

<p>DISTRICT COURT, LARIMER COUNTY, COLORADO Court Address: 201 La Porte Avenue Fort Collins, CO 80521 Phone Number: (970) 494-3500</p>	<p>DATE FILED: March 3, 2020 3:13 PM FILING ID: 8861BFEBBF5B8 CASE NUMBER: 2018CV149</p>
<p>Plaintiff: ERIC SUTHERLAND, <i>pro se</i> 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.</p>	<p>▲ COURT USE ONLY ▲</p>
<p><i>Attorneys for Defendant City of Fort Collins:</i> John W. Mill (#22348) Sherman & Howard L.L.C. 633 17th Street, Suite 3000 Denver, CO 80202 (303) 297-2900 jmill@shermanhoward.com Carrie M. Daggett, #23316 John R. Duval, #10185 Fort Collins City Attorney's Office 300 LaPorte Avenue Fort Collins, CO 80522-0580 970-221-6520 cddaggett@fcgov.com, jduval@fcgov.com</p>	<p>Case No.: 2018CV149 Courtroom/Division: 3C</p>
<p>CITY OF FORT COLLINS' RESPONSE TO PLAINTIFF'S AMENDED MOTION FOR RECONSIDERATION OF ORDER GRANTING FORT COLLINS' SECOND MOTION FOR ATTORNEYS' FEES AND COSTS</p>	

The City of Fort Collins, by and through its counsel, for its response to Plaintiff's Amended Motion for Reconsideration of Order Granting Fort Collins' Second Motion for Attorneys' Fees & Costs ("Plaintiff's Motion for Reconsideration"), states as follows:

I. INTRODUCTION

The Court has twice awarded attorneys' fees and costs to the City of Fort Collins. See Order Granting Fort Collins's Motion for Attorneys' Fees and Bill of Costs (Apr. 2, 2019) ("the First Order Awarding Fees"); Order Granting Fort Collins's Second Motion for Attorneys' Fees & Costs (Jan. 14, 2020) ("the Second Order Awarding Fees"). In both orders, the Court properly applied C.R.S. § 13-17-102 in determining that Mr. Sutherland's claims against the City and his conduct in this case justified an award of fees against him, and the Court reasonably and fairly exercised its discretion under C.R.S. § 13-17-103 in determining the amount of fees awarded. Plaintiff's Motion for Reconsideration should be denied for multiple reasons including:

- Plaintiff's Motion for Reconsideration fails to comply with C.R.C.P. 121, § 1-15(11).
- Plaintiff's Motion for Reconsideration consists, in part, of arguments that are totally irrelevant to the two fee awards to the City.
- The First Order Awarding Fees is proper.
- The Second Order Awarding Fees is proper.
- Mr. Sutherland is not "immunized" against an award of attorneys' fees by C.R.S. § 13-17-102(6).

For all of these reasons (and more), the Court should deny Plaintiff's Motion for Reconsideration.

II. THE COURT PROPERLY AWARDED FEES TO THE CITY

The Court properly, fairly, and consistent with the law, awarded attorneys' fees to the City and against Mr. Sutherland. His claims were frivolous because he knew he had not suffered any injury in fact. His conduct before, during and after the March 15, 2019 hearing on the City's first request for attorneys' fees was, at least in part, stubbornly litigious and vexatious. In sum, Mr. Sutherland's actions clearly justified the Court's two fee awards against him, and the fact that he is pro se does not "immunize" him from a fee award.

A. Plaintiff's Motion for Reconsideration Fails to Comply with C.R.C.P. 121, § 1-15(11)

Mr. Sutherland clearly disagrees with the two orders awarding fees against him. That, however, is not proper grounds for reconsideration. Mr. Sutherland previously opposed both of the City's fee requests. He requested, and was granted, a hearing on both fee requests. The Court ruled against him. That decided those issues. Now Mr. Sutherland is re-arguing those decided issues. This is improper.

Motions to reconsider court orders are "disfavored." See C.R.C.P. 121, § 1-15(11). Mr. Sutherland "must show more than a disagreement with the court's decision." Id. He was required to allege "a manifest error of fact or law that clearly mandates a different result or other circumstance resulting in manifest injustice." Id. He fails to do so. The Court can, and should, deny Plaintiff's Motion for Reconsideration on this ground alone.

