APPENDIX A

17CA1010 Mulcahy v Aspen Skiing 11-29-2018

COLORADO COURT OF APPEALS

Court of Appeals No. 17CA1010 Pitkin County District Court No. 12CV97 Honorable Christopher G. Seldin, Judge

Edward Lee Mulcahy, Jr.,

Plaintiff-Appellant,

v.

Aspen Skiing Company Defendant-Appellee.

JUDGMENT AFFIRMED Division I Opinion by

JUDGE TERRY Taubman and Fox, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced November 29, 2018

Edward Lee Mulcahy, Jr., Pro Se

Tierney Lawrence, L.L.C., Edward T. Ramey, Denver, Colorado, for Defendant-Appellee

¶ 1 Plaintiff, Edward Lee Mulcahy, Jr., appeals the district court's order granting summary judgment in favor of defendant, Aspen Skiing Company (Skico). We affirm.

I.Background

¶ 2 Mulcahy worked as a ski instructor at Skico until he was fired. He filed a claim with the NLRB alleging, among other things, that he was improperly terminated because of his pro-union speech and activities, including distributing a pro-union flyer. Skico banned Mulcahy from all of its properties, including public land that it leases. After the NLRB proceedings were resolved, Skico's ban of Mulcahy remained in place.

¶ 3 Acting pro se, Mulcahy filed a complaint against Skico in county court, alleging that the ban against him unconstitutionally restricted his free speech rights. Mulcahy served the complaint by taping a copy of it to a side door of Skico's Aspen headquarters. He accessed this side door from a public parking lot. He was arrested for criminal trespass because of this incident, but the charge was dropped nine months later.

¶ 4 Two weeks after he had attempted to serve the county court complaint, Mulcahy filed the same complaint, with the same accusations, in district court.

¶ 5 The case was then set for trial in district court. Almost three years later, Mulcahy hired an attorney, who prepared an amended complaint. The amended complaint alleged, among other things, that Skico committed the torts of abuse of process and malicious prosecution, claiming that Skico had maliciously initiated the criminal trespass charges against him, knowing they were baseless.

¶ 6 These claims were dismissed on Skico's motion. Mulcahy's only surviving claim was that Skico's ban against him unconstitutionally restricted his right to free speech under article II, section 10 of the Colorado Constitution. On this claim, the court granted summary judgment in part to each party. It enjoined Skico from restricting Mulcahy's access for reasonable free speech purposes to public land that it leases.

II. Abuse of Process and Malicious Prosecution

¶ 7 Mulcahy contends that the court erred by

concluding that the abuse of process and malicious prosecution claims in his amended complaint did not relate back to the allegations of the original complaint under C.R.C.P. 15(c), and were thus barred by the two-year statute of limitations. We disagree.

A. Legal Standards

¶ 8 Because Mulcahy appears pro se, his pleadings should be liberally construed. *People v. Bergerud*, 223 P.3d 686, 697 (Colo. 2010). Even so, pro se litigants must adhere to rules of procedure applicable to attorneys. *Adams v. Sagee*, 2017 COA 133. 10. A pro se litigant's pleadings must not be conclusory. *See Bd. of Cty. Comm'rs v. Barday*, 197 Colo. 519, 521, 594 P.2d 1057, 1058 (1979). They must allege sufficient facts for a court to be able to judge whether the claims have legal merit. *See id.*

¶ 9 We review de novo a district court's dismissal of a claim based on a statute of limitations defense. *SMLL, L.L.C. v. Peak Nat'l Bank*, 111 P.3d 563, 564 (Colo. App. 2005). Under section 13-80- 102(1)(a), C.R.S. 2018, a plaintiff must bring claims of malicious prosecution and abuse of process within two years after the causes of action accrue.

¶ 10 For statute of limitations purposes, a new claim in an amended complaint relates back to the date of

the original complaint if the claim asserted in the amended complaint "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original" complaint. C.R.C.P. 15(c). When a party asserts in an amended complaint a new legal theory that is unsupported by factual claims raised in the original complaint, the proposed claim will not relate back to the original claim's filing date. *See* 27A *Federal Procedure Pleadings and Motions* § 62:335 (Lawyer's ed. 1996), *cited in Peters v. Smuggler-Durant Mining Corp.*, 930 P.2d 575, 581 (Colo. 1997).

