

DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Larimer County Justice Center 201 Laporte Avenue, Suite 100 Fort Collins, CO 80521-2762 Telephone: (970) 494-3500	Court Use Only
Plaintiff: THE CITY OF FORT COLLINS, COLORADO, a municipal corporation, v. Defendants: BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, COLORADO; STREETMEDIAGROUP, LLC	
Attorneys for Defendant Board of County Commissioners Frank N. Haug, Reg. No. 41427 Jeannine Haag, Reg. No Larimer County Attorney's Office Post Office Box 1606 Fort Collins, Colorado 80522 Telephone (970) 498-7450 fhaug@larimer.org jeanninehaag@larimer.org	Case No. 2020 CV 30580 Courtroom: 4B
REPLY TO STREETMEDIA'S RESPONSE TO DEFENDANT BOARD OF COUNTY COMMISSIONERS' MOTION TO DISMISS CROSSCLAIM	

Defendants Board of County Commissioners of Larimer County (“BCC”), by and through the Larimer County Attorney’s Office, reply to Defendant StreetMedia’s Response to the BCC’s motion that this Court to Dismiss the Crossclaim filed by StreetMediaGroup, LLC (“StreetMedia”) pursuant to Colorado Rules of Civil Procedure (“C.R.C.P.”) 12(b)(1) an 12(b)(5):

I. STANDARD OF REVIEW

“In Colorado, cross-claims are permissive, not compulsory.” *Continental Divide Insurance Co. v. Western Skies Management, Inc.*, 107 P.3d 1145, 1147 (Colo.App. 2004), citing *See* C.R.C.P. 13(g) (“A pleading *may* state as a cross claim ...”) (emphasis added); *T.L. Smith Co. v. Dist. Court*, 163 Colo. 444, 448, 431 P.2d 454, 457 (1967) (C.R.C.P.13(g) is clearly permissive, not compulsory); *see also* 6 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 1431, at 236 (1990) (under identical federal rule, a cross-claim “always is permissive”).

II. ARGUMENT

The primary argument in StreetMedia’s Response is that their constitutional claims against the County are inextricably tied to the City’s 106(a)(4) claims. StreetMedia argues that the crossclaims cannot be dismissed without a dismissal of the 106(a)(4) claim. However, StreetMedia’s crossclaims should not function as a lever to force the dismissal of the whole case or the invalidation of the entire sign code. They must be assessed on their own merit. The crossclaims, as previously stated, do not contain any non-conclusory or non-speculative allegations that the County has done anything to violate StreetMedia’s constitutional rights.

StreetMedia circuitously argues that the County has violated StreetMedia’s constitutional rights because the County was sued by the City for approving StreetMedia’s sign. The County has no control over the City’s decision to file its 106(a)(4) case. The County approved StreetMedia’s permit and the sign has already been built. The City’s complaint does not raise constitutional claims, nor must the Court address them to resolve the issue. Instead, the City’s argument is simply that the BCC made a decision which was not supported by the record, was a misapplication of the

LUC, or was inconsistent with staff recommendations or with the IGA between the County and Fort Collins. None of the issues require the Court to determine whether the County violated StreetMedia's constitutional rights.

StreetMedia cites to *CLPF-Parkridge One, L.P. v. Harwell Investments, Inc.*, 105 P.3d 658, 660 (Colo. 2005), for the proposition that a crossclaim is appropriately maintained in this case. However, that case does not stand for the proposition that a court must allow a crossclaim to proceed in all instances or for the concept that a court cannot dismiss a crossclaim if it is without merit. Instead, that case dealt primarily with statutory analysis and a particular statutory bar to claims in construction defect cases, and not crossclaims in general. As a result, this case is inapposite not helpful in resolving the County's Motion to Dismiss.

StreetMedia insists that evidence and testimony must be taken regarding whether its constitutional rights were violated. However, the entirety of the record is available to the Court. This includes the planning staff determinations, the transcript and determination of the BCC, as well as the correspondence and positions of the various parties, which are well documented in writing. It is unclear what additional evidence or testimony would uncover, or what clarity it could provide. Instead, the Court has the information necessary to make a determination on the City's 106(a)(4) claim, and further discovery and investigation are an unnecessary use of judicial and legal resources.

