

District Court, Larimer County, Colorado
201 LaPorte Avenue, Suite 100
Fort Collins, CO 80521-2761
970-494-3500

DATE FILED: February 24, 2016
CASE NUMBER: 2015CV30938

Plaintiffs: BUCK 2ND, LLLP, a Colorado limited liability partnership

v.

Defendants: CITY OF LOVELAND, COLORADO, a municipal corporation

▲COURT USE ONLY▲

Case No.: 15 CV 30938

Courtroom: 5B

ORDER REGARDING DEFENDANT'S MOTION TO DISMISS

This matter comes before the Court on the City of Loveland's Motion to Dismiss. The Court has reviewed the Motion to Dismiss, Response, and Reply, along with the applicable law, and finds and orders as follows.

The Court finds that it has jurisdiction in this matter and venue is proper, as the action arises from business conducted by the City of Loveland ("Defendant"), a municipality, in the state of Colorado, and the action concerns a contract for services to be performed in Larimer County.

Background

Buck 2nd, LLLP ("Plaintiff") is a developer and home builder in Colorado. On August 22, 2008, Plaintiff and Defendant entered into a contract for services titled, "Streets Oversizing Agreement" ("Agreement"). Under the Agreement, Defendant would reimburse Plaintiff for the costs of street improvements once Plaintiff had completed the improvements and Defendant had appropriated the money for the reimbursement.

Plaintiff claims that Defendant appropriated money for the reimbursement on August 22, 2008, and that Plaintiff completed the street improvements on November 6, 2009. At this point, Plaintiff claims, Defendant became obligated to reimburse Plaintiff for the improvements. Because Defendant has not reimbursed Plaintiff, Plaintiff argues that Defendant breached the Agreement. Plaintiff brings claims for the following:

- 1) Breach of contract;
- 2) Breach of implied covenant of good faith and fair dealing;
- 3) Promissory estoppel;
- 4) Unjust enrichment;
- 5) Account stated; and
- 6) Declaratory judgment.

Defendant does not dispute that a contract exists, nor does Defendant dispute the terms of the Agreement. In fact, Defendant claims that it intends to reimburse Plaintiff and has communicated its timeline for repayment to Plaintiff. However, Defendant argues that it is not obligated to reimburse Plaintiff at this time. In Defendant's view, the Agreement predicated reimbursement for the street improvements on two requirements:

- 1) The street improvements had to be installed and accepted; and
- 2) Money had to be appropriated for the Plaintiff's installation of the improvements.

Defendant argues that neither of these requirements has been completed.

In the alternative, Defendant argues that even if, on November 6, 2009, Defendant became obligated to reimburse Plaintiff under the Agreement as Plaintiff claims, the statute of limitations bars Plaintiff's recovery.

In response to Defendant's argument that Plaintiff's claims are barred by the statute of limitations, Plaintiff argues that the doctrine of equitable tolling applies. In support of this argument, Plaintiff alleges that Defendant misled Plaintiff by failing to disclose that Defendant did not plan on reimbursing Plaintiff for the street improvements until 2017. As a result, Plaintiff claims that its cause of action did not accrue until October 21, 2015, when Defendant finally did disclose its anticipated schedule for reimbursement. Therefore, Plaintiff believes its claims for relief are within the three-year statute of limitations suggested by Defendant.

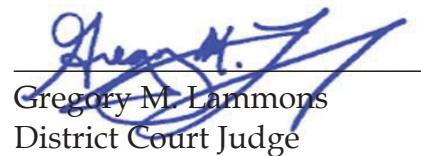
Analysis

The Court finds that the applicability of the statute of limitations is determinative. Specifically, resolution of this case hangs on whether the doctrine of equitable tolling applies, such that Plaintiff's cause of action did not accrue until October 21, 2015. The Court finds that the most efficient use of judicial resources is to convert Defendant's C.R.C.P. 12(b)(5) Motion to Dismiss to a C.R.C.P. 56 Motion for Summary Judgment on the claim that Defendant's actions tolled the statute of limitations pursuant to the doctrine of equitable tolling. *See Brannan Sand & Gravel Co., Inc. v. F.D.I.C.*, 928 P.2d 1337, 1342 (Colo.App.1996).

The Court shall permit both parties supplement the pleadings in light of the conversion. Defendant will have until March 16, 2016 to supplement. The Plaintiff will have until March 30, 2016 for Response. The Defendant will have until April 4, 2016 for any Reply.

Dated: February 24, 2016.

BY THE COURT:



Gregory M. Lammons
District Court Judge