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| DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO<br>1437 Bannock Street<br>Denver, Colorado 80202 | DATE FILED: November 6, 2023 9:49 AM<br>CASE NUMBER: 2023CV32212 |
| | **COURT USE ONLY** |
| Plaintiff: EBERT METROPOLITAN DISTRICT, a Colorado Special District<br><br>v.<br><br>Defendant: TOWN CENTER METROPOLITAN DISTRICT, a Colorado Special District. | Case Number: 23CV32212<br><br>Courtroom: 280 |

**ORDER RE: MOTION TO DISMISS**

This matter is before the Court on Town Center Metropolitan District's Motion to Dismiss filed on September 1, 2023. Ebert Metropolitan District filed a response on September 22, 2023. Defendant filed a reply on September 29, 2023. The Court having reviewed the pleadings, the file, applicable law, and being fully advised in the premises, finds, and concludes as follows:

## BACKGROUND

Town Center Metropolitan District ("Plaintiff") and Ebert Metropolitan District ("Defendant") are organized and structured as special districts. The General Assembly has declared that "special districts are political subdivisions and instrumentalities of the state of Colorado and local governments thereof." C.R.S. § 32-1-1601. Once the procedural mechanisms have been complied with to become certified as a special district, that special district gains all the regular powers of a political subdivision of the state. C.R.S. § 32-1-305

Plaintiff and Defendant are located within Green Valley Ranch North ("GVRN"), a planned community in Denver, Colorado. In 2001, the original development company filed a

master declaration ("Master Declaration") which contains the covenants, conditions, and restrictions for the community. GVRN includes a golf course that is bound in significant part by a fence separating private residential lots from property owned by Defendant and the city of Denver. The Master Declaration provides that "[a]n owner shall not modify or replace a community fence adjoining its site without prior electronically transmitted or written approval from the [Defendant]." According to the Master Declaration, if a violation occurs, the violator is to remedy the violation or the Defendant itself is to otherwise remedy the noncompliance.

Plaintiff and Defendant entered into a service agreement ("Service Agreement") that was amended several times but is still in effect. This Service Agreement provides that Defendant "shall have the authority, duty, and power to enforce the Master Declaration…" In 2021, an audit identified forty-six illegal gate or fence violations adjacent to the golf course. Defendant informed the residents that the fences would not be required to be returned to their original condition. Plaintiff then notified Defendant of the Defendant's obligation to remedy the noncompliance in accordance with the Master Declaration. As of the date of the complaint, the community fence has not been restored to its original condition as provided for in the Master Declaration.

Plaintiff filed this lawsuit alleging that Defendant: 1) intentionally refused to restrict the residential owners adjacent to the golf course from modifying or replacing the community fence; 2) failed to maintain or repair the community fence; 3) failed to maintain or repair all common areas within the vicinity of the community fence; and 4) has arbitrarily and capriciously enforced the Master Declaration. Plaintiff requests that this Court issue a mandatory injunction, permanent injunction and specific performance, as well as a writ of mandamus. Defendant filed this Motion alleging the Plaintiff lacks subject matter jurisdiction and has failed to state a claim upon which relief may be granted.

## Standard of Review

A motion to dismiss a claim for lack of subject matter jurisdiction can be filed under C.R.C.P. 12(b)(1). Parties can raise an issue regarding subject matter jurisdiction at any time during a proceeding. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). The plaintiff bears the burden of proving that the court has jurisdiction to hear the case and keep the litigation moving forward. *Tidwell ex rel. Tidwell v. City and Cnty. of Denver*, 83 P.3d 75, 85 (Colo. 2003). Further, "[i]f the motion is a factual attack on the jurisdictional allegations of the complaint… the trial court may receive any competent evidence pertaining to the motion." *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (Colo. 1993). Rule 12(b)(1) consequently allows the court to weigh the evidence and satisfy itself as to whether there is jurisdiction to hear the case. *Medina*, 35 P.3d at 452.

