

**DISTRICT COURT, CIVIL DIVISION  
BOULDER COUNTY, COLORADO**

Boulder County District Court – Civil Division  
PO Box 4249  
1777 6<sup>th</sup> Street  
Boulder, Colorado 80306-4249  
303-441-3750

Plaintiff(s): John Hanks

vs.

Defendant(s): Kenneth H. Dimon III and RE/MAX of  
Boulder.

DATE FILED: January 22, 2013

**COURT USE ONLY**

Case No: 2011-CV-1062

Div: 3 Ctrm: K

**ORDER**

Having reviewed the files, affidavits filed and telephone testimony, submitted evidence and testimony, pleadings and lack of mandated appearances on January 10, 2013 at the Trial Management Conference by Defendant Kenneth Dimon and at the trial scheduled for January 17, 2013, and being otherwise advised in the premises, this Court makes the following findings and rulings.

***FINDINGS***

This case arises from sale of residential real property located at 100 Spaulding Street, Lafayette, Colorado 80026 (hereinafter "Property") from Seller and Defendant Kenneth H. Dimon, III (hereinafter "Defendant" or "Dimon" or "Seller") to Plaintiff, John Hanks (hereinafter "Hanks" or "Plaintiff"). Said Property was listed for sale by Phil Boren of ReMax of Boulder, Inc. and was marketed through the multiple listing service (hereinafter "MLS") to the public, which provides universal access of all Colorado real estate professionals who subscribe to the MLS. Said property was originally listed in June 2010 for \$189,900.00 upon information and belief

During the listing period, numerous negative feedback showings and that the Seller was incarcerated and disclosed that he was moving to North Carolina to get a fresh start, resulted in the listing price to be reduced to \$150,000.00 in October 2010 and again to \$139,900.00 in December 2010.

In January 2011, Phil Boren wrote to Seller Dimon, Cecile and Fred Blankenhorn (Seller's parents) discussing numerous judgments amounting to \$12,000 as well as a \$55,000.00 Deed of Trust. Said Deed of Trust was actually a criminal fidelity bond, secured by the value of the Property given by Seller to Nichole Diedrich's father, Steven

K. Diedrich, a convicted methamphetamine addict, on December 5, 2007. The posting of the bond correlates with Steven Diedrich arrest record in December 2007.

Both Steven Diedrich and his daughter, Nichole Diedrich, are repeat drug offenders and have extensive criminal pasts associated with methamphetamine. See police records.

Steven Diedrich was convicted and the bond was forfeited but the Deed of Trust had not been properly released. Another criminal fidelity bond for \$50,000 was placed on the Property by Seller in August 2009, but such Deed of Trust was released.

Testimony and documents were received and admitted that Seller also had a drug problem, an extensive criminal history and that his girl-friend, Nichole Diedrich and the mother of their child, Skyler Nills Dimon, was a long time user of illegal drugs, including methamphetamine and would not seek treatment for her addiction. See Child Custody Order as well as Dimon's frequent drug testing for cocaine, amphetamines, opiates and cannabinoids, which is representative of probation.

During the listing period, June 2010 to April 2011, Seller had been incarcerated, left the property vacant and unlocked, had disconnected the home phone and moved back to his parent's residence in North Carolina. See feedback notes from ReMax. It is evident from these acts that Defendant Kenneth Dimon was not in the least interested in safeguarding his Property and based on the wide-spread contamination of methamphetamine throughout the Property, Defendant's acts are consistent with a mindset of the Property having very little real and remaining value.

The Court notes that the Seller, Defendant Kenneth Dimon, has had his criminal records sealed, but failed to seal such records with the Colorado Bureau of Investigation and its database. Based on a review of those records, Dimon has numerous offenses involving identity theft, larceny of \$20,000 or more, computer crimes, forgery as well as serious criminal charge of Organized Crime under C.R.S. § 18-17-103 *et seq.* and various physical assault crimes of resisting arrest, child abuse, obstruction from 2009-2011. See police records of Kenneth Dimon, Nichole and Steve Diedrich.

