

<p>District Court, Larimer County, Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521 (970) 494-3500</p> <hr/> <p>Plaintiff: Kendra Musgrave</p> <p>v.</p> <p>Defendant: Loveland Municipal Court Judge Geri R. Joneson</p>	<p>DATE FILED: June 21, 2018 CASE NUMBER: 2018CV140</p> <hr/> <p>▲ FOR COURT USE ▲</p> <hr/> <p>Case No.: 18CV140 Courtroom: 5B</p>
<p align="center">ORDER GRANTING DEFENDANT’S MOTION TO DISMISS AND DENYING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT</p>	

This matter comes before the Court on Defendant’s Motion to Dismiss and Plaintiff’s subsequent Motion for Summary Judgment. The Court has considered the Motion, Response, and Reply and relevant law and finds and orders as follows:

Plaintiff brought this Mandamus Complaint pursuant to C.R.C.P. 106(a)(2). Although not clearly pled, the Plaintiff appears to assert five causes of action:

- (1) Right to represent oneself;
- (2) Issuance of a judgment;
- (3) Service of all orders on Plaintiff;
- (4) Challenge to the propriety of a potential nunc pro tunc order; and
- (5) Alleged violation of Plaintiff’s right to due process.

Defendant filed this Motion to Dismiss 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. Defendant asserts her absolute judicial immunity, Plaintiff’s failure to comply with the Colorado Governmental Immunity Act (CGIA), the Order dismissing the municipal case at issue and case law governing writs of mandamus as bases for the Motion to Dismiss.

Motions to Dismiss under C.R.C.P. 12(b)(5) and 12(b)(1)

A motion to dismiss for failure to state a claim tests the sufficiency of a plaintiff’s complaint and is looked on with disfavor. *Allen v. Steele*, 252 P.3d 476, 481 (Colo. 2011).

A complaint must contain sufficient factual allegations to raise a right to relief above the level of speculation to the level of plausibility. *Warne v. Hall*, 373 P.3d 588, 595 ¶ 24 (Colo. 2016).

On a motion to dismiss, a court must accept as true all averments of material fact in a complaint. *Id.* at 591 ¶ 9. However, legal conclusions and conclusory allegations are not entitled to be assumed true. *Id.*; *id.* at 596 ¶ 27. A court must only consider the complaint's contents, but it may examine documents referred to in the complaint without converting the motion into one for summary judgment. *Yadon v. Lowry*, 126 P.3d 332, 335-36 (Colo.App. 2005). Ultimately, a claim that is not plausible on its face will be dismissed for failure to state a claim. *Warne*, 373 P.3d at 595.

A motion to dismiss for lack of subject matter jurisdiction may be brought at any time and the plaintiff has the burden of proving jurisdiction. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). A court is authorized to make appropriate factual findings and it "need not treat the facts alleged by the non-moving party as true as it would under C.R.C.P. 12(b)(5)." *Id.*, citing *City of Lakewood v. Brace*, 919 P.2d 231, 244 (Colo. 1996). Motions brought pursuant to Rule 12(b)(1) permit the court "to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Trinity Broadcasting, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993).

Application

The municipal charges against Plaintiff were dismissed on September 6, 2016, the same day that Plaintiff filed a motion to represent herself and terminated her former attorney. A copy of the court's order was sent to Plaintiff's former attorney, George Kokus, on September 8, 2016. Plaintiff asserts that she was not served with a copy of the order dismissing the charges. She asserts the lack of service upon herself rendered the Order void. Finally, she asserts that certain subpoenas remain outstanding.

While an order must be served upon each party to a case, the service in this case to Plaintiff's former attorney does not render the Order and the dismissal of the case void. Service may be made by mailing a copy to the party's attorney of record. C.R.C.P. 5(b). Though Plaintiff filed a motion to represent herself that day, the case was effectively dismissed and there would have been no need for her to represent herself, rendering that motion moot. Any subsequent subpoenas or motions were moot.

Furthermore, Plaintiff has alleged no injury resulting from the failure to serve her personally with the order of dismissal. The case against her being dismissed, she had no further charges to defend herself against. The Plaintiff has failed to show harm from the fact that her former attorney received the order dismissing her case. Plaintiff has failed to state a claim upon which relief could be granted.

Further, Plaintiff's complaint fails for lack of subject matter jurisdiction and judicial immunity. Plaintiff failed to file notice of a claim pursuant to the CGIA within the time limitations set forth in the Act. The CGIA requires that 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). Plaintiff's claims against Judge Joneson are subject to this jurisdictional requirement and stem from the dismissal of the case in September 2016, more than 18 months prior to the filing of this Complaint. This Court thus lacks subject matter jurisdiction.

Additionally, the actions or omissions about which Plaintiff complains are judicial acts for which Judge Joneson has absolute judicial immunity from suit. "In Colorado, absolute immunity has been extended to judges, prosecutors, witnesses, and other persons who perform official functions in the judicial process." *Hoffler v. Colorado Dept. of Corrections*, 27 P.3d 371, 374 (Colo. 2001).

The Motion to Dismiss pursuant to C.R.C.P. 12(b)(1) and 12(b)(5) is granted. Accordingly, Plaintiff's Motion for Summary Judgment is moot.

Dated: June 21, 2018.

BY THE COURT:



Gregory M. Lammons
District Court Judge