¶ 11 To determine whether a claim in an amended complaint relates back, we consider whether a reasonably prudent defendant ought to have anticipated that other aspects of the same conduct, transaction, or occurrence referenced in the original complaint might be called into question. *Liscio v. Pinson*, 83 P.3d 1149, 1154 (Colo. App. 2003).

¶ 12 To state an abuse of process claim, the plaintiff must allege the following elements: "(1) an ulterior purpose in the use of judicial proceedings; (2) willful actions by a defendant in the use of process that are not proper in the regular conduct of a proceeding; and (3) damages." *Hewitt v. Rice*, 154 P.3d 408, 414 (Colo. 2007). "The essential element of an abuse of process claim is the use of a legal proceeding in an improper manner. Therefore, an improper *use* of the process

must be established." *Trask v. Nozisko*, 134 P.3d 544, 554 (Colo. App. 2006) (citation omitted); *see also* Restatement (Second) of Torts § 682 cmt. a (Am. Law Inst. 1977) (Abuse of process is "not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process."). An action merely brought for an ulterior motive, or one brought knowingly upon an unfounded claim, does not rise to the level of abuse of process. *Sterenbuch v. Goss*, 266 P.3d 428, 439 (Colo. App. 2011) (dismissing abuse of process claim because pleadings merely alleged that an action was brought to harass or bully, and was groundless).

¶ 13 A malicious prosecution claim must allege the following elements: "(1) the defendant contributed to bringing a prior action against the plaintiff; (2) the prior action ended in favor of the plaintiff; (3) no probable cause; (4) malice; and (5) damages." *Thompson v. Md. Cas. Co.*, 84 P.3d 496, 503 (Colo. 2004). For a claim to be considered to have ended in favor of the plaintiff, "the criminal prosecution must be disposed of in a way which indicates the innocence of the accused." *Allen v. City of Aurora*, 892 P.2d 333, 335 (Colo. App. 1994). A dismissal in the interest of justice upon motion of the prosecution is not a favorable termination because such a termination does not reach the merits of the case. *Id.* (citing *Delany v. Gerdon*, 785 F. Supp. 1128, 1129 (E.D.N.Y. 1992)).

B. Analysis

¶ 14 We conclude that Mulcahy's abuse of process and malicious prosecution claims, first mentioned in his amended complaint, do not relate back to the original complaint under C.R.C.P. 15(c) and are thus time barred.

¶ 15 Mulcahy filed his original complaint in district court on April 16, 2012. He filed his amended complaint nearly three years later, on March 26, 2015. The amended complaint alleged for the first time that Skico engaged in conduct amounting to abuse of process and malicious prosecution. He now contends that this conduct was a part of a larger pattern of conduct, described in his original complaint as "corporate bullying." Thus, he argues, his abuse of process and malicious prosecution claims arose out of conduct described in the original complaint and therefore relate back to that complaint under C.R.C.P. 15(c). We disagree.

¶ 16 Skico complained to the police about Mulcahy's actions. Mulcahy describes those actions as his attempt to serve Skico with his county court complaint at Skico's Aspen headquarters. The police charged Mulcahy with criminal trespass, but the charge was later dismissed on motion of the district attorney. Setting aside the question of whether an abuse of

process or malicious prosecution claim can be brought against a private citizen for merely contacting police to complain about a neighbor's actions, *see Walker v. Van Laningham*, 148 P.3d 391, 394 (Colo. App. 2006); *see also Fappani v. Bratton*, 407 P.3d 78, 82–83 (Ariz. Ct. App. 2017), we conclude that the court did not err in ruling that the claims did not relate back to the original complaint.

¶ 17 The original complaint did not allege sufficient facts to put Skico on notice of the possibility of an abuse of process claim. *See Barday*, 594 P.2d at 1058. Though Mulcahy alleged that Skico engaged in "corporate bullying" in the original complaint, such vague phrasing fails to describe an identifiable legal claim and could not provide Skico with the requisite notice of an abuse of process claim. *See Liscio*, 83 P.3d at 1154.

¶ 18 Similarly, the "corporate bullying" reference in Mulcahy's original complaint did not allege sufficient facts to put Skico on notice of the possibility of a malicious prosecution claim. *See Barday*, 594 P.2d at 1058. The original complaint did not mention the trespass charge or any prior legal action; it did not allege facts relating to a lack of probable cause, malice, or damages; and it did not allege that the trespass charge had been dismissed in his favor. *See Thompson*, 84 P.3d at 503. The dismissal of the charge by the district attorney in the interests of justice would not have constituted a dismissal in favor of Mulcahy,

as is required for a malicious prosecution claim. *See Allen*, 892 P.2d at 335 (action for malicious prosecution requires disposition of criminal prosecution in manner that indicates innocence of the accused).

