|  |  |
| --- | --- |
| DISTRICT COURT, DENVER COUNTY, COLORADO |  |
| DAT  Court Address: Denver County District Court FILIN  1437 Bannock St., Room 256 CASE  Denver, CO 80202  (720) 865-8301 | E FILED: November 3, 2015 1:50 PM G ID: 569CDEB9B21E0  NUMBER: 2015CV31709 |
| Plaintiff: ROBERT ABRAMS |  |
| v. |  |
| Defendants: SHAWN BEESON, an individual; and CALIFORNIA STREET PARKING GARAGE, LLLP, a  Colorado limited liability limited partnership. | **COURT USE ONLY** |
| Attorneys for Plaintiff: | Case Number: 2015CV31709 |
| ELKUS SISSON & ROSENSTEIN, P.C.  Steven T. Mandelaris, #37964 501 S. Cherry Street, Suite 920  Denver, CO 80246  Phone #: (303) 567-7981  Fax #: (303) 431-3753  E-mail: [smandelaris@elkusandsisson.com](mailto:smandelaris@elkusandsisson.com) | Division: 409 |
| ABRAMS & ASSOCIATES, LLC  Robert Abrams  700 17th St., Suite 650  Denver, CO 80202  Phone #: (303) 322-4115  Fax #: (303) 333-0708  E-m[ail: Robert@AbramsLaw.net](mailto:Robert@AbramsLaw.net) Atty. Reg. #: 37950 |  |
| **PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION FOR LEAVE TO FILE FIRST AMENDED COUNTERCLAIM** | |

COMES NOW, Plaintiff Robert Abrams, through his attorneys at Elkus Sisson and Rosenstein, P.C. and Abrams & Associates, LLC, and hereby files his Response to Defendant’s Motion for Leave to File First Amended Counterclaim (“Motion”). In support thereof, Plaintiff state and allege as follows:

# INTRODUCTION

1. On June 25, 2015, Plaintiff filed and served his Amended Complaint and Jury Demand (hereinafter as “Amended Complaint”) in the above-captioned matter.
2. Defendant Shawn Beeson (hereinafter as “Defendant” or “Beeson”) filed his Answer and Counterclaim on September 22, 2015. Subsequent, Beeson filed a Motion for Leave to Amend his Counterclaim on October 21, 2015.
3. Defendant’s Amended Counterclaim is defective; therefore, his Motion should be denied and his Counterclaim dismissed for the reasons stated herein.

# LEGAL AUTHORITY

1. Pursuant to C.R.C.P. 12(b). How Presented. Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (5) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived……….. If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.
2. A motion to dismiss for failure to state claim tests the sufficiency of a claim. *Lavarato v. Branney*, 210 P.3d 485 (Colo. App. 2009). In assessing such a motion, a court must accept all matters of material fact in the complaint as true and view the allegations in the light most favorable to the Defendant and may grant the motion only if Defendant’s factual allegations cannot support a claim as a matter of law. *Asphalt Specialties, Co. v. City of Commerce City*, 218 P.3d 741 (Colo. App. 2009). A motion to dismiss for failure to state a claim is viewed with disfavor, and should be granted only if it clearly appears that the Defendant would not be entitled to any relief under the facts pled. *Nat’l Sur. Corp. v. Citizens State Bank*, 593 P.2d 362 (1978). The court must consider only those matters stated within the four corners thereof. *Kratzer v. Colo. Intergovernmental Risk Share Agency*, 18 P.3d 766 (Colo. App. 2000). Here, the allegations as pled by Defendant fail to state a claim upon which relief can be granted because:
   1. The element of two violations occurring within a ten year period are absent from Defendant’s claim;
   2. The allegations as pled are not racketeering claims as identified within C.R.S. § 18-17-103(5); 18 U.S.C. § 1961(1) (A), (1) (B), (1) (C), and (1) (D);
   3. Defendant pled no prohibited activities required in C.R.S. § 18-17- 104; and
   4. Defendant failed to plead any “enterprise” activities as required therein.
3. Although a motion to amend is entitled to a lenient examination, this leniency is not without limits. *Polk v. Denver Dist. Court*, 849 P.2d 23, 25 (Colo. 1993). Leave should be “freely given” unless the amendment is futile. *Id.* “[T]he trial court must assess the motion to amend in light of the totality of the circumstances. It must balance the policy favoring the amendments of pleadings against the burdens which granting the amendment may impose on the other parties. *(internal citations omitted)” Id.* at 25-26.

