

**DISTRICT COURT, ARCHULETA COUNTY,
COLORADO**

Court Address: 449 San Juan Boulevard
Pagosa Springs, CO 81147

**PLAINTIFF: COLORADO'S TIMBER RIDGE
HOMEOWNERS ASSOCIATION, a Colorado non-
profit corporation**

**DEFENDANTS: COLORADO TIMBER RIDGE
RANCH, L.P., a California limited partnership;
GEORGE TAULMAN and JEAN TAULMAN, a
married couple; and WALTER JOSEPH
MACHOCK**

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Case Number: 09 CV 95

Div.: Ctrm.:

**PLAINTIFF'S MOTION TO DISMISS DEFENDANT COLORADO TIMBER RIDGE
RANCH, L.P.'s SECOND COUNTERCLAIM AND DEFENDANT WALTER JOSEPH
MACHOCK'S COUNTERCLAIM**

CERTIFICATION – DUTY TO CONFER

The undersigned moving counsel certifies, pursuant to C.R.C.P. Rule 121, Section 1-15(8), that he has conferred with opposing counsel, Jeffrey A. Lane, Esq., (counsel for defendants Colorado Timber Ridge Ranch, L.P., Walter Joseph Machock, and George and Jean Taulman) before filing this motion. This Motion is opposed.

MOTION

COMES NOW plaintiff Colorado's Timber Ridge Homeowners Association ("HOA"), by and through counsel, Shand, Newbold & Chapman, P.C., and in accordance with C.R.C.P. Rule 12(b)(5), hereby moves this Court for an order dismissing Defendants' Second and Third Counterclaims against the HOA. As grounds for and in support of this Motion, the HOA states:

INTRODUCTION

1. This action was filed by the HOA to enforce applicable covenants and sections of C.R.S. § 38-33.3-101, *et seq.* In response to the HOA's Second Amended Complaint, Defendants filed counterclaims alleging (1) that the HOA has intentionally interfered with the prospective business relations of Defendant Colorado Timber Ridge Ranch, L.P. ("CTRR"), and (2) that the HOA has intentionally inflicted emotional distress on Defendant Walter Joseph Machock ("Machock"). (See Second and Third Claims for Relief in the Answer, Jury Demand and Counterclaims of Defendants Colorado Timber Ridge Ranch, L.P. and Walter Joseph Machock (hereinafter "Defendants' Counterclaims")). Defendants' claims fail to set forth any facts upon which relief may be granted and are therefore insufficient as a matter of law.

STANDARD OF REVIEW

2. The purpose of a C.R.C.P. Rule 12 motion to dismiss for failure to state a claim is to test the formal sufficiency of the statement of the claim for relief. *Town of Alma v. AZCO Construction, Inc.*, 10 P.3d 1256, 1259 (Colo. 2000), (holding that defendants' motion to dismiss plaintiffs' negligence claim was properly granted based upon the economic loss rule because there was no independent duty owed by the defendants). When evaluating a motion to dismiss a complaint, the court must only consider matters stated therein and must not go beyond the confines of the pleadings. *Hewitt v. Rice*, 119 P.3d 541, 544 (Colo. App. 2004) (holding the trial court properly granted a motion to dismiss the plaintiffs' claims of malicious prosecution against the defendants because the facts of the case did not support the claims alleged), *aff'd* 154 P.3d 408. The court must also accept all averments of material fact as true. *Id.* However, the court is not required to accept legal conclusions as true, even where they are couched as factual allegations. *Western Innovations, Inc. v. Sonitrol Corporation*, 187 P.3d 1155, 1157-1158 (Colo. App. 2008), (holding the trial court properly granted a motion to dismiss plaintiffs' negligence claims because the undisputed facts established that the defendants did not owe any duty to plaintiffs).