State courts are courts of general jurisdiction, as such there is a "mandate to construe our rules liberally to secure the just, speedy, and inexpensive determination of every action." *Tidwell*, 83 P.3d at 85. Because there is no presumption against state court jurisdiction, courts are to construe immunity statutes narrowly and are to afford plaintiffs the reasonable inferences of their evidence. *Id.* Hence, even though the burden to prove subject matter jurisdiction falls on the plaintiff, "the burden is a relatively lenient one." *Id.* at 86.

Additionally, a motion to dismiss for failure to state a claim upon which relief can be granted can be filed under C.R.C.P. 12(b)(5). The purpose of a motion to dismiss for failure to state a claim is to test the sufficiency of the pleading's allegations and to permit early dismissal of meritless claims. *In re Estate of Everhart*, 493 P.3d 272, 275 (Colo. App. 2021). To test the sufficiency of the pleadings, Colorado has adopted a plausibility standard. *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016). "Under the plausibility standard from *Warne*, a complaint must state

a claim for relief that is plausible on its face to avoid dismissal…" *In re Marriage of Runge*, 415 P.3d 884, 887 (Colo. App. 2018) (internal citations omitted).

When assessing a Rule 12(b)(5) motion, courts accept all allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Bly v. Story*, 241 P.3d 529, 534 (Colo. 2010). Courts take such a perspective because motions to dismiss are viewed with disfavor. *Id.* Therefore, a dismissal is only proper when the facts alleged cannot, as a matter of law, support the claim for relief. *N.M. by and through Lopez v. Trujillo*, 397 P.3d 370, 374 (Colo. 2017).

On the other hand, a claim has facial plausibility when the plaintiff pleads facts that allow the court to draw reasonable inferences that the defendant is liable for the conduct alleged. *Barnes v. State Farm Mut. Auto. Ins. Company*, 497 P.3d 5, 10 (Colo. App. 2021). For a claim to be deemed plausible, the "factual allegations of the complaint must be enough to raise a right to relief above the speculative level." *Alderman v. Bd. of Governors of Colorado State University*, 2023 COA 61, 2023 WL 4241290 at *3 (Colo. App. June 29, 2023). To do so, a plaintiff must identify the grounds they are entitled to relief, as opposed to merely asserting conclusions and labels. *Id.* "A complaint is insufficient if it provides only bald assertions without further factual enhancement." *Id.* For a claim to be plausible, there must be more than the sheer possibility that the defendant acted unlawfully. *Id.* If the court can draw a reasonable inference that the defendant is liable for the conduct alleged, then the claim has facial plausibility. *Id.*

## Analysis

### A. Specific Performance

"Specific performance is a remedy developed by courts of equity to provide relief when the legal remedies of damages and restitution are inadequate." *Air Solutions, Inc. v. Spivey*, 529 P.3d 644, 655 (Colo. App. 2023). However, in bringing legal action against a governmental body,

the concept of sovereign immunity typically applies and can limit potential avenues of relief. *Thompson Creek Townhomes, LLC v. Tabernash Meadows Water and Sanitation Dist.*, 240 P.3d 554, 555 (Colo. App. 2010).

While the United States Supreme Court has emphasized the difference between monetary compensation and specific performance as types of relief against a sovereign, Colorado had historically joined a minority of states in employing a different reasoning. *Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C.*, 176 P.3d 737, 744-745 (Colo. 2007). Colorado courts have held that,

> "The applicable principle is that when a state enters into authorized contractual relations it thereby waives immunity from suit… A state or any of its departments entering into contracts lays aside its attributes of sovereignty and binds itself substantially as one of its citizens does when he enters into a contract, and, in general, its contracts are interpreted as the contracts of individuals are and are controlled by the same laws."

