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| **DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO**<br><br>1437 Bannock St., Denver, CO 80202 | DATE FILED: April 29, 2020 2:54 PM<br>CASE NUMBER: 2019CV32214 |
| Plaintiff: AUTUMN SCARDINA<br><br>v.<br><br>Defendant(s): MASTERPIECE CAKESHOP INC. et al | ▲ COURT USE ONLY ▲<br><br>Case Number: 19CV32214<br><br>Courtroom: 275 |

**ORDER DENYING IN PART DEFENDANTS' MOTION TO DISMISS**

THIS MATTER comes before the Court on Defendants Masterpiece Cakeshop Inc. and Jack Phillips' Motion to Dismiss. The Court, having reviewed the parties' briefs and relevant legal authority, having heard oral argument on the matter, and being otherwise fully advised, hereby ORDERS as follows.

## I. C.R.S. § 24-34-306(11)

Defendants' first two, related arguments are that the Court lacks jurisdiction over Plaintiff's Colorado Anti-Discrimination Act ("CADA") claim due to her alleged failure to comply with § 24-34-306(11) (hereafter "§ 306(11)"), which states:

> If written notice that a formal hearing will be held is not served within two hundred seventy days after the filing of the charge, if the complainant has requested and received a notice of right to sue pursuant to subsection (15) of this section, or if the hearing is not commenced within the one-hundred-twenty-day period prescribed by subsection (4) of this section, the jurisdiction of the commission over the complaint shall cease, and the complainant may seek the relief authorized under this part 3 and parts 4 to 7 of this article against the respondent by filing a civil action in the district court for the district in which the alleged discriminatory or unfair practice occurred. Such action must be filed within ninety days of the date upon which the jurisdiction of the commission ceased, and if not so filed, it shall be barred and the district court shall have no jurisdiction to hear such action.

Defendants argue that the three scenarios described at the beginning of § 306(11) are the exclusive means for a complainant such as Plaintiff to exit proceedings before the Colorado Civil Rights Commission ("Commission") and then bring a CADA claim in district court.

Alternatively, Defendants assert that Plaintiff did not bring her CADA claim in the correct district court. Defendants argue these defects deprive the Court of jurisdiction. The Court disagrees.

For the reasons that follow, the Court interprets § 306(11) as containing a single express jurisdictional requirement—the 90-day time limit for filing a claim—and a second implicit requirement of exhaustion of administrative proceedings. The scenarios described at the beginning of § 306(11) are examples of when the time limit begins. And the forum requirement clause in § 306(11) specifies venue only and is not jurisdictional.

**A. Conditions Precedent**

Defendants' first argument highlights the three scenarios described in the opening language of § 306(11), namely:

> If written notice that a formal hearing will be held is not served within two hundred seventy days after the filing of the charge, if the complainant has requested and received a notice of right to sue pursuant to subsection (15) of this section, or if the hearing is not commenced within the one-hundred-twenty-day period prescribed by subsection (4) of this section, the jurisdiction of the commission over the complaint shall cease …

Defendants argue those scenarios are exclusive and necessary to allow Plaintiff to file a CADA claim in district court, and that none occurred here. In essence, Defendants claim there is a point of no return—the commencement of a hearing—after which a complainant is bound by the Commission's decision, subject only to an appeal to the Court of Appeals. The negative corollary to this interpretation is that the three scenarios are conditions precedent to having a statutory right of action. Perhaps confusing the analysis, the parties also discuss exhaustion of administrative remedies, which itself is a condition precedent to the Court having jurisdiction. *See* § 24-34-306(14) ("No person may file a civil action in a district court in this state based on an alleged discriminatory or unfair practice prohibited by parts 4 to 7 of this article without first exhausting the proceedings and remedies available to him under this part 3 …").

To place these arguments in context, the Court will outline what took place before the Commission with respect to Plaintiff's complaint.

The administrative process in this case began with Plaintiff filing a charge of discrimination with the Colorado Division of Civil Rights ("Division") on July 20, 2017. The Division issued a probable cause determination on June 28, 2018. After the parties attempted compulsory mediation to no avail, the Commission issued a notice of hearing and formal complaint on October 9, 2018.[1] The Commission held a "commencement hearing" on February 4, 2019. *See generally May v. Colorado Civil Rights Com'n*, 43 P.3d 750, 754-55 (Colo. App.

