

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHARLES A. COLEY,)
)
 Plaintiff,)
)
 vs.)
)
 DOENGES BROS. FORD, INC.,)
 an Oklahoma corporation, and)
 THE STATE OF OKLAHOMA,)
 ex rel OKLAHOMA TAX)
 COMMISSION,)
)
 Defendants.)

No. 77-C-382-C

FILED

NOV 30 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

Plaintiff in this action requests a declaration of the unconstitutionality of Oklahoma's Mechanic's Lien law, 42 O.S. §§ 91, et seq., pursuant to 28 U.S.C. § 2201. This statute permits one who performs work on personal property and is not paid for this work to foreclose upon a lien thereby arising by selling the personal property. 42 O.S. § 91. The defendant Oklahoma Tax Commission has filed a motion to dismiss under F.R.C.P. 12(b)(6), failure to state a claim upon which relief can be granted, on the ground that it plays no part in the sale permitted by the Oklahoma Mechanic's Lien law, supra.

Plaintiff alleges that the application of the Oklahoma Mechanic's Lien law sale provision would deprive him of his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution. The other defendant to this action, Doenges Brothers Ford, is in possession of plaintiff's automobile. It has performed work on this automobile and has informed plaintiff that it intends to foreclose upon its statutory Mechanic's Lien unless paid. Plaintiff alleges that the defendant Oklahoma Tax Commission also participates in this alleged deprivation because it will be responsible for issuing a Certificate of Title to the new owner.

The requested relief is a declaratory judgment. For a

declaratory judgment to issue, there must be a controversy that is "definite and concrete, touching the legal relations of the parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) [Citations omitted]. The test is, "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

Plaintiff's complaint against the Oklahoma Tax Commission does not satisfy these standards. Its statutory duty is simply to issue a Certificate of Title to the vehicle owner. 47 O.S. § 23.3. This would not be done until the sale is accomplished. The Oklahoma Tax Commission has no duties under the Oklahoma Mechanic's Lien law in regard to the sale. Thus a declaratory judgment against the Oklahoma Tax Commission would serve no purpose. Its duties are not defined by the allegedly unconstitutional statute, and if this statute were declared unconstitutional, it would have no obligation to issue a Certificate of Title to one acquiring title by way of a sale authorized by the statute. Any dispute that plaintiff may have with the Oklahoma Tax Commission is not one "admitting of specific relief through a decree of a conclusive character . . ." Aetna Life Ins., supra.

In opposition to the motion to dismiss, plaintiff relies primarily on Caesar v. Kiser, 387 F.Supp. 645 (M.D.N.C. 1975). That case can be distinguished from the case at bar in that there the North Carolina Department of Motor Vehicles played a more active role in the sale of vehicles under that

State's lien law. Notice of sale has to be given to the Department before such a sale is proper. N.C. Gen. Stats. § 44A-4(f). The Court used this participation of the Department simply as an indication of state action. The Department was not a defendant in that case.

For the foregoing reasons, it is ordered that the motion to dismiss of the defendant Oklahoma Tax Commission is hereby sustained.

It is so Ordered this 30th day of November, 1977.


H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 30 1977

Clark C. Silver, Clerk
U. S. DISTRICT COURT

BANK OF COMMERCE OF TULSA,)
an Oklahoma banking corporation,)

Plaintiff)

vs.)

No. 77-C-63-C

ARKANSAS VENDING & SOUND, INC.,)
an Arkansas corporation, and)
INSURANCE COMPANY OF NORTH AMERICA,)
a Pennsylvania corporation,)

Defendants)

STIPULATION OF ALL PARTIES OF
DISMISSAL WITH PREJUDICE

Come now the parties herein and, pursuant to Rule 41(a)(1)(ii), advise the Court that all issues between the parties have been settled by payment of certain moneys from defendant Insurance Company of North America to plaintiff Bank of Commerce of Tulsa and all parties stipulate and agree that plaintiff's cause be dismissed with prejudice as to all defendants and that all of the parties herein withdraw any claims they may have against any party for costs and attorneys' fees, and all parties request the Court to make and enter its order of dismissal of plaintiff's cause with prejudice, and that all parties bear their respective costs and attorneys' fees.

DONE AND DATED this 30 day of November, 1977.

BANK OF COMMERCE OF TULSA
Plaintiff

MOYERS, MARTIN, CONWAY,
SANTEE & IMEL

By s/Steven A. Stecher
Steven A. Stecher
Attorneys for Plaintiff
920 NBT Building
Tulsa, Oklahoma 74103
918 582-5281

ARKANSAS VENDING & SOUND, INC.

FARMER, WOOLSEY, TIPS & GIBSON, INC.

By s/Lawrence A. Johnson
Lawrence A. Johnson
Attorneys for Arkansas Vending & Sound, Inc.
Fifth Floor, Mid-Continent Building
Tulsa, Oklahoma 74103
918 585-1181

INSURANCE COMPANY OF NORTH AMERICA

GREEN, FELDMAN, HALL & WOODARD

By *S/ Wm. S. Hall*

Wm. S. Hall

Attorneys for Insurance Company of
North America

816 Enterprise Building

Tulsa, Oklahoma 74103

918 583-7129

ORDER OF DISMISSAL WITH PREJUDICE

For good cause shown and on consideration of the premises, including the above and foregoing stipulation by all parties, the Court finds that plaintiff's cause should be dismissed with prejudice as to all defendants, and that all parties bear their respective costs and attorneys' fees.

BE IT, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that plaintiff's causes against the defendants be, and the same are, hereby dismissed with prejudice.

BE IT FURTHER ORDERED that all parties bear their respective costs and attorneys' fees.

DONE AND DATED this 3rd day of December, 1977.

(Signed) H. Dale Cook

United States District Judge

FILED

DEC 5 1977

Jack C. S.
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PAUL A. BISCHOFF,)
)
 Plaintiff,)
)
 vs.)
)
 GRUMMAN AMERICAN AVIATION)
 CORPORATION, GRUMMAN COR-)
 PORATION, CORWIN MEYER,)
 ALBERT GLENN, ALAN LEMLEIN,)
 CHARLES COPPI, NORMAN STEINER,)
 JOSEPH GAVIN, JR., RICHARD)
 KEMPER, ROY GARRISON, GEORGE)
 WESTPHAL, ROBERT HUMMEL,)
 FRANK WISEKAL, FRED KIDDER,)
 FRED JOHNSON, ROBERT FREESE,)
 EMMY PICCARD, ESTATE OF)
 CLAUDE FLANIGAN, DECEASED,)
)
 Defendants.)

✓
No. 77-C-343-C

FILED
NOV 29 1977
Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

This action is brought under alternative theories of negligence, breach of warranty and manufacturers' products liability for damages allegedly sustained by plaintiff as a result of the death of his son in an airplane crash. Ten of the individual defendants have filed a motion to quash the issuance of summons upon them and to dismiss the action as to them on the ground that they have performed no acts in Oklahoma which would grant this Court in personam jurisdiction over them pursuant to Oklahoma's "long-arm" statutes, 12 O.S. §§ 187 and 1701.03. Each of these defendants has filed an affidavit in which he states, in part:

"That he is a citizen and resident of the State of Georgia; that this Affiant, neither individually nor through another, has ever transacted any business within the State of Oklahoma; has never committed any act within the State of Oklahoma; has never paid any taxes in or to the State of Oklahoma; and has never been personally engaged in the manufacture, distribution or sale of any goods, products or services within the State of Oklahoma."

These affidavits are uncontroverted by plaintiff, who has advised the Court by letter dated October 31, 1977 that he

does not intend to respond to the defendants' motion.

It is well settled that the party seeking to invoke the jurisdiction of a court has the burden of establishing that jurisdiction exists, and this burden cannot be shifted to the party challenging the jurisdiction. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); Haynes v. James H. Carr, Inc., 427 F.2d 700 (4th Cir. 1970); Tetco Metal Products, Inc., v. Langham, 387 F.2d 721 (5th Cir. 1968). If the plaintiff's ". . . allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof." McNutt v. General Motors Acceptance Corp., supra, 298 U.S. at 189. The court in Taylor v. Portland Paramount Corporation, 383 F.2d 634 (9th Cir. 1967), was faced with a situation similar to the one now before this Court. The non-resident defendant in that case filed a motion to dismiss for lack of in personam jurisdiction, and in support of her motion, she filed an affidavit, very similar to the affidavits filed by the defendants in the instant case, in which she denied any contacts with the forum state. The plaintiff filed no counter affidavits. The court cited McNutt v. General Motors Acceptance Corp., supra, for the proposition that the party asserting jurisdiction has the burden of establishing it if his allegations are challenged in any appropriate manner, and then held:

"There certainly is such a challenge here. The motion was properly made under Rule 12(b)(2) of the Federal Rules of Civil Procedure, and such a motion can properly be supported by affidavit. (Rule 43(e)). We do not think that the mere allegations of the complaint, when contradicted by affidavits, are enough to confer personal jurisdiction of a non-resident defendant. In such a case, facts, not mere allegations, must be the touchstone." 383 F.2d at 639.

In the instant case, the plaintiff has not alleged any specific acts on the part of the individual defendants which would properly invoke Oklahoma's "long-arm" statutes. He

merely alleges that "[t]he above mentioned aircraft and its component parts was designed, manufactured, assembled, tested and sold by defendants and each of them." In the face of the uncontroverted affidavits of the defendants denying any contacts with the State of Oklahoma, plaintiff's allegations are not sufficient to confer upon this Court in personam jurisdiction over the non-resident defendants, and the Court finds that plaintiff has failed to meet his burden of establishing that jurisdiction over these defendants exists.

For the foregoing reasons, it is hereby ordered that the motion to dismiss of defendants Corwin Meyer, Albert Glenn, Alan Lemlein, Charles Coppi, Norman Steiner, Richard Kemper, Roy Garrison, George Westphal, Frank Wisekal and Fred Johnson is sustained.

It is so Ordered this 29th day of November, 1977.


H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 23 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

THOMAS P. BRANCHAM,
Plaintiff

vs.

SEARLE & COMPANY,
Defendant

No. 77-C-354-C

ORDER OF DISMISSAL

ON This 23rd day of November, 1977, upon the written application of the parties for A Dismissal with Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the plaintiff filed herein against the defendant be and the same hereby is dismissed with prejudice to any future action.

J. Dale Cook
JUDGE, DISTRICT COURT OF THE UNITED STATES
NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:

WILLIAM R. GRIMM

W. R. Grimm
Attorney for Plaintiff

ALFRED B. KNIGHT

A. B. Knight
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EMMA L. SMITH,)
)
 Plaintiff,)
)
 vs.) No. 76-C-619-C
)
 JOSEPH A. CALIFANO, JR.,)
 Secretary of Health,)
 Education and Welfare,)
)
 Defendant.)

FILED

NOV 23 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

J U D G M E N T

This is an action brought by the plaintiff, Emma L. Smith, to review the final determination of the defendant, Secretary of the Department of Health, Education and Welfare, denying disability benefits under Sections 216(i) and 223 of the Social Security Act, as amended. (42 U.S.C. §§ 416(i) and 423.)

The Court in its review has been granted power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the case for a rehearing period. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. In this action, the plaintiff alleges the record does not support the determination of the Secretary by substantial evidence.

The plaintiff filed a previous application for disability benefits on May 1, 1973, which was denied on initial and reconsidered determinations. A hearing was held, and on March 7, 1974 a decision was entered affirming the reconsidered determination. The case was reviewed by the Appeals Council which dismissed the appeal, and the decision of the Administrative Law Judge became final. The application which initiated the proceedings now before this Court was filed on

January 7, 1975, and relates only to the period beginning March 7, 1974. The matter was first heard, on record, by an Administrative Law Judge of the Bureau of Hearings and Appeals of the Social Security Administration whose written decision was issued July 8, 1976, in which it was found that the claimant was not entitled to a period of disability or to disability insurance benefits under §§ 216(i) and 223, respectively, of the Social Security Act, as amended. Thereafter the decision of the Administrative Law Judge denying permanent disability was appealed to the Appeals Council of the Bureau of Hearings and Appeals which Council on October 14, 1976 issued its Order finding that the decision of the Administrative Law Judge was correct and that further action by the Council would not result in any change which would benefit the plaintiff. Thus the decision of the Administrative Law Judge became the final decision of the Secretary of the Department of Health, Education and Welfare.

Judicial review of the Secretary's denial of Social Security disability benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g), and is not a trial de novo. Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1970); Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). The findings of the Secretary and the inferences to be drawn therefrom are not to be disturbed by the courts if there is substantial evidence to support them. 42 U.S.C. § 405(g); Atteberry v. Finch, supra. Substantial evidence has been defined as ". . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and it must be based on the record as a whole." Glasgow v. Weinberger, 405 F.Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300, 59 S.Ct. 501, 83 L.Ed. 660 (1939), the Court, interpreting what constitutes substantial evidence, stated:

"It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Atteberry v. Finch, supra; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Celebrezze, 351 F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957).

The transcript of the entire record of proceedings relating to the application of the plaintiff, Emma L. Smith, and filed of record in this cause has been carefully reviewed. The principal issue presented herein is whether the record, by substantial evidence, sustains the finding that the plaintiff is not under a disability as defined by the Social Security Act at any time prior to the date of that decision

Section 223(d)(1) of the Social Security Act defines disability, as pertinent to the matters here in issue, as the "inability to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." Section 223(d)(2)(A) further provides that "an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any kind of substantial gainful work which exists in the national economy, regardless of whether he would be hired if he applied for work." The term "disability" is further defined in Section 223(d)(3), which provides that "[f]or purposes of this subsection, a 'physical or mental impairment' is an impairment that results from anatomical, physiological, psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

A review of the record indicates that the evidence upon which the plaintiff relies to support her claim of disability consists of her own subjective complaints of pain and inability to work, as well as the report of her personal physician, Dr. G. E. Moots, that in his opinion, the plaintiff is ". . . unable to work outside her home for gainful employment." A claimant's "[s]ubjective symptoms must be evaluated with due consideration for credibility, motivation, and medical evidence of impairment," Dvorak v. Celebrezze, 345 F.2d 894 (10th Cir. 1965), and as a fact finder, the Administrative Law Judge has a right to reject a claimant's testimony entirely, so long as his findings indicate that it was considered. Baerga v. Richardson, 500 F.2d 309 (3rd Cir. 1974); Good v. Weinberger, 389 F.Supp. 350 (W.D.Pa. 1975). A medical opinion cannot conclusively determine disability as a fact, Twardesky v. Weinberger, 408 F.Supp. 842 (W.D.Pa. 1976); Good v. Weinberger, supra, and it is not error for an Administrative Law Judge to rely on medical opinions contrary to those supportive of a claimant's case, even if the opinion relied on is by a doctor selected by the Secretary. Bledsoe v. Richardson, 469 F.2d 1288 (7th Cir. 1972). In Sykes v. Finch, 443 F.2d 192 (7th Cir. 1971), the claimant's physician testified that: "'[s]he will never be well. I believe she is permanently disabled and will not be able to work.'" The statement was not supported by any medically acceptable clinical or laboratory diagnostic data or findings, and the court held that it was therefore properly discountable as insubstantial. In the instant case, the opinion of Dr. Moots is likewise not supported by the type of evidence required by Section 223(d)(3). In fact, the objective tests performed by Dr. Moots resulted in negative findings. To support his decision, the Administrative Law Judge relied primarily on the report of Dr. R. L. Imler, Jr. Dr. Imler performed numerous clinical tests upon which he based his conclusion that "[a]t this time, I did not find

any residual impairment of speech, sensor or motor function." The Administrative Law Judge recognized that the plaintiff ". . . has a chronic anxiety tension state and mild osteoarthritis of the lumbar spine," but nevertheless found that she retains the residual physical and mental capacity to perform her duties as a psychiatric aide and other jobs present in significant numbers in the region where she lives. The findings of the Administrative Law Judge were based upon "[t]he objective medical findings, the medical opinion of the effect of these objective findings on the claimant, the subjective evidence of pain and disability, and the claimant's background, work history, and age. . . ."

While the question in this case is a close one, the Court finds that the determination of the Appeals Council to the effect that the plaintiff is not under a disability as defined in the Social Security Act is supported by substantial evidence. The determination of the Secretary is therefore affirmed, and Judgment is hereby entered on behalf of the defendant.

It is so Ordered this 23rd day of November, 1977.


H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**
NORTHERN DISTRICT OF OKLAHOMA

WALTER M. BOWERS,)
individually, and for)
all individuals similarly)
situated,)
)
Plaintiff,)
)
v.)
)
REGENCY OLDSMOBILE, INC.,)
)
Defendant.)

NOV 22 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

No. 77-C-289-B

ORDER

The Court has for consideration Defendant's Motion to Dismiss and has reviewed the file, the briefs and the recommendations of the Magistrate concerning said motion, and being fully advised in the premises, finds:

That the Defendant's Motion to Dismiss as to the class action should be sustained for the reasons stated herein.

This is an action brought by plaintiff individually and as a class action under the provisions of 15 U.S.C. § 1981, et seq., for damages purportedly arising from defendant's alleged agent having "rolled back" the odometer on a used automobile sold to the plaintiff.

Defendant's Motion to Dismiss is based upon two grounds.

First, defendant contends that plaintiff's action fails to meet the prerequisites of a class action under Rule 23(a) of the Federal Rules of Civil Procedure. Additionally, defendant claims that plaintiff's Complaint is, on its face, barred by the statute of limitations.

It is well settled that for a suit to be properly maintained as a class action, all four of the requirements of Fed.R.Civ.P. 23(a) must be satisfied. Rule 23(a) states: "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is

so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class." Any suit, if it is to be properly maintained as a class action, must satisfy all four of the prerequisites. See McAdory v. Scientific Research Instruments, Inc., 355 F.Supp. 468 (D.C. Md. 1973).

Underlying the abovementioned prerequisites to maintaining a class action is the fact that a class must indeed exist. "And when it appears that a class does not exist, an action under Rule 23 cannot be maintained." McAdory v. Scientific Research, supra, p. 473. The defendant calls the Court's attention to the Bowers' deposition on pages 25-31, in which the plaintiff states that he has no first-hand knowledge of any other parties similarly situated. He testified that he knew of one person who had recently called him who had also bought a car from R. H. Beard, but he did not know his name nor the circumstances of the transaction. Furthermore, Bowers states on page 28 of his deposition that any other information which he has pertaining to other parties similarly situated came through his attorneys. Mr. Anderson, Bowers' attorney, stated on the record at page 31 of the Bowers' deposition, that the information which they have relied on in filing the Complaint came from Beard. On Pages 38-39 of the Bowers' deposition, the plaintiff, Walter M. Bowers, testified that he would not believe Beard under oath.

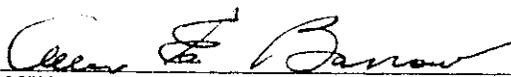
The defendant further argues that even assuming that there is a class in existence, this would still be an improper case for a class action because Rule 23(a)(1) requires that the class be so numerous that joinder of all

members is impracticable. The plaintiff has attempted to satisfy this prerequisite by stating in his Complaint in paragraph 3 that: "The class identified above is composed of many members who are unknown to the plaintiff, but who are known to the defendant, and the number makes it impracticable to join all of them in this action." The plaintiff, by pleading in this manner, has attempted to place the burden of establishing a class of members too numerous to join upon the defendant. As stated in Albertson's, Inc. v. The Amalgamated Sugar Co., 503 F.2d 459 (10th Cir. 1974), ". . . the burden is upon the party requesting a class action to show that the several requirements of Fed.R.Civ.P. 23 are satisfied." Furthermore, mere speculation as to the number of parties involved is not sufficient to satisfy 23(a)(1). See Al Barnett & Son, Inc. v. Outboard Machine Corp., 64 F.R.D. 43 (1974).

As to defendant's argument that the plaintiff's action was filed after the running of the two (2) year period of limitation provided for in 15 U.S.C. § 1989(b), the Court, after examining the record and hearing both parties' arguments as to the date of purchase of the subject matter automobile, finds that the purchase of the automobile in question occurred on July 7, 1975, thereby placing plaintiff's action, filed on July 6, 1977, clearly within the 15 U.S.C. §1989(b) statute of limitation.

IT IS, THEREFORE, ORDERED that the Defendant's Motion to Dismiss as to the class action be and is hereby sustained.

DATED this 22nd day of November, 1977.


CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NEWMAN LANGSTON,)
)
 Plaintiff,)
)
 v.)
)
 GLEN H. "PETE" WEAVER,)
 CHARLIE DAVIS, KENNETH)
 DeCAMP, GEORGE SILVEY,)
 a/k/a GEORGE SILZER, JAMES)
 "BUCKY" DUNN, and HUGH)
 HORTON,)
)
 Defendants.)

No. 77-C-287-B

FILED

NOV 22 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has for consideration Defendant's Motion to Dismiss or in the Alternative Motion to Make More Definite and Certain and has reviewed the file, the briefs and the recommendations of the Magistrate concerning said motion, and being fully advised in the premises, finds:

That the Defendant's Motion to Dismiss should be sustained for the reasons stated herein; that the alternative motion is therefore moot.

This action by the plaintiff alleges denial of his Constitutional Rights under Title 42, § 1983 of the United States Code. This Court therefore has jurisdiction of this cause by virtue of Title 42 of the United States Code, §1343.

Plaintiff alleges that his Constitutional Rights were violated by the defendants, including the Movant who was the duly elected Sheriff of Mayes County, Oklahoma where the allegedly unlawful acts occurred. Plaintiff alleges he was seized by the defendants, searched, arrested, charged, and jailed by the defendants.

A careful study of the Plaintiff's Complaint discloses no mention of the Movant Sheriff Glen H. "Pete" Weaver in

respect to the alleged illegal search and seizure. Any contentions the acts of any deputy brings vicarious liability on Sheriff Weaver is not supported by law.

