DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 South Potomac Street Centennial, Colorado 80112	DATE FILED: October 25, 2023 9:51 AM CASE NUMBER: 2023CV31209
Plaintiff: MURPHY CREEK DEVELOPMENT, INC. and MURPHY CREEK, LLC v. Defendants: MURPHY CREEK METROPOLITAN DISTRICT NO.3 *et. al.*	▲ **COURT USE ONLY** ▲ Case Number: 2023CV31209 Div. 202

ORDER RE: DEFENDANT BRIAN K. MATISE'S SPECIAL MOTION TO DISMISS PURSUANT TO C.R.S. §13-20-1101(3)(a)

THIS MATTER comes before the Court on motion of Defendant Brian K. Matise ("Matise") seeking dismissal of Plaintiffs claims asserted against him pursuant to Colorado's Anti-SLAPP statute, §13-20-1101(3)(a), C.R.S. The Court, having considered the pleadings, argument of counsel, file and applicable law, finds the motion is GRANTED.

INTRODUCTION

1. Parties. Plaintiffs Murphy Creek Development, Inc. and Murphy Creek, LLC (jointly "Plaintiffs") are generally "in the business of developing property [and] own vacant land in and adjacent to" property controlled by Defendant Murphy Creek Metropolitan District No. 3 (the "District"). Cmpl ¶s 1 and 2. The District "is a quasi-municipal corporation … formed under Title 32 of the Colorado Revised Statutes." Cmpl ¶3. Plaintiffs sued the District, its governing board (the "Board"), various directors that

served on the Board ("Schriner," and "Rash") and the Board's attorney, Matise, as well as others associated with the District.[1]

2. Claims that the Service Fees are Taxes. Plaintiffs assert that the District improperly imposed fee resolutions on them. Plaintiffs seek Declaratory Judgments that the 2021 Fee Resolution was an improper tax because it was imposed to "Defray the General Expense of Government" (First Claim for Relief), "Not Reasonably Related to the Districts … Service Costs" (Second Claim for Relief), "Violates Article X, §20 of the Colorado Constitution" (Fourth Claim for Relief), and "Violates Article X, §3" (Fifth Claim for Relief).

3. Claim that the Service Fees are not Related to Costs. Alternatively, Plaintiffs seek Declaratory Judgment that the fees assessed against Plaintiffs are improper and must be vacated because they do not relate to the actual cost for services provided pursuant to the fees. (Third Claim for Relief).

4. Claim of Improper Use of Fees. Plaintiffs further assert that the District has "violated its own 2021 Fee Resolution by failing to separately account for … collections and expenses" (Sixth Claim for Relief); "failed to use the 2021 Fee Resolution revenue paid from Vacant Land to install or maintain specific local improvements …" (Seventh

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[1] The Complaint also named as defendants, Margaret A. Sobey, The Consulting Course, Jake Willet, Coloradoscapes, LLC and John Does. Sobey was identified as a property owner and sole owner of The Consulting Source. Willet was identified as the manager member of Coloradoscapes, which provided landscape services to the District. (Plaintiff dismissed its claims against Willet "with prejudice" by notice dated 9/8/23). (ColoradoScapes LLC was dismissed "with prejudice" by notice dated 10/4/23.) The John Does were described as "current or former Board directors, District officers, or District consultants that conspired, aided and abetted the alleged wrongs committed against the Plaintiffs." Cmpl ¶10.

Claim for Relief); and "materially deviated from the Service Plan … to fund costs of a capital nature," (Eighth Claim for Relief).

5. Fraud Claim (Ninth Claim for Relief. Plaintiffs assert a claim of fraud against the Board, the defendant directors and attorney Matise, primarily related to conduct concerning the imposition of Operation & Maintenance ("O&M") Fees enacted in 2019 and were the subject of a prior lawsuit. Plaintiffs assert that defendants "knew" such fees were "not intended to fund services and was instead intended as a penalty to get the Plaintiffs' attention, discourage and penalize agricultural use, and incentivize development …" Cmpl ¶208. Plaintiffs set forth allegations concerning the conduct of the Board, Directors and particularly Matise in the conduct of that prior litigation to support their fraud claim. Plaintiffs also allege fraud in connection with the 2021 Fee Rsolution alleging that the "Board did not intend to use payments from Vacant Land" for its stated purpose (Cmpl ¶259), the "District has misused all revenue from Vacant Land to pay its general administration, direct and indirect costs for services unrelated to vacant land," (Cmpl ¶260) and "Plaintiffs paid charges (under protect) … relying on Defendant Matise's representations and the language of the 2021 Fee Resolution, and [they] have been damaged by these false statements." Cmpl ¶261.

