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| DISTRICT COURT, DENVER COUNTY, COLORADO  Court Address: Denver County Court  1437 Bannock St., Room 256  Denver, CO 80202  (720) 865-8301  Plaintiffs: ROBERT ABRAMS and ABRAMS & ASSOCIATES, LLC, a Colorado limited liability company;  v.  Defendants: SHAWN BEESON | ATE FILED: June 13, 2016 4:23 ILING ID: F6746D8D5EC80 ASE NUMBER: 2015CV31709  **COURT USE ONLY** | PM |
| Attorneys for Plaintiff: | Case Number: 2015CV31709 | |
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| **PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANT’S SECOND AND THIRD CLAIMS OF HIS FIRST AMENDED COUNTERCLAIMS AGAINST ROBERT ABRAMS PERSONALLY FOR THEFT AND BREACH OF CONTRACT** | | |

COMES NOW, Plaintiff Robert Abrams, through his attorneys at Silver Law, LLC and Abrams & Associates, LLC, and hereby files his Partial Motion for Summary Judgment on Defendant’s Second and Third Claims against Robert Abrams individually, for Theft and Breach of Contract. In support thereof, Plaintiff state and allege as follows:

C.R.C.P. 121 § 1-15, ¶8 Certification: Plaintiff contacted defense counsel in good faith regarding this Motion. Defendant opposes the relief requested herein.

1. From the pleadings, Affidavits and matters of record, no genuine issue of material fact exist; therefore, Plaintiff’s Motion must be granted.
2. A Memorandum Brief setting forth Plaintiff’s position with particularity is set forth herein in support of its Motion for Partial Summary Judgment.

**ISSUES PRESENTED AGAINST DEFENDANT SHAWN BEESON**

1. **DEFENDANT SUED ROBERT ABRAMS PERSONALLY FOR BREACH OF CONTRACT. MR. ABRAMS ENTERED NO CONTRACT WITH DEFENDANT AND IS THEREFORE NOT A REAL PARTY IN INTEREST. ACCORDINGLY, SUMMARY JUDGMENT IS APPROPRIATE UNDER C.R.C.P. 56.**
2. **DEFENDANT SUED ROBERT ABRAMS PERSONALLY FOR THEFT OF HIS MONEY. MR. ABRAMS NEVER HAD POSSESSION OF DEFENDANT’S MONEY; ACCORDINGLY, SUMMARY JUDGMENT IS APPROPRIATE ON THIS ISSUE.**