As stated in Beard v. Boren, 413 F. Supp. 41, 43 (W.D. Okla. 1976):

"It is a general rule that an official will not be held liable in a Civil Rights action unless he directly and personally participates in conduct under color of state law which deprives the plaintiff of rights, privileges and immunities secured him by the federal Constitution. Richardson v. Snow, 340 F. Supp. 1261 (D.Md. 1972). It is an essential element of a Civil Rights claim that a particular defendant be personally involved in the alleged denial of the constitutional right. Battle v. Lawson, 352 F. Supp. 156 (W.D. Okla. 1972); Townes v. Swenson, 349 F. Supp. 1246 (W.D. Okla. 1972)."

And in Barrows v Faulkner. 327 F. Supp. 1190, 1191 N.D. Okla. 1971);

"Plaintiff nowhere alleges that Defendant directed or personally participated in any of the acts of which Plaintiff complains and which constitute her federal civil rights cause of action. This being the case, Plaintiff fails to state any claim based on a federal ground against Defendant Faulkner and/or his surety."

See also Hopkins v. Hall, 372 F. Supp. 182 (E.D. Okla. 1974).

Thus the acts of defendants Horton, Dunn and Decamp, as alleged in Paragraph VI, VII, VIII and IX of plaintiff's Complaint, void of any mention of defendant Weaver, clearly bring no liability vicariously on defendant Weaver and further states no claim upon which relief can be granted against the defendant Weaver. Further Paragraph X, which states the length of plaintiff's detention again is void of any mention of defendant and adds no facts nor states any

claim upon which relief can be granted against the defendant Weaver.

Merely causing charges to be filed against an individual does not state any claim upon which relief may be granted against this defendant for alleged violations of plaintiff's civil rights.

A case in point is that of Atkins v. Lanning, et al, 415 F. Supp. 186 (N.D. Okl., 1976). Therein, the Court, having found that the District Attorney had certain immunity in filing charges, was faced with the question of whether an investigator and an undercover agent violated plaintiff's rights by conspiring to charge him with a crime without probable cause. This is analogous to plaintiff's Paragraphs XI and XII other than the fact that in Atkins, plaintiff alleged a lack of probable cause - such a claim is absent in the case presently before this Court.

In discussing the plaintiff's Complaint, the Atkins Court stated at 191:

"The vindication of federal rights under 42 U.S.C. §1983 is determinable by federal law. Diamond v. Marland, 395 F. Supp. 432 (D.C. Ga. 1975) However, since the elements of a §1983 cause of action based upon allegations of malicious prosecution have not been federally established, the Court will consider state law. According to the law of the State of Oklahoma, the elements entering into and necessary to be shown in a suit for malicious prosecution are that a prosecution was commenced against the plaintiff, that the prosecution was malicious and was instituted or instigated by defendant, that the prosecution was without probable cause and that the prosecution was legally and finally terminated in plaintiff's favor.

. . . In the case at bar, plaintiff does not allege that defendants maliciously caused charges to be brought without probable cause While Oklahoma allows this inference, it is merely an inference and does not amount to an irrebutable presumption. In the case at bar, malice is not alleged and any inference of malice due to lack of probable cause is rebutted by the facts alleged in the Complaint.

. . . The Restatement provides that the initiating of criminal proceedings against another who is not guilty of the offense charged is liable to him if the proceedings were initiated without probable cause and primarily because of a purpose other than that of bringing an offender to justice. In the case at bar, the factual allegations certainly do not indicate that the defendants initiated the prosecution against plaintiff primarily because of a purpose other than that of bringing an offender to justice. This element would seem to be a proper prerequisite to the bringing of a §1983 action based upon an alleged malicious prosecution."

Plaintiff's Complaint herein says nothing more in respect to Defendant Weaver other than the fact that charges were filed. Plaintiff does not meet the prerequisites set out in Atkins, supra, nor even allege that they were made without probable cause. Plaintiff has totally failed to state a cause of action against the defendant Weaver.

Finally, it is noted that the last sentence of Paragraph XI states "that the plaintiff pled guilty to said reduced charge after being coerced by the defendants, and each of them". The claim of coercion is nothing more than a legal conclusion, being void of any fact supporting same.

IT IS, THEREFORE, ORDERED that the Defendant's Motion to Dismiss be and is hereby sustained.

Dated this 22nd day of November, 1977.

Ellen E. Barrow
CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TERRY EUGENE McDONALD, Individually,)
and MILDRED McDONALD, Individually,)

Plaintiffs,)

vs.)

THE ROCKWOOD INSURANCE)
COMPANY, STUYVESANT)
INSURANCE COMPANY and)
WILLIAM DEES, FRED HOPKINS,)
DEWEY WARD, RALPH JOHNSON,)
dba DEES BAIL BOND COMPANY,)
and LAURA MAE TURNER,)
GEORGE TRENT SPAHR and)
FREDDIE MARIE QUICK,)

Defendants.)

No. 77-C-305-B

FILED

NOV 22 1977

**Jack C. Silver, Clerk
U. S. DISTRICT COURT**

ORDER GRANTING MOTION TO DISMISS
OF ROCKWOOD INSURANCE COMPANY

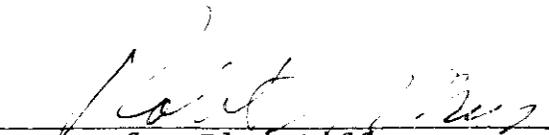
This matter came on for consideration on this 22nd day of November, 1977 upon the Special Appearance and Motion to Dismiss filed by Rockwood Insurance Company with supporting Brief and Exhibits, in accordance with Rule 12(b). The Court has considered the Motion, Brief and Exhibits filed by said party. No response was made by the plaintiffs thereto although granted an extension of time to do so. Counsel for plaintiffs further agrees that the said defendant's Motion is well taken and should be sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Special Appearance and Motion to Dismiss of Rockwood Insurance Company be and the same hereby is sustained and the Complaint of Terry Eugene McDonald, individually, and Mildred McDonald, individually, against Rockwood Insurance Company is dismissed without cost to said party.

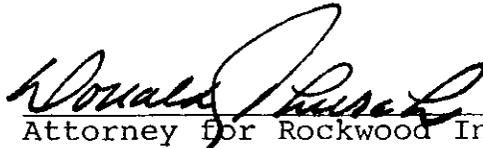
(Signed) Allen E. Barrow

ALLEN E. BARROW, Chief Judge
United States District Court
for the Northern District of
Oklahoma

APPROVED:



Attorney for Plaintiffs



Attorney for Rockwood Insurance
Company

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF OKLAHOMA

FILED

NOV 22 1977

COMMERCIAL SOLVENTS CORPORATION)
and THE HOME INSURANCE COMPANY)
)
Plaintiffs)
)
vs.)
)
LIBERTY MUTUAL INSURANCE COMPANY)
)
Defendant)

Jack C. Silver, Clerk
U. S. DISTRICT COURT

NO. 74 Civ. 133
(AEB)

ORDER OF DISMISSAL

Pursuant to the stipulation of settlement filed herein on the
21 day of November, 1977, it is ordered that plaintiffs', Commercial
Solvents Corporation and The Home Insurance Company, action against the
defendant Liberty Mutual Insurance Company is hereby dismissed with
prejudice; and the counterclaim of defendant Liberty Mutual Insurance
Company against plaintiffs Commercial Solvents Corporation and The Home
Insurance Company is hereby dismissed with prejudice.

Dated this 22 day of November, 1977.

(Signed) Allen E. Barrow

Allen E. Barrow, Chief Judge of the
United States District Court, Northern
District of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 22 1977

**Jack C. Silver, Clerk
U. S. DISTRICT COURT**

CHEOKAS IMPORTERS &)
EXPORTERS, INC., & O. CARL)
NEEDLES, Individually and)
as Attorney in Fact for)
Cheokas Importers &)
Exporters, Inc.)

Plaintiff,)

v.)

No.77-C-250-B

PIONEER-HARRISON COAL)
COMPANY, INC., et al.,)

Defendants.)

ORDER

The Court has for consideration defendants Motion to Dismiss and the Court has carefully reviewed the pleadings, affidavits and briefs filed by all of the parties hereto and has carefully considered the recommendations of the Magistrate concerning the motions, and being fully advised in the premises FINDS:

That the defendants' Motion to Dismiss should be sustained for the reasons stated herein.

This is an action brought as a result of purported contracts entered into on April 8, 1977, in Tulsa, Oklahoma, between certain parties to this action. Plaintiff, Cheokas Importers & Exporters, Inc. is a corporation with its principal office at Americus, Georgia, and having no business interests or other contacts within the State of Oklahoma. Plaintiff, O. Carl Needles is, according to information given to the Magistrate, at the time of this hearing, a citizen of the State of Indiana. The property in controversy consists of coal mined, stored and held in the State of West Virginia. The Defendants, Frank Hurn and Mrs. Frank Hurn are citizens of the State of West Virginia and are owners of Pioneer-Harrison Coal Company, Inc., a West Virginia corporation. Defendant, Robert Elmore, is a citizen

of Fort Lauderdale, Florida, and is also president of Red Jacket Coal Company, Inc., a Kentucky corporation. None of the Defendants who are parties to the motions under consideration herein are citizens of the State of Oklahoma, nor do they have any business interests within the state of Oklahoma, nor did any of said Defendants authorize any other person to act for or on their behalf as agent or otherwise, in engaging in any business enterprises for and on their behalf within the State of Oklahoma as was evidenced by affidavits duly filed with this Court and reviewed at the time of said hearing.

Jurisdiction is based solely upon a diversity of citizenship coupled with an allegation of a jurisdictional amount in controversy in excess of Ten Thousand Dollars (\$10,000.00). It is further noted that the complaint states in the second paragraph: "All of the parties hereto, whether corporate or individually, are non-residence (sic) of the States of Oklahoma..."

The pleadings and affidavits submitted show that none of the defendants was served with Summons or Complaint in the State of Oklahoma, but all were served pursuant to the Oklahoma Long-Arm Statutes in jurisdictions outside the State. None of the defendants does business in the State of Oklahoma, nor has any of said defendants ever conducted business in the State of Oklahoma.

Plaintiffs contend that the contracts in question were executed within the State of Oklahoma and attempt to assert that actions were taken on the part of defendants by persons purporting to act as agents for said defendants. The affidavits filed on behalf of the defendants absolutely deny under oath the truthfulness of any such contention and no counter affidavits are filed herein, nor has the complaint been amended herein to establish otherwise. It is Plaintiff's contention that the jurisdiction of this Court should be invoked solely by virtue of the alleged contracts being executed within the Northern District of Oklahoma.

The defendants assert that this Court is without jurisdiction of the persons of said defendants or the subject matter to this action.

12 O.S. (1971) ¶187(a) of the Oklahoma Statutes authorizes jurisdiction in Oklahoma over a non-resident defendant when a cause of action arises from "the transaction of any business within this state." A newer and parallel section of 12 O.S. (1971) ¶1701.03 likewise authorizes such jurisdiction over claims based on the non-resident defendant's "transaction of any business." These provisions require both minimum reasonable contact between a defendant and the State of Oklahoma and that the claim sued upon in Oklahoma derives itself from the purposeful acts of the defendant in Oklahoma. Garrett v. Levitz Furniture Corp., 356 F. Supp. 283, 284 (N.D. Okl. 1973); Crescent Corp. v. Martin, 443 P.2d 111, 117 (Okl. 1968). In a diversity case, a Federal Court is limited in its ability to effectuate extra territorial service of process and jurisdiction by the law of the forum state. F.R.C.P. 4(e) and (f); Jem Engineering and Mfg. Inc. v. Toomer Elec. Co., 413 F. Supp. 481 (N.D. Okl. 1976).

To constitute doing business in Oklahoma, a defendant's activities must be substantial, continuous, and regular as distinguished from casual, single or isolated. Anderson v. Shiflett, 435 F.2d 1036, 1037 (10th Cir. 1971). In addition, in considering the question of personal jurisdiction when some of the defendants are individuals, as well as corporate, as in the case at bar, the analysis must be more rigorous and restrictive than it is when it is a corporation which is engaged in arguable business activities. Id. at 1038. Further, the defendant must personally avail himself of the privilege of doing business in the State of Oklahoma and by doing so invoking the benefits and protection of its law. Id. at 1038.

The Oklahoma Supreme Court in Roberts v. Jack Richards Aircraft Co., 536 P.2d 353, 355 (Okl. 1975) held:

"To assert personam jurisdiction over a foreign corporation by 12 O.S. (1971) ¶187, the record should show a voluntarily committed act of the defendant by which that defendant purposefully availed itself of the privilege of conducting activities within the State so as to invoke the benefits and protection of the laws of Oklahoma."

Thus, where a non-resident purchaser of services did not initiate the contract which gave rise to a contract claim by an Oklahoma resident, and where the purchaser has no other relationship with Oklahoma, Oklahoma's Long-Arm Statutes simply do not apply.

Jem Engineering and Mfg. Inc. v. Toomer Elec. Co., supra;

Vacu-Maid, Inc. v. Covington, 530 P.2d 137 (Ct. App. Okl. 1975).

The Court finds that the circumstances surrounding the alleged contracts, their execution, and performance demonstrates no reasonable relationship with Oklahoma which could give rise to a basis for jurisdiction over the defendants in this forum. Jurisdiction, in this case, is asserted under Title 28 U.S.C. ¶1332(a) which provides that the District Courts of the United States shall have original jurisdiction in all civil actions where the matter in controversy exceeds the sum of Ten Thousand Dollars (\$10,000.00) and it is between "citizens" of different states or citizens of a State and foreign States and citizens thereof. Allegations of citizenship are required to meet the jurisdictional requirements. Guerrino v. Ohio Casualty Insurance Company, 423 F.2d 419, 421 (3rd Cir. 1970); Boehnen v. Walston & Company, Inc., 358 F. Supp. 537 (D.C.S.D. 1973); Attwell v. City of Chicago, 358 F. Supp. 1248 (D.C. Wis. 1973).

IT IS THEREFORE ORDERED, that the defendants' Motion to Dismiss be and is hereby sustained.

DATED this 22nd day of November, 1977.



ALLEN E. BARROW, CHIEF JUDGE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RANDOLPH P. NEAL, # 12738,)
)
Petitioner,)
)
v.)
)
DR. JOE TYLER, Superintend-)
ent Eastern State Hospital,)
Vinita, Oklahoma, et al.,)
)
Respondents.)

No. 77-C-365-B

FILED

NOV 22 1977

**Jack C. Silver, Clerk
U. S. DISTRICT COURT**

ORDER

This is a proceeding pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Randolph P. Neal. He is confined in the Eastern State Hospital, Vinita, Oklahoma, pursuant to proceedings in the District Court of Tulsa County, State of Oklahoma.

Petitioner presents to this Court as grounds for his petition that he is incarcerated in violation of his rights guaranteed by the Constitution of the United States in that he was taken to Eastern State Hospital and is there held against his will without having had a hearing before a jury, and without legal advice or information as to the charges against him and opportunity to defend. After repeated readings of the petition, and giving it the broad interpretation required, it is determined that Petitioner demands a hearing and release.

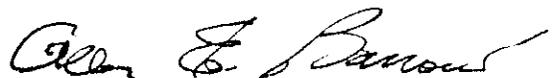
The State of Oklahoma provides remedies to resolve petitioner's claims by post-conviction procedure pursuant to 22 O.S.A. § 1080, et seq., and by habeas corpus pursuant to 12 O.S.A. § 1331, et seq. However, in his petition, Petitioner admits that he has not appealed or in any way presented the issues he urges to this Federal Court to the high Courts of the State of Oklahoma.

Until Petitioner has availed himself of the adequate and available procedures through the highest State Court, his State remedies are not exhausted and his petition to

this Court is premature. No principle in the realm of Federal habeas corpus is better settled than that State remedies must be exhausted. See, Hoggatt v. Page, 432 F.2d 41 (10th Cir. 1970); Preiser v. Rodriguez, 411 U.S. 475 (1973); Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972) cert. denied 410 U.S. 944 (1973). Further, the probability of success is not the standard to determine whether a matter should first be determined by the State Courts. Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969); Daegele v. Crouse, 429 F.2d 503 (10th Cir. 1970) cert. denied 400 U. S. 1010 (1971). No hearing herein is required and the petition should at this time be denied, without prejudice, for failure to exhaust adequate and available state remedies.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Randolph P. Neal be and it is hereby denied, without prejudice, and the case is dismissed.

Dated this 22nd day of November, 1977, at Tulsa, Oklahoma.


CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOHN J. HOWERTON,)
)
 Plaintiff,)
)
 v.)
)
 BUDDY FALLIS, DISTRICT)
 ATTORNEY, ET AL.,)
)
 Respondents.)

No. 777-C-1366-8
FILED

NOV 21 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has before it for consideration the Petition of John J. Howerton for Writ of Habeas Corpus filed pursuant to Title 28 U.S.C. § 2254. Petitioner is currently incarcerated in the Tulsa County Jail. Petitioner states that he is charged with three counts of second degree burglary.

Petitioner alleges as grounds in support of his petition that excessive bail has been set by the state district court in violation of his rights under the United States Constitution; that personal funds of his were illegally confiscated; that he was refused medical attention; and that his mail has been "tampered with" and destroyed.

Petitioner states that his case has not yet been set for trial. His petition further shows that he has made no appeal to a higher State Court regarding his contentions and also admits on the face of his petition that he has no petition, application, motion or appeal pending in any Court regarding the above matters he presents in his Federal petition.

The Statutes of the State of Oklahoma provide by habeas corpus procedure, 12 O.S.A. § 1314, for the high Court of the State of Oklahoma to determine whether bail is excessive. As to Petitioner's allegations challenging his conditions of confinement, they too may be presented to the State Courts for consideration by State habeas corpus, by a State action for injunctive relief pursuant to 12 O.S.A. § 1381, or by State writ of mandamun pursuant to 12 O.S.A. § 1451.

Until Petitioner has availed himself of the adequate and available procedures through the highest State Court, his State remedies are not exhausted and his petition to this Court is premature. No principle in the realm of Federal habeas corpus is better settled than that State remedies must be exhausted. See, Hoggatt v. Page, 432 F.2d 41 (10th Cir. 1970); Preiser v. Rodriguez, 411 U.S. 475 (1973); Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972) cert. denied 410 U.S. 944 (1973). Further, the probability of success is not the standard to determine whether a matter should first be determined by the State Courts. Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969); Daegele v. Crouse, 429 F.2d 503 (10th Cir. 1970) cert. denied 400 U. S. 1010 (1971). No hearing herein is required and the petition should at this time be denied, without prejudice, for failure to exhaust adequate and available state remedies.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of John J. Howerton be and it is hereby denied, without prejudice, and the case is dismissed.

Dated this 21st day of November, 1977, at Tulsa, Oklahoma.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM T. WRIGHT,)
)
Petitioner,)
)
v.)
)
JUDGE DALTON, DISTRICT)
JUDGE, ET AL.,)
)
Respondents.)

No. 77-C-367-C

FILED

NOV 21 1977

ORDER

Jack C. Silver, Clerk
U. S. DISTRICT COURT

The Court has before it for consideration the Petition of William T. Wright for Writ of Habeas Corpus filed pursuant to Title 28 U.S.C. § 2254. Petitioner is currently incarcerated in the Tulsa County Jail. Petitioner states that he is charged with two counts of burglary, possession of firearm ACF, embezzlement by bailee, and fugitive warrant from Arkansas for aggravated robbery.

Petitioner alleges as grounds in support of his petition excessive bail on fugitive charge of aggravated robbery which is \$50,000.00; that he has been denied "proper living conditions as guaranteed by federal laws"; that he has been denied "access to legal reference"; and that he has been "denied a Grand Jury Indictment and was given a 'Bogus' Preliminary Hearing in 3 of his cases."

Petitioner states that his case has not yet been set for trial. His petition further shows that he has made no appeal to a higher State Court regarding his contentions and also admits on the face of his petition that he has no petition, application, motion or appeal pending in any Court regarding the above matters he presents in his Federal petition.

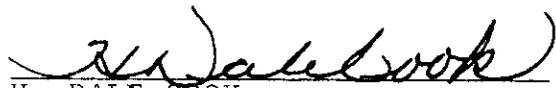
The Statutes of the State of Oklahoma provide by habeas corpus procedure, 12 O.S.A. § 1314, for the high Court of the State of Oklahoma to determine whether bail is excessive. As to Petitioner's allegations challenging his conditions of confinement, they too may be presented to the State Courts

for consideration by State habeas corpus, by a State action for injunctive relief pursuant to 12 O.S.A. § 1381, or by State writ of mandamun pursuant to 12 O.S.A. § 1451.

Until Petitioner has availed himself of the adequate and available procedures through the highest State Court, his State remedies are not exhausted and his petition to this Court is premature. No principle in the realm of Federal habeas corpus is better settled than that State remedies must be exhausted. See, Hoggatt v. Page, 432 F.2d 41 (10th Cir. 1970); Preiser v. Rodriguez, 411 U.S. 475 (1973); Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972) cert. denied 410 U.S. 944 (1973). Further, the probability of success is not the standard to determine whether a matter should first be determined by the State Courts. Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969); Daegele v. Crouse, 429 F.2d 503 (10th Cir. 1970) cert. denied 400 U. S. 1010 (1971). No hearing herein is required and the petition should at this time be denied, without prejudice, for failure to exhaust adequate and available state remedies.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of William T. Wright be and it is hereby denied, without prejudice, and the case is dismissed.

Dated this 21st day of November, 1977, at Tulsa, Oklahoma.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BERNARD J. MUSSMAN,)
)
 Petitioner,)
)
 v.)
)
 BUDDY FALLIS, TULSA)
 DISTRICT ATTORNEY, ET AL.,)
)
 Respondents.)