¶ 19 We conclude that the trial court did not err in dismissing the claims of abuse of process and malicious prosecution in Mulcahy's amended complaint because those claims do not relate back to the filing of the original complaint under C.R.C.P. 15(c) and are thus time barred.

III. Declaratory Judgment

¶ 20 Mulcahy argues that the trial court erred by declining to rule on his motion for declaratory judgment as to whether the pro-union flyer Mulcahy distributed on Skico's property constituted free speech protected by article II, section 10 of the Colorado Constitution. We disagree.

A. Legal Standards

¶ 21 Mulcahy preserved this issue by filing three motions for entry of a declaratory judgment.

¶ 22 Because the decision whether to enter a declaratory judgment under section 13-51-110, C.R.S. 2018, and C.R.C.P. 57(f) requires the exercise of the court's discretion, we review the court's decision for

an abuse of discretion. *Zab, Inc. v. Berenergy Corp.*, 136 P.3d 252, 255 (Colo. 2006). A court abuses its discretion when its ruling is (1) based on an erroneous understanding or application of the law or (2) manifestly arbitrary, unreasonable, or unfair. *People v. Esparza-Treto*, 282 P.3d 471, 480 (Colo. App. 2011). "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." § 13-51-110; C.R.C.P. 57(f).

B. Analysis

¶ 23 Before Mulcahy was fired, he distributed a pro-union flyer in and around Skico's property. Partly in response, Skico banned Mulcahy from all of its property, including public land that it leases.

Mulcahy filed a claim in district court that Skico's ban against him unconstitutionally restricted his free speech under article II, section 10 of the Colorado Constitution. On cross-motions for summary judgment, the trial court enjoined Skico from banning Mulcahy from public land that it leases. As a result, Mulcahy was able to exercise his free speech rights on that land.

¶ 24 Mulcahy now contends that if the trial court had

declared that the flyer was free speech that was protected by article II, section 10, then it would have been clear that Skico's banning of Mulcahy from its property was retaliatory. According to Mulcahy, if the ban had been considered retaliatory, then the court would have enjoined Skico from banning him from its leased public land, so that he would be free to enter that public land generally, and not just for the limited purposes of exercising his free speech rights under article II, section 10.

¶ 25 Article II, section 10 of the Colorado Constitution generally protects citizens against the infringement of their free speech rights by governmental entities. Skico is a private entity, not a governmental entity. Even so, under *Bock v. Westminster Mall Co.*, 819 P.2d 55, 60 (Colo. 1991), a private entity may become subject to compliance with article II, section 10 if it is "affected with a public interest" through a close association with the state or with public property. The issue before the trial court was whether Skico's operations on leased public land were "affected with a public interest" under *Bock* and thus subject to compliance with article II, section 10. The trial court concluded that they were. It thus enjoined Skico from banning Mulcahy from public land that it leases to the extent that the ban would restrict Mulcahy's reasonable free speech there.

¶ 26 Whether Skico's ban was retaliatory has no bearing on this analysis. And whether article II, section 10 would protect Mulcahy's pro-union flyer from interference by governmental entities generally is also irrelevant. The issue was not whether Mulcahy's flyer constituted protected free speech under article II, section 10, but whether Skico, in conducting operations on public land, was the type of entity to which article II, section 10 applies.

¶ 27 A declaratory judgment as to whether Mulcahy's pro-union flyer constituted speech protected by article II, section 10 would not have terminated the uncertainty as to whether Skico's operations on public land meant that Skico was subject to compliance with that provision, and thus unable to restrict Mulcahy's free speech on that land. *See* § 13-51-110; C.R.C.P. 57(f).

¶ 28 Mulcahy's brief appears to further contend that he has a federal First Amendment retaliation claim under 42 U.S.C. § 1983 (2018). However, Mulcahy has not shown how Skico acted under color of state law, as is required for a 42 U.S.C. § 1983 claim. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) ("Like the state-action requirement of the Fourteenth Amendment, the under- color-of-state-law element of § 1983 excludes from its reach 'merely private conduct,

no matter how discriminatory or wrongful.'") (citation omitted); *Moody v. Ungerer*, 885 P.2d 200, 201 (Colo. 1994).

