District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-3500	DATE FILED: January 14, 2020 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 SECOND MOTION FOR ATTORNEYS' FEES & COSTS

On July 25, 2019, the City of Fort Collins (the "City") filed its Second Motion for Attorneys' Fees & Costs. The Plaintiff responded on August 15, 2019, and subsequently requested a hearing. The City replied on August 21, 2019. A hearing on the Motion was held on December 13, 2019. Having considered the Motion, Response, Reply, evidence and argument presented during the hearing, and applicable law, the Court finds and orders as follows:

On April 26, 2018, the Plaintiff filed a Complaint for Declaratory Judgment and Equitable Relief. He 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, the Court dismissed all of the Plaintiff's claims against the City of Fort Collins, Steve Miller, and Irene Josey.

On September 26, 2018, the City filed its first motion seeking an award of attorneys' fees and costs for the fees and costs it incurred through January 12, 2019. A hearing was held on that motion on March 15, 2019. On April 2, 2019, the Court granted the motion and judgment was entered against the Plaintiff. Now, the City seeks an award of attorneys' fees and costs incurred since January 12, 2019.

I. Legal Standards

In a civil action, a court may award a party attorneys' fees if the opposing party "brought or defended an action, or any part thereof, that lacked substantial justification

or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct[.]" C.R.S. § 13-17-102(4). An action "lacked substantial justification" if it was "substantially frivolous, substantially groundless, or substantially vexatious." *Id.* Attorneys' 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).

"A claim is substantially groundless if the allegations in the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence at trial." *In re Estate of Shimizu*, 411 P.3d 211, 216 (Colo. App. 2016).

"A claim is vexatious if it is brought or maintained in bad faith. Bad faith may include conduct that is arbitrary, abusive, stubbornly litigious, or disrespectful of the truth." *In re Marriage of Roddy and Betherum*, 338 P.3d 1070, 1077 (Colo. App. 2014) (internal citations omitted).

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, 1380 (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 attorneys' fees and, if so, what amount to award, a court considers the following factors:

> (a) The extent of any effort made to determine the validity of any action or claim before said action or claim was asserted;
>
> (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;
>
> (c) The availability of facts to assist a party in determining the validity of a claim or defense;

(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

The City is seeking fees and costs associated with what it describes as the Plaintiff's "substantially frivolous post-dismissal conduct." Motion at 4. In particular, the City wants to be reimbursed for the fees and costs it incurred to: (1) participate in the first hearing on fees and costs, (2) respond to the Plaintiff's post-dismissal motions, and (3) respond to emails from the Plaintiff that lacked a legitimate purpose. The Court addresses each category of fees and costs in turn.

A. The First Hearing

In the City's view, although the Plaintiff had a right to request a hearing on its first motion for fees and costs, the Plaintiff's conduct both before and during the hearing unnecessarily expanded the scope of the proceeding and caused the City to incur unnecessary fees and costs. The Court agrees, in part.

1. Fees and Costs Incurred to Respond to Subpoenas

The City contends that prior to the March 15, 2019 hearing, the Plaintiff filed multiple subpoenas compelling City personnel to attend the hearing and/or produce documents at the hearing, and that, as demonstrated by the City's Ex. I, he knew that the subpoenas lacked a legitimate legal basis. The City contends that it should be awarded the fees and costs it incurred to review and move to quash the subpoenas.

Ex. I is an email from the Plaintiff to defense counsel wherein he wrote: "As I mentioned before …. there is no point to quashing the subpoenas. The materials that

were listed for production do not exist. That is the whole point." As the Court noted in its March 15, 2019 Order Granting Motion to Quash, the Plaintiff failed to comply with the service and timeliness provisions of C.R.C.P. 45 and quashed the subpoenas on those grounds. Although the Plaintiff represents himself in this case, he is no stranger to the procedural requirements that accompany a lawsuit.[1] That the Plaintiff admitted to abusing subpoena power to demand the production of documents that he knew did not exist only further evinces his intention to harass the City in bad faith.

Accordingly, the Court finds that the Plaintiff knew or reasonably should have known that filing the subpoenas was substantially vexatious behavior. Based on the Court's review of the City's Ex. A, it appears the City directly incurred $2,950 in fees and $54.39 in costs to review and respond to the subpoenas.

2. Other Hearing-Related Fees and Costs

In addition to the fees and costs it incurred to deal with the Plaintiff's pre-hearing subpoenas, the City requests an award of the fees and costs it incurred for the hearing itself as it claims that "[a]t the hearing, Mr. Sutherland's frivolous conduct continued. Rather than demonstrating a rational basis for an injury, Mr. Sutherland continued to stubbornly litigate his 'novel theory' of standing." Motion at 4.