StreetMedia has added in new allegations in the form of both statements in its Response, as well as an affidavit written by Gary Young. While the County does not necessarily dispute the statements or documents accuracy at this stage of the proceeding, the fact remains that StreetMedia must allege sufficient, non-conclusory grounds for its claims in its Complaint, not in its Response and addendums thereto.

The new information provided by StreetMedia that it has applied for additional signage in the County is non-dispositive to the matter at hand. First, because StreetMedia has only raised these issues through its Response and through an affidavit provided as an attachment to its response, and nowhere in its Complaint. Second, because StreetMedia has not alleged that the signs have been granted or denied in violation of its rights. Again, StreetMedia is attempting to bring in external and speculative claims as a mechanism to resolve the 106(a)(4) claim in its favor. If, hypothetically, StreetMedia's new signs were denied, and StreetMedia felt they were denied on unconstitutional grounds, it would be able to resolve that issue in a separate case against the County. This is even acknowledged on page 7 of the Response by StreetMedia. This would prevent the mixing of separate issues and contentions into this matter, which is a review of a particular decision of a local board. Crossclaims are permissive and no prejudice would result to StreetMedia by bringing a separate case.

As StreetMedia makes clear, their sign has been up and operating for some time. The County permitted the sign, and there are no allegations that sustain StreetMedia's claims against the County. As the Court noted in its Order Denying StreetMedia's Motion to Dismiss, to the extent that StreetMedia believes that Fort Collins' arguments in the 106(a)(4) case violate StreetMedia's constitutional rights, it may raise those arguments as part of the 106(a)(4) action. *See Nuttall v. Leffingwell*, 563 P.2d 356, 358 (Colo. 1977). There is no need for a separate constitutional crossclaim against the County. Especially where StreetMedia agrees the County provided it with the permits and permissions it requested.

Streetmedia seeks a complete invalidation of the LUC sign code. However, as previously argued "if a law can be constitutionally applied under any set of circumstances, a challenge to its

facial validity must fail.” *People v. Perez-Hernandez*, 348 P.3d 451, 456 (Colo. App. 2013) (quoting *People v. Montour*, 157 P.3d 489, 499 (Colo. 2007)). It is unnecessary for the Court to evaluate the validity of the entirety of the sign code in this case. Instead, the question at hand is whether the City has appropriately met its burden to demonstrate that the decision of the BCC was in some way improper. Contrary to the argument presented by StreetMedia, C.R.C.P. 12(h)(3) allows the Court to find jurisdiction over the 106(a)(4) but not the crossclaims. It is instead simply a statement that to the extent the Court lacks jurisdiction on any particular claim, it should dismiss that action. To the extent that there are any constitutional issues tied into that analysis, those matters can be resolved as part of the 106(a)(4) action.

The Court has previously ruled on the matter relating to the timeliness of the City’s complaint, as well as the procedural safeguards related to ensuring protection from prior restraint. Therefore, the County does not present additional argument on the matter at this time.

As previously argued, there is no relief the Court can grant StreetMedia based on its crossclaims against the County. Further, a decision in favor of StreetMedia on its crossclaims will not resolve any pending issue. The County has already given all of the permissions and permits for the sign to be built. StreetMedia has failed to raise plausible and non-conclusory claims against the County, and as a result the crossclaims should be dismissed.

III. CONCLUSION

Though the crossclaims were brought in the context of a 106(a)(4), they still must pass procedural and substantive muster on their own merits. The question is whether one party (StreetMedia) has been harmed by another (the County) in a manner that is legally redressable by a court. Here, the BCC approved the sign. There has been no harm to StreetMedia by the County,

and there is no relief that the Court can grant on that issue. If StreetMedia believes that the City's arguments and claims may infringe on their constitutional rights, it can raise those either in the 106(a)(4) action, or in a separate action against the City.

WHEREFORE, the Defendants request this Court dismiss StreetMedia's Crossclaim in its entirety.

Dated: February 12, 2021

LARIMER COUNTY ATTORNEY'S OFFICE.

By: s/Frank N. Haug
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing REPLY TO STREETMEDIA'S RESPONSE TO DEFENDANT BOARD OF COUNTY COMMISSIONERS' MOTION TO DISMISS CROSSCLAIM was served via Colorado Court's E-filing system this 12th day of February, 2021, to:

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