6. Fraud Allegations Against Defendant Matise. Plaintiffs previously filed a lawsuit seeking to establish that the 2019 O&M fees were improper. Matise defended the lawsuit on behalf of the District. Plaintiffs allege that the following actions of Matise, taken during that prior litigation, constitute fraudulent conduct:

- Matise prepared affidavits for Director Schriner and Landscaper Willet in which they claimed that the District incurred additional landscape and security costs caused by Plaintiffs' agricultural use of their property. Cmpl ¶211-213.

- Matise "filed briefs responding to Plaintiffs' motions for summary judgment "fraudulently claiming they funded additional landscape and security costs…" Cmpl ¶24.

- The court denied Plaintiffs' motions for summary judgment.

- But for the representations in response to the motions for summary judgment, the motions would have been granted.

- Defendant Matise and the Board "knew" that certain land was zoned "PD" and not "zoned agricultural" as early as February 2020 … but did not withdraw fees based on agricultural zoning until the end of the trial.

- "Defendant Matise filed a motion for extension of time to file his closing argument…" Cmpl ¶228 In that closing argument, Plaintiffs allege, Matise "fraudulently claimed that no party in the litigation knew the property was zoned "PD" until the trial…" Cmpl ¶230.

- Plaintiffs sought attorney fees in this earlier litigation pursuant to §1988. Plaintiffs assert that "Matise's brief in opposition to attorneys' fees fraudulently argued that the District voluntarily conceded the charges related to agricultural zoning should be withdrawn." Cmpl ¶240.

- Plaintiffs further assert that Matise's argument in opposition to their claim for attorneys' fees was "disingenuous[ ]." Cmpl ¶241.

- Plaintiffs argue that Matise continued to oppose their claim for attorneys' fees on appeal.

Plaintiffs also set forth an allegation of fraud against Matise related to the 2021 fees, with a general allegation that Matise made "representations" about the fees, which were relied on by Plaintiffs to their detriment. Plaintiffs do not specify what these representations were, or how they were false. (See Cmpl ¶261).

7. Conspiracy Claim (Tenth Claim for Relief). Separately, Plaintiffs allege that the Board, its Directors and attorney Matise "conspired to abuse the powers delegated to metropolitan districts under Colorado law … to achieve their own personal

objectives and otherwise harass and punish the Plaintiffs." Cmpl ¶264. They allege that the District's claims and appeals in the earlier lawsuit including "fil[ing] appellate briefs, [making] oral argument and petition[ing] the Supreme Court for certiorari" constitute actions in furtherance of such conspiracy. Cmpl ¶268. As to defendant Matise specifically, the Plaintiffs allege:

- "Matise … conspired to use the District's platform … to fight development in the master planned community and interfere with Plaintiffs' land sale contracts … [by] … telling would-be builders that their end users would not be allowed to use the District's public clubhouse and pool facilities and representing that a lien for the District's invalided fees, which it later repealed and replaced, continued to exist on Plaintiffs' property until the appeals were decided." Cmpl ¶269

- "Matise … conspired to use the District's website platform … to publish letters to the community and meeting minutes that misrepresented, libeled, and injured the Plaintiffs …" Cmpl ¶270

- "Matise … conspired to claim ignorance of the Grazing Land's zoning as a means to trick the Colorado Courts to accept the District's disingenuous concession of the O&M Fee…which was done solely as a means to evade an award of reasonable attorneys' fees." Cmpl ¶274

