

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**
Bankruptcy Judge Sid Brooks

In re:)	
)	
CHEYENA HOUSTON KLEINHANS,)	Bankruptcy Case No.
SS#XXX-XX-0702)	07-19376 SBB
Debtor.)	(Chapter 7)
<hr style="width: 40%; margin-left: 0;"/>)	
)	
DANIEL A. HEPNER, Chapter 7 Trustee,)	
Plaintiff,)	
)	
v.)	Adversary Proceeding No.
)	08-01067 SBB
ROBERT LAWRENCE PERRY,)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court for the trial of the Complaint filed by the Plaintiff Daniel Hepner, Chapter 7 Trustee (“Plaintiff” or “Trustee”) against Robert Lawrence Perry (“Defendant”) on January 15, 2009. The Court, having conducted a trial in this matter and having received evidence and testimony and having reviewed the file, and being advised in the matter, makes the following findings of fact, conclusions of law, and enters the following Order.

I. Introduction

The Plaintiff is a Chapter 7 Trustee in the bankruptcy case, *In re Cheyena Houston Kleinhans*, Bankruptcy Case No. 07-19376-SBB. Here, he is attempting to recover for the benefit of the estate and its creditors a mobile home, which was owned by the Debtor prepetition. Debtor and her husband,¹ the Defendant, Mr. Perry, have resisted that effort.

This is a case where the Chapter 7 Trustee has attempted to exercise his rights and responsibilities in an otherwise straightforward case, but because of the Debtor’s and Defendant’s extraordinary machinations and deliberate, persistent, defiance of the Trustee, and applicable law, it has become a legal and financial nightmare for the estate. This dispute illustrates how a purposeful, aggressive, and creative debtor—in league with her non-debtor husband—can almost defeat the effective working of the Bankruptcy Code thwart the effective and efficient administration of this estate by the Trustee.

¹ The relationship between the Defendant and Debtor has been vague, elusive, and ever-changing throughout the history of this adversary proceeding and during the course of Debtor’s bankruptcy case. The Debtor and Defendant have advised this Court at different hearings that they are married, separated, or divorced. The status of their relationship flows back and forth among these categories. The true status and relationship of Defendant and Debtor, and the history of their marriage situation is unclear and not fully understood by this Court.

II. Findings

A. Background

Cheyena Houston Kleinhans, also known as Cheyena Houston Perry (“Debtor”), filed a voluntary petition for relief under Chapter 7 of Title 11 of the United States Code (“Bankruptcy Code”) on August 23, 2007 (the “Petition Date”).² On the Petition Date, the Debtor resided at 1228 Maple Street, Apartment B, Fort Collins, Colorado 80521.³

Plaintiff is the duly appointed Chapter 7 Trustee of the bankruptcy estate of the Debtor.

Defendant is the Debtor’s husband. Defendant holds a bachelor’s degree in economics from Colorado State University. Defendant does not have a paralegal certificate. Defendant does not have a law degree and is not a licensed attorney. Defendant lives with the Debtor at 1228 Maple Street, Apartment B, Fort Collins, Colorado 80521 despite, evidently, being legally separated from the Debtor.

Despite Defendant’s lack of formal legal education, he has participated as an active legal advocate for Debtor, from all appearances in the courtroom, and, it appears, from the pleadings filed on behalf of himself and Debtor. Based on the history and dynamics of this case, it very much appears that he has driven and directed the course of this adversary proceeding and the related adversary proceeding, *Hepner v. Kleinhans*, Adv. No. 07-01782-SBB, and the underlying bankruptcy case. He has been the person who has persistently and repeatedly tried to represent the Debtor. Moreover, the Debtor has routinely turned to him in court hearings for answers to questions, advice on procedure, and guidance in matters substantive, factual and legal.

Defendant previously filed a bankruptcy case for himself and a former wife in May of 2002 in Colorado. Defendant obtained a discharge in his bankruptcy case in or around November 2002. Defendant has knowledge of the effect of the automatic stay provisions of the Bankruptcy Code from his prior bankruptcy case.

B. Purchase of the Mobile Home and FED Action

In or around April of 2007, Defendant purchased a 1968 Continental Mobile Home, Serial Number S10812 (the “Mobile Home”). Defendant never resided in the Mobile Home. The Mobile Home was located at 2700 Laporte Avenue, Lot #25, Fort Collins, Colorado (the “Mobile Home Park”).

