

DISTRICT COURT, LARIMER COUNTY
STATE OF COLORADO
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CASE NUMBER: 2018CV140

Plaintiff(s):
KENDRA MUSGRAVE

v.

Defendant:
LOVELAND MUNICIPAL COURT JUDGE, GERRI (sic)
R. JONESON

COURT USE ONLY

Attorney for Defendant
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Case No.: 2018CV140

Division/Courtroom:

DEFENDANT'S MOTION TO DISMISS

Cathy Havener Greer of Wells, Anderson & Race, LLC, on behalf of Defendant, files this Motion to Dismiss pursuant to C.R.C.P. 12(b)(1) and 12(b)(5), and in support thereof, states as follows:

INTRODUCTION

Plaintiff's Amended Complaint, filed April 16, 2018 by Plaintiff, who is pro se, purports to be brought pursuant to C.R.C.P. 106(a)(2) and challenges the judicial actions of Loveland Municipal Court Judge Geri R. Joneson in a municipal court matter. The Amended Complaint and exhibits thereto are vague and rambling and do not clearly and concisely show that Plaintiff

is entitled to relief. Plaintiff's Amended Complaint attempts to assert five claims for relief: 1) First Claim for Relief, the right to represent oneself; 2) Second Claim for Relief for issuance of a judgment; 3) Third Claim for Relief for service of all orders on Plaintiff; 4) Fourth Claim for Relief challenging the propriety of a potential nunc pro tunc order; and 5) Fifth Claim for Relief for an alleged violation of Plaintiff's asserted right to due process.

The essence of Plaintiff's Amended Complaint appears to be a due process challenge to the actions of Judge Joneson and is therefore barred by the absolute judicial immunity of Defendant Joneson, Plaintiff's failure to comply with the Colorado Governmental Immunity Act ("CGIA"), the Order dismissing the municipal case in question and the case law governing writs of mandamus, *see* C.R.C.P. 106(a)(2).

Accordingly, the Court should dismiss Plaintiff's claims pursuant to C.R.C.P. 12(b)(1) for lack of jurisdiction and C.R.C.P. 12(b)(5) for failure to state a claim.¹

ARGUMENT

A motion to dismiss pursuant to C.R.C.P. 12(b)(1) challenges the Court's subject-matter jurisdiction. Under this rule, "the plaintiff has the burden of proving jurisdiction." *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). See also, *Trinity Broad., Inc. v. City of Westminster*, 848 P.2d 916, 924-25 (Colo. 1993) (Plaintiff must "prove jurisdiction"). This Court lacks subject matter jurisdiction because of Plaintiff's failure to comply with the CGIA's notice requirement set forth in C.R.S. § 24-10-109.

¹ Because Plaintiff is *pro se*, the C.R.C.P. 121 § 1-15(8) duty to confer does not apply.

To the extent that Plaintiff alleges a due process violation, her claims lie in tort and are subject to the jurisdictional prerequisite of filing a CGIA notice pursuant to C.R.S. § 24-10-109. Under the CGIA, any plaintiff “claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment . . . shall file a written notice as provided in this section within one hundred eighty-two days after the date of the discovery of the injury.” C.R.S. § 24-10-109(1). Compliance with this CGIA notice requirement “shall be a jurisdictional prerequisite,” and “failure of compliance shall forever bar any such action.” *Id.*; *see also Villalpando v. Denver Health & Hosp. Auth.*, 181 P.3d 357, 361 (Colo. App. 2007). A claimant’s failure to adhere to the notice requirements of the CGIA “requires a court to dismiss the action for lack of subject-matter jurisdiction.” *See Mesa County Sch. Dist. No. 51 v. Kelsey*, 8 P.3d 1200, 1206 (Colo. 2000). Here, Plaintiff’s failure to comply with the CGIA notice requirement requires dismissal of her Complaint.

In contrast to a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim, the Court is not required to treat the facts alleged by the non-moving party as true when adjudicating a C.R.C.P. 12(b)(1) motion. *Medina*, 35 P.3d at 452. Instead, the Court may “weigh the evidence and satisfy itself as to the existence of its power to hear the case.” *Id.* (quoting *Trinity Broad.*, 848 P.2d at 925). The Court may “receive any competent evidence pertaining to the motion.” *Trinity Broad.*, 848 P.2d at 924. “Any factual dispute upon which the existence of jurisdiction may turn is for the court alone, and not a jury to determine.” *Id.*, 848 P.2d at 924-25.

Plaintiff’s Amended Complaint fails to state a claim upon which relief may be granted under C.R.C.P. 12(b)(5). The convoluted allegations of the Amended Complaint appear to allege

that Plaintiff was a defendant in a municipal court matter in 2016 and is not in possession of a court order dismissing the action. The matter at issue was dismissed by Court Order September 6, 2016. *See Exhibit A.* This Order eradicates each of Plaintiff's five purported claims. The underlying case about which Plaintiff complains was dismissed and is not viable.

Plaintiff's assertion of jurisdiction by invoking C.R.C.P. 106(a)(2) does not save her Amended Complaint. First, she ignores the fact that an order dismissing the action against her was entered nearly two years ago. Second, she seeks an injunction to require Judge Joneson to issue an order dismissing the municipal action against her; however, mandamus will not "lie against a court, unless it be clearly shown that such court has refused to perform some manifest duty." *See Lindsey v. Carlton*, 44 Colo. 42, 48 (1908). (It is a fundamental principle that mandamus lies to compel the performance of a purely ministerial duty, involving no discretionary right and not requiring the exercise of judgment.) *See People v. Gangruth*, 990 P.2d 697, 700 (Colo. 1999).

Ultimately, the alleged actions or omissions about which Plaintiff complains are judicial acts for which Judge Joneson has absolute judicial immunity from suit. As the Colorado Supreme Court affirmed in *Hoffler v. Colorado Department of Correction*, 27 P.3d 371, 373-374 (Colo. 2001), absolute immunity has been extended to state judges for their judicial acts and to other persons who perform official functions in the judicial process. Plaintiff's claims against Judge Joneson cannot go forward and must be dismissed.

CONCLUSION

Plaintiff's claims against Judge Joneson must be dismissed for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction.

WHEREFORE, Judge Geri R. Joneson, respectfully moves the Court to dismiss Plaintiff's Amended Complaint and all claims against her for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1).

Dated this 15th day of May, 2018.

Respectfully submitted,

WELLS, ANDERSON & RACE LLC

/s/ Cathy Havener Greer

By:

Cathy Havener Greer, #10935
Attorney for Defendant

Printed copy with original signature available for inspection at the office of Wells, Anderson & Race, LLC

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2018, a true and correct copy of the foregoing **DEFENDANT'S MOTION TO DISMISS** was electronically delivered via Colorado Courts E-filing and service upon the following, pursuant to C.R.C.P. 121, § 1-26(3):

Kendra Musgrave
P.O. Box 1101
Greeley, Colorado 80631
Pro se Plaintiff

/s/ Barbara McCall

Printed copy with original signature available for inspection at the office of Wells, Anderson & Race LLC