DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	DATE FILED: July 15, 2014 CASE NUMBER: 2013CV30444
Plaintiff: CITY AND COUNTY OF DENVER CITY TREASURER v. **Defendants:** TELE COMM RESOURCES, LP and JEFF WRIGHT	**COURT USE ONLY** Case Number: 2013CV30444 Courtroom: 269

ORDER

This matter is before the Court on Plaintiff's Motion for Summary Judgment. The Court, having reviewed the motion, the responsive pleadings, the Court file, and the applicable legal authorities, finds, concludes, and orders as follows:

PROCEDURAL HISTORY

1. On January 31, 2013, Plaintiff filed a Complaint against Defendants in which Plaintiff assert two claims based on Defendants alleged failure to pay civil penalties. The civil penalties were assessed pursuant to the Denver Revised Municipal Code ("DRMC") for properties located at 3700, 3720, 3734, and 3746 Gaylord Street, Denver, Colorado ("the Gaylord property") and 3701, 3719, 3735, and 3749 York Street, Denver, Colorado ("the York property"). Plaintiff requested that the Court enter judgment against Defendants for the amount of assessed but unpaid civil penalties, for a 10% penalty for the cost of assessment as permitted under the DRMC, for a 30% collection fee as permitted in the DRMC, for interest at a rate of 10% per annum, and for costs.

2. The trial in this case originally was scheduled to begin on December 13, 2013. This trial setting was continued, by request of Defendants.[1] More specifically, Defendants' counsel asserted in a motion for continuance of trial that he would be out of town the week before the scheduled trial and that Defendant would require substantial discovery in the case.

3. On December 13, 2013, Defendants filed their Answer. In the Answer, Defendants admitted that Jeff Wright is a general partner of Tele Comm Resources L.P.

4. A court trial currently is scheduled to begin on September 5, 2014.

5. On January 8, 2014, the parties submitted a stipulated case management order, in which they agreed that discovery should be completed 63 days before trial. Accordingly, all discovery in this matter should have been completed by July 7, 2014.[2] The Court approved the stipulated case management order on January 13, 2014.

6. On April 4, 2014, counsel for Plaintiff submitted requests for admission. (*See* Plaintiff's Second Interrogatories, Requests for Admission and Requests for Production of Documents to Defendants). A certificate of service, signed by Christina R. Gonzales-Paralegal, was attached to the Plaintiff's Second Interrogatories, Requests for Admission and Requests for Production of Documents to Defendants. The certificate of service indicated that, on April 4, 2014, a copy of Plaintiff's Second Interrogatories, Requests for Admission and Requests for Production of Documents to Defendants was placed in the United States mail, that postage was paid, and that the mailing was addressed as follows:

Shawn Mitchell, Esq.
12530 Newton St.
Broomfield, CO 80020

7. Plaintiff's Second Interrogatories, Requests for Admission and Requests for Production of Documents to Defendants contained numerous requests for admission relating to the identity of the parties, the ownership of the properties for which the civil fines were assessed, and prior communications regarding the violations occurring on the properties. Significantly, the Plaintiff's Second Interrogatories, Requests for Admission and Requests for Production of Documents to Defendants contained the following requests for admission:

> 6. Admit that Tele Comm Resources, Limited Partnership, took title to the real property located at 3700, 3720, 3734, and 3746 Gaylord Street, Denver, Colorado[.]
>
> 7. Admit that Tele Comm Resources, Limited Partnership, took title to the real property located at 3701, 3719, 3735, and 3749 York Street, Denver, Colorado[.]

[1] Plaintiff stipulated to the continuance of trial.

[2] Although the last date for the completion of discovery would be July 4, 2014, this is a legal holiday, and July 5, 2014 and July 6, 2014 are weekend days. Accordingly, the period for discovery ended on July 7, 2014. *See* C.R.C.P. 6.

(Plaintiff's Second Interrogatories, Requests for Admission and Requests for Production of Documents to Defendants, pp. 5-6.)

8. Defendants did not respond to these requests for admission.

9. On May 29, 2014, Plaintiff filed its motion for summary judgment, asserting that the requests for admission should be deemed admitted.

10. Defendants' response to the motion for summary judgment was due on or before June 19, 2014. On June 27, 2014, Defendants' counsel filed a Motion Out of Time for a 7 Day Extension of Time to File a Response in Opposition to Motion for Summary Judgment. Plaintiff objected to the motion for extension of time. Although the Court shared Plaintiff's concerns, the Court accepted Defendants' untimely filed response.

