

Obtaining Payment through The Colorado Trust Fund Statute

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Many construction professionals have experienced instances when those they have contracted with have been paid by others but have failed to pay their obligations to the construction professional. The Colorado legislature attempted to remedy this unfair situation through enactment of the C.R.S. § 38-22-127(1), the “**Colorado Trust Fund Statute.**” Many are familiar with this statute and the ability of contractors to seek redress in court. Remedies for violation of the Colorado Trust Fund Statute include trebled damages, attorney fees and costs. Unfortunately, many of these same construction professionals expend significant resources obtaining judgments only to be served with a notice of bankruptcy by the non-paying contractor or the individual owners of the company. In such instances construction professionals continue to have options to attempt to remedy this additional insult.

In instances where a violation of the Colorado Trust Fund Statute exists, the innocent construction professional still has options and should consider seeking a determination of the the Bankruptcy Court that the debt is non-dischargeable pursuant to 11 U.S.C. §523. That federal bankruptcy statute provides that bankruptcy does not “discharge an individual debtor from any debt...for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny” nor does it “discharge an individual debtor from any debt...for willful and malicious injury by the debtor to another entity or the property of another entity.”

The Colorado Trust Fund Statute requires that:

“All funds disbursed to any contractor under any building, construction, or remodeling contract or on any construction project shall be held in trust for the payment of the subcontractors, laborer or material suppliers, or laborers who have furnished laborers, materials, services or labor, who have a lien, or may have a lien, against the property, or who claim, or may claim, against a principal and surety under the provisions of this article and for which such disbursement was made.”

When the non-paying contractor is paid 100% of the contract price, that contractor is statutorily required, and has a fiduciary duty, to keep the funds in trust to pay the innocent construction professional. If the contractor then diverts those funds to others and/or to itself, it is liable to the innocent construction professional for all diverted funds.

For the debt to be deemed non-discharged, the innocent construction professional must establish; 1) that a fiduciary relationship existed between the non-paying contractor and the innocent construction professional, and 2) that the debt owed is attributable to the fraud or defalcation committed by the non-paying contractor in the course of the fiduciary relationship.

In order to show a fiduciary relationship there must be an express or technical trust. The Colorado Trust Fund Statute creates such a trust.

Additionally, an individual in control of the finances and financial decisions of an entity in violation of C.R.S. § 38-22-107 is personally liable. Thus, even if the non-paying contractor is a corporation, limited liability company or other entity where individuals are supposedly immune from liability for the acts of the entity, the individual officers of the entity may be held personally liable and a personal bankruptcy will not shield those individuals from their liability. Even if the entity is insolvent, directors of a corporation have a fiduciary obligation to creditors when the corporation becomes insolvent. Managers of a limited liability company manage the limited liability company as directors manage the corporation and the presence of this same fiduciary duty to creditors is required in judging the actions of managers. As a fiduciary, the officer or manager has an obligation to not divest corporate property for his or her own benefit.

The Colorado Trust Fund Statute states that a violation constitutes theft. Theft involves the knowing control over the property of another without authority or by theft or deception with the mental culpability defined in the statute.

As such, the non-paying contractor and/or the officer or director of a corporation or member/manager of a limited liability company who personally benefited by the decision to pay money to himself or herself, instead of the entities creditors, including the innocent construction professional, can be held liable for Civil Theft and a determination that the debt is not discharged in bankruptcy pursuant to 11 U.S.C. 523.

Those innocent construction professionals making their case as outlined above may continue in their collection efforts and attempt to remedy the wrong committed on them.

The Colorado attorneys at Bradley Devitt Haas & Watkins look forward to speaking with you and further explaining how we can assist you in obtaining payment for the work you performed in honoring your contractual obligations. Please contact Steve Watkins at 303-384-9228 to discuss any of your legal needs regarding construction contracting or construction disputes.

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