DISTRICT COURT, JEFFERSON COUNTY, COLORADO Court Address: 100 Jefferson County Parkway Golden, CO 80401 DATE FILED: September 11, 2019 4:49 PM FILING ID: 74FB0AB1AE47A CASE NUMBER: 2019CV31185	
Plaintiff: THREE DINOS, LLC, a Colorado limited liability company v. **Defendant:** GREEN MOUNTAIN WATER AND SANITATION DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado	**▲COURT USE ONLY▲**
Attorneys For Defendant: Mary Joanne Deziel Timmins, #13859 DEZIEL TIMMINS LLC 450 East 17th Avenue, Suite 210 Denver, Colorado 80203 **Telephone:** (303) 592-4500 **Facsimile:** (303) 592-4515 **E-mail:** jt@timminslaw.com	**Case Number:** 2019-CV-031185 **Division:** 2 **Courtroom:** 4B

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION UNDER C.R.C.P. 12(b)(1) AND FOR FAILURE TO STATE A CLAIM UNDER C.R.C.P. 12(b)(5)

Defendant Green Mountain Water and Sanitation District ("Green Mountain") files its Motion to Dismiss for Lack of Subject Matter Jurisdiction under C.R.C.P. 12(b)(1) and for Failure to State a Claim under C.R.C.P. 12(b)(5), and in support states as follows:

CERTIFICATION

Pursuant to C.R.C.P. 121, § 1-15(8), the undersigned hereby certifies that she conferred with counsel for Plaintiffs regarding this Motion. Plaintiffs' counsel stated that he would oppose the relief requested herein.

I. INTRODUCTION

This is one of five cases recently filed by a group of real estate developers trying to force Green Mountain to provide sanitary sewer service to their properties, which Green Mountain is not required to do, nor even permitted to do without numerous public notices and hearings, and prior approvals from the county, city, and electorate. The developers are trying to get around the public notice and hearing requirements inherent in the statutory process for setting up a sanitation district, or the statutory requirements for extending the boundaries of an existing sanitation district. A more detailed summary of the factual background of these five related cases is set forth in the Motion for Summary Judgment filed by Green Mountain in the action filed by Big Sky Metropolitan District No. 1. Case No. 2019 CV 30887. In this case, Plaintiff Three Dinos, LLC ("Three Dinos"), has no contractual, or other, legal relationship with Green Mountain, and therefore the claims fail to state claims for relief due to lack of standing, among other things.

II. DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION

These related cases seek review by this Court of a formal Resolution adopted by the Green Mountain Board of Directors on April 9, 2019. In the Resolution, the Green Mountain Board determined that an intergovernmental agreement that had been executed by a prior Green Mountain Board of Directors in 2018 was void and needed to be terminated. The intergovernmental agreement was between Green Mountain and Big Sky Metropolitan District No. 1 ("Big Sky"), and contemplated the provision of sanitary sewer service to Big Sky. Because Plaintiff's claims seek this Court's review of a formal Resolution adopted by the Green Mountain Board determining that an intergovernmental agreement with Big Sky was void, the claims should be dismissed for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1) because Plaintiff

failed to file its claims within the 28-day time limit under C.R.C.P. 106(a)(4) and (b). C.R.C.P. 106(a)(4) provides the exclusive avenue for district court review of final, quasi-judicial decisions of a local governmental body. Such claims must be filed within 28 days after the challenged decision was rendered. C.R.C.P. 106(b). If the claims are not timely filed, the district court lacks jurisdiction to hear them. See C.R.C.P. 106(b); *Danielson v. Zoning Bd. of Adjustment,* 807 P. 2d 541, 543 (Colo. 1990).

A. Exclusive Remedy – Requires Joinder of All Claims Within 28 Days.

C.R.C.P. 106(a)(4) is the exclusive remedy for determining whether a local governmental body exercising a quasi-judicial function has abused its discretion or exceeded its jurisdiction. *Consol. Case v. City of Aspen,* 2018 Colo. Dist. LEXIS 574, ¶27 (Pitkin County) ("C.R.C.P. 106(a)(4) is exclusive remedy for determining whether governmental body exercising quasi-judicial function has abused its discretion or exceeded its jurisdiction."); *Meyerstein v. City of Aspen,* 2009 Colo. Dist. LEXIS 624, ¶15 (Pitkin County) (If governmental action is quasi-judicial, review by District Court is solely under Rule 106(a)(4)).

