IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-CV-00753-MSK-BNB

ALEXANDER L. TRUJILLO,
DAVID HENRICHSEN,
GILBERT LUCERO,
ALAN ROMAN,
COLBY DOOLITTLE,
OTTO KNOLLHOFF, and
MATT MARTIN,
on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

THE CITY OF COLORADO SPRINGS,

Defendant.

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

COME NOW Defendant, the City of Colorado Springs ("the City"), which submits this Reply in support of Defendant's Motion to Dismiss the Plaintiffs' Third, Fourth, Fifth and Sixth Claims for Relief for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

Introduction

This Court should dismiss a claim pursuant to Fed. R. Civ. P. 12(b)(6) when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." GFF Corp. v. Associated Wholesale Grocers, 130 F.3d 1381, 1384 (10th Cir. 1997) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Plaintiffs spend most of their

Response to Defendant's Motion to Dismiss ("Response") arguing the leniency of this standard. However, a lenient standard does not mean the plaintiff automatically prevails. Plaintiffs cannot show that the actions taken or statements made by the defendant were compliant with municipal law. That failure dooms their causes of action under state law. Plaintiffs simply have not met even the admittedly low standard for surviving a motion to dismiss.

Argument

I. Breach of Contract

Plaintiffs can prove no set of facts that would support the existence of a contract. Colorado law defines a contract as a "legally enforceable agreement." Acad. of Charter Schs v. Adams County Sch. Dist. No. 12, 32 P.3d 456, 463 (Colo. 2001). Plaintiffs have not alleged *any* facts which indicate that the City and the Plaintiffs had an *agreement* in the first place, and they certainly have not alleged facts to indicate that the agreement was legally enforceable.

First, the Defendant's Policies and Procedures and Standard Operating Procedures do not constitute an agreement over the terms regarding overtime. An agreement giving rise to a contract is marked by mutual assent to the agreement. I.M.A., Inc. v. Rocky Mountain Airways, Inc., 713 P.2d 882 (Colo. 1986). Plaintiffs cannot credibly allege mutual assent based on these written documents because the municipal code explicitly states that "(t)he policies and procedures are not intended to be an express or implied contract." Colorado Springs Municipal Code § 1.4.102. Further, persons who contract with a municipality are charged with knowledge of that municipality's codes and regulations. Chellsen v. Pena, 857 P.2d 472 (Colo. App. 1992).

Recognizing these limitations, Plaintiffs attempt to save their claim by alleging that various oral statements made by the representatives of the Defendant gave rise to a contract.

Plaintiffs have failed yet again to make any credible allegation that by these statements the Defendant assented to a contract with the Plaintiffs.

Furthermore, Plaintiffs cannot allege that these so-called agreements were legally enforceable. Municipal agreements that violate municipal codes and regulations are not legally enforceable. Seeley v. Bd of Cty Comm'rs, 791 P.2d 696 (Colo. 1990); Chellsen, 857 P.2d; Keeling v. City of Grand Junction, 689 P.2d 679 (Ct. App. Colo. 1984). Defendant has identified multiple municipal charter and code provisions that preclude the Defendant from contracting by way of the written documents or oral statements and Plaintiffs have not disputed these. See Colorado Springs Charter § 7-60; Colorado Springs Municipal Code § 1.2.313, § 1.2.404, §1.2.505, §1.4.102. Thus, even if there were an agreement between the parties, it was not a legally enforceable agreement and thus not a contract.

Plaintiffs' sole argument is to appeal yet again to the leniency of the motion to dismiss standard by arguing that the illegality of the alleged agreements is an affirmative defense. Their argument is inaccurate because, as Plaintiffs concede, the first element of a breach of contract claim is to allege the existence of a contract which is, by definition, a *legally enforceable* agreement. Acad. Of Charter Schs, 32 P.3d at 463. Courts in other jurisdictions have ruled that plaintiff failed to state a claim for relief where the alleged contract was contrary to municipal law. Pleva v. Norquist, 195 F.3d 905 (7th Cir. 1999).

