

SIXTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF LUNA

2011 JUN 29 PM 3:40

LARRY CALDWELL,
Plaintiff,

Judge V. M. Montes
DEPUTY

vs.

NO. CV-2011-00179
Judge Viramontes

CITY OF DEMING,
Defendant.

**MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS**

Defendant, by and through his attorney, Jim Foy, in support of the Motion to Dismiss filed pursuant to 1-012 (B) (6) NMRA states as follows:

Plaintiff failed to file suit within the statute of limitations and to provide notice as required by statute.

1. Section 37-1-24 NMSA 1978 provides in pertinent part:

No suit, action or proceeding at law or equity, for the recovery of judgment upon, or the enforcement or collection of any sum of money claimed due from any city, town or village in this state, or from any officer as such of any such city, town or village in this state, arising out of or founded upon any ordinance, . . . , shall be commenced except within three years next after the date of the act of omission or commission giving rise to the cause of action, suit or proceeding . . .

In order for this act to stand it had to be brought within 3 years of the date of the notice, April 2003. In order to bring this suit, Plaintiff must provide proof of notice within 3 years of filing suit, i.e. June of 2008. Plaintiff has failed to plead or provide any notice within the last three years as required by Section 10-15-3B, NMSA 1978.

Section 10-15-3B, NMSA 1978 in pertinent part states as follows:

B. All provisions of the Open Meetings Act shall be enforced by the attorney general or by the district attorney in the county of jurisdiction. However, nothing in that act shall prevent an individual from independently applying for enforcement through the district courts, **provided that the individual first provides written notice of the claimed violation to the public body (emphasis added) and that the public body has denied or not acted on the claim within fifteen days of receiving it. . . .**

Plaintiff has failed to plead any facts alleging that he gave notice to defendant within the last three years as required by statute giving rise to a cause of action for violation of the Open Meetings Act;

New Mexico courts are unwilling to allow claims to proceed that are not supported by sufficient specific factual basis. Saylor v. Valles, 133 N.M. 432, 63 P.3d 1152 2003-NMCA-037, 2003. The United States Supreme Court in Bell Atlantic Corp. v Twombly, 550 U.S. 544 (2007) affirmed the dismissal of an antitrust conspiracy complaint for failure to state a claim upon which relief could be granted. The court held that "Factual allegations must be enough to raise a right to relief above the speculative level". *Id.* At 546. The Court went on to say ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the assumption that all the allegations in the complaint are true." And further, "In applying these general standards to a §1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to

raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.*

The complaint filed by plaintiff is void of any facts alleging any violations of the "Open Meetings Act", other than in April of 2003, and certainly does not satisfy the standard of a pleading where "[f]actual allegations must be enough to raise a right to relief above the speculative level". *Id.* At page 9.

Plaintiff failed to Join Necessary Parties

2. Section 3-12-2 NMSA 1978 provides in pertinent part:
 - A. The corporate authority of a municipality is vested in the governing body that shall constitute the legislative branch of the municipality and shall not perform any executive functions except those functions assigned to it by law.
 - B. ...
 - C. ...
 - D. The governing body of a municipality having a mayor-council form of government is the council or board of trustees whose members are the mayor and not less than four or more than ten councilmen or trustees. .

The conduct complained of in the complaint, if committed, was performed by the council and mayor in place in 2003, not the current sitting body. Plaintiff has failed to name any mayor or councilmembers as defendants.

Section 1-019 NMRA 1978 provides in pertinent part:

- A. Persons to be joined if feasible. A person who is subject to service of process shall be joined as a party in the action if:
 - (1) in his absence complete relief cannot be accorded among those already parties;

The Courts in New Mexico have ruled in analogous cases as follows:

Plaintiff could not prevail on claim that county commissioners either did not legally give permission for defendant to build pipeline or that such permission was misconstrued by defendant and trial court, since trial court lacked jurisdiction because of absence of county commissioners, who

were necessary parties to suit attacking their actions. *Perez v. Gallegos*, 87 N.M. 161, 530 P.2d 1155 (1974).

Absence of commissioner of public lands, when not only a necessary but an indispensable party, completely deprived court of jurisdiction to proceed in absence of such party, and any judgment rendered in his absence would be a nullity and subject to collateral attack. *State Game Comm'n v. Tackett*, 71 N.M. 400, 379 P.2d 54 (1962).

Absent necessary parties suit inherently defective. — Where necessary parties cannot for any reason be brought before court, there is nothing to be done except to dismiss the bill, for the suit is inherently defective. *State ex rel. Walker v. Hastings*, 79 N.M. 338, 443 P.2d 508 (Ct. App. 1968); *State Game Comm'n v. Tackett*, 71 N.M. 400, 379 P.2d 54 (1962).

As set forth in *Perez v. Gallegos*, 87 N.M. 161, 530 P.2d 1155 (1974),

Plaintiff is attacking the actions of the 2003 Mayor and Council. To prevail, he must name them as Defendants. Even if he does this, he must then get over the statute of limitations issue.

Defendant is entitled to be awarded attorney fees and court costs.

3. Section 10-15-3C NMSA 1978 provides in pertinent part:

C . . . If the prevailing party in a legal action brought under this section is a public body defendant, it shall be awarded court costs. A public body defendant that prevails in a court action brought under this section shall be awarded its reasonable attorney fees from the plaintiff if the plaintiff brought the action without sufficient information and belief that good grounds supported it.

Plaintiff through his discovery tendered herein is clearly on a "fishing trip" and has other avenues available than this suit and formal discovery. Rather than pursue those avenues, plaintiff filed this suit which necessitated that Defendant incur attorney fees in defense of this suit. It is clear that plaintiff brought the action without sufficient information and belief that good grounds supported it. Plaintiff has a history of harassment of the City of Deming and

its employees. Plaintiff's conduct in the past has been so egregious as to require the City of Deming to seek and obtain a Restraining Order, See CV200600426.

CONCLUSION

Plaintiff was required to plead facts which provided some legal basis for recovery under the violation of the Open Meetings Act. As Plaintiff failed to meet this requirement, dismissal of his claim is warranted.

WHEREFORE, the Defendant respectfully requests that this Court dismiss the complaint filed herein.

Submitted by:



Jim Foy
Attorney for Defendant
P.O. Box 2615
Silver City, NM 88062
575-538-9835