The Mobile Home Park was owned by Alasco Investments, Ltd. (“Alasco”). Defendant and the Debtor did not obtain a written lease from Alasco prior to Defendant’s purchase of the Mobile Home in or around April of 2007.

² Plaintiff’s Exhibit 1.

³ *Id.*

In April of 2007, Alasco filed an eviction action (the “FED Action”) in the District Court, Larimer County, Colorado (the “District Court”) against Defendant and the Debtor. Alasco sought to obtain possession of the space underlying the Mobile Home in the FED Action.⁴ Defendant and the Debtor filed an Answer to Alasco’s complaint in the FED Action. Defendant asserted counterclaims against Alasco in the FED Action.⁵ The Debtor did not assert any counterclaims against Alasco in the FED Action.⁶ On or about August 1, 2008, the District Court entered an Order for Possession in favor of Alasco and against the Debtor and Defendant.⁷

The District Court gave Defendant and the Debtor 45 days to post a bond in the amount of \$7,500 to stay the execution on the Court’s Order for Possession.⁸ Defendant and the Debtor did not post the required bond to stay the execution on the Court’s Order for Possession.

On August 7, 2007, Defendant transferred the Mobile Home to the Debtor.

On or about September 14, 2007, the District Court held a hearing in the FED Action.⁹ In connection with the hearing on September 14, 2007, the District Court noted that the automatic stay applied only to the Debtor, not Defendant.¹⁰ In connection with the hearing on September 14, 2007, the District Court noted that Defendant transferred the Mobile Home to the Debtor in August of 2007.¹¹

The District Court set a hearing for October 19, 2007 on Alasco’s request to dismiss Defendant’s counterclaims in the FED Action for lack of standing because Defendant was no longer an owner of the Mobile Home, and for failure to state a claim.¹² On October 19, 2007, the District Court held a hearing in the FED Action on Alasco’s request to dismiss Defendant’s counterclaims against Alasco.¹³ In connection with the hearing on October 19, 2007, the District Court found that: (1) Defendant transferred the title to the Mobile Home to the Debtor on August 7, 2007;¹⁴ (2) Defendant

⁴ Plaintiff’s Exhibit 9, pp. 4-6.

⁵ Plaintiff’s Exhibit 15.

⁶ *Id.*

⁷ Plaintiff’s Exhibit 9, pp. 4-6.

⁸ *Id.*

⁹ Plaintiff’s Exhibit 13.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Plaintiff’s Exhibit 15.

¹⁴ *Id.*

was not a real party in interest, nor did he have standing in the FED Action to assert counterclaims against Alasco as he was no longer the owner of the Mobile Home;¹⁵ and (3) Defendant was not a credible witness.¹⁶ Consequently, the District Court dismissed Defendant's counterclaims with prejudice.¹⁷

C. Debtor's Ownership of the Mobile Home, Debts and Bankruptcy Filings

Prior to filing for relief, on or about August 7, 2007, the Debtor acquired an ownership interest in the Mobile Home from Defendant.¹⁸ The value of the Mobile Home was \$4,000.00 at the time of the transfer of the Mobile Home from Defendant to the Debtor. *Id.*

The Debtor acquired the Mobile Home from Defendant in satisfaction of a debt that Defendant owed to the Debtor.¹⁹ Defendant ostensibly owed the Debtor \$3,950.00 at the time of the at the time of the transfer of the Mobile Home from Defendant to the Debtor.²⁰ This left a purported balance of \$50.00 owed by the Debtor to Defendant. In an attempt to put in writing the \$50.00 debt seemingly owed by the Debtor to Defendant, the Debtor signed a Promissory Note in the amount of \$50.00 in August of 2007 (the "August Note").²¹ The August Note was to be paid in installments of \$1.00 per month.²²

On or about August 17, 2007, the documents evidencing the transfer of ownership of the Mobile Home from Defendant to the Debtor were accepted by the State of Colorado.²³ On or about August 17, 2007, Defendant and the Debtor entered into a Postnuptial Agreement.²⁴ Under the terms of the August 17, 2007 Postnuptial Agreement, the Debtor was to be solely responsible for any debts and liabilities associated with the Mobile Home.²⁵ Under the terms of the August 17, 2007 Postnuptial Agreement, Defendant was held harmless by any liabilities, debts, or other costs incurred in the ownership or

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Plaintiff's Exhibit 7.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Plaintiff's Exhibit 7.