[1] The notice of hearing was filed more than 270 days after Plaintiff filed the charge of discrimination. The notice of hearing stated, however, that "[t]imeliness and all other jurisdictional and procedural requirements of title 24, article 34, parts 3 and 4 have been satisfied." Moreover, in their Motion to Dismiss, Defendants do not argue the Commission lost jurisdiction over the charge, so the Court assumes an extension of some kind was granted.

2002) (discussing nature of and reasons for commencement hearings). Thereafter, it appears the Commission and Defendants reached a settlement whereby the Commission dismissed the formal complaint and Defendants dismissed the lawsuit they filed in federal court against the members of the Commission. On March 22, 2019, the Commission issued a closure order, specifically stating "all administrative proceedings … have been exhausted."

Normally, there are two, diverging paths under CADA: either (1) the Division finds probable cause that discriminatory or unfair practices occurred, and if compulsory mediation fails, the Commission issues a formal complaint culminating in an evidentiary hearing before an administrative law judge; or (2) the Division finds no probable cause, dismisses the charge, and the complainant can sue in district court. § 24-34-306. In other words, the statute contemplates the Division and Commission either endeavoring to assess and end any alleged discriminatory behavior or yielding jurisdiction to allow private suit by the complainant. The Court does not interpret CADA as allowing the Commission to extinguish a would-be plaintiff's claim by holding a commencement hearing and then dismissing the complaint before holding an evidentiary hearing.

In keeping with the aims of CADA, the Court concludes that the only express jurisdictional requirement in § 306(11) is the 90-day time limit for filing a claim. That time limit begins when the Commission's jurisdiction ends; the opening language of § 306(11) describes contemplated scenarios where that jurisdiction typically would end. This interpretation is bolstered by reading § 306(11) in conjunction with § 24-34-306(2)(b)(I), where the jurisdictional emphasis is on the 90-day time limit as well. Under the unusual circumstances of this case, the March 22, 2019, closure order signaled the end of the Commission's jurisdiction and the start of the 90-day time limit for filing a claim in district court.

Defendants argue, however, that Plaintiff's sole recourse following the Commission's dismissal of the formal complaint was to appeal to the Court of Appeals pursuant to § 24-34-307. Appeals under § 24-34-307 are directed at determinations by the Commission. By contrast, direct actions against the alleged discriminatory actor, as facilitated by § 306(11), are to be pursued in district court. Here, the Court does not ascribe final, appealable order status to the Commission's dismissal of the formal complaint without an evidentiary hearing. In *Demetry v. Colorado Civil Rights Com'n*, 752 P.2d 1070, 1072 (Colo. App. 1988), the Court of Appeals held that § 24-34-306(6), (9), and (10) prohibit the Commission from issuing a final order in the absence of an evidentiary hearing or default, neither of which occurred here. Additionally, the dismissal order does not use language signaling appeal, i.e., "final order" or "final judgment," but instead the language of exhaustion of agency proceedings, i.e., "all administrative proceedings … have been exhausted." Contrary to Defendants' argument, the Commission's closure order, with its finding of exhaustion, left Plaintiff no option but to sue in district court.

**B. Forum Requirement**

Defendants' second argument highlights the forum requirement clause in § 306(11), which specifies "the complainant may seek the relief authorized under this part 3 and parts 4 to 7 of this article against the respondent by filing a civil action in the district court *for the district in which the alleged discriminatory or unfair practice occurred*." Defendants argue that Plaintiff

filed her CADA claim in the wrong district, a defect that Defendants contend deprives this Court of jurisdiction. The Court first addresses the issue of which district is the proper forum. The Court then addresses whether the forum requirement clause specifies venue or is jurisdictional.

If Defendants are correct that there can only be one proper forum, the Court agrees that Jefferson County makes the most sense. Masterpiece Cakeshop Inc. is in Jefferson County, and the alleged discriminatory act of refusing to make the cake took place within the cakeshop.