- "Matise … conspired to defend the O&M Resolution's … Fees…" Cmpl ¶275

8. <u>§1983 Deprivation of Rights (Eleventh Claim for Relief)</u>. Plaintiffs allege that the Board, its Directors and attorney Matise "conspired to use the District's power to impose service fees to deprive Plaintiffs of their right to substantive due process and penalize the Plaintiffs for using the Grazing Land and Extraterritorial Grazing Land for agricultural purposes." Cmpl ¶281. They argue that the 2019 "O&M Fee Resolution, Backup Fee, and 2021 Fee Resolution's liens constitute a taking without just compensation, and thus, violate due process." Cmpl ¶285. Plaintiffs assert that they are

entitled to be "free from unauthorized actions of government that substantially impair their rights and cause financial harm." Cmpl ¶289. They maintain that the imposition of the fees impaired contractual rights (Cmpl ¶290) and violate the "contracts clause." Cmpl ¶291.

9. Accounting (Twelfth Claim for Relief). Plaintiffs assert that the District has violated certain provisions of the Open Meetings law and other statutes and seeks "an accounting of all revenue that has accrued to the District, all revenue that the District has actually received, and all expenditures the District has made from January 1, 2019 to the present." Cmpl ¶300.

Motion to Dismiss Under Anti-SLAPP Statute

10. Anti-SLAPP Motion. Matise filed the within motion pursuant to Colorado's Anti-SLAPP statute, §13-20-1101(3)(a), C.R.S, seeking dismissal of the three Claims of Relief asserted against him individually, *i.e*. Fraud, Civil Conspiracy and §1983 Deprivation of Rights, arguing that all of Plaintiffs' claims against him are based on either "1) statements made in public meetings regarding questionable developer transactions …; or 2) legal advice given to the District in his capacity as general counsel to the District…" SLAPP Mtn, 2. Matise argues that he has met the threshold showing under Colorado's Anti-SLAPP statute that Plaintiffs' claims fall within the scope of the statute and that he has established a "reasonable likelihood of prevailing on the claim[s]." SLAPP Mtn, 18.

11. Public Comments. Matise maintains that he "has been perhaps the leading Colorado attorney speaking in public on matters critical of developers who abuse the metropolitan district structure." SLAPP Mtn, 5. He goes on to state that "In

January 2023 Mr. Matise announced his candidacy for Aurora City Council based on a platform that includes more responsible development and less abuses by developers." SLAPP Mtn, 6. Matise asserts that part of Plaintiffs' allegations against him relate to public comments he made at a District public meeting in 2017, concerning proposed refinancing of the District's 2006 bonds. He states that he "spoke at a public hearing in 2017 on this issue to the Board as a member of the public." SLAPP Mtn, 8. The Board at the time "(which did NOT include defendants Schriner or Rash) decided not to proceed with the proposed 2017 refinancing after Mr. Matise's comments." SLAPP Mtn, 9.

12. Legal Representation. Matise subsequently became counsel to the Board. The Board imposed certain fees on Plaintiffs which was the catalyst for the referenced prior litigation. As a result of that litigation "the Court ruled in favor of the plaintiffs that the fee was unreasonable because the actual costs of the services on plaintiffs' property was significantly less than the amount of the fees to be collected. However, the Court denied attorney fees and did not grant relief based on the Section 1983 claims. Both parties appealed to the Court of Appeals. The Court of Appeals affirmed all orders including the trial court's finding that the fee on undeveloped lots was unreasonable and the denial of attorney fees. Petitions for certiorari to Colorado Supreme Court and US Supreme Court on the Section 1983 attorney fee issue were denied." [internal citation to prior court orders omitted] SLAPP Mtn, 14. At the conclusion of this prior litigation, the Board, in approximately June 2021 adopted a new fee resolution. Earlier, in mid 2021, Matise "gave notice to the Board that he planned to resign as general counsel" due to his wife's health and he "officially resigned as general counsel at the end of September