Even if the failure to comply with municipal law is an affirmative defense, that alone does not preclude dismissal of Plaintiffs' claim. Courts have dismissed claims based on an affirmative defense where the defense "appears plainly on the face of the complaint itself." Miller v. Shell Oil Co., 345 F.2d 891, 893 (10th Cir. 1965); Greene v. Rhode Island, 398 F.3d 45 (1st Cir. 2005); 2-12 Moore's Federal Practice - Civil § 12.34. In the present case, the contract as

alleged on the face of the complaint does not comport with municipal law, therefore rendering it legally unenforceable.

II. Promissory Estoppel

Plaintiffs have not alleged a promise sufficient to maintain a cause of action for promissory estoppel. Plaintiffs concede that the first element of a promissory estoppel claim is that the defendant has actually made a promise. By law, descriptions of an employer's policies and procedures are not promises. Jaynes v. Centura Health Corp., 148 P.3d 241, 247 (Colo. Ct. App. 2006); Soderlun v. Pub. Serv. Co. of Colo., 944 P.2d 616, 620 (Colo. Ct. App. 1997); Young v. Dillon Co., 468 F.3d 1243, 1254 (10th Cir. 2006). To support their promissory estoppel claim, Plaintiffs merely identify written and oral descriptions of Defendant's policies and procedures. Plaintiffs have failed to state a claim because they have not alleged that a promise was made.

Additionally, Plaintiffs cannot show that they relied on the promise. According to Colorado law, a plaintiff cannot show reasonable reliance where municipal codes and regulations prohibited the promise from being made. Keeling, 689 P.2d at 681. In the present case, the promise was unauthorized because the Colorado Springs Charter prohibits an employee from imposing upon the City an obligation for payment without prior appropriation. Colorado Springs Charter §7-60. Therefore, Plaintiff cannot show reasonable reliance, and the promissory estoppel claim must fail.

Plaintiffs' sole argument to refute this claim is that the Court "has no context in which to consider this argument." Plaintiff's Response to Defendant's Motion to Dismiss. The context of this Court is the motion to dismiss standard. Plaintiffs can prove no set of facts to support that

the written and oral statements constituted a promise and that Plaintiffs reasonably relied thereon. The claim should be dismissed.

III. Implied Contract

Plaintiffs cannot state a claim for breach of an implied contract because they cannot show a reasonable expectation of payment. Colorado courts have held that where defendant's alleged actions and statements were contrary to municipal law, no cause of action for an implied contract will lie. Seeley, 791 P.2d; Chellsen, 857 P.2d; Keeling, 689 P.2d. In Seeley, a deputy sheriff who was employed at will alleged that he had an implied contract with the sheriff that limited the sheriff's ability to terminate the deputy sheriff. In dismissing the claim, the court found that "(b)ecause Sheriff Brown was not authorized to limit his power to discharge Seeley, Seeley cannot state a claim for relief for breach of implied contract. Seeley cannot enforce the terms of a contract into which Sheriff Brown had no power to enter." Seeley, 791 P.2d at 700. Similarly, in the present case, Defendant was not authorized to enter contracts without prior appropriation, approval by the City Manager, approval by the City attorney and attestation by the Clerk. Plaintiffs cannot enforce the alleged implied contract into which Defendant was not authorized to enter. Like in Seeley, dismissal at this stage in the proceedings is entirely appropriate.

IV. Unjust Enrichment

To support claims for unjust enrichment, Plaintiffs must allege that under the circumstances it would be inequitable if the Plaintiffs were denied the relief requested. Even if Plaintiffs' allegations are true, Plaintiffs do not deserve relief because they are imputed with knowledge that the Defendant had no authority to enter into a contract with Plaintiffs or to authorize the expenditure of money. Given the municipal laws and Plaintiff's imputed knowledge of that law, no inequity would result from refusing Plaintiffs' requested relief. Plaintiffs' claims should be dismissed.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2007, I electronically filed the foregoing **REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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