²⁴ Plaintiff's Exhibit 6.

²⁵ *Id.*

transfer of the Mobile Home to the Debtor.²⁶

On or about August 17, 2007, the documents evidencing the transfer of ownership of the Mobile Home were accepted by the State of Colorado.²⁷ On or about August 31, 2007, the State of Colorado issued a new certificate of title for the Mobile Home in the Debtor's name (the "August Title").²⁸ No lien or mortgage against the Mobile Home was filed with the State of Colorado in connection with the August Title.²⁹ No lien against the Mobile Home was noted on the August Title by the State of Colorado.³⁰

Nevertheless, Defendant asserts a lien against the Mobile Home by virtue of the August Note.³¹ Defendant's lien against the Mobile Home was not noted on the August Title on the Petition Date.

On the Petition Date, (1) the Debtor owned the Mobile Home,³² (2) Defendant did not own the Mobile Home,³³ and (3) there were no properly perfected liens against the Mobile Home.³⁴ Defendant materially and substantially assisted the Debtor with the preparation of her bankruptcy Schedules and Statement of Financial Affairs when she filed for bankruptcy relief.

On or about October 4, 2007, the Debtor filed an Amended Schedule B in which she claimed, among other things, ownership of the Mobile Home.³⁵

On or about October 9, 2007, the Debtor filed an Amended Schedule D in which she claimed, among other things, that Defendant was a secured creditor holding a lien against the Mobile Home for the principal amount of \$50.00.³⁶ On or about October 16, 2007, the Debtor filed an Amended Schedule C asserting, among other things, a claim of exemption to the Mobile Home under Colorado's

²⁶ *Id.*

²⁷ Plaintiff's Exhibit 7.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Plaintiff's Exhibit 14.

³² Plaintiff Exhibits. 1, 2 & 7.

³³ Plaintiff's Exhibit 7.

³⁴ *Id.*

³⁵ Plaintiff's Exhibit 2.

³⁶ Plaintiff's Exhibit 5.

personal property exemption statute and Colorado's homestead exemption statute.³⁷ Defendant has acknowledged during hearings that he had materially and substantially assisted the Debtor with the preparation of her Amended Schedule C. Defendant gave the Debtor advice as to which exemptions to claim for the Debtor's personal property in connection with her bankruptcy case.³⁸

On October 16, 2007, the Debtor was still the owner of the Mobile Home. On October 18, 2007, the Debtor transferred the Mobile Home to Defendant.³⁹ Despite the transfer of the Mobile Home to Defendant on October 18, 2007, Defendant and the Debtor filed a Reaffirmation Agreement for the amounts owed by the Debtor to Defendant on August Note with the Bankruptcy Court or about October 25, 2007. On November 29, 2007, the Bankruptcy Court declined to approve the Reaffirmation Agreement between the Debtor and Defendant.

D. The Meeting of Creditors

The Debtor appeared and was examined under oath at the meeting of creditors under 11 U.S.C. §341 held on October 12, 2007 (the "341 Meeting"). The Plaintiff conducted the 341 Meeting. Defendant was present at the 341 Meeting.

At the 341 Meeting, the Plaintiff advised the Debtor and Defendant that:

- (1) the Mobile Home was property of the bankruptcy estate;
- (2) the Plaintiff would administer the Mobile Home as an asset of the bankruptcy estate if he could realize any value for the bankruptcy estate from the Mobile Home;
- (3) if any lien asserted by Defendant against the Mobile Home was not perfected on the Petition Date, the automatic stay provisions of 11 U.S.C. §362 prohibited Defendant from taking any steps to perfect or enforce Defendant's lien against the Mobile Home;
- (4) absent an order granting Defendant relief from the automatic stay of the Bankruptcy Code, Defendant could not perfect and/or enforce any lien asserted by Defendant against the Mobile Home;
- (5) Debtor's claim of exemptions were improperly scheduled in her bankruptcy paperwork filed with the Bankruptcy Court;
- (6) the Plaintiff did not believe that the Debtor could claim an exemption in the Mobile

³⁷ Plaintiff's Exhibit 4.

