

*\*Not for Publication\**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO  
The Honorable A. Bruce Campbell**

In re:	)	
	)	
SUSAN IRENE STROBEL	)	Case No. 05-27338 ABC
	)	Chapter 7
Debtor.	)	
_____	)	
FERGUSON ENTERPRISES, INC., d/b/a	)	
BEAUTYWARE PLUMBING SUPPLY, INC.,	)	<b>Adversary No. 05-1843 ABC</b>
	)	
Plaintiff,	)	
v.	)	
	)	
SUSAN IRENE STROBEL,	)	
	)	
Defendant.	)	
_____	)	
In re:	)	Case No. 05-46949 MER
	)	Chapter 7
KENNETH JOE STROBEL,	)	
	)	
Debtor.	)	
_____	)	
FERGUSON ENTERPRISES, INC., d/b/a	)	
BEAUTYWARE PLUMBING SUPPLY, INC.,	)	<b>Adversary No. 06-1017 ABC</b>
	)	<i>(Consolidated for purposes of</i>
Plaintiff,	)	<i>pretrial procedures and trial</i>
v.	)	<i>under Adv. No. 05-1843 ABC)</i>
	)	
KEN STROBEL PLUMBING CO., INC., et al.,	)	
	)	
Defendants.	)	
_____	)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RULING**

**Appearances:**

Jeffrey Brinen, Esq.  
Kutner Miller Brinen, P.C  
303 E. Seventeenth Avenue, #500  
Denver, Colorado 80203

*-and-*

Robert H. Winter, Esq.  
3900 East Mexico Avenue, #955  
Denver, Colorado 80210  
*Co-Counsel for Plaintiff Ferguson Enterprises, Inc.*

Dane Torbenson, Esq.  
Law Offices of Randy B. Corporon, PC  
1724 Gilpin Street  
Denver, Colorado 80218  
*Counsel for Defendant Kenneth J. Strobel*

W. Robert Montgomery, Esq.  
10155 W. Kentucky Drive, #1  
Denver, Colorado 80226  
*Counsel for Defendant Susan I. Strobel*

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO  
The Honorable A. Bruce Campbell**

In re:	)	
	)	
SUSAN IRENE STROBEL	)	Case No. 05-27338 ABC
	)	Chapter 7
Debtor.	)	
<hr/>		
FERGUSON ENTERPRISES, INC., d/b/a	)	
BEAUTYWARE PLUMBING SUPPLY, INC.,	)	<b>Adversary No. 05-1843 ABC</b>
	)	
Plaintiff,	)	
v.	)	
	)	
SUSAN IRENE STROBEL,	)	
	)	
Defendant.	)	
<hr/>		
In re:	)	Case No. 05-46949 MER
	)	Chapter 7
KENNETH JOE STROBEL,	)	
	)	
Debtor.	)	
<hr/>		
FERGUSON ENTERPRISES, INC., d/b/a	)	
BEAUTYWARE PLUMBING SUPPLY, INC.,	)	<b>Adversary No. 06-1017 ABC</b>
	)	<i>(Consolidated for purposes of</i>
Plaintiff,	)	<i>pretrial procedures and trial</i>
v.	)	<i>under Adv. No. 05-1843 ABC)</i>
	)	
KEN STROBEL PLUMBING CO., INC., et al.,	)	
	)	
Defendants.	)	
<hr/>		

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RULING**

Before this Court, in two adversary proceedings that were consolidated for trial, are the claims of Ferguson Enterprises, Inc., d/b/a Beautyware Plumbing Supply, Inc., in the amount of \$78,357.27 against separate Chapter 7 Debtors, Susan I. Strobel and Kenneth J. Strobel. In this litigation, Plaintiff seeks a determination that its separate claims against the Strobels are each nondischargeable under section 523(a)(4) of the Bankruptcy Code as debts arising from defalcation of each Defendant while acting in a fiduciary capacity.

The Court has jurisdiction over these proceedings pursuant to 28 U.S.C. §§ 1334(a) and (b) and 28 U.S.C. §§ 157(a) and (b)(1). Because these two adversary proceedings concern challenges to dischargeability of particular debts, these are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(I).