3. As discussed in *Western Innovations, Inc.*, the United States Supreme Court recently abrogated the long time "notice pleading" standard that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that

the plaintiff can prove no set of facts in support of his claim which would entitle him to relief” to now be that “the complaint must set forth factual allegations sufficient to ‘raise a right to relief above the speculative level,’” also known as the “plausibility standard”. *Western Innovations, Inc. v. Sonitrol Corporation*, 187 P.3d 1155, 1157-1158 (Colo. App. 2008), citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 1968-1969, 167 L.Ed.2d 929 (2007). The 10th Circuit has since held that the standard set forth in *Twombly* applies to all motions to dismiss for failure to state a claim for relief. *Western Innovations, Inc. v. Sonitrol Corporation*, 187 P.3d 1155, 1157-1158 (Colo. App. 2008), citing *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 n. 2 (10th Cir. 2007) (affirming the trial court’s dismissal of plaintiffs’ tort claims and holding that the standard set forth in *Twombly* now applies to motions to dismiss). Since F.R.C.P. Rule 12(b)(6) and C.R.C.P. Rule 12(b)(5) are essentially identical, the new standard set forth in *Twombly* is persuasive in this case and should be followed by Colorado courts. See *Antolovich v. Brown Group Retail, Inc.*, 183 P.3d 582, 604 (Colo. App. 2007), (holding that where the federal rule of civil procedure is similar to the Colorado rule of civil procedure, case law interpreting the federal rule is persuasive in the analysis of the Colorado rule), citing *Forbes v. Goldenhersh*, 899 P.2d 246, 249 (Colo. App. 1994).

ARGUMENT

4. CTRR’s sole allegation giving rise to a claim against the HOA for intentional interference with prospective business relations is as follows:

5. Plaintiff, through its Board of Directors, has engaged in a pattern of intentional and improper conduct designed to subvert and interfere with the ability of Defendant Colorado Timber Ridge Ranch, L.P. to further develop and sell the real property at issue.

See Defendants’ Counterclaims, Second Claim for Relief, ¶’s 5 – 8.

5. This single allegation fails to set forth any facts demonstrating the HOA’s alleged improper conduct that would entitle CTRR to relief for intentional interference with prospective business relations. See *Memorial Gardens, Inc. v. Olympian Sales & Management Consultants, Inc.*, 690 P.2d 207, 210-211 (Colo. 1984), (holding that a court must determine whether the alleged conduct giving rise to alleged interference with prospective business relations is improper). Because CTRR has not set forth a single fact that would allow the Court to evaluate whether the HOA’s conduct was improper or not, CTRR has failed to set forth a claim upon which relief can be granted under either the “notice pleading standard” or the “plausibility standard.”

6. Machock’s sole allegation in support of his claim that he HOA intentionally inflicted emotional distress is as follows:

9. Plaintiff, through its Board of Directors, has engaged in an intentional pattern of extreme and outrageous conduct designed to inflict severe emotional distress upon defendant Walter Joseph Machock by causing him severe and extreme economic hardship.

See Defendants' Counterclaims, Third Claim for Relief, ¶'s 9 – 10.

7. Machock's single allegation fails to set forth any facts demonstrating any alleged outrageous conduct that would confer a right to relief for intentional infliction of emotional distress. See *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999), (holding that the court must initially rule on the threshold issue of whether the alleged conduct is sufficiently outrageous as a matter of law). Machock's allegation is simply a conclusion of law without supporting facts. For this reason, Machock fails to set forth a claim upon which relief can be granted.

8. Taking every statement set forth in Defendants' Counterclaims as true, there is not a single fact alleged that supports their claims for intentional interference with prospective business relations and intentional infliction of emotional distress. For this and the other foregoing reasons, the Second and Third Counterclaims fail to state claims upon which relief can be granted and should be dismissed.

WHEREFORE the HOA requests that the Court grant its Motion to Dismiss Defendant Colorado Timber Ridge Ranch, L.P.'s Second Counterclaim and Defendant Walter Joseph Machock's Counterclaim. A proposed form of order is submitted to the Court with this motion.

RESPECTFULLY SUBMITTED this 9th day of October, 2009.

SHAND, NEWBOLD & CHAPMAN, P.C.
*Original signature on file at the offices of
Shand, Newbold & Chapman, P.C.*

/s/ R. Thomas Geyer
A. Michael Chapman
R. Thomas Geyer
*Attorneys for Plaintiff Colorado's Timber Ridge
Homeowners Association*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of October, 2009 a true and correct copy of the foregoing document was electronically served via LexisNexis File and Serve, addressed as follows:

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/s/ R. Thomas Geyer

R. Thomas Geyer