³⁸ See also *Motion to Consolidate Trial* filed on December 19, 2008 (Docket #62) regarding, generally, the assistance given by Defendant to Debtor.

³⁹ Plaintiff's Exhs. 7 & 8.

Home.⁴⁰

Defendant knew on and after the 341 Meeting that the Plaintiff asserted an interest in the Mobile Home. The Debtor knew on and after the 341 Meeting that the Plaintiff disputed her claim of exemption to the Mobile Home. At the 341 Meeting, the Debtor advised the Plaintiff that the Debtor had the original August Title at her residence.

E. Transfer of the Mobile Home Post-Petition to Defendant

On October 18, 2007, the Debtor transferred the Mobile Home to Defendant. On October 18, 2007, the State of Colorado issued a new certificate of title for the Mobile Home in Defendant's name (the "October Title").⁴¹ No liens against the Mobile Home were noted on the October Title.⁴² The Debtor transferred the Mobile Home to Defendant for no consideration.⁴³ Neither Defendant nor the Debtor obtained an order from the Bankruptcy Court, which authorized the transfer the Mobile Home to Defendant. The Mobile Home was transferred to Defendant after the Petition Date.⁴⁴ Neither Defendant nor the Debtor advised the Plaintiff that the Mobile Home was transferred to Defendant on October 18, 2007.

F. Status of Title to Mobile Home after Transfer to Defendant

At the October 19, 2007 hearing in the FED Action, the District Court rejected Defendant's assertion that he was the owner of the Mobile Home and required Defendant to surrender the title to the Mobile Home. On or about October 19, 2007, Defendant surrendered the October Title to the District Court.⁴⁵ Prior to surrendering the October Title to the District Court, Defendant endorsed the back of the October Title and wrote a lien on the face of the October Title. The Mobile Home was transferred to Defendant on October 18, 2007, one day before the District Court held a hearing on Defendant's counterclaims in the FED Action. The real purpose for Defendant acquiring title to the Mobile Home in October 2007 from the Debtor was for Defendant to preserve his counterclaims against Alasco.

G. Plaintiff's Efforts Following the Post-Petition Transfer

The Plaintiff filed this adversary proceeding against Defendant on January 22, 2008. The purpose of the adversary proceeding, among other things, was to seek an Order from this Court to avoid the subject transfer to the Defendant and recover the Mobile Home. Defendant filed several answers to

⁴⁰ Plaintiff's Exhibit 17.

⁴¹ Plaintiff's Exhibit 8.

⁴² *Id.*

⁴³ Plaintiff's Exhibit 7.

⁴⁴ *Id.*

⁴⁵ *Id.*

the Plaintiff's complaint in this adversary proceeding and asserted counterclaims against the Plaintiff.

On June 5, 2008, the Court dismissed Defendant's counterclaims against the Plaintiff in this adversary proceeding for, among other things, failure to state a claim and lack of standing.

This adversary proceeding has been vigorously contested by Defendant, including an appeal of the Bankruptcy Court's order dismissing Defendant's counterclaims against the Plaintiff. There is a distinct element of bad faith in Defendant's actions, in this Court, before other courts, and with Defendant's efforts to defeat the Plaintiff's administration of the bankruptcy estate. The Plaintiff was forced to retain counsel to assist him with avoiding the Debtor's transfer of the Mobile Home to Defendant and to recover the Mobile Home for the bankruptcy estate. The Plaintiff has incurred costs and attorney's fees in the approximate amount of \$27,000.00 as of December 31, 2008. The Plaintiff's costs and attorney's fees in the underlying bankruptcy case and this adversary proceeding are a direct and proximate result of the Debtor's transfer of the Mobile Home to Defendant. The Plaintiff would not have incurred the costs and expenses of counsel in this bankruptcy case if the Debtor had not transferred the Mobile Home to Defendant after the Petition Date. The Plaintiff's actions in filing and prosecuting this adversary proceeding are a proper exercise of the Plaintiff's discretion in administering the bankruptcy estate. This adversary proceeding was necessary for the Plaintiff to avoid and recover the Mobile Home for the bankruptcy estate.

The Mobile Home has a value to the bankruptcy estate in the approximate amount of \$3,500.00.