Moreover, all claims that effectively seek judicial review (whether framed as claims under C.R.C.P. 106(a)(4) or not) are subject to the 28-day filing deadline of C.R.C.P. 106(b). See *Bd. of County Comm'rs v. Sundheim*, 926 P.2d 545, 548 (Colo. 1996) (Complaint under Rule 106(a)(4) must include all causes of action, including constitutional and statutory claims, in a single Rule 106(a)(4) action.) See also *JJR 1, LLC v. Mt. Crested Butte,* 160 P. 3d 365 (Colo. App. 2007) (Complaint dismissed under 12(b)(1) for failure to file claims within 28-day time limit under Rule 106(b)). Thus, claims for declaratory relief under C.R.C.P. 57 that seek review of quasi-judicial decisions must be filed within 28 days. *See Tri-State Generation & Transmission Co. v. City of Thornton,* 647 P.2d 670, 676-77 (Colo. 1982) (Party may not seek

review of quasi-judicial decisions indirectly through a declaratory judgment if its claim under C.R.C.P. 106(a)(4) was time barred). This is true for constitutional and statutory challenges as well. See *Powers v. Board of County Comm'rs,* 651 P. 2d 463 (Colo. App. 1982) (Petitioner's constitutional and statutory challenges must be litigated in one action governed by the time limits of C.R.C.P. 106(b)). See also *Norby v. City of Boulder,* 577 P. 2d 277 (Colo. 1978) (One challenging quasi-judicial decision of a governmental body "must prosecute all of his causes, including constitutionality, in one action, which must be brought within [28] days.")

Important public policy considerations underlie the Rule 106 time limits and exclusivity. Where aggrieved parties have been given notice and an opportunity to be heard, "it is not unfair to require that they litigate their challenge, be it constitutional or statutory, within the time limits established in Rule 106(b)." *Snyder v. Lakewood,* 542 P. 2d 371, 377 (Colo. 1975). Requiring local governmental bodies, and their citizens, to live under a cloud of uncertainty, and protracted litigation, is not compatible with modern governmental planning. *Id.*

B. Quasi-Judicial Action.

An action is quasi-judicial, and therefore subject to exclusive review under Rule 106(a)(4), if the governmental decision adversely affects the interests of specific individuals, and the decision is reached through application of preexisting legal standards or policy considerations to present or past facts. *Cherry Hills Resort Dev. Co. v. Cherry Hills Village,* 757 P. 2d 622 (Colo. 1988); *Meyerstein, supra,* at ¶58. In the exercise of its judicial authority, it is incumbent on a governmental body to provide notice and an opportunity to be heard to those whose interests are likely to be affected by the governmental decision. *Cherry Hills, supra,* at 628.

C. Standard of Review.

When a defendant raises a challenge under Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction, and the trial court may make factual findings regarding the issue. *Consol. Case v. City of Aspen,* 2018 Colo. Dist. LEXIS 574 (Pitkin County). In a 12(b)(1) analysis, the allegations in the complaint are not entitled to any presumptions in favor of the non-moving party, and the court may conduct a hearing if necessary to resolve disputed jurisdictional facts. *Trinity Broadcasting of Denver, Inc. v. City of Westminster,* 848 P. 2d 916, 924-5 (Colo. 1993). If the matter can be resolved based on undisputed facts, a trial court does not need to conduct a fact-finding hearing. *Seefried v. Hummel,* 148 P. 3d 184 (Colo. App. 2005).

Rule 106(a)(4) limits judicial review to a determination of whether the local governmental body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the body or officer. C.R.C.P. 106(a)(4)(I). A reviewing court must uphold the decision of the lower governmental body unless there is "no competent evidence in the record to support it." *Carney v. Civil Serv. Comm'n.,* 30 P. 3d 861, 863 (Colo. App. 2001). "No competent evidence" means that the governmental body's decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Id.; Board of County Comm'rs. v. O'Dell,* 920 P. 2d 48 (Colo. 1996).

D. No Subject Matter Jurisdiction over Claims in this Case.

The adoption of the Resolution determining the Big Sky IGA was void was a quasi-judicial act of the Green Mountain Board of Directors. The Resolution affected the rights and duties of specific individuals, namely Big Sky Metropolitan District No. 1, the only other party to the IGA. The decision by the Board of Directors that the IGA was void was reached through the application of preexisting legal standards to present or past facts, including application of the

Colorado Constitution and the Special District Act, among other statutes, to the terms of the IGA. *Cherry Hills Resort Dev. Co. v. Cherry Hills Village*, 757 P. 2d 622 (Colo. 1988)

