

The Court finds that the requisite diversity jurisdiction is not present in this case, which was originally filed in this Court.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss filed by Unit Rig and Equipment Company be and the same is hereby sustained and this cause of action and complaint are dismissed as to all defendants for lack of diversity jurisdiction, without prejudice.

ENTERED this 3/04 day of August, 1978.

A handwritten signature in cursive script, appearing to read "Allen J. Barrow", is written over a horizontal line.

CHIEF UNITED STATES DISTRICT JUDGE

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

TERRY NEES,

Plaintiff,

vs.

ST. LOUIS & SAN FRANCISCO
RAILWAY CO., a/k/a FRISCO
RAILWAY COMPANY, a corporation,

Defendant.

No. 78-C-40-B

FILED

AUG 31 1978

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

ORDER OF DISMISSAL

On this 31 day of August, 1978, it appearing to the Court from Application for Dismissal with Prejudice filed by the plaintiff herein that the above entitled case has been fully settled and compromised by the parties thereto;

IT IS ORDERED that all said causes of action contained therein be, and are hereby dismissed with prejudice.

Allen E. Brown

U. S. DISTRICT JUDGE

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

SHELTON SMITH and SUSAN
SMITH

Plaintiffs,

-vs-

IMPLEMENT DEALERS MUTUAL
INS. CO., et al,

Defendants.

CIVIL ACTION **FILED**
NO. 78-C-41-C

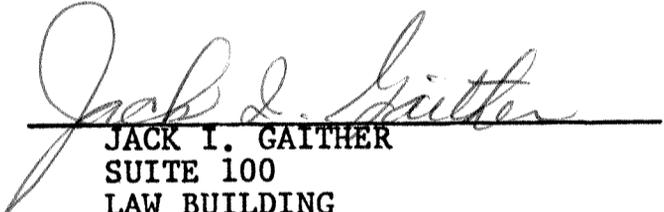
AUG 31 1978

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

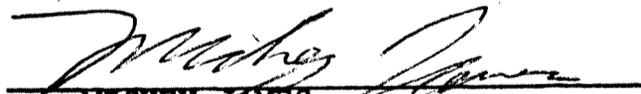
STIPULATION FOR DISMISSAL
WITH PREJUDICE

All of the parties hereto state to the court that they have compromised and settled all of their differences as a result of the matters which gave rise to captioned case, including any respective claims that they might have against each other.

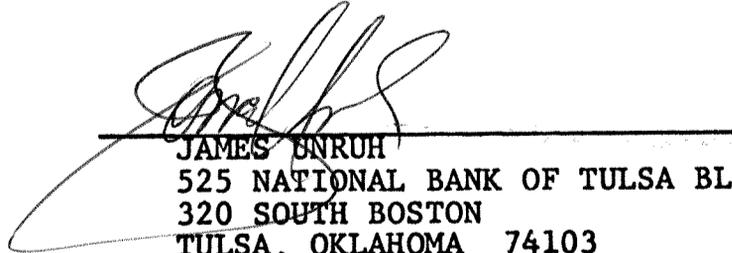
The parties hereto request the court to enter an order dismissing captioned case with prejudice.



JACK I. GAITHER
SUITE 100
LAW BUILDING
500 WEST SEVENTH STREET
TULSA, OKLAHOMA 74119
ATTORNEY FOR PLAINTIFFS



MICKEY JAMES
of GREEN AND JAMES
SUITE 710 LEONHARDT BUILDING
OKLAHOMA CITY, OKLAHOMA, 73102
ATTORNEYS FOR DEFENDANT



JAMES ENRUH
525 NATIONAL BANK OF TULSA BLDG.
320 SOUTH BOSTON
TULSA, OKLAHOMA 74103
ATTORNEY FOR 3rd PARTY DEFENDANT

O R D E R

The foregoing Stipulation came before the court on ~~August~~ ^{Sept.} 5, 1978, after hearing the statement of council, considering the court file, and being fully advised, the court finds that the following order should be entered:

Captioned case is hereby dismissed with prejudice.

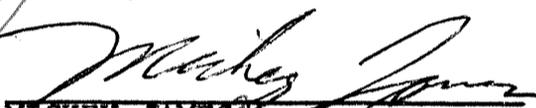


H. DALE COOK
UNITED STATES DISTRICT JUDGE

APPROVED:



JACK I. GAITHER



MICKEY JAMES



JAMES UNRUH

Movant has fully served his sentence, however, it appears of record that by reason of this conviction he is prevented from voting, holding public office, and acting in his former capacity as a law enforcement officer in that he cannot, under the conviction, carry firearms or operate official police radios. Therefore, although the sentence has been fully served, this Court has jurisdiction to consider the present contentions. See, United States v. Morgan, 346 U. S. 502 (1954); McDonald v. United States, 356 F.2d 980 (10th Cir. 1966) cert. denied 385 U. S. 936 (1966); Blair v. United States, 349 F.2d 405 (10th Cir. 1965). Further, Movant did not file a direct appeal in these proceedings and the time for appeal has passed, however, the Court being fully advised in the premises finds that there was no deliberate bypassing of a known right that would preclude relief herein. Belton v. United States, 429 F.2d 933 (10th Cir. 1970).

The new evidence presented by the motion overruled May 14, 1976, was in the affidavit of the Manager of the Holiday Inn West in Tulsa, Oklahoma, that the check-out card for the Defendant indicates that the "check out" was accomplished by a cleaning lady employed by the motel who had found the room vacant while making her rounds to clean, supporting Defendant's trial testimony of his time of departure from the motel room. The affidavit of one Jimmy Benton states that while Mr. Benton was incarcerated in the Creek County Jail on or near August 15, 1975, that in a conversation with the prisoner, Police Officer Joe Collins stated, "I am out to get Pat Reynolds." which supports Defendant's contention that these charges were politically motivated.

The new evidence presented with the motion overruled by Order of February 7, 1977, was payroll tax records demonstrating that the alien in question earned taxable FICA wages during the years 1974 and 1976, and that he possessed and presented what appeared to be a valid Social Security Card bearing No. 460-23-9786. This Social Security Card is dissimilar from the one introduced at trial in that the newly discovered card is typewritten and appears in all respects to be valid. The affidavit of Robert L. Goldberg, manager of the American Iron and Metals Company of Dallas, Texas, is that the alien who Defendant was charged with harboring had been employed by that company from November 29, 1973, to August 16, 1974, and that the alien had presented to that company

during his tenure a social security card with the same numbers as relied upon by Defendant for the aliens employment at Reynolds Supply Company, Inc. of Sapulpa, Oklahoma. Defendant presents evidence that under this same social security number Federal Tax Forms were filed, taxes and social security payments were withheld and paid to the United States Treasury, and that Defendant maintained payroll records on the alien. Proof is also presented that the testimony of the alien that he paid the bill incurred at the Holiday Inn on July 15, 1975, was false.

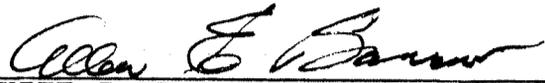
Presented as new evidence in support of the present motion are affidavits of Bryce Coleman, Sheriff of Creek County, and I. E. Hardee, an employee of the Sapulpa Police Department, stating that the Defendant brought the aliens in his employe, of which the alien Juan Olivares Padilla in question was a member, collectively to them advising the officers that the aliens had what appeared to be valid social security numbers and asking if there were any rules or regulations that must be complied with to employ them. He was told by the Officers that nothing further need be done. An affidavit of the trial attorney for the Movant states that because of personal matters, he was prevented from marshalling evidence, interviewing witnesses and giving Movant's case the full and undivided attention the defense required to insure a fair and impartial trial.

The Court finds in considering the newly discovered evidence presented, recalling the trial, and upon again reviewing the file, that although the newly discovered evidence presented was discoverable with reasonable diligence prior to trial, the trial attorney takes unto himself the blame for this failure and the Defendant should not, under the circumstances before the Court, be held accountable for the late discovery of the evidence. The sum total of the evidence presented since the verdict is more than merely impeaching or cumulative, it is material to the issues, and it is such as would probably have produced an acquittal. Therefore, the Court finds that to achieve justice under the compelling circumstances herein the conviction on Count Five of the indictment in Case No. 75-CR-129 should be set aside and held for naught.

IT IS, THEREFORE, ORDERED that the conviction and sentence of Harry Anson Reynolds on Count Five of the indictment in Case No. 75-CR-129 be

and it is hereby set aside and held for naught. Said Defendant having been previously acquitted notwithstanding the verdict on Counts One, Two, Three and Four of the indictment, the case is dismissed.

Dated this 28th day of August, 1978, at Tulsa, Oklahoma.



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

FILED

AUG 28 1978

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

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

BILL WAYBOURN and DON EAST,)
d/b/a EAST-WAYBOURN DISTRIBUTING,)
)
Plaintiffs,)
)
vs.)
)
SYKES FLOORING COMPANY, INC.,)
)
Defendant.)

No. 77-C-446-C

DISMISSAL WITH PREJUDICE

Come now the plaintiffs and hereby dismiss the above
cause with prejudice.

DATED this 23 day of August, 1978.



Attorney for Plaintiff

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

BILL WAYBOURN and DON EAST,)
d/b/a EAST-WAYBOURN DISTRIBUTING,)
)
Plaintiff,)
)
vs.)
)
SYKES FLOORING COMPANY, INC.,)
)
Defendant.)

No. 77-C-446-C

FILED

AUG 25 1978

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

O R D E R

Having reviewed the Joint Application to Allow the Entry of a Dismissal With Prejudice and for good cause shown, this Court finds that the Application should be granted.

IT IS THEREFORE ORDERED that the parties be allowed to enter upon the Court records the Dismissal With Prejudice executed by the attorney for the Plaintiffs herein.

S/H. Dale Cook
JUDGE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

DATED this 25th day of August, 1978.

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

DONNA L. KIDWELL,)
)
 Plaintiff,)
)
 vs.)
)
 SIDAL ALUMINUM CORPORATION,)
 ALLOY SERVICE CENTER DIVISION,)
)
 Defendant.)

No. 78-C-138-C **FILED**

AUG 28 1978

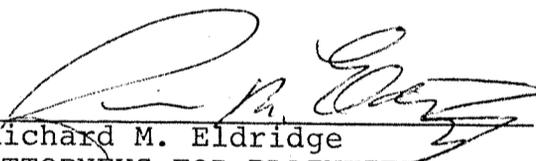
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL

COMES NOW the Plaintiff, Donna L. Kidwell, by and through her attorneys, Jacobus, Green & Eldridge, by Richard M. Eldridge, and the Defendant, Sidal Aluminum Corporation Alloy Service Center Division, by and through its attorney, H. Richard Raskin, and hereby jointly and mutually stipulate and agree as follows:

That the Plaintiff and Defendant jointly and mutually stipulate and agree that this Cause has been settled and that Plaintiff does herewith dismiss, with prejudice to future actions, her First and Second Causes of Action, and any other relief to which she might be entitled, with prejudice to future action. That the Defendant does herewith accept said dismissal with prejudice.