H. Credibility of the Debtor and Defendant

Based upon the Court's review of the file and the inconsistencies in the pleadings filed by the Debtor and based upon the Debtor's demeanor a trial, the Court concludes that the Debtor is not a credible witness. Specifically, the Debtor's testimony before the Court at trial was inconsistent and does not comport with her actions.

Defendant is not a credible witness. Defendant's testimony before the Court was inconsistent and does not comport with his actions. Defendant has engaged in repeated, continuous, conscious, and deliberate efforts to hinder and delay the Plaintiff, including, but not limited to, failing to turnover the Mobile Home to the Plaintiff once served with the Plaintiff's complaint in this adversary proceeding, launching counterclaims against the Plaintiff, and, continuing to assert an interest in the Mobile Home despite his own admission that he does not properly hold any such interest.

III. Conclusions of Law

A. Jurisdiction

The Court has core jurisdiction over this action pursuant to 28 U.S.C. § 157(b)(2). This Court also has jurisdiction over matters arising in or related to a case under Title 11, pursuant to 28 U.S.C. § 1334. This is a core proceeding. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

B. The Related Adversary Proceeding, Adv. Proceeding No. 07-01782-SBB

The Court adopts all of its relevant findings of fact and conclusions of law entered in connection with the Plaintiff's adversary proceeding against the Debtor to deny her discharge under 11 U.S.C. §727(a)(2)(B), following a trial in that proceeding.

C. Declaratory Judgment as to Mobile Home

The Mobile Home was owned by the Debtor on the Petition Date. Pursuant to 11 U.S.C. §541, the Mobile Home became property of the bankruptcy estate upon the Debtor's bankruptcy filing. No other person held an ownership interest in the Mobile Home on the Petition Date. No other person had a valid and properly perfected lien against the Mobile Home on the Petition date.⁴⁶ The Mobile Home was and is property of the bankruptcy estate to the exclusion of any claim or interest held by Defendant.⁴⁷

D. Avoidance of Post-Petition Transfer Pursuant to 11 U.S.C. §549

The Mobile Home was improperly transferred to Defendant after the Debtor filed for bankruptcy. No order from the Court was entered authorizing the post-petition transfer of the Mobile Home to Defendant. No provision of the Bankruptcy Code authorized the post-petition transfer of the Mobile Home to Defendant. The post-petition transfer of the Mobile Home to Defendant is voidable by the Plaintiff pursuant to 11 U.S.C. §549.⁴⁸ The post-petition transfer of the Mobile Home to Defendant is void. Pursuant to 11 U.S.C. §550, the Plaintiff is entitled to recover the Mobile Home from Defendant. As the relief requested by the Plaintiff in his Second Claim for Relief is in addition to the monetary relief requested in his Fourth Claim for Relief, the Trustee shall make an election as to the chosen relief (i.e. either the monetary relief in his Fourth Claim for Relief, or the turnover as requested in the Second Claim for Relief). In order to effectuate the bankruptcy estate's recovery of the Mobile Home, if the Trustee so elects the relief granted hereby, the State of Colorado is directed to issue a title to the Mobile Home to the bankruptcy estate free and clear of any lien.

⁴⁶ See *ENT Federal Credit Union v. Chrysler First Fin. Serv. Corp.*, 826 P.2d 430, 431-32 (Colo.App. 1992).

⁴⁷ It is also not insignificant that the Defendant herein has filed a Motion to Abandon the Mobile Home in the underlying bankruptcy case on December 29, 2008 (Docket #75) and an Amended Motion to Abandon the Mobile Home on December 30, 2008 (Docket #78). The Defendant acknowledges in these motions that the Mobile Home "*should be abandoned as property of the estate due to its deteriorated and uninhabitable condition.*" Thus, the Defendant acknowledges that this is property of the estate. Notice of these Motions was provided under L.B.R. 202 and objections have been filed to these motions, but this Court has not yet ruled on these matters because the Defendant has never filed a Certificate of Contested Matters pursuant to L.B.R. 202. This ruling makes moot the pending Motions and this Court will enter concurrently herewith this Court's denial of the Motion to Abandon and the Amended Motion to Abandon.

⁴⁸ See *Sender v. Love Funeral Home (In re Potter)*, 386 B.R. 306, 308 (Bankr.D.Colo. 2008).