Dimon's departure from Colorado in 2011 coincided with his Property being vacant was most likely a result of his cooperation with the Colorado Drug Enforcement Agency ("DEA"). Plaintiff testified that DEA Agent, Jason Walter, met Plaintiff at the Property in July 2011 they discussed Seller's addiction to methamphetamine during his 10 year period in Colorado. Such period coincides with Seller's purchase of the Property in August 1998 to the date of sale, to wit: April 29, 2011 to Plaintiff.

In March 3, 2011, Hanks submitted an offer for the Property for \$119,000.00, which was countered for \$124,000.00 on March 5, 2011 and accepted. On that day, Plaintiff also received Seller's Property Disclosures dated July 21, 2010 (hereinafter "SPD") which state that the Property was not used for a methamphetamine laboratory.

Plaintiff carefully reviewed the SPD, which affirmatively stated that no methamphetamine lab was on the Property. Said SPD was signed by Defendant Kenneth Dimon and per his Answers to Plaintiff's Discovery, was signed and completed by him. Plaintiff had the property inspected by Mountain States Inspection in March 9, 2011. Said Inspection purposefully stated the inspection report is not technically exhaustive and does not inspect or cover environmental hazards, such as lead, asbestos, air borne hazards, etc. The Inspection Report did not discover the use or production of methamphetamine and nor was the Inspector obligated to look for same.

Plaintiff visited the Property twice before purchasing same and noted the utter chaotic living conditions, a BMX dirt bike course in the backyard as well as mounds of trash, and debris, numerous electrical cords and propane tanks, and an alarming amount of discarded junk in the yard, garage and residence.

Upon closing in April 29, 2011, Plaintiff and his wife, Carla Hanks moved into the property in early May 2011. Shortly thereafter, Carla Hanks and Plaintiff began cleaning the Property and immediately began to have severe eye reactions and other physical ailments.

Upon conversing with their new neighbors, they learned that Dimon was suspected to be a methamphetamine dealer due to numerous late night visitors, police visits and noxious fumes emanating from the Property over the course of years.

Immediately in early May 2011, Plaintiff engaged Caoimhim P. Connell of Forensic Applications Consulting Technologies, Inc., a licensed industrial hygienist, to perform a Preliminary Assessment. As stated in the Preliminary Assessment and following reports and correspondence, the Property confirmed **overt, profound and widespread methamphetamine contamination. Samples taken conclusively demonstrated the presence of methamphetamine contamination throughout the structure.** The dining room and kitchen showed visual signs of production and yellow staining. The living room, foyer closet, bathroom and hallway showed extreme concentrations of methamphetamine. The two bedrooms and garage had contained visual indicators of controlled substances production and extreme methamphetamine concentration. As an example, multiple locks were on interior doors, locks were reversed as well as venting from the bedroom to the outside was observed.

The attic contained remarkable amounts of pseudoephedrine. Based on the pseudoephedrine reduction method to produce methamphetamine, pseudoephedrine is combined with other compounds resulting in the pseudoephedrine to be aerosolized and airborne. Simply put, the only way pseudoephedrine could have been deposited in the attic is by the production of methamphetamine. As stated in Exhibit A to the Complaint, the Industrial Hygienist stated that the property is so heavily contaminated that if you were able to gather up the residue of methamphetamine, it would have a street value of \$28,650.00. Methamphetamine concentrations on the Property were 10,000 times the legal limit.

Based on the conclusions in the report, **all parts** of the Property were conclusively and extensively used for various stages of methamphetamine production.

This Court accepts the Industrial Hygienist Report, associated correspondence and opinion that the Property was used for drug production and extensive use and that the Property was heavily contaminated.

The Industrial Hygienist was obligated under Colorado statutes and health regulations to notify Boulder County authorities, resulting in Plaintiff having to move out of the residence until remediation was completed. See May 20, 2011 letter from Michael Richen.

Having no additional funds to undertake extensive remediation as well as being obligated to allow residence to be inspected by Seller to refute the Industrial Hygienist's preliminary assessment, Plaintiff was obligated by statute to find temporary lodging.

In September 2011, litigation was commenced against Defendant Dimon and ReMax of Boulder, Inc. for fraud, declaratory relief, violation of disclosure of C.R.S. §38-35.7-103, negligent misrepresentation and violation of the Consumer Protection Act, codified at C.R.S. § 6-1-101 et seq.