JACOBUS, GREEN & ELDRIDGE

By: 

Richard M. Eldridge
ATTORNEYS FOR PLAINTIFF
201 West Fifth, Suite 411
Tulsa, Oklahoma 74103
(918) 587-0174


H. Richard Raskin
ATTORNEY FOR DEFENDANT
201 West Fifth, Suite 411
Tulsa, Oklahoma 74103
(918) 587-0174

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

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

JACQUELINE HOLDMAN,)
and HOUSEHOLD FINANCE)
CORPORATION, a corporation,)

Defendants.)

CIVIL ACTION NO. 78-C-269-B

FILED

AUG 28 1978

JUDGMENT OF FORECLOSURE

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

THIS MATTER COMES on for consideration this 28th
day of August, 1978, the Plaintiff appearing by Robert P. Santee,
Assistant United States Attorney; the Defendant, Jacqueline
Holdman, appearing by her attorney, Gary Lee Hobough; and the
Defendant, Household Finance Corporation, a corporation, appearing
not.

The Court being fully advised and having examined the file
herein finds that Defendants, Jacqueline Holdman and Household
Finance Corporation, a corporation, were served with Complaint and
Summons on June 29, 1978, and June 19, 1978, respectively, both as
appears from the United States Marshal's Service herein.

It appearing that the Defendants, Jacqueline Holdman and
Household Finance Corporation, 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 upon the following described real property
located in Tulsa County, Oklahoma, within the Northern Judicial
District of Oklahoma:

Lot Three (3), Block Seven (7), Suburban
Acres Third Addition to the City of Tulsa,
Tulsa County, State of Oklahoma, according
to the recorded Plat thereof.

THAT the Defendant, Jacqueline Holdman, did, on the 3rd
day of September, 1973, execute and deliver to the Administrator

of Veterans Affairs, her mortgage and mortgage note in the sum of \$9,750.00, with 4 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, Jacqueline Holdman, made default under the terms of the aforesaid mortgage note by reason of her 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 \$9,040.69, as unpaid principal with interest thereon at the rate of 4 1/2 percent per annum from January 1, 1978, 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, Jacqueline Holdman, in personam, for the sum of \$9,040.69, with interest thereon at the rate of 4 1/2 percent per annum from January 1, 1978, 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 Defendant, Household Finance Corporation, 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 appraisal 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, each of the Defendants 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.


UNITED STATES DISTRICT JUDGE

APPROVED


ROBERT P. SANTEE
Assistant United States Attorney

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)

vs.)

CIVIL ACTION NO. 78-C-331-C

VERNON C. BUCKNER, ALGERTHA B.)
BUCKNER, THE LOMAS & NETTLETON)
COMPANY, a corporation, NEIL)
WILDEROM, d/b/a THRIFTY RENT-)
A-CAR, COUNTY TREASURER,)
Washington County, Oklahoma,)
and BOARD OF COUNTY)
COMMISSIONERS, Washington)
County, Oklahoma,)
Defendants.)

FILED

AUG 25 1978

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

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 25th
day of August, 1978, the Plaintiff appearing by Robert P. Santee,
Assistant United States Attorney; and the Defendant, Neil Wilderom,
d/b/a Thrifty Rent-A-Car, appearing by his attorney, Jack Heskett;
the Defendant, The Lomas & Nettleton Company, appearing by its
attorney, Kenneth C. Dippel; and the Defendants, Vernon C. Buckner,
Algertha B. Buckner, County Treasurer, Washington County, Oklahoma,
and Board of County Commissioners, Washington County, Oklahoma,
appearing not.

The Court being fully advised and having examined
the file herein finds that Defendants, Vernon C. Buckner and
Algertha B. Buckner, were served with Summons and Complaint and
Summons and Amendment to Complaint on July 18, 1978 and August 3,
1978, respectively; that Defendant, The Lomas & Nettleton Company,
was served with Summons and Complaint and Summons and Amendment to
Complaint on July 24, 1978 and August 7, 1978, respectively; that
Defendant, Neil Wilderom, d/b/a Thrifty Rent-A-Car, was served with
Summons and Complaint and Summons and Amendment to Complaint on
July 18, 1978 and August 3, 1978, respectively; and that Defendants,
County Treasurer, Washington County, Oklahoma, and Board of County
Commissioners, Washington County, Oklahoma, were each served with
Summons, Complaint and Amendment to Complaint on August 3, 1978; all
as appears on the United States Marshal's Service herein.

It appearing that the Defendant, The Lomas & Nettleton Company, has filed its Disclaimer on July 27, 1978; that Defendant, Neil Wilderom, d/b/a Thrifty Rent-A-Car, has filed his Disclaimer on August 8, 1978; and that Defendants, Vernon C. Buckner and Algertha B. Buckner, 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 Washington County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Thirty (30), Block Twenty-Six (26),
Oak Park Village, Section II, an Addition
to the City of Bartlesville, Oklahoma, as
per recorded plat of said Addition on file
in the Office of the County Clerk, Wash-
ington County, Oklahoma.

THAT the Defendants, Vernon C. Buckner and Algertha B. Buckner, did, on the 29th day of September, 1969, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$10,800.00, with 7 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, Vernon C. Buckner and Algertha B. Buckner, 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 \$9,872.05, as unpaid principal with interest thereon at the rate of 7 1/2 percent per annum from September 29, 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 Washington, State of Oklahoma, from Defendants, Vernon C. Buckner and Algertha B. Buckner, the sum of \$24.99, plus interest according to law for personal property taxes for the year(s) 1971 and 1972, and that Washington 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, Vernon C. Buckner and Algertha B. Buckner, in personam, for the sum of \$9,872.05, with interest thereon at the rate of 7 1/2 percent per annum from September 29, 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 Washington have and recover judgment, in rem, against Defendants, Vernon C. Buckner and Algertha B. Buckner, for the sum of \$ 24.99, 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 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 appraisal 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.

18/H. Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED

Robert P. Santee
ROBERT P. SANTEE
Assistant United States Attorney

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JOHN R. McCAUSE, CHARLOTTE R.)
 McCAUSE, LIONEL L. ZUGLER and)
 MARIE V. ZUGLER,)
)
 Defendants.)

CIVIL ACTION NO. 78-C-211-C

FILED

AUG 25 1978

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

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 25th
day of August, 1978, the Plaintiff appearing by Robert P. Santee,
Assistant United States Attorney; and the Defendants, John R.
McCause, Charlotte R. McCause, Lionel L. Zugler and Marie V.
Zugler, appearing not.

The Court being fully advised and having examined the
file herein finds that Defendants, John R. McCause and Charlotte
R. McCause, were served by publication, as appears from the Proof
of Publication filed herein; and that Defendants, Lionel L. Zugler
and Marie V. Zugler, were served with Complaint and Summons on
May 15, 1978, both as appears from the United States Marshal's
Service herein.

It appearing that the Defendants, John R. McCause,
Charlotte R. McCause, Lionel L. Zugler and Marie V. Zugler, 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 Four (4), COURSEY ADDITION, an Addition
in Tulsa County, State of Oklahoma, according
to the recorded Plat thereof.

THAT the Defendants, John R. McCause and Charlotte R. McCause, did, on the 10th day of May, 1974, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$9,250.00, with 7 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, John R. McCause and Charlotte R. McCause, 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 \$8,957.79, as unpaid principal with interest thereon at the rate of 7 percent per annum from May 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 Defendants, John R. McCause and Charlotte R. McCause, in rem, for the sum of \$8,957.79, with interest thereon at the rate of 7 percent per annum from May 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 Defendants, Lionel L. Zugler and Marie V. Zugler.

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 appraisal 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.

15/14 Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED



ROBERT P. SANTEE
Assistant United States Attorney

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

LEE EARL HAYES,)
)
 Plaintiff,)
)
 vs.)
)
 HOFFMANN-LaROCHE, INC.,)
)
 Defendant.)

No. 77-C-534-C ✓

FILED

AUG 25 1978 *hm*

O R D E R

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

Plaintiff in the above-captioned case alleges that he had an oral contract of permanent employment with the defendant and that the defendant wrongfully terminated that employment in breach of the contract. Plaintiff prays for an award of money damages as relief for the alleged wrongful termination. The defendant has counter-claimed against the plaintiff and plaintiff's ex-wife, who has been joined as an additional party defendant to the counterclaim, for the amount allegedly due and owing to the defendant on a promissory note. Now before the Court is the defendant's Motion for Summary Judgment on plaintiff's claim and defendant's counterclaim.

In Redhouse v. Quality Ford Sales, Inc. 511 F.2d 230 (10th Cir. 1975) the Tenth Circuit Court of Appeals reiterated the following criteria in regard to a motion for summary judgment:

"Summary judgment cannot be awarded when there exists a genuine issue as to a material fact. Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), White Motor Co. v. United States, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963), United States v. Diebold, Incorporated, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962), Ando v. Great Western Sugar Company, 475 F.2d 531 (10th Cir. 1973). . . . Summary judgment does not serve as a substitute for trial, nor can it be employed so as to require parties to litigate via affidavits. Smoot v. Chicago, Rock Island and Pacific Railroad Company, 378

F.2d 879 (10th Cir. 1967). It is considered a drastic relief to be applied with caution. Jones v. Nelson, 484 F.2d 1165 (10th Cir. 1973), Ando v. Great Western Sugar Company, supra. Pleadings, therefore, must be liberally construed in favor of the party opposing summary judgment. Harman v. Diversified Medical Investments Corporation, 488 F.2d 111 (10th Cir. 1973), Smoot v. Chicago, Rock Island and Pacific Railroad Company, supra. Appellate courts must consider factual inferences tending to show triable issues in a light most favorable to the existence of such issues. Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 494 F.2d 168 (10th Cir. 1974)." 511 F.2d at p. 234.

Rule 56(c) of the Federal Rules of Civil Procedure provides that

"[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The defendant bases its motion in regard to plaintiff's claim on three grounds: 1) Plaintiff's purported oral contract for a "permanent position" or "permanent employment" is void and unenforceable under the Statute of Frauds and lacks mutuality; 2) Plaintiff's actions in accepting a sales position with the defendant in its Pantene Division, following his transfer from the Fine Chemicals Division, would constitute a modification or waiver of any purported claim for permanent employment; 3) No evidence representatives of defendant have express or implied authority to offer "permanent employment" as asserted by plaintiff. Construing the pleadings, interrogatories, and depositions before it liberally in favor of the plaintiff, it is the Court's holding that the defendant is entitled to judgment on plaintiff's claim as a matter of law under the first ground raised above, as appears more fully hereinafter.