At the opening of the trial in these matters, the parties submitted a form of proposed pretrial order containing a stipulation to enumerated facts and to admission of eighteen exhibits. The Court signed the pretrial order as proposed, and the stipulated facts therein contained are incorporated as part of the Court's fact findings. The pretrial order essentially concluded Adversary Proceeding No. 05-1843 against Ms. Strobel, as it contains her consent to judgment against her and in favor of Plaintiff in the amount of \$78,357.27. It also contains her consent to the determination that, as against her, this debt is nondischargeable. Judgment against Ms. Strobel has entered accordingly.

Adversary Proceeding No. 06-1017 against Mr. Strobel presents a single question to this Court: does Kenneth Strobel fit the circumstances under which a principal of a closely held corporation is personally liable when the corporation is liable under Colorado's mechanic's lien trust fund statute, C.R.S. 38-22-127? Mr. Strobel has stipulated to the fact that the Strobels' corporation, Ken Strobel Plumbing Co., Inc. (the "Company"), is liable to Plaintiff for breach of fiduciary duty under that statute. Materials delivered to the Company by Plaintiff were incorporated by the Company into identified jobs and not paid for by the Company after it was paid for its work on the jobs. The "trust funds" the Company was paid were used for purposes other than paying \$78,357.27 the Company owed Plaintiff for plumbing materials. No evidence was offered suggesting that these trust funds were disbursed by the Company for other legitimate trust purposes, i.e. to payment of other subcontractors, laborers, or suppliers on the particular projects.

The Company was a plumbing contractor for approximately eighteen years before it went out of business in 2005. It was a family business owned and run by Susan and Kenneth Strobel. Ms. Strobel owned 51% of the capital stock. Mr. Strobel owned 49%. Both were directors, officers and employees. Mr. Strobel, as a master plumber, provided the license necessary for the business to operate and oversaw its plumbing work. Ms. Strobel oversaw all aspects of business administration of the Company and "ran the office." Ms. Strobel had little or nothing to do with carrying out plumbing contracts. Mr. Strobel had little or nothing to do with any aspect of the Company's business other than the jobs in the field. This division of labor apparently worked, as the Company's business supported the Strobels for many years until they separated and proceedings to dissolve their marriage were filed in the Fall of 2004. From that point, the business deteriorated rapidly. Mr. Strobel was paid very modestly by the Company after November 2004, and resigned as an officer and employee at the end of March 2005. The Company shut down and ceased operations by the end of July of that year.

The evidence in this record is clear that Susan Strobel was in charge of, and was in control of, the Company's finances. The evidence is uncontroverted that Kenneth Strobel had little or no interest in or knowledge of the Company's finances or other business paperwork. For these matters he was entirely dependent on Ms. Strobel. He had no part in bill paying, payroll, maintaining the Company's checkbook, receipt of funds, record keeping or communicating with the Company's accountant. These matters were Ms. Strobel's domain, were not understood by Mr. Strobel, and Ms. Strobel did not so much as consult with Mr. Strobel about them. Ms. Strobel decided, without input from Mr. Strobel, who would be paid by the Company and when. Mr. Strobel testified that, although he has a high school education, he has difficulty with numbers and reads only at an elementary school level. The evidence was credible that Mr. Strobel suffers from these disabilities, but is, nevertheless, an experienced and, apparently, able master plumber.

In December of 2004, Mr. Strobel went to the bank and withdrew \$5300 from the Company's bank account. Ms. Strobel testified that this seriously disrupted the Company's business. She responded by applying successfully to the dissolution court for an order prohibiting Mr. Strobel from further access to Company funds without her consent. In her motion seeking that order she represented,

Since its inception, [Ms. Strobel] has controlled all of the funds of the business, buying supplies, paying employees, keeping the company books, and otherwise running the family business. [Mr. Strobel] has not kept abreast of the financial circumstances of the business, and in fact has no knowledge of its current operating expenses or liabilities.

This occurred at the very time Plaintiff was extending to the Company the credit that is the subject of this litigation.