No. 77-C-376-C

FILED

NOV 21 1977

ORDER

Jack C. Silver, Clerk
U. S. DISTRICT COURT

The Court has before it for consideration the Petition of Bernard J. Mussman for Writ of Habeas Corpus filed pursuant to Title 28 U.S.C. § 2254. Petitioner is currently incarcerated in the Tulsa County Jail. The Petition alleges that "on July 6, 1977, a Tulsa detective representing the interest of Buddy Fallis, Tulsa County D. A. did without a search warrant, and without permission of Petitioner, enter the apartment of Petitioner when Petitioner was not home, and in the presence of, petitioner's landlady, did take the following items pertaining to petitioner's case." (Petitioner alleges certain items of property allegedly taken from his apartment) Petitioner contends that such search was illegal and violated his rights under the Constitution of the United States. Petitioner states that he has not yet been tried on the charges pending against him in the state district court. Petitioner further alleges that motions challenging the search have been filed and ruled upon by the state district court. However, petitioner makes no showing that he has exhausted his remedies in the courts of Oklahoma.

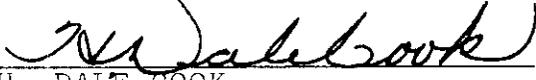
Title 28 U.S.C. § 2254(b) provides that:

"An application for a writ of habeas corpus in custody pursuant to the judgment of State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, . . . "

Until Petitioner has availed himself of the adequate and available procedures through the highest State Court, his State remedies are not exhausted and his petition to this Court is premature. No principle in the realm of Federal habeas corpus is better settled than that State remedies must be exhausted. See, Hoggatt v. Page, 432 F.2d 41 (10th Cir. 1970); Preiser v. Rodriguez, 411 U.S. 475 (1973); Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972) cert. denied 410 U.S. 944 (1973). Further, the probability of success is not the standard to determine whether a matter should first be determined by the State Courts. Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969); Daegele v. Crouse, 429 F.2d 503 (10th Cir. 1970) cert. denied 400 U. S. 1010 (1971). No hearing herein is required and the petition should at this time be denied, without prejudice, for failure to exhaust adequate and available state remedies.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Bernard J. Mussman be and it is hereby denied, without prejudice, and the case is dismissed.

Dated this 21st day of November, 1977, at Tulsa, Oklahoma.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARJORIE L. HAENKY, Executrix)
of the Estate of Norman H.)
Haenky, Deceased,)
)
Plaintiff,)
)
vs.)
)
WHEATLEY COMPANY, a Delaware)
corporation,)
)
Defendant.)

No. 77-C-248-C

FILED

NOV 21 1977

O R D E R

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Plaintiff brings this action seeking damages for the breach of an Agreement for Sale of Patents and Payment of Royalties (Agreement), entered into between her husband, Norman H. Haenky, and defendant's predecessor in interest, F.W.I., Inc. Plaintiff alleges that beginning in January, 1976, the defendant has failed to pay royalties due the plaintiff under the terms of the Agreement, and she asks the Court to order the defendant to account for all past due royalties. Defendant has filed counterclaims, alleging that the Agreement is unenforceable because it extends beyond the expiration of the patents involved and therefore constitutes a per se misuse of the patents and a violation of the anti-trust laws. Defendant also alleges that an amendment to the Agreement was executed without consideration, is fraudulent and is therefore unenforceable. The validity of the patents in issue is not questioned.

An examination of the pleadings caused the Court to question the existence of diversity jurisdiction over plaintiff's complaint, and a hearing on that issue was held on September 30, 1977. Plaintiff has since advised the Court that discovery has convinced her that both parties are citizens of the State of Oklahoma for the purpose of federal jurisdiction. While the Agreement in issue involves the

assignment of patents, plaintiff's cause of action is one sounding in common law breach of contract. It has long been the law that where a suit is brought on a contract of which a patent is the subject matter, either to enforce such contract, or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws.

Luckett v. Delpark, 270 U.S. 496, 46 S.Ct. 397, 70 L.Ed. 703 (1926); Dale Tile Manufacturing Co. v. Hyatt, 125 U.S. 46, 8 S.Ct. 756, 31 L.Ed. 683 (1888). Therefore, in the absence of diversity of citizenship, the Court lacks subject matter jurisdiction over plaintiff's complaint, and it must be dismissed.

Plaintiff has filed a motion to dismiss defendant's counterclaims for failure to state a claim upon which relief can be granted. Defendant relies upon 28 U.S.C. §§ 2201 and 2202 and diversity of citizenship to sustain this Court's jurisdiction over its counterclaims. Since diversity of citizenship is absent, the counterclaims cannot be maintained on the jurisdictional basis relied upon by defendant. However, even if defendant's pleadings could be construed as an attempt to allege federal question jurisdiction, the Court is convinced that the counterclaims should be dismissed for lack of subject matter jurisdiction.

Defendant alleges that the Agreement constitutes a per se misuse of patents because it extends beyond the expiration date of the relevant patents. This allegation arguably could bring the counterclaims within the exclusive federal jurisdiction provisions of 28 U.S.C. § 1338. Defendant relies primarily on the case of Brulotte v. Thys Co., 379 U.S. 29, 85 S.Ct. 176, 13 L.Ed.2d 99 (1964) to support its allegations of patent misuse. The agreement in that case involved patents which had all expired at the time suit was brought. The Supreme Court did hold that an extension of a license agreement beyond the expiration date of the patents was a misuse of the patents, but reversed a lower court's

order validating the agreement only ". . . insofar as it allows royalties to be collected which accrued after the last of the patents . . . had expired." 379 U.S. at 30. To the contrary, the Agreement in the instant case involves patents which will expire between 1979 and 1988, and plaintiff seeks to recover only those royalties which have accrued to date. It should be noted that Brulotte v. Thys Co., supra, was tried and appealed through the courts of the State of Washington, thus indicating that a defense of patent misuse is not within the exclusive jurisdiction of the federal courts. Defendant's counterclaims therefore do not arise ". . . under any Act of Congress relating to patents. . . ." and 28 U.S.C. § 1338 does not give this Court subject matter jurisdiction over the counterclaims.

Defendant also alleges that "[t]he patent agreement dated November 20, 1967 and amended on March 13, 1973 constitutes a contract in conspiracy and combination in restraint of trade or commerce among several states and, accordingly, is illegal and not enforceable under 15 U.S.C. §§ 1-7 and 12-27 . . ." These allegations are insufficient to state a cause of action under the federal antitrust laws.

"Although the Federal Rules permit statement of ultimate facts, a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal."

Heart Disease Research Foundation v. General Motors Corp., 463 F.2d 98, 100 (2nd Cir. 1972). See also McCleneghan v. Union Stock Yards Co. of Omaha, 298 F.2d 659 (8th Cir. 1962); Milton G. Waldbaum Company v. Roberts Dairy Company, 325 F.Supp. 772 (D.Neb. 1971). Defendant has not alleged any facts to support its claims under the antitrust laws. An antitrust claim requires more than a theory, International Railways of Central America v. United Brands Co., 405 F.Supp. 884 (S.D.N.Y. 1975), and a statement that jurisdiction is founded upon the antitrust laws is clearly insufficient.

Seligson v. Plum Tree, Inc., 350 F.Supp. 440 (E.D. Pa. 1972). Therefore, the Court does not have federal question jurisdiction over defendant's counterclaims under the anti-trust laws.

The remaining grounds for relief asserted in defendant's counterclaims are based upon common law theories which cannot provide federal question jurisdiction. Because there is no diversity of citizenship and no federal question adequately raised by the counterclaims, they must be dismissed.

Also before the Court at this time is plaintiff's application for leave to file an amended complaint. In effect, plaintiff's proposed amended complaint is a restatement of her original complaint, in the form of a request for a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202. Plaintiff asks the Court to declare the Agreement valid, and states that an actual controversy has arisen between the parties, based upon the defendant's allegations of patent misuse and violations of the antitrust laws. The Declaratory Judgment Act does not establish a new basis for jurisdiction in the federal courts; it merely establishes a new remedy, available in cases in which jurisdiction otherwise exists. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950); Bard v. Seaman, 507 F.2d 765 (10th Cir. 1974); Workman v. Mitchell, 502 F.2d 1201 (9th Cir. 1974). Plaintiff has admitted the absence of diversity of citizenship, and she has merely adopted the allegations of defendant's counterclaims to support a controversy based upon patent misuse and antitrust violations. Because the Court has already held that these allegations are insufficient to confer upon it federal question jurisdiction over the counterclaims, it follows that they cannot provide that jurisdiction under the Declaratory Judgment Act. Although Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend pleadings ". . . shall be freely given when justice so requires," leave need

not be granted if the amendment is futile or would be subject to dismissal. See Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); DeLoach v. Woodley, 405 F.2d 496 (5th Cir. 1968). Therefore, since the proposed amended complaint would be subject to dismissal for the same reasons that the defendant's counterclaims have been dismissed, the plaintiff's application should be denied.

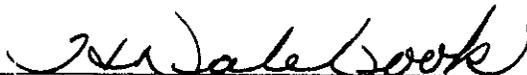
For the foregoing reasons,

IT IS ORDERED that plaintiff's complaint is dismissed.

IT IS FURTHER ORDERED that plaintiff's motion to dismiss defendant's counterclaims is sustained.

IT IS FURTHER ORDERED that plaintiff's application for leave to file an amended complaint is denied.

It is so Ordered this 21st day of November, 1977.


H. DALE COOK
United States District Judge

F I L E D

NOV 18 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KATHY D. RAGLIN,
Plaintiff,

vs.

JOSEPH CALIAFANO, JR., Secretary
of Health, Education and Welfare
of the United States,

Defendant.

77-C-341-B

ORDER

The Court has for consideration the following pleadings:

1. The Motion to Dismiss filed by the defendant;
2. A letter dated November 7, 1977, submitted by the plaintiff, which has been filed and will be treated as a Motion for Extension of Time to respond to the Motion to Dismiss.

The Court has carefully persued the entire file, and, being fully advised in the premises, finds:

Plaintiff commenced this litigation pro se on August 8, 1977, for judicial review of an adverse ruling of the defendant with reference to Social Security benefits.

Plaintiff alleges that she received notice of the ruling on June 6, 1977. The action of the Appeals Council was dated May 27, 1977, and the affidavit of Adelaide E. Edelson, Chief of Section 2 of the Civil Actions Branch of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education and Welfare, indicates that the decision was mailed to the plainiff by certified mail on June 1, 1977.

There is no dispute that no extension to file this litigation has been sought or granted.

The Motion to Dismiss of the defendant is predicated on the following grounds:

1. To dismiss this action on the grounds that the Court lacks jurisdiction because the action was not commenced within the time prescribed by section 205(g) of the Soecial Security Act, 42 U.S.C. 405(g);

2. To dismiss the action on the ground that it is barred by the time limitation specified in section 205(g) of the Social Security Act, 42 U.S.C. 405(g), because it was not commenced within 60 days after the date of the mailing to the plaintiff of notice of the final decision of the Secretary of Health, Education and Welfare, and the time for commencing the action was not extended by the Appeals Council of the Social Security Administration.

3. To dismiss the action because the complaint fails to state a claim upon which releif can be granted;

4. To dismiss the action because the Court lacks jurisdiction over the subject matter of the action.

Title 42 U.S.C. §405(g) provides, in pertinent part:

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. ***." (Emphasis supplied)

The exclusive nature of the procedures set out in Section 205(g) have been recognized on numerous occasions. *Tate v. United States*, 437 F.2d 88 (9th Cir. 1971); *Small v. Gardner*, 390 F.2d 186 (1st Cir.), cert. denied, 393 U.S. 984 (1968); *Jamieson v. Folsom*, 311 F.2d 506 (7th Cir.), cert. denied, 374 U.S. 487 (1963); *Willis v. Weinberger*, 385 F.Supp. 1092 (USDC ED Va., 1974).

It is also well established that the jurisdiction of this Court is limited by Section 205(g) and that while the Secretary of Health, Education and Welfare may allow further time beyond the sixty-day period to file an action for review, the Court is without authority to do so. *Macy v. United States Secretary of Health, Education and Welfare*, 353 F.Supp. 849 (M.D.N.C. 1972).

In *Bomer v. Ribicoff*, 304 F.2d 427 (6th Cir. 1962) it was said:

"The right of action here sought to be enforced is one created by statute and is limited by the provisions thereof as to time within which the right must be asserted. Such conditions operate as a condition of liability rather than as a period of limitation and there can be no recovery unless the condition precedent is fulfilled Not having filed the present action to review the adverse administrative ruling within the sixty days provided by the statute, the right provided by the statute ceased to exist, and the present action was properly dismissed. ***."

The Court, therefore, finds that this litigation was not timely commenced by the plaintiff and that the defendant's Motion to Dismiss should be sustained.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss filed by the defendant be and the same is hereby sustained and this cause of action and complaint are hereby dismissed.

IT IS FURTHER ORDERED that the motion for extension of time filed by the plaintiff is overruled as being moot.

ENTERED this 15th day of November, 1977.



CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARY COFFIELD TACKETT,)
)
Plaintiff,)
)
vs.)
)
FLOYD COFFIELD, EUNICE COFFIELD,)
DOYLE WATSON, and DAVID YOUNG,)
District Attorney,)
)
Defendants.)

No. 77-C-335-C

FILED

NOV 16 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

This is an action for damages based upon an alleged deprivation by the defendants of the civil and constitutional rights of the plaintiff. The plaintiff is prosecuting this action pro se, and while the complaint does not include an allegation of the specific statutory basis for this Court's jurisdiction, later pleadings indicate that the plaintiff is relying upon 42 U.S.C. §§ 1983 and 1985. The actions about which plaintiff complains relate to an alleged conspiracy by the defendants to murder plaintiff's father in 1954 and subsequent conspiracies to deprive her of her father's property and to interfere with her efforts to prove that her father was murdered. All of the defendants have filed motions to dismiss, on various grounds, which are now before the Court.

Plaintiff does not specify upon which subsection of § 1985 she relies. Subsection (1) concerns conspiracies to interfere with an office under the United States and is clearly inapplicable to the facts of this case. Section (2) involves conspiracies to interfere with the judicial process and is likewise inapplicable. The only subsection arguably related to the facts of the instant case is § 1985(3), which provides in pertinent part as follows:

"If two or more persons . . . conspire
. . . for the purpose of depriving,
either directly or indirectly, any

person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . , the party so injured or deprived may have an action for the recovery of damages. . . ."

To constitute a cause of action under this statute, ". . . there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). See also Lesser v. Braniff Airways, Inc., 518 F.2d 538 (7th Cir. 1975). The plaintiff must show that she was treated differently than anyone else would have been treated under the same circumstances. Joyce v. Ferrazzi, 323 F.2d 931 (1st Cir. 1963). In the instant case, the plaintiff has not alleged any discrimination -- racial, class-based or otherwise. § 1985 does not attempt to reach a conspiracy to deprive one of every constitutional right; it is directed solely to deprivations of "equal protection of the laws" or of "equal privileges and immunities under the laws." Collins v. Hardyman, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253 (1951). Because the plaintiff has failed to allege any discriminatory deprivation of equal protection or equal privileges and immunities, her complaint fails to state a cause of action against any of the defendants under 42 U.S.C. § 1985(3).

Title 42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

To fall within the provisions of this statute, a deprivation must be "under color of law"; that is, there must be state action. Watson v. Kenlick Coal Company, Inc., 498 F.2d 1183 (6th Cir. 1974). Defendant Young, as District Attorney of

Creek County, is the only defendant whose actions are alleged to involve state action. A prosecuting attorney is immune from liability for certain of his actions performed in his official capacity, but a distinction is often drawn between actions taken in the prosecutor's capacity as an advocate and actions taken in his capacity as an administrator or investigator. Immunity is generally granted for actions taken in the former capacity, but not necessarily for actions taken in the latter. See Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977); Waits v. McGowan, 516 F.2d 203 (3rd Cir. 1975); Sykes v. State of California, 497 F.2d 197 (9th Cir. 1974). In the instant case, it is not clear from the complaint that defendant Young was in the performance of quasi-judicial duties at the times in question. Under such circumstances, it has been held error to dismiss a complaint, for failure to state a claim upon which relief can be granted, on the ground of immunity from liability. Dodd v. Spokane County, Washington, 393 F.2d 330 (9th Cir. 1968). Aside from the question of immunity, the Court must determine if the complaint contains allegations sufficient to state a cause of action under § 1983 against this defendant. In her complaint, plaintiff makes the following allegations regarding this defendant:

"The Defendant, David Young, is the District Attorney of Creek County, Oklahoma, and in such capacity has been willfully, wantonly and contumaciously derelict in his sworn duty and became a party to the conspiracy herein complained of by his refusal to request exhumation of the body of the said Dr. A. W. Coffield, deceased, for the purpose of legally determining the exact cause of death, even though requested so to do by this Plaintiff."

Plaintiff's amended complaint contains the following additional allegations:

"That the said Defendant, David Young, in his capacity as District Attorney, became a co-conspirator by his failure, neglect and refusal to order a proper autopsy of the body of the said A. W. Coffield, it being his sworn

duty in his capacity to protect the rights and privileges of all of the citizens of the State; the failure, neglect and refusal of same being a furthur (sic) violation of the Constitutional and Civil Rights of this Plaintiff as well as an obstruction of justice."

The performance of autopsies in Oklahoma is governed by 63 O.S. § 944, which provides in pertinent part as follows:

"When necessary in connection with an investigation to determine the cause and/or manner of death and when the public interest requires it, the Chief Medical Examiner, his designee, a medical examiner or a district attorney shall require and authorize an autopsy to be conducted. In determining whether the public interest requires an autopsy the medical examiner or district attorney involved shall take into account but shall not be bound by request therefor from private persons or from other public officials."

Plaintiff has not alleged facts which would have required a mandatory application of this statute on the part of defendant Young. Title 63 O.S. § 946 deals with the exhumation of bodies. That statute provides in pertinent part:

"If death occurred under circumstances as enumerated in Section 938 of this title, and if the body has been buried without proper certification of death, it shall be the duty of the medical examiner, upon ascertaining such facts, to notify the Chief Medical Examiner and the district attorney of the county in which the body was buried. The district attorney or Chief Medical Examiner shall thereupon present such facts to the judge of the district court of such county, and the judge may by written order require the body to be exhumed and an autopsy performed by the Chief Medical Examiner or his designee."

Again, plaintiff has not alleged facts showing that this statute should have been applied, and the statute itself provides that the final authority to order an exhumation is within the discretion of the judge, not the district attorney.

"Complaints relying on the civil rights statutes are plainly insufficient unless they contain some specific allegations indicating a deprivation of civil rights, rather than state simple conclusions."

Koch v. Yunich, 533 F.2d 80, 85 (2nd Cir. 1976). See also Nickens v. White, 536 F.2d 802 (8th Cir. 1976). ". . .

[C]onclusory allegations, such as 'intentionally, wilfully and recklessly,' without supporting facts are not sufficient

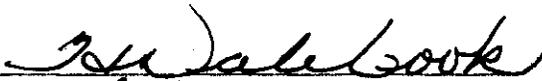
to make out a complaint under 42 U.S.C. § 1983." Curtis v. Everette, 489 F.2d 516, 521 (3rd Cir. 1973). In paragraph I of her amended complaint, plaintiff lists ". . . the acts of the said Defendants which specifically have denied this Plaintiff of her Civil Rights and Constitutional Rights" None of the acts listed are those of defendant Young. Plaintiff has failed to specifically allege in what manner defendant was "derelict in his sworn duty", how such dereliction could in any way deprive her of civil or constitutional rights, or which of her civil or constitutional rights were interfered with by this defendant. Under the circumstances of this case, an allegation that defendant Young did not act, "even though requested to do so by this Plaintiff", is simply not sufficient to constitute a cause of action under § 1983.

All of the remaining defendants are private citizens, who cannot be held liable under § 1983 unless their wrongful actions were done under color of state law or state authority. Hill v. McClellan, 490 F.2d 859 (5th Cir. 1974). While it is true that private persons may be sued under § 1983 when they are acting in conspiracy or collusion with state officials, Taylor v. Gibson, 529 F.2d 709 (5th Cir. 1976), allegations of conspiracy ". . . must show some overt acts related to the promotion of the conspiracy, and some link between the alleged conspirators." Croy v. Skinner, 410 F. Supp. 117 (N.D. Ga. 1976). See also Powell v. Workmen's Compensation Board of the State of New York, 327 F.2d 131 (2nd Cir. 1964). In the instant case, the only possible basis of liability under § 1983 against defendants Floyd Coffield, Eunice Coffield and Doyle Watson is as co-conspirators of defendant Young, the only defendant who was acting under color of state authority. However, neither the complaint nor the amended complaint contains any factual allegations connecting the activities of defendant Young with the activities of any of the other defendants, and, as previously

stated, plaintiff's list of specific acts which have interfered with her rights contains no acts of defendant Young. Plaintiff's conclusory allegations of conspiracy are not sufficient to sustain a cause of action against the private defendants based upon § 1983.

For the foregoing reasons, the motions to dismiss filed by defendants Floyd Coffield, Eunice Coffield, Doyle Watson and David Young are hereby sustained.

It is so Ordered this 18th day of November, 1977.


H. DALE COOK
United States District Judge

United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 76-C-626-C

WILLIAM L. FORD,

Plaintiff,

vs.

FORD MOTOR COMPANY,

Defendant.

JUDGMENT
FILED
NOV 16 1977

Jack C. Silver, Clerk
U.S. DISTRICT COURT
H. DALE COOK

This action came on for trial before the Court and a jury, Honorable

, United States District Judge, presiding, and the issues having been duly tried and

the jury having duly rendered its verdict,

It is Ordered and Adjudged that judgment is entered for the Defendant, Ford Motor Company, and against the Plaintiff, William L. Ford, and that the Defendant recover of the Plaintiff its cost of action.

Dated at TULSA, OKLAHOMA
of NOVEMBER , 1977 .