¶ 29 Mulcahy also contends that his pro-union flyer constituted speech protected by Section 7 of the National Labor Relations Act. To the extent this was raised in his amended complaint, it was relevant only to his unlawful employment retaliation claim, which was properly dismissed by the trial court as pre-empted by the National Labor Relations Act.

¶ 30 Because there was no separate remedy available to Mulcahy based on his assertion of free speech rights, the court did not err in declining to issue a declaratory judgment as to whether his flyer was constitutionally protected free speech.

IV. Disqualification

¶ 31 Mulcahy next argues that the district court judge, Judge Christopher Seldin, abused his discretion by declining to disqualify himself. We disagree.

A. Legal Standards

¶ 32 Mulcahy preserved this issue by twice moving to disqualify Judge Seldin.

¶ 33 A trial judge's decision whether to disqualify

himself is discretionary and will not be reversed unless an abuse of discretion is shown. *Spring Creek Ranchers Ass'n v. McNichols*, 165 P.3d 244, 245 (Colo. 2007).

¶ 34 Motions for disqualification are governed by C.R.C.P. 97. Disqualification is appropriate when the motion and supporting affidavits allege sufficient facts from which it may reasonably be inferred that the judge is prejudiced or biased, or appears to be prejudiced or biased, against a party to the litigation. *Johnson v. Dist. Court*, 674 P.2d 952, 955-56 (Colo. 1984); *see also People v. Schupper*, 2014 COA 80M, ¶ 57 (reviewing Crim. P. 21(b), section 16-6-201, C.R.S. 2018, and Canon 3 of the Code of Judicial Conduct).

¶ 35 In ruling on the sufficiency of a motion for disqualification, a judge must accept the factual statements contained in the motion and affidavits as true and determine as a matter of law whether they allege legally sufficient facts for disqualification. *S.S. v. Wakefield*, 764 P.2d 70, 73 (Colo.1988). Where the motion and supporting affidavits merely allege opinions or conclusions, unsubstantiated by facts supporting a reasonable inference of actual or apparent bias or prejudice, they are not legally sufficient to require disqualification. *Id.*

B. Analysis

¶ 36 Mulcahy raises three arguments to support his claim that Judge Seldin should have disqualified himself.

¶ 37 First, Mulcahy contends that he is a Republican while the judge and the family that owns Skico are Democrats. But the fact that a judge shares a political affiliation with one party and not the other is not grounds for disqualification, because courts presume that judges are able to resist partisan political pressure and have a duty to do so. *See People v. Vecchio*, 819 P.2d 533, 535 (Colo. App. 1991) (declining to conclude that the trial court judge should have been disqualified because of alleged political pressure); *see also* C.J.C. 2.4(B).

¶ 38 Second, Mulcahy contends that because the judge had ruled against him in a previous, unrelated case, the judge should have disqualified himself. But a judge's unfavorable rulings against a party are not grounds for disqualification. *Goebel v. Benton*, 830 P.2d 995 (Colo. 1992) (rejecting the contention that a judge's delay and unfavorable rulings were bases for disqualification); *People in Interest of S.G.*, 91 P.3d 443, 448 (Colo. App. 2004) ("[A] judge is not disqualified for presiding over an earlier unrelated case involving the same party.").

¶ 39 Third, Mulcahy contends that because the judge was a member of the Society of Fellows of the Aspen Institute periodically over a fourteen-year period, and because a member of the family that owns Skico is the chair of the Aspen Institute's Board of Trustees, the judge's disqualification was required. This, too, is an insufficient ground to require disqualification. *People v. Julien*, 47 P.3d 1194, 1196 (Colo. 2002) (concluding that the trial judge's former affiliation with a government agency was not a sufficient basis for disqualification in a case in which that government agency was a party). Further, the judge's past affiliation here is with an intermediary — the Aspen Institute — and not with Skico itself.

¶ 40 Mulcahy speculates about the family that owns Skico and its wealth and influence, as well as the Aspen Institute and its wealth and influence. But mere speculation is not grounds for disqualification. *See People v. Drake*, 748 P.2d 1237, 1249 (Colo. 1988) (mere speculative statements and conclusions are not enough to establish a judge's bias).

¶ 41 It cannot be reasonably inferred from Mulcahy's factual allegations that the judge was prejudiced or biased, or appeared to be. *See Johnson*, 674 P.2d at 955-56. We conclude that the judge did not abuse his discretion by declining to disqualify himself.

V. Conclusion

¶ 42 The judgment is affirmed.

