UNITED STATED BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Howard R. Tallman

In re:	)	
	)	
BRYAN BYLER,	)	**Case No. 06-18347 HRT**
	)	**Chapter 7**
Debtor.	)	
	)	
	)	
FOXWORTH-GALBRAITH LUMBER COMPANY,	)	**Adversary No. 07-1042 HRT**
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
BRYAN BYLER,	)	
	)	
Defendant.	)	

ORDER GRANTING RENEWED MOTION FOR SANCTIONS AND ENTRY OF DEFAULT JUDGMENT

This case comes before the Court on Plaintiff's *Renewed Motion for Sanctions and Entry of Default Judgment* (docket #33) [the "Motion"].

In response to the Plaintiff's original *Motion for Sanctions and Entry of Default Judgment* (docket #30), the Court denied that motion and issued its *Order to Compel Discovery and Order Denying Motion for Sanctions and Entry of Default Judgment* (docket #31). That Order set a deadline of August 17, 2007, for the Defendant to respond to Plaintiff's discovery requests. In addition, it clearly informed the Defendant that the penalty for his failure to comply with the Order would be entry of a default judgment in favor of the Plaintiff.

The Defendant has failed to respond in compliance with the Court's Order to Compel, consequently, the Court will enter default judgment in the Plaintiff's favor.

In addition to the actual damages that the Plaintiff has shown by way of affidavit, Plaintiff asks the Court to treble those damages. As support for its treble damages request, Plaintiff cites the Court to three Colorado statutes:

1. COLO. REV. STAT. § 38-22-127;
2. COLO. REV. STAT. § 18-4-401; and
3. COLO. REV. STAT. § 18-4-405.

When contractors or subcontractors receive funds pursuant to a building, construction or remodeling contract, under subsections (1) and (2) of § 38-22-127, those funds are required to be

held in trust for payment of subcontractors, laborers and materialmen who have provided labor, materials or services on the project. That statute further provides that:

> Any person who violates the provisions of subsections (1) and (2) of this section commits theft, as defined in section 18-4-401, C.R.S.

COLO. REV. STAT. § 38-22-127(5).

In turn, Colorado's criminal theft statute defines theft as follows:

> (1) A person commits theft when he knowingly obtains or exercises control over anything of value of another without authorization, or by threat or deception, and:
> (a) Intends to deprive the other person permanently of the use or benefit of the thing of value; or
> (b) Knowingly uses, conceals, or abandons the thing of value in such manner as to deprive the other person permanently of its use or benefit; or
> (c) Uses, conceals, or abandons the thing of value intending that such use, concealment, or abandonment will deprive the other person permanently of its use and benefit; or
> (d) Demands any consideration to which he is not legally entitled as a condition of restoring the thing of value to the other person.

COLO. REV. STAT. § 18-4-401.

Finally, Colorado statutes provide a civil cause of action in cases of theft, robbery or burglary:

> All property obtained by theft, robbery, or burglary shall be restored to the owner, and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his right to such property. The owner may maintain an action not only against the taker thereof but also against any person in whose possession he finds the property. In any such action, the owner may recover two hundred dollars or three times the amount of the actual damages sustained by him, whichever is greater, and may also recover costs of the action and reasonable attorney fees; but monetary damages and attorney fees shall not be recoverable from a good-faith purchaser or good-faith holder of the property.

COLO. REV. STAT. § 18-4-405.

It is easy to conclude, from a reading of that constellation of statutory provisions, that violation of § 38-22-127(1) & (2) leads to a finding of criminal theft and, in turn, to an automatic trebling of the applicable damages in a civil action – all without any finding of criminal intent. In essence, it appears that Colorado has created a species of strict liability upon violation of § 38-22-127. But, two other divisions of this Bankruptcy Court have held that a violation of

§ 38-22-127 does not entitle a plaintiff to an award of treble damages under § 18-4-405 without first establishing proof of criminal intent under § 18-4-401. *See In re Barnes*, 2007 WL 3018907 (Bankr. D. Colo. Oct. 5, 2007) (Campbell, J.); *In re Dorland*, 2007 WL 2309783 (Bankr. D. Colo. Mar. 23, 2007) (Brooks, J.). For the following reasons, this Court agrees with those divisions.