# ARGUMENT

1. Pursuant to C.R.C.P. 12(b)(5), Defendant must plead a claim upon which relief can be granted. He has failed to do so in his Amended Counterclaim.
2. C.R.S. § 18-17-103 Definitions. "Pattern of racketeering activity" means engaging in at least two acts of racketeering activity, which are related to the conduct of the enterprise, if at least one of such acts occurred in this state after July 1, 1981, and if the last of such acts occurred within ten years (excluding any period of imprisonment) after a prior act of racketeering activity.
3. In order to establish a "pattern of racketeering activity" under Colorado Organized Crime Control Act, it was not necessary to prove the criminal acts meet standards of continuity or of related to one another as those requirements are established by judicial construction under the federal Racketeer Influenced and Corrupt Organization Act (RICO). *People v. Chaussee*, 880 P.2d 749 (Colo. 1994).
4. "Pattern of racketeering activity" under subsection (3) can be established by proving at least two acts of "racketeering", as defined in subsection (5), that are related to the conduct of the enterprise. *People v. Chaussee*, 880 P.2d 749 (Colo. 1994). Here, for Plaintiff to commit racketeering he must meet the elements stated herein and be in a racketeering enterprise. No such multiple allegations are pled; accordingly, Defendant’s Motion on its face fails to meet his burden.

C.R.S. § 18-17-103

C.R.S. § 18-17-104. Prohibited activities.

(1)(a) It is unlawful for any person who knowingly received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds or the proceeds derived from the investment or use thereof in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

* + 1. It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to knowingly acquire or

maintain, directly or indirectly, any interest in or control of any enterprise or real property.

* + 1. It is unlawful for any person employed by, or associated with, any enterprise to knowingly conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.

C.R.S. § 18-17-104

Here, Defendant fails to allege in his amended counterclaim, pattern racketeering for collection of an unlawful debt to use or investment thereto into any real estate. Therefore, Defendant’s claim fails to allege prohibited activities.

1. C.R.S. § 18-17-103(5) “Racketeering activity" means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit:
2. Any conduct defined as "racketeering activity" under 18 U.S.C. 1961(1) (A), (1) (B), (1) (C), and (1) (D); or
3. Any violation of the following provisions of the Colorado statutes or any criminal act committed in any jurisdiction of the United States which, if committed in this state, would be a crime under the following provisions of the Colorado statutes:
   1. Offenses against the person, as defined in sections 18-3-102 (first degree murder), 18-3-103 (second degree murder), 18-3-104 (manslaughter) , 18- 3-202 (first degree assault), 18-3-203 (second degree assault), 18-3-204 (third degree assault), 18-3-206 (menacing) , 18-3-207 (criminal extortion), 18-3-301 (first degree kidnapping), 18-3-302 (second degree kidnapping), 18-3-503 (human trafficking for involuntary servitude), and 18-3-504 (human trafficking for sexual servitude);
   2. Offenses against property, as defined in sections 18-4-102 (first degree arson), 18-4-103 (second degree arson), 18-4-104 (third degree arson), 18- 4-105 (fourth degree arson), 18-4-202 (first degree burglary), 18-4-203 (second degree burglary), 18-4-301 (robbery) , 18-4-302 (aggravated robbery), 18-4-303 (aggravated robbery of controlled substances), 18-4-401 (theft), 18-4-409 (aggravated motor vehicle theft), and 18-4-501 (criminal mischief);
   3. Offenses involving computer crime, as defined in article 5.5 of this

title;

* 1. Offenses involving fraud, as defined in sections 18-5-102 (forgery)

18-5-104 (second degree forgery), 18-5-105 (criminal possession of forged instrument), 18-5-109 (criminal possession of forgery devices), 18-5-110.5 (trademark counterfeiting), 6-16-111, C.R.S., (felony charitable fraud), 18-5-206 (defrauding a secured creditor or debtor), 18- 5-309 (money laundering), 18-5-403 (bribery in sports), 18-5-113 (criminal impersonation), 18-5-114 (offering a false document for recording), 18-5-702 (unauthorized use of a financial transaction device), 18-5-705 (criminal possession or sale of a blank financial transaction device), 18-5-706 (criminal possession of forgery devices), 18-5-707 (unlawful manufacture of a financial transaction device), 18-5-902 (identity theft), 18-5-903

(criminal possession of a financial device), 18-5-903.5 (criminal possession of an identification document), 18-5-904 (gathering identity information by deception), and 18-5-905 (possession of identity theft tools);