2021." SLAPP Mtn, 14-15. Matise argues that all of his conduct as legal counsel on behalf of the district is protected under the Anti-Slapp statute, as well as the litigation privilege. Matise points out that "an individual who plays an integral part of the judicial process has absolute immunity from later civil damages liability for statements made in the proceedings." SLAPP Mtn, 21. He argues that this litigation privilege also undermines Plaintiffs' civil conspiracy claim, because "an attorney's statements, when made in the course of, or in preparation for, judicial proceedings in a filed case cannot be the basis of a tort claim if the statements are related to the litigation." SLAPP Mtn, 21, citing to *Patterson v. James* 454 P3d 345 (2018). He maintains that "all of [his] statements were made as part of his legal advice provided to the District in response to their concerns regarding District matters, including the past 2006 bond refinancing, the 2017 ARI levy, the reduction of pledged revenues for developer lots, and the allocation of fees going forward. These are public statements protected by the First Amendment as well as legal advice that is not a legal basis for a tort (or fraud claim). The Complaint further does not cite to any unlawful acts…" SLAPP Mtn, 22.

13. <u>§1983 Claims</u>. As to Plaintiffs' §1983 claim, Matise argues, "Plaintiffs have not articulated any protected Constitutional right, privilege or immunity of which they were deprived as a result of Mr. Matise's legal advice to the District. SLAPP Mtn, 25. He asserts that he is not a state actor under §1983, arguing that private attorneys do not act under color of state law.

Plaintiffs' Response

14. <u>Plaintiffs' Opposition</u>. While Plaintiffs do not dispute the analysis to be applied in considering a motion to dismiss under Colorado's Anti-SLAPP statute,

Plaintiffs assert that they have demonstrated a reasonable probability of success on their claims. SLAPP Rsp, 12.

15. Public Speech. Plaintiffs concede that Matise has the right to make public speeches about his position concerning developers. However, Plaintiffs state that they are not making claims on Matise's public speech, but merely referencing such speech to establish Matise's motivation for alleged misconduct. Plaintiffs argue that Matise's objections to proposed refinancing "demonstrate the propensity of the Defendant and District to disregard legal obligations in favor of an illegal option." SLAPP Rsp, 15. Plaintiffs do not explain how the proposed refinancing was a "legal obligation," as opposed to a choice, or how the District's decision to take other steps concerning financing was "illegal." Having asserted that Matise's speech is not the basis for its claims, Plaintiffs then state that "the Exclusion Speech was made in a private capacity as general counsel to the District, which should fall outside of anti-SLAPP because it does not concern an individual citizen's right to petition or of free speech on a public issue." SLAPP Rsp, 15.

16. Legal Representation. Plaintiffs assert that "Legal representation is not a category of protected speech under the first amendment." SLAPP Rsp, 15. Plaintiffs acknowledge that Matise was providing legal advice to a client but then argue that if that legal advice was faulty, then Matise committed fraud, or engaged in a civil conspiracy with his clients by either giving the advice or allowing his clients to act on such advice. Plaintiffs argue that "Defendant took actions that are not typical of a standard attorney-client relationship, and if the Plaintiffs' allegations are proven true, the Defendant is

guilty of fraud, conspiracy, and served an integral role in perpetrating a violation under §1983." SLAPP Rsp, 18.

17. <u>§1983 Claims</u>. Plaintiffs argue that they "seek to invalidate the District's third attempt at imposing illegal fees and to hold accountable the defendants that committed fraud and played a role in a civil conspiracy to impermissibly utilize Colorado local government for unconstitutional ends." SLAPP Rsp, 13. Plaintiffs claim that Matise is liable for this alleged deprivation of rights "in his role as a friend of other defendants, as the District's general and litigation counsel, and [that] in the aid of the District's board of directors and officers [he] played an integral role in the defendants' illicit use of a local govern and its powers under Colorado's Constitution and Special District Act to unconstitutionally harass, punish and fight the Plaintiffs.' SLAPP Rsp, 25. Plaintiffs further allege that its §1983 claims are based on: "(i) the District's attempt to penalize/violate vested property rights exercised within and outside its boundaries, … (ii) … the frivolous and vexatious use of the District's right to appeal and [(iii)] its imposition of the 2021 Fee Resolution to fund the appeal and otherwise continue their crusade." SLAPP Rsp, 26.

