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

| | | |
|---|---|---|
| In re: | ) | |
| | ) | |
| PATRICK G. RILEY | ) | Case No. 02-29529 ABC |
| | ) | Chapter 7 |
| | ) | |
| Debtor. | ) | |
| In re: | ) | |
| | ) | |
| RALPH W. WALKER | ) | Case No. 02-30914 EEB |
| | ) | Chapter 7 |
| | ) | |
| Debtor. | ) | |
| | ) | |
| LAFARGE WEST, INC., f/k/a Western Mobile Southern, Inc., d/b/a LaFarge Southern, | ) | |
| | ) | |
| Plaintiff, | ) | Adversary No. 03-1082 ABC |
| v. | ) | |
| | ) | |
| PATRICK G. RILEY and RALPH W. WALKER, | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

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

Before the Court in this adversary proceeding are the claims in the amount of $192,878.48 of LaFarge West, Inc. ("LaFarge") against Patrick G. Riley ("Riley") and Ralph W. Walker ("Walker"). In this litigation LaFarge requests a determination that such claims are nondischargeable pursuant to 11 U.S.C. § 524(a)(4) in the separate Chapter 7 bankruptcy proceedings of Riley and Walker. The Court has jurisdiction over this matter under 28 U.S.C. §§ 1334(a) and (b) and 28 U.S.C. § 157(a) and (b)(1). This is a core proceeding under 28 U.S.C. § 157(b)(2)(I), as it involves determinations as to dischargeability of particular debts. The matter was tried on August 2 through August 5, 2004, at the conclusion of which the Court took the matter under advisement.

In December of 1999, Walker and Riley bought the assets of a business that operated as Red Lion Sports, Inc., d/b/a Springs Construction Co. ("Springs"). Initially, this business operated almost exclusively as a subcontractor on homes built by Richmond Homes. Springs built foundations known as post-tension slab foundations for Richmond. Throughout the life of Springs, following the Walker/Riley acquisition, until Springs went out of business, Walker and Riley, who were owners, executive officers, and directors of Springs, made all-important management decisions and controlled the disposition of all funds of Springs.

Sometime after defendants' acquisition of Springs, Richmond Homes changed its foundations from horizontal post-tension slab foundations to vertical cast wall foundations. This change had profound consequences to Springs. In an ultimately unsuccessful effort to retain Richmond's business, Springs incurred unanticipated retraining and retooling expenses on the order of $500,000-$600,000. Springs was forced at the same time to diversify its customer base. All this resulted in cash flow problems and deterioration in customer satisfaction with the quality of Springs' work. Ultimately, Springs never recovered from the dislocation to this business brought on by Richmond's change in type of foundation for its homes. It closed its doors in late October 2002.

During the time it was in business, substantially all of Springs' revenues were from customer jobs for builders. Over the two-year and ten-month life of the company, Springs billed its customers approximately $5 million, all of which was colleted except approximately $125,000. The revenues Springs received as a subcontractor were spent in significant part to pay for materials and labor on the hundreds of jobs it did for builders. As might be expected, these revenues also paid for general operating expenses, unrelated to particular jobs, such as executive and office staff compensation, rent, insurance, debt service and the like. Springs' subcontract job revenue also provided funds for capital expenses, such as equipment and vehicles, and for distributions to owners by way of loan repayments as well as returns on equity invested.

At the time Springs went out of business it had no debt for unpaid labor, except possibly compensation that Walker and Riley were due for their own services to the company as it ran out of cash. Little evidence was presented at trial which segregated labor costs incurred on general and administrative expenses from direct labor cost on Springs' subcontract jobs for builders. Virtually no evidence was presented that separated lienable labor costs on a job-by-job basis.