Certainly, the Plaintiff's improper lawsuit was a "but-for" cause of the first hearing on fees and costs, but that does not mean that the City is therefore entitled to recover 100 percent of its hearing-related fees and costs. If that were the case, this action would, in theory, never reach its conclusion, as the City could request the fees and costs it incurred for the prior hearing on fees and costs, the Plaintiff could request a hearing on the appropriateness of those fees and costs, a hearing would be held, and the pattern would repeat itself *ad infinitum*.

Further, the Court can only enter an award of fees and costs against a *pro se* party such as the Plaintiff if it determines that that party's complained-of conduct ran afoul of C.R.S. § 13-17-102(6). In this case there is a fine line to be drawn between the Plaintiff stubbornly "re-litigating" his novel theory of law and the Plaintiff defending his alleged good-faith basis for litigating the theory in the first place. Upon the Court's review of

[1] Indeed, as noted previously, the Plaintiff has shown a pattern of filing meritless lawsuits in the Eighth Judicial District—so much so that a different judge found, in 2018CV30567, that "Mr. Sutherland's frivolous and vexatious litigation activity constitutes a serious abuse of civil process" and consequently enjoined him from filing any more cases in this district without an attorney.

the transcript from the first hearing on fees and costs and the procedural history more generally, it is clear the Plaintiff found himself on both sides of that line.

Though the Plaintiff's testimony included statements such as "the primary intent of this testimony will be to provide the Court with a statement of my knowledge of and understanding of the law [at the time I filed my lawsuit]" and "this presents my understanding of my legal rights at the time that I filed, and that I did not know – didn't think there was any reason to know that my case was substantially frivolous," it also includes (1) argument about what procedure the City should have followed when adopting the underlying ordinance, (2) his unprompted opinion that "I looked back over the entire history of this project, and I think it's gonna be a spectacular failure," and (3) a statement that "the city council of the City of Fort Collins does not really care a lot about what its citizens think, and certainly the staff considers even less."

The transcript further shows the Plaintiff attempting to admit irrelevant exhibits and hearsay that went neither to his rationale for bringing suit nor the reasonableness of the City's requested fees and costs. This, on top of the fact that the Plaintiff attempted to compel City officials to attend the hearing to testify and produce documents for purposes that would have gone far beyond the scope of the hearing, shows that the Plaintiff engaged in substantially vexatious behavior prior to and during the hearing.

Given the Plaintiff's testimony during the March 15, 2019 hearing in conjunction with, on the one hand, his right to the hearing, and on the other, his willful expansion of the scope of the proceeding beyond its proper purpose, the Court determines that 50 percent of the fees and costs the City incurred to participate in the hearing are attributable to the Plaintiff's unreasonable expansion of the proceeding.[2] Additionally, the Court finds that the Plaintiff reasonably should have known his behavior was substantially vexatious. Based on Ex. A, it appears the City directly incurred $24,477.50 in hearing-related fees and $98.01 in hearing-related costs that are not attributable to the subpoenas. Less half of each, the City incurred $12,287.76 in fees and costs.

B. Post-Dismissal Motions

The City also contends that after the case was dismissed for lack of standing, the Plaintiff filed four motions within which he relitigated his novel theory of law and unnecessarily expanded the scope of the proceeding, and filed another motion that

[2] The Court appreciates that such a back-of-the-envelope calculation is necessarily imprecise. Nevertheless, it is equitable.

unnecessarily expanded the scope of the proceeding because it was substantively identical to a motion filed on appeal.

1. March 6, 2019 Motion to Vacate Order

On March 6, 2019, the Plaintiff filed his Motion to Vacate Order Granting Defendnt's [sic] Motions to Dismiss as to City of Fort Collins, Steve Miller and Irene Josey Pursuant to Rule 60(b). The City responded to the motion on March 27, 2019, and the Court issued an order denying the motion on April 19, 2019. In its order, the Court determined that the Plaintiff's motion articulated a new claim of relief against the City that was both inappropriately raised through C.R.C.P. 60(b) and lacking in merit. Based on Ex. A, it appears that the City directly incurred $4,274.58 in fees to review and respond to the motion.

2. April 16, 2019 Motion for Amendment of Judgment & May 6, 2019 Motion to Withdraw

On April 16, 2019, the Plaintiff filed his Motion for Amendment of Judgment Granting City of Fort Collins' Motion for Attorneys' Fees and Bill of Costs Pursuant to C.R.C.P. Rule 59. In an email to the City dated May 1, 2019, however, the Plaintiff admitted that he was "in error" with the motion. City's Ex. S. So, on May 6, 2019, the Plaintiff moved to withdraw the motion. In his motion to withdraw, the Plaintiff included argument despite the withdrawal being unopposed. The City responded to the motion to withdraw on May 7, 2019, and the Court issued an order granting the motion on May 10, 2019. In its order, the Court noted that the motion to withdraw was unopposed and declined to entertain the substantive arguments Plaintiff made in the motion. Based on Ex. A, it appears the City directly incurred $833.75 in fees to review and respond to the motion.

