

Decision No. R14-0993-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14F-0608CP

DURANGO TAXI LLC,

COMPLAINANT,

v.

ANIMAS TRANSPORTATION AND DONALD TUNICK,

RESPONDENT.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
DENYING MOTION TO DISMISS,
SCHEDULING HEARING, AND
ESTABLISHING DEADLINES**

Mailed Date: August 15, 2014

I. STATEMENT, FINDINGS, DISCUSSION, AND CONCLUSIONS

1. Only those portions of the procedural history necessary to understand this Decision are included.

2. On June 4, 2014, Durango Taxi LLC, (Durango Taxi), filed a formal Complaint (Complaint) with the Commission against Animas Transportation and Donald Tunick (Respondents).

3. On June 9, 2014, Commission Director Doug Dean issued an Order to Answer or Satisfy. At the same time, a Notice of Hearing was issued, scheduling the hearing on the Complaint for August 25, 2014 at 9:00 a.m.

4. During its weekly meeting held June 11, 2014, the Commission referred this matter to an Administrative Law Judge (ALJ) for disposition.

5. Respondents filed a Motion to Dismiss on July 1, 2014. Respondents also filed a Notice of Technical Error Pursuant to Commission Rule 1211(d) (Notice). The Notice states that due to technical problems with the Commission's e-filing system, Respondents were unable to file their Motion to Dismiss when they originally attempted to file it on June 30, 2014. The Notice requests that the Motion to Dismiss be treated as if filed on June 30, 2014.

6. On July 7, 2014, the ALJ scheduled the matter for a prehearing conference to take place on August 7, 2014. Decision No. R14-0764-I. The same Decision vacated the August 24, 2014 evidentiary hearing.

7. On July 8, 2014, Durango Taxi filed a "Motion by Complainant to Take Hearing Testimony by Telephone or Similar Reliable Media" (Motion for Telephone Testimony). Durango Taxi's Motion for Telephone Testimony requests that its witnesses be permitted to testify by telephone or other reliable media at the evidentiary hearing scheduled for August 24, 2014.

8. On July 17, 2014, Durango Taxi filed a "Response by Complainant to Motion to Dismiss" (Response to Motion to Dismiss).¹

9. The ALJ convened the prehearing conference on August 7, 2014 as noticed. All parties appeared. Mr. Thomas Burke appeared as counsel for Durango Taxi while Ms. Amber Harrison appeared as counsel for Respondents.

¹ Durango Taxi filed a "Motion for Extension of Time and Waiver of Response Time" on July 11, 2014 seeking an extension of time to respond to the Motion to Dismiss. That request was granted on July 11, 2014 by Decision No. R14-0809-I>

10. During the prehearing conference, Respondents' counsel made argument in reply to Durango Taxi's Response to the Motion to Dismiss; and Durango Taxi's counsel responded to those arguments. The ALJ denied the Motion to Dismiss without prejudice. The basis for the ALJ's decision is discussed in further detail herein.

11. In addition, during the prehearing conference, Respondents clarified that Ms. Robin Cone is not an owner of Animas Transportation.² And, Durango Taxi clarified that it does not seek to hold Respondents responsible for violations of Commission rules or relevant statutes that may have occurred prior to Mr. Tunick's purchase of Animas Transportation. Moreover, although Durango Taxi raised a question as to the timeliness of the Motion to Dismiss (in its Response to the Motion to Dismiss), Durango Taxi does not argue that the Motion should be denied on the ground that it was not filed timely.

12. No objection or response was filed to Respondents' Notice requesting that the Motion to Dismiss be treated as if filed on June 30, 2014. For good cause shown and because it is unopposed, the ALJ will grant this request.

13. Durango Taxi reiterated the request in its Complaint that the evidentiary hearing be held in Durango, Colorado. Respondents agreed this is appropriate.