As a preliminary matter, the plaintiff has raised a conflict of laws question. The federal courts must apply the conflict of laws rules of the States in which they sit.

See Klaxon Co. v. Stentor Elec. Manu. Co., Inc., 313 U.S. 487 (1941). Plaintiff cites Monahan v. New York Life Ins. Co., 26 F.Supp. 859 (W.D. Okla. 1939) for the proposition that a contract is interpreted according to the law of the place of performance. The Court cannot dispute that statement. However, the question before this Court is whether the contract falls within the Statute of Frauds, which is a question going to the validity of the contract. In Oklahoma, the law of the place where the contract is made governs its validity. See Caribbean Mills, Inc. v. McMahon, 217 F.Supp. 639 (N.D. Okla. 1963). Even though there are cases from Oklahoma which hold that the law of the place of performance controls as to the validity of a contract, e.g. Collins v. Holland, 34 P.2d 587, 169 Okla. 10 (1934), such a rule would be impossible to apply in this case because plaintiff's employment contract was to be performed in several states. A contract is made in the place where final assent is given. See Gen'l. Elec. Co. v. Folsom, 332 P.2d 950 (Okla. 1958). Since the final assent to the contract was given in Oklahoma, the Court will apply Oklahoma law to determine whether the contract falls within the Statute of Frauds.

Construed most favorably to the plaintiff, the facts are as follows: The plaintiff has been employed as a salesman in different divisions of the defendant corporation since about August of 1972. This employment has been somewhat sporadic, due to the sale or closing of these divisions and the consequent termination of the plaintiff from their employ. However, as the Court understands this lawsuit, it is concerned only with plaintiff's employment in defendant's Fine Chemical Division from about April, 1974 to December, 1975. In early 1974, plaintiff was working for defendant's Toiletries Division out of Tulsa, Oklahoma. It was at about that time that that division was closed out. Nevertheless, plaintiff was kept on salary, retained full benefits, and

was allowed the use of a company car until he should find another job. He was also allowed an expense account should he desire to travel out of town for a job interview.

In March, 1974, plaintiff was offered and accepted a sales position with United States Surgical Instruments Company. He was to be based in Tulsa. The next day, plaintiff was offered the position in defendant's Fine Chemicals Division. Plaintiff had discussed this Fine Chemicals position with department heads and the management of defendant before he accepted the U. S. Surgical position. Plaintiff also accepted the Fine Chemicals position. At the time plaintiff was offered and accepted the Fine Chemicals position, plaintiff informed defendant's representatives that he had been offered a position with U. S. Surgical, but not that he had accepted the position.

Because the plaintiff had not definitely decided which of the two positions he wanted, he flew to New York to participate in U. S. Surgical's training program. It was during this time that plaintiff was guaranteed a permanent position or permanent employment with defendant's Fine Chemicals Division. He was to be located in San Francisco. It was represented to plaintiff that he would have this position as long as he did the job or until he retired. Based upon these representations, the plaintiff decided to stay with the defendant. Plaintiff sold his home in Tulsa, Oklahoma, making about a \$2,000.00 profit, and moved to San Francisco. The defendant voluntarily loaned plaintiff \$10,000.00 to enable him to purchase a home in the San Francisco area. Plaintiff never finished the U. S. Surgical training program, which was a prerequisite to employment with that company.

In November, 1975, plaintiff was informed that he would have to move to Los Angeles. Plaintiff was very disturbed by this development, but nevertheless agreed to move.

Plaintiff began preparations for the move to Los Angeles, including the sale of his San Francisco home. In December, 1975, defendant's top management began to "clean back" the sales force. Many of the sales personnel were terminated, including the plaintiff. It is the plaintiff's belief that those representatives of the defendant who were responsible for the offer of permanent employment, made that offer in good faith and never intended to mislead him. Plaintiff does not hold those persons responsible for his termination.

In Dicks v. Clarence L. Boyd Co., 205 Okla. 383, 238 P.2d 315 (1951), the court held that an oral contract for "permanent employment as long as [the plaintiff] was able to continue actively at work" fell within the Oklahoma Statute of Frauds, which provides:

"The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent:

1. An agreement that, by its terms, is not to be performed within a year from the making thereof. . . ." 15 O.S. § 136.

The court also reiterated its earlier holding in McKelvy v. Choctaw Cotton Oil Co., 52 Okla. 81, 152 P. 414 (1915), where the court defined the term "permanent employment":

"'Permanent employment' means employment for an indefinite period which may be severed by either party. As a general rule the word 'permanent,' as applied to employment, is construed to mean that the employe [sic] shall retain the position only until one of the contracting parties shall elect to terminate it, and this election may be an arbitrary one without assigning any cause therefor. This construction is uniformly placed thereon, unless it appears that the contract was entered into with some valuable consideration as its basis, as where one agrees to give another permanent employment in settlement of a claim for personal injuries and like instances." (Citations omitted). 152 P. at p.415.

The Dicks court held that the contract before it was likewise terminable at will because the plaintiff's promise to perform the services required by the contract did not constitute sufficient consideration under the rule.

In Morris Plan Co. v. Campbell, 180 Okla. 11, 67 P.2d 52 (1937), the court held that an oral employment contract falling with 15 O.S. § 136 was unenforceable on account of the statute despite the fact that the employee had rendered partial performance under that contract.

It therefore appears that under Oklahoma law, the instant contract is also invalid because of the Statute of Frauds. This case is readily distinguishable from Cherokee Labs., Inc. v. Pierson, 415 F.2d 85 (10th Cir. 1969), where the court held that a "lifetime" employment contract did not fall within the Statute of Frauds.

"All parties to the action agreed, and the minutes of December 17, 1962, specifically stated, that the period of the contract was the life of Pierson. Upon his death the oral contract was to come to an end and Cherokee was to be relieved from any additional obligations thereunder, except those that had accrued before pierson's death.

It is a well settled general rule that an oral agreement, the continued performance of which is dependent upon the happening of a stated contingency, is not within the statute of frauds, if the contingency is one that may occur within one year. This is true, although the contingency may not, in fact, happen until after the expiration of the year.

The Supreme Court of Oklahoma follows the general rule, as stated above. In Roxana Petroleum Co. v. Rice, 109 Okl. 161, 235 P. 502, Syllabus 6 by the Court, which in Oklahoma is the law of the case, states:

"An oral agreement the performance of which is dependent upon the happening of a certain contingency is not within the statute of frauds, if the contingency is such as may occur within one year, and this is true, although the contingency may not, in fact, happen until after the expiration of the year, and although the parties may not have expected that it would occur within that period. It is sufficient if the possibility of performance within the prescribed time existed."

Obviously, the rule applies to a contract in which such contingency is the death of one of the parties." 415 F.2d at p.92.

The continued performance of plaintiff's contract was not dependent upon the happening of any stated contingency which could have occurred within one year. The plaintiff may have

understood his contract to be "for life," but this was never stated and agreed upon by the parties.

Furthermore, plaintiff's action for wrongful termination of his employment contract will not lie because the contract lacks mutuality. Applying Oklahoma law, the United States District Court for the Western District of Oklahoma held that

"where there is a contract of employment which is terminable at will by either of the parties, an action for damages for wrongful termination will not lie under Oklahoma law for lack of mutuality."
Freeman v. Chicago, Rock Island and Pac. R.R. Co., 239 F.Supp. 661, 662 (W.D. Okla. 1965).

Plaintiff argues that when he gave up his position with U. S. Surgical and moved his family to San Francisco to accept the Fine Chemicals position, he thereby provided consideration for the employment contract. Plaintiff cites several California decisions for the proposition that a contract for permanent employment is not terminable at will when it is supported by some consideration other than the services to be rendered. Fibreboard Prods., Inc. v. Townsend, 202 F.2d 180 (9th Cir. 1953). This conclusion is also voiced in McKelvy, supra. In Millsap v. Nat'l Funding Corp. of Ca., 135 P.2d 407 (Cal. App. 1943), the court found sufficient consideration to support a contract of permanent employment when the employee refused to give up his present employment unless the prospective employer expressly agreed to give him permanent employment. In Stone v. Burke, 244 P.2d 51 (Cal. App. 1952), the court likewise held that the employee's giving up his existing employment was an inducement to the employer for the latter's promise of permanent employment and that therefore there was sufficient consideration to support the contract for permanent employment. These cases would indicate that plaintiff's contract was not lacking in mutuality had the defendant been induced to promise permanent employment to the plaintiff because plaintiff

promised to give up his position with U. S. Surgical. Contrary to the statement made in plaintiff's responsive brief, it is clear to the Court from plaintiff's deposition that defendant's representatives were not aware that plaintiff had accepted a position with U. S. Surgical when their offer was made to and accepted by plaintiff. Plaintiff certainly did not agree to give up his position with U. S. Surgical at that time. That position was not sacrificed until some time later, while plaintiff was attending the U. S. Surgical training school.

In any event, those cases were not concerned with the Statute of Frauds. To escape the prohibitions of the Statute of Frauds, the plaintiff must show that the consideration he has given or the detriment he has suffered rises to the level required by the doctrine of equitable estoppel. In B.F.C. Morris Co. v. Mason, 171 Okla. 589, 39 P.2d 1 (1935), an argument very similar to that raised by the present plaintiff was raised in another suit involving an oral employment contract. The court rejected that argument on the basis of its earlier holding in St. Louis Trading Co. v. Barr, 168 Okla. 184, 32 P.2d 293 (1934).

"It is an indispensable element of equitable estoppel that the person relying thereon must have been induced to act or alter his position to his detriment or injury, and, where equitable estoppel is relied on to preclude another from asserting the statute of frauds as a defense to an oral contract not to be performed within a year, such injury must be unjust and unconscionable, and such that there is no complete and adequate remedy at law available to the person asserting the equitable estoppel." 39 P.2d at p.3.

The court held that the plaintiff had not suffered an "unjust and unconscionable injury."