3. April 22, 2019 Motion to Stay Enforcement

On April 22, 2019, the Plaintiff filed his Motion to Stay Enforcement of Judgments Pursuant to C.R.C.P. Rule 62. The City responded to the motion on May 13, 2019, and the Court issued an order denying the motion on May 23, 2019. In its order, the Court determined that the Plaintiff had failed to post the required supersedeas bond and that it lacked jurisdiction over the related *coram non judice* motion (see below). Based on Ex. A, it appears the City directly incurred $3,260 in fees to review and respond to the motion.

4. May 2, 2019 Motion to Deem this Proceeding coram non judice

On May 2, 2019, the Plaintiff filed his Motion to Deem this Proceeding *coram non judice* Since June 23, 2018 Pursuant to Rule 60(b)(5). The City responded on May 23, 2019, and the Court determined that it lacked jurisdiction to decide the motion. Based on Ex. A, it appears the City directly incurred $3,175.75 in fees to review and respond to the motion.

The Court finds that each of the Plaintiff's five post-dismissal motions described above unnecessarily expanded the scope of the proceedings in this case and demonstrated the Plaintiff's stubborn litigiousness, and the Plaintiff knew or reasonably should have known that the continued defense of his action in this Court—as opposed to limiting such efforts to the appellate courts—was substantially groundless and vexatious. Altogether, the Court calculates that the City directly incurred $11,544.08 in fees and $1,180.73 in costs to analyze and respond to the above motions.

C. Emails

The City further asserts that it should be awarded attorneys' fees for its email correspondence with the Plaintiff. The Court agrees, in part. The Court has reviewed the emails that were admitted during the December 13, 2019 hearing, the City's Ex. Q, R, S, and T. Exhibits R, S, and T relate to the above-described motions. Where the Court can identify fees incurred by the City to read and respond to those emails in Ex. A, the fees are included in Section B. above and are not double-counted here.

With respect to Ex. Q, an email the Plaintiff sent to "City Leaders" on March 19, 2019, it does not call for a response from the City's outside counsel. Certainly, however, the City's outside counsel had an obligation to read the email as they were cc'd and the email related to this case. The Court calculates that the City incurred in $136.25 in compensable fees to read the email, and awards the same.

D. C.R.S. § 13-17-103(1) Factors

With respect to the statutory factors, the Court incorporates its findings from the April 2, 2019 Order as if fully set forth herein, and adds the following:

First, the City prevailed on its first motion for fees and costs. Second, if anything, the Plaintiff has expanded the number of issues in this case instead of making efforts to

reduce them.[3] Finally, it appears the City has made multiple settlement offers to the Plaintiff wherein it offered to refrain from collecting its first award of fees and costs if the Plaintiff would stop litigating this case, but the Plaintiff has refused to settle.

E. Reasonableness of Fees and Costs

After reviewing Ex. A, the Court finds that the amount of time expended by the attorneys for the City was reasonable. The City's attorneys have an ethical duty to represent their client. During the period in question, the Plaintiff interjected new and unusual legal issues into this case that required significant time and attention to respond to. However, as before, the Court does not find that that rates charged by the City's attorneys are reasonable.

During the December 13, 2019 hearing, counsel for the City testified that, as reflected in Ex. A, he both exercised billing discretion in this case and applied a 10 percent discount to his firm's normal rate. 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 each of the City's attorneys by 20 percent so that they are more equivalent to the rates charged in this legal community. The costs are entirely reasonable. Overall, the City is entitled to an award of and costs pursuant to C.R.S. § 13-17-102 as follows:

Description	**Fees**	**Costs**
Subpoenas	$2,950.00	$54.39
Hearing	$12,238.75	$49.01
Motions	$11,544.08	$1,180.73
Emails	$136.25	N/A
Subtotal	**$26,869.08**	**$1,284.13**
(20 Percent Discount)	($5,373.82)	N/A
Final Amount	**$21,495.26**	**$1,284.13**

[3] For example, shortly before the first hearing on fees and costs, the Plaintiff attempted, for the first time, to claim he has standing under Colorado's Open Meetings Law, C.R.S. § 24-6-402.

III. Order

The Court enters judgment in favor of the City of Fort Collins and against Eric Sutherland in the amount of $21,495.26 in attorneys' fees and $1,284.13 in costs for a total of $22,779.39. Interest shall accrue at the statutory rate of 8% per annum.

Dated: January 14, 2020.

BY THE COURT:

Gregory M. Lammons
District Court Judge