Moreover, Plaintiff's Motion for Reconsideration is, in part, untimely. Motions for reconsideration must be filed within 14 days from the date of the order. See id. Plaintiff's Motion for Reconsideration, in part, seeks reconsideration of the First Order Awarding Fees. See Plaintiff's Motion for Reconsideration at 4-9 (§ III addressing the April 2, 2019 Order).

Plaintiff's Motion for Reconsideration, however, was filed over nine months after the First Order Awarding Fees. That is untimely under Rule 121, § 1-15(11). Mr. Sutherland has failed to provide good cause for not seeking reconsideration of the First Order Awarding Fees within fourteen days of that Order.¹ This untimeliness is sufficient grounds to deny the Motion in part and decline to reconsider the First Order Awarding Fees.

B. Plaintiff's Motion for Reconsideration Includes Totally Irrelevant Arguments

Mr. Sutherland's Motion for Reconsideration spends over two pages discussing (i) the dismissal of the appeal in Case No. 2019 CA 800, and (ii) his claim against the Timnath Development Authority. See Plaintiff's Motion for Reconsideration at 2-4. These issues are totally irrelevant to the fee awards to the City of Fort Collins.

C. The First Award of Fees Is Proper

The Court should reject Mr. Sutherland's Motion to Reconsider the First Order Awarding Fees as untimely. The Court incorporated its findings on the C.R.S. § 13-17-103(1) factors from the First Order Awarding Fees into the Second Order Awarding Fees. See Second Order Awarding Fees at 7. Mr. Sutherland asserts this gives him license now--over nine months later--to move for reconsideration of the First Order Awarding Fees. Not so. Nine months is more than fourteen days. Incorporating by reference the § 13-17-103(1) findings from the first order

¹ Mr. Sutherland did file a 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 (Apr. 16, 2019) within 14 days of the First Order Awarding Fees. That motion made many of the same arguments as pages 4-10 of the current Plaintiff's Motion for Reconsideration. However, Mr. Sutherland withdrew the Rule 59 Motion. See Plaintiff's Motion to Withdraw Plaintiff's Rule 59 Motion (May 6, 2019). This proves he could have timely moved for reconsideration as to the first order but did not.

into the second order does not invite or allow an untimely challenge to the First Order Awarding Fees; it would only allow a challenge to the Second Order Awarding Fees on the ground that the § 13-17-103(1) factors identified in the first order were not applicable to the second order. Thus, Mr. Sutherland's incorporation-by-reference theory is unfounded, and there is no basis for him to challenge at this late date the First Order Awarding Fees.

Even if the first order could be challenged at this time, the First Order Awarding Fees was entirely proper. The Court dismissed all of Mr. Sutherland's claims against the City. See Order Granting Defendants' Motions to Dismiss As to Defendants City of Fort Collins, Steve Miller and Irene Josey (Sept. 5, 2018). The City then moved for attorneys' fees pursuant to C.R.S. § 13-17-102. See The City of Fort Collins' Combined Motion for Attorneys' Fees and Bill of Costs (Sept. 26, 2018). Mr. Sutherland filed a response. See Plaintiff's Response to City of Fort Collins' Motion for Attorneys' Fees and Bill of Costs (Oct. 17, 2018). The Court, at Mr. Sutherland's request, held a hearing on the fee request on March 15, 2019. Mr. Sutherland testified at the hearing. The Court considered the pleadings, the City's motion, Mr. Sutherland's response, the testimony and other evidence presented by the parties at the hearing, and applicable law, and issued an eight-page order awarding the City \$40,243.27 in attorneys' fees and costs. In that order, the Court held that Mr. Sutherland's action against the City was substantially frivolous. See First Order Awarding Fees at 3. The Court concluded that "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." Id. at 3-4. The Court considered Mr. Sutherland's arguments but concluded they were not persuasive. Id. at 4-5. The Court complied with the law, gave Mr. Sutherland a fair hearing, and ruled against him.

Nothing in Plaintiff's Motion for Reconsideration presents grounds to reconsider or change the First Order Awarding Fees.

D. The Second Award of Attorneys' Fees Is Proper

On July 25, 2019, the City filed its second motion for attorneys' fees and costs. See City of Fort Collins' Second Motion to Attorneys' Fees & Costs (July 25, 2019). Mr. Sutherland filed a response. See Plaintiff's Response to City of Fort Collins' Second Motion for Attorneys' Fees and Costs (Aug. 15, 2019). The Court held a hearing on the Second Motion on December 13, 2019. Mr. Sutherland testified at this hearing.