Notice was given to Big Sky, the party to the IGA, that the IGA was being suspended and was under review for its invalidity under Colorado law. See Letter Dated September 4, 2018, to Big Sky, and others, attached hereto as **Exhibit A**. Big Sky, through its counsel, was given the opportunity to be heard at the Regular Meeting of the Board of Directors of Green Mountain Water and Sanitation District on January 8, 2019. Minutes of Regular Meeting, at p. 3 "Public Comment," attached hereto as **Exhibit B.** Public notice of the April 9, 2019 Regular Meeting of the Green Mountain Water and Sanitation District was posted as required under the Special District Act. See Notice of Regular Meeting, dated April 9, 2019, attached hereto as **Exhibit C**. The Resolution was adopted at a public meeting, after public notice, at which all members of the public were given an opportunity to be heard regarding the termination of the IGA. See Minutes of Regular Meeting of the Board of Directors of Green Mountain Water and Sanitation District, dated April 9, 2019, attached as **Exhibit D.**

Therefore, Three Dino's exclusive remedy for review of the Board's Resolution is C.R.C.P. 106(a)(4), and Three Dinos was required to join all its claims in the Rule 106 action, within the 28-day time limit set forth in Rule 106(b), or by May 7, 2019. Three Dinos failed to file its Complaint within the 28-day time limit under Rule 106(b) and therefore, this case is jurisdictionally barred and should be dismissed for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1).

III. DISMISSAL FOR FAILURE TO STATE A CLAIM

A. Plaintiff's First, Fourth and Fifth Claims for Relief (Declaratory Relief) Should be Dismissed under C.R.C.P. 12(b)(1) for Lack of Standing

In its First, Fourth and Fifth Claims for Relief, Three Dinos seeks declaratory relief under Rule 57. Specifically, Three Dinos seeks declarations that (1) it is a third-party beneficiary of "the interlocking and various intergovernmental agreements" (Complaint at ¶¶9 and 15); (2) Green Mountain is not empowered to become involved in "land use planning"(Complaint at ¶28); and (3) Three Dinos is "an interested party in and to a series of Agreements" and is entitled to a determination of the rights and obligations of the parties to such agreements. (Complaint at ¶30-32.)

C.R.C.P. 57(b) states:

> Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

To have standing to bring an action under Rule 57, a person must show it is "interested" under a contract, or has other "legal relations" that are affected by such contract. *Associated Master Barbers v. Journeyman Barbers, etc.*, 258 P. 2d 599 (Colo. 1955). A plaintiff who is not a party to a contract is without standing to obtain a declaratory judgment interpreting, or determining the validity of, the contract. *Id.* See also *Wibby v. Boulder County Bd.*, 409 P. 3d 516 (Colo. App. 2016) (Rule 57 action dismissed under Rule 12(b)(1) for lack of standing).

Three Dinos does not identify any contracts in its Complaint under which it claims "legal relations" or status as an "interested party." Three Dinos merely alleges that it is the "beneficiary" of "the interlocking and various intergovernmental agreements entered into by Green Mountain to provide statutorily required services." Complaint at ¶9. Three Dinos does not identify the

"various agreements" that form the basis of its Rule 57 causes of action. Therefore, Three Dinos lacks standing to seek declaratory relief under Rule 57 because it has not identified a contract to which it is an interested party.

If Three Dino's claims are based on the Big Sky IGA and/or the Fossil Ridge IGA, agreements that are identified in complaints filed in some of the related cases, Three Dinos lacks standing under Rule 57 because it has no rights under the IGA's either as a party or a third-party beneficiary. Three Dinos does not dispute that it is not a party to the Big Sky IGA or the Fossil Ridge IGA. Three Dinos appears to make its claims as a third-party beneficiary under these IGA's. Complaint at ¶9.

Under Colorado law a "person not a party to an express contract may bring an action on such contract if the parties to the agreement intended to benefit the non-party, provided that the benefit claimed is a direct and not merely an incidental benefit of the contract." *E. B. Roberts Constr. Co. v. Concrete Contractors, Inc.*, 704 P. 2d 859, 865 (Colo. 1985). A third-party beneficiary to a contract may generally sue to enforce its terms. *Bewley v. Semler*, 432 P. 3d 582, 587 (Colo. 2018). The key question in determining the status of a party as a third-party beneficiary is the intent of the parties to the actual contract. *Concrete Contractors, Inc. v. E.B. Roberts Constr. Co.*, 664 P. 2d 722, 725 (Colo. App. 1983).

Paragraph 12.4 of the Big Sky IGA, and paragraph 12.4 of the Fossil Ridge IGA, titled "No Third-Party Beneficiaries," state: "No third-party beneficiary rights are created in favor of any person not a Party to this Agreement." See Big Sky IGA at ¶12.4 attached hereto as **Exhibit G.** See Fossil Ridge IGA attached hereto as **Exhibit J.**[1] Therefore, the parties to the Big Sky

[1] If a document is referred to in the complaint and is central to the plaintiff's claims, the defendant may submit a copy to the court attached to its motion to dismiss, and the court's consideration of the document does not require conversion of the motion to one for summary judgment. *Yadon v. Lowry*, 126 P. 3d 332, 336 (Colo. App. 2005).