JUDGE TAUBMAN and JUDGE FOX concur. BY THE COURT: Alan M. Loeb Chief Judge Dated September 27, 2018

APPENDIX B

District Court, Pitkin County, Colorado 506 East Main Street, Suite E Aspen CO 81611

Plaintiff(s): LEE MULCAHY

Vs.

Defendant(s): PAULA & JAMES CROWN, et al. Case 2012CV97

ORDER RE: DEFENDANT ASPEN SKIING COMPANY'S MOTION TO DISMISS

This matter is before the Court on the above entitled motion. Having reviewed the motion, response, reply, the file and relevant authorities, the Court enters this

order.

Plaintiff Lee Mulcahy has filed the claims of declaratory and injunctive relief against Defendants Paula & James Crown and Aspen Skiing Company (collectively "ASC") alleging that ASC has violated his rights to free speech. As alleged in the pleadings, Mulcahy was once employed as a ski instructor by ASC and was fired when he encouraged other ski instructors to unionize. ASC has also banned Mulcahy from entering any and all of its properties which include ski properties that are both privately owned by ASC and are leased from the United States government, and also include numerous hotels, restaurants, bars, shopping centers and other public establishments throughout the City of Aspen. ASC has moved to dismiss Mulcahy's complaint for failure to state a claim.

"Dismissal under C.R.C.P. 12(b)(5) is only proper where the factual allegations in the complaint cannot, as a matter of law, support the claim for relief." *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012). A motion to dismiss must be denied if relief is available to the plaintiff under any legal theory. Id. When deciding the motion, a court must view the allegations in a light

most favorable to the plaintiff. *Kelso v. Richenbaugh Cadillac Co.*, 262 P.3d 1001, 1003 (Colo. App. 2011).

ASC contends that the first amendment claims must be dismissed because ASC's properties are not designated public forums and ASC is not a state actor. While ASC relies primarily on federal case law to support its position, Article II, Section 10 of the Colorado Constitution provides greater protections for free speech than does the First Amendment. *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991). In *Brock* (sic), the Colorado Supreme Court held that the free speech protections of Article II, Section 10 applied to a privately owned shopping mall. In so doing, the court based its holding on the fact that there was governmental involvement with the mall's operation and the mall also functioned as a "downtown business district." *Id.* at 61-2.

Ultimately, Article II, Section 10 not only guarantees the right to free speech as to public entities but also regarding "certain exercises of private power." *Id.* at 60. THe degree of governmental involvement with a private enterprise is determined based on the "framework of the peculiar facts or circumstances present." *Id.* "Only by sifting facts and weighing circumstances can the nonobvious involvement of the

State in private conduct be attributed its true significance." *Id.* at 60-1.

Here, Mulcahy alleges that ASC has banned him from its properties because he encouraged his fellow employees to unionize. He also alleges that ASC holds much of its ski properties as a tenant of the federal government and that it also owns nearly 50% of the commercial property in and around downtown Aspen. When these allegations are construed in a light most favorable to Mulcahy, the Court finds that he has alleged facts which, if true, could support a free speech claim under Article II, Section 10 to the extent that ASC may qualify as a "downtown business district" under *Bock.* Ultimately, the merits of Mulcahy's claim will depend on the totality of the circumstances which cannot be weighed or determined on the pleadings. As such, the Court will deny ASC's motion. For the same reasons, the Court will also deny Mulcahy's request for a judgment on the pleadings.

Based on the foregoing, IT IS ORDERED that ASC's Motion to Dismiss is denied. ASC's request for its attorney fees is also denied.

Dated this 3 day of October, 2012.

BY THE COURT

Thomas W. Ossola

Senior District Court Judge

APPENDIX C

COLORADO SUPREME COURT CASE ANNOUNCEMENTS

No. 19SC100, Court of Appeals Case No. 17CA1010

Petitioner: Lee Mulcahy

V.

Respondent: Aspen Ski Company

Petition for Writ of Certiorari DENIED. EN BANC.

August 19, 2019

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: September 4, 2019
Certiorari to Court of Appeals, 2017CA1010 District Court, Pitkin County, 2012CV97	
Petitioner: Edward Lee Mulcahy, Jr., **v.** **Respondent:** Aspen Skiing Company.	Supreme Court Case No: 2019SC100
ORDER OF COURT	

Upon review of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said Petition for Rehearing is DENIED. C.A.R. 40(c)(3) (No petition for rehearing may be filed after denial of a petition without explanation).

BY THE COURT, SEPTEMBER 4, 2019.