

DISTRICT COURT, LARIMER COUNTY, COLORADO

Court Address: 201 LaPorte Avenue, Suite 100  
Fort Collins, CO 80521

DATE FILED: February 6, 2018 11:05 AM  
FILING ID: DE4171152CEDB  
CASE NUMBER: 2016CV30703

**Plaintiff:**

CITY OF LOVELAND, a Colorado Municipal  
Corporation

v.

**Defendant:**

ROGER GOMEZ

Kathie Troudt Riley  
Kathie Troudt Riley, P.C.  
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Loveland, CO 80538  
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Case Number:

**2016CV30703**

Div.: **4A** Ctrm:

**DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO AMEND COMPLAINT**

Defendant, Roger Gomez ("Mr. Gomez"), by and through counsel, Kathie Troudt Riley, P.C., responds to Plaintiff's motion to amend complaint, and states:

1. Rule 15(a) states, "... leave [to amend a party's pleading] shall be freely given when justice so requires".

2. The purpose of our Rules of Civil Procedure is to secure a just, speedy, and inexpensive determination of every action. Focus is upon resolution of actions on their merits in a reasonable, expeditious manner. Pleadings should represent the true positions of the parties. *Benton v. Adams*, 56 P.3d 81, 86 (Colo. 2002) (citations omitted).

3. In many cases, delay standing alone may justify denial of leave to amend. If a party seeks leave to amend after substantial progress toward trial has occurred, or if granting leave to amend would significantly delay the progress of the case to trial, a trial court may deny leave to amend. *Id.*

4. Granting leave to amend is within the sound discretion of the trial court. Whether leave to amend should be allowed or not depends upon the facts and circumstances. Grounds for trial court denial of a motion to amend pleadings include delay, bad faith, dilatory motive, repeated failure to cure deficiencies in the pleadings via prior amendments, undue prejudice to the opposing party, and futility of amendment. *Id.*

5. An amendment is futile, if, for example, it merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss. *Id.*, 56 P.3d at 87.

6. The parties filed cross motions for summary judgment upon which the Court ruled June 23, 2017. The Court found that both water lines were installed with the permission of the Railroad pursuant to license agreements, and therefore were not adverse at that time for the purposes of establishing a prescriptive easement. The ruling was based upon the undisputed fact that the City had installed both water lines in the Railroad Right of Way. The Court found that the City must prove whether the water lines were adverse and open and notorious while the Millers, who obtained the Railroad Right of Way in 1971,<sup>1</sup> or any subsequent owners owned the property.

7. One and one-half years into this litigation, the City, during the judicial settlement conferences, obtained a survey of the location of the water lines and the easements the City wishes to acquire on Mr. Gomez's property. The survey conducted on or about December 14, 2017, revealed that the 34-inch water main was installed by the City +/- 3.75 feet south of the northernmost boundary of the Railroad Right of Way on the east, with the separation between the 34-inch water main and the northernmost boundary of the Railroad Right of Way progressively decreasing until the 34-inch water main ultimately crossed over the northernmost boundary of the Railroad Right of Way and entirely onto private land not subject to the Railroad Right of Way. On the west of the Mr. Gomez's property, the 34-inch water main is +/- one (1) foot north of the Railroad Right of Way, entirely on Mr. Gomez's land upon which the City had no authority to install the water main. The survey further revealed, and counsel for the City has stated, that it is the City's intent to acquire an easement fifteen (15) feet north of the 34-inch waterline. This easement would fall almost entirely on Mr. Gomez's land outside of the Railroad Right of Way.

8. The City's entire case relies upon its ability to prove that any owner of the property after Millers acquired title acquiesced to the presence of both water lines where they are installed. However, acquiescence implies a knowledge of the facts. The present case is factually identical to *Upper Eagle Valley Sanitation District v. Carnie*,

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<sup>1</sup> The Court rule that the when the Railroad sold the right of way in 1971 to Millers, the licenses were considered revoked.

634 P.2d 1008 (Colo.App. 1981). In that case, as here, it is impossible to show that any owner of the property after Millers acquired title knew that the 34-inch water line had been constructed outside of the Railroad Right of Way. As ruled in *Upper Eagle Valley Sanitation District*, the City is a trespasser that only has the right to acquire an easement for the 34-inch water line by condemnation.

9. As stated in the special concurrence in *Upper Eagle Valley Sanitation District*, the City has taken possession by trespass and it has no legal right to use or retain possession of the property outside of the Railroad Right of Way. Mr. Gomez can require the City to stop using and to remove the 34-inch water line from his property outside of the Railroad Right of Way.

10. The City's proposed amendment to the complaint is futile and fails as a matter of law. The City cannot obtain an easement on Mr. Gomez's property outside of the Railroad Right of Way in any manner or under any theory except by condemnation.

11. Even after the City "discovered" that the land the City wishes to acquire is outside of the Railroad Right of Way, the City stubbornly persists in attempting to litigate this case as an easement by some equitable theory which the City wants to acquire for free, contrary to precedent and contrary to the protections afforded landowners under the Colorado Constitution and statutes.

WHEREFORE, Defendant, Roger Gomez, respectfully requests the Court to deny the City's motion to amend the complaint as proposed.

Dated this 6<sup>th</sup> day of February 2018.

KATHIE TROUDT RILEY, P.C.  
(Duly signed original on file at the offices of  
Kathie Troudt Riley, P.C.)  
By /S/ Kathie Troudt Riley  
Kathie Troudt Riley, 15941  
Attorney for Defendant

#### CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO AMEND COMPLAINT** upon all parties herein by service through ICCES this 6<sup>th</sup> day of February 2018, as follows:

Alicia R. Calderon  
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Loveland, CO 80537

(Duly signed original on file at the offices of  
Kathie Troudt Riley, P.C.)  
By /S/ Kathie Troudt Riley  
Kathie Troudt Riley, 15941