11. In the response to the motion for summary judgment, Defendants acknowledge that they never answered the requests for admission but assert that they never received them. Defendants argue that the requests for admission should not be deemed admitted. In the alternative, Defendants request that they be permitted to withdraw the admissions.

12. In the verified reply brief, Plaintiff's counsel asserts that none of the documents he has sent to Defendants' counsel has been sent back as returned mail, including the copy of the Plaintiff's Second Interrogatories, Requests for Admission and Requests for Production of Documents to Defendants. Further, Christina R. Gonzales has signed a sworn statement, in which she asserts that the Plaintiff's Second Interrogatories, Requests for Admission and Requests for Production of Documents to Defendants were mailed in accordance with the certificate of service attached to that document.

FACTUAL BACKGROUND

13. Plaintiff has submitted several affidavits and exhibits in support of its motion for summary judgment. Defendants have not objected to the affidavits and exhibits and the Court therefore accepts the facts set forth in these affidavits and exhibits as undisputed.

14. As set forth in the affidavits and exhibits, on June 30, 2010, a hearing officer issued an order authorizing fines of not more than $999.00 per day against Defendant Tele Comm Resources L.P. and Doug Bruce[3] for each property in violation of the DRMC.

15. According to the Affidavit of Rae Alarid-Santore, the Gaylord property remained in violation from June 30, 2010 through December 26, 2011. A civil penalty of $999.00 per day was assessed on this property. On February 2, 2012, civil penalties relating to the Gaylord property totaled $544,455.00. These assessed penalties were limited to a value of 110% of the actual value of the Gaylord property. Defendant Tele Comm, L.P. did not pay the penalties assessed and, on March 3, 2012, the penalties were referred to collections. A 10% cost of assessment penalty was assessed pursuant to DRMC section 2-294(d). A collection fee of 30% of the debt was also assessed pursuant to DRMC section 53-4. Interest has accrued on this debt

[3] The Court does not address any judgments entered against Mr. Bruce, as he is not a party to this case.

in the amount of 10% per annum. As of May 23, 2014, Defendants owed a total of $911,640.368 in connection with the Gaylord property.

16. According to the Affidavit of Rae Alarid-Santore, a civil penalty of $999.00 per day was assessed for violations relating to the York property. The York property remained in violation from June 30, 2010 through March 23, 2011. On February 2, 2012, assessed civil penalties for this property totaled $266,733.00. The penalties assessed were limited to a value of 110% of the actual value of the York property. The assessed penalties were not paid and, on March 3, 2012, the penalties were referred to collections. A 10% cost of assessment penalty was assessed pursuant to DRMC section 2-294(d). A collection fee of 30% of the debt was also assessed pursuant to DRMC section 53-4. Interest has accrued on this debt in the amount of 10% per annum. As of May 23, 2014, Defendants owed a total of $446,618.44 in connection with the York property.

LAW AND ANALYSIS

Under C.R.C.P. 56(c), summary judgment is proper only if the pleadings and supporting documents establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Civil Service Commission v. Pinder*, 812 P.2d 645, 649 (Colo. 1991). The moving party bears the burden of establishing the non-existence of a genuine issue of material fact. *Id.* If the moving party meets that initial burden, the burden then shifts to the nonmoving party to establish that there is a triable issue of fact. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712-13 (Colo. 1987).

I. Defendants' argument that the requests for admission should not be deemed admitted.

Defendants first assert that they never received the requests for admission and therefore, the Court should not deem the requests admitted. The Court rejects this argument.

C.R.C.P. 36(a) provides, in pertinent part, as follows:

> **(a) Request for Admission.** Subject to the limitations contained in the Case Management Order, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of C.R.C.P. 26(b) set forth in the request that relate to statements or opinions of fact . . . .
>
> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 35 days after service of the request[4], or within such shorter or longer time as the court may allow or as the parties may agree to in writing pursuant to C.R.C.P. 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney[.]

[4] Service by mail is complete on mailing. *See* C.R.C.P 5(b)(2)(B).

A party's failure to timely respond to a request for admission results in the admission of the relevant subject matter of the request. *Grynberg v. Karlin*, 134 P.3d 563, 565 (Colo. App. 2006).