Throughout its existence, Springs obtained most of its concrete from LaFarge. Springs grew to be one of LaFarge's largest customers. LaFarge originally agreed to allow Springs low six figure open account access to credit. There was apparently no written agreement to this effect, and the credit was administered by a practice under which Richmond would pay Springs with checks made payable both to Springs and LaFarge. The evidence is clear and uncontroverted that, in fact, every check Richmond paid for Springs' work over the entire Springs/Richmond relationship was made payable jointly to Springs and LaFarge.

In late 2000 and the first two thirds of 2001, the account receivable from Springs to LaFarge grew further, approaching $400,000. Checks from builders other than Richmond that were payable only to Springs started being used for working capital by Springs without paying LaFarge's supplier invoices after LaFarge delivered concrete to Springs' jobs for builders other than Richmond.

By the summer of 2001, the magnitude of the Springs' delinquent account became a significant concern to LaFarge's credit manager, Lisa Doggett, who then took over the handling of this account herself. LaFarge sought to have Springs obtain joint check agreements from Springs' customers under which builders would agree to make all checks to Springs for its subcontract work jointly payable to LaFarge. LaFarge, under such joint check agreements with builders would, in turn, release its supplier's liens against the projects on which Springs had worked and for which Springs was being paid by the builders. For the most part, LaFarge was not successful in getting Springs' largest customers to sign joint check agreements. This notwithstanding, by the end of the summer of 2001, Doggett was successful in requiring Springs, on payments for almost all its jobs, to get checks made payable jointly to Springs and LaFarge. Aware of the demand for joint checks by Springs' principal supplier, Springs' customers were willing to provide joint checks in exchange for LaFarge lien waivers on specific properties on which Springs had worked. LaFarge willingly gave the lien waivers in connection with receiving joint checks. Doggett testified that she did not consider relinquishment of lien rights on new residences a very significant concession because of the home buyer's bona fide purchaser exception to a supplier's mechanic lien protection contained in Colo. Rev. Stat. § 38-22-125.

With the requirement of joint checks from almost all Springs' customers in place by late summer of 2001, Doggett got control of what had been a steadily growing delinquent account. She would consult with Springs over each joint check and insist that LaFarge's current invoices on the particular jobs for which Springs was being paid would come off the top of each joint check. LaFarge and Springs would then negotiate and agree on the division of the balance of each joint check. A portion would go to LaFarge to be applied to delinquent Springs invoices; the balance would go to Springs for working capital.[1]

Doggett had decided that the best way to collect its past due open account from Springs was to cooperate in keeping Springs in business. That meant getting joint checks and giving lien waivers. Refusal by LaFarge to provide lien releases would have caused Springs' customers promptly to discontinue doing business with Springs. LaFarge's credit manager testified that she was distressed that that Springs' account receivable had been allowed to reach the size and age it had. She also testified that at no time was LaFarge treated other than with candor and honesty by Springs' principals. The cooperative approach employed by Doggett to this "problem credit" was not altogether unsuccessful, in that the account apparently was reduced by approximately half at the time of Springs' demise.

[1]There is no evidence that U.S. Home shifted to issuing joint checks; it appears to have continued to issue checks for Springs' work payable only to Springs. Nevertheless, once Doggett got control of this account in late summer 2001, the same process of agreed allocation of U.S. Home checks was employed by LaFarge and Springs.

## LAFARGE'S CLAIMS

Walker and Riley take no issue with LaFarge's accounting for what is owed it by Springs. The agreed amount owed by Springs to LaFarge for concrete and related goods supplied to Springs' jobs is $192,878.48. The dispute in this case is whether this sum is a personal liability of Walker and Riley and, if so, whether it is dischargeable in their bankruptcy cases.