, this 16th day


Clerk of Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 16 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

THOMAS MICHAEL RITCHIE,)
)
Plaintiff,)
)
vs.)
)
McDOUGAL CONSTRUCTION COMPANY,)
a corporation,)
)
Defendant.)

No. 76-C-522

JOURNAL ENTRY OF JUDGMENT

This cause came on for jury trial on the 17th day of October, 1977, all parties being present and announcing ready for trial. The plaintiff appeared in person and with his attorney, Gerald Swanson, and the defendant appeared by its representative and attorney, Jack M. Thomas. After opening statements were made by the parties, the plaintiff put his case in chief on and the case was continued for further evidence to the 18th day of October, 1977. At the conclusion of the 18th of October, 1977, both parties rested and the matter was continued until the 19th of October, 1977, for argument and instructions of the Court.

After argument and instructions read to the jury, the jury retired to deliberate and after having deliberated for a period of time returned a verdict for the defendant and against the plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the jury verdict vying for the defendant be in the same as hereby approved and ordered to be filed of record. Dated this 16th day of November, 1977.

1st A. Dale Cook
JUDGE

lh

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

THE PRUDENTIAL INSURANCE COMPANY)
OF AMERICA, a corporation,)
)
Plaintiff,)
v.)
)
TERESA ANN GREEN, et al.,)
)
Defendants.)

NOV 15 1977

**Jack C. Silver, Clerk
U. S. DISTRICT COURT**

NO. 77-C-370-B

ORDER

The Motion of the Defendant, Teresa Ann Green, for judgment on the pleadings having been presented, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, and the Court being fully advised in the premises, finds that the Defendant, Teresa Ann Green, is entitled to judgment on the pleadings.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Motion of the Defendant, Teresa Ann Green, for judgment on the pleadings be, and it is hereby, granted.

IT IS FURTHER ORDERED by the Court that Lawrence D. Taylor, Guardian Ad Litem for Lotrise LaAnn Green and Lorenzo Green, Jr., be awarded an attorney's fee of \$200.00, and the Clerk of this Court is hereby ordered to pay to the said Lawrence D. Taylor the sum of \$200.00 from the funds now on deposit in this cause.

IT IS FURTHER ORDERED by the Court that the Clerk of this Court pay to Teresa Ann Green the sum of \$20,933.60, said amount being the balance of the sums now on deposit herein.

DATED this 15th day of November, 1977.

(Signed) Allen E. Barrow

JUDGE OF THE DISTRICT COURT

APPROVED:

Thomas A. Layon, Jr.
Thomas A. Layon, Jr., Attorney for
Defendant, Teresa Ann Green.

Larry Harral
Larry Harral, Attorney for Defendant,
Irthoudis Green

Lawrence D. Taylor
Lawrence D. Taylor, Guardian Ad Litem
and Attorney for Defendants, Lotrise
LaAnn Green and Lorenzo Green, Jr.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GO WIRELINE SERVICES,)
a division of Gearhart-)
Owen Industries, Inc., a)
Texas Corporation,)
)
Plaintiff,)

v.)

No. 77-C-251-B

OSBORN DRILLING COMPANY,)
an unincorporated)
association, and JIM)
OSBORN, Individually,)
d/b/a OSBORN DRILLING)
COMPANY,)
)
Defendants.)

FILED

NOV 15 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

This cause comes on for hearing on the 7th day of October, 1977, upon Plaintiff's application for default judgment, and the Court being fully advised in the premises and fully familiar with the files and records herein, and having heard the statements of counsel for the Plaintiff and having three times called the Defendants in Open Court, and the Defendants having failed to appear personally or by his counsel or other representative, the Court finds as follows:

That this matter was set by this Court on the 7th day of October, 1977, at the hour of 10:30 o'clock a.m., on Motion for Default Judgment for failure to answer. That on the 7th day of October, 1977, the Defendants having been called three times in open Court appearing not nor by their representative or counsel the Court granted default judgment against said Defendants and referred the matter to the United States Magistrate for the purpose of taking testimony as to the amount of the judgment to be entered.

Based upon the Findings and Recommendations of the Magistrate filed herein on November 2, 1977, the Court finds that the Plaintiff, Go Wireline Services, a division of Gearhart-Owen Industries, should have judgment in the

amount of TWENTY NINE THOUSAND FOUR HUNDRED SEVENTY AND TWO AND 41/100 (\$29,472.41) DOLLARS together with interest thereon at ten (10%) percent per annum in the accrued sum to date of THREE THOUSAND AND NO/100 (\$3,000.00) DOLLARS. And that this judgment should carry interest at the rate of 10% percent per annum from October 7, 1977, until paid: That the Plaintiff should have judgment for its costs herein accrued and accruing of THIRTY THREE (\$33.00) DOLLARS hereafter. That the Plaintiff should have judgment for a reasonable attorney's fee for the use and benefit of its attorney, J. Rex Spurr, Shawnee, Oklahoma, in the amount of FIVE THOUSAND DOLLARS (\$5,000.00), and that this judgment should carry interest at the rate of 10% percent per annum from October 7, 1977, until fully paid.

The Court further finds, orders, adjudges and decrees that the Plaintiff has duly filed its Mechanic's and Materialman's Lien Statement against the J. R. Martin #1 Lease in the Martin Field, in Nowata County, Oklahoma, for a portion of the amount included in the above sum of FOUR HUNDRED NINETY-SIX AND 25/100 (\$496.25) for labor and material furnished and performed on said leasehold which is more specifically described as:

C of NE/4 NW/4 NE/4
2000' from S/Line
1300' from W/Line
Section 14-29N-14E
Nowata County, Oklahoma

And this Court finds and it is hereby ordered adjudged and decreed that the defendants above named are the owners of the 7/8 working interest or a portion thereof, in said oil and gas mining lease which is more specifically set forth on the said Mechanic's and Materialman's Statement attached to the Plaintiff's Complaint incorporated herein, references to which is made as though recopied.

The Court does hereby find and order said lien hereby established and determined to be a valid and subsisting lien against the oil and gas mining leasehold estate above described, together with all the well or wells so located thereon, and equipment and supplies thereunto belonging, connected therewith, and pertaining thereto, and that the Plaintiff be and is hereby rendered a judgment against the Defendants, above named, and each of them in the amount of the labor and material furnished and performed on said lease above described in the amount of \$496.25 together with a reasonable attorney fee and costs which is incorporated in the sum as set forth above on Page One hereof.

It is further ordered, adjudged and decreed that said lien is hereby foreclosed, and judgment of foreclosure is hereby entered against all parties to this action being Defendant owners as above named and their interest therein, and it is hereby ordered that the leasehold and property and equipment subject to the said lien be ordered sold upon execution as provided by law, and that all the proceeds of said sale be paid to the Clerk of this Court toward the satisfaction of Plaintiff's judgment as hereinabove rendered, and to abide by any further order of this Court.

The Court further finds, orders, adjudges and decrees that the Plaintiff has duly filed its Mechanic's and Materialman's Lien Statement against the Jerrel Smith #1 Lease in the Schultor Field, in Okmulgee County, Oklahoma, for a portion of the amount included in the above judgment in the sum of THREE THOUSAND SEVEN HUNDRED SIXTY-SEVEN AND 68/100 DOLLARS (\$3,767.68) for labor and material furnished and performed on said leasehold which is more specifically described as:

NE SW SE NW
Sec. 8-12N-13E
Okmulgee County, Oklahoma

And this Court finds and it is hereby ordered, adjudged and decreed that the defendants above named are the owners of the 7/8 working interest or a portion thereof, in said oil and gas mining lease which is more specifically set forth on the said Mechanic's and Materialman's Statement attached to the Plaintiff's Complaint incorporated herein, references to which is made as though recopied.

The Court does hereby find and order said lien hereby established and determined to be a valid and subsisting lien against the oil and gas mining leasehold estate above described, together with all the well or wells so located thereon, and equipment and supplies thereunto belonging, connected therewith, and pertaining thereto, and that the Plaintiff be and is hereby rendered a judgment against the Defendants, above named, and each of them in the amount of the labor and material furnished and performed on said lease above described in the amount of \$3,767.68 together with a reasonable attorney fee and costs which is incorporated in the sum as set forth above on Page One hereof.

It is further ordered, adjudged and decreed that said lien is hereby foreclosed, and judgment of foreclosure is hereby entered against all parties to this action being Defendant owners as above named and their interest therein, and it is hereby ordered that the leasehold and property and equipment subject to the said lien be ordered sold upon execution as provided by law, and that all the proceeds of said sale be paid to the Clerk of this Court toward the satisfaction of Plaintiff's judgment as hereinabove rendered, and to abide by any further order of this Court.

The Court further finds, orders, adjudges and decrees that the Plaintiff has duly filed its Mechanic's and Materialman's Lien Statement against the #1 Exton Lease in the Cushing Field, in Payne County, Oklahoma, for a portion of the amount included in the above sum of THREE THOUSAND EIGHT HUNDRED FORTY-SIX AND 42/100 DOLLARS (\$3,846.42) for labor and material furnished and performed on said leasehold which is more specifically described as:

NE NE NW
26-18N-5E
Payne County, Oklahoma

And this Court finds and it is hereby ordered, adjudged and decreed that the defendants above named are the owners of the 7/8 working interest or a portion thereof, in said oil and gas mining lease which is more specifically set forth on the said Mechanic's and Materialman's Statement attached to the Plaintiff's Complaint incorporated herein, references to which is made as though recopied.

The Court does hereby find and orders said lien hereby established and determined to be a valid and subsisting lien against the oil and gas mining leasehold estate above described, together with all the well or wells so located thereon, and equipment and supplies thereunto belonging, connected therewith, and pertaining thereto, and that the Plaintiff be and is hereby rendered a judgment against the Defendants, above named, and each of them in the amount of the labor and material furnished and performed on said lease above described in the amount of \$3,846.42 together with a reasonable attorney fee and costs which is incorporated in the sum as set forth above on Page One hereof.

It is further ordered, adjudged and decreed that said lien is hereby foreclosed, and judgment of foreclosure is hereby entered against all parties to this action being

Defendant owners as above named and their interest therein, and it is hereby ordered that the leasehold and property and equipment subject to the said lien be ordered sold upon execution as provided by law, and that all the proceeds of said sale be paid to the Clerk of this Court toward the satisfaction of Plaintiff's judgment as hereinabove rendered, and to abide by any further order of this Court.

The Court further finds, orders, adjudges and decrees that the Plaintiff has duly filed its Mechanic's and Materialman's Lien Statement against the Martin # 1 Lease in the E. Papoose Field, in Okfuskee County, Oklahoma, for a portion of the amount included in the above sum of FIVE THOUSAND TWO HUNDRED EIGHTEEN AND 55/100 DOLLARS (\$5,218.55) for labor and material furnished and performed on said leasehold which is more specifically described as:

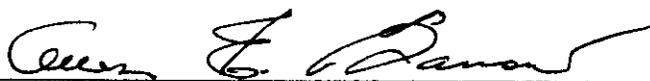
C S/2 SE SE
36-10N-9E
Okfuskee County, Oklahoma

And this Court finds, and it is hereby ordered, adjudged and decreed that the defendants above named are the owners of the 7/8 working interest or a portion thereof, in said oil and gas mining lease which is more specifically set forth on the said Mechanic's and Materialman's Statement attached to the Plaintiff's Complaint incorporated herein, references to which is made as though recopied.

The Court does hereby find and order said lien hereby established and determined to be a valid and subsisting lien against the oil and gas mining leasehold estate above described, together with all the well or wells so located thereon, and equipment and supplies thereunto belonging, connected therewith, and pertaining thereto, and that the Plaintiff be and is hereby rendered a judgment against the Defendants, above named, and each of them in the amount of

the labor and material furnished and performed on said lease above described in the amount of \$5,218.55 together with a reasonable attorney fee and costs which is incorporated in the sum as set forth above on Page One hereof.

It is further ordered, adjudged and decreed that said lien is hereby foreclosed, and judgment of foreclosure is hereby entered against all parties to this action being Defendant owners as above named and their interest therein, and it is hereby ordered that the leasehold and property and equipment subject to the said lien be ordered sold upon execution as provided by law, and that all the proceeds of said sale be paid to the Clerk of this Court toward the satisfaction of Plaintiff's judgment as hereinabove rendered, and to abide by any further order of this Court.



CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 15 1977 K

REPUBLIC ALUMINUM COMPANY,)
a Texas corporation,)
)
Plaintiff,)
)
vs.)
)
CUSTOM PRODUCTS, INC., an)
Oklahoma corporation, and GARY)
PINALTO,)
Defendant.)

Jack C. Silver, Clerk
U. S. DISTRICT COURT

NO. 77-C-125-B ✓

JUDGMENT BY CONSENT

The plaintiff, Republic Aluminum Company, having filed its Complaint herein on April 4, 1977, and defendant, Custom Products, Inc., having acknowledged receipt of a copy of the Summons and Complaint filed herein and having admitted the jurisdiction of this Court over the subject matter of this action, and plaintiff and defendant having agreed upon a basis for settlement of this action including the entry of a Final Judgment by Consent with respect to defendant, and plaintiff and defendant having entered into a Stipulation of Settlement dated Nov. 14, 1977, the original of which has been filed with this Court, said Stipulation having been made solely for the purpose of settlement, and it appearing that there has been no trial of the matters alleged in the Complaint, and that there has been no finding of fact or conclusion of law or adjudication made with respect to any matter alleged in, or arising out of, the Complaint, with respect to the defendant, Custom Products, Inc., and it appearing further that no notice of hearing upon the entry of said Final Judgment Consent need be given.

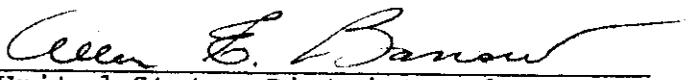
Now, therefore, upon the Stipulation of Settlement between plaintiff, Republic Aluminum Company and defendant, Custom Products, Inc., dated Nov. 14, 1977, upon all prior proceedings had herein, and upon the consent of the parties hereto, it is

ORDERED, ADJUDGED AND DECREED that defendant, Custom Products, Inc., will pay to plaintiff, Republic Aluminum Company, \$11,264.74 for insufficient funds checks outstanding and amount due on account, plus interest at 18% per annum upon the following amounts from and after the dates as hereinafter stated:

<u>AMOUNT</u>	<u>DATE</u>
\$1,771.01	September 21, 1976
\$5,537.90	December 31, 1976
\$3,092.58	January 24, 1977
\$ 863.25	December 21, 1976

together with a reasonable attorneys fee for and on behalf of plaintiff and its Counsel of Record, Robinson, Boese & Davidson in the amount of \$2,500.00.

Dated: Nov. 15, 1977.


United States District Judge

11-10-77
NGG/dm

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LARRY DON ROSE,)
)
Plaintiff)
)
vs.)
)
CHEMICAL EXPRESS CARRIERS,)
INC.,)
)
Defendant)
)
and)
)
TRANSPORTATION EMPLOYEES)
ASSOCIATION, affiliated with)
District 2, MEBA, AFL-CIO,)
)
Necessary Party)

No. 76-C-46B

FILED

NOV 11 1977

Jack C. Stone, Clerk
U. S. DISTRICT COURT

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This cause came on before me on the motion of necessary party for summary judgment in accordance with Rule 56(b) and (c). The Court finds that at the time plaintiff was discharged by defendant there was no contractual relationship existing between defendant's employees and necessary party whereby necessary party was duly authorized signatory to a collective bargaining agreement for defendant's employees as a unit. Counsel for the plaintiff has stated he has no opposition to the affidavit filed in support of necessary party's motion for summary judgment and agrees that if there was no valid existing relationship between the necessary party and the defendant company's employees on the date alleged in the Complaint, the plaintiff has no alternative but to acquiesce to necessary party's motion for summary judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing by his suit, individually or as class representative, against necessary party, TRANSPORTATION EMPLOYEES ASSOCIATION, now known as District 2A, Transportation, Technical, Warehouse, Industrial and Service Employees Union, affiliated with District 2, MEBA, AFLCIO, and his complaint against necessary party be dismissed without cost to said party.

William C. Stone
CHIEF JUDGE
UNITED STATES DISTRICT COURT

FILED

NOV 11 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk
U. S. DISTRICT COURT

BOBBY R. SHATWELL,)
)
 Plaintiff,)
)
 vs.) 77-C-400-B
)
 BILL HALL, District Attorney)
 of Osage County, Oklahoma,)
)
 Defendant.)

O R D E R

The Court has for consideration the Motion to Dismiss filed by defendant and the brief in support thereof; and plaintiff's Brief in Opposition of Defendant's Motion to Dismiss; and, having carefully perused the entire file, and being fully advised in the premises, finds:

The plaintiff in this action is a State Senator for the State of Oklahoma, and the defendant is the duly elected and acting District Attorney of Osage County, Oklahoma. In his Complaint, plaintiff alleged that his civil rights were violated by the defendant in that the defendant filed a two-count criminal Information against plaintiff in this action in the District Court of Osage County (State of Oklahoma v. Bobby R. Shatwell, CRF-77-81), charging Senator Shatwell with having committed the crime of perjury, and that the filing of the Information was without justification and with no foundation, and was filed with malice and for the sole purpose of injuring Senator Shatwell's reputation as a public official. Said criminal prosecution against Senator Shatwell is still pending.

In Imbler v. Pachtman, 424 U.S. 409 (1976), the Supreme Court set forth the rule that a prosecuting attorney, acting within the scope of his duties as a prosecutor, is absolutely immune from suit under § 1983, that section of the Federal Civil Rights Act which this defendant is alleged to have violated. The allegation in the Complaint in this action

is based upon the institution of an alleged wrongful criminal action against this plaintiff. In this regard, the Supreme Court stated in Imbler, supra:

"We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." (424 U.S. at 431).

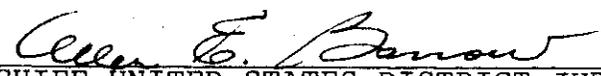
The holding in Imbler has already been followed in this District. In Atkins v. Lanning, 415 F. Supp. 186 (N.D. Okla. 1976), aff'd, 556 F.2d 485 (10th Cir. 1977), the Court faced the identical question of immunity with regard to the filing of an Information, and stated:

"The filing of an information by a prosecutor certainly comes within his quasi-judicial role for which the Supreme Court has provided absolute immunity. If the prosecutor were faced with the prospect of civil liability whenever he authorizes prosecution, the prosecutor would bring few charges and justice would not be served." (415 F. Supp. at 189).

The cases relied on by plaintiff are not inapposite. Those cases deal with prosecutors who were involved in investigatory, and not prosecutorial, duties. It is true that when a prosecutor commits acts related to police activity as opposed to judicial activity, there is no absolute immunity. Such is not the case here, however. The defendant in this action is alleged to have acted wrongfully in his filing of the criminal Information and, according to the Supreme Court decision in Imbler, the filing of a criminal charge is well within a prosecutor's role as a quasi-judicial officer. Accordingly, the Motion to Dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) should be sustained. Therefore, the Court need not pass on the alternative ground raised in defendant's Motion to Dismiss that the Complaint should be dismissed because there is presently litigation pending in State court relating to the same set of facts and issues.

IT IS, THEREFORE, ORDERED that defendant's Motion to Dismiss for failure to state a claim should be and is hereby granted, and the Complaint and cause of action are hereby dismissed.

ENTERED this 11th day of November, 1977.


CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN MAXWELL,)
)
) Petitioner,)
)
 vs.)
)
) THE WILLIAMS COMPANIES, and)
) subsidiary thereof, AGRICO)
) CHEMICAL COMPANY & ROY SPACE,)
)
) Respondents.)

Case No. 76-C-596-B

FILED

NOV 10 1977 *AC*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

STIPULATION

It is hereby stipulated by Charlie Phipps, Jr., attorney for the Petitioner, JOHN MAXWELL, and J. Patrick Cremin, attorney for the Respondents, THE WILLIAMS COMPANIES, AGRICO CHEMICAL COMPANY and ROY SPACE, that the above entitled action be dismissed without prejudice against Respondent, THE WILLIAMS COMPANIES, since said Respondent was erroneously sued. Petitioner reserves all of Petitioner's rights against Respondents, AGRICO CHEMICAL COMPANY and ROY SPACE.

DATED: November 10, 1977.

By: *Charlie Phipps, Jr.*
Charlie Phipps, Jr.
Attorney for Petitioner
Suite #108
Liberty Towers Building
1502 South Boulder
Tulsa, Oklahoma 74119
(918) 587-0014

By: *J. Patrick Cremin*
J. Patrick Cremin
Hall, Estill, Hardwick, Gable,
Collingsworth & Nelson, P.C.
Attorneys for Respondents
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74103
(918) 588-2677

FILED

NOV 15 1977 *J.*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

On the above Stipulation filed herein on November 10th, 1977, it is so ordered. *Entered November 15, 1977*

Lee F. Barrow
United States District Judge

FILED

NOV 09 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
vs.)	CIVIL ACTION NO. 77-C-296-B
)	
)	
ORION L. WILLIAMS, MAMMIE)	
ANN WILLIAMS, JESSIE D.)	
PECK, PAULINE E. PECK,)	
COUNTY TREASURER, Rogers)	
County, and BOARD OF)	
COUNTY COMMISSIONERS,)	
Rogers County,)	
)	
Defendants.)	

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 9th day of November, 1977, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney, and the Defendants, Orion L. Williams, Mammie Ann Williams, Jessie D. Peck, Pauline E. Peck, County Treasurer, Rogers County, and Board of County Commissioners, Rogers County, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, Orion L. Williams, Mammie Ann Williams, County Treasurer, Rogers County, and Board of County Commissioners, Rogers County, were served with Summons and Complaint on July 14, 1977; and that Defendants, Jessie D. Peck and Pauline E. Peck, were served with Summons and Complaint on August 17, 1977.