**STATEMENT OF THE CASE**

1. On September 22, 2015, defendant answered plaintiff’s complaint and individually named plaintiff for breach of contract, theft and battery. Defendant, in his caption, sued third party defendant Abrams & Associates, LLC, yet failed to name this defendant for any claims in this lawsuit. *Exhibit 1.*
2. Throughout defendant’s entire counterclaim he refers to plaintiff Robert Abrams, thereby putting Mr. Abrams on notice, he personally must defend against these claims; and, plaintiff does so throughout this proceeding.
3. Further, in defendant’s wherefore clause at *para. A*, of his original counterclaim, he directly requests judgment enter against Robert Abrams for all claims and counterclaims. *Exhibit 1.* Therefore, Abrams personally is the named party in defendant’s counterclaims.
4. On October 21, 2015 Defendant filed his Answer to Plaintiffs’ Third Amended Complaint and his First Amended Counterclaim. In that counterclaim, defendant sued Robert Abrams personally and not his named company Abrams & Associates, LLC. *Exhibit 2.*
5. Defendant knew of Abrams & Associates, LLC because he sued Mr. Abrams and Abrams & Associates, LLC, in his fourth counterclaim for Violation of the Colorado Organized Crime Act, which the court dismissed as futile on December 9, 2015.
6. In Defendant’s counterclaim, he sues “Mr. Abrams” personally, in his Third Claim, for breach of contract. *Exhibit 2.*
7. Abrams Law, LLC k.n.a. Abrams & Associates, LLC is the contracting party. Mr. Abrams individually, never entered into a contract with defendant and defendant has no contract with Mr. Abrams’ name on it individually. *Exhibit 3.*
8. On or about May 27, 2011, Plaintiff Abrams & Associates, LLC (f.k.a. Abrams Law, LLC hereinafter the “Firm”) and Defendant Beeson (hereinafter “defendant”) entered into a Contract for Legal Services on a contingent fee basis to represent him in Denver District Court case number 2012CV79. *Exhibit 3.*
9. Defendant, in his counterclaim to plaintiff’s Third Amended Complaint, makes a claim for breach of contract. Defendant states, at para. 93-95 of his Answer and Counterclaim, the parties had a contract, and he is not paid thereunder. *Exhibit 3* proves otherwise. Accordingly, defendant has no contract with Mr. Abrams as pled in his counterclaim.
10. Because no contract exists between Mr. Abrams and defendant, the court can summarily dismiss this Third Claim.
11. As a direct and proximate result of Defendant suing the wrong party for breach of contract in both his original counterclaim and his amended counterclaim, plaintiff participated in the proceeding and incurred legal expenses and costs in defending against a frivolous and groundless lawsuit. Defendant, as a signer of *Exhibit 3,* certainly knew who he signed a contract with and failed to sue that party. Accordingly, plaintiff incurred damages defending against defendant’s claim of breach of contract against Mr. Abrams.
12. Next, defendant sues “Abrams” personally for theft. To prove this claim he must prove Mr. Abrams is in possession of his money with no intention of returning it.
13. Defendant has not one shred of evidence to prove or support his claim Mr. Abrams has any money in his possession; or, that defendant ever asked for same and Mr. Abrams refused to return it.
14. As a direct and proximate result of Defendant suing the wrong party for theft, plaintiff participated in the proceeding and incurred legal expenses and costs in defending against this frivolous and groundless lawsuit. Defendant has no evidence to support Mr. Abrams has any of his money; therefore, his lawsuit is groundless. Plaintiff unnecessarily incurred damages defending against defendant’s claim of theft against Mr. Abrams.

**STATEMENT OF UNDISPUTED FACTS**

1. On or about May 27, 2011, the Firm and Defendant entered into a Contract for Legal Services on a contingent fee basis to represent him in Denver District Court case number 2012CV79. *Exhibit 3.*
2. Defendant was awarded a settlement in the prior case against Denver Health. The Firm received the settlement proceeds in that matter and the Firm deposited the settlement proceeds into the Firm’s COLTAF account ending in #5019. *Exhibit 4. (Redacted)*
3. Immediately thereafter, the Firm tendered payment to defendant of the disputed settlement funds, in the amount of $23,177.93 from the Firm’s COLTAF account. *Exhibit 5.*
4. The check tendered to defendant did not contain any restrictive endorsements, it was his to cash. However, at all times relevant hereto, plaintiff makes a claim against the Disputed Sum under the legal theory of *quantum meruit,* per the parties’ contract with Abrams & Associates, LLC.
5. Defendant received the check and refused to cash the check tendered to him by the Firm. *Exhibit 5.* Defendant, in his Response to plaintiff’s motion for summary judgment on the issue of breach of contract, put up as evidence the very letter accompanying the check sent to him by the Firm, as defendant’s exhibit 10. *Exhibit 6.* Brittany Hayes, through affidavit, affirms she sent the letter and check to defendant, as stated herein, and identified as *Exhibits 5 and 6. Exhibit 7.*
6. Defendant never requested the remaining funds from Abrams or the Firm.