LaFarge contends that the course of conduct described above renders Walker and Riley personally liable under the Colorado mechanic's lien trust fund statute, Colo. Rev. Stat. § 38-22-127.[2] Furthermore, LaFarge asserts that such defalcation while acting in a fiduciary capacity renders that liability nondischargeable pursuant to 11 U.S.C. § 523(a)(4).[3]

## WALKER'S AND RILEY'S DEFENSES

Walker and Riley have contested neither that Springs owes LaFarge the subject debt nor that a violation of the mechanic's lien trust statute renders a related debt nondischargeable. Each has, however, strenuously maintained that no violation of the mechanic's lien trust statute was committed by Springs and that even if it were, he would have no personal liability under applicable Colorado law. More particularly, the defenses asserted by Walker and Riley are:

– LaFarge waived its rights under the mechanic's lien trust statute by delivering lien waivers on properties on which Springs received trust funds.

– LaFarge relinquished its mechanic's lien trust fund statutory rights when it entered into joint check agreements with Springs' customers who were paying trust funds to Springs.

– Springs' good faith belief that LaFarge's lien claims were not valid excused Springs from trust fund liability under Colo. Rev. Stat. § 38-22-127(2).

---

[2] Colo. Rev. Stat. § 38-22-127. "Money for lien claims made trust funds. . ." states in relevant part:

> (1) All funds disbursed to any . . . subcontractor under any building . . . contract . . . shall be held in trust for the payment of . . . material suppliers . . . who have a lien, or may have a lien, against the property . . . and for which such disbursement was made.

[3] 11 U.S.C. § 523(a)(4) states:

> (a) A discharge under section 727. . . of this title does not discharge an individual debtor from any debt –
>
> > . . . .
> > (4) for fraud or defalcation while acting in a fiduciary capacity. . . .

– – LaFarge relinquished its trust fund statutory rights by its course of conduct with Springs, in accepting, endorsing and dividing joint trust fund checks.

– – LaFarge's application of trust funds to its past due invoices on other properties supports an equitable affirmative defense based on LaFarge's unclean hands.

– – The recent Colorado Supreme Court decision in ***Leonard v. McMorris*, 63 P.3d 323 (Colo. 2003)**, exculpates Walker and Riley from any personal liability for violation of the Colorado mechanic's lien trust fund statute.[4]

### 1. Mechanic's Lien Waivers

Although all Springs' builder/customers did not require lien waivers from LaFarge, the evidence is undisputed that Springs regularly obtained lien releases from LaFarge in connection with Springs getting paid by builders for work Springs had done. It is also undisputed that LaFarge did not seek to enforce its collection rights against Springs by prosecuting its mechanic's lien rights against properties to which it delivered concrete to Springs.

Neither the language of the statute, business practice, or authority supports Walker's and Riley's position that a supplier's rights under the mechanic's lien trust statute are dependent upon preserving its mechanic's lien rights. Mechanic's lien trust fund claims are separate from and not dependent upon pursuit of mechanic's lien claims. ***In re Regan*, 311 B.R. 271, 276 (Bankr. Colo. 2004); *First Commercial Corp. v. First National Bancorporation, Inc.*, 572 F. Supp. 1430, 1434 (D. Colo. 1983)**. The former are claims against "any contractor or subcontractor" who receives disbursed trust funds (Colo. Rev. Stat. § 38-22-127(1)); the latter are claims "upon the property" which has been furnished labor or materials (Colo. Rev. Stat. § 38-22-101). While these claims are both found in the Colorado general mechanic's lien statute, nothing in that statute indicates that the rights in favor of subcontractors, laborers and suppliers under section 101 and section 127 are either interdependent or mutually exclusive. On the contrary, the provision of the statute creating the statutory trust expressly creates the trust in favor of subcontractors, laborers and suppliers "who have a lien, or <u>may</u> have a lien. . . ." (emphasis added; see fn. 2, *supra*).