It appearing that the said Defendants have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note and that the following described real property is located in Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lots Seven (7) and Eight (8) in Block 3 of the Tacora Hills Subdivision of a part of the S 1/2 of NE 1/4 of Section 1, Township 22 North, Range 15 East of the I. B. & M. Rogers County, Oklahoma, according to the recorded plat thereof.

THAT the Defendant, Orion L. Williams, did, on the 8th day of October, 1974, execute and deliver to the United States of America, acting through the Farmers Home Administration, United States Department of Agriculture, his mortgage and mortgage note in the sum of \$10,000.00 with 9 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendant, Orion L. Williams, made default under the terms of the aforesaid mortgage note by reason of his failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendant is now indebted to the Plaintiff in the sum of \$12,498.88 as unpaid principal with interest thereon at the rate of 9 1/2 percent per annum from August 23, 1977, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Rogers, State of Oklahoma, from Defendant, Orion L. Williams, the sum of \$8.25 plus interest according to law for personal property taxes for the years 1975, 1976, and 1977 and that Rogers County should have judgment, in rem, for said amount,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendant, Orion L. Williams, in personam, for the sum of \$12,498.88 with interest thereon at the rate of 9 1/2 percent per annum from August 23, 1977, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Rogers have and recover judgment, in rem, against Defendant, Orion L. Williams, for the sum of \$8.25 as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants, Mammie Ann Williams, Jessie D. Peck, and Pauline E. Peck.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendant to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisalment the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

15/ Allen E. Barrow
UNITED STATES DISTRICT JUDGE

APPROVED



ROBERT P. SANTEE
Assistant United States Attorney

FILED

NOV 09 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
vs.)	CIVIL ACTION NO. 77-C-281-B
)	
)	
GARNER DANIELS, FREDA MAE)	
DANIELS, ROBERT DANIEL a/k/a)	
ROBERT DANIELS, LON L. CHILDS,)	
DRUCELLA A. CHILDS, MANHATTAN)	
FURNITURE COMPANY, INC.,)	
BENEFICIAL FINANCE COMPANY)	
OF TULSA, INC., ROGERS HEATING,)	
PLUMBING AND AIR CONDITIONING,)	
a Corporation, FROUG'S DEPARTMENT)	
STORES, INC., COUNTY TREASURER,)	
Tulsa County, and BOARD OF)	
COUNTY COMMISSIONERS, Tulsa)	
County,)	
)	
Defendants.)	

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 9th
~~day of October~~ ^{november} 1977, the Plaintiff appearing by Robert P.
Santee, Assistant United States Attorney; the Defendants, County
Treasurer, Tulsa County, and Board of County Commissioners, Tulsa
County, appearing by Kenneth L. Brune, Assistant District Attorney;
the Defendant, Froug's Department Stores, Inc., appearing by its
attorney, Don E. Gasaway; and the Defendants, Garner Daniels,
Freda Mae Daniels, Robert Daniel a/k/a Robert Daniels, Lon L.
Childs, Drucella A. Childs, Manhattan Furniture Company, Inc.,
Beneficial Finance Company of Tulsa, Inc., and Rogers Heating,
Plumbing and Air Conditioning, a corporation, appearing not.

The Court being fully advised and having examined
the file herein finds that Defendants, Lon L. Childs and Drucella
A. Childs, were served by publication, as appears from the Proof
of Publication filed herein; the Defendants, Garner Daniels,
Freda Mae Daniels, Robert Daniel a/k/a Robert Daniels, Manhattan
Furniture Company, Inc., Beneficial Finance Company of Tulsa, Inc.,
Rogers Heating, Plumbing and Air Conditioning, a corporation, County

Treasurer, Tulsa County, and Board of County Commissioners, Tulsa County, were served with Summons and Complaint on July 5, 1977; and the Defendant, Froug's Department Stores, Inc., was served with Summons and Complaint on July 12, 1977, all as appears from the U.S. Marshals Service herein.

It appearing that Defendants, County Treasurer, Tulsa County, and Board of County Commissioners, Tulsa County, have duly filed their Answers herein on August 1, 1977; that Defendant, Froug's Department Stores, Inc., has duly filed its Disclaimer herein on July 25, 1977; and that Defendants, Garner Daniels, Freda Mae Daniels, Robert Daniel a/k/a Robert Daniels, Lon L. Childs, Drucella A. Childs, Manhattan Furniture Company, Inc., Beneficial Finance Company of Tulsa, Inc., and Rogers Heating, Plumbing and Air Conditioning, a corporation, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note and that the following described real property is located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty-one (21), Block Thirty-nine (39), VALLEY VIEW ACRES SECOND ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded plat thereof.

THAT the Defendants, Garner Daniels and Freda Mae Daniels, did, on the 4th day of August, 1970, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$11,000.00 with 8 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Garner Daniels and Freda Mae Daniels, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$11,141.53 as unpaid principal with interest thereon at the rate of 8 1/2 percent

per annum from July 4, 1976, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Defendants, Garner Daniels and Freda Mae Daniels, the sum of \$ none ^{cash} plus interest according to law for personal property taxes for the year(s) _____ and that Tulsa County should have judgment, in rem, for said amount, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Garner Daniels and Freda Mae Daniels, in personam, for the sum of \$11,141.53 with interest thereon at the rate of 8 1/2 percent per annum from July 4, 1976, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against Defendants, Garner Daniels and Freda Mae Daniels, for the sum of \$ none ^{cash} as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants, Robert Daniel a/k/a Robert Daniels, Lon L. Childs, Drucella A. Childs, Manhattan Furniture Company, Inc., Beneficial Finance Company of Tulsa, Inc., and Rogers Heating, Plumbing and Air Conditioning, a corporation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's

money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

15/ Allen E. Barrow
UNITED STATES DISTRICT JUDGE

APPROVED



ROBERT P. SANTEE
Assistant United States Attorney



~~KENNETH L. BRUNE~~
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARGUERITE EAGLIN,)
)
 Plaintiff,)
)
 vs.)
)
 JOHN YOUNG,)
)
 Defendant.)

No. 76-C-624-C

FILED

NOV - 9 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

This is an action in which plaintiff alleges that as a result of a contract entered into between herself and the defendant, defendant received excessive attorneys' fees for work performed in representing her in a will contest action in Creek County, Oklahoma. Included in the defendant's answer was a defense of failure to state a claim upon which relief can be granted. On August 4, 1977, the Court advised the parties that, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, it would treat the defendant's defense as a motion for summary judgment under Rule 56, and the parties were given twenty days to supplement the record. Defendant's motion for summary judgment is now ready for the Court's consideration.

The following facts relevant to a consideration of the motion are not in substantial dispute. Plaintiff is a resident of Ypsilanti, Michigan. She was traveling in Tulsa on October 13, 1972 when she learned that the will of her half sister, Bennie Lee Sewell Cuthbert, was in the process of being probated. On that date, she contacted the defendant for the purpose of employing him to represent her in a contest over her sister's will. The parties executed a document entitled "Attorney's Contract" on October 13, in which the plaintiff agreed to pay the defendant a \$250.00 retainer, plus an undivided one-fourth of any property or sums recovered by her in the probate proceedings. On July

10, 1973, a Decree of Distribution was entered in the matter of The Estate of Bennie Lee Sewell Cuthbert, Deceased. The plaintiff received a distribution of \$901.49, one-fourth of which she paid to the defendant; and an undivided one-half interest in several parcels of real estate. She did not transfer any interest in these properties to the defendant, and on August 31, 1973, defendant commenced an action against her in the District Court of Creek County for the recovery of attorneys' fees pursuant to the October 13, 1972 contract. While that action was pending, plaintiff transferred to defendant an undivided one-fourth interest in the real estate she had received in the probate proceedings. Subsequently, on October 22, 1973, defendant dismissed, with prejudice, his breach of contract action against the plaintiff. The instant action was filed on December 15, 1976, in which plaintiff seeks a reconveyance of the real estate to her and a determination by the Court of what fee should have been charged by the defendant.

At the outset, defendant challenges the jurisdiction of this Court, arguing that the amount in controversy is less than \$10,000.00. Plaintiff alleges "[t]hat the amount in controversy is in excess of \$10,000.00 exclusive of court costs and attorney fees." She also alleges that one of the parcels of land contains a producing oil well, and "[t]hat Defendant received 1/4 of Plaintiff's interest in the oil well and that to this date has received in excess of \$1,000.00 in royalties from the well. That it is expected in the ensuing years Defendant will receive in excess of \$10,000.00 in royalties from the well." Thus, on its face, the complaint alleges the requisite amount in controversy. Nonetheless, defendant argues that the plaintiff admits in the following allegation that the amount in controversy is less than \$10,000.00:

"That Defendant has offered to sell his interest in the surface rights of the land to

Plaintiff for \$3,800.00 and his interest in the mineral rights for an additional \$50.00 per acre of which there are approximately 30 acres."

However, the Court can imagine many situations in which the value of property would not necessarily be established by an offer to sell it to a person either unwilling or unable to purchase it. The very existence of this lawsuit is evidence that the plaintiff believes she is entitled to the property outright and that she would not buy it from the defendant at whatever price he placed upon it. The law regarding amount in controversy is clear:

"The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.' In deciding this question of good faith we have said that it 'must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.'" (footnotes omitted)

Horton v. Liberty Mutual Insurance Co., 367 U.S. 348, 353, 81 S.Ct. 1570, 6 L.Ed.2d 890 (1961), rehearing denied 368 U.S. 870, 82 S.Ct. 24, 7 L.Ed.2d 70 (1961). See also Craig v. Champlin Petroleum Company, 421 F.2d 236 (10th Cir. 1970). Under the circumstances of this case, the Court cannot say as a matter of "legal certainty" that plaintiff's claim is for less than \$10,000.00, and, consequently, this Court has subject matter jurisdiction over plaintiff's cause of action.

Contingent attorneys' fees are authorized by statute in Oklahoma. Title 5 O.S. § 7 provides, in pertinent part, as follows:

"It shall be lawful for an attorney to contract for a percentage or portion of the proceeds of a client's cause of action or claim not to exceed fifty (50%) per centum of the net amount of such judgment as may be recovered, or such compromise as may be made, whether the same arises ex contractu or ex delicto. . . ."

This statute was held to apply to probate proceedings in Southard v. MacDonald, 360 P.2d 940 (Okla. 1961), wherein the court upheld a contract providing for a transfer of 40% of

the land distributed to the clients under the will in question. By virtue of this statute, a contingent fee contract cannot be per se void so long as it is for less than the statutory maximum. However,

"[i]t may be held void if it is an unconscionable contract even though the amount specified is less than the statutory limitation for such a contract partakes of fraud. To be unconscionable it must be such as no man in his senses and not under a delusion would make on one hand, and as no honest and fair man would accept, on the other."

Board of Education of Oklahoma City v. Thurman, 247 P.996, 997 (Okla. 1926). There is a distinction made between contracts executed before the attorney-client relationship is entered into and those made after it has begun.

"Where a prospective client makes a contract for the employment of an attorney, before the attorney enters on the business of such party, no confidential relationship exists, and the contract will stand on the same footing as any contract between persons competent to contract."

Renegar v. Staples, 388 P.2d 867, 871 (Okla. 1963). See also Renegar v. Fleming, 211 P.2d 272 (Okla. 1949). Contracts between an attorney and his client are not presumptively fraudulent.

"Generally the burden of proof, or the burden of going forward with the evidence, does not shift to the person holding the position of trust and confidence until his opponent has presented some evidence or circumstances which indicates that he has been abused, defrauded, subjected to undue influence, or overreached."

Renegar v. Staples, supra, at 871.

In the instant case, the contract was apparently executed before the attorney-client relationship began. Plaintiff now alleges that the fee received by the defendant was excessive. She alleges "[t]hat Defendant was paid an excessive fee for his work in the handling of the Will contest, not having spent more than four or five hours on the case." Nowhere does plaintiff allege the exact amount received by the defendant. Plaintiff does not seem to

contend that the contract was excessive at the time it was executed; rather, she argues that the defendant ". . . received a windfall because a case was decided by the Supreme Court of Oklahoma two months after he took this case." The case referred to is In Re Estate of Robbs, 504 P.2d 1228 (Okla. 1972), in which the Supreme Court made a ruling which increased the amount that half-blood relatives would receive under certain circumstances pursuant to Oklahoma's statutes of intestate succession. Plaintiff therefore seems to argue that even though she received more property than she thought she would receive when she retained the defendant, she should not be obligated to pay the defendant more than she expected to pay him at that time. This uncertainty in the final fee amount is involved in every contingent fee contract and, indeed, is one of the reasons why such contracts are utilized. If plaintiff had desired to pay a fixed fee, she was certainly free to execute such a contract. The complaint contains no allegations of fraud or undue influence. The only statements in that regard are contained in plaintiff's brief filed March 31, 1977, in which she says:

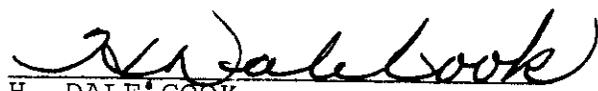
"Plaintiff felt very uncomfortable about entering into this contact at this point in time. However, she was in excess of 1,000 miles from home and in an area in which she had not lived for something over 30 years and the Will was being probated very soon. Since Plaintiff and her husband were on vacation they thought they had to take some action, and though they felt the terms were unreasonable, at that particular point in time they felt they had absolutely no choice. Thus, rather than lose all of the property in question, Mrs. Eaglin signed the contract retaining one John Young, esquire."

Plaintiff does not say why she felt compelled to retain the defendant, to the exclusion of all other attorneys in the area, after he presented her with an "unreasonable" fee contract, or how she would lose all of the property if the contract were not signed. Under the circumstances of this case, and in light of the undisputed material facts, the Court finds that the fee contract in question was not

unconscionable, that the plaintiff has not alleged or shown any circumstances indicating that she has been abused, defrauded, subjected to undue influence or overreached, and that the contract is therefore valid and enforceable.

For the foregoing reasons, the defendant's motion for summary judgment is hereby sustained.

It is so Ordered this 9th day of November, 1977.


H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BOARD OF TRUSTEES, PIPELINE)
INDUSTRY BENEFIT FUND,)
)
Plaintiff,)
)
vs.)
)
NORTHWEST CONSTRUCTORS, INC.)
)
Defendant.)

FILED

NOV - 8 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

No. 77-C-348 - B

JUDGMENT BY DEFAULT

NOW on this 8th day of November, 1977, this matter coming on to be ~~heard~~ ^{considered} before me the undersigned Judge of the United States District Court for the Northern District of Oklahoma; Plaintiff appearing by and through its attorney, William K. Powers, of Dyer, Powers, Marsh & Turner; and it appearing to the Court that the Defendant appears not, having been duly served with Summons and copy of the Complaint herein, an extension of time having been granted until November 1, 1977, within which the Defendant might plead or answer said Petition, such time having expired and no pleading having been filed; and upon the filing of Plaintiff's Motion For Default Judgment and an Affidavit of the amount due, it is

ORDERED, ADJUDGED AND DECREED by this Court that the Defendant is in default herein, and that the allegations in Plaintiff's Complaint are to be taken as true and confessed;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that judgment be entered herein in favor of the Plaintiff above named, and against the Defendant above named, in the amount of \$3,765.47, with interest thereon at the legal rate from this date of judgment until fully paid, an attorney's fee in the amount of \$500⁰⁰, together with costs expended herein in the amount of \$18.00.

DATED at Tulsa, Oklahoma, this 8th day of November, 1977.

BY THE COURT: (Signed) Allen E. Barrow

U. S. District Judge

As to the issue regarding bail, Petitioner makes no allegation or showing that bail as set is an abuse of discretion by the State Judge amounting to a denial of constitutional rights or that the decisions were arbitrary or unreasonable. Further, the Statutes of the State of Oklahoma provide by habeas corpus procedure, 12 O.S.A. § 1314, for the high Court of the State of Oklahoma to determine whether bail is excessive. As to Petitioner's allegations challenging his conditions of confinement, which are presented only in the context of his immediate release from custody, they too may be presented to the State Courts for consideration by State habeas corpus, by a State action for injunctive relief pursuant to 12 O.S.A. § 1381, or by State writ of mandamus pursuant to 12 O.S.A. § 1451.

Until Petitioner has availed himself of the adequate and available procedures through the highest State Court, his State remedies are not exhausted and his petition to this Court is premature. No principle in the realm of Federal habeas corpus is better settled than that State remedies must be exhausted. See, Hogatt v. Page, 432 F.2d 41 (10th Cir. 1970); Preiser v. Rodriguez, 411 U. S. 475 (1973); Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972) cert. denied 410 U. S. 944. Further, the probability of success is not the standard to determine whether a matter should first be determined by the State Courts. Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969); Daegele v. Crouse, 429 F.2d 503 (10th Cir. 1970) cert. denied 400 U. S. 1010. No hearing herein is required and the petition should at this time be denied, without prejudice, for failure to exhaust adequate and available state remedies.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Terry Lynn Lawson be and it is hereby denied, without prejudice, and the case is dismissed.

Dated this 8th day of November, 1977, at Tulsa, Oklahoma.

Cecil E. Baran
CHIEF JUDGE, UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

H. A. CHAPMAN, d/b/a)
H. A. CHAPMAN INVESTMENTS,)
)
Plaintiff,)
)
vs.)
)
AMF TUBOSCOPE, INC.,)
)
Defendant.)

No. 76-C-642-C

FILED

NOV. 8 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

J U D G M E N T

The Court on November 8, 1977, filed its Findings of Fact and Conclusions of Law which are hereby incorporated herein and made a part of its judgment.

IT IS HEREBY ORDERED ADJUDGED AND DECREED that Judgment be entered in favor of the plaintiff, H. A. Chapman, d/b/a H. A. Chapman Investments, and against the defendant, AMF Tuboscope, Inc., and that total damages be entered in favor of the plaintiff, and against the defendant in the amount of \$558,500.00, in light of this Court's Findings of Fact and Conclusions of Law.

It is so Ordered this 8th day of November, 1977.

H. Dale Cook
H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

H. A. CHAPMAN, d/b/a)
H. A. CHAPMAN INVESTMENTS,)
)
Plaintiff,)
)
vs.)
)
AMF TUBOSCOPE, INC.,)
)
Defendant.)

No. 76-C-642-C

FILED

NOV 8 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

In this action, the plaintiff seeks to recover from the defendant amounts expended by him allegedly as a result of the negligent inspection by the defendant of oil well casing owned by the plaintiff. Plaintiff also seeks to recover the value of certain oil reserves allegedly lost to him as a result of the defendant's negligence. The case was tried to the Court beginning on July 18, 1977. The parties have submitted trial briefs and proposed findings of fact and conclusions of law, and the case is now ready for disposition on the merits.

After considering the pleadings, the testimony and exhibits admitted at trial, all of the briefs and arguments presented by counsel for the parties, and being fully advised in the premises, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The plaintiff is a citizen of the State of Oklahoma. The defendant is a corporation incorporated under the laws of the State of Texas, with its principal place of business in Houston, Texas. The amount in controversy is in excess of \$10,000.00.

2. The plaintiff is engaged in oil exploration and

production.

3. The defendant is in the business of inspecting pipe and tubing and of reporting the condition thereof to persons employing them for such purpose.

4. Prior to August 14, 1974, plaintiff purchased in excess of 30,000 feet of used casing to be used in the drilling of oil wells and the production of oil.

5. In late August or early September, 1974, plaintiff arranged to have defendant inspect, clean and thread the used casing he had purchased. The arrangements were made orally, and the agreement was not reduced to writing at that time. Limitation of defendant's liability for its own negligence was not discussed at that time.

6. After inspection, defendant was to mark the casing with bands of paint as follows: a yellow band indicated surface defects affecting 15% or less of the nominal wall thickness, a blue band 16-30%, and a red band 31% or greater.

7. The first inspection by defendant took place on September 8, 1974. The results of that inspection were that out of 303 lengths of casing inspected, 176 were marked with a yellow band, 74 with a blue band and 53 with a red band.

8. A second inspection was performed by defendant between September 19 and September 22, 1974. Out of a total of 749 lengths inspected at that time, 687 were marked with a yellow band, 41 with a blue band and 21 with a red band. Both inspections were performed utilizing the Analog III method.

9. After the inspections were completed, Roland Adams, one of plaintiff's employees, signed a work order prepared by defendant. On the reverse side of the work order was a clause which purported to limit defendant's liability for its own negligence to replacement, recoating, re-inspection or reworking of the affected pieces of equipment. Before he signed the work order, Adams did not read the reverse side, was not asked to read it, and his attention

was not directed to the exculpatory clause. No other documents were submitted to any of plaintiff's representatives until after the inspections were completed.

10. Plaintiff paid defendant's bill for inspection services in the amount of \$11,726.64.

11. Subsequently, plaintiff utilized some of the casing inspected by defendant in two oil wells, located in Grant County, Kansas. All of the pipe so used had been marked with a yellow band.

12. The drilling of the first well, designated Hooper #2, began in September, 1974 and was completed in October, 1974 to the Chester formation, at a depth of 5520 feet. Routine tests performed at that time indicated that the well should be a productive one. All of the casing used in this well had been graded as yellow band by defendant.

13. Upon completion of the Hooper #2 well, plaintiff began drilling a well designated as Davis #1. This well was drilled to a depth of 5630 feet on November 1, 1974 and also utilized casing graded by defendant as yellow band.

14. Hooper #2 began producing oil in mid-December of 1974.

15. Almost from the beginning, Hooper #2 produced substantial amounts of water. Eventually, the water production became so great that a decision was made to abandon the well.

16. Plaintiff also encountered problems with Davis #1. Circulation broke when the tubing was pressurized at 1500 p.s.i. Tests revealed that the casing had holes in it at several levels. Several attempts were made to squeeze the well, but it continually failed to hold pressure. A final attempt to correct the problem was made utilizing a packer. However, the casing split, forcing the abandonment of the packer in the hole. Davis #1 was later abandoned.