Ms. Strobel controlled the finances of the Company, almost to the complete exclusion of Mr. Strobel, before, at and after the Company's defalcation against Plaintiff under the Colorado mechanic's lien trust fund statute. The evidence in this case is also clear that Mr. Strobel was fully engaged as a principal in this family business from the beginning. As an officer, key employee, and person with signing power on the Company's bank account, Mr. Strobel had full legal capacity and authority, along with Ms. Strobel, to control this business's finances.

The law has long been clear that a principal of a closely held corporation may be personally liable under Colorado's mechanic's lien trust fund statute. The essential legal question in determining whether Mr. Strobel is liable for the Company's defalcation under the statute is whether one must actually exercise control over a corporation's finances in connection with the defalcation against a subcontractor, laborer, or supplier, or whether it is sufficient for personal liability merely to have the legal authority and capacity to exercise that control. This Court concludes the former is the case.

The Colorado and federal court cases that have found personal liability for principals of a defalcating corporation under Colorado's mechanic's lien trust fund statute have consistently focused on actual control by individuals of the corporation's cash, not mere legal authority to control the corporation's finances. In the leading case of *Alexander Co. v. Packard*, 754 P.2d 780 (Colo. App. 1988), the Colorado Court of Appeals found a corporate officer personally liable from the point where he controlled the corporation's financial decisions and knowingly diverted trust funds. 754 P.2d at 782. In *Flooring Design Associates, Inc. v. Novick*, 923 P.2d 216 (Colo. App. 1995), the Colorado Court of Appeals found a corporate principal personally liable who had "made financial decisions" for the corporations involved and "controlled their finances." 923 P.2d at 221.

In the leading recent Colorado Bankruptcy Court case of *Fowler & Peth, Inc. v. Regan*, 311 B.R. 271 (Bankr. D. Colo. 2004) (aff'd after certification to Colo. Sup. Ct. on separate issue 477 F.3d 1209 (10<sup>th</sup> Cir. 2007)), another division of this Court found principals of a corporation liable for its breach of the Colorado mechanic's lien trust fund statute when they had "controlled the cash flow and made all the necessary financial decisions for the entity." 311 B.R. at 274. The Court noted that it had to determine "whether [the individuals] participated in the defalcation" committed by the corporation. It found they had, having knowingly misappropriated trust property. 311 B.R. at 278-81.

This division of this Court has previously found personal liability of principals for corporate violation of Colorado's mechanic's lien trust fund statute where an officer actually engaged in the conduct constituting the statutory breach while controlling the entity's finances, or personally perpetrated a breach of fiduciary duty while acting as corporate agent. See *Stetson Ridge Assoc., Ltd. v. Walker*, 315 B.R. 595, 599 (Bankr. D. Colo. 2004), rev'd on other grounds 325 B.R. 598 (D. Colo. 2005); *LaFarge West, Inc. v. Riley*, No. 03-1082 ABC, slip op. at 11 (Bankr. D. Colo. Sept. 17, 2004) (aff'd No. 04-F-2224, slip op. (D. Colo. May 25, 2005).

On the record before it, the Court finds and concludes that, while Kenneth J. Strobel had legal authority to control the finances of Ken Strobel Plumbing Co., Inc., he at no time did so. Nor did he participate in the conduct that constituted that corporation's defalcation against Plaintiff under the Colorado mechanic's lien trust fund statute. Accordingly, Mr. Strobel has no liability for the debt to Plaintiff arising in connection with his company's defalcation under that statute. It is therefore,

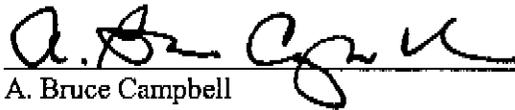
ORDERED that Plaintiff Ferguson Enterprises, Inc.'s claim against Kenneth J. Strobel, debtor in Case No. 05-46949 MER, seeking a determination of nondischargeability of a debt, is DISMISSED;

FURTHER ORDERED that Kenneth J. Strobel shall be awarded his costs in Adversary Proceeding No. 06-1017 ABC; and

FURTHER ORDERED that judgment shall enter in favor of Kenneth J. Strobel accordingly.

DATED: *April 24, 2007*

BY THE COURT:

A handwritten signature in black ink, appearing to read "A. Bruce Campbell", written over a horizontal line.

A. Bruce Campbell  
United States Bankruptcy Judge