In the ordinary progression of construction projects, owners, contractors and lenders routinely insist on periodic lien releases or waivers as a condition to going forward. There is no reason to believe that the Colorado General Assembly intended to penalize a supplier who accommodates by giving a lien release prior to being paid by discharging its trust fund rights against the contractor or subcontractor who misappropriates or fails to account for funds received by it and earmarked for the

[4]These defenses are listed in the pre-trial order that was submitted jointly by the parties and entered by the Court. The pre-trial order states that Walker and Riley assert "in addition the equitable defenses of waiver, estoppel and ratification. . . ." Those "additional" defenses are subsumed in the more particularly delineated defenses listed by Walker and Riley and are not otherwise supported by the evidence before the Court.

supplier. Such in interpretation of the mechanic's lien law would discourage the very kind of cooperative workout effort LaFarge undertook in trying to keep Springs viable so it might ultimately maximize repayment of its debts. The evidence in this case is clear that had LaFarge either refused to provide lien waivers or filed liens on the projects to which it delivered concrete to Springs, Springs would have been "kicked off" those jobs and summarily shut off from further work for its customers. As a matter of law, beneficiaries of the mechanic's lien trust fund statute do not lose their rights thereunder merely by surrendering or otherwise impairing their statutory lien rights.

### 2. Joint Check Agreements

In exchange for its cooperation, LaFarge had Springs approach Springs' customers with "Joint Check Agreements." Under these, builders would make checks payable for Springs' work jointly to LaFarge and Springs. In return, LaFarge "agreed to refrain from enforcing its legal rights under the Colorado mechanic's lien statute, with regard to materials furnished to Springs Construction and delivered to the above project(s)."

Springs points out that this "waiver" is not limited to lien rights but applied to "legal rights" under Article 22 of Title 38, which are inclusive of both lien rights and trust fund rights. This defense fails for lack of supporting evidence.

While several Springs customers were persuaded to utilize joint checks to Springs and LaFarge, as few as four actually signed joint check agreements. Of these, only Saddlehorse Homes is among the builders on whose jobs LaFarge continues to have outstanding invoices. The Saddlehorse Joint Check Agreement fails to specify any projects with respect to which LaFarge agrees not to enforce rights under the mechanic's lien statute.

### 3. Colo. Rev. Stat. Section 38-22-127(2) Good Faith Belief of Invalidity

Subsection (2) of the mechanic's lien trust fund statute creates an exception to trust fund responsibilities if the contractor or subcontractor-holder of disbursed funds has a good faith belief that a supplier's or laborer's claim or lien is not valid or is subject to setoff.[5] There was no evidence presented in this case that Springs at any time disputed the validity of LaFarge's claim for materials delivered to it or LaFarge's rights to file liens in connection therewith. Nor is there any evidence of

---

[5]This subsection states in relevant part:

> (2) This section shall not be construed as to require any such contractor or subcontractor to hold in trust any funds which have been disbursed to him or her for any . . . material supplier . . . who claims a lien against the property . . . if such contractor or subcontractor has a good faith belief that such lien . . . is not valid or if such contractor or subcontractor, in good faith, claims a setoff, to the extent of such setoff.

setoff rights against LaFarge's claim. LaFarge's decision not to prosecute its lien rights does not create a defense under the good faith contested validity exception to the contractor's or subcontractor's fiduciary duties under the mechanic's lien trust fund statute.

#### 4. **Utilization of Joint Checks**

Springs regularly was paid for its subcontract work by builders with checks covering multiple jobs. These checks were in significant part "trust funds" for Colorado mechanic's lien trust fund statute purposes. Many of these checks, particularly after late summer 2001, were made jointly payable to Springs and LaFarge. Many others, even where payable only to Springs, were, like the joint checks, divided between Springs and LaFarge in a collaborative undertaking. During the first twenty months of Springs' existence, the application of proceeds of builder checks resulted in a growing open account extension of credit from LaFarge to Springs. During the last fourteen months of Springs' existence, the division of proceeds from these checks resulted in a reduction of this credit to the $192,878.48 that remains unpaid.

Where multiple projects or properties are concerned, in evaluating the merits of Colorado mechanic's lien trust fund claims, or defenses against such claims, neither plaintiff nor defendant can "aggregate" its analysis on the multiple properties. Such claims must be analyzed on a property-by-property basis. As to any separate property, the defendant contractor or subcontractor must have received trust funds. Plaintiff subcontractor, supplier or laborer must be unpaid with respect to that particular property. Finally, the defendant contractor or subcontractor must account for proper application of trust funds "for each project or contract," or face liability for breach of fiduciary duty. Colo. Rev. Stat. § 38-22-127(4).