E. Disallowance of a Claim Pursuant to 11 U.S.C. §502(d)

The post-petition transfer of the Mobile Home to Defendant is avoidable under 11 U.S.C. §549 and recoverable by the Plaintiff under 11 U.S.C. §550. Defendant asserts claims against the bankruptcy estate and the Mobile Home. Defendant did not surrender or turnover the Mobile Home to the Plaintiff despite the Plaintiff's express demand.

Pursuant to 11 U.S.C. §502(d), the Court DISALLOWS any and all claims held by Defendant against the bankruptcy estate and the Mobile Home.⁴⁹

F. Conversion of Property of the Estate Pursuant to COLO.REV.STAT. §18-4-405

1. The Colorado Theft Statute

The Colorado State Theft Statute, COLO.REV.STAT. § 18-4-405, provides:

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.

Under Colorado law, "theft" is broadly defined under COLO.REV.STAT. § 18-4-403, which provides:

If *any* law of this state refers to or mentions larceny, stealing, embezzlement (except embezzlement of public moneys), false pretenses, confidence games, or shoplifting, that law shall be interpreted as if the word "theft" were substituted therefor; and in the enactment of section 18-4-401 to 18-4-403 it is the intent of the general assembly to define one crime of theft and to incorporate therein such crimes thereby removing distinctions and technicalities which previously existed in the pleading and proof of such crimes.⁵⁰

COLO.REV.STAT. § 18-4-401 specifically defines the components of "theft" as follows:

⁴⁹ See *In re Commercial Fin. Serv. Inc. v. Chase Manhattan Bank (In re Commercial Fin. Serv., Inc.)*, 322 B.R. 440, 452 (Bankr.N.D.Okla. 2003).

⁵⁰ Emphasis added.

(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 matter 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.

2. Burden of Proof under COLO.REV.STAT. 18-4-405

The Court concludes that the requisite burden of proof for awarding treble damages under COLO.REV.STAT. 18-4-405 is the preponderance of evidence standard rather than the higher burden used in criminal matters of beyond a reasonable doubt.⁵¹

3. Plaintiff has Demonstrated by the Preponderance of the Evidence that a Theft has Occurred

From and after October 18, 2007, Defendant exercised a distinct, unauthorized act of dominion and control, or ownership, over property of the bankruptcy estate, including the Mobile Home, in a concerted and conscious effort to preserve his counterclaims against Alasco in the FED Action. Thus, this Court concludes that Defendant intended to deprive the Plaintiff and this estate permanently of the

⁵¹ See *Iten v. Ungar*, 17 P.3d 129, 135 n. 9 (Colo. 2000) (the Colorado Supreme Court noted that it has rejected the argument that the statutory remedy of treble damages requires the higher criminal burden of proof beyond a reasonable doubt, rather than the civil standard of preponderance of the evidence, even when the trebling of damages may, in part, have a punitive impact on the debtor, as may occur with the application of COLO.REV.STAT. § 18-4-405). However, it would appear that, in the context of a *criminal proceeding under COLO.REV.STAT. 38-22-127*, the burden of demonstrating the essential elements of “theft” must be proven “beyond a reasonable doubt.” *People v. Erickson*, 695 P.2d 804, 805 (Colo.App. 1985); *People v. Collie*, 682 P.2d 1208, 1210 (Colo. App. 1984); *People v. Brand*, 43 Colo.App. 347, 348, 608 P.2d 817, 818 (Colo.App. 1979). The Court also notes that this Court addressed the question of the burden of proof in *Bemas Constr., Inc. v. Dorland (In re Dorland)*, 374 B.R. 765 (Bankr. D.Colo. 2007).

use or benefit of the Mobile Home.⁵² Moreover, the Defendant's actions were intentional and constituted the knowing use and concealment of the Mobile home so as to deprive the Plaintiff and the estate permanently of its use or benefit.⁵³

Defendant's unauthorized act of dominion or ownership over property of the bankruptcy estate has caused the bankruptcy estate damages in the amount of \$3,500.00 to avoid and recover the Mobile Home. The damages to the estate are a direct and proximate result of the acts of Defendant. Defendant's actions with respect to property of the bankruptcy estate, including the Mobile Home, were done with a willful and/or reckless disregard for the rights of the Plaintiff and the bankruptcy estate. The bankruptcy estate shall further be awarded treble damages against Defendant pursuant to COLO.REV.STAT. §18-4-405, together with the bankruptcy estate's costs and attorney's fees.⁵⁴