Hearing on Special Motion

18. On October 11, 2023, the Court held a hearing on the Anti-SLAPP motion. The Court determined that Matise had met his initial burden under the statute, finding that Plaintiffs claims appeared based on public speech or "written or oral statement or writing made before a …judicial proceeding." §13-20-1101(2)(I), C.R.S. The Court also stated that, to the extent that alleged conduct of Matise was not protected by the Anti-SLAPP statute, it appeared that the conduct was protected by the Litigation Privilege

and could not form the basis of a claim against counsel. Defendant Matise rested on his pleading. Plaintiffs' counsel made further argument and asked for the opportunity to file a written response on the Litigation Privilege issue. The Court granted Plaintiff until October 12, 2021 to file a supplemental response with citations related to Litigation Privilege. Matise was given the opportunity to file any reply to Plaintiffs' supplemental response by October 13, 2023.

Plaintiffs' Supplemental Response

19. On October 12, 2023, Plaintiffs filed a twenty-four page response, which contained many of the same arguments previously set out in its initial response. Plaintiffs first asked the Court to reconsider its finding that Matise met his initial burden of proof under the Anti-SLAPP statute. Plaintiffs argue that "Defendants speech and conduct at issue in this case were undertaken in his official capacity as the District's general counsel, and thus are not entitled to First Amendment protection ... [Plaintiffs then go on to argue that] … the statute and associated case law clearly demonstrate that anti-SLAPP protections and the litigation shield are not synonymous … [and conclude that] … anti-SLAPP clearly does not apply to the fraud claim…" 2nd SLAPP Rsp, 4. Plaintiffs assert that "nowhere in Plaintiffs' complaint does it allege any cause of action based on speech or conduct occurring ***before*** Defendant was hired as the District's general counsel." (Emphasis added) 2nd SLAPP Rsp, 6. Despite this statement, Plaintiffs then argue that their "civil conspiracy claim concerns the Defendant's conduct ***prior to*** his formal role as general or litigation counsel of the District." (Emphasis added0 2nd SLAPP Rsp, 16.

Plaintiffs recognize that under Colorado's anti-SLAPP statute protected speech includes "'written or oral statement or writing made before a … judicial proceeding or any other official proceeding authorized by law;' or any 'written or oral statement or writing made in connection with an issue under consideration or review by a … judicial body …'" 2nd SLAPP Rsp, 9; §13-20-1101(2)(a)(I) and (II), C.R.S. However, Plaintiffs argue that the anti-SLAPP statute does not protect illegal speech and then assert that "Plaintiffs' adequately demonstrate that Defendant's behavior was *illegal as a matter of law*. … [since] the 2018 fee resolution and backup fee … resolutions have already been held invalid as applied to Plaintiffs" (emphasis added) 2nd SLAPP Rsp, 11.[2] Plaintiffs also argue that Matise violated his ethical duties of candor, asserting that Matise made "false representations to a tribunal" concerning the agricultural zoning issue. 2nd SLAPP Rsp, 12.

Plaintiffs acknowledge that "the litigation shield exists to guarantee access to the judicial process, including through the promotion of zealous representation by counsel of their client…" 2nd SLAPP Rsp, 10. They appear to concede that the privilege protects against allegations of conduct while Matise was involved in litigation, and propose withdrawing their fraud claim, but appear to believe that an amended complaint involving fraud committed prior to litigation could be revived. "Plaintiffs submit that

[2] "Although Colorado law is not entirely clear, it appears that a claimant seeking relief through an independent equitable action based on fraud must establish extrinsic fraud as opposed to intrinsic fraud. … This rule is consistent with the approach followed by a majority of the federal circuits … [where] a clear majority of courts holds that class forms of intrinsic fraud, such as perjury or nondisclosure by a party, are insufficient to warrant relief in an independent action." *In re Marriage of Gance*, 36 P3d 114, 117-18 (Colo. App. 2001). Also see: *Gravina Siding and Windows Co. v Gravina*, 516 P3d 37, 52 (Colo. App. 2022) (A claim is not frivolous or groundless merely because it is unsuccessful "something can be 'credible' without the necessity of its ultimately being 'believed' or accepted by the trier of fact.")

fraudulent acts/speech committed after litigation commences, but in furtherance of a conspiracy that commenced before any litigation privilege could attach, should not be afforded the litigation privilege." 2nd SLAPP Rsp, 21. Finally, Plaintiffs argue that Colorado's anti-SLAPP statute "does not apply to federal claims such as §1983" (2nd SLAPP Rsp, 18) and that a state litigation shield cannot preclude a federal §1983 action..