A. Respondents' Motion to Dismiss.

14. A motion to dismiss tests the sufficiency of a complaint. *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 385 (Colo. 2001). Motions to dismiss are disfavored; a complaint should not be dismissed unless it "appears beyond a doubt" that a plaintiff (here, a complainant) can prove no set of facts in support of her claim which would entitle her to relief. *Allen v. Steele*,

² Respondent's Motion to Dismiss alleges that Ms. Cone is an owner of Animas Transportation. Motion to Dismiss, ¶ 1. Ms. Cone is not a named party in this proceeding.

252 P.3d 476, 481 (Colo. 2011). Moreover, in deciding a motion to dismiss, all averments of material fact in the Complaint must be accepted as true, and those averments must be viewed in a light most favorable to the Complainant. *Id.*

15. Unless based on a challenge to subject matter jurisdiction, when a motion to dismiss submits materials outside the pleadings, the motion to dismiss is converted to a motion for summary judgment. *Lee v. Banner Health*, 214 P.3d 589, 593 (Colo. 2009); *Busse v. City of Golden*, 73 P.3d 660, 665 (Colo. 2005). Under that standard, summary judgment cannot be granted when material facts are in dispute. *Id.* And, the nonmoving party is entitled to the benefit of all favorable inferences that may be drawn from the undisputed facts; all doubts as to the existence of a triable issue of fact must be resolved against the moving party. *Id.* Moreover, summary judgment can only be granted if, after giving all favorable inferences to the nonmoving party, and only considering undisputed facts, the moving party is entitled to judgment as a matter of law. *Alexander v. Morrison-Knudsen*, 444 P.2d 397, 399-400 (Colo. 1968); *McDaniels v. Laub*, 186 P.3d 86, 87 (Colo. App. 2008).

16. Here, Respondents' Motion to Dismiss attaches affidavits and photographs that were not included as a part of the Complaint. Exhibits A and B to Motion to Dismiss. The affidavits and photographs both amount to information outside of the Complaint. And, the Motion to Dismiss itself also alleges facts outside the Complaint. *See, e.g.*, ¶¶ 9, 11, 13, 16 and 17, Motion to Dismiss. Because the Motion to Dismiss includes information outside of the Complaint not related to subject matter jurisdiction, it is converted to a motion for summary judgment. *Lee*, 214 P.3d at 593; *Busse*, 73 P.3d at 665.

17. Durango Taxi's Response to the Motion to Dismiss points out that the Motion to Dismiss is premised on affidavits that attempt to attack the facts alleged in the Complaint as being inaccurate. It is clear from the Response to the Motion to Dismiss, that the new facts alleged by the Motion to Dismiss are disputed. Moreover, Respondents fail to show that they are entitled to judgment as a matter of law.

18. The ALJ finds and concludes that because the Motion to Dismiss (treated as a motion for summary judgment) relies upon disputed material facts, and does not establish that Respondents are entitled to judgment as a matter of law, the Motion must be denied. *Alexander*, 444 P.2d at 399-400; *McDaniels*, 186 P.3d at 87.

19. And, even if the Motion were treated as a Motion to Dismiss (rather than a motion for summary judgment), the Motion would still be denied, because the ALJ must accept the allegations of the Complaint as true. *Allen*, 252 P.3d at 481. The Motion to Dismiss seeks the ALJ to act in direct contradiction of this clearly established principal, by instead accepting Respondents' statement of disputed fact as true.

B. Procedural Matters.

20. The ALJ grants Durango Taxi's request that the evidentiary hearing on the Complaint be held in Durango, Colorado, as set forth in the Ordering Paragraphs below.

21. Durango Taxi's Motion for Telephone Testimony will be denied as moot, because the August 24, 2014 hearing (for which telephone testimony was sought) has been vacated, and because the hearing will be held in Durango, thus eliminating the need for telephone testimony.

22. During the prehearing conference, the parties agreed to and the ALJ approved hearing dates, and a procedural schedule for the parties to disclose the evidence they intend to present in support of their position. That schedule is set forth in the ordering paragraphs below.

23. Disclosures will include witness and exhibit lists, and exhibits. Details on the nature of the required disclosures are included in the ordering paragraphs below.