*Exhibit 7.*

1. At all times relevant hereto, the Disputed Sum remained in the Firm’s COLTAF accounts. *Exhibit 8.* Accordingly, by operation of law, if maintained in a COLTAF account it cannot be stolen. Client property to be maintained separately in COLTAF accounts. RPC 1.15.
2. The Firm filed an attorney’s lien in Denver District Court Case number 2012CV79 for failure to pay attorney fees per the parties’ contract in the amount of $37,851.96. *Exhibit 9.* To date, defendant’s outstanding balance at the Firm is $20,930.46 plus interest, of attorney’s fees owed to the Firm by Defendant, which he failed to pay. This is the basis of plaintiff’s *quantum meruit* claim.
3. Robert Abrams never received nor had defendant’s money in his possession. *Exhibit 10, Abrams’ affidavit.* For brevity, Firm puts up bank statements at both Compass Bank and Bank of the West, in 6-month intervals, showing maintenance of the disputed sum at all times in the Firm’s COLTAF account. Abrams affirms same in his affidavit.

**LEGAL AUTHORITY**

1. Summary judgment is proper only when the pleadings, affidavits, depositions, or admissions establish that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” C.R.C.P. 56(c); *see also Huydts v. Dixon*, 606 P.2d 1303, 1306 (1980). “A material fact is a fact that affects the outcome of a case.” *Trigg v. State Farm Mut. Auto. Ins. Co.*, 129 P.3d 1099, 1101 (Colo. App. 2005). “A court must afford all favorable inferences that may be drawn from the undisputed facts to the nonmoving party, and must resolve all doubts as to the existence of a triable issue of fact against the moving party.” *Cotter Corp. v. American Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 819 (Colo. 2004). The moving party has the burden of establishing the nonexistence of a genuine issue of material fact*. Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Urban v. Beloit Corp.*, 711 P.2d 685, 687 (Colo.1985). “This burden has two components: an initial burden of production on the moving party, which burden when satisfied then shifts to the nonmoving party, and an ultimate burden of persuasion, which always remains on the moving party.” *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). “Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish there is a triable issue of fact.” *Continental*, 731 P.2d at 713. If the nonmoving party cannot produce sufficient evidence to make out a triable issue of fact, “a trial would be useless and the moving party is entitled to summary judgment as a matter of law.” *Id*. On summary judgment, the court’s “role is simply to determine whether the evidence proffered by plaintiff would be sufficient, if believed by the ultimate factfinder, to sustain [a] claim.” *Jones v. Barnhart*, 349 F.3d 1260, 1265-66 (10th Cir. 2003).
2. Rule 17. Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest……, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the people of the state of Colorado.

**ARGUMENT**

* 1. **DEFENDANT SUED ROBERT ABRAMS PERSONALLY FOR BREACH OF CONTRACT. MR. ABRAMS ENTERED NO CONTRACT WITH DEFENDANT AND IS THEREFORE NOT A REAL PARTY IN INTEREST. ACCORDINGLY, SUMMARY JUDGMENT IS APPROPRIATE UNDER C.R.C.P. 56.**

1. Defendant must meet the following burden to prevail on his breach of contract claim: 1. The parties entered a contract; 2. The contract had consideration; 3. Abrams failed to pay defendant thereby causing damages. For an enforceable contract to exist there must be mutual assent to an exchange between competent parties, legal consideration and sufficient certainty with respect to the subject matter and essential terms of the agreement. *Denver Truck Exch. v. Perryman,* 134 Colo. 586, 307 P.2d 805 (1957); *Industrial Prods. Intl, Inc. v. Emo Trans, Inc*., 962 P.2d 983 (Colo.App.1997).
2. The parties did not enter into a contract for fees for legal services. *Exhibit 3.* Abrams Law, LLC and Shawn Beeson entered a contract. If this contract was breached the real parties in interest would be Abrams Law, LLC (k.n.a. Abrams & Associates, LLC) and Beeson.
3. Unless defendant can show a contract with Mr. Abrams name on it, individually, that he arguably breached, the court must summarily dismiss the claim as frivolous and groundless.
4. Defendant in both his original counterclaim and his amended counterclaim sued Robert Abrams personally. Specifically, Robert Abrams and Beeson never had a contract; therefore, the court must dismiss defendant’s third claim for relief for breach of contract.
5. All matters in the Complaint must be accepted as true viewing the allegations in the light most favorable to the Plaintiff. *Yadon v. Lowry,* 126 P.3d 332, (Colo. App. 2005). Plaintiff participated in the proceeding and incurred legal expenses and costs in defending against a frivolous and groundless breach of contract lawsuit. The parties have no factual disputes about the claim of breach of contract asserted therein. Thus, applying the standard for resolving motions for summary judgment, plaintiff’s Motion for Partial Summary Judgment on this issue of breach of contract must be granted.

