

DISTRICT COURT, LARIMER COUNTY,
COLORADO

Court Address: 201 La Porte Avenue
Fort Collins, CO 80521
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CASE NUMBER: 2018CV149

Plaintiff: ERIC SUTHERLAND, *pro se*

v.

Defendants: 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.

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Case No.: 2018CV149

Courtroom/Division: 3C

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**CITY OF FORT COLLINS' RESPONSE TO PLAINTIFF'S MOTION TO
DISCONTINUE HEARING OF DECEMBER 13, 2019**

The Defendant City of Fort Collins (the “City”), by and through its counsel, respectfully submits the following response to Plaintiff’s Motion Made Under Duress to Discontinue Hearing of December 13, 2019 (“Motion to Discontinue”) and states as follows:

BACKGROUND

Almost four months ago, Mr. Sutherland requested a hearing on the City’s Second Motion for Attorneys’ Fees (“Fee Motion”). His requested hearing is scheduled for Friday, December 13, 2019 at 1:30 p.m. Now, less than 48 hours before the hearing, Mr. Sutherland seeks to “discontinue” the requested hearing. But rather than withdrawing his Motion for a Hearing, Mr. Sutherland filed his Motion to Discontinue and argues that he must “forgo” his right to a hearing because he is under economic duress.

First, Mr. Sutherland’s representation that he cannot satisfy the judgments against him does not constitute legal duress. Second, the City seeks an Order on its Fee Motion and it remains willing to participate in Mr. Sutherland’s requested hearing. Mr. Sutherland’s allegations of duress are groundless and this Court should move forward and decide the City’s Fee Motion.

I. Mr. Sutherland is not under legal duress.

Duress is an “improper threat that leave no reasonable alternative.” *Vail/Arrowhead, Inc. v. Dist. Court*, 954 P.2d 608, 612 (Colo. 1998). There is no improper threat against Mr. Sutherland that could constitute duress. This Court’s Order finding his complaint to be frivolous and awarding the City its fees and costs is not an improper threat. An award of attorneys’ fees may be difficult for an individual, but the purpose of the fee statute is to discourage improper litigation conduct: “The award of attorney fees is an important sanction available to a court in a

civil case to punish an attorney or a party who engages in conduct improperly instigating or prolonging litigation.” *Aldrich*, 945 P.2d at 1378.¹

Likewise, the City’s request to recover its fees and costs expended in responding to Mr. Sutherland’s excessive and frivolous post-dismissal conduct is not an improper threat. Mr. Sutherland’s post-dismissal conduct constitutes frivolous and groundless behavior that unnecessarily expanded the scope of the litigation. This position is supported by the evidence supplied in the City’s Fee Motion as well as Colorado law. *See, e.g., Smith v. Greeley Stampede & Greeley*, 2015 Colo. Dist. LEXIS 833, *1 (“Plaintiff’s stubborn and repetitious filing of multiple motions for reconsideration supports a finding of bad-faith and of substantially vexatious and frivolous conduct.”); *Spring Creek Ranchers Ass’n v. McNichols*, 165 P.3d 244, 246 (Colo. 2007) (awarding fees where plaintiff’s “stubborn litigiousness” during trial unnecessarily “lengthened the water court proceeding”).

Mr. Sutherland disagrees and takes the position that he is being unfairly attacked for exercising his rights. Mr. Sutherland’s position does not evidence duress or any other kind of improper conduct by the City. In *Flexisystems v. Am. Standards Testing Bureau*, the Court of Appeals rejected a position similar to Mr. Sutherland’s. There, the plaintiff sought fees for the defendants’ frivolous appeal. 847 P.2d 207, 210 (Colo. App. 1992). In response, the defendants argued that “their appeal was not frivolous or groundless because they were appealing a final order as a matter of right.” *Id.* The Court of Appeals rejected the defendants’ argument and

¹ Although Mr. Sutherland’s financial position can be considered when determining whether to award fees under C.R.S. § 13-17-102, Mr. Sutherland’s representations are (1) unsubstantiated and (2) outweighed by the other factors discussed in the City’s Fee Motion. *See* Fee Motion at pp. 9-13.

awarded fees. *Id.* Likewise, although Mr. Sutherland has a “right” to file a meritorious claim, that right does not allow him to pursue frivolous claims and does not immunize him from a fee award if he engaged in sanctionable conduct. It is not improper for the City to request fees for his post-dismissal conduct.²

II. The City requests the Court to move forward and decide its Fee Motion.

The City seeks resolution of its Fee Motion. Although a party can request a hearing as a matter of right, that right can be waived. *See In re Marriage of Aldrich*, 945 P.2d 1370, 1380 (Colo. 1997). Mr. Sutherland is now waiving his right to a hearing. *See Mot. to Discontinue* at p. 6 (stating that he is “elect[ing] to forgo his right to a hearing on the City’s second motion for attorneys’ fees”). At this juncture, the Court can proceed in one of two ways:

- (1) Find that Mr. Sutherland had voluntarily waived his right to a hearing (notwithstanding his assertions of “duress” and that his waiver is “not voluntary”), vacate the hearing scheduled for December 13, 2019 at 1:30 p.m., and decide the City’s Second Motion for Attorneys’ Fees based on the Motion, affidavit, attached fee invoices, and other papers in the record.
- (2) Enter an order that the Court will hold the hearing on December 13, 2019 at 1:30 p.m. and, regardless of whether Mr. Sutherland attends, the City will present its

² On pages 6-8 of his Motion Mr. Sutherland discusses his intent to file another Rule 60 motion in an attempt to reopen his dismissed complaint and then footnotes a list of factors “weighing in favor of the relief requested.” Mr. Sutherland’s future plans to repeatedly litigate his dismissed complaint have no bearing on whether the hearing on the City’s Fee Motion should go forward. Further, his list of “factors” are not evidence and should not be considered in connection with the hearing or the City’s Fee Motion. Mr. Sutherland’s listed factors are mere allegations regarding the City’s broadband initiative that are (1) unsubstantiated by citation, evidence, or affidavit; (2) an issue on which he has no personal knowledge; and (3) therefore that are wholly inadmissible. The Court should disregard these arguments.

evidence and arguments in support of its Second Motion for Attorneys' Fees and the Court can then decide the Motion.

CONCLUSION

Ultimately, the City requests that the Court rule on its Second Motion for Attorneys' Fees. The City will comply with the Court's scheduling of the hearing for December 13, 2019 at 1:30 p.m. unless the Court enters an order vacating the hearing.

DATED: December 12, 2019

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CERTIFICATE OF SERVICE

I certify that on the 12th day of December, 2019, a true and correct copy of the foregoing **CITY OF FORT COLLINS' RESPONSE TO PLAINTIFF'S MOTION TO DISCONTINUE HEARING OF DECEMBER 13, 2019** was filed via Colorado Court's E-Filing system, and was served on the following:

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/s/ Rebecca Janzen
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