The similarity between that case and the case at bar is noteworthy. On the strength of an oral contract of employment, the plaintiff in B.F.C. Morris gave up his home and job in one state, and moved to another state. Here we have a plaintiff who gave up a position and a home in Tulsa, Oklahoma and moved himself and his family to San Francisco to begin

his employment with defendant's Fine Chemicals Division. The plaintiff had not yet begun his employment in the position he gave up. In fact, he had not even completed the training program that was a prerequisite to that employment. Plaintiff sold his home in Tulsa and made a \$2,000.00 profit. The defendant voluntarily loaned him \$10,000.00 to purchase a new home in San Francisco. It is difficult to see how the plaintiff has suffered any "unconscionable or unjust" injury that would take his oral contract of permanent employment out of the Statute of Frauds.

The defendant is also entitled to summary judgment on its counterclaim. In his disposition, the plaintiff admits that he signed a promissory note payable to the defendant for \$10,000.00. He admits that the amount alleged in the counterclaim remains unpaid and that the defendant has made demand for that amount. The defenses raised in plaintiff's reply to the counterclaim are not supported by the facts as disclosed by plaintiff's deposition. The plaintiff simply has no legal defense to the counterclaim.

For the foregoing reasons, it is therefore ordered that the defendant's Motion for Summary Judgment on plaintiff's claim and defendant's counterclaim is hereby sustained.

It is so Ordered this 25th day of August, 1978.


H. DALE COOK
United States District Judge

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA AUG 25 1978

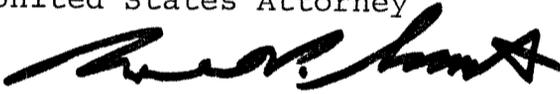
Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.	)	CIVIL ACTION NO. 78-C-348-B
)	
)	
TERRY G. LEE,)	
)	
Defendant.)	

NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff herein, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action, without prejudice.

Dated this 25th day of August, 1978.

UNITED STATES OF AMERICA
HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JERU A. SALAAM, DOROTHY I.
SALAAM and ROBERT B.
COPELAND, Attorney at Law,

Defendants.

CIVIL ACTION NO. 78-C-212-C

FILED

AUG 25 1978

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

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 25th
day of August, 1978, the Plaintiff appearing by Robert P. Santee,
Assistant United States Attorney; the Defendant, Robert P. Copeland,
Attorney at Law, appearing pro se; and the Defendants, Jeru A.
Salaam and Dorothy I. Salaam, appearing not.

The Court being fully advised and having examined the
file herein finds that Defendant, Jeru A. Salaam was served by
publication as appears from the Proof of Publication filed herein;
that Defendant, Dorothy I. Salaam, was served with Complaint and
Summons on May 17, 1978; and that Defendant, Robert B. Copeland,
Attorney at Law, was served with Complaint and Summons on May 24,
1974, both as appears from the United States Marshal's Service
herein.

It appearing that the Defendant, Robert B. Copeland,
Attorney at Law, has filed his Disclaimer on May 31, 1978; and that
Defendants, Jeru A. Salaam and Dorothy I. Salaam, 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 Twenty-four (24), Block Five (5),
NORTHRIDGE, an Addition in Tulsa
County, State of Oklahoma, according
to the recorded Plat thereof.

THAT the Defendants, Jeru A. Salaam and Dorothy I. Salaam, did, on the 1st day of September, 1976, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$11,750.00, with 9 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Jeru A. Salaam and Dorothy I. Salaam, 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 \$11,669.59, as unpaid principal with interest thereon at the rate of 9 percent per annum from October 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 Defendants, Jeru A. Salaam and Dorothy I. Salaam, in rem, for the sum of \$11,669.59, with interest thereon at the rate of 9 percent per annum from October 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 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 appraisal 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.

H. Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED

Robert P. Santee
ROBERT P. SANTEE
Assistant United States Attorney

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

JOSEPH H. LAWRENCE, By and Through
ANDREW T. DALTON, JR., Guardian,

Plaintiff,

-vs-

OKLAHOMA PUBLIC WELFARE
COMMISSION, DEPARTMENT OF
INSTITUTIONS, SOCIAL AND RE-
HABILITATIVE SERVICES, and
L. E. RADER, Director, Department
of Institutions, Social and Rehabilitative
Services, and REGINALD D. BARNES,
Chairman, ROBERT M. GREER, Vice-
Chairman, WILBUR D. CAVE, W. E.
FARHA, LEON N. GILBERT, M.D.,
MRS. ROBERT I. HARTLEY, DEAN C.
JAMES, SR., JOE D. VOTO, and
CARL E. WARD, O.D., Commissioners,

Defendants.

FILED

AUG 23 1978

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

Civil Action

No. 78-C-78-C

Notice of
DISMISSAL

TO: MR. MICHAEL J. STANCAMPIANO,
Attorney for the defendants, Oklahoma
Public Welfare Commission, et al.

WHEREAS, the above-entitled action was commenced on February 21, 1978,
and

WHEREAS, the defendants have filed neither an answer nor a motion for
summary judgment herein; and

WHEREAS, counsel for the defendants has been notified of plaintiff's inten-
tion of dismissing the above-styled cause without prejudice and indicates he has no
objection to such dismissal;

NOTICE IS HEREBY GIVEN that the plaintiff hereby dismisses the above-
entitled action without prejudice.

Application to Withdraw as Attorneys of Record, stating:

"Come now Davis and Thompson, Attorneys at Law, P.O. Drawer 487, Jay, Oklahoma 74346, and represent and state to the Court that they are the attorneys of record for the defendant in the above captioned case. That this case was dismissed by the Court for failure to prosecute, said dismissal having been made on the 7th day of July, 1977, that being the last regular motion docket of the Court. That subsequent to the above mentioned dismissal by the Court, the undersigned attorneys notified their client, as well as opposing counsel, of their intention to withdraw as attorneys of record, and neither opposing counsel or clients had any objection to such withdrawal. That the distance involved between Jay, Oklahoma, and Tulsa, Oklahoma, makes it impracticable for them to continue representing the defendant should this case be refiled by the plaintiffs."

On August 3, 1977, this Court granted said application and allowed said attorneys to withdraw.

A review of the file shows that this case has once been dismissed for failure to prosecute. The Court further notes that the default complained of herein was granted with the following finding by the Court:

"Plaintiffs have applied to this Court for a Judgment by Default pursuant to Rule 52(b)(2) of the F.R.C.P. by reason of the Defendants' failure to appear as ordered by this Court or obtain counsel in this cause, and the Court finds that Plaintiffs' Application should be granted and judgment should be entered for the Plaintiffs by reason of the default of the Defendant."

The Court further notes that under date of July 26, 1978, received by the Court Clerk on July 31, 1978, the following letter was directed to the Court Clerk by plaintiffs' counsel:

"This law firm, together with the Honorable Bert C. McElroy, is counsel of record for Plaintiffs in the styled Complaint, in which final Judgment was entered on the 12th day of July, 1978.

"Please cause execution to issue for the Judgment and forward the original, together with three certified copies thereof, together with your statement for any costs of this service."

Ab initio, the Court notes that its reference to Rule 52(b)(2) is a typographical error and should read Rule 55(b)(2) in the Order entered July 12, 1978.

Notice was given that this case was set on the disposition docket before the Honorable Allen E. Barrow on February 1, 1978, for failure of the parties to file pre-trial order, due on October 7, 1977. The Magistrate heard the disposition docket and

on the same date as the disposition docket the plaintiff filed an Application for Further Enlargement of Time to File Pre-Trial Order, or in the Alternative for Default Judgment. The Magistrate (to whom the pretrial was referred) set the case for pretrial on February 21, 1978, and it was reset for March 6, 1978. On March 6, 1978, the defendants did not appear and on June 20, 1978, the Magistrate filed his Findings and Recommendations that default judgment be entered against the defendants. On July 12, 1978, with no objections having been filed by the defendants to said Findings and Recommendations, the Court entered the Judgment now sought to be set aside.

The file reflects that defendants were given proper notice of all the above proceedings.

In Wright & Miller, Federal Practice and Procedure, Volume 10, ¶2693 it is said:

"In exercising discretion under Rule 55(c), the court will be very cognizant of the competing policies and values that are relevant to entering defaults and setting them aside. Both the default entry and judgment play an important role in the maintenance of an orderly, efficient judicial system. They are significant weapons for enforcing compliance with the rules of procedure and therefore facilitate the speedy determination of litigation. The default procedure offers a useful remedy to a good faith litigant who is confronted by an obstructionist adversary. It also represents a means of encouraging an unwilling or uncooperative party to honor the rules established for litigation in the federal courts and provides the nondefaulting party an expeditious path to follow when his adversary does not do so or simply abandons the contest. But if default is to be an effective sanction, relief under Rule 55(c) cannot be granted too readily."

It is further said:

"***As a result, the general rule is that on a motion for relief from the entry of default or a default judgment, all doubts should be resolved in favor of the party seeking relief. This attitude is re-enforced by a feeling that a default judgment is a drastic method of effecting compliance with the rules of procedure and a recognition of the fact that the equitable powers of the court enable the fashioning of less Draconian remedies.

But it is further stated:

"***On the other hand, when the nondefaulting party endeavors to encourage the other party to respond, provides sufficient opportunity for the opponent to correct the default, or does not press too rapidly for the entry of the default and the subsequent judgment, the court typically will conclude that there is no reason to give the defaulting party relief. Similarly, when the party in default engages in delaying or obstructive tactics or wilfully ignores the processes of the court, a district judge generally will be reluctant to grant

a motion to set aside the entry of judgment or will do so only on terms that will alleviate any inequities caused by the defaulter's behavior."

In his recommendations that default be entered, the Magistrate made the following findings:

"1. That heretofore on the 9th day of October, 1975, the Court ordered the parties to conduct between themselves a Pre-Trial conference and to submit to the Court on or before the 26th day of November, 1975, a Pre-Trial Order agreed to by both parties or, in the alternative, if the parties were not able to agree thereon, that each party should submit to the Court on or before the 26th day of November, 1975, a proposed Pre-Trial Order. Included in said Order was a directive to the parties to complete all discovery three weeks prior to trial date. That from and after the 19th day of November, 1975, the Plaintiff has submitted to the Court numerous applications for Enlargement of Time to File Pre-Trial Order wherein Plaintiff has set forth the fact that such Pre-Trial could not, in the exercise of due diligence, be completed without completion of discovery, including Depositions of the Defendant.

"2. That counsel for Plaintiff and Defendant has corresponded on numerous occasions in an attempt to mutually agree upon a time for taking of Deposition of the Defendant but that Defendant had failed to agree to the taking of such Deposition.

"3. That prior to July 13, 1977, Defendant's counsel filed herein his Application to withdraw as Attorney of Record for Defendant and that no Entry of Appearance has been made herein since said date by any counsel for Defendant.