IGA and Fossil Ridge IGA explicitly disclaimed any intent to confer a benefit on any third party via the Big Sky IGA or the Fossil Ridge IGA. As a matter of law, Stream is not a third-party beneficiary under either IGA.

B. Plaintiff's Second Claim for Relief (Breach of Duty of Good Faith and Fair Dealing) Should Be Dismissed for Failure to State a Claim

A duty of good faith of good faith and fair dealing arises from obligations created under a contract and requires the existence of two circumstances: (1) a contract between the parties; and (2) a fiduciary duty between the parties. *Shirk v. Gladden*, 2010 Colo. Dist. LEXIS 841*29 (Adams County). See also *Decker v. Browning-Ferris Industr.*, 931 P. 2d 436, 443 (Colo. 1997) (Covenant of good faith and fair dealing arises from the obligations created by a contract rather than an obligation arising independently from a contract).

This claim fails to state a claim for relief for two reasons. First, nowhere in the complaint does Three Dinos allege that a fiduciary duty is owed between the parties. In fact, no fiduciary duty is owed between the parties, as the parties have no legal or factual relationship, and therefore, Green Mountain did not owe a duty of good faith and fair dealing to Three Dinos. See *Shirk v. Gladden*, 2010 Colo. Dist. LEXIS 841*29 (Adams County).

Second, Three Dinos fails to allege the existence of a contract between the parties. Three Dinos does not allege the existence of a specific contract, but rather bases its Second Claim for Relief on "interlocking and various intergovernmental agreements" that are unspecified. Complaint at ¶9. These allegations are insufficient, as a matter of law, to state a claim for breach of contract. *Rowland v. Black*, 2015 Colo. Dist. LEXIS 2268*4 (Jefferson County) (Allegation of "a 2010 agreement" insufficient to state a claim for breach of contract). See also *Wibby v. Boulder County Bd.*, 409 P. 3d 516 (Colo. App. 216) (Dismissal of breach of contract claim

affirmed because "documents they believe will establish contract with County" insufficient to allege existence of contract.)

More importantly, Three Dinos has failed to allege the existence of a contract between Three Dinos and Green Mountain, which is required to state a claim for breach of duty of good faith and fair dealing. *Rowland v. Black, supra,* 2015 Colo. Dist. LEXIS 2268*5 (Breach of contract claim dismissed under rule 12(b)(5) because complaint did not allege contracts with the Plaintiff and Defendant as parties.) Three Dinos alleges that the "various intergovernmental agreements" were "entered into by Green Mountain." But does not allege that Three Dinos is a party to any of the alleged agreements. Plaintiff's Second Claim for Relief should be dismissed for failure to state a claim.

C. Plaintiff's Third Claim for Relief (Promissory Estoppel) Fails to State a Claim

The elements of promissory estoppel are: (1) the promisor made a promise to the promisee; (2) the promisor should reasonably have expected that the promise would induce action or forbearance by the promisee; (3) the promisee in fact reasonably relied to the promisee's detriment; and (4) the promise must be enforced to prevent injustice. *Patzer v. City of Loveland,* 80 P. 3d 908, 911 (Colo. App. 2003). A promise is a "manifestation of an intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made. *G&A Land, LLC v. City of Brighton*, 233 P. 3d 701, 702 (Colo. App. 2010). The promise, whether stated in words or inferred, must be sufficiently definite to allow a court to understand the nature of the obligation to perform. *Id.*

Nowhere in the Complaint does Three Dinos allege that Green Mountain made a promise to Three Dinos. On the contrary, the Complaint alleges that Green Mountain had various "obligations." Complaint at ¶5 ("Green Mountain is obliged to provide those services") and

Complaint at ¶6 (Green Mountain's actions are "inconsistent with its obligations as a special district"). To the extent Three Dinos relies on alleged promises made by Green Mountain in the "interlocking agreements" alleged in the Complaint, Three Dinos fails to allege that any of those agreements were between Three Dinos and Green Mountain. Three Dinos has failed to allege the existence of a "promise" on which it allegedly relied, and therefore its promissory estoppel claim fails to state a claim.

IV. CONCLUSION

For the reasons set forth above, Plaintiff's claims should be dismissed for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1). In the alternative, Plaintiff's claims should be dismissed for failure to state a claim under C.R.C.P. 12(b)(5).

Dated this 11th day of September, 2019

DEZIEL TIMMINS LLC
/s/ Mary Joanne Deziel Timmins
Mary Joanne Deziel Timmins #13859
Attorneys for Defendant Green Mountain Water and Sanitation District

CERTIFICATE OF SERVICE

I certify that, on September 11, 2019, a true and correct copy of the foregoing was served on the following via the Colorado Courts E-Filing System and/or by email:

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