Judgment shall enter in favor of the Plaintiff, for the benefit of the bankruptcy estate, against Defendant in the amount of \$10,500.00 (\$3,500.00 multiplied by three) and the Court will also award attorney's fees and costs consistent with the statute in the sum of \$27,000.00. As the relief requested by the Plaintiff in his Second Claim for Relief is in addition to the monetary relief requested in this Fourth Claim for Relief, the Trustee shall make an election as to the chosen relief (i.e. either the monetary relief in his Fourth Claim for Relief, or the turnover as requested in the Second Claim for Relief).

G. Avoidance of Lien Pursuant to 11 U.S.C. §544 and COLO.REV.STAT. §38-29-125

Pursuant to 11 U.S.C. §544, the Trustee is a judgment lien creditor of the Debtor as of the Petition Date. Pursuant to COLO.REV.STAT. §38-29-125, a mortgage or lien against a mobile home is not effective as a lien against the rights of third parties, purchasers for value without notice, mortgagees, or creditors of the owner unless the lien is filed for public record and the fact of filing noted on the owner's certificate of title.

Defendant did not hold an ownership interest in the Mobile Home on the Petition Date. Defendant did not have a properly perfected lien against the Mobile Home on the Petition Date.⁵⁵ No lien or mortgage against the Mobile Home was filed with the State of Colorado prior to the Petition Date. No lien or mortgage against the Mobile Home was noted on the August Title prior to the Petition Date by the State of Colorado. To the extent that Defendant asserts any lien on or against any property of the bankruptcy estate, including the Mobile Home, such lien is void as against the Trustee, the bankruptcy estate and the property of the bankruptcy estate as Defendant did not properly perfect such lien prior to the Petition Date.

⁵² COLO.REV.STAT. § 18-4-401(1)(a).

⁵³ COLO.REV.STAT. § 18-4-401(1)(b) and (c).

⁵⁴ *Itin v. Ungar*, 17 P.3d at 134; *Pritchard Concrete, Inc. v. Barnes (In re Barnes)*, 377 B.R. 289, 302 (Bankr.D.Colo. 2007).

⁵⁵ *See ENT Federal Credit Union v. Chrysler First Fin. Serv. Corp.*, 826 P.2d 430 (Colo.App. 1992).

H. Sanctions Pursuant to 11 U.S.C. §105(a)

Bankruptcy courts have the power to “sanction conduct abusive of the judicial process.”⁵⁶ Here, the following conduct of the Defendant warrants sanctions:

1. Defendant’s unlawful acquisition of property of the bankruptcy estate, including, but not limited to the Mobile Home, after the Petition Date.
2. Defendant’s acquisition of ownership of the Mobile Home despite Defendant’s knowledge of the Plaintiff’s and the bankruptcy estate’s interest in the Mobile Home.
3. Defendant’s transfer of the Mobile Home in violation of the Bankruptcy Code, despite his knowledge that the automatic stay provisions of the Bankruptcy Code prohibited him from taking any action(s) against property of the Debtor after the Petition Date.
4. Defendant’s action(s) against property of the bankruptcy estate, including the Mobile Home, for his own personal benefit and to the detriment of the bankruptcy estate.

Although the Defendant has articulated explanations that this adversary proceeding could have been more easily resolved. None of these explanations are credible or logical where, during opening statements, the Court asked Defendant if he was still opposing the Plaintiff’s efforts to recover the trailer and Defendant answered yes.

As a direct and proximate result of the acts of Defendant, the bankruptcy estate has suffered damages in the amount of \$27,000.00 to avoid and recover the Mobile Home. Defendant’s deliberate attempts to circumvent the Bankruptcy Code and interfere with the bankruptcy process compel the Court to enter sanctions in favor of the Plaintiff and the bankruptcy estate. The bankruptcy estate is entitled to an award of its fees and costs which were incurred as a direct and necessary consequence of Defendant’s violation of the Bankruptcy Code.⁵⁷ Because attorney’s fees and costs have already been awarded with respect to the Plaintiff’s claim under Plaintiff’s Fourth Claim for Relief (Conversion) is GRANTED and pursuant to COLO.REV.STAT. § 18-4-405, the Court will grant this relief, not in addition to the relief already granted, but as an alternative to the relief already granted. Moreover, this relief will be granted in addition to the turnover ordered related to the Second Claim for Relief if the Trustee makes an election to proceed with the relief granted on the Second Claim for Relief.