"4. After the withdrawal of Defendant's counsel, Plaintiff served upon the Defendant a Notice of Taking Depositions, the original of which has been filed in this cause together with a return receipt indicating of delivery upon the Defendant, which notice provided for taking of Depositions on or about the 14th day of October, 1977; that Defendant failed to appear for Depositions on said date as provided in said notice and has not, since the withdrawal of his counsel, obtained counsel and has not appeared at any hearing ordered by this Court since the 13th day of July, 1977.

"5. That from and after the 13th day of July, 1977, the Court has from time-to-time enlarged time for the filing of a Pre-Trial Order herein and that no such order has been filed but that Plaintiff's counsel has appeared when ordered by this Court and has made known to the Court Plaintiff's inability to prepare and file a proposed Pre-Trial Order in the absence of completion of discovery.

"6. That Plaintiff has exercised due diligence in an effort to complete discovery and prepare and file Pre-Trial Orders herein and has been unable to do so by reason of Defendant's failure to appear for Depositions after proper service of notice upon him and by reason of the lack of counsel for Defendant in this cause."

Although this Court is cognizant of and in agreement that the imposition of a default judgment is a drastic sanction, nevertheless, the documented record in this case reveals that the defendants have engaged in "delaying or obstructive tactics" and has wilfully ignored the processes of this Court.

a motion to set aside the entry of judgment or will do so only on terms that will alleviate any inequities caused by the defaulter's behavior."

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"2. That counsel for Plaintiff and Defendant has corresponded on numerous occasions in an attempt to mutually agree upon a time for taking of Deposition of the Defendant but that Defendant had failed to agree to the taking of such Deposition.

"3. That prior to July 13, 1977, Defendant's counsel filed herein his Application to withdraw as Attorney of Record for Defendant and that no Entry of Appearance has been made herein since said date by any counsel for Defendant.

"4. After the withdrawal of Defendant's counsel, Plaintiff served upon the Defendant a Notice of Taking Depositions, the original of which has been filed in this cause together with a return receipt indicating of delivery upon the Defendant, which notice provided for taking of Depositions on or about the 14th day of October, 1977; that Defendant failed to appear for Depositions on said date as provided in said notice and has not, since the withdrawal of his counsel, obtained counsel and has not appeared at any hearing ordered by this Court since the 13th day of July, 1977.

"5. That from and after the 13th day of July, 1977, the Court has from time-to-time enlarged time for the filing of a Pre-Trial Order herein and that no such order has been filed but that Plaintiff's counsel has appeared when ordered by this Court and has made known to the Court Plaintiff's inability to prepare and file a proposed Pre-Trial Order in the absence of completion of discovery.

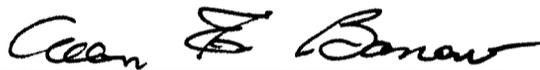
"6. That Plaintiff has exercised due diligence in an effort to complete discovery and prepare and file Pre-Trial Orders herein and has been unable to do so by reason of Defendant's failure to appear for Depositions after proper service of notice upon him and by reason of the lack of counsel for Defendant in this cause."

Although this Court is cognizant of and in agreement that the imposition of a default judgment is a drastic sanction, nevertheless, the documented record in this case reveals that the defendants have engaged in "delaying or obstructive tactics" and has wilfully ignored the processes of this Court.

The defendants have not presented this Court any excuses for such delays and tactics. Furthermore, it appears that the delay in securing new counsel is the fault of the defendants. Additionally, the defendants wilfully failed to appear at the properly noticed depositions.

IT IS, THEREFORE, ORDERED that the Motion to Set Aside Default Judgment and for Relief from Judgement be and the same is hereby denied.

ENTERED this 23rd day of August, 1978.



CHIEF UNITED STATES DISTRICT JUDGE

FILED

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

AUG 23 1978

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.	)	CIVIL ACTION NO. 78-C-255-B
)	
)	
JIMMY L. MONDAY,)	
)	
Defendant.)	

DEFAULT JUDGMENT

This matter comes on for consideration this 23rd day of August, 1978, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Jimmy L. Monday, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Jimmy L. Monday, was personally served with Summons and Complaint on July 18, 1978, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Jimmy L. Monday, for the sum of \$918.26 plus the costs of this action accrued and accruing.

Allen E. Bonar

UNITED STATES DISTRICT JUDGE

APPROVED:

Robert P. Santee

ROBERT P. SANTEE
Assistant United States Attorney

FILED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

AUG 23 1978

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

MAPCO INC., et al.,)
)
 Plaintiffs,)
)
 v.)
)
 GERALD R. FORD, PRESIDENT OF)
 THE UNITED STATES, et al.,)
)
 Defendants.)

No. 75-C-573-B

ORDER DISMISSING ACTION

On the 23rd day of August, 1978, the joint motion for dismissal comes to be heard before the Court. Having been fully advised in the premises, the Court finds that the motion should be granted. Therefore, it is Adjudged, Ordered and Decreed that the joint motion for dismissal be and is hereby granted, *and the Causes of action & Complaint are hereby dismissed.*

Allen E. Barrow
District Judge

FILED

AUG 18 1978

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RAY MARSHALL, Secretary of Labor,)
United States Department of Labor,)
)
Plaintiff,)
)
v.)
)
L. C. SINOR)
)
and)
)
JOHN DAVID BRADSHAW,)
)
Defendants.)

Civil Action
No. 72-C-227-D

ORDER OF DISMISSAL AS TO
DEFENDANT L.C. SINOR

Defendant L.C. Sinor having been ordered to show cause, if any there be, why he should not be adjudicated in civil contempt of this court's November 13, 1974 judgment; and it appearing to the court that at this time defendant L.C. Sinor is not financially able to comply with this court's November 13, 1974 judgment restraining him from continuing to withhold payment of overtime compensation due to his employees; it is therefore

ORDERED that defendant L.C. Sinor shall file annually with the Regional Administrator, Employment Standards Administration, United States Department of Labor, Dallas, Texas 75202, a statement of non-reportable income (such as, but not limited to, gifts and inheritances) and a copy of his income tax returns at the same time each year he files such income tax returns with the Internal Revenue Service; and it is further

ORDERED that all remaining prayers for relief in plaintiff's November 24, 1975 petition for adjudication in civil contempt be, and hereby are, dismissed as to defendant L.C. Sinor.

DATED this 11th day of August, 1978.

Fred O'burgherty
UNITED STATES DISTRICT JUDGE

FILED

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

AUG 18 1978

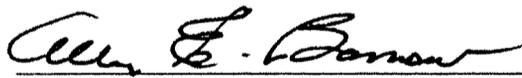
SAMUEL SHAW, III,)	
)	
Plaintiff,)	
)	
vs.	)	No. 77-C-252-B
)	
BILL'S COAL COMPANY, et al.,)	
)	
Defendants.)	

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

ORDER OF DISMISSAL

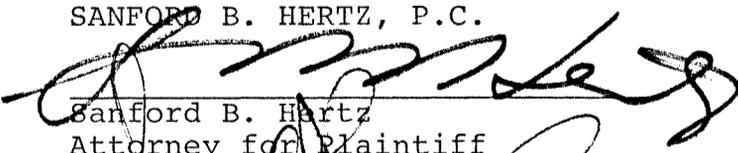
ON this 18th day of August, 1978, upon the written application of the parties for a dismissal with prejudice of the Complaint and Cross-Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and Cross-Complaint and have requested the Court to dismiss said Complaint and Cross-Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint and Cross-Complaint should be dismissed pursuant to said application.

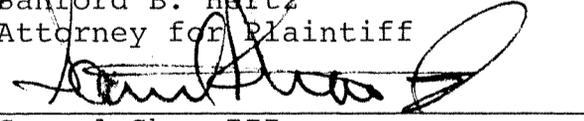
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and Cross-Complaint and all causes of action of the plaintiff and the defendants filed herein be and the same are dismissed with prejudice to any future action, each party to pay their own costs.


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

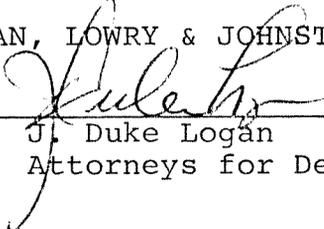
APPROVAL:

SANFORD B. HERTZ, P.C.


Sanford B. Hertz
Attorney for Plaintiff


Samuel Shaw III
Plaintiff

LOGAN, LOWRY & JOHNSTON

By 
J. Duke Logan
Attorneys for Defendants

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

PRESTON GADDIS,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES ENVIRONMENTAL)
 PROTECTION AGENCY; DOUGLAS)
 COSTLE, Administrator; and)
 ADLENE HARRISON, Regional)
 Administrator,)
)
 Defendants.)

No. 77-C-494-B

FILED

AUG 18 1978

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

ORDER

The Court has for consideration Plaintiff's Motion to Dismiss Without Prejudice and Defendants' Motion for Summary Judgment and has reviewed the file, the briefs and all of the recommendations concerning the motions, and being fully advised in the premises, finds:

That the Plaintiff's Motion to Dismiss Without Prejudice should be sustained and that Defendants' Motion for Summary Judgment is moot.

In his Motion to Dismiss Without Prejudice, plaintiff states that:

"3. It is now apparent that the City is Re-assessing this facility based upon some of the principle issues raised in this action, i.e., population demographics, impacts on Pathfinder Parkway, overall costs, the need for more (and more expensive) land than is available at the site, water quality impacts, etc."

"It is appropriate that this matter be returned to the responsible officials to allow them to fully and completely conduct their reassessment. It would also save valuable judicial time."

The Defendants object to Plaintiff's Dismissal without Prejudice and urge the Court to sustain their Motion for Summary Judgment. In Defendant's Memorandum in response to Plaintiff's Motion to Dismiss, Defendants state "EPA has no objection whatever to the dismissal of the lawsuit and would in fact favor such dismissal, but only if such action did not impose any additional requirements on Defendant."

Under the provisions of Rule 41(a)(2) F.R.C.P. the Court may dismiss the action "upon such terms and conditions as the Court deems proper."

IT IS, THEREFORE, ORDERED that Plaintiff's Motion to Dismiss Without Prejudice be and is hereby sustained and that Defendants' Motion for Summary Judgment is moot in view of the ruling on Plaintiff's Motion to Dismiss Without Prejudice.

IT IS FURTHER ORDERED that the plaintiff pay the costs of this action.

Dated this 18th day of August 1978,
1978.


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

AUG 18 1978

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMAJack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,)	
Plaintiff-Respondent,)	
v.	)	NOS. 78-C-246-B
	)	75-CR-175
JO ANN ALEXANDER,)	
Defendant-Movant.)	