LEGAL ANALYSIS

Colorado's Anti-SLAPP Statute

"In 2019, the General Assembly enacted the anti-SLAPP statute to 'encourage and safeguard the constitutional rights of persons to petition … and at the same time, to protect the rights of persons to file meritorious lawsuits for demonstrable injury. The anti-SLAPP statute strikes such a balance by establishing a procedure allowing the district court to 'make an early assessment about the merits of claims brought in response to a defendant's speech activity. The statute establishes a two-step process for considering a special motion to dismiss. First, the defendant filing the special motion to dismiss must make a threshold showing that the anti-SLAPP statute applies. … Second, if a defendant can establish that the claim falls within the anti-SLAPP statute's scope, the burden shifts to the plaintiff to demonstrate a 'reasonable likelihood that the plaintiff will prevail on the claim. … If the district court, after considering the pleadings and supporting documents, concludes that there is a reasonable likelihood that the plaintiff will prevail on the claim, it must deny the special motion to dismiss. … a [grant or] denial of a special motion to dismiss under the anti-SLAPP statute is immediately

appealable." [internal citations omitted] *Rosenblum v. Budd*, 2023 WL 4938545, 5, 2023COA72, ¶s 23 – 25.

"Because few cases have applied Colorado's anti-SLAPP statute, and because it closely resembles California's anti-SLAPP statute, we look to California case law for guidance in outlining the two-step process for considering a special motion to dismiss." *L.S.S. v. S.A.P*. 2022 COA 123, ¶20, 523 P3d 1280 (Colo App 2022). "Under the California anti-SLAPP statute … this step has been described as a summary judgment-like procedure in which the court reviews the pleadings and the evidence to determine 'whether the plaintiff has stated a legally sufficient claim and made a *prima facie* factual showing sufficient to sustain a favorable judgment. In making that determination, 'the court does not weigh evidence or resolve conflicting factual claims' but simply 'accepts the plaintiff's evidence as true and evaluates the defendant's showing only to determine if it defeat's the plaintiff's claim as a matter of law." *LSS, Id.* at ¶23, 1286. Here, the Court finds that Matise has met the first step of the analysis by asserting that Plaintiffs' claims against him relate to either public speeches he made about developers, or his conduct during litigation on behalf of the District. Plaintiffs have the burden of establishing a likelihood that they will prevail on their claims.

Litigation Privilege

In this case, Plaintiffs assert that conduct of Matise as the attorney for the District, including preparing affidavits filed with the court, presenting witnesses, filing pleadings, and making argument at both the trial level and on appeal, constitute fraud and civil conspiracy. Plaintiffs argue that Matise's advice and positions taken in that litigation fall short of reasonable conduct for an attorney and had no basis in fact. They

maintain that these allegations are sufficient to overcome application of the Litigation Privilege.

"The applicability of the litigation privilege presents a question of law…" *Killmer, Lane & Newman, LLP v. BKP, Inc.*, 535 P3d 91, 95 (Colo. 2023). The Colorado Supreme Court in *Killmer* adopted the definition of the litigation privilege as set out in the Restatement (Second) of Torts, § 586. Section 586 provides:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding. …
>
> Thus, the pertinency required is not technical legal relevancy, but rather a general frame of reference and relation to the subject matter of the litigation. Accordingly, the privilege embraces anything that possibly may be relevant.

Killmer, Id at 96.

"[T]he privilege not only shields attorneys from defamation claims arising from statements made during the course of litigation, but it also bars other non-defamation claims that stem from the same conduct." *Belinda A. Begley and Robert K. Hirsch Revocable Trust v. Ireson*, 490 P3d 963, 969 (Colo. App. 2020)

> Absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior … so long as the act has some relation to the proceeding. … [The privilege has been applied to] lawyer's management of inspection of corporate books and records … attorney's alleged aiding and abetting of client's breach of fiduciary duty … lawyer's disclosure of experts in litigation…

Begley, Id. at 969-70.