The City requested attorneys' fees for (i) preparing for and participating in the hearing on March 15, 2019, (ii) responding to multiple post-dismissal motions filed by Mr. Sutherland, and (iii) responding to emails from Mr. Sutherland. Based on the procedural history of this case and the transcript of the March 15, 2019 hearing, the second motion and response, and the evidence at the December 13, 2019 hearing, the Court concluded that "Plaintiff engaged in substantially vexatious behavior prior to and during the [March 15, 2019] hearing." Second Order Awarding Attorneys' Fees at 5. This finding of fact is supported by the record. See id. The Court concluded that 50% of the fees incurred by the City to participate in the March 15 hearing "are attributable to the Plaintiff's expansion of the proceeding." Second Order Awarding Fees at 5. This percentage is reasonable and well within the Court's discretion to determine the amount of the award. As the Court acknowledged, this calculation is imprecise but equitable. Id.

In addition, the Court found that Plaintiff's five post-dismissal motions "unnecessarily expanded the scope of the proceedings in this case and demonstrated the Plaintiff's stubborn litigiousness." Id. at 7. The Court's conclusions are supported by the evidence and consistent

with the law. For the reasons stated in the Second Order Awarding Fees, the Court's decision to award fees to the City and against Mr. Sutherland is consistent with C.R.S. §13-17-102 and -103. Plaintiff's Motion for Reconsideration does not identify any valid reason to reconsider or change the Court's conclusion to award of \$22,779.39 in attorneys' fees and costs to the City in the Second Order Awarding Fees.²

III. CONCLUSION

Mr. Sutherland's frivolous claims, and vexatious conduct in this case, satisfied the requirements for the Court to award attorneys' fees to the City and against Mr. Sutherland. The law clearly authorized the Court to impose attorneys' fees against Mr. Sutherland. He knew or reasonably should have known that his claims and conduct were substantially frivolous, groundless and/or vexatious. The awards of fees were proper. Plaintiff's Motion for Reconsideration should be denied.

² The amount and conditions of any offer of settlement as related to the amount and conditions of the ultimate relief granted by the court is one factor in determining whether to assess fees and the amount. See C.R.S. § 13-17-103(h). The Court stated "it appears the City has made multiple settlement offers to the Plaintiff where it offered to refrain from collecting its first award of fees and costs if the Plaintiff would stop litigating the case, but the Plaintiff has refused to settle." This statement is correct. Settlement discussions have continued into early March 2020. To date, no settlement has been reached. Mr. Sutherland attached multiple emails between him and the City regarding settlement. See Exhibits 1-2 to Plaintiff's Motion for Reconsideration. These are Rule 408 settlement communications and not admissible for certain purposes. They are admissible to show that the City has, since at least July 2019, offered to settle with Mr. Sutherland but he has found multiple reasons not to settle.

DATED: March 3, 2020

SHERMAN & HOWARD L.L.C.

By: /s/ John W. Mill

John W. Mill (#22348)

633 17th Street, Suite 3000

Denver, CO 80202

Telephone: (303) 297-2900

Email: jmill@shermanhoward.com

FORT COLLINS CITY ATTORNEY'S OFFICE

By: /s/ John R. Duval

John R. Duval, #10185

Carrie M. Daggett, #23316

300 LaPorte Avenue

Fort Collins, CO 80522-0580

Telephone: 970-221-6520

Email: jduval@fcgov.com

ATTORNEYS FOR DEFENDANT
CITY OF FORT COLLINS

CERTIFICATE OF SERVICE

I hereby certify on the 3rd day of March, 2020, that a true and correct copy of the foregoing **CITY OF FORT COLLINS' RESPONSE TO PLAINTIFF'S AMENDED MOTION FOR RECONSIDERATION OF ORDER GRANTING FORT COLLINS' SECOND MOTION FOR ATTORNEYS' FEES AND COSTS** was served via Colorado E-filing system, upon the following:

Chloe Mickel, Esq.
Jesse D. Sutz, Esq.
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202

Eric R. Burris, Esq.
Brownstein Hyatt Farber Schreck, LLP
201 Third Street NW, Suite 1800
Albuquerque, NM 87102

And was served by email and U.S. Mail on:

Mr. Eric Sutherland
3520 Golden Currant Boulevard
Fort Collins, CO 80521
(By email and U.S. Mail)

/s/ Rebecca Janzen

Rebecca Janzen, Legal Assistant