It is not clear, however, that there cannot be multiple places that satisfy the forum requirement. Where "the alleged discriminatory or unfair practice occurred" could refer both to where the alleged discriminatory actor was located (Jefferson County) and where the alleged discrimination was felt (Denver County). *See D & D Fuller CATV Const., Inc. v. Pace*, 780 P.2d 520, 524 (Colo. 1989) ("use of the term 'tortious act' in [Colorado's] long-arm statute implies the total act embodying both the cause and its effect"); *Classic Auto Sales v. Schocket*, 832 P.2d 233, 235-36 (Colo. 1992) (same). Federal courts applying Title VII have used a similar analysis, concluding that venue is proper both where the discriminatory employment decision was made and where the effects of that decision were felt. *See, e.g.*, *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 504-506 (9th Cir. 2000).

Nor is the Court persuaded by Defendants' argument that "*the* district" means there can be only one proper forum. Defendants read too much into the word "the." One rule of statutory construction is that the singular includes the plural. C.R.S. § 2-4-102. Under that interpretation, "the district" necessarily means "the district(s)" if an alleged discriminatory or unfair practice can occur across multiple districts.

Even assuming there is only one proper district, the Court must determine whether the forum requirement clause in § 306(11) specifies venue or is jurisdictional. In interpreting forum requirement clauses, the Supreme Court of Colorado has explained the difference between venue defects and jurisdictional defects, holding that venue defects are cured by transfer and jurisdictional defects require dismissal:

> Venue requirements are imposed for the convenience of the parties, and are a procedural, not a substantive issue. When a party brings an action in an improper venue, it is not a jurisdictional or fatal defect. The remedy for improper venue is a transfer to the proper venue. However, not all place-based forum requirements are venue provisions; some are jurisdictional in nature. When a party violates a jurisdictional requirement … the court has no power to hear the case, or even to order a transfer. Instead, the court must dismiss the case.

*Associated Gov'ts of Nw. Colo. v. Colo. PUC*, 2012 CO 28, ¶¶ 8-10 (internal citations omitted).

The Court concludes that the forum requirement clause in § 306(11) specifies venue, and thus, is non-jurisdictional. The Court reaches that conclusion by reading the plain language of the statute as a whole. Section 306(11), when read in conjunction with subsection (2)(b)(I), indicates the only express jurisdictional element is the 90-day time limit for filing an action. If

an action is filed within that timeframe, and exhaustion has occurred, the jurisdictional requirements are satisfied. The procedural question of which district court is the proper forum is a question of venue. This interpretation is consistent with the Court's overall reading of § 306(11).

Assuming, *arguendo*, that venue does not lie in Denver County, had Defendants moved to change venue, the Court would lack jurisdiction to do anything other than ordering the transfer. *Denver Air Center v. District Court*, 839 P.2d 1182, 1185 (Colo. 1992). Defendants, however, waived their objection to venue when they did not file a motion to change venue contemporaneous with their Motion to Dismiss. C.R.C.P. Rule 98(e)(1).

## II. Claim Preclusion

Defendants next argue that Plaintiff's CADA claim is barred by claim preclusion because the Commission dismissed the formal complaint in the administrative proceedings.

"Claim preclusion works to preclude the relitigation of matters that have already been decided as well as matters that could have been raised in a prior proceeding but were not." *Argus Real Estate, Inc. v. E-470 Public Highway Authority*, 109 P.3d 604, 608 (Colo. 2005). "For a claim in a second judicial proceeding to be precluded by a previous judgment, there must exist: (1) finality of the first judgment, (2) identity of subject matter, (3) identity of claims for relief, and (4) identity or privity between parties to the actions." *Id*. Claim preclusion may apply following an administrative decision "if the agency that rendered the decision acted in a judicial capacity and resolved disputed issues of fact which the parties had an adequate opportunity to litigate." *Gallegos v. Colorado Ground Water Com'n*, 147 P.3d 20, 32 (Colo. 2006) (quoting *Industrial Com'n of State v. Moffat County School Dist. RE No. 1*, 732 P.2d 616, 620 (Colo. 1987)).

Without deciding whether any of the other elements of claim preclusion are satisfied here, the Court notes that the first element is lacking. The Commission dismissed the formal complaint before conducting a hearing on the merits. As such, the Commission did not give the parties an adequate opportunity to litigate in the administrative proceedings. And as referenced above, "the Commission cannot issue a final order in the absence of an evidentiary hearing or default." *Demetry*, 752 P.2d at 1072. Therefore, claim preclusion does not apply.