17. Subsequent to the abandonment of the Hooper #2 and Davis #1 wells, a twin well was drilled near the #2, designated

Hooper #2-T, utilizing casing other than that inspected by defendant.

18. As a result of water invasion of the Chester formation in the Hooper #2, the Hooper #2-T was also unproductive and was eventually abandoned.

19. After encountering the problems with Hooper #2 and Davis #1, plaintiff employed the Suzy Pipe Service Company of Duncan, Oklahoma to perform hydrostatic tests on the remainder of the casing previously inspected by defendant. The results of these tests indicated that some of the previously graded yellow band casing was actually of a lower quality.

20. In late December of 1974 or early January of 1975, defendant reinspected the casing, utilizing the Sonoscope method. As a result of these tests, a substantial number of the previously graded yellow band lengths were downgraded to lower classifications. The tests also indicated that the weight of some of the casing had been previously graded incorrectly.

21. Employees of the defendant admitted that the first inspection had not been a good one and that the Amalog III method was not the proper one to utilize on used casing such as plaintiff's.

22. The source of the water contamination which led to the abandonment of the Hooper #2 and Hooper #2-T wells was a strata located above the Chester formation.

23. The water entered Hooper #2 through holes in the casing and was thereby transported into the Chester formation.

24. The cause of the problems with the Davis #1 well was substandard casing, which eventually split and forced the abandonment of the packer at the bottom of the well.

25. The defendant performed the original inspections in a negligent manner. The problems in plaintiff's three wells were proximately caused by defects in the casing which should have been, but were not, discovered in defendant's

original inspections.

26. Plaintiff at all times acted in a reasonably prudent manner with regard to the Hooper #2, Davis #1 and Hooper #2-T wells.

27. The following amounts were reasonably expended as a proximate result of the negligence of defendant and would not have been spent but for that negligence. All bills have been paid.

(a) Excess expenses incurred on Hooper #2 as a result of faulty casing	-	-	-	-	-	\$ 36,431.97
(b) Cost of drilling Hooper #2-T	-	-	-	-	-	\$132,553.31
(c) Excess expenses incurred on Davis #1 as a result of faulty casing	-	-	-	-	-	\$ 19,197.62
(d) Cost of inspection by Suzy Pipe Service Company	-	-	-	-	-	\$ 1,214.67

28. The evidence was insufficient to establish with certainty the amount of loss sustained by plaintiff, if any, as a result of the failure to pull the casing from Davis #1 after it was abandoned.

29. The production decline method of estimating oil reserves provides the most accurate results. Utilizing this method, the amount of oil which would have been produced by Hooper #2 during its productive life is 49,220 barrels of oil from primary production and 24,600 barrels from secondary production.

30. Hooper #2 actually produced 5,600 barrels of oil during the time it was operating.

31. The operating expenses during the estimated 16 year primary production life of Hooper #2 would have been \$580.00 per month.

32. Plaintiff would have received \$12.10 per barrel for oil produced from Hooper #2.

33. Plaintiff would have paid a production tax to the State of Kansas in the amount of \$.33 per barrel of oil produced from Hooper #2.

34. There was no evidence presented as to the cost of producing the 24,600 barrels during secondary production.

35. Plaintiff owns only a 75% interest in the Hooper #2 well.

CONCLUSIONS OF LAW

1. The Court has jurisdiction under Title 28 U.S.C. § 1332.

2. The terms and conditions contained on the reverse side of defendant's work order, and especially the clause purporting to limit defendant's liability for its own negligence, were an attempt by defendant to modify the terms of the prior oral contract between plaintiff and defendant.

3. By mutual assent, parties to an existing contract may subsequently enter into a valid contract to modify the former contract, provided there is a consideration for the new agreement. Watt Plumbing, Air Conditioning & Electric, Inc., v. Tulsa Rig, Reel & Manufacturing Co., 533 P.2d 980 (Okla. 1975).

4. The performance of an obligation a party already is legally bound to perform is not sufficient consideration to support a contract. Gragg v. James, 452 P.2d 579 (Okla. 1969).

5. At the time the work order was signed by one of plaintiff's employees, defendant had already performed its obligations under the contract and plaintiff was legally bound to perform his obligations. Therefore, the attempted modification of the oral contract was without consideration, and the exculpatory clause is not legally binding.

6. Under the law of Oklahoma, an allowance for future damages must be reduced to its present worth. St. Louis-San Francisco Railway Co. v. Fox, 359 P.2d 710 (Okla. 1961).

7. As a proximate result of the negligence of defendant, plaintiff is entitled to recover damages in the amount of \$558,500.00, computed as follows:

(a) \$ 27,323.98 - 75% of the excess

expenses incurred on Hooper #2 as a result of faulty casing;

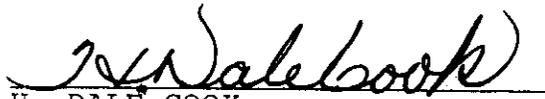
(b) \$ 99,414.98 - 75% of the cost of drilling Hooper #2-T;

(c) \$19,197.62 - Excess expenses incurred on Davis #1 as a result of faulty casing;

(d) \$ 1,214.67 - Cost of inspection by Suzy Pipe Service Company;

(e) \$ 411,348.75 - 75% of the primary and secondary production from Hooper #2, reduced to its present worth.

It is so Ordered this 8th day of November, 1977.


H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT IN AND FOR
THE NORTHERN DISTRICT OF OKLAHOMA

LEAGUE OF WOMEN VOTERS OF TULSA,)
INC., a non-profit corporation;)
LEAGUE OF WOMEN VOTERS OF OKLAHOMA)
INC., a non-profit corporation;)
PATRICIA LANER, SUDYE NEFF)
KIRKPATRICK, AND KATHY GROSHONG,)

Plaintiffs,)

v.)

No. 77 C 54(C) ✓

THE UNITED STATES OF AMERICA ex)
rel THE DEPARTMENT OF THE ARMY AND)
THE UNITED STATES CORPS OF ENGI-)
NEERS AND HON. MARTIN R. HOFFMAN,)
Secretary of the Army, LIEUTENANT)
GENERAL JOHN W. MORRIS, Commanding)
Officer United States Corps of)
Engineers and COLONEL ANTHONY A.)
SMITH, Commanding Officer, United)
States Corps of Engineers, Tulsa)
District,)

Defendants.)

FILED

NOV. 8 1977, *hmm*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER SUSTAINING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Now on this first day of November, 1977, there comes on for hearing the Plaintiffs' Motion for Summary Judgment; the Court having examined the briefs, authorities and evidence previously presented and having heard the arguments finds that the Motion for Summary Judgment should be sustained.

The Court further finds that the option agreement for water storage space in Oologah Reservoir between the City of Tulsa, Oklahoma, and the United States Corps of Engineers dated December 4, 1956, as modified December 1, 1961, has expired by its own terms.

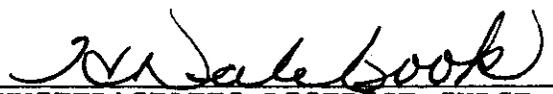
The Court further finds that the proposal of the United States Corps of Engineers to contract with the City of Tulsa, Oklahoma, is subject to the provisions of the National Environmental Policy Act and United States Corps of Engineers' Regulations governing compliance with the National Environmental Policy Act.

The Court further finds, based upon representation from counsel for the United States Corps of Engineers, that execution of the proposed contract is not imminent and consequently there is no need, at this time, to enjoin the United States Corps of Engineers from entering into such contract.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiffs' Motion for Summary Judgment be and it is hereby sustained.

It is the order of this Court that the Corps must comply with the National Environmental Policy Act and pertinent controlling regulations, and determine if there are actual or potentially significant environmental impacts, resulting from entering into a contract for water storage space in Oologah Reservoir.

IT IS FURTHER ORDERED that the United States Corps of Engineers shall report its compliance within 90 days or its need for additional time.


UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

OKLAHOMA ORDNANCE WORKS AUTHORITY,)
a public trust,)
Plaintiff,)
vs.)
SHELTER RESOURCES CORPORATION, a)
Delaware corporation, et al.,)
Defendant.)

No. 75-C-328-C

FILED

NOV 8 1977

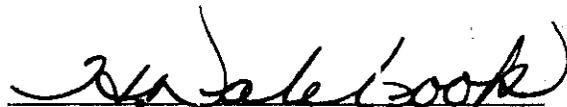
Jack C. Silver, Clerk
U. S. DISTRICT COURT

J U D G M E N T

The Court on November 8, 1977 filed its Findings of Fact and Conclusions of Law which are hereby incorporated herein and made a part of the Judgment of the Court.

IT IS HEREBY ORDERED ADJUDGED AND DECREED that Judgment be entered on behalf of the defendant, Freiburger Agency, Inc. and against the plaintiff, the Oklahoma Ordnance Works Authority.

It is so Ordered this 8th day of November, 1977.


H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

OKLAHOMA ORDNANCE WORKS AUTHORITY,
a public trust,

Plaintiff,

vs.

SHELTER RESOURCES CORPORATION, a
Delaware corporation, et al.,

Defendant.

No. 75-C-328-C

FILED

NOV. 8 1977

J U D G M E N T M E M O R A N D U M

Jack C. Silver, Clerk
U. S. DISTRICT COURT

This is an action for money damages brought by the plaintiff, Oklahoma Ordnance Works Authority (hereinafter OOWA) against the defendant Freiberger Agency, Inc. (hereinafter Freiberger) alleging breach of contract or tortious negligence by the defendant. Damages were sustained as a result of a windstorm that destroyed certain buildings leased by OOWA to Shelter Resources Corporation and its wholly-owned subsidiaries, Winston Delaware, Inc. and Winston Industries, Inc. Plaintiff bases its allegations on Freiberger's failure to list the OOWA as a named insured on the comprehensive policy insuring the Cherokee Mobile Home Plant and Freiberger's failure to notify the OOWA of the cancellation of insurance coverage on the buildings.

The action was originally brought by the plaintiff against Shelter Resources Corporation; Winston Delaware, Inc., a Wholly-owned Subsidiary of Shelter; Winston Industries, Inc., a Wholly-owned Subsidiary of Shelter; and Freiberger Agency, Inc., a corporation. During the pendency of the action, and on August 31, 1976, the plaintiff and the defendants, Shelter Resources Corporation, Winston Delaware, Inc. and Winston Industries, Inc., stipulated to, and a judgment was rendered in favor of the plaintiff against Shelter Resources Corporation, Winston Delaware, Inc. and Winston Industries, Inc., jointly and severally, in the

amount of \$128,049.65, plus interest until paid. (The parties stipulate in the Pre-trial Order that for purposes of this litigation Shelter Resources Corporation, Winston Delaware, Inc. and Winston Industries, Inc. are to be considered a single entity. The Court will therefore hereinafter refer to them simply as Shelter.) The case was tried to the Court non-jury commencing April 20, 1977 and concluding April 22, 1977. The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1332 based upon diversity of citizenship and amount. Based upon the testimony and evidence presented, and the law relevant to the issues involved, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The OOWA is a public trust of the State of Oklahoma. The OOWA operates a large industrial park south of Pryor, Oklahoma, known as the Mid-America Industrial District.

2. On November 19, 1968, OOWA entered in a lease agreement with Cherokee Homes, Inc., Shelter's predecessor in title, covering several buildings to be used as a mobile home manufacturing facility.

3. By virtue of the lease agreement with the OOWA, Shelter was obligated to procure insurance to the extent of the "full insurable value" on the property owned by the OOWA and leased to Shelter. The lease specifically provided:

"The Lessee agrees to keep the buildings and improvements upon the leased premises insured against loss or damage by fire, tornado and other causes normally included within a comprehensive insurance policy, such insurance to be in the amount of the full insurable value of all improvements on the premises in an insurance company or companies satisfactory to the Lessor. All such insurance shall be payable to the Lessor as beneficiary, and Lessee shall pay all premiums to maintain such insurance in force and effect"

The lease further provided:

". . . Lessee shall, within fifteen (15) days of the execution of the Lease, deliver to Lessor copies of the insurance policy or insurance

certificates indicating compliance with this paragraph by Lessee to the satisfaction of Lessor."

Under this lease provision, the lessee had the duty and responsibility to furnish the lessor with copies of the insurance policy or insurance certificate indicating compliance with the lease provisions to the satisfaction of the lessor. (The Court takes note that had defendant been aware of the lease provisions, it would reasonably have believed that Shelter had complied therewith, that OOWA had in fact been furnished sufficient evidence of the insurance as issued and that it was satisfactory to and approved by OOWA since no objection was made to the policy as written.)

4. Lessee, Shelter, procured insurance on the premises on December 21, 1971 through R. H. Siegfried Agency, naming the OOWA as an insured "as its interest may appear." R. H. Siegfried covered the plaintiff's property leased to Shelter with insurance of approximately \$172,350 issued by five separate insurance companies. The plaintiff appeared as a named insured on these policies.

5. In early 1972, the defendant, Freiburger, became interested in making a proposal to Shelter to write a Master Policy covering the mobile home plant and manufacturing facilities owned or operated by Shelter. Mr. Philip Pier of Freiburger, and Mr. Howard Glickman, a vice president of Freiburger and brother to Carl Glickman, then Chairman of the Executive Committee and Chief Executive Officer of Shelter, sought information from Shelter regarding the various plant locations to be covered.

6. Howard Glickman, on behalf of Freiburger, asked Shelter for a list of their plants, and asked for lease agreements on Shelter's leased plants. Shelter furnished Glickman with a list of its plants which included Cherokee. In regard to the lease agreements, however, although Shelter furnished "good" information on the Winston Industries' plants, no lease information was furnished as to the Winston

Delaware plants, of which Cherokee was one.

7. On November 27, 1972, Freiberger, as insurance brokers proposed a quotation to Shelter for property insurance covering the fire and extended coverage insurance on Shelter's plants in Pennsylvania, Missouri, Oklahoma, Texas and Arkansas, under a Master Policy in excess of \$4,000,000. The insurance was placed with eight different insurance companies, each one taking a percentage of the total risk involved, not to exceed 20%, and was written through Wohlreich & Anderson, Ltd., an insurance agency at North Arlington, New Jersey. The total policy consisted of a Certificate of Insurance and the actual copies of the insurance policies or insuring agreements issued by each of the companies involved.

8. Freiberger complied with all instructions of Shelter in relation to the insurance policy.

9. At the time this new policy took effect, the Siegfried policy was still in effect. Because the new policy with Freiberger had a \$50,000 deductible, in conflict with the requirement of the Lease quoted above, Shelter, through its Secretary-Treasurer and General Counsel, Robert Uvick, sought OOWA's consent to the substituted coverage. In January of 1973, following commencement of the new coverage but prior to cancellation of the Siegfried policy, Mr. Uvick called Gene Redden, Administrator of OOWA, to discuss this problem. Mr. Redden told Mr. Uvick that OOWA would not approve the deductible policy. Mr. Uvick then asked Howard Glickman, of Freiberger, to talk to Mr. Redden regarding the deductible provision of the policy. Thereafter, Mr. Redden agreed to the deductible provision based upon Shelter agreeing to guarantee payment of the first \$50,000 of any loss. In discussing the matter with Mr. Glickman, Mr. Redden did not request that the OOWA be made a named assured.

10. The Siegfried policy was thereafter cancelled on January 16, 1973.

11. The term of the master policy brokered by Freiberger

was December 1, 1972 to December 1, 1976.

12. The policy named only Shelter and its subsidiaries and affiliates as insureds.

13. On January 29, 1973, the Comptroller of the OOWA wrote to the General Counsel of Shelter requesting a copy of the master insurance policy on the property.

14. On April 2, 1973, Philip Pier of Freiburger sent to the OOWA's Comptroller a letter stating that, at the request of Shelter, he enclosed a copy of the fire policy covering Winston-D (Cherokee) and adding, "Please do not hesitate to contact us directly if you need additional information." Attached to the letter was a copy of the Certificate of Insurance of which the bottom three inches were omitted apparently due to the fact that it had inadvertently been copied on letter size paper rather than legal size.

15. The first page of the Certificate of Insurance showed the assured as "Shelter Resources Corporation and Subsidiary and Affiliated Companies."

16. The OOWA never contacted defendant Freiburger to inform Freiburger of the terms of the lease agreement or to determine whether the OOWA was a named assured under the policy.

17. After receiving a copy of the Certificate of Insurance on April 2, 1973, the OOWA made no inquiry in regard to why it was not a named assured nor did it direct Freiburger to make any changes in the policy.

18. The OOWA did not act in a reasonably prudent manner, under the circumstances, regarding the coverage provided by the policy of insurance as to OOWA's interest in the subject property.

19. In regard to the extent of knowledge on the part of Freiburger that Shelter did not own the Cherokee property but was merely a lessee, the Court initially notes the complexity of the master policy brokered by Freiburger. In

brokering this policy, Freiberger was not dealing solely with the coverage required as to the Cherokee Homes property. The policy covered eleven different facilities of Winston Delaware, Inc., located in five different states, brokered through eight insurance companies, involving over \$4,000,000 in coverage.

20. Based upon the evidence presented, it is the finding of the Court that plaintiff did not prove by a preponderance of the evidence that Freiberger had actual knowledge of the property interest of OOWA in Cherokee Homes.

21. However, the Court finds that Freiberger had acquired sufficient information that it reasonably should have known the OOWA held a property interest in the Cherokee Homes property. This finding is supported by various circumstantial evidence, including the telephone conversation between Howard Glickman of Freiberger and Gene Redden of the OOWA in regard to the \$50,000 deductible provision of the master policy. Also, on or about January 15, 1973, Howard Glickman received a letter from Robert Johnston of Shelter transmitting copies of five insurance policies on Cherokee Homes, Inc., and stating that the Cherokee plant was leased and that the owners required "total dollar coverage" and had previously not accepted a \$50,000 deductible. In addition, Freiberger was requested by Shelter to send the OOWA a copy of the master insurance policy and sent copies of other correspondence to the OOWA relating to the coverage.

22. It is the further finding of the Court that the evidence does not support a finding that Freiberger had knowledge of the provisions of the lease between Shelter and the OOWA or its specific requirements in regard to insurance.

23. On January 28, 1975, Shelter directed Freiberger to terminate the insurance coverage with respect to the Cherokee plant, effective January 31, 1975, and on January 31, 1975, Freiberger instructed the agent of the insurance

companies to this effect.

24. Neither Shelter nor Freiburger notified OOWA of the cancellation of the policy.

25. On June 17, 1975, major portions of the structures comprising the Cherokee plant were destroyed or severely damaged by a tornado. The OOWA notified Shelter of this loss and requested that the insurance carriers be notified. Shelter subsequently informed the OOWA that there was no insurance coverage for the loss. The OOWA had no previous knowledge of the cancellation.

CONCLUSIONS OF LAW

Introduction

The Pretrial Order filed by the parties in this action defines the issues to be determined. The only issues of law stated, except those relating to Freiburger's defenses and to amount of damages are:

- "1. Did Defendant owe Plaintiff a fiduciary duty?
- "2. Did Defendant owe Plaintiff a duty of ordinary care?"

Plaintiff asserts that if Freiburger had knowledge or should have known that the OOWA owned the Cherokee property, it had a duty to "maintain coverage satisfactory to OOWA." Plaintiff states, "In short, Freiburger was obligated to OOWA to obtain coverage in the proper form." Although plaintiff now asserts that the key question before the Court is that of Freiburger's knowledge, the Court finds the key question to be, "What if any duty was owed by Freiburger to the OOWA, assuming Freiburger had knowledge of a property interest of OOWA?"

Plaintiff cites no cases holding that when a party requests insurance, enters into an insurance contract, pays the premiums, and directs or accepts that the proceeds be paid in a specific manner, that the insurer, upon learning that the party is not the exclusive party in interest, has the duty or the authority to add as an assured under the

policy, such third party holding a security interest, unless directed to do so by the party contracting for the coverage.

Both parties rely heavily on statements contained in Appelman, Insurance Law and Practice. As stated in 16,

Appelman § 8841:

"An insurance broker is the agent of the insured in negotiating for a policy, and owes a duty to his principal to exercise reasonable skill, care, and diligence in effecting insurance." (emphasis added)

In the case at bar, Shelter was the insured and Freiburger as its agent owed a duty to Shelter to exercise reasonable care and diligence. Appelman notes the broker's duty to follow instructions and the evidence in this case shows that Freiburger did not act contrary to the instructions of Shelter. The treatise further states:

"There is a presumption that a broker did his duty, so that he is not obliged to offer any evidence to show that he exercised ordinary care in the premises until the plaintiff has shown that he was negligent."

Plaintiff asserts two alternative theories of recovery, i.e. breach of contract and negligence. In order for plaintiff to recover under a theory of negligence plaintiff must show that Freiburger had a duty to the OOWA to exercise reasonable care. Alternatively, under the contract theory, plaintiff must show a contractual duty on the part of Freiburger to the OOWA. Plaintiff asserts two bases for Freiburger's alleged duty. First, plaintiff contends that the OOWA was a third-party beneficiary of the insurance coverage. Second, plaintiff contends that Shelter was the agent of the OOWA and that Freiburger was the agent of Shelter, allegedly making Freiburger the sub-agent of the OOWA.

Third-Party Beneficiary

Plaintiff asserts that the agent's duty of skill, care and diligence also runs to persons intended to be beneficiaries of the agent's agreement to effect the insurance. Initially the Court notes that the evidence does not prove that Shelter

ever expressed an intention to Freiburger that the OOWA be made an assured under the policy, even though it had a contractual obligation to do so. Plaintiff quotes the following statement from Appelman:

"However, persons intended to be beneficiaries of insurance contracts have a right to sue as donee beneficiaries of a contract to procure insurance."

