not presented in Plaintiff's complaint. Plaintiff cannot add this new claim for relief through the Rule 60(b) process.

Additionally, Plaintiff has not shown by clear and convincing evidence that he has standing to pursue this claim. Plaintiff asserts his new claim for relief under C.R.S. § 24-6-402. To have standing under that statute, Plaintiff would have to show that he was "denied or threatened with denial of any of the rights that are conferred on the public by this part 4". C.R.S. § 24-6-402(9)(a). It is undisputed that Plaintiff attended the EUEB meeting in question and was permitted to speak at the meeting. Therefore, Plaintiff clearly had notice that the meeting was taking place and the meeting was clearly open to the public. Plaintiff has not shown by clear and convincing evidence that his rights under C.R.S. § 24-6-402 were denied or threatened with denial in a manner that would grant Plaintiff standing. Plaintiff's claim is not meritorious when he does not have standing to pursue his claim.

Therefore, the Court finds that this factor weighs against granting Plaintiff's motion.

C. Equities

Finally, Plaintiff has not demonstrated by clear and convincing evidence that the equities weigh in his favor.

> In determining whether Rule 60(b) relief would be consistent with equitable considerations, a district court should take into account the promptness of the moving party in filing the Rule 60(b) motion; the fact of any detrimental reliance by the opposing party on the order or judgment of dismissal; and any prejudice to the opposing party if the motion were to be granted, including any impairment of that party's ability to adduce proof at trial in defense of the claim.

Taylor, 417 P.3d at 953 (citations omitted).

1. Promptness of Filing the Motion

The Court issued its Order dismissing the City of Fort Collins and the County Defendants on September 5, 2018. Plaintiff filed a Notice of Appeal with the Court on October 23, 2018. On October 29, 2018, the Court issued a Status Order informing the Parties that the Court did not have jurisdiction while the case was being appealed. On March 6, 2019, Plaintiff filed the present motion and informed the Court that the appeal was being dismissed without prejudice.

The Court finds that, given the circumstances of this case, Plaintiff's Rule 60(b) motion was promptly filed.

2. Detrimental Reliance

The relationship of the County Defendants to this case has always been tenuous. In his Complaint, Plaintiff argued that the Court should enjoin the County Defendants from collecting money pursuant to the debt authorized by TDA. Plaintiff has not alleged that any action of the County Defendants was illegal. Given the tenuous connection, it is unclear whether the County Defendants have detrimentally relied on the Court's order granting dismissal.

The City of Fort Collins has detrimentally relied on the Court's order of dismissal. The City has moved forward with the issuance of its revenue bonds and the construction of a city-owned broadband network. If the Court grants Plaintiff's Rule 60(b) motion, it could conceivably place the validity of the bonds at issue. This could result in delays and problems for the City in its continued construction efforts. This could additionally place the City in legal jeopardy with regard to the contracts it has entered into to construct the broadband network. The Court finds that the city of Fort Collins has detrimentally relied on the Court's order dismissing Plaintiff's claims against the City.

3. Prejudice

The Court finds that the City and the County Defendants would be prejudiced if the Court granted Plaintiff's motion. This is particularly true given the Court's conclusion that Plaintiff has failed to demonstrate that his underlying claims are meritorious. The Court finds it likely that, if Plaintiff's motion is granted, the City and the County Defendants will be forced to again defend against Plaintiff's tenuous claims that there was impropriety in the creation of debt by TDA and the issuance of bonds by the EUEB. Incurring the cost and time associated defending against these claims, which in all likelihood would fail on the merits, would be prejudicial towards Defendants.

Therefore, the Court finds that this factor weighs against granting Plaintiff's motion.

The Court finds that all relevant factors under Rule 60(b) weigh against granting Plaintiff's motion. Therefore, the Court denies Plaintiff's motion to vacate the order granting the motions to dismiss of the City of Fort Collins and the County Defendants.

Order

Plaintiff's motion is denied.

Dated: April 19, 2019.

BY THE COURT:

Gregory M. Lammons
District Court Judge