There is a rebuttable presumption that a properly mailed letter was received by the addressee. *See Campbell v. IBM Corp*., 867 P.2d 77, 80 (Colo App. 1993); *City and County of Denver v. East Jefferson County Sanitation Dist*., 771 P.2d 16, 18 (Colo. App. 1988). When the addressee denies receiving the letter, the binding effect of the presumption ends, and the trier of fact must decide the issue based on the weight of the evidence. *East Jefferson County Sanitation Dist.*, 771 P.2d at 18.

Here, the certificate of service attached to the Plaintiff's Second Interrogatories, Requests for Admission and Requests for Production of Documents to Defendants indicates that the document was served on Defendants' counsel by mailing. Further, Christina R. Gonzales has signed a sworn statement in which she asserts that the document was in fact mailed as set forth in the certificate of service. Defendants have not suggested that the mailing address in the certificate of service was incorrect, or that the mailing of the requests for admission was otherwise improper. Accordingly, the Court presumes that Defendants received Plaintiff's Second Interrogatories, Requests for Admission and Requests for Production of Documents. Even though Defendants assert in their response that they did not receive the requests for admission, Defendants have not submitted any evidence or affidavits in support of this assertion. *See* C.R.C.P. 56(e); *McDaniels v. Laub*, 186 P.3d 86, 87 (Colo. App. 2008) ("When a motion for summary judgment is submitted and supported by affidavit, the party opposing the motion for summary judgment cannot rely on the mere allegations of that party's pleadings, but must, by affidavit or otherwise as provided in C.R.C.P. 56, set forth specific facts showing a genuine issue of material fact."). The requests for admission are, therefore, deemed admitted.

II. Defendants' argument that they should be permitted to withdraw their admissions and defend the case.

Defendants next argue that substantial justice will be subserved if they are not permitted to withdraw their admissions. For the reasons set forth below, the Court rejects this argument.

The effect of admission under C.R.C.P. 36 is as follows:

> **(b) Effect of Admission.** Any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits[.]

Rule 36(b) "provides a mechanism by which a party may seek to avoid the effect of a deemed admission, and it provides standards by which a court is to evaluate such a request." *Sanchez v. Moosburger*, 187 P.3d 1185, 1187 (Colo. App. 2008). First, the rule authorizes a

party to move to withdraw an admission. In interpreting this provision, the Colorado Court of Appeals has held "that no formal motion to withdraw the deemed admission is required, and a request to withdraw a deemed admission may be implied from a party's actions." *Id.* at 1188. Indeed, the Colorado Supreme Court has held that an untimely response to a request for admission may be treated as a motion to withdraw the admission. *Moses v. Moses*, 180 Colo. 397, 403, 505 P.2d 1302, 1305 (1973). Second, the rule sets forth a two-part test for authorizing the withdrawal of an admission. The court may authorize the withdrawal of the admission when (1) the presentation of the merits of the action will be subserved and (2) the opposing party fails to establish that such withdrawal will prejudice him or her. In employing this test, the Court of Appeals has emphasized that "the court must take care that 'technical considerations will not be allowed to prevail to the detriment of substantial justice[.]'" *Moosburger*, 187 P.3d at 1188, quoting *8A Federal Practice and Procedure §* 2257, at 543. However, a trial court must be cautious in exercising its discretion to permit withdrawal or amendment of an admission. *Grynberg*, 134 P.3d at 566. "Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated." *Id*. (internal quotation marks and citation omitted.)

Here, Defendants have provided the "functional equivalent" of a motion to withdraw the deemed admissions by requesting, in their response, that they be permitted to withdraw the admissions and respond to the requests for admission. *See Moosburger*, 187 P.3d at 1189 (plaintiff provided the functional equivalent of a motion to withdraw the deemed admission by filing an untimely motion to permit her to serve late responses and an opposition to a motion for summary judgment). Thus, the question remains as to whether these circumstances satisfy the two-part test set forth in C.R.C.P. 36(b) for withdrawing an admission.