*Ace Flying Service, Inc. v. Colorado Dept. of Agriculture*, 314 P.2d 278, 280 (Colo. 1957). The Colorado Supreme Court later deemed it necessary to distinguish between types of relief that could be obtained against the government for breach of contract. *Wheat Ridge*, 176 P.3d at 745. The *Wheat Ridge* court found that the *Ace* decision did not address the issue of specific performance and reasoned that,

> "[a]part from any implied waiver of sovereign immunity, or consent to be sued in court, the question of equitable relief for breach of contract, or specific performance, implicates an additional concern for the separation of governmental powers. As recognized by the Supreme Court, there are 'the strongest reasons of public policy' for the rule that specific performance cannot be had against the sovereign."

*Id.* *Wheat Ridge* held the judiciary lacks the authority to order specific performance of core governmental powers such as eminent domain. *Id.* at 746. Other examples of powers reserved to the state through core government functions include traffic regulation, business and occupational

licensing, nuisance abatement, and prevention of breaches of the peace. *Crossroads West Ltd. Liability v. Town of Parker*, 929 P.2d 62, 64 (Colo. App. 1996).

However, this principle has since been expanded beyond core governmental values. *Thompson Creek Townhomes*, 240 P.2d at 556. The Colorado Court of Appeals has held that "[w]e do not read *Wheat Ridge* so narrowly to require that an activity must be a core governmental power in the nature of condemnation, for example, in order to insulate a governmental entity from specific performance." *Id.* The *Thompson Creek Townhomes* court could not find a single Colorado case or statute, or in any United States jurisdiction, that allowed for specific performance against a governmental body. *Id.*

In this case, Plaintiff asserts that Defendant waived any defense to litigation and consented to being sued. Plaintiff argues it is not seeking specific performance of a core governmental power, that the Service Agreement should be construed against Defendant since it was the drafter, and that specific performance should be granted so that Defendant cannot avoid its duties under the Master Declaration.

Defendant maintains that *Thompson Creek Townhomes* is directly controlling and requires dismissal of this claim. Defendant argues that Plaintiff ignores the portion of *Thompson Creek Townhomes* that discussed the right to sue a government entity for breach of contract recognized in *Ace Flying Services* is subject to the "additional concern for the separation of powers," which concern was defined to preclude specific performance. Defendant maintains that while Plaintiff is asserting an unavailable claim for specific performance, it does not necessarily render the contract unenforceable.

The Court finds that it lacks subject matter jurisdiction to hear Plaintiff's claim for specific performance. While *Ace Flying Service* found that a state waives immunity from litigation when

it enters a contract, the Colorado Supreme Court plainly held in *Wheat Ridge* that *Ace Flying Service* did not involve claims for specific performance. Further, the state supreme court and court of appeals have held that specific performance cannot be granted against a governmental entity for core functions and non-core functions. Plaintiff's argument is unavailing as it argued that the relief requested was for a non-core governmental function and/or because Defendant waived immunity from litigation.

Plaintiff's claim for specific performance against Defendant is dismissed.

**B. Mandatory Injunction**

While specific performance remedies a past contract breach by fulfilling the expectations of the parties, an injunction is generally a preventative measure aimed at future acts. *Snyder v. Sullivan*, 705 P.2d 510, 513 (Colo. 1985). Even with this distinction, a mandatory injunction "resembles specific performance in its requirement of affirmative performance. However, its essential purpose, like that of a negative injunction, is to preserve the status quo and prevent injury, rather than to redress past wrongs." *Id.* at 514 n.5. Nevertheless, mandatory injunctions differ from specific performance in that mandatory injunctions require the court to choose a method of performance that includes a range of possibilities beyond the contract itself. *Id.*

When examining an alleged contract breach and potential remedies, courts construe an agreement in its entirety to give effect to each contractual provision. *Colowyo Coal Co. v. City of Colorado Springs*, 879 P.2d 438, 445 (Colo. App. 1994). If the meaning of the contract can be determined by the written agreement, the parties are bound by what it says. *Id.* However, all contracts are subject to the police power of the state, and neither the state nor a city may contract away its police powers. *Id.* at 447.