O R D E R

The Court has for consideration the motion pursuant to 28 U.S.C. § 2255 filed pro se, in forma pauperis, by Jo Ann Alexander. The cause has been assigned civil Case No. 78-C-246-B and docketed in her criminal Case No. 75-CR-175-B.

Defendant, Movant herein, is a prisoner at the Federal Correctional Institution, Ft. Worth, Texas, pursuant to conviction upon her plea of guilty to a two-count indictment charging in Count One, bank robbery in violation of 18 U.S.C. § 2113(a); and on Count Two, aggravated bank robbery, in violation of 18 U.S.C. § 2113(d). She was sentenced June 1, 1976, on Count Two as a young adult offender for an indeterminate period pursuant to the Youth Corrections Act, 18 U.S.C. §§ 4216:5010(b). Said sentence to run concurrently with the sentence imposed in Case No. 75-CR-173. A Rule 35, Federal Rules of Criminal Procedure, motion for discretionary modification of sentence was overruled by Order of this Court dated September 14, 1976, and the jurisdictional period for such Rule 35 motion has long ago expired.

In her § 2255 motion, Movant demands her release from custody and as grounds therefor claims that she is being deprived of her liberty in violation of her rights guaranteed by the Constitution of the United States. In particular, Movant claims that the United States Parole Commission's denial of conditional release based solely on the severity of the offense is illegal, not supported by the regulations governing parole, that no interests supporting the regulations are served by denying parole, and further incarceration might be detrimental as stated by the professional staff at the institution of incarceration.

In the present motion, Movant does not in any way challenge the validity of her plea, conviction or sentence in this Court. Rather, she challenges the Parole Commission's application of its guidelines to her case. Her appropriate remedy is to file a habeas corpus petition

pursuant to 28 U.S.C. § 2241 in the United States District Court having jurisdiction over her place of confinement, and that only after available administrative remedies have first been exhausted. See, Rogers v. United States, No. 76-1122 unreported (10th Cir. filed Nov. 2, 1976); Weiser v. United States, No. 76-1589 unreported (10th Cir. filed Feb. 10, 1977), which cases are applicable to establish the appropriate procedure in regard to the issue raised to this Court herein although they deal with a different factual claim than here presented.

Having carefully reviewed the motion and criminal file, and being fully advised in the premises, the Court finds that there is no need for a response or an evidentiary hearing, and that the motion should be overruled and dismissed.

IT IS, THEREFORE, ORDERED that the motion pursuant to 28 U.S.C. § 2255 of Jo Ann Alexander be and it is hereby overruled and dismissed without prejudice to her filing a habeas corpus petition in the proper jurisdiction in Texas, if necessary, after administrative remedies have been exhausted.

Dated this 18th day of August, 1978, at Tulsa, Oklahoma.


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

AUG 18 1978

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

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

UNITED STATES OF AMERICA,)	
)	
v.	)	NOS. 78-C-245-B
	)	75-CR-173
JO ANN ALEXANDER,)	
)	
Defendant-Movant.)	

O R D E R

The Court has for consideration the motion pursuant to 28 U.S.C. § 2255 filed pro se, in forma pauperis, by Jo Ann Alexander. The cause has been assigned civil Case No. 78-C-245-B and docketed in her criminal Case No. 75-CR-173-B.

Defendant, Movant herein, is a prisoner at the Federal Correctional Institution, Ft. Worth, Texas, pursuant to sentence upon her conviction on plea of guilty to bank robbery in violation of 18 U.S.C. § 2113(a). She was sentenced June 1, 1976, as a young adult offender for an indeterminate period pursuant to the Youth Corrections Act, 18 U.S.C. §§ 4216:5010(b). A Rule 35, Federal Rules of Criminal Procedure, motion for discretionary modification of sentence was overruled by Order of this Court dated September 14, 1976, and the jurisdictional period for such Rule 35 motion has expired.

In her § 2255 motion, Movant demands her release from custody and as grounds therefor claims that she is being deprived of her liberty in violation of her rights guaranteed by the Constitution of the United States. In particular, Movant claims that the United States Parole Commission's denial of conditional release based solely on the severity of the offense is illegal, not supported by the regulations governing parole, that no interests supporting the regulations are served by denying parole, and further incarceration might be detrimental as stated by the professional staff at the institution of incarceration.

In the present motion, Movant does not in any way challenge the validity of her plea, conviction or sentence in this Court. Rather, she challenges the Parole Commission's application of its guidelines to her case. Her appropriate remedy is to file a habeas corpus petition pursuant to 28 U.S.C. § 2241 in the United States District Court having jurisdiction over her place of confinement, and that only after available administrative remedies have first been exhausted. See, Rogers v. United

States, No. 76-1122 unreported (10th Cir. filed Nov. 2, 1976); Weiser v. United States, No. 76-1589 unreported (10th Cir. filed Feb. 10, 1977), which cases are applicable to establish the appropriate procedure in regard to the issue raised to this Court herein although they deal with a different factual claim than here presented.

Having carefully reviewed the motion and criminal file, and being fully advised in the premises, the Court finds that there is no need for a response or an evidentiary hearing, and that the motion should be overruled and dismissed.

IT IS, THEREFORE, ORDERED that the motion pursuant to 28 U.S.C. § 2255 of JoAnn Alexander be and it is hereby overruled and dismissed without prejudice to her filing a habeas corpus petition in the proper jurisdiction in Texas, if necessary, after administrative remedies have been exhausted.

Dated this 18th day of August, 1978, at Tulsa, Oklahoma.



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

FILED

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

AUG 18 1978 K

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 KENNETH DUANE GADBERRY,)
)
 Defendant.)

CIVIL ACTION NO. 78-C-268-B ✓

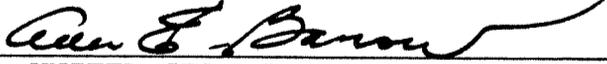
DEFAULT JUDGMENT

This matter comes on for consideration this 18th
day of August, 1978, the Plaintiff appearing by Robert P. Santee,
Assistant United States Attorney for the Northern District of
Oklahoma, and the Defendant, Kenneth Duane Gadberry, appearing
not.

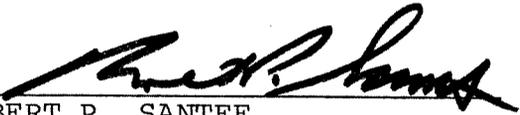
The Court being fully advised and having examined the
file herein finds that Defendant, Kenneth Duane Gadberry, was
personally served with Summons and Complaint on June 20, 1978,
and that Defendant has failed to answer herein and that default
has been entered by the Clerk of this Court.

The Court further finds that the time within which the
Defendant could have answered or otherwise moved as to the
Complaint has expired, that the Defendant has not answered or
otherwise moved and that the time for the Defendant to answer
or otherwise move has not been extended, and that Plaintiff is
entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that
the Plaintiff have and recover Judgment against Defendant,
Kenneth Duane Gadberry, for the sum of \$858.86, plus the costs
of this action accrued and accruing.


UNITED STATES DISTRICT JUDGE

APPROVED:


ROBERT P. SANTEE
Assistant United States Attorney

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ROBERT A. HOMANS and)
 PATRICIA HOMANS,)
)
 Defendants.)

CIVIL ACTION NO. 78-C-317-C

FILED

AUG 16 1978

DEFAULT JUDGMENT

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

This matter comes on for consideration this 16th
day of August, 1978, the Plaintiff appearing by Robert P. Santee,
Assistant United States Attorney for the Northern District of
Oklahoma, and the Defendants, Robert A. Homans and Patricia
Homans, appearing not.

The Court being fully advised and having examined the
file herein finds that Defendants, Robert A. Homans and Patricia
Homans, were personally served with Summons and Complaint on
July 12, 1978, and that Defendants have failed to answer herein
and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the
Defendants could have answered or otherwise moved as to the
Complaint has expired, that the Defendants have not answered or
otherwise moved and that the time for the Defendants to answer
or otherwise move has not been extended, and that Plaintiff is
entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that
the Plaintiff have and recover Judgment against Defendants, Robert
A. Homans and Patricia Homans, for the sum of \$2,217.00, plus
interest, plus the costs of this action accrued and accruing.

1/5/ H. Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED:

Robert P. Santee
ROBERT P. SANTEE
Assistant United States Attorney

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

Phillip Allan Flanagan,

Plaintiff,

-vs-

G. L. Simpson, et al.,

Defendants.

No. 77-C-135-B

FILED

NO
AUG 15 1978

STIPULATION OF VOLUNTARY DISMISSAL

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

The Defendants, by stipulation with the Plaintiff, hereby agree
to the dismissal of this action pursuant to the Federal Rules of Civil
Procedure, Rule 41(a)(1)(ii).

Approved by:


PHILLIP ALLAN FLANAGAN
Plaintiff


THOMAS E. SALISBURY
Co-Counsel for Plaintiff
1634 South Boulder
Tulsa, Oklahoma 74119
(918) 599-0091


DAVID L. PAULING
Counsel for Defendant
200 Civic Center, Room 1012
Tulsa, Oklahoma 74103
(918) 581-5201

AUG 15 1978

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

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
v.	)	NOS. 78-C-354-B
	)	76-CR-64
MICHAEL MC LEMORE,)	
)	
Movant and Defendant.)	

O R D E R

The Court has for consideration the motion pursuant to 28 U.S.C. § 2255 filed on behalf of the Defendant and Movant, Michael McLemore. The cause has been assigned civil Case No. 78-C-354-B and docketed in his criminal Case No. 76-CR-64. Movant also has pending in his criminal case a motion for reduction of sentence pursuant to Rule 35, Federal Rules of Criminal Procedure, timely filed by counsel on behalf of the Defendant, Michael McLemore, following receipt April 13, 1978, of the mandate issued upon affirmance on appeal of the Judgment of conviction.

Movant is a prisoner in the Federal Correctional Institution, El Reno, Oklahoma, pursuant to conviction by the Court on stipulation to Count One of the indictment charging possession of marihuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1). He was sentenced October 5, 1976, to the maximum period for observation and study pursuant to 18 U.S.C. §§ 4216:5010(e). On December 16, 1976, definitive sentence was imposed to an indeterminate period pursuant to the Youth Corrections Act, 18 U.S.C. §§ 4216:5010(b). He was released on appeal bond, said bond was revoked, and Defendant started service of his sentence on April 11, 1978.

It is contended as grounds for the Rule 35 motion that the sentence should be reduced in that (1) on reflection and second look the Court might find the original sentence is too harsh; (2) two responsible and respected persons have offered to supervise the Defendant if released; (3) the severity of the offense will probably require that Defendant serve 12 to 27 months before being considered for release; and (4) the shock value of incarceration has already had its benefit.