During discovery and with many opportunities to be afforded by Plaintiff's counsel, neither Defendant undertook a physical inspection of the Property. Further, Defendant Dimon uniformly refused to answer all questions concerning methamphetamine production or use by invoking the United States and Colorado Constitution. Such acts by Defendant Dimon of failing to cooperate in discovery or to undertake any defense of this case up to the date of the case management order is evident and resulted in unnecessary delay and needless expense to the Court as well as to Plaintiff.

Further Dimon refused to attend his deposition in Colorado, resulting in various motions to compel to be filed concerning evasive and incomplete answers in his two sets of answers to discovery as well as failing to attend his court-ordered deposition. On December 28, 2012, this Court issued a default as a sanction for Dimon's refusal to cooperate in discovery and to provide meaningful discovery. The Court determined that Dimon's refusal impeded Plaintiff's ability to prepare his case and wasted judicial resources. The Court left open the issue of willful and wanton conduct, which was heard in open court via a bench trial on January 17, 2013.

Plaintiff has settled out of court with Defendant ReMax of Boulder, Inc. in mid-December 2012.

In mid-December 2012, the Trial Management Order, agreed to by Plaintiff and Dimon's counsel, listed various defenses, but no witnesses, expert or lay. Plaintiff's claims consisted of compensatory, exemplary or punitive damages as well as attorney's fees and costs. Further, such issue of willful and wanton conduct, associated with exemplary damages was reserved for trial in the December 28, 2012 Order.

On January 10, 2013, Plaintiff's counsel voiced concern due to Dimon's lack of cooperation in discovery as well as procedural issues regarding trial and motions *in limine*.

At the close of evidence at trial, Plaintiff has moved to amend the Complaint to include a claim for exemplary damages. Such amendment of claim is entirely permissible at this late stage due to Dimon's lack of cooperation in discovery, that the December 28, 2012 Order contemplated such issues to be tried as well as that the Trial Management Order, agreed to by Dimon's counsel, contemplated such testimony. See also Davis v. GuideOne Mutual Insurance Company, 2012 WL 1499204, 2012 COA 70, -- P.3d -- (April 29, 2012).

Presently before the Court is whether Plaintiff has established beyond a reasonable doubt willful and wanton conduct by Defendant Dimon under either the Colorado Consumer Protection Act, § 6-1-101 *et seq.*, C.R.S. and/or exemplary damages under § 13-21-102 *et seq.*, C.R.S. As Plaintiff has voluntarily withdrawn his claim against Defendant Dimon under the Colorado Consumer Protection Act, the only claim remaining to be tried to this Court is the fraud claim and exemplary damages under § 13-21-102, C.R.S.

Upon presentation of evidence and no defenses being interposed by Defendant Dimon, this Court finds that Defendant Kenneth Dimon knew as well as actively participated in the use and production of methamphetamine of the Property and actively concealed the use and production of the illegal drugs on the Property during the sale of the Property in violation of disclosure obligations pursuant to C.R.S. § 38-35.7-103. Such failure to disclose was material. Under C.R.S. §25-18.5-101 *et seq.*, this Court also finds that the Property constitutes an illegal drug lab and that Defendant Kenneth Dimon knew about the production and use of illegal drugs on the Property from the date of his purchase of the Property in 1998 to the date of sale to Plaintiff in April 2011. Such drug used was admitted to by Defendant Dimon, his girlfriend, Nichole Diedrich, was admitted to be a methamphetamine addict and based on the representation of evidence, lived with Dimon in the Property.

Based on the numerous late night visits of strangers during all hours of the night to the Property, the chaotic living conditions of the Property, the numerous yellow stains, order and other visual signs, the uncontroverted Expert Report and the Industrial Hygenist's opinion of drug use and manufacture at the Property, this Court is persuasively convinced that Dimon used the Property as a clandestine and illegal drug laboratory and failed to disclose same and such failure to disclose to Plaintiff John Hanks was material.

Accordingly, this Court enters judgment on Plaintiff's First Claim for relief for fraud and Plaintiff's Third Claim for Relief under Violation of Disclosure of C.R.S. §38-35.7-103.

At this juncture, this Court is obligated to ascertain whether Plaintiff is entitled to exemplary damages.