Thus, in the alternative, Judgment shall enter in favor of the Plaintiff, for the benefit of the bankruptcy estate, against Defendant in the amount of \$27,000.00.

⁵⁶ *In re Scrivner*, 535 F.3d 1258, 1263 (10 th Cir. 2008).

⁵⁷ *Marrama v. Citizens Bank*, 549 U.S. 365, 376, 127 S.Ct. 1105, 1112, 166 L.Ed.2d 956 (2007) (the Supreme Court noted that the Court has the inherent power to sanction “abusive litigation practices”); *In re Skinner*, 917 F.2d 444, 447 (10th Cir. 1990)(under 11 U.S.C. § 105(a), the bankruptcy court has inherent civil contempt power to sanction); *In re Aspen Limousine Serv., Inc.*, 198 B.R. 341, 348 (D.Colo. 1996).

IV. Order

IT IS THEREFORE ORDERED as follows:

1. The relief sought in Plaintiff's First Claim for Relief (Declaratory Judgment) is GRANTED and declaratory judgment is entered finding that the Mobile Home is property of the bankruptcy estate to the exclusion of any claim or interest held by Defendant is hereby entered.

2. The relief sought in Plaintiff's Second Claim for Relief (Avoidance of the Post-petition Transfer Pursuant to 11 U.S.C. § 549(a)) is GRANTED and the post-petition transfer of the Mobile Home to Defendant is VOID. Pursuant to 11 U.S.C. §550, the Plaintiff is entitled to recover the Mobile Home from Defendant. In order to effectuate the bankruptcy estate's recovery of the Mobile Home, the State of Colorado is hereby ORDERED to issue a title to the Mobile Home to the bankruptcy estate free and clear of any lien. Because the relief requested by the Plaintiff in his Second Claim for Relief is in addition to the monetary relief requested in this Fourth Claim for Relief, the Trustee shall make an election as to the chosen relief granted hereby.

3. The relief sought in the Plaintiff's Third Claim for Relief (Disallowance of Claim Pursuant to 11 U.S.C. § 502(d)) is GRANTED. Any and all claims held by Defendant against the bankruptcy estate and the Mobile Home are VOID and otherwise DISALLOWED.

4. The relief sought in the Plaintiff's Fourth Claim for Relief (Conversion) is GRANTED and pursuant to COLO.REV.STAT. § 18-4-405, JUDGMENT is entered for conversion and the Plaintiff, for the benefit of the estate is granted an award of three times his damages against Defendant pursuant to COLO.REV.STAT. §18-4-405, together with the bankruptcy estate's costs and attorney's fees. JUDGMENT is entered in favor of the Plaintiff, for the bankruptcy estate, against Defendant in the amount of \$10,500.00 together with attorney's fees and costs of \$27,000.00. Because the relief requested by the Plaintiff in his Second Claim for Relief is in addition to the monetary relief requested in this Fourth Claim for Relief, the Trustee shall make an election as to the chosen relief granted hereby.

5. The relief sought in the Plaintiff's Fifth Claim for Relief (Lien Avoidance - 11 U.S.C. § 544) is GRANTED and pursuant to 11 U.S.C. §544 & COLO.REV.STAT. §38-29-125, to the extent that Defendant asserts any lien on or against any property of the bankruptcy estate, including the Mobile Home, such lien is void as against the Plaintiff, the bankruptcy estate and the property of the bankruptcy estate as Defendant did not properly perfect such lien prior to the Petition Date.

6. The relief sought in the Plaintiff's Sixth Claim for Relief (Contempt and Sanctions pursuant to 11 U.S.C. § 105(a)) is GRANTED and JUDGMENT is entered, as an alternative remedy to Plaintiff's Fourth Claim for Relief (Conversion) is GRANTED and pursuant to COLO.REV.STAT. § 18-4-405, in favor of the Plaintiff, for the bankruptcy estate, against Defendant in the amount of \$27,000.00 for sanctions.

Dated this 28th day of May, 2009.

BY THE COURT:



Sidney B. Brooks,
United States Bankruptcy Judge