In this case, Plaintiff maintains that the mandatory injunctive relief claim is different than the specific performance claim. Plaintiff argues mandatory injunctions require courts to choose from a wide range of possibilities, rather than one already defined in the contract, thus encompassing different considerations. Plaintiff reasons the Master Declaration must be enforceable by some means and injunctive relief could be the appropriate remedy in this situation. Plaintiff further contends that an injunction is necessary to prevent alienation of the property. In this regard, Plaintiff asserts that an injunction would preserve the status quo and protect its rights pending a final determination on the matter.

Defendant asserts that this Court cannot grant a mandatory injunction. Defendant argues there are no reported cases in Colorado that hold that courts have the authority to enter injunctions compelling political subdivisions to perform their contractual obligations. Defendant further argues there is no substantive difference between ordering a governmental entity to specifically perform a contract and entering a mandatory injunction. Defendant therefore argues that the requested mandatory injunctive relief is essentially the same as the requested specific performance relief that was denied by the courts in *Wheat Ridge* and *Thompson Creek Townhomes*.

Both parties present the Court with conflicting viewpoints on the applicable case law. However, there is a court of appeals precedent on point with the issue presented. In *Plains Metro. Dist. v. Ken-Caryl Ranch Metro. Dist.*, a special district sued another special district over an alleged contract breach. 250 P.3d 697, 699 (Colo. App. 2010). In that case, a service plan was created in which one special district was to build recreational facilities. *Id.* Several years later, the district that was obliged to construct the facilities informed the other district of its intent to dissolve and not begin construction. *Id.* The other special district then began legal action, claiming the service plan mandated the facilities be built. *Id.* In the words of that court, "[t]he question,

therefore, is whether courts can compel special districts to comply with the mandatory terms of their service plans." *Id.* at 700.[1]

That court examined C.R.S. § 32-1-207(1), which provides that "the organization of the special district, the facilities, services, and financial arrangements of the special district shall conform so far as practicable to the approved service plan." *Id.* The *Plains Metro.* court determined that unless a special district can provide some reason why it is not practicable to do so, it must conform to the service plan. *Id.* That court held,

> "Section 32-1-207(3)(a) empowers a court – acting sua sponte or upon motion of the county or municipal board or 'any interested party' – to enjoin a district's material departure from the plan… Accordingly, injunctive relief is expressly authorized by statute. And where the material departure from a service plan involves inexcusable inaction, such relief may take the form of a mandatory injunction."

*Id.* (emphasis added).

A corresponding situation is presented to this Court. Both cases involve special districts, mandatory language within the respective service plans, allegations that the mandatory language was being neglected, and the question of whether courts can employ mandatory injunctive relief as a means of recourse.[2] Given the judicial precedent and related statutes, this Court finds that it has subject matter jurisdiction to hear this case and finds that Plaintiff has stated a claim that is plausible claim.

**C. Writ of Mandamus**

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[1] When assessing the mandatory language in the service plan, the *Plains Metro.* court held that "statutory provisions that an entity 'will' do something typically are construed, like those using the term 'shall,' as mandatory." *Id.* at 699.

[2] Plaintiff began this litigation, in part, on language within the Service Agreement that Defendant "shall have the authority, duty, and power to enforce the Master Declaration…" In *Plains*, the language in the service agreement was that the facilities "will include a swim and tennis facility," that they "will include a swim pool, 2 tennis courts…" and that "the ball field park will consist of 3 combination softball/soccer fields." *Plains Metro. Dist.*, 250 P.3d at 699.