* 1. Offenses involving the family relation, as defined in section 18-6- 403 (sexual exploitation of children);
  2. Offenses relating to morals, defined in section 18-7-102 (wholesale promotion of obscenity or promotion of obscenity), 18-7-203 (pandering), 18-7- 206 (pimping) , 18-7-402 (soliciting for child prostitution), 18-7-403 (pandering of a child), 18-7-404 (keeping a place of child prostitution), and 18-7-405 (pimping of a child);
  3. Offenses involving governmental operations, as defined in sections 18-8-302 (bribery) , 18-8-303 (compensation for past official behavior), 18-8-306 (attempt to influence a public servant), 18-8-402 (misuse of official information), 18-8-502 (first degree perjury), 18-8-503 (second degree perjury), 18-8-603 (bribe-receiving by a witness), 18-8-606 (bribing a juror), 18-8-608 (intimidating a juror), 18-8-609 (jury-tampering) , 18-8-610 (tampering with physical evidence), 18-8-703 (bribing a witness or victim), 18-8-704 (intimidating a witness or victim), and 18-8-707 (tampering with a witness or victim);
  4. Offenses against public peace, order, and decency, as defined in sections 18-9-303 (prohibited wiretapping) and 18-9-304 (prohibited eavesdropping);
  5. Gambling, as defined in sections 18-10-103(2) (professional gambling), 18-10-105 (possession of a gambling device or record), 18-10-106 (transmission of receipt of gambling information), and 18-10-107 (maintaining gambling premises);
  6. Offenses relating to firearms and weapons, as defined in sections 18-12-102 (possessing an illegal weapon or a dangerous weapon), 18-12-107.5 (illegal discharge of a firearm), and 18-12-109 (possession, use, or removal of explosives or incendiary devices or the possession of components thereof);
  7. Offenses involving the making, financing, or collection of loans, as defined in sections 18-15-102 (extortionate extension of credit), 18-15-104 (engaging in criminal usury), 18-15-105 (financing extortionate extensions of credit), 18-15-106 (financing criminal usury), 18-15-107 (collection of extensions of credit by extortionate means), and 18-15-108 (possession or concealment of records of criminal usury);
  8. Fraud upon the department of revenue, as defined in section 39-21- 118, C.R.S.;
  9. Securities offenses, as defined in sections 11-51-401 and 11-51- 603 (registration of brokers and dealers), 11-51-301 and 11-51-603 (registration of securities), and 11-51-501 and 11-51-603 (fraud and other prohibited practices), C.R.S.;
  10. Offenses relating to controlled substances (part 1 of article 42.5 of title 12, C.R.S., part 2 of article 80 of title 27, C.R.S., and article 18 of this title);
  11. Offenses relating to taxation, defined in section 39-22-621, C.R.S.;
  12. Offenses relating to limited gaming, as defined in article 47.1 of title 12, C.R.S., or article 20 of this title; and
  13. Offenses relating to telecommunications crime in section 18-9-309.

(6) "Unlawful debt" means a debt incurred or contracted in an illegal gambling activity or business or which is unenforceable under state or federal law in whole or in part as to principal or interest because of the law relating to usury.

C.R.S. § 18-17-103

1. Defendant claims Plaintiff failed to pay him money owed. This may be a breach of contract claim or a civil theft claim, but it fails to meet the elements of a racketeering claim or prohibited activities of C.R.S. § 18-17-104.
2. Defendant’s fourth counterclaim of Violation of the Colorado Organized Crime Control Act Against Plaintiff Abrams and Abrams and Associates, LLC (hereinafter “COCCA”) fails to plead any allegations containing any of the required elements of C.R.S. § 18-17-103(5) that might rise to a COCCA violation. Accordingly, said claim fails to state a claim upon which relief can be granted and therefore must be dismissed.
3. C.R.S. § 13-17-102. Attorney fees. On its face, Defendant’s fourth claim for relief lacks substantial justification.

C.R.S. § 13-17-102 (2) ……in any civil action of any nature commenced or appealed in any court of record in this state, the court shall award, by way of judgment or separate order, reasonable attorney fees against any attorney or party who has brought or defended a civil action, either in whole or in part, that the court determines lacked substantial justification.

(4) ………..As used in this article, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

1. Because Defendant failed to plead the elements of either a C.R.S. § 18-17-103(5) racketeering crime or a pattern of racketeering as required by COCCA, Defendant’s claim lacks substantial justification, whereby Plaintiff should be awarded his attorney fees for his response.

# CONCLUSION

To prevail upon a COCCA claim, Defendant must allege in his pleading that Plaintiff engaged in a pattern of racketeering; that the conduct identified therein is conduct stated as racketeering within C.R.S. § 18-17-103(5); and, that said conduct is prohibited within C.R.S. § 18-17-104. Defendant failed to plead any allegations to prove the matter asserted and therefore failed to establish a claim upon which relief could be granted. Accordingly, Defendant’s fourth claim for a COCCA violation must be dismissed. Because the claim lacks substantial justification and is groundless, the Court may award attorney fees.

WHEREFORE, Plaintiff respectfully requests the Court deny Defendant’s Motion for Leave to Amend his Counterclaim and award Plaintiff $1,185 in attorney fees for this Response to Defendant’s Motion; and, any further relief the Court deems appropriate.

RESPECTFULLY SUBMITTED this 3rd day of November, 2015.

ELKUS SISSON & ROSENSTEIN, P.C.

*/s/ Steven T. Mandelaris*

Steven T. Mandelaris Attorney at Law

*(Original signature on file at Elkus Sisson & Rosenstein, pursuant to C.R.C.P. 121 § 1-26)*

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY I have this 3rd day of November, 2015, served via ICCES a true and correct copy of the PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION FOR LEAVE TO FILE FIRST AMENDED COUNTERCLAIM upon:

Michael P. Boyce

Law Office of Michael P. Boyce, PC

3773 Cherry Creek Drive North, Suite 575 Denver, CO 80209

*Attorney for Defendant Beeson*

Tom Hames

Ray Lego & Associates 6060 S. Willow Drive

Greenwood Village, CO 80111 [THAMES@travelers.com](mailto:THAMES@travelers.com) *Attorney for Defendant California*

*/s/ Brittany Hayes*

Brittany Hayes, Paralegal