Springs, as subcontractor, and LaFarge, as its principal supplier, dealt together on hundreds of separate properties on which Springs did foundation or other concrete work for builders. LaFarge argues, with respect to these properties as a group, that because Springs has spent trust funds in excess of $192,878.48 on non-lienable general operations and capital expenses, and because LaFarge is unpaid that amount for lienable invoices for concrete delivered to these properties taken together, Springs is liable for breach of its mechanic's lien trust fund fiduciary duty.[6]

Conversely, Springs defends asserting that there is no violation of the trust fund statute because LaFarge was complicit in and consented to disposition of sufficient trust funds from projects worked on in late 2001 and 2002 to have paid not only LaFarge invoices on those projects, but also

---

[6]LaFarge's expert focused his analysis on aggregating trust funds received and funds spent during the period of LaFarge's outstanding invoices. He concludes that in the fifteen months between September 2000 and November 2001, Springs received total trust funds of $2,757,244 and disbursed $1,705,458 on non-trust matters. As was pointed out on cross examination, this expert's "non-trust fund disbursements figure" inexplicably included nothing from Springs' $1.2 million of payroll expense during the period covered.

LaFarge's outstanding invoices from 2000 and early 2001 that remain unpaid in the amount of $192,878.48.

Neither of these "aggregating" analyses is apposite under Colo. Rev. Stat. § 28-4-127. The duty thereunder is to account on a project-by-project basis. Once trust funds are identified to a property by plaintiff, defendant must account for them with respect to that property. If it fails to, it has defalcated in its fiduciary duty to do so.

In this case, LaFarge as presented uncontroverted evidence of more than 1300 invoices paid to Springs by its customers over the course of Springs' existence. These reflect collections of $4,774,577.96. Such "trust funds" include among them payments from all properties which are the subjects of each of LaFarge's 205 outstanding invoices.[7] Having established that Springs received trust funds for each of the projects on which LaFarge holds unpaid invoices to Springs for concrete delivered, the burden shifts to Springs. Springs must account for these trust funds and demonstrate that these monies have been properly applied to beneficiaries of the statutory trusts associated with each separate property to which LaFarge delivered concrete and was not paid. ***In re Storie*, 216 B.R. 283, 288-89 (10th Cir. BAP 1997)**. Except with respect to twenty-eight invoices identified below, Springs fails to meet this burden.

Springs did not offer any evidence concerning the application of trust funds on any particular property to trust beneficiaries on that property, i.e. subcontractors, laborers and suppliers. Instead, Springs contends that LaFarge's participation with it in allocating trust fund builder checks, between Springs for working capital and LaFarge for amounts due it, constitutes a waiver or other relinquishment of LaFarge's trust fund rights with respect to what remains owed to LaFarge. Springs' argument fails, notwithstanding the fact that LaFarge agreed to retention by Springs, from checks on jobs where LaFarge current invoices were paid, of additional trust funds in excess of what remains owing to LaFarge on earlier unpaid invoices. It is Springs' failure to account for disposition of trust funds it received on jobs associated with unpaid invoices for the period before the late summer 2001, when Lisa Doggett took control of this account, that constitutes Springs' breach of fiduciary duty.