"Mandamus relief represents an extraordinary remedy awarded not as a matter of legal right, but in the exercise of sound judicial discretion." *Rocky Mountain Animal Defense v. Colorado Div. of Wildlife*, 100 P.3d 508, 517 (Colo. App. 2004). This remedy can be used to compel performance by public officials of a duty held by virtue of their office or which the law enjoins as a duty resulting from office. *Board of Cnty. Com'rs of Cnty. of Archuleta v. Cnty. Road Users Ass'n*, 11 P.3d 432, 437 (Colo. 2000). While C.R.C.P. 106 abolished the special form of pleading for a writ of mandamus, "the substantive aspects of such proceedings are preserved, and relief of the same nature as was formerly provided in mandamus actions may be granted in accordance with precedents established under the old practice." *Ahern v. Baker*, 366 P.2d 366, 368 (Colo. 1961).

To obtain mandamus a plaintiff must prove that: 1) they have a clear right to the relief sought; 2) the defendant has a clear duty to perform the act requested; and 3) there is no other available remedy. *Gramiger v. Crowley*, 660 P.2d 1279, 1281 (Colo. 1983). The power of courts to grant this type of relief is extremely limited and generally not available to an administrative agency performing duties delegated to the entity. *Jones v. Colorado State Bd. of Chiropractic Examiners*, 874 P.2d 493, 494 (Colo. App. 1994). "Mandamus lies to compel the performance of a purely ministerial duty involving no discretionary right and not requiring the exercise of judgment. It does not lie where the performance of a trust is sought which is discretionary or involves the exercise of judgment." *Bd. of Cnty. Comm'rs of Cnty. of Archuleta*, 11 P.3d at 437. Mandamus will therefore not regulate a general course of conduct over a series of continuous acts that are performed under varying conditions. *Ahern*, 366 P.2d at 369. Rather, mandamus relief "can only command that an agency act, thereby setting it in motion." *Rocky Mountain Animal Defense*, 100 P.3d at 517.

Plaintiff argues that while mandamus cannot be used to compel discretionary acts, Defendant does not have the right to not act at all concerning the Master Declaration and Service Agreement. Plaintiff asserts that Defendant's reliance on *Rocky Mountain Animal Defense* is misplaced, as that case established that mandamus can be used to compel an agency to use its discretion but will not tell that agency how to exercise its discretion. Finally, Plaintiff maintains that the residents were taxed according to the benefits supposedly given under the Master Declaration, and thus Plaintiff and the residents did not get their benefit of the bargain.

Defendant reasons that C.R.C.P. 106 abolished mandamus relief and Plaintiff's claim should accordingly be dismissed. Defendant also argues that mandamus can only be obtained to compel action stemming from an office, trust, or statute, whereas Plaintiff seeks to enforce the Master Declaration and Service Agreement. According to Defendant, Plaintiff requests the regulation of a long series of conduct where discretionary decisions will be involved, and that is the type of conduct *Rocky Mountain Animal Defense* held was not available through mandamus.

The Court first examines Defendant's claim that this Court lacks subject matter jurisdiction. Relating to Defendant's argument that the claim should be dismissed because of the language of C.R.C.P. 106, the Colorado Supreme Court has expressly held that the substantive aspects of mandamus proceedings are still preserved, and the same relief is available. Further, *Rocky Mountain Animal Defense* found that mandamus can compel a governmental body to exercise its discretion but cannot direct how this discretion is to be used. Additionally, Plaintiff describes the relief requested as directing Defendant to act in some capacity, as opposed to requesting a long series of continuous actions.

The Court once again notes that while Plaintiff has the burden of proving that this Court has subject matter jurisdiction, this standard is lenient. The Court finds that Plaintiff has pled in a manner sufficient to meet this burden and the Court has jurisdiction hear this claim.

Next, the Court examines Defendant's contention that Plaintiff has not pled a claim upon which relief may be granted. Plaintiff contends that Defendant has not acted in accordance with the Master Declaration and Service Agreement, that Defendant has a duty to perform the acts requested, and no other adequate remedy is available because Defendant is tasked with enforcing these agreements. The Court finds and concludes that Plaintiff has pled facts that allow for an inference that Defendant is liable for the conduct alleged, and these facts are at least above the speculative level. The Plaintiff has met the plausibility standard.