24. All parties are advised that this proceeding is governed by the Rules of Practice and Procedure found at 4 *Code of Colorado Regulations* (CCR) 723-1, the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6, and applicable case law and statutory authority. The ALJ expects the parties to comply with the Rules of Practice and Procedure. Both sets of rules are available on the Commission's website (www.dora.colorado.gov/puc) and in hard copy from the Commission. This proceeding is also governed by the Colorado Rules of Evidence, a free copy of which can be found at the following link, under the "Colorado Court Rules" tab: <http://www.lexisnexis.com/hottopics/colorado/>.

25. All parties are advised that failure to make disclosures as required by this Decision may result in a decision dismissing the Complaint without prejudice, or a decision preventing the party who violates this Decision from presenting undisclosed witnesses and evidence at the evidentiary hearing.

II. ORDER

A. It Is Ordered That:

1. Animas Transportation and Donald Tunick's (Respondents) request made in its Notice of Technical Error Pursuant to Commission Rule 1211(d) that its Motion to Dismiss be treated as if filed on June 30, 2014 is granted. The Commission's administrative record shall be amended to reflect that the Motion to Dismiss was filed on June 30, 2014.

2. For the reasons and authorities discussed above, Respondents' Motion to Dismiss is denied without prejudice.

3. Durango Taxi LLC's (Durango Taxi) "Motion by Complainant to Take Hearing Testimony by Telephone or Similar Reliable Media" is denied as moot for the reasons discussed above.

4. A hearing on the merits of Durango Taxi's formal Complaint in this proceeding will be held as follows:

DATES: January 7 and 8, 2015

TIMES: 9:30 a.m. each day

PLACE: Fort Lewis College
1000 Rim Drive
Student Union, Senate Chambers SU 163
Durango, Colorado 81301

5. At the above date, time, and place you will be given the opportunity to be heard if you so desire.

6. Durango Taxi shall file with the Commission and serve exhibit and witness lists and exhibits on or by 5:00 p.m. MST on November 6, 2014.

7. Respondents shall file with the Commission and serve exhibit and witness lists and exhibits on or by 5:00 p.m. MST on November 20, 2014.

8. Witness lists shall include a description of the witnesses' anticipated testimony, the witnesses' name and job title (if any), and the witnesses' last known address and telephone number.

9. All exhibits shall be identified by sequential numbers (*e.g.*, Exhibit 1, Exhibit 2, Exhibit 3). Durango Taxi is assigned hearing exhibit numbers 1-100 and Respondents are assigned hearing exhibit numbers 101-200.

10. Any party requiring additional exhibit numbers may use the next set of unassigned exhibit numbers (*e.g.*, numbers 201-300). In such a circumstance, the party utilizing unassigned exhibit numbers shall notify the other party of their intent to do so. This will ensure that all parties are aware of the next set of unassigned exhibit numbers that are available for use.

11. Exhibits shall be marked to include the following information: exhibit number, proceeding number, name of the witness who will testify to the exhibit's foundation, and the date of the hearing. The parties must have all their exhibits pre-marked and properly identified prior to the time the hearing is scheduled to begin.

12. At the hearing, the parties shall bring enough copies of the pre-marked exhibits they intend to introduce to ensure that: there is a copy available for all parties; there is a copy available for the witnesses' use; there is a copy available for the administrative law judge; and there is a copy to be treated as the original exhibits. The parties shall also bring to the hearing a completed exhibit list in the format set forth in Appendix A to this Decision.

13. If any exhibit is longer than two pages, the party offering the exhibit shall sequentially number *each page* of the exhibit.

14. Failure to file and serve witness lists as required by this Decision, except witnesses called in rebuttal, may result in a decision prohibiting any undisclosed witnesses from testifying.

15. Failure to file and serve exhibits as required by this Decision, except exhibits for rebuttal or impeachment, may result in a decision rejecting the admission of undisclosed exhibits.

16. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director