### ***ANALYSIS OF APPLICABLE STATUTORY PROVISIONS FOR EXEMPLARY DAMAGES***

Exemplary damages under statutorily governed by §13-21-102, C.R.S. Bennett v. Greeley Gas Co., 969 P.2d 754 (Colo. App. 1998). Those elements must be established beyond a reasonable doubt. See §13-25-127(2), C.R.S.; Frick v. Abell, 602 P.2d 852, 853 (Colo. 1979).

The relevant sections state in pertinent part:

(1) (a) In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. The amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party.

(b) As used in this section, "willful and wanton conduct" means conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff.

C.R.S. § 31-21-102.

Colorado caselaw makes clear that the general purposes of exemplary damages are punishment of the defendant and deterrence against the commission of similar offenses by the defendant or others in the future. Mince v. Butters, 616 P.2d 127 (1980); Lexton-Ancira Real Estate Fund v. Heller, 826 P.2d 819 (Colo. 1992). This Court is entitled to award exemplary damages as the trier of fact. Sanders v. Knapp, 674 P.2d 385 (Colo. App. 1983).

Exemplary damages may be awarded even though the action sounds in contract. Riva Ridge Apts. v. Robert G. Fisher Co., 745 P.2d 1034 (Colo. App. 1987) and is not barred by the economic loss rule. As an example, Plaintiff's claim transcended the contract, and was not precluded by the economic loss rule, where a triable issue of fact existed regarding alarm company's willful and wanton failure to respond to a burglary and fire. U.S. Fire Ins. Co. v. Sonitrol Mgmt. Corp., 192 P.3d 543 (Colo. App. 2008). Exemplary damages may be awarded if the injury is attended by circumstances of fraud, malice, or willful and wanton conduct. Eads v. Dearing, 874 P.2d 474 (Colo. App. 1993).

To justify exemplary damages there must be some wrong motive accompanying the wrongful act, or a reckless disregard of plaintiff's rights. Ellis v. Buckley, 790 P.2d 875

(Colo. App. 1989), cert. denied, 498 U.S. 920 (1990). The act causing the injuries must be done with an evil intent and with the purpose of injuring the plaintiff, or with such a wanton and reckless disregard of his rights as evidences a wrongful motive. Frick v. Abell, 602 P.2d 852 (Colo. 1979). The requirements for the award of exemplary damages are met if the defendant, while conscious of his conduct and cognizant of existing conditions, knew, or should have known, that the injury would probably result from his acts. *Id.* at 854.

In this case, throughout discovery, Defendant Dimon has invoked the privilege to not incriminate himself under the Fifth Amendment of United States and Colorado Constitution. Such right to invoke the privilege needs to be balanced against the Plaintiff's right to present his case. See Steiner v. Minnesota Life Insurance, 85 P.3d 135, 141 (Colo. 2004). In civil cases, negative inferences may be drawn from the refusal of the Defendant to answer such discovery or to testify by invoking the protections of the 5<sup>th</sup> Amendment. See Chaffin v. Wallian, 689 P.2d 684, 680 (Colo. App. 1984). As in Chaffin and the case *sub judice*, the litany of invocations of the 5<sup>th</sup> Amendment by Defendant Dimon is not unnoticed. In answers to 17 Combined Discovery requests regarding methamphetamine, Dimon invoked the 5<sup>th</sup> Amendment privilege 17 times.

In the Trial Management Order, Dimon's counsel listed no witnesses, expert or lay. The lack or identity of any witnesses by Defendant Dimon leaves this Court with little alternative. It also suggests to the Court that Defendant Dimon knew throughout this case that no defense would be accepted by the trier of fact.

Further, this Court concludes that Plaintiff's expert is well-qualified and reputable in his field as an Industrial Hygienist, and his expert report is uncontroverted, conclusive and clearly establishes extensive methamphetamine use and production on and about the Property. As stated above, all parts of the Property were extensively contaminated with methamphetamine residue, which had a street value of \$28,650.00 alone. The existence of methamphetamine as well as the byproducts of methamphetamine use and production are incredibly toxic and causes immediate as well as long term health risks and hazards to any occupant, some of which are known to be disastrous, as evidenced by an Adams county man suffering permanent brain injury due to steam cleaning a methamphetamine contaminated carpet.

As established by Plaintiff and his expert, Plaintiff and his wife suffered immediate adverse health issues upon occupying the Property after closing on April 29, 2011.