The ground asserted for the § 2255 motion is that the sentence imposed will cause the Movant to be confined for a longer period than the Court could have or did anticipate because of the Parole Guidelines that will be used in determining his period of confined treatment prior to supervised release.

The Court has a clear recollection of these proceedings and has refreshed its memory by a careful review of the file, transcripts, pleadings, attachments, supplements, and letters. The Court is fully advised in the premises and finds that a hearing is not required and that the § 2255 motion should be overruled and dismissed.

The Court at definitive sentence was fully aware that the indeterminate sentence pursuant to 18 U.S.C. § 5010(b) could require a full four years in confined treatment followed by two years conditional release under supervision. Also, the Court knew that under the sentence imposed the period of confinement and supervised release were matters left to the discretion of the Youth Division of the Parole Commission. Under these circumstances, Movant's challenge of the Parole Commission's application of its guidelines to his case is an administrative responsibility unrelated to the sentencing process. That should be presented by way of habeas corpus, or possibly mandamus, to the United States District Court having jurisdiction over his place of incarceration, after his administrative remedies have been fully exhausted.

However, from the information before the Court, the Court finds that the aims of a Youth Correction Act sentence have been thwarted by a subsequent conviction in the State of New Mexico and that the Defendant, Michael McLemore, would not benefit from the provisions of the Youth Corrections Act. Further, the Court finds that the Defendant has done extremely well under supervision and continued confinement might be detrimental, therefore, his sentence imposed December 16, 1976, and commenced April 11, 1978, should be reduced.

IT IS, THEREFORE, ORDERED that the motion pursuant to 28 U.S.C. § 2255 of Michael McLemore be and it is hereby overruled and dismissed.

IT IS FURTHER ORDERED that the sentence of Michael McLemore imposed December 16, 1976, and commenced April 11, 1978, be and it is hereby modified to the following:

The Defendant, Michael McLemore, is hereby committed to the custody of the Attorney General or his authorized representative for a period of three years pursuant to 21 U.S.C. § 841 (b)(1)(B), six months to be served in a jail-type institution and the remainder to be served on probation as provided by 18 U.S.C. § 3651. The term of imprisonment shall be followed by a special parole term of two (2) years in addition to the term of imprisonment and probation.

Dated this 15th day of August, 1978, 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

Theodore Wm. Fry,
Plaintiff,

-vs-

M. Seymour, et al.,
Defendants.

No. 77-C-140-B **FILED**

AUG 15 1978

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

STIPULATION OF VOLUNTARY DISMISSAL

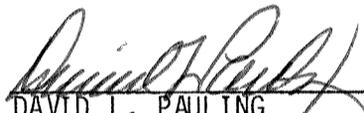
The Defendants, by stipulation with the Plaintiff, hereby agree to the dismissal of this action pursuant to the Federal Rules of Civil Procedure, Rule 41(a)(1)(ii).

Approved by:



THEODORE WM. FRY
Plaintiff

THOMAS E. SALISBURY
Co-Counsel for Plaintiff
1634 South Boulder
Tulsa, Oklahoma 74119
(918) 599-0091


DAVID L. PAULING
Counsel for Defendant
200 Civic Center, Room 1012
Tulsa, Oklahoma 74103
(918) 581-5201

FILED

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

AUG 15 1978 *fm*

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

OKLAHOMA BEVERAGE COMPANY,)
)
 Plaintiff,)
 vs.)
)
 DR. PEPPER LOVE BOTTLING)
 COMPANY (of Muskogee), et al.,)
)
 Defendants.)

No. 74-C-170-(BOH) ✓

ORDER NUNC PRO TUNC

This matter comes before the court upon plaintiff's Motion to Amend and Correct the Order Entered August 9, 1978. Because of clerical errors made in the Order of August 9, 1978, said Order is hereby vacated, set aside and held for naught, and this Order shall replace the prior Order.

The court heretofore entered Findings of Fact, Conclusions of Law and Judgment in this case. Thereafter, defendant counsel called the court's attention to the fact that the court has stated there would be a further hearing in the case. The court, inadvertently overlooking such statement, entered Findings of Fact, Conclusions of Law and Judgment herein awarding the plaintiff damages in the sum of \$5,607.10 and attorney fees in the sum of \$22,500.00, together with interest thereon as provided by law. Upon being apprised of the oversight, the court entered an Order staying the Findings of Fact, Conclusions of Law and Judgment and set the matter for hearing August 7, 1978, to hear evidence and arguments as to any error in the court's Findings, etc. On hearing, defendant counsel had no evidence to offer, but complained that the costs had not been properly recorded with the Clerk of the Court and therefore were improper. The costs recited in the Findings of Fact and Conclusions of Law are costs not required to be filed with the Clerk but are costs incurred by the plaintiff in overcoming the torts committed by the defendants.

IT IS, THEREFORE, ORDERED that the Findings of Fact, Conclusions of Law and Judgment heretofore entered in this case on the 22rd day of June, 1978, be reinstated in all things and that the judgment of this court in favor of the plaintiff herein represents a total judgment of \$28,107.10, which shall draw interest as provided by law from and after June 22, 1978.

IT IS FURTHER ORDERED that the time for appeal shall begin to run with the filing of this Order.

Dated this 14th day of August, 1978.

Luther Bohannon
UNITED STATES DISTRICT JUDGE

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

DAVID B. DRUMMOND,)
)
 Plaintiff,)
)
 v.)
)
 ADDRESSOGRAPH MULTIGRAPH)
 CORPORATION, a corporation,)
)
 Defendant,)
)
 v.)
)
 GARY DAVID DRUMMOND, I. M.)
 TEAGUE and SPECIAL SERVICE)
 SYSTEMS, INC., an Oklahoma)
 corporation,)
)
 Additional)
 Defendants on)
 Counterclaim.)

No. 77-C-131-B

FILED

AUG 14 1978

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

JOURNAL ENTRY OF JUDGMENT

consideration
This cause comes on for ~~hearing~~ before the Court on
this 14 day of August, 1978, pursuant to agreement of the
parties, the Plaintiff David B. Drummond ~~appearing~~ by his attor-
ney, E. Carlton James, and the Defendant Addressograph Multigraph
Corporation ("Addressograph") ~~appearing~~ by its attorneys, John
S. Athens and Charles W. Shipley, and the Additional Defendants
on the Counterclaim, Gary David Drummond, I. M. Teague and Special
Service Systems, Inc., ~~appearing~~ by their attorney, E. Carlton
James. Counsel having informed the Court that the parties, in
settlement of their differences, have consented to the entry of
judgment, the Court ~~proceeded to~~ *having* review *ad* the pleadings in this action
and the settlement provisions to which the parties have agreed,
and after ~~hearing~~ *considering* the statement of counsel for the Plaintiff, the
statement of counsel for Addressograph, and the statement of
counsel for the Additional Defendants on the Counterclaim respecting
these matters, finds that the settlement provisions to which the
parties have agreed are fair and should be incorporated into the
formal entry of judgment of the Court and further finds that

judgment on the Second Amended Petition filed herein by the Plaintiff should be entered on behalf of Addressograph and further finds that Addressograph shall take nothing on the first through the fifth causes of action set forth in the Counterclaim filed herein by it and further finds that judgment should be entered on behalf of Addressograph on the sixth cause of action of the Counterclaim filed herein by it.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff David B. Drummond has no right or claim under the Addressograph Multigraph Corporation Comprehensive Retirement Plan; nor any other right or claim as against Addressograph for damages including vacation pay, accrued wages, sales commission, severance pay, or any other payments arising from the claims set forth in the Plaintiff's Second Amended Petition filed herein; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Addressograph take nothing as against the Plaintiff David B. Drummond or the Additional Defendants on the Counterclaim, Gary David Drummond, I. M. Teague and Special Service Systems, Inc. based upon the allegations contained in the first through the fifth causes of action set forth in Addressograph's Counterclaim filed herein; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff David B. Drummond and the Additional Defendants on the Counterclaim, Gary David Drummond, I. M. Teague and Special Service Systems, Inc., and each of them and their agents, servants, deputies, employees and all persons acting in concert and participating with them be, and they hereby are, required to turn over and return to Addressograph forthwith any and all trade secrets of Addressograph and information concerning Addressograph's customers and all other documents, papers, and other property of Addressograph which are now in the possession of David B. Drummond and Additional Defendants Gary David Drummond, I. M. Teague, or Special Service Systems, Inc.; and

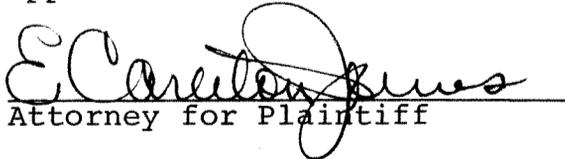
IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff David B. Drummond and the Additional Defendants on the Counterclaim, Gary David Drummond, I. M. Teague, and Special Service Systems, Inc., and each of them, their deputies, agents, servants and employees and all persons acting in concert and participating with them be, and they hereby are, restrained and enjoined from in any manner, directly or indirectly, using the aforementioned trade secrets and information in soliciting the business of or initiating contacts with Addressograph's customers or prospective customers.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff David B. Drummond and the Additional Defendants on the Counterclaim, Gary David Drummond, I. M. Teague, and Special Service Systems, Inc., and each of them and their deputies, agents, servants and employees and all persons acting in concert and participating with them be, and they hereby are, permanently restrained and enjoined from in any manner, directly or indirectly, making false and injurious representations and disparagements concerning the goods and services offered by Addressograph.

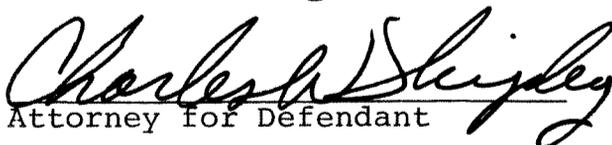


ALLEN E. BARROW
Chief Judge
United States District Court
for the Northern District of
Oklahoma

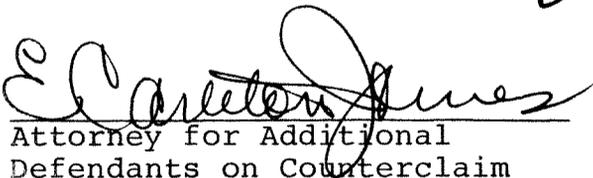
Approved as to Form:



Attorney for Plaintiff



Attorney for Defendant



Attorney for Additional
Defendants on Counterclaim

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

F I L E D

ROGER F. WILLIAMS,)
DELMAS McCLENDON,)
JOE E. YARBOROUGH,)
EDWARD SCOTT, all of)
Tulsa, Oklahoma;)
C. L. WEST, of)
Claremore, Oklahoma,)

Plaintiffs,)

vs.)