Only to the extent the evidence establishes that LaFarge participated in disposition of trust funds associated with particular jobs to which it delivered concrete and still has unpaid invoices relating to those jobs, can Springs make out a defense to LaFarge's mechanic's lien trust fund claims. Where LaFarge has been complicit in disposition of trust funds identified to particular properties, it

---

[7]During almost three years of existence when it collected $4,774,577.96 from customers, Springs had only $124,890.74 of outstanding uncollected accounts from sixteen unpaid invoices. Only one of these sixteen invoices was to a builder on a project for which LaFarge supplied concrete to Springs, and for which LaFarge still has an open account, an April 2002 unpaid invoice from Springs to Sawhorse Co. All unpaid LaFarge invoices to Springs on Sawhorse properties post-date this Springs-Sawhorse account receivable by four months. Thus, LaFarge has established that Springs received trust funds for every project on which Springs has an unpaid invoice from LaFarge.

cannot complain that such disposition gives it recourse for breach of trust on unpaid invoices concerning those properties.

Unlike with any other of Springs' builder-customers, every check from Richmond Homes over the entire course of its dealing with Springs was made jointly payable to, and endorsed by, LaFarge. Accordingly, on Richmond jobs, there was no need for Springs to account further with respect to LaFarge trust fund claims. The evidence is clear that LaFarge consented to and participated in disposition of trust funds on <u>every</u> Richmond job. Therefore, LaFarge's trust fund claim on the twenty unpaid invoices aggregating $27,510.27 and relating to Richmond jobs must fail.

The evidence at trial shows that a similar analysis is applicable to the most recent eight invoices, dated August 10, 2001 through September 14, 2001, aggregating $5,091.71 and relating to Keller Homes, Inc. jobs. All Keller checks from and after August 8, 2001, were jointly payable to and endorsed by LaFarge. Springs need not account further for trust funds on specific properties after the time at which the evidence demonstrates that LaFarge signed off on disposition of trust funds relating to those specific jobs.

The evidence also shows that it is likely that LaFarge agreed to disposition of trust funds relating to some, or even many, other of its now outstanding invoices from the period November 2000 through August 2001. There is, however, insufficient evidence before the Court to permit it to determine which of such trust funds were related to what specific properties in connection with which there remain outstanding LaFarge invoices. Once trust funds have been identified to particular properties by LaFarge, the burden to account for their proper disposition under Colo. Rev. Stat. § 38-22-127 rests squarely on Springs. Its inability to meet that burden constitutes a breach of fiduciary duty. ***In re Storie, id.***

In summary: (i) LaFarge's 205 outstanding invoices aggregating $192,878.48 arise from jobs Springs did in the last months of 2000 through approximately August 2001; (ii) LaFarge has established that Springs received trust funds from its builder-customers on all of these jobs; (iii) through the cooperative LaFarge/Springs trust fund check proceeds allocation effort on jobs after late summer of 2001, almost every LaFarge invoice during Springs' final fourteen months in business was paid on a current basis,[8] with some trust funds from post-summer 2001 jobs also going to repay pre-summer 2001 delinquent LaFarge invoices.

This course of dealing does not discharge Springs' fiduciary duties under the Colorado mechanic's lien trust fund statute for trust funds identified to jobs for which LaFarge has unpaid invoices for concrete delivered in the period November 2000 through August 2001. Springs has a fiduciary duty to account for these trust funds which it has failed to meet. Cooperative efforts

[8]Five of LaFarge's 205 unpaid invoices were, in fact, dated after August 2001 and relate to two jobs Springs did in its last months of its existence. The builder's payment to Springs on these jobs apparently eluded LaFarge altogether.

between Springs and LaFarge with respect to proper application of trust funds from jobs after August 2001, does not relieve Springs of its fiduciary duty to account for trust funds on earlier jobs. Nor does it create a waiver of LaFarge's trust fund rights with respect to trust funds on those earlier jobs.

Accordingly, of Springs' uncontested $192,878.48 debt to LaFarge, Springs is answerable to LaFarge for violations of the trust fund statute except with respect to twenty invoices from Richmond Homes jobs (totaling $27,510.27) and eight invoices on Keller Homes jobs (totaling $5,091.71) where the evidence shows that LaFarge acquiesced in the disposition of trust proceeds from the particular jobs.

