

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Court Address: 1437 Bannock St., Room 256
Denver, CO 80202

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CASE NUMBER: 2015CV32427

Plaintiffs: ARTHUR KEITH WHITELOW, III, JOHN DERUNGS, KATHERINE K. MCCRIMMON, LAURA PITMON, DENISE SIGON f/k/a DENISE L. SAGER, and ALAN and RITA SINGER.

Defendants: THE DENVER CITY COUNCIL (including the individual Council members in their official capacity, Albus Brooks, Charlie Brown, Jeanne Faatz, Christopher Herndon, Robin Kniech, Peggy Lehmann, Paul López, Judy H. Montero, Chris Nevitt, Debbie Ortega, Jeanne Robb, Susan Shepherd, Mary Beth Susman;
THE MANAGER OF COMMUNITY PLANNING AND DEVELOPMENT (Brad Buchanan, in his official capacity);
THE DENVER PLANNING BOARD (including the individual Board members in their official capacity, Andy Baldyga, Jim Bershof, Shannon Gifford, Renee Martinez-Stone, Brittney Morris Saunders, Joel Noble, Susan Pearce, Arleen Taniwaki, Julie Underdahl, Frank Schultz, and Chris Smith);
THE CITY AND COUNTY OF DENVER; and
CEDAR METROPOLITAN LLC (the Property Owner/zoning Applicant).

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Case Number: 2015cv032427

Courtroom: 269

**PLAINTIFFS' BRIEF IN OPPOSITION TO
"DEFENDANT CEDAR METROPOLITAN, LLC'S MOTION TO DISMISS" AND
PLAINTIFFS' REQUEST TO STRIKE THAT MOTION AS UNTIMELY**

Plaintiffs file this Brief in opposition to the motion to dismiss that Defendant Cedar Metropolitan, LLC (“Cedar”) filed on September 10, 2015. The Court should deny that motion because: a) that motion to dismiss is untimely; b) Plaintiffs timely served Cedar Metropolitan, LLC’s registered agent on July 6, 2015; c) Cedar is in default in this action and therefore should not be allowed to participate in the briefing; and d) Cedar waived under C.R.C.P. 12(h)(1) any objection to the insufficiency of service of process by failing to file a timely motion to dismiss under C.R.C.P. 12(b)(4) by July 27, 2015.

Because Cedar filed its motion to dismiss 45 days late, on September 10, 2015, instead of the date it was due under C.R.C.P. 12(a) of July 27, 2015, Plaintiffs also request that the Court strike that motion and grant Plaintiffs’ pending motion for entry of an interim default judgment against Cedar. *See, e.g., AA Construction Co. v. Gould*, 470 P.2d 916, 918 (Colo. App. 1970) (when party did not timely move to extend court deadline with evidence showing excusable neglect, there was no proper basis for trial court to deny motion to strike).

Finally, if the Court considers it necessary or appropriate for Plaintiffs to personally serve Cedar’s registered agent again with a copy of Plaintiffs’ Summons and Complaint, Plaintiffs request that the Court briefly extend the time for service on Cedar under C.R.C.P. 4(m) to allow a period of 14 days after the Court’s order for Plaintiffs to re-serve that Summons and Complaint on Cedar’s registered agent. There is good cause for such an extension because Plaintiffs have a valid basis to believe they already properly served Cedar’s registered agent on July 6, 2015.

Plaintiffs already articulated most of the arguments relevant to this opposition brief in their September 16, 2015 reply brief in support of their motion for entry of an interim default

judgment. Where applicable, Plaintiffs incorporate those arguments by reference, rather than repeat them here.

Argument

1. Plaintiffs personally served Cedar's registered agent on July 6, 2015, the same day they filed this lawsuit. *See* Plaintiffs' Return of Service (filed August 6, 2015); Plaintiffs' Motion for Entry of Interim Default Judgment (filed September 8, 2015); Plaintiffs' Reply Brief in support of their Motion for Entry of Interim Default Judgment (filed September 16, 2015), at 2-5.

2. If Cedar sought to dispute the sufficiency of that personal service on its registered agent, its recourse was to file a timely motion to dismiss for insufficiency of service of process under C.R.C.P. 12(b)(4) within the 21-day deadline for response in C.R.C.P. 12(a), i.e., by July 27, 2015. *See* Plaintiffs' Reply Brief in support of their Motion for Entry of Interim Default Judgment (filed September 16, 2015), at 5-6.

3. By failing to file a timely Answer or Rule 12(b) motion by July 27, 2015, Cedar waived under C.R.C.P. 12(h)(1) any defense or objection to the sufficiency of service and is now in default. *See* Plaintiffs' Reply Brief in support of their Motion for Entry of Interim Default Judgment (filed September 16, 2015), at 6.

4. Therefore, Cedar's motion to dismiss relying on the 63-day deadline in C.R.C.P. 4(m) and accompanying motion for attorney's fees, are baseless. The Court should deny that motion.

5. If the Court considers it necessary or appropriate for Plaintiffs to personally serve Cedar's registered agent again with a copy of Plaintiffs' Summons and Complaint, Plaintiffs

request that the Court briefly extend the time for service on Cedar under C.R.C.P. 4(m) to allow a period of 14 days after the Court's order for Plaintiffs to re-serve that Summons and Complaint on Cedar's registered agent.

Conclusion

Therefore, the Court should strike Cedar's motion to dismiss as untimely or deny it.

If the Court considers it necessary or appropriate for Plaintiffs to personally serve Cedar's registered agent again with a copy of Plaintiffs' Summons and Complaint, Plaintiffs request that the Court briefly extend the time for service on Cedar under C.R.C.P. 4(m) to allow a period of 14 days after the Court's order for Plaintiffs to re-serve that Summons and Complaint on Cedar's registered agent.

Dated: September 29, 2015.

/s/ Gregory J. Kerwin

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2015 a copy of the PLAINTIFFS' BRIEF IN OPPOSITION TO "DEFENDANT CEDAR METROPOLITAN, LLC'S MOTION TO DISMISS" AND PLAINTIFFS' REQUEST TO STRIKE THAT MOTION AS UNTIMELY was served on the parties listed below through the ICCES system:

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