## III. Other CADA Arguments

Defendants' remaining arguments concerning Plaintiff's CADA claim are: (1) Plaintiff does not allege that Defendants would create a custom cake that expresses the same message for a different customer; (2) the federal and state constitutions protect Defendant Phillips' decision not to speak; and (3) the federal and state constitutions bar discrimination against Defendant Phillips because of his religious exercise.

Under Rule 12(b)(5), "a court properly dismisses a claim if the factual allegations in the complaint, *taken as true and viewed in the light most favorable to the plaintiff*, do not present plausible grounds for relief." *Begley v. Ireson*, 2017 COA 3, ¶ 8 (citing *Warne v. Hall*, 2016

CO 50, ¶¶ 9, 24) (emphasis added). Viewed in that way, the Court concludes that Plaintiff's claims present plausible grounds for relief. Defendants' arguments are either affirmative defenses, and therefore not appropriate under Rule 12(b)(5), or require the Court to draw inferences against Plaintiff and in favor of Defendants. These are issues for a later day.

## IV. Failure to State a CPA Claim

Defendants' next two arguments relate to Plaintiff's Consumer Protection Act ("CPA") claim. Defendants argue that (1) Plaintiff is subject to and fails to satisfy Rule 9(b)'s heightened pleading requirements, and (2) the federal and state constitutions forbid punishing Defendant Phillips' noncommercial speech under the CPA.

On the Rule 9(b) issue, the Court agrees to an extent. Federal courts interpreting the Colorado CPA have consistently applied Fed. R. Civ. P. 9(b), the federal equivalent of C.R.C.P. Rule 9(b). *See, e.g.*, *Two Moms and a Toy, LLC v. International Playthings, LLC*, 898 F. Supp. 2d 1213, 1219 (D. Colo. 2012); *HealthONE of Denver, Inc. v. UnitedHealth Group Inc.*, 805 F. Supp. 2d 1115, 1120-21 (D. Colo. 2011). To state a claim under the CPA, Plaintiff must show that the defendant engaged in an unfair or deceptive trade practice, such as false advertising. *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 146 (Colo. 2003). In the Complaint, Plaintiff alleges that Defendants made "repeated" false representations and advertisements regarding their willingness to make cakes for members of the LGBT community. As examples, Plaintiff points to a 2012 Westword article and a fundraising website.

The Court concludes that Plaintiff did not plead with sufficient particularity under Rule 9(b) the specific statements made by Defendants that deceived Plaintiff, including the context in which the statements were made. Without sufficient particularity, Defendants and the Court cannot assess whether the statements were made in a manner that violate the CPA. Having said that, the proper fix is for the Court to grant leave to amend the Complaint, not dismissal.

As for Defendants' argument concerning constitutional protections for noncommercial speech, the Court again notes its limited authority to dismiss claims under Rule 12(b)(5) based on what appears to be an affirmative defense. Since it requires factual development, Defendants' argument is not a proper subject of a Rule 12(b)(5) motion.

## V. Claims Against Defendant Jack Phillips Individually

Defendants' last argument is that Plaintiff did not state a claim against Defendant Jack Phillips in his individual capacity. Defendants seemingly rely on ¶ 7 of the Complaint, in which Defendant Phillips is described as the owner and operator of Masterpiece Cakeshop. Defendants thus argue that he was sued solely in a representative capacity. The Court notes the disconnect between this assertion and Defendants' repeated invocation of Mr. Phillips individual rights.

In any event, Defendants read far too much into the Complaint's brief description in ¶ 7. As explained above, under Rule 12(b)(5), "a court properly dismisses a claim if the factual allegations in the complaint, *taken as true and viewed in the light most favorable to the plaintiff,*

do not present plausible grounds for relief." *Begley*, 2017 COA at 3 (emphasis added). Under that standard, Plaintiff adequately stated claims against Defendant Phillips as an individual.

To the extent they are not specifically addressed above, the Court has considered Defendants' other arguments and concludes they do not warrant dismissal.

For the foregoing reasons, the Court denies Defendants' Motion to Dismiss in part and grants Plaintiff leave to amend the Complaint to properly state a CPA claim within 14 days should she choose to do so. Defendants shall answer within 14 days thereafter.

DATED AND ORDERED: April 29, 2020.

**BY THE COURT:**

Judge A. Bruce Jones
Denver District Court Judge