While the Court does not disagree that if an agent fails to procure insurance, an intended beneficiary may have a cause of action; in the case at bar the insurance coverage was procured in keeping with the directions of the party and in form acceptable to the party securing the coverage. Plaintiff's additional quotation from Appelman of Keither v. Schiefen-Stockham Insurance Agency, Inc., 498 P.2d 265 (Kan. 1972) is likewise not in point.

In the section on Landlord and Tenant, § 3365, Appelman states:

". . . if a lessee agrees to keep a building insured by policies 'in the name of the lessor or assigned to her', a policy of the lessee will be considered in equity as held in trust for the lessor, although such an agreement would give no rights against the insuror."
(emphasis added)

In support of this statement the treatise refers to the holding in Spires v. Hanover Fire Ins. Co., 32 Erie 161 (Pa.Com.Pl. 1949) to the effect that "the fact that tenant was to carry insurance for protection of the landlord does not make an insurance policy taken out by the tenant a third-party beneficiary contract for the benefit of the landlord."

Plaintiff also quotes from Corbin on Contracts in regard to persons recognized as having enforceable rights created in them by a contract to which they are not parties, who are called third-party beneficiaries. However, although the law of Oklahoma recognizes that a contract made expressly for the benefit of a third party may be enforced by him, "to entitle such a third person to maintain an action to enforce the contract it must appear that the contract was made

'expressly' for his benefit, and it is not sufficient for him to show that he will be incidentally benefited by the performance of the contract." Apex Siding & Roofing Co. v. First Federal Saving & Loan Association, 301 P.2d 352 (Okla. 1956). Although in the case at bar plaintiff is not attempting to enforce the insurance contract, this language by the Court and that contained in 15 O.S. § 29 limiting the rights of third-party beneficiaries to instances where the contract is expressly for the benefit of the third party has a logical converse limiting effect on the duty of the contracting parties to situations where the contract is expressly for the benefit of a third party. The intent to name the OOWA was never expressed to Freiberger.

Sub-Agent

In regard to this theory on duty, plaintiff quotes the following:

"Where there is an authorized delegation of authority by an agent, the person to whom the delegation was made will be considered the agent of the principal and the principal must seek a remedy directly against the sub-agent for negligence or misconduct. 3 Am.Jur. 2d 154 at p. 545."

However, a sub-agent must follow the directions given it by the agent. In this case, Freiberger followed the directions of Shelter. Freiberger is not under a duty to assume that Shelter was not acting in accordance with the directions of its principal, even assuming Freiberger knew of the existence of the principal.

Contributory Negligence

Defendant asserts that plaintiff should be precluded from recovering herein because of its own negligence in regard to securing coverage. In 16 Appelman § 8843, it is stated:

"If the plaintiff's failure to have an adequate policy was due to his own negligent default in not ascertaining the defect and procuring another policy, recovery may be limited to nominal damages, or may be denied

entirely. Likewise, in fixing damages, the court must consider whether the insured could have avoided the consequences resulting from the broker's breach of contract by the exercise of reasonable diligence. Similarly the plaintiff may be estopped by its actions to sue for breach of contract. The insured's knowledge that the proper coverage was not obtained may be inferred from the circumstances."

1. It is the finding of the Court that defendant Freiberger did not breach any contractual duty or a duty of reasonable care.

2. Although a broker may have acquired information sufficient to charge it with knowledge that parties other than the insured hold insurable risks in the subject property, the broker has no duty to contact such other parties to ascertain if they desire to be named as an additional assured, particularly where the broker has not been informed of and has no direct knowledge of contractual agreements between the insured and such other parties.

3. Freiberger having no duty to name the OOWA as an assured under the policy, it likewise had no duty to notify the OOWA when the named insured directed that the policy be cancelled.

4. The OOWA relied upon Shelter to properly perform pursuant to the conditions of the lease. Likewise, Freiberger relied upon Shelter to direct it in regard to the named insureds.. Freiberger had as much right to rely on Shelter and the information furnished by Shelter in regard to an assured as did the plaintiff to rely on Shelter. The plaintiff had the responsibility, to ascertain whether Shelter was performing properly. Shelter failed to reasonably act in accordance with its obligations.

5. The OOWA did not act reasonably when it failed to take any action after receipt of the Certificate of Insurance which failed to name it as an assured.

6. It is therefore the determination of the Court that even if Freiberger had a duty to add the OOWA as an assured, although it had not been instructed to do so, and

even if it was negligent in performing said duty, the negligence of the OOWA was at least equal to and in fact exceeded any negligence on the part of Freiburger, and the Court therefore finds the defendant not liable.

7. Likewise, even were the Court to find that there existed some contractual duty on the part of the defendant, the Court finds that due to plaintiff's failure to make inquiry as to the assured under the policy or to object to the policy as written or to notify Freiburger that the OOWA was to be an assured under the policy after having received a copy, with a cover letter inviting the OOWA to make inquiry if there were any question in regard to the policy, plaintiff is now estopped to assert a claim against Freiburger. 16
Appelman § 8843.

8. Based upon the foregoing it is the determination of the Court that Judgment should be entered on behalf of the defendant, Freiburger Agency, Inc. and against the plaintiff, the Oklahoma Ordnance Works Authority.

It is so Ordered this 8th day of November, 1977.


H. DALE COOK
United States District Judge

Now, although the Court could be inclined to follow the Latin maxim of "fiat justitia, ruat caelum" (let justice be done, though the heavens fall), stare decisis commands that the ultimate ruling of the Court be made adversely to the plaintiffs.

Plaintiffs in the instant case are all registered Democratic voters in the State of Oklahoma (some of the plaintiffs are duly elected members of the Oklahoma State Senate and Oklahoma State House of Representatives).

The Democratic Party is a political party in the State of Oklahoma. Political parties are voluntary organizations in Oklahoma. Title 26 O.S. §1-107 defines a political party as:

"Recognized political parties shall include parties whose candidates' names appeared on the General Election ballot in 1974, and those parties which shall be formed according to law."

Title 26 O.S. §1-108 provides that a group of persons may form a recognized political party at any time except during the period between July 1 and November 15 of any even-numbered year, by following the procedure set up in the statute. The statutes of Oklahoma further provide that "a primary election shall be held on the fourth Tuesday in August of each even-numbered year, at which time each political party recognized by the laws of Oklahoma shall nominate its candidates for the offices to be filled at the next succeeding General Election ***." Title 26 O.S. §1-102.

Title 26 O.S. §1-105 covers the substitute candidates, and provides, in pertinent part:

"In the event of the death of a political party's nominee for office, a substitute candidate will be permitted to have his name placed on the General Election ballot if the following procedure is observed:

"1. If the nominee was a candidate for county office, the political party's central committee of said county shall notify, in writing, the secretary of the county election board of said nominee's death within five (5) days after said death occurs, and shall, within fifteen (15) days after such notification, certify to the secretary the name of a substitute candidate, who shall be selected in a manner to be determined by the county central committee of said party.

"2. If the nominee was a candidate who filed his Declaration of Candidacy with the State Election Board, the political party's state central committee shall notify, in writing, the Secretary of the State Election Board of said nominee's death within five (5) days after said death occurs and shall, within fifteen (15) days after such notification, certify to the Secretary the name of a substitute candidate, who shall be selected in a manner to be determined by the state central committee of said party.

"3. ***."

Title 26 O.S. §1-109 sets forth the provisions by which a political party ceases to exist in the State of Oklahoma.

Title 26 O.S. §2-111 covers nomination of members to the State Election Board by political parties, etc.

The above referenced statutes were effective January 1, 1975, having replaced prior statutes in force. It appears, however, that fundamentally there is little change in the new statutes vis-a-vis the old statutes as here involved.

The Court notes that the plaintiffs have raised no allegations that these statutes are unconstitutional, and, thus, no constitutional challenge as to the statutes is before this Court.

The thrust of the plaintiffs' complaint is that they are being deprived of the right to equal representation (one-man, one-vote) in the Democratic Party in the State of Oklahoma because of the organizational and delegate rules presently in effect in the party. They allege that the organizational structure of the party, as presently constituted, is grossly disproportionate because the representation is based on geographic rather than on population areas. Plaintiffs allege that the organizational structure enacted by the Democratic Party dilutes their representation. They further allege in their complaint that such organizational structure discriminates against and deprives "Negroes" in urban areas of the right of equal participation in the party organization. Plaintiffs request that the Court enforce the plaintiffs' legal right to equal representation in the Democratic Party of the State of Oklahoma and order said Democratic Party to promulgate and adopt new organizational and delegate voting rules to provide for equal representation of all Democrats in accordance with the principle of one-person, one-vote.

Plaintiffs allege jurisdiction by virtue of 28 U.S.C. §§1343, 1391; 28 U.S.C. §§2201-2202; and 42 U.S.C. §§1981-1983; as well as alleged violations of the 14th and 15th Amendments to the United States Constitution.

The Declaratory Judgment Act, Title 28 U.S.C. §§2201-2202, is procedural in nature. It does not broaden the jurisdiction of federal courts nor bring non-judicial issues within their cognizance. Title 28 U.S.C. §1391 is the venue statute. Therefore, §§2201, 2202 and 1391 do not vest this court with jurisdiction.

The sections to be considered by the Court, thus, are Title 42 U.S.C. §§1981-1983; and the 14th and 15th Amendments, in order for the Court to have jurisdiction under Title 28 U.S.C. §§1343(3) and (4):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

In its answer, the defendant, among other things, alleges that the complaint fails to state a cause of action and that this Court lacks jurisdiction. Objections that the complaint fails to state a claim upon which relief can be granted may be made by answer or on motion. Moore's Federal Practice, Volume 2A, ¶12.05. Therefore, the Court has for initial determination the question of whether the complaint states a claim as well as whether this Court has jurisdiction to entertain the allegations asserted by the plaintiffs.

The Court must start with the basic premise that the general proposition espoused by the Supreme Court of the United States is that a political party's management of its internal affairs is protected by its members' First Amendment freedom of association. The Court should not and will not lightly dismiss, as de minimis, a party's choice of organizational structure, even though the Court feels that such organizational structure is implicitly inequitable.

In *Ripon Society v. National Republican Party*, 525 F.2d 548, 586 (D.C. Cir. 1975), the Court said that the Supreme Court in *Cousins v. Wigoda*, 419 U.S. 477 (1975) placed the internal workings of a political party squarely within the protection of the First Amendment. See also *Fahey v. Darigan*, 405 F.Supp. 1386 (USDC, D. Rhode Island, 1975).

Several recent cases were considered by the Court in arriving, although reluctantly, at its decision in this case.

The first case considered was *Lynch v. Torquato*, 343 F.2d 370 (3rd Cir. 1965) wherein the registered voters of the Democratic county committee of Cambria County, Pennsylvania, brought suit to enjoin them from conducting an election of a county chairman and to require the election of such chairman by the popular vote of all registered Democratic voters. The United States District Court for the Western District of Pennsylvania, 228 F.Supp. 268, entered a judgment dismissing the complaint and the appeal was lodged. The Third Circuit affirmed, saying at page 371:

"However, the contention of the plaintiff is that the umbrella of the equal protection clause covers an even wider area. For the matter in controversy here is the choice not of county officers, but of a Democratic County Committee and a Democratic County Chairman, the party functionaries empowered to administer the local affairs of the Democratic party.

"The normal and ordinary responsibilities of such local party leaders are familiar. They administer a miscellany of party business. They may be responsible for raising and spending money in the party interest. They may plan and direct local political campaigns as well as continuing efforts to win new party adherents and to encourage voter registration between campaigns. They may administer political patronage.

"But the citizen's constitutional right to equality as an elector, as declared in the relevant Supreme Court decisions, applies to the choice of those who shall be his elected representatives in the conduct of government, not in the internal management of a political party. It is true that this right extends to state regulated and party conducted primaries. However, this is because the function of primaries is to select nominees for governmental office even though, not because, they are party enterprises. The people, when engaged in primary and general elections for the selection of their representatives in their government, may rationally be viewed as

the 'state' in action, with the consequence that the organization and regulation of these enterprises must be such as accord each elector equal protection of the laws. In contrast, the normal role of party leaders in conducting internal affairs of their party, other than primary or general elections, does not make their party offices governmental offices or the filling of these offices state action which must satisfy the requirements of Gray v. Sanders.

"However, this is not the end of the matter. In addition to the duties of the type already discussed, the party chairman in Cambria County is alleged to be the person who in fact exercises the party's power of choosing a substitute party nominee when a nomination for county-wide governmental office becomes vacant as a result of the death or disqualification of a party nominee between primary time and election time. It is arguable that in making such emergency selection of a substitute nominee, a party leader is exercising a constitutionally protected function of the electorate and, therefore, that he can constitutionally do so only if he himself has been chosen by a process which respects the 'one man one vote' principle. Whether the equalitarian requirement of the Fourteenth Amendment extends to procedural alternatives of primary elections, and particularly to such post-primary emergency nominations as we have here, may well be doubted. But we need not and do not decide these questions. For even if it should be unconstitutional for party leaders chosen in an undemocratic manner to make emergency designations of party nominees for governmental office, it does not follow that these party leaders are constitutionally disqualified from performing their many and varied normal functions of administering the party business. A party chairman may perform these functions throughout his term of office without ever having occasion to select a substitute nominee for governmental office.

"If the plaintiffs' theory of the application of the equal protection concept to emergency nominations is sound, it might arguably support a proceeding to restrain undemocratically chosen county officers from making such nominations. But that is not this case. Rather, the complaint is a general challenge to the right of a person who has not been selected in accordance with the one man one vote principle to serve as party County Chairman. The nature of the office and its normal responsibilities make this claim much too broad for constitutional validity.

"In our view the only relief to which the plaintiffs might have an arguable constitutional claim would be an order restraining a County Chairman chosen in an undemocratic way from making party nominations for elective public offices. But it is not alleged that the County Chairman has made any such nomination or that the unusual situation has arisen in which he is authorized to do so. Thus, neither a violation of the plaintiffs' rights as voters nor the imminent prospect of such violation appears in this case. Indeed, this lawsuit appears to be an effort of dissidents to wrest control of ordinary party affairs from the present leadership rather than an attempt to vindicate the plaintiffs' right to share equitably in the choice of nominees

for public office in some emergency situation which may never arise. Thus, an anticipatory solution of a possible future controversy of constitutional dimensions is urged upon us as justification for judicial intervention in a present controversy which involves no actual or imminently threatened violation of constitutional rights.

"In these circumstances, this is very clearly a proper case for judicial abstention from constitutional decision pursuant to wholesome and authoritatively accepted principle that 'federal judicial power is to be exercised *** only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action.'"
(Emphasis Supplied)

The Court then dismissed the action with the following comment:

"We respect the sound doctrine which disapproves the anticipation of constitutional questions by affirming the dismissal of this action without expressing any opinion upon the validity of the presently authorized method of making emergency nominations for county office in Cambria County."

In 1972 the Second Circuit Court of Appeals had before it the case of Seergy v. Kings County Republican County Committee, 459 F.2d 308 (2nd Cir. 1972), a challenge to the New York Election Law. In distinguishing the Seergy case, supra, in Todd v. Oklahoma State Democratic Central Committee, et al., 361 F.Supp. 491 (USDC WD Okla, 1973) it was said:

"The holding in Seergy v. King's County Republican Committee, C.A.2, 1972, 459 F.2d 308, is not to the contrary. There, as here, the Complaint alleged that the Plaintiff's constitutional right of one person, one vote had been invalidly diluted. But there, unlike here, the Election Law of the state prescribed the manner in which state and county party committees are to be established and further provided that the county committee should consist of two members elected from each election district within the county and also that the voting power of each member thus elected should be in proportion to such party vote in his election district. The Election Law provided, however, that each county committee might adopt an alternative election procedure whereby additional members, up to four, might be elected from each county election district and that, in the counties adopting this alternative each member of the county committee should have one vote.

"The Defendant King's County Republican County Committee adopted the alternative statutory procedures for the election of its county committeemen. Thus each county committeeman had an equal instead of a weighted vote which he would have had if the subject committee had adopted the first statutory alternative and had limited each county election district to two committeemen. Because of the wide disparities in the Republican voter strength among the election districts in King's County the committeemen from election districts in the county with low Republican enrollment exercised a voting strength much greater than the proportionate strength of the Republican voters they represented. It was this failure to accord voting weight in proportion to the voting strength of each

committeeman's constituency that was attacked by the Plaintiffs in Seergy, supra, as violative of the one man, one vote principle. In short, the Plaintiffs therein contended that in all county committee matters they were entitled in effect to the equivalent of one Republican, one vote.

"The Court declined to adopt the argument as respects the Defendant Committee's internal affairs. The Court said that the Equal Protection of the Law Clause does not mandate the adoption by the Committee 'of weighted voting in the performance of their major duty and function as committeemen, which is to conduct the internal management and business of the county committee. Whatever its reason for giving disproportionate weight to the vote of some committeemen in such matters *** when the county committee acts only as a private voluntary association of citizens, it is no more bound by the constitutional duty to weigh committee members' votes according to the number of constituents represented by them than is any other private club.' It was only as to the extent that Section 12 of the Election Law of the state authorized disproportionate voting by committeemen in their infrequent performance of public electoral functions that the statute was violative of the one man, one vote principle. The Court held only that the 'second alternative allowed by §12 of the Election Law, as implemented by the Art. 1, §1, King's County Republican County Committee Rules, is invalid as applied to those rare instances where the committee performs a public electoral function.' p. 315

"The Court finds no provision in the laws of Oklahoma, either identical or comparable to those of the New York Election Law, ***. It follows that the case is clearly distinguishable from the case at hand."

The Todd v. Oklahoma State Democratic Central Committee case, supra, was a class action by state political electors alleging that their constitutional rights, as electors, of "one person, one vote" had been invalidly diluted and seeking declaratory and injunctive relief against the Party Central Committee, chairman of the party, and against the Governor and the Attorney General.

At page 493, the Court said:

"Political parties are voluntary organizations in Oklahoma. A political party in Oklahoma is defined as 'an affiliation of electors representing any political organization which at the next general election preceding, polled for President or Governor at least five per centum of the entire vote cast for either of said respective officers, or any such political organization which may have polled at least ten per centum of the vote of as many as three other states at the last election held in such states.' 26 O.S. §111. The statutes further provide that 'political parties in this state shall select or nominate their respective candidates for the various national, state, district, county and township offices by a primary election or elections ***. 26 O.S. §112a.

The Court is aware that the statutes involved in the Todd case were amended in January, 1975, as set forth above.

The Three-Judge Court went on to say that the organization of the Democratic Party of Oklahoma is structured by the constitution of the party and that the "***structural organization and rules of the Democratic Party of Oklahoma are mandated by the constitution of the Party and not by state statutes". The Court did, however, note that the existence of the State Democratic Central Committee is recognized by statute in the statute dealing with the State Election Board.

One of the statutes specifically attacked in the Todd case was the statute dealing with the vacancy of a nominee if such nominee declined to stand for election or died.

In the Todd case, the plaintiffs predicated Count One of their complaint as follows:

"Count One alleges that 'all members of the Defendant Central Committee are elected on a disproportionate population (sic) basis,' in that each precinct, regardless of the number of registered electors, elects a Chairman and Co-chairman who, as members of the County Central Committee, elect the Chairman and Co-Chairman thereof, and also elect the Chairman and Co-chairman of the Congressional District Committee, ***."

The Complaint prayed for the Court to declare the process by which the Constitution of the Oklahoma State Democratic Party selects the members of the State Central Committee to be null and void as a violation of the one person, one vote rule of the Fourteenth Amendment. Plaintiffs, in the Todd case, predicated Count One on the cases of Baker v. Carr, 369 U.S. 169, and its progeny, Reynolds v. Sims, 1974, 377 U.S. 533; Wesberry v. Sanders, 1964, 376 U.S. 1; and Gray v. Sanders, 1963, 372 U.S. 368. The Court said that it was to be noted that the precinct lines are drawn by the County Election Board, 26 O.S. §25 and that the party organization had nothing to do with laying out the precinct. The Court then said:

"***Baker v. Carr, supra, simply held that a case involving 'dilution' of a voter's right of suffrage

presented a justiciable question under the Equal Protection Clause of the Fourteenth Amendment. The case affords no protection to one who has no right to vote for the members of the Defendant Committee because there is no right to be diluted." (Emphasis Supplied)

At page 495, the Court said:

"Gray v. Sanders, supra, is not controlling herein. In denying the applicability of Gray v. Sanders, supra, in Lynch v. Torquato, 1964, C.A.3, 343 F.2d 370, Circuit Judge Hastie said:

"For present purposes we may assume that the same principle would control a precinct unit scheme of voting to choose party nominees for countywide executive and legislative office. *** However, the contention of the plaintiffs is that the umbrella of the equal protection clause covers an even wider area. For the matter in controversy here is the choice not of county officers, but of a Democratic County Committee and a Democratic County Chairman, the party functionaries empowered to administer the local affairs of the Democratic party. *** the citizen's constitutional right to equality as an elector, as declared in the relevant Supreme Court decisions, applies to the choice of those who shall be his elected representatives in the conduct of government, not in the internal management of a political party. It is true that this right extends to state regulated and party conducted primaries. However, this is because the function of primaries is to select nominees for governmental office even though, not because, they are party enterprises. The people, when engaged in primary and general elections for the selection of their representative in their government, may rationally be viewed as the 'state' in action, with the consequence that the organization and regulation of these enterprises must be such as accord each elector equal protection of the laws. In contrast, the normal role of party leaders in conducting internal affairs of their party, other than primary or general elections, does not make their party offices governmental offices or the filling of these offices state action which must satisfy the requirements of Gray v. Sanders, supra."

In deciding to abstain the Three-Judge Court said:

"Likewise in the case at bar the Complaint neither alleges that the Defendant Committee has made or is threatening to make, any nomination of replacement nor that an unusual situation has arisen in which the Defendant Committee is authorized to do so. In truth, the Complaint is devoid of any allegation that the Defendant Committee through its lengthy history has ever made such a nominee replacement. This Court adheres to the sound doctrine which disapproves the anticipation of constitutional questions and finds that the Motion to Dismiss of each Defendant should be sustained."