The topic of criminal conviction for a traditional common law crime, without proof of criminal intent, was discussed at length by the U.S. Supreme Court in *Morissette v. U.S.*, 342 U.S. 246, 72 S. Ct. 240 (1952). In that case, the Supreme Court reversed the defendant's conviction for conversion of government property. The lower courts had read the subject statute as not requiring any element of criminal intent. But, the Supreme Court rejected the argument that, where a traditional common law offense had been codified without reference to a requirement of criminal intent, the defendant could be convicted without a finding of such intent. *Id*. at 250-63, 243-49.

Likewise, a reading of § 38-22-127(5) that would permit a conviction for theft without proof of criminal intent has been rejected by the Colorado Supreme Court, sitting en banc, in both *People v. Piskula*, 595 P.2d 219, 221 (Colo. 1979), and *People v. Mendro*, 731 P.2d 704, 707 (Colo. 1987). In *Piskula*, the Colorado Supreme Court said:

> This is not a prosecution under 38-22-127; rather, the terms of that statute dictate that any violation thereof must be prosecuted under section 18-4-401. Thus, the inquiry here is not whether the intent to defraud is an element of section 38-22-127, but whether such intent is required to sustain a prosecution under section 18-4-401.

Piskula, 595 P.2d at 221. The *Piskula* court answered the question in the affirmative. *Id* Thus, the Colorado Supreme Court reads § 38-22-127(5) to provide that a violation of § 38-22-127 may be prosecuted as a criminal theft under § 18-4-401; but it does not read it to have eliminated the intent requirements contained in § 18-4-401 when such prosecutions are based upon a violation of § 38-22-127.[1] The Colorado Supreme Court again made the point in *Mendro* where it said:

> A prosecution for a violation of section 38-22-127 must be prosecuted under section 18-4-401. In order to convict, the prosecution must prove each of

[1] In the later case of *People v. Quick*, 713 P.2d 1282, 1288-89 (Colo. 1986), the court qualified its holding to clarify that it did not intend to suggest that a prosecution for theft by deception required the specific intent to deceive because § 18-4-401 established "knowing conduct" as an alternative *mens rea* for prosecution under § 18-4-401. *Id*. at 1289. At the same time, it also emphasized that "[s]ection 18-4-401 also requires proof of a culpable mental state as well as proof of prohibited conduct for conviction of any of the offenses enumerated therein." *Id*. at 1287.

> the elements of the crime of theft as set out in section 18-4-401, including the requisite intent. . . . Section 38-22-127(5) mandates that a person who violates its provisions commits theft under section 18-4-401. Section 18-4-401 requires proof of a culpable mental state as well as proof of prohibited conduct for conviction of any of the offenses enumerated therein.

Mendro, 731 P.2d at 706-707 (citations omitted).

The fact that the Colorado Supreme Court decided the *Piskula* and *Mendro* cases in the context of criminal appeals and this case arises in the civil context is, in this Court's view, a distinction without a difference.[2] It is the *crime* of theft as it is defined in § 18-4-401 that must be established before a court may consider the damages to be awarded under § 18-4-405. Section 18-4-405 creates a *civil* cause of action. A plaintiff is not required to show that a defendant has been convicted of theft in a *criminal* proceeding in order to maintain an action under § 18-4-405. Nonetheless, in a civil action under § 18-4-405, the plaintiff is required to prove all of the elements of criminal theft. *Itin v. Ungar*, 17 P.3d 129, 133-35 (Colo. 2000). *Piskula* and *Mendro* are unequivocal in stating that the crime of theft cannot be proven without proof of criminal intent regardless of any contrary suggestion in the reading of § 38-22-127(5).

In the civil context, an award of punitive or exemplary damages typically requires a showing of malicious intent. For example, Colorado law provides that:

> In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. The amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party.

COLO. REV. STAT. § 13-21-102. Thus, this Court would expect to see a very clear expression of legislative intent where it is asked to apply the highly punitive trebling of damages on a strict liability basis to a violation of § 38-22-127. But, in order to make the argument that the Court is required to award treble damages upon a finding that § 38-22-127 has been violated, the Plaintiff has had to lay out a string of three separate statutory provisions. It is only through the interaction of the three individual provisions that such a result might be reached. The Court's review of the statutes involved reveals no discernable legislative intent to support such a result. The path between § 38-22-127 and § 18-4-405's treble damages provision it too attenuated for

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[2] Certainly, there are substantial differences between criminal and civil cases. That is most obvious in the burden of proof and the remedies. *See Itin v. Ungar*, 17 P.3d 129, 135 n.9 (Colo. 2000). However, those differences have no bearing upon the elements necessary to prove theft under § 18-4-401.

the Court to find that Colorado's legislature intended such a harsh penalty on a strict liability basis in the absence of a clear expression of legislative intent.