> Generally, statements made in the course of judicial or quasi-judicial proceedings are absolutely privileged and cannot form the basis for a subsequent civil claim if the statements 'bear some relation or reference to the subject of the inquiry.' This is the case even if the statements are false or defamatory or made with knowledge of their falsity.

Gonzales v. Hushen, 2023 WL 6301610, 5 (Colo. App. 2023)

"The absolute privilege to defame in the course of judicial proceedings is not limited to statements during trial but may extend to steps taken prior to trial such as conferences and other communications preliminary to the proceeding. All doubt should be resolved in favor of its relevancy or pertinency. No strained or close construction will be indulged to exempt a case from the protection of the privilege. Thus, letters sent to persons having collateral interests in the litigation are privileged to the extent that the alleged defamatory statements have some relation to the subject matter of the proposed litigation and are made in furtherance of the objective of the litigation." *Club Valencia Homeowners Ass'n, Inc. v. Valencia Associates*, 712 P2d 1024, 1027-28 (Colo. App. 1985). In *Valencia*, a homeowners association had a dispute with seller of condominium units. An attorney representing the HOA wrote letters on behalf of the HOA to individual homeowners advising them of certain problems with "money unaccounted for, substantial problems with the common elements … and considerable maintenance and repair …" and requested that the homeowners assign their individual causes of action to the HOA. *Valencia, Id. at 1026*. After some attempt to resolve the dispute, the HOA filed a civil lawsuit "to seek redress from Valencia Associates for the defects, deficiencies, and missing sums of money to which the [HOA] is entitled." *Valencia Id.* at 1026. Defendant, Valencia Associates, filed counterclaims for misrepresentation against the individual homeowners asserting that they had signed

documents acknowledging Defendant's disclaimer of warranties, and also filed a counterclaim for libel against the HOA's attorney based on the letter he previously sent to the homeowners. The trial court dismissed the libel claim against the attorney as "absolutely privileged." *Valencia, Id. at 1026*. Defendant appealed the dismissal of its claim against the attorney. In upholding the dismissal, the Court of Appeals stated:

> The privilege applies, even though the publication was made outside the courtroom and no official function of the court or its officers was invoked. The publication was made in the course of judicial proceeding to achieve the objects of the litigation, and had a reasonable relation to the action. Accordingly, we hold that the letter was absolutely privileged and the libel claim was properly dismissed by the trial court.

Valencia, Id. at 1028.

In this case, the Court finds that whether Plaintiffs claims are limited to conduct of Matise only after he became counsel for the District, or also include conduct prior to the commencement of litigation, as has been variously argued by Plaintiffs, the litigation privilege applies to that conduct. Thus, Plaintiffs cannot show a likelihood of success on either their fraud or civil conspiracy claims.

§1983 Claims

"As relevant here, §1983[3] provides [in part] that:

> [A]ny person within the jurisdiction of the United States may invoke this cause of action against any other person who, acting 'under color of' state law, has deprived them of 'any rights, privileges, or immunities secured by the Constitution and laws of the United States.

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[3] "In Colorado, section 1983 actions are governed by the residual statute of limitations, section 13-80-102(1)(i), 5 C.R.S. (2003), with a time period of two years." *Civil Service Com'n v. Carney*, 97 P3d 961, fn3 (Colo. 2004). It thus appears, at the very least, that Plaintiffs' §1983 claims cannot be based on the 2018 O&M fees, or back-up fees.

Health and Hospital Corp of Marion County v. Talevski, 599 U.S. 166, 174-75, 143 S.Ct.1444, 216 L.Ed2d 183 (2023)

"'Section 1983 creates no substantive rights, but rather creates only a remedy against those who, acting under color of law, violate rights secured by federal statutory or constitutional law." *Churchill v. University of Colorado at Boulder*, 293 P3d 16, 33 (Colo. App. 2010). "The traditional definition of acting under color of state law requires that the defendant in a Section 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' Under such circumstances, it can be said that the defendant's alleged constitutional violation is 'fairly attributable to the state.'" *Angling v. City of Aspen, Colo.*, 552 F.Supp2d 1229, (D.Colo 2008), quoting *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed2d 40 (1988). An attorney performing traditional functions as counsel does not "act under color of state law," even where the attorney is hired by the state. *Polk County v. Dodson*, 454 U.S. 312, 324 102 S.Ct. 445, 70 L.Ed2d 509 (1981). Here, Plaintiffs do not assert that Matise was acting as a government or quasi-governmental agent. Rather, Plaintiffs describe Matise as a "friend of the defendants" and as "general and litigation counsel." The Court finds that such designations do not set forth an allegation that Matise was acting "under color of state law."