### 5. LaFarge's Unclean Hands

Between summer of 2001 and October 2002, Springs' debt to LaFarge was reduced on the order of $100,000 to $200,000. The source of the reduction was "trust fund" payments to Springs from its builder customers, over and above payments by Springs to LaFarge for then current concrete deliveries to jobs. Springs contends that by participating in such diversion of trust funds to payment of its prior jobs with delinquent invoices, LaFarge has "unclean hands;" Equity should not permit LaFarge now to claim as a beneficiary on prior jobs under the trust fund statute.

This defense fails on the facts and the law. Springs offered no evidence of any trust beneficiary who went unpaid on jobs where trust fund builder checks were divided by Springs and LaFarge. Furthermore, the Colorado mechanic's lien trust fund statute only requires that a contractor or subcontractor "shall maintain separate records of account for each project or contract...." It expressly does <u>not</u> require segregation by the contractor or subcontractor of that which is identified as "trust funds." Colo. Rev. Stat. § 38-22-127(4). It follows that any creditor who collects from the violator of the trust fund statute is not accountable for or complicit in the violation of the trust fund statute merely because of the source of the funds from which such creditor collects. On this record, LaFarge is without "unclean hands."

### 6. Corporate Officers' Insulation From Personal Liability Under the McMorris Case

The Colorado mechanic's lien trust fund statute has been interpreted for many years by Colorado courts to hold accountable officers of a corporate contractor or subcontractor who have controlled the entity's finances and actually engaged in the conduct constituting the statutory breach of trust. See ***Flooring Design Associates, Inc. v. Novick*, 923 P.2d 216, 221 (Colo. App. 1996); *Alexander Co. v. Packard*, 754 P.2d 780, 782 (Colo. App. 1988); *In re Regan*, 311 B.R. 271 (Bankr. Colo. 2004)** and cases cited therein. Walker and Riley readily acknowledge that throughout Springs' existence they together controlled all decisions concerning its cash, management and operation.

Walker and Riley maintain, however, that after the Colorado Supreme Court's recent pronouncement in ***Leonard v. McMorris*, 63 P.3d 323 (Colo. 2003)**, the Colorado mechanic's lien trust fund statute no longer imposes personal liability on those who control a corporation's finances where the corporation violates Colo. Rev. Stat. § 28-22-127. The ***McMorris*** case is distinguishable and not controlling as argued by Walker and Riley. It dealt with a separate Colorado statute (the Colorado Wage Claim Act) that, in identified circumstances, imposes liability on an "employer." Corporate officers were found not to be liable in the ***McMorris*** case. The case turned on an ambiguity found to exist by a majority of the Colorado Supreme Court concerning whether the definition in the statute of "employer" (which included an "officer" of a corporation) rendered officers liable for the corporate employers acts that were proscribed in later sections of the statute. This Court, like the court in ***Regan*** cited above, does not read ***McMorris*** so expansively as to interpret Colorado law now as exculpating from liability corporate officers who personally perpetrate a breach of fiduciary duty while acting as corporate agents.

The law is well established in this district that to the extent a debt arises in connection with a violation of the Colorado mechanic's lien trust fund statute, that debt may not be discharged in Chapter 7. It is a "debt...for fraud or defalcation while acting in a fiduciary capacity..." within the purview of 11 U.S.C. § 523(a)(4).

Upon the foregoing findings of fact and conclusions of law, it is

ORDERED that judgment shall enter on LaFarge's claims against Walker and Riley, jointly and severally, in the amount of $192,878.48; and it is

FURTHER ORDERED that of said amount $160,276.50 is determined to be nondischargeable pursuant to 11 U.S.C. § 523(a)(4) in the pending Chapter 7 bankruptcy cases of Ralph W. Walker and Patrick G. Riley; and it is

FURTHER ORDERED that Plaintiff LaFarge West, Inc. shall recover its costs herein.

DATED: September 17, 2004.

BY THE COURT:

__________________________________
A. Bruce Campbell
United States Bankruptcy Judge