# II. DEFENDANT SUED ROBERT ABRAMS PERSONALLY FOR THEFT OF HIS MONEY. MR. ABRAMS NEVER HAD POSSESSION OF DEFENDANT’S MONEY; ACCORDINGLY, SUMMARY JUDGMENT IS APPROPRIATE ON THIS ISSUE.

1. Defendant sued Robert Abrams, individually, for theft. He did not sue the Firm. *Exhibits 1 and 2.* Defendant’s theft claim rises from the law firm of Abrams Law, LLC (now Abrams & Associates, LLC) representing Defendant in the for mentioned prior civil action with Denver Health. Defendant settled the Denver Health lawsuit filed in that matter. The Firm received the settlement proceeds from Denver Health and immediately deposited same into its trust account. *Exhibit 4.* Then, the Firm immediately tendered defendant’s disputed portion of the settlement, due under the parties’ fee agreement, to defendant. *Exhibits 5 and 6.*
2. Without waiving any claim thereto for *quantum meruit*, plaintiff states, upon receipt of the Denver Health settlement funds, he deposited same into the Firm’s COLTAF account ending in #5019. The Firm then tendered a check to defendant for his settlement share (the “Disputed Sum”), in January 2013, for $23,177.93 from the settlement proceeds held in its trust account. The check tendered to Defendant did not contain any restricted endorsements leaving Defendant with the ability to cash the check on his own accord.
3. A dispute arose during the settlement phase of defendant’s case, as to the Firm’s fee under the fee agreement. Regardless, factually, the Firm tendered the full sum that could be due defendant to him in January of 2013. Defendant received the check because it was tendered with his disbursement letter that he put up as *Exhibit 10, in his Response Motion for summary judgment for breach of contract. Exhibit 6.* Defendant refused to cash the Firm’s tendered settlement check sent to him and never made a request to receive his settlement proceeds. Accordingly, it cannot be said, Abrams, individually, committed theft.
4. To prove theft, defendant must prove Abrams, individually, committed theft. Specifically, that he, not his Firm, received defendant’s money and failed to give it to him. Abrams’ firm is not a party to the claim of theft. At all times relevant hereto, Abrams’ Firm has the Disputed Sum.
5. Defendant never requested the Disputed Sum from the Firm. *Exhibit 7 & 10.*
6. At all times relevant hereto, the Disputed Sum remained in the Firm’s COLTAF accounts. Plaintiff, at all times relevant hereto maintained and continues to maintain his *quantum meruit* claim against the Disputed Sum.
7. Under the law, a lawyer is required to hold funds belonging to clients or third parties in a trust account separate from the lawyer’s funds. Colo. RPC 1.15A(a). A lawyer has a charging lien against property or funds that the lawyer assisted the client in obtaining. C.R.S. § 12-5-119. The Firm maintains its lien under *quantum meruit.* Furthermore, the Colorado Rules of Professional conduct clearly state, when a lawyer holds funds that are the subject of a “dispute” between or among two or more persons (one of whom may be the lawyer), the lawyer must keep the disputed funds in a trust account. Colo. RPC 1.15A(c). If any of the funds are undisputed, the lawyer must promptly distribute that portion. Colo. RPC 1.15(c).
8. Defendant’s theft claim is unsupported by fact and law. Defendant alleges Abrams stole his money by failing to tender the full amount of settlement proceeds. In fact, the Firm tendered the disputed amount of the settlement proceeds to Defendant immediately after receiving it. Defendant received the check and refused to cash it. Upon defendant’s refusal to cash his check, the Firm, following the Rules of Professional conduct, held the disputed portion of funds in a separate COLTAF account. Furthermore, the disputed funds were never in the possession of Mr. Abrams as the law clearly states, money held in trust is not in the possession of the attorney. *See* Colo. RPC 1.15A(a) (establishing a lawyers duty to hold funds belonging to clients in a trust account separate from the lawyer’s funds) (emphasis added).
9. Pursuant to C.R.S. § 18-4-401, a person commits theft when her or she knowingly obtains, retains, or exercises control over anything of value of another without authorization with the intent to permanently deprive that person of the use or benefit of the thing of value. Here, the Firm tendered the Disputed Sum to defendant, so it cannot be argued it tendered the check to Robert Abrams, who then kept the money. Upon defendant’s obstinate refusal to cash the check, the Disputed Sum remained in the Firm’s COLTAF account.
10. Under the Colorado Rules of Professional Conduct, money held in trust by an attorney is separate from the attorney’s funds. *See* Colo. RPC 1.15A(a). Therefore, Abrams was never in possession of the funds as it remained in the Firm’s COLTAF account. Because Robert Abrams never had the money, as proven by the evidence, he could not have knowingly maintained control over it, without authorization, with the intent to permanently deprive the owner of the property. Accordingly, defendant’s claim against Abrams individually, must be dismissed. There is no claim of theft before the court against the Firm. Therefore, based upon the evidence, the court can summarily dismiss this claim against Abrams.
11. Because defendant has no evidence the settlement proceeds are in Mr. Abrams’ possession or ever were; and, because the Firm admits it has the disputed sum as corroborated by Mr. Abrams’ affidavit, the court may summarily grant plaintiffs’ motion under Rule 56 and dismiss defendant’s second claim of Theft, as frivolous and groundless.