**D. Attorney Fees**

In determining whether attorney fees can be awarded, the court must proceed according to the American rule, which precludes such an award absent a contractual, statutory, or procedural rule proving otherwise. *City of Aurora ex rel. Util. Enter. v. Colorado State Eng'r*, 105 P.3d 595, 618 (Colo. 2005). The Colorado General Assembly has provided that parties may be awarded attorney fees and costs if a claim is substantially frivolous, substantially groundless, or substantially vexatious. C.R.S. § 13-17-101. This was enacted because "courts of record of this state have become increasingly burdened with litigation which is straining the judicial system and interfering with the effective administration of civil justice." *Id.* This statute is thus an important sanction available to punish an attorney or party who engages in conduct that improperly instigates or prolongs litigation. *In re Marriage of Aldrich*, 945 P.2d 1370, 1378 (Colo. 1997).

A claim is substantially frivolous if no rational argument based on the evidence or law can be made to support that claim or defense. *City of Aurora ex rel. Util. Enter.*, 105 P.3d at 620.

"Meritorious actions that prove unsuccessful and good faith attempts to extend, modify, or reverse existing law are not frivolous." *Id.* A claim is considered substantially groundless if the allegations are not supported by any credible evidence at trial. *Consumer Crusade, Inc. v. Clarion Mortg. Cap. Inc.*, 197 P.3d 285, 289 (Colo. App. 2008). "The test for groundlessness is based on the presumption that the proponent has a valid legal theory but can offer little or no evidence to support the claim." *Id.* Additionally, a claim can be substantially vexatious if brought or maintained in bad faith to annoy or harass another. *Id.* This can include conduct that is arbitrary, abusive, stubbornly litigious, or disrespectful of truth. *Id.* at 289-90.

The trial court is in the best position to determine if claims are substantially frivolous, groundless, or vexatious. *Mulberry Frontage Metro. Dist. v. Sunstate Equipment Co., LLC*, 2023 COA 66, 2023 WL 4502338 at *8 (Colo. App. July 13, 2023). A trial court therefore has broad discretion in such a ruling and will not be overturned absent an abuse of discretion. *Consumer Crusade*, 197 P.3d at 289. While § 13-17-101 requires a court to make specific factual findings when granting an award of fees, a court does not have to do so when denying an award. *Munoz v. Measner*, 247 P.3d 1031, 1032 (Colo. 2011).

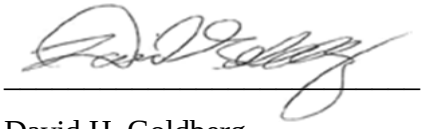
The Court denied the Motion regarding Plaintiff's claims for a mandatory injunction and writ of mandamus. Therefore, the Court will only address whether Defendant is entitled to an award of fees for Plaintiff's claim for specific performance. Given the facts, pleadings, and arguments, the Court finds that Plaintiff's claim for specific performance was not substantially frivolous, substantially groundless, or substantially vexatious. Plaintiff, while unsuccessful on this issue, brought to the Court a good faith argument to support its claim. Further, Plaintiff does not appear to have brought this claim with the intent of annoying or harassing Defendant. The Court therefore denies Defendant's motion for fees and costs under C.R.S. § 13-17-101.

## Conclusion

The Court Grants Defendant Town Center Metropolitan's Motion to Dismiss the Second Claim for Relief for Specific Performance. The Court Denies Defendant's Motion to Dismiss the First Claim for Relief for Mandatory Injunction and Third Claim for Relief for Writ of Mandamus.

SO ORDERED: this 6th day of November 2023

BY THE COURT:



David H. Goldberg
District Court Judge