"It is beyond dispute that 'taxes and user fees are not takings." *Koontz v. St. Johns River Water Mgmt Dist*. 570 U.S. 595, 615, 133 S.Ct. 2586, 186 L.Ed2d 697 (2013). Imposition of fees, even if unauthorized by state or local law "do not create claims pursuant to §1983. … The Supreme Court has always been reluctant to expand the concept of substantive due process. Consequently, substantive due process claims are subject to heightened standards." *Rector v. City and County of Denver*, 348 F.3d

935, 948 (10th Cir. 2003). In *Rector*, the 10th Circuit ruled that Denver's imposition of late fees for failure to timely pay parking tickets, even if unauthorized by the municipal code, did not amount to a substantive due process violation and could not be redressed in a §1983 action. Thus, it appears that even if Plaintiffs claims that the fees assessed by the District are improper, such fees would not support Plaintiff's claim that they constitute a "takings" in the context of a §1983 claim

Similarly, Plaintiffs' §1983 contracts clause violation is problematic. The U.S. supreme court has "articulated the modern approach to analyzing Contract Clause claims, … hold[ing] that a law affecting a contractual right does not run afoul of the Contract Clause unless it constitutes a substantial impairment of the right … [and] … there is no Contract Clause violation if there is only an insubstantial impairment or any substantial impairment is reasonable and necessary to serve a significant and legitimate public purpose." *Justus v. State*, 337 P3d 1219, 1231 (Colo. App. 2012), citing to *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186, 112 S.Ct.1105, 117 L.Ed2d 328 (1992).

> At the same time, not all laws affecting pre-existing contracts violate the Clause. To determine when such a law crosses the constitutional line, this Court has long applied a two-step test. The threshold issue is whether the state law has 'operated as a substantial impairment' of a contractual relationship. In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights. If such factors show a substantial impairment, the inquiry turns to the means and ends of the legislation.

Sveen v. Melin, 584 U.S. ___, 138 S.Ct. 1815, 1821-22, 201 L.Ed2d 180 (2018)

Here, it is questionable whether there is a contract right established in the first place. Next there is a question whether imposition of a fee could be considered an interference

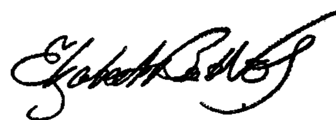
with such right, and finally, it is clear that Plaintiffs have a path to challenge any fee that might be considered as interfering with a contractual right. Thus, even if Plaintiffs' §1983 claim based on violation of the Contract Clause is pursued only against the District, it is unlikely that they will be able to prevail on a claim that the fee substantially impaired a contractual right.

CONCLUSION

For all of the reasons set out more fully above, the Court finds that Matise has established that Plaintiffs' claims of fraud, civil conspiracy and violation of §1983, as set forth against Matise in the complaint implicate Matise's right to engage in public speech as well as speech and conduct involved in judicial proceedings. The Court further finds that Plaintiffs have not established a likelihood of success on such claims. Application of the litigation privilege precludes the fraud and civil conspiracy claims because those claims are based on conduct of Matise as the attorney for the District. Plaintiff's §1983 claim fails against Matise, as he is not an person acting "under color of state law," and further it is highly questionable whether Plaintiffs can sustain their allegation of deprivation of a federal constitutional right based on the District's imposition of fees. For these reasons, Defendant Matise's motion to dismiss under §13-20-1101 is GRANTED.

SO ORDERED THIS October 25, 2023.

BY THE COURT:



Elizabeth Beebe Volz
District Court Judge