**CONCLUSION**

Theft requires Robert Abrams personally took defendants money, without his consent, with the intent to permanently deprive him of same. The facts stated by both parties hereto prove otherwise:

1. Robert Abrams never had defendant’s money.
2. Abrams & Associates (f.n.a. Abrams Law, LLC) has the disputed sum in a separate trust account.
3. The Firm tendered defendant’s disputed sum to him.
4. Defendant received the settlement check from the Firm.
5. Defendant never cashed the settlement check.
6. Defendant never requested his money from the Firm.
7. The Firm maintained the money in its trust account from January 2013 to the present.
8. The Firm always maintained a claim against the settlement proceeds of defendant for

*quantum meruit,* even after tendering defendant his settlement funds.

Breach of contract requires the parties had a contract. Here, no contract exists; therefore, Robert Abrams is not the real party in interest who could possibly owe any damages to defendant under his claim. Defendant sued Abrams personally under two claims for relief, which the court can summarily dismiss based upon the evidence. Abrams spent time, effort and money defending these claims that are frivolous and groundless. C.R.S. § 13-17-102 provides relief for parties under these circumstances and Abrams requests his attorney fees and costs for his defense of these claims.

WHEREFORE, plaintiff Robert Abrams, hereby requests this court grant his motion for summary judgment and dismiss defendant’s second and third claims against him for theft and breach of contract. Plaintiff requests, based upon the evidence presented, defendant’s claims are frivolous and groundless, pursuant to C.R.S. § 13-17-102, and award him attorney fees in defending against this action.

RESPECTFULLY SUBMITTED this 13th day of June, 2016.

SILVER LAW, LLC

*/s/ Nathan Silver*

Nathan Silver, Attorney at Law

*(Original signature on file at Silver Law, LLC, pursuant to C.R.C.P. 121 § 1-26)*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY I have this 13th day of June, 2016, via ICCES, served a true and correct and correct copy of the foregoing PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANT’S SECOND AND THIRD CLAIMS OF HIS FIRST AMENDED COUNTERCLAIMS AGAINST ROBERT ABRAMS PERSONALLY FOR THEFT AND BREACH OF CONTRACT upon:

Wadi Muhaisen, #34470 Muhaisen & Muhaisen, LLC 1435 Larimer Street – Suite 203

Denver, CO 80202

*Attorney for Defendant*

*/s/ Jessica Arras*

Jessica Arras, Paralegal