

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 ▲ COURT USE ONLY ▲
Plaintiff: Eric Sutherland v. Defendants: The City of Fort Collins, et. al.	
Case Number: 2018CV149 Courtroom: 5B	
ORDER DENYING MOTION TO VACATE ORDER GRANTING ATTORNEY FEES	

Plaintiff filed a Motion Vacate Order Granting Attorney Fees on March 11, 2019. Having considered the motion, response, 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 granting Timnath Development Authority (TDA) and Compass Mortgage Corporation (Compass) attorney fees. Plaintiff argues for relief under the theory of “mistake, inadvertence, surprise, or excusable neglect”. Mot. at 5–6. Plaintiff describes his “mistake, inadvertence, surprise, or excusable neglect” by stating that “I first became fully aware of TDA’s complete absence of capacity to come into court in November of 2018”. *Id.* at 5. Plaintiff argues that TDA engaged in “subterfuge” when it filed counterclaims in this action and filed a separate action against Plaintiff. *Id.* at 5–6. Plaintiff further argues that

it was in response to the presentation of a claim for legal relief clouded, as it was, by the unquestionable subterfuge of the TDA that I commenced a review of the law concerning the capacity of the TDA to sue or be sued and concluded

sometime in mid November, 2018 that the TDA lacked capacity to engage in litigation and, as relevant here, to request and be awarded attorneys fees.

Id. at 6.

TDA and Compass argue that Plaintiff's motion is really an attempt to relitigate his original position that the TDA is unlawfully constituted. TDA and Compass further argue that Plaintiff has been in possession of all relevant facts at all times during the litigation and, for that reason, cannot show that his neglect was excusable.

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 does not clearly articulate why he believes that his neglect is excusable. Plaintiff argues that TDA engaged in "subterfuge" which caused Plaintiff to begin to consider the issue of whether TDA had capacity to sue. Plaintiff does not explain what the "subterfuge" was that caused him to consider this legal theory to begin with. Further, Plaintiff does not identify any new facts that he discovered that led him to conclude that TDA did not have capacity to sue or be sued. Plaintiff's position from the beginning of this lawsuit was that the TDA was improperly constituted and failed to reform its board in accordance with the Urban Renewal statute. Compl. at ¶¶18-20. Plaintiff now argues that, the fact that TDA is not lawfully constituted means that it does not have the capacity to sue or be sued. This is simply a slightly modified legal theory based entirely on facts known to Plaintiff at the time he filed this lawsuit. Plaintiff has not shown that any neglect in failing to recognize this legal theory at the time the lawsuit was filed is excusable.

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

B. Meritorious Claim

Plaintiff has not shown by clear and convincing evidence that his underlying claim is meritorious. Plaintiff argues that TDA does not have capacity to sue and be sued. *See* Mot. at 2-3. Plaintiff further argues that this lack of capacity means that TDA could not legally request an award of attorney fees in this matter. *Id.* Plaintiff's theory

is entirely based on his belief that TDA is not properly constituted under the Urban Renewal statute. *See id.* at 9-14.

The Court finds this legal theory to be very similar to the legal theory originally brought by Plaintiff against TDA and Compass. Plaintiff's original claim for relief against TDA and Compass alleged that the TDA was not properly constituted under the Urban Renewal statute. Compl. at ¶¶18-20. The Court dismissed that claim because Plaintiff lacked standing. *See Order Granting Defendants Timnath Development Authority and Compass Mortgage Corporation's Joint Motion to Dismiss.* The Court further denied Plaintiff's motion for reconsideration regarding this order. *See Order Denying Motion for Reconsideration.*

In his present motion, Plaintiff reiterates his arguments for standing presented in his previous filings with the Court. *Mot* at 4-5. The Court has twice ruled against Plaintiff on these arguments as noted above. Plaintiff does not present any new theory of standing in his current motion that would allow him to pursue his current claim for relief.

The Court's prior order stand. Plaintiff does not have standing to contest TDA's compliance with the Urban Renewal statute. As Plaintiff does not have standing to contest TDA's compliance with the Urban Renewal statute, his claim that TDA does not have capacity to sue or be sued is without merit.

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 Granting Timnath Development Authority's and Compass Mortgage Corporation's Motion for Attorneys' Fees and Bill of Costs on September 10, 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 11, 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

No information was presented to the Court that TDA or Compass Mortgage Corporation has detrimentally relied on the Court's order granting attorney fees.

3. Prejudice

The Court finds that TDA and Compass 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, TDA and Compass will be required to litigate the issue of attorney fees for a second time. Incurring the cost and time associated with litigating the motion for a second time against an unmeritorious claim would be prejudicial to TDA and Compass.

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