The Todd case, supra, is cited with approval in the case of Fahey v. Darigan, 405 F.Supp. 1386 (USDC D. Rhode Island, 1975).

Based on the foregoing cited cases, the Complaint in the instant litigation, on its face, reflects the following:

1. There has been no showing on the face of the complaint that any minority in the urban area has been treated any differently from a majority in the urban area. The sociological habitat of Homo Sapiens is not dictated by a political party, but by the economic and social habits of a society. The disparity in this case in classification and representation, if any, does not arise from the social impact of minority versus majority---it arises from a lack of sizeable population in rural areas as opposed to the populous urban areas. The allegation made in the complaint by the plaintiffs is more than an alleged discrimination against the minorities----the complaint reveals that the majority, as well as the minority are discriminated against by virtue of the manner in which the present Democratic Party Central Committee is constituted. The apparent disproportionate distribution of the populous of the State of Oklahoma cannot be attributed to any action on the part of the Democratic Party (or any political party). The Complaint, in its present posture, does not state a cause of action under Title 42 U.S.C. §§1981-1983.

2. The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote, *Gray v. Sanders*, supra. The Complaint, in its present posture, shows no state involvement and no abridgement of the right to vote for an elective office, and, therefore, does not state a cause of action under the Fifteenth Amendment.

3. The Complaint, on its face, does not show a violation of the Fourteenth Amendment based on the case law hereinabove cited, and, thus, the Complaint does not state a cause of action under the Fourteenth Amendment.

4. The case law hereinabove cited does indicate that there is a possibility of a violation under the Fourteenth Amendment, if and when the Central Committee of the Democratic Party should in fact nominate an individual in the event of the death or inability of a nominee to run in the general election after the primary election (which occurrence has not been alleged in this complaint). Such procedure for nomination by the Central Committee of the Democratic Party, if and when instituted could possibly state a cause of action under the "one-man, one-vote" decisions of the

United States Supreme Court. This Court feels, under the cited case law, that such a nomination with the present procedure for composition of the Democratic Central Committee, (geographical rather than population) could result in a questionable disenfranchisement of the Democratic Party members as a whole. There has been, however, no showing of a present danger that the Central Committee of the Democratic Party intends to appoint a substitute nominee at this time. The case law is replete in holding that Federal Courts should not anticipate such action, without a present danger, and, therefore, this Court should abstain, as this Court does at this time. The Complaint on its face, as well as the evidence and argument adduced at two hearings, shows no present danger of a violation of the Fourteenth Amendment of the United States Constitution.

The Court, therefore, finds that this cause of action and Complaint must be dismissed for failure to state a claim and for the lack of jurisdiction. The Court does not, however, preclude the plaintiffs from refileing any action they deem appropriate by the proper "vehicle" to vest the Court with jurisdiction, when and if the allegations and facts are such as to state a cause of action that would create jurisdiction in this Court.

The Court, having so found, need not determine the question of the political question doctrine raised by the parties.

5. Of course (as evidenced by the two periods of time granted by the Court to resolve their differences) the Court was hopeful that the parties would work out a satisfactory solution among themselves. The Court can only comment that it "takes big persons to admit inequities exist, especially when the inequities inure to their benefit---it takes even bigger persons to agree to adjust those recognized inequities."

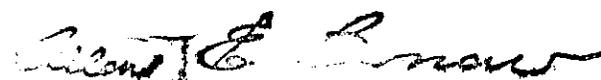
6. Defendant is no doubt aware (to paraphrase an oft used axiom) that the "wheels of justice, although they may grind slowly--- nevertheless grind". There is little doubt but that in the foreseeable future there is the possibility that the Democratic

Party could be faced with the very situation that concerns the Court---the nomination of a candidate by the Central Committee of the Democratic Party as thus constituted on geographic rather than populous representation. The utter chaos and resultant disorder of such a situation could catapult the Democratic Party into a Court mandated reapportionment at that time to assure the members of the Democratic Party of the "one-man, one-vote" representation that our great country is founded upon. This basic right is not taken lightly by the Court.

Nevertheless, the Court finds, under the controversy presented in this litigation, that the following order must be entered, and, thus,

IT IS, THEREFORE, ORDERED that this cause of action and complaint as presented to the Court in this case, be and the same are hereby dismissed without prejudice for failure to state a cause of action and submit facts sufficient to create jurisdiction in this Court.

ENTERED this 6th day of November, 1977.



Allen E. Barrow
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LINDA K. COLEMAN,)
)
 Plaintiff,)
)
 vs.) No. 77-C-369-C
)
 UNARCO INDUSTRIES, INC.,)
)
 Defendant.)

FILED

NOV 04 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

In this action, originally filed in the Tulsa County District Court, plaintiff alleges that her employment with the defendant was wrongfully terminated, in violation of 85 O.S. § 5. Defendant removed the action to this Court, pursuant to 28 U.S.C. § 1441(a) and (b), alleging federal subject matter jurisdiction. Now before the Court is plaintiff's motion to remand the action to the state court.

Title 28 U.S.C. § 1441(a) and (b), upon which defendant relies to support the jurisdiction of this Court, provides as follows:

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

"(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

The burden is upon the defendant to establish his right to remove under this statute, and if the right to remove is doubtful, the case should be remanded. Wilhelm v. United States Department of the Air Force, Accounting & Finance Center, 418 F.Supp. 162 (S.D. Tex. 1976); Tasner v. U.S.

Industries, Inc., 379 F.Supp. 803 (N.D. Ill. 1974). The defendant has admitted that it is a citizen of the State of Oklahoma for federal jurisdictional purposes, and its right to remove this action must therefore be based upon the existence of a federal question. In her petition filed in the state court, the plaintiff seeks injunctive relief for an alleged violation of 85 O.S. § 5, which provides:

"No person, firm, partnership or corporation may discharge any employee because the employee has in good faith filed a claim, or has retained a lawyer to represent him in said claim, instituted or caused to be instituted, in good faith, any proceeding under the provisions of Title 85 of the Oklahoma Statutes, or has testified or is about to testify in any such proceeding. Provided no employer shall be required to rehire or retain any employee who is determined physically unable to perform his assigned duties."

Despite the apparent state-law nature of plaintiff's claim, defendant contends that the petition "failed to mention certain material facts", namely that plaintiff is a member of a labor union and is subject to a collective bargaining agreement governing the terms and conditions of her employment. Defendant argues that because of the existence of a collective bargaining agreement, this action is actually one arising under the National Labor Relations Act, 29 U.S.C. §§ 151 et seq., and specifically § 185 of that Title. In the alternative, defendant argues that the state statute in question is an invalid attempt to regulate the employer-employee relationship, a field which it contends has been preempted by federal law.

In considering plaintiff's motion to remand, this Court is not permitted to infer allegations which do not appear on the face of the original petition.

"Ordinarily the presence of a federal question which will authorize removal of the suit to a United States court must be disclosed by plaintiff's petition or complaint, unaided by defendant's answer or defenses, or indeed by plaintiff's reply to the defenses pleaded by defendant."

Rosecrans v. William S. Lozier, Inc., 142 F.2d 118, 121 (8th

Cir. 1944). To serve as the basis for federal subject matter jurisdiction, a federal right must be an essential element of plaintiff's cause of action. Burgess v. Charlottesville Savings & Loan Association, 477 F.2d 40 (4th Cir. 1973); McCorkle v. First Pennsylvania Banking & Trust Co., 459 F.2d 243 (4th Cir. 1972). A factual situation similar to the instant one was before the court in City of Galveston v. International Organization of Masters, Mates & Pilots, 338 F.Supp. 907 (S.D. Tex. 1972). That action was originally filed in the state court seeking injunctive relief from defendants' picketing activities. The case was removed to the federal district court on the ground that it arose under the National Labor Relations Act. The defendants argued that the complaint sounded in an unfair labor practice violation, an area of controversy preempted by federal law. The court rejected defendants' arguments and ordered the case remanded to the state court.

". . . [W]here . . . plaintiff has a choice of relying upon state law and does so rely, there can be no removal except on the basis of diversity. (citations omitted)

"Plaintiff here seeks only injunctive relief against defendants' alleged violations of state law. In the present lawsuit it is clear that no contract or collective bargaining is involved under the allegations of the complaint. . . .

". . . [T]he Court is persuaded that an allegation of a contract or agreement must be made before this Court will have original or removal jurisdiction based on Section 301. The fact that the controversy involves a 'labor dispute' does not in itself vest the federal court with jurisdiction to adjudicate the matter." Id. at 909.

The original petition filed in the state court in the instant case contains no allegation of a contract or agreement. Plaintiff's cause of action is based entirely upon an alleged violation of a state statute. Under the authorities previously cited, the Court finds that this action does not arise under any law of the United States and, consequently, that the Court does not have subject matter jurisdiction. Therefore,

plaintiff's motion to remand is hereby sustained.

It is so Ordered this 4th day of November, 1977.



H. DALE COOK
United States District Judge

FILED

NOV 04 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ADA BRANNON,)
)
 Plaintiff)
)
 -vs-)
)
 TRIANGLE TRUCK STOP, INC.,)
 STANDARD OIL COMPANY (Indiana),)
 and PORCELAIN ENAMEL, INC.)
)
 Defendant)

No. 77-C-212-B

ORDER OF DISMISSAL

ON this 4th day of November, 1977, upon the written application of the parties for A Dismissal with Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the plaintiff filed herein against the defendant be and the same hereby is dismissed with prejudice to any future action.

Allen S. Benson
JUDGE, DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:

M. David Riggs

M. David Riggs
Attorney for Plaintiff

Alfred B. Knight

Alfred B. Knight
Attorney for Defendant
Porcelain Enamel, Inc.

Truman B. Rucker

Truman B. Rucker
Attorney for Defendant
Standard Oil Company

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JAMES M. SEATON, PEGGY D. SEATON,)
 JAMES R. ADELMAN, TRUSTEE, ROBERT)
 PARKER, Attorney-at-Law,)
)
 Defendants.)

CIVIL ACTION NO. 77-C-303-B

FILED

NOV 2 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 2nd
day of ~~NOVEMBER~~ NOVEMBER, 1977, the Plaintiff appearing by Robert P.
Santee, Assistant United States Attorney; and the Defendant,
James R. Adelman, Trustee, appearing by his attorney, Fred W.
Woodson; and, the Defendants, James M. Seaton, Peggy D. Seaton,
and Robert Parker, Attorney-at-Law, appearing not.

The Court being fully advised and having examined
the file herein finds that Defendant, James M. Seaton, was
served with Summons, Complaint, and Amendment to Complaint on
August 1, 1977, and August 10, 1977, respectively; that Defendant,
Peggy D. Seaton, was served with Summons, Complaint, and Amendment
to Complaint on August 2, 1977, and August 18, 1977, respectively;
that Defendant, James R. Adelman, Trustee, was served with Summons,
Complaint, and Amendment to Complaint on August 15, 1977; and,
that Defendant, Robert Parker, Attorney-at-Law, was served with
Summons, Complaint, and Amendment to Complaint on August 5, 1977;
all as appears on the United States Marshal's Services herein.

It appearing that the Defendant, James R. Adelman,
Trustee, has filed his Answer herein on August 25, 1977; and,
that Defendants, James M. Seaton, Peggy D. Seaton, and Robert
Parker, Attorney-at-Law, have failed to answer herein and that
default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Thirty-Two (32), Block Six (6), LAKE-VIEW HEIGHTS AMENDED ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

THAT Murrell O. Broughton and Edwinna Broughton did, on the 22nd day of August, 1966, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$9,250.00 with 6 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, James M. Seaton and Peggy D. Seaton, were the grantees in a deed from Murrell O. Broughton and Edwinna Broughton dated May 14, 1976, filed May 26, 1976, in Book 4216, Page 796, records of Tulsa County, wherein Defendants, James M. Seaton and Peggy D. Seaton, assumed and agreed to pay the mortgage indebtedness being sued upon herein.

Murrell O. Broughton and Edwinna Broughton were released from any liability under the Note and Mortgage by the Veterans Administration on August 25, 1976.

The Court further finds that Defendants, James M. Seaton and Peggy D. Seaton, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$7,739.19 as unpaid principal with interest thereon at the rate of 6 percent per annum from January 1, 1977, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendant, James M. Seaton, in rem, and against Defendant, Peggy D. Seaton, in personam, for the sum of \$7,739.19 with interest thereon at the rate of 6 percent per annum from January 1, 1977, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment in rem against Peggy D. Seaton as to any interest she might have by reason of a judgment dated February 22, 1977, entered March 2, 1977, in the amount of \$300.00 plus \$13.00 costs, style of case being: "Peggy Dawanna Seaton, Creditor, vs. James Michael Seaton, Debtor," Case No. JFD-76-17, Tulsa County District Court, State of Oklahoma, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment in rem against James R. Adelman, Trustee of the Estate of James M. Seaton, Bankruptcy Case No. 77-B-178, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment in rem against Robert Parker, Attorney-at-Law.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction

of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

s/Allen E. Barrow
UNITED STATES DISTRICT JUDGE

APPROVED


ROBERT P. SANTEE
Assistant United States Attorney


FRED W. WOODSON
Attorney for James R. Adelman, Trustee

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NOLAN ALBERT LINAM, #93642)
)
 Petitioner,)
)
 v.)
)
 PETER A. DOUGLAS, WARDEN,)
 ET AL.,)
)
 Respondents.)

No. 77-C-194-C ✓

FILED

NOV 2 1977 *hmc*

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

This is a proceeding brought pursuant to the provisions of Title 28 U.S.C. § 2254, by a state prisoner confined at the Lexington Treatment Center, Lexington, Oklahoma. Petitioner attacks the validity of the judgment and sentence rendered and imposed by the District Court of Tulsa County, State of Oklahoma in Case No. CRF-76-1724.

Petitioner demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights under the Constitution of the United States of America. In particular, petitioner claims:

- 1) That he was incompetent at the time of the trial in Case No. CRF-76-1724.
- 2) That the sentences he received in the state district court should have been concurrent and not consecutive.
- 3) That his counsel was incompetent.

Respondent has filed a Motion to Dismiss upon the grounds that the Petitioner has not exhausted available state remedies. It appears that a direct appeal by Petitioner in Case No. 76-1724, is now pending in the Oklahoma Court of Criminal Appeals. A Petition in Error was filed in that Court on April 29, 1977, Case No. F-77-303. Appellant's brief was filed on May 25, 1977 and the case is now before the Oklahoma Court of Criminal Appeals for its consideration.

The exhaustion doctrine requires that Petitioner first present his claims to the state courts. 28 U.S.C. § 2254(b). Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); Gurule v. Turner, 461 F.2d 1083 (10th Cir. 1972); McInnes v. Anderson, 366 F.Supp. 983 (E.D.Okla. 1973). If an appeal is pending, the requirement of exhaustion of state remedies has not been met. Denney v. State, 436 F.2d 587 (10th Cir. 1971); Kessinger v. Page, 369 F.2d 799 (10th Cir. 1966). This Court must dismiss Petitioner's claims without prejudice for failure to exhaust the remedies available in the Oklahoma Courts.

Accordingly, for the reasons stated herein the Application for Writ of Habeas Corpus is dismissed.

It is so Ordered this 2nd day of November, 1977.


H. DALE COOK
United States District Judge

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NOV 2 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
vs.)
)
GEORGIA REMONIA SKILLENS a/k/a)
GEORGIA R. SKILLENS, et. al.,)
)
Defendants.)

CIVIL ACTION NO. 77-C-279-B

STIPULATION OF DISMISSAL

COME NOW the United States of America by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and John F. Cantrell, Tulsa County Treasurer, and the Board of County Commissioners, Tulsa County, by and through their attorney, Andrew B. Allen, Assistant District Attorney for Tulsa County, and hereby stipulate and agree that this action be and the same is hereby dismissed without prejudice.

Dated this 31ST day of October, 1977.

HUBERT H. BRYANT
United States Attorney



ROBERT P. SANTEE
Assistant United States Attorney



ANDREW B. ALLEN
Assistant District Attorney
for Tulsa County

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BRUCE HENDRICKSON,
Plaintiff,
vs.
JONES & LAUGHLIN STEEL
CORPORATION, a foreign
corporation,
Defendant.

No. 76-C-215-C

FILED

NOV 2 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

The Court has before it for consideration the motion of the plaintiff, Bruce Hendrickson, for a new trial. After careful consideration of the plaintiff's motion, the Court is satisfied that the verdict returned by the jury is sustained by the evidence and is in accordance with the instructions of the Court, and further that the remaining grounds for plaintiff's motion are without merit. Therefore, plaintiff's motion for new trial is hereby overruled.

It is so Ordered this 2nd day of November, 1977.


H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

REPUBLIC ALUMINUM CORPORATION,)
a Texas corporation,)
)
Plaintiff,)
)
vs.)
)
CUSTOM PRODUCTS, INC.,)
an Oklahoma corporation,)
and GARY PINALTO,)
)
Defendants.)

No. 77-C-125-B

FILED

NOV 1 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

The Court has for consideration Defendant Pinalto's Motion to Set Aside Default Judgment and has carefully reviewed the entire file, the briefs and the Recommendations of the Magistrate concerning said Motion, and being fully advised in the premises, finds:

That the Defendant Pinalto's Motion to Set Aside Default Judgment should be sustained for the reasons stated herein.

This action was filed April 4, 1977, against Custom Products, Inc., a corporation, and the movant, Gary Pinalto, who is Vice President of Custom Products, Inc. The Complaint is in three causes of action, the first two seeking to recover on open account, and the third seeking damages for fraud. The corporate defendant timely filed an Answer, but the movant did not, and judgment by default was rendered against him by the Court Clerk on May 19, 1977.

On July 12, 1977, movant filed his Motion to Set Aside Default Judgment, supported by his Affidavit, the Affidavit of Lester A. Pinalto (the movant's father, who is also President of Custom Products, Inc.), and by a supporting brief. Additionally, movant attached to his Motion a

proposed Answer, setting forth his defenses to the claims stated in the Complaint. Movant seeks permission to file his proposed Answer in the event the default judgment is set aside. The Affidavits of movant and Lester A. Pinalto have not been controverted by any evidentiary material filed by plaintiff in opposition to the Motion.

Movant's Affidavits reflect the following: that service of process as to both defendants was made on movant on or about April 6, 1977; that movant delivered said process to Lester A. Pinalto, President of the corporate defendant, who advised that he would arrange for the defense of the action as to both defendants and would obtain counsel for that purpose; that Lester Pinalto did retain counsel for the aforesaid purpose, but apparently as the result of some misunderstanding, an Answer was filed in the action only on behalf of the corporate defendant; that movant had no actual knowledge that a defense had not been entered on his behalf, or that he was in default, on May 19, 1977, the date default judgment was rendered against him by the Court Clerk, and further, that movant had no notice of the default judgment itself; that movant did not receive notice of entry of the default judgment until he was served on or about June 30, 1977, with an injunction and order to appear and answer as to assets; that upon receiving such injunction and order, movant immediately retained counsel, and the present Motion was promptly filed on July 12, 1977.

The movant has offered that, in the event his Motion to Set Aside Default Judgment is granted, he will proceed on such schedule as the Court may set for pre-trial and trial of the action as to the corporate defendant, so that his

participation will not result in any delay in the final disposition of this action. Movant has further offered to submit to either jury or non-jury trial, whichever the other parties to the action may elect.

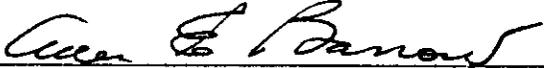
Rule 60(b)(1), F.R.Civ.Proc., is dispositive of this Motion. It provides that a party may be relieved from the force and effect of a final judgment, if entered as the result of "mistake, inadvertence, surprise or excusable neglect". Rule 60(b) is a remedial rule, to be liberally construed, 7 Moore's Federal Practice ¶60.22[2], p. 247 (1975). This liberal construction stems from the Courts' proper respect for trial on the merits, and any doubts concerning vacation of a judgment must be resolved in favor of trial on the merits. Medunic v. Lederer, 533 F.2d 891 (3d Cir. 1976); Barrett v. Southern Railway Co., 68 F.R.D. 413 (D. S.C. 1975); Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969); Tozer v. Charles A. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951).

It appears from the Affidavits that the default judgment entered against the movant was clearly the product of mistake and excusable neglect on his part. Further, misunderstandings such as that present in this action have been held sufficient to vacate judgments by default. See Standard Grate Bar Co. v. Defense Plant Corp., 3 F.R.D. 371 (D.C. Pa. 1944); United States v. 96 Cases, More or Less, of Fireworks, 244 F.Supp. 272 (N.D. Ohio 1965); and Rooks v. American Brass Co., 263 F.2d 166 (6th Cir. 1959). The defendant Pinalto has promptly moved for an order to vacate, upon discovery of the default judgment entered against him. Setting aside the default will not delay trial on the merits, nor otherwise work any

prejudice on the other parties to the action.

IT IS THEREFORE ORDERED that the defendant Pinalto's Motion to Set Aside Default Judgment be sustained and that he be permitted to file his proposed Answer; that the defendant Pinalto pay to plaintiff the sum of \$500, as and for attorneys' fees incurred by plaintiff in connection with taking the default judgment, and the proceedings had on the present Motion; that this action be scheduled for non-jury trial (all parties having agreed to trial without a jury), with the Pre-Trial Order to be prepared by the parties and submitted to the Court no later than November 6, 1977; and that the injunction served on the defendant Pinalto on or about June 30, 1977, and continued in effect on July 7, 1977 until further Order of the Court, be vacated.

Dated this 1st day of ^{November}~~October~~, 1977.


ALLEN E. BARROW, CHIEF JUDGE,
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
OKLAHOMA