This case is currently before the Court on a motion for default judgment. In that posture, the Court cannot find that the Defendant has defaulted with respect to any allegations of intent that are not contained in the complaint. But, no allegation is made that the Defendant possessed the criminal intent required by § 18-4-401. Indeed, the constraints of Rule 9011 will make it an unusual case where a Plaintiff can ethically and in good faith make such an allegation in cases of this sort.[3]

Finally, in a different context, not related to § 38-22-127, this Court has had occasion to look at the treble damages aspect of § 18-4-405 in relation to chapter 13 eligibility determinations. *See In re Salazar*, 348 B.R. 559 (Bankr. D. Colo. 2006); *In re Krupka*, 317 B.R. 432 (Bankr. D. Colo. 2004). In each case, this Court's consideration of the effect of treble damages on chapter 13 eligibility was based upon allegations that the debtor had committed at least one crime that serves as a predicate to an action for damages under § 18-4-405. The precise issue before this Court was whether or not the effect of § 18-4-405's treble damages provision could be taken into account in making the determination of whether certain of each debtor's debts were "liquidated" as that term is used in the context of chapter 13 eligibility determinations.

In *Krupka*, the claimed damages were sufficiently certain and the elements of criminal theft were sufficiently alleged for the Court to conclude that successful prosecution of those claims would result in an award of treble damages under § 18-4-405. The claims were, therefore, "liquidated" claims that were taken into account in determining the Debtor's eligibility for chapter 13 relief. *Krupka*, 317 B.R. at 438-40. In *Salazar*, creditors asserted claims alleging fraudulent conduct and included claims for treble damages. But, the Court could not calculate the actual damages with the certainty required to regard them as "liquidated." Without an underlying "liquidated" amount of actual damages, the Court could not consider the effect of treble damages under § 18-4-405. *Salazar*, 348 B.R. at 572.

In order for a court to award treble damages based on violation of § 38-22-127, it needs to make two separate and distinct determinations. The first determination is whether or not the conduct that led to a violation of § 38-22-127 is conduct that supports a finding that the defendant has committed criminal theft as defined by § 18-4-401. If not, § 18-4-405 is

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[3] In bankruptcy cases, questions regarding the applicability of § 38-22-127 arise most often in cases involving the failure of a contracting or construction business. In this Court's experience, it is not common for criminal intent to be the explanation for such a failing business not paying all of its contractors and material suppliers. That is not to say that violation of § 38-22-127 is a small matter. The statute creates fiduciary duties and violations of those duties often lead to debts that are nondischargeable under § 523(a)(4) of the Bankruptcy Code. It is simply less common to find a violation of § 38-22-127 that is actuated by criminal intent.

inapplicable. It is only where a court finds that the conduct leading to a violation of § 38-22-127 also satisfies all of the elements of criminal theft under § 18-4-401 that a court may move on to the second determination – whether to award treble damages under § 18-4-405. In this case, Plaintiff only alleges a violation of § 38-22-127; it has made no allegations of criminal theft under § 18-4-401. Therefore, there is no basis for consideration of treble damages under § 18-4-405 and the Plaintiff's request for treble damages will be denied.

In accordance with the above discussion, it is

ORDERED that Plaintiff's *Renewed Motion for Sanctions and Entry of Default Judgment* (docket #33) is GRANTED. It is further

ORDERED that judgment will enter against the Defendant and in favor of the Plaintiff in the principal amount of $23,241.81; pre-judgment interest at the rate of 5.1% per annum (11 U.S.C. § 1961) in the amount of $941.77; costs of $250.00; and post judgment interest at the rate of 3.97% per annum (28 U.S.C. § 1961). It is further

ORDERED that the judgment entered herein is nondischargeable under 11 U.S.C. § 523.

Dated this 5th day of November, 2007.

BY THE COURT:

/s/ Howard Tallman
Howard R. Tallman, Chief Judge
United States Bankruptcy Court