Dimon specifically admits to having a drug problem and that the mother of his child and his girlfriend, Nichole Diedrich, abused methamphetamine and was addicted to same in his Child Custody Order. See Custody Order in Dimon's Second Disclosures. Dimon was tested for amphetamines, opiates and other illegal drugs, indicating to the Court some type of probation. See Dimon's First Disclosures. When the above information of Dimon's admitted drug use, his incarceration during the listing period, Dimon's own extensive criminal past, his girlfriend's admitted methamphetamine addiction is taken in

totality along with the uncontroverted expert report of Plaintiff, the Court is convinced Dimon clearly knew or should have known that his failure to disclose methamphetamine production, as mandated by the Seller's Property Disclosure Statement under C.R.S. § 38-35.7-103, was material, intentional and consciously done in reckless disregard of Plaintiff's property and his health.

Further, not only did Defendant Dimon have full opportunity to inspect the property to determine if the property was in fact contaminated during this litigation, he also had the ability to remediate the property in accordance with health regulations promulgated by the State of Colorado before selling the property, but deliberately elected not to do so. Rather Dimon was more interested in concealing the material fact of methamphetamine contamination and simply desirous of selling his contaminated residence to Plaintiff for \$124,000, which, in reality, will cost Plaintiff John Hanks far more in funds to remediate and replace. This Court finds that the willful and wanton conduct of Defendant Kenneth Dimon regarding use and production of methamphetamine on the Property has been established beyond a reasonable doubt and Plaintiff's claim of fraud is conclusively established. Dimon's concealment of methamphetamine use and production was not simple negligence but was attendant with a conscious disregard of and indifference to the safety of Plaintiff and the property he purchased.

As set forth above, the purpose of exemplary damages are to deter Dimon as well as others from engaging in similar conduct. This Court finds that exemplary damages will deter Dimon and other drug users, addicts and drug producers from escaping from liability by not revealing clandestine drug operations in the sale of real property in Colorado.

Accordingly, this Court grants exemplary damages associated with Plaintiff's fraud claim in the amount of \$            in addition to the compensatory damages of \$       .

The Court, in its discretion, may decrease or increase the amount of exemplary damages. Specifically, §13-21-102(3) provides:

(3) Notwithstanding the provisions of subsection (1) of this section, the court may increase any award of exemplary damages, to a sum not to exceed three times the amount of actual damages, if it is shown that:

(a) The defendant has continued the behavior or repeated the action which is the subject of the claim against the defendant in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case; or

**(b) The defendant has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation. (Emphasis supplied.)**



C.R.S. § 13-21-102(3).

This Court finds that in a number of specific instances, Defendant Dimon committed perjury in his discovery responses by claiming that the only adverse physical conditions on the Property were oil in the garage, sawdust and propane tanks. See Dimon Discovery responses to Requests to Admit #'s 2 & 3. In responding to adverse physical conditions, Dimon commits perjury in denying the use of aliases. See Dimon response to Interrogatory #10 and response to Request to Admit #16. Yet Dimon's police record establishes various charges and convictions involving identity theft, aliases, and property crimes by false information. Dimon has actively thwarted Plaintiff's ability during this litigation which merit additional sanctions under C.R.S. § 13-21-103(3). Further, this Court has already determined in its December 28, 2012 Order that Dimon has failed to cooperate in discovery, caused significant expenditures on the part of Plaintiff's counsel and has wasted judicial resources. Such ruling by this Court constitutes *prima facie* evidence of aggravation of C.R.S. § 13-21-102(3)(b) meriting further sanctions in the amount of \$ .

Plaintiff's compensatory damages of \$ , as shown by affidavit and uncontroverted testimony shall bear interest at the statutory rate from the date of April 29, 2012. Plaintiff's exemplary damages in the total amount of \$ shall bear interest at the statutory rate from the date of this Order.

Under C.R.S. § 13-21-804, Plaintiff reasonable attorney's fees and costs of \$ shall bear interest from date of this Order. Plaintiff shall also be entitled to post-judgment attorney's fees and costs upon submission and application to this Court.

IT IS SO ORDERED this 22 day of January 2013. *NPT. 1-10-13*

  
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Judge, District Court, Boulder