The Court finds that Defendants have failed to satisfy the requirements of the two-part test set forth in C.R.C.P 36(b). Although the first part of the test has been met, as the admissions dispense with the need for Plaintiff to prove certain elements of its claim, permitting the withdrawal of the admissions would prejudice Plaintiff. As noted above, if a party seeking to secure an admission cannot depend on its binding effect, the party cannot safely avoid the expense of preparing to prove the very matters on which he or she has secured the admissions. *See Grynberg*, 134 P.3d at 566. Here, although Plaintiff served the requests for admission on April 4, 2014, as of the date of this Order, Defendants have not answered the requests for admission. Indeed, the only action Defendants have taken regarding the requests for admission is to file an untimely response to the motion for summary judgment, in which they request that they be permitted to answer the requests for admission within three weeks of the filing of the already untimely filed response. Further, although Defendants request that they be permitted to withdraw the admissions, they do not specifically indicate that they would deny any of the information in the requests for admission. The trial in this matter, which already has been continued once, is scheduled for September 5, 2014. Significantly, as set forth in the stipulated case management order, the period for discovery in this matter has ended. The Court finds that, by stipulating that all discovery must be completed 63 days before trial, the parties implicitly recognized that conducting discovery past this time period would be prejudicial. Based on the above factors, the Court finds that permitting the withdrawal of the admissions at this late stage of litigation would be prejudicial to Plaintiff. Accordingly, the Court denies Defendants' request

to withdraw the admissions. The admissions set forth in Plaintiff's Second Interrogatories, Requests for Admission and Requests for Production of Documents to Defendants are, therefore, incorporated into this Order.

III. Summary Judgment in Appropriate.

The Court, having determined that the requests for admission are deemed admitted, and that withdrawal of the admissions is not warranted, will consider the requests for admission to be undisputed facts. Based on the admissions, and the affidavits and exhibits submitted with the motion for summary judgment, the Court finds that Plaintiff is entitled to summary judgment as a matter of law. [5]

First, Defendants have admitted in their Answer that Defendant Jeff Wright is a general partner of Tele Comm Resources L.P. Since general partners are jointly and severally liable for all debts and obligations of the partnership, *see Black v. First Federal Sav. And Loan of Fargo, North Dakota, F.A.*, 830 P.2d 1103, 1110 (Colo. App. 1992), Defendant Wright is jointly and severally liable for any debts or obligations of Defendant Tele Comm Resources L.P. Second, as set forth in the admissions, Tele Comm Resources, Limited Partnership, held title to the Gaylord and York properties. Under DRMC section 10-139(m), a civil penalty of up to $999.00 per day may be assessed against the owner of a property that is found to be derelict or neglected. The order entered on June 30, 2010 specifically established that the properties were derelict or neglected and reaffirmed that a penalty of up to $999.00 per day could be assessed against Defendant Tele Comm Resources, Limited Partnership for any property remaining in violation.

Further, the 10% assessment cost is proper pursuant to DRMC section 2-294(d), the 30% collection fees assessed proper under DRMC section 53-4(b), and the 10% per annum interest assessed is proper under DRMC section 2-294(a). Finally, the affidavits and exhibits have established that the civil penalties, assessment cost, collection fees, and interest have not been paid. Accordingly, summary judgment is appropriate.

CONCLUSION

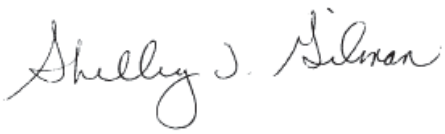
Based on the admissions and the undisputed facts set forth in the affidavits and exhibits, the Court **Grants** Plaintiff's Motion for Summary Judgment. It is hereby ORDERED that Summary Judgment is entered in favor of the Plaintiff and against Defendants, Tele Comm Resources, Limited Partnership and Jeff Wright, jointly and severally, in the principal sum of $811,188.00 (combined civil penalties assessed against the Gaylord and York properties), plus an assessment cost penalty of 10% of the debt for an amount of $81,118.80 pursuant to DRMC section 2-294(a), for a total debt of $892,306.80, plus a collection fee of 30% of the debt for an amount of $267,692.04 pursuant to DRMC section 53-4, for a balance of $1,159,998.84, plus interest from March 3, 2012, at the rate of 10% per annum pursuant to DRMC section 2-294(a), in the amount of $198,259.98 as of May 23, 2014. Total Judgment of $1,358,258.82, shall enter. Interest shall accrue at the rate of 10% per annum from May 23, 2014 until the Judgment is paid

[5] Defendants do not argue that summary judgment is not supported by the admissions. Instead, their argument has been that the admissions should either not be treated as admissions or that Defendants should be permitted to withdraw the admissions.

in full. Finally, although Plaintiff has requested costs, Plaintiff has not submitted any specific amount of requested costs; therefore the Court will not enter a judgment for costs at this time. Plaintiff may submit a bill of costs pursuant to C.R.C.P. 121, section 1-22.

DATED: July 15, 2014

BY THE COURT:



SHELLEY I. GILMAN
District Court Judge