HENRY BELLMON, U. S. Senator,)
JIMMY CARTER, President of)
the United States,)

Defendants.)

AUG 14 1978

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

No. 78-C-161-C

O R D E R

Plaintiffs herein challenge the authority of a United States Senator and the President of the United States to convey the Panama Canal to the Republic of Panama by treaty. Plaintiffs claim that this conveyance is contrary to certain provisions of the Constitution of the United States, to-wit: the reservation of rights and powers contained in the Ninth and Tenth Amendments; the Due Process Clause of the Fifth Amendment; the Property Clause of Article Four; and Article Six, insofar as it is concerned with the oath to support the Constitution. Plaintiffs have requested both injunctive and monetary relief. Now before the Court is the defendants' Motion to Dismiss for lack of subject matter jurisdiction.

The defendants first argue that the plaintiffs lack standing to bring this action. The plaintiffs respond that they have established a legally cognizable injury because as United States Citizens they each hold a 1/220,000,000 interest in the Panama Canal.

The gist of standing is that a plaintiff must allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely

depends for illumination of difficult constitutional questions" Baker v. Carr, 369 U.S. 186, 204 (1962). However, "standing is not to be denied simply because many people suffer the same injury." United States v. SCRAP, 412 U.S. 669, 687 (1973).

The Court assumes that the plaintiffs claim their property interests in the Panama Canal by virtue of the 1903 treaty between the United States and the Republic of Panama. Isthmian Canal Convention, Nov. 18, 1903, 33 Stat. 2234. The Court is of the opinion that insofar as property or other individual rights are concerned, that treaty is not self-executing, and therefore it does not confer upon the plaintiffs enforceable property interests.

A self-executing treaty is one that prescribes the rules by which the rights of private citizens or subjects may be determined under the treaty. When a treaty is self-executing, it becomes the equivalent of an act of the legislature, and the private rights established thereunder can be enforced in the courts.

"A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance

thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

And in Foster v. Neilson, Chief Justice Marshall said: 'Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract -- when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; . . .'" Z. & F. Assets Real. Corp. v. Hull, 114 F.2d 464, 470-71 (D.C. Cir. 1940). See also Dreyfus v. Von Finck, 534 F.2d 24 (2nd Cir. 1976); United States v. Vargas, 370 F.Supp. 908 (D.P.R. 1974); Camacho v. Rogers, 199 F.Supp. 155 (S.D.N.Y. 1961); Pauling v. McElroy, 164 F.Supp. 390 (D.D.C. 1958).

Plaintiffs' claimed basis for standing therefore fails. They cannot establish the requisite "personal stake in the outcome of the controversy . . ." Baker v. Carr, supra.

The defendants' second ground in support of their motion to dismiss is that plaintiffs' action involves a political question. The political question doctrine is closely tied to the standing issue. A political question does not present a justiciable case or controversy as is required by Article 3, § 2, cl. 1 of the Constitution. See Baker v. Carr, supra; Dreyfus v. Von Finck, supra; Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972); Z & F. Assets Real. Corp. v. Hull, supra.

In determining whether a case involving foreign relations presents a political question, an analysis should be made "of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences

of judicial action." Baker v. Carr, supra, at pp. 211-12.

The making of treaties is a power delegated to the President with the advice and consent of the Senate by Article 2, § 2, cl. 2 of the Constitution. Traditionally, courts have been hesitant to interfere with this power unless a provision of the Constitution has been violated. See Asakura v. Seattle, 265 U.S. 332 (1924); Grofroy v. Riggs, 133 U.S. 258 (1890); Holmes v. Laird, supra; Aris Gloves, Inc. v. United States, 420 F.2d 1386 (Ct. Cl. 1970).

Plaintiffs allege numerous Constitutional violations by the defendants. It is alleged that since the Constitution does not give the President the power to give away United States property, this is a power reserved to the States or the people by the Ninth and the Tenth Amendments.

The Ninth Amendment has not received a great deal of attention by the courts. Mr. Justice Goldberg in his concurring opinion in Griswold v. Connecticut, 381 U.S. 479 (1965) stated that the "Ninth Amendment expressly recognizes . . . fundamental personal rights . . . which are protected from abridgment by the Government though not specifically mentioned in the Constitution." 381 U.S. at p.496.

"The purpose of the Ninth Amendment is therefore to guarantee to individuals those rights inherent to citizenship in a democracy which are not specifically enumerated in the Bill of Rights." United States v. Cook, 311 F.Supp. 618 (W.D. Pa. 1970).

The plaintiffs have not alleged the violation of any fundamental personal rights, except that they have been deprived of their property without due process of law. This, of course, is a specific guarantee of the Fifth Amendment, not one of the "penumbral" rights guaranteed by the Ninth Amendment.

Nor can the plaintiffs claim any rights under the Tenth Amendment. As far as this Court is aware, that amendment has never been construed as a grant of individual rights, but is simply a declaration of the relationship between the

national and state governments. See McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316 (1819).

Plaintiffs' principle argument is that the defendants have deprived them of their property without due process of law. The previous conclusion of the Court that plaintiffs have no recognized or enforceable property rights in the Panama Canal adequately disposes of this argument.

Plaintiffs also contend that under the Property Clause, the defendants are without authority to "give away" the Panama Canal. Article 4, § 3, cl. 2 of the Constitution provides that "[t]he Congress shall have Power to dispose of . . . the Territory or other Property belonging to the United States; . . ."

The District of Columbia Circuit was recently faced with a challenge to the defendant Carter's use of the treaty power to convey the Panama Canal and contiguous properties to the Republic of Panama. The plaintiff in that case was a Member of Congress. He argued that the Property Clause, requiring the consent of the entire Congress, was the exclusive method contemplated by the Constitution for disposal of United States property, and that therefore disposal of United States property under the treaty power, requiring only the consent of two-thirds of the Senate, was unconstitutional. In a very thorough and well-reasoned opinion, the court held that the Property Clause and the treaty power were alternative, concurrent means provided in the Constitution for the disposal of United States property, and that therefore the President's choice of the treaty power as the basis for the transfer was not unconstitutional. See Edwards v. Carter, No. 78-1166 (D.C. Cir., April 6, 1978). The Court views that opinion as dispositive of the Property Clause argument in the instant case.

Since the Court has found no constitutional violations by the defendants, it almost goes without saying that the defendants have not violated Article Six by failing to abide

by their oath to support the Constitution. Furthermore, there being no constitutional violation, this action presents a question that is purely political and not justiciable by this Court. In accordance with the analysis suggested by the Supreme Court in Baker v. Carr, supra, this Court is acutely aware of the possible consequences of judicial action in this matter. At an earlier state in these proceedings, the Court noted that the Judiciary should not be converted into "'an open forum for the resolution of political or ideological disputes about the performance of government.'" United States v. Richardson, 418 U.S. 166, 192 (1974)." Order of April 18, 1978. That caveat bears re-emphasis.

For the foregoing reasons, it is therefore ordered that defendants' Motion to Dismiss is hereby sustained.

It is so Ordered this 17th day of August, 1978.


H. DALE COOK
United States District Judge

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

AUG 11 1978

TRI-STATE INSURANCE COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 NATIONAL HORSE TRAILERS, INC.,)
 A dissolved corporation, and)
 LOUIS DAVIS,)
)
 Defendants.)

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

No. 77-C-89-B

ORDER

NOW on this 11th day of August, 1978, the Court finds that pursuant to a Stipulation entered into between the Plaintiff and Defendant this action should be dismissed without prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this action be and the same hereby is dismissed without prejudice.

Allen E. Bonaw

JUDGE, U. S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

APPROVALS:

KNIGHT, WAGNER, STUART & WILKERSON

By: *Stephen C. Wilkerson*
Attorney for Plaintiff

PIERCE, COUCH, HENDRICKSON, JOHNSON
& BAYSINGER

By: *Kirk D. Fredrickson*
Attorney for Defendant

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

JON L. DEES,
Plaintiff,

VS.

SOUTHWESTERN BELL TELEPHONE CO.,
Defendant.

NO. 78-C-22-B

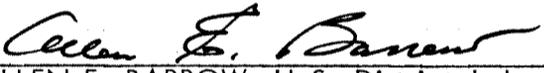
FILED

AUG 11 1978

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

ORDER OF DISMISSAL

Now on this 11th day of August, 1978, this matter coming on before me the application of the plaintiff to dismiss this action as settled; the court finds that the application should be granted and this case is herewith dismissed with prejudice to its being refiled at a later date.


ALLEN E. BARROW, U.S. District Judge

APPROVED:


DON L. DEES, Attorney for the Plaintiff


O. CAREY EPPS, Attorney for the Defendant

suits.

Defendant's Motion to Dismiss, which is the subject of this Motion to Reconsider was filed on June 5, 1978. On the same date a Minute Order was entered directing that plaintiff filed a responsive brief to defendant's motion within 10 days. No extensions were requested and when the Court entered its Order sustaining the Motion to Dismiss, plaintiff was in violation of the Court order and in default when the Court entered its order on July 13, 1978.

In her Motion to Reconsider the plaintiff does not state an excuse or mitigating reason for failure to comply with the Order of this Court.

While, as the defendant states, this Court noted that the plaintiff had defaulted, the case was not treated as either a default or a dismissal for failure to prosecute, but was in fact, dismissed upon a review of the pleadings and file, and a determination by the Court that the Motion to Dismiss should be sustained.

The Court notes that it does not enter useless orders and that it is expected that counsel will comply with all valid orders issued by the Court.

Turning to the limitation problem, it was stated in *Occidental Life Insurance Co. v. E.E.O.C.*, 432 U.S. 355 (1977), that a state statute of limitations would not be controlling as to litigation commenced by the EEOC because the legislation was silent as to a limitation period. Needless to say, we are not here faced with an EEOC case, but a suit brought by an individual claimant.

In ruling previously that the State two-year statute of limitation applies to plaintiff's claim under Title VII, this Court relied on *Allen v. St. John's Hospital*, Case No. 76-C-11-B (Sept. 9, 1976); *Lockett v. Carnation Co.*, Case No. 77-C-38-B (March 14, 1978); *Person v. St. Louis-San Francisco Ry. Co.*, 428 F.Supp. 1148 (WD Okl. 1976); *Clayton v. McDonnell Douglas Corp.*, 419 F.Supp. 28 (C.D. Cal. 1976) and *Painter v. Rockwell*

International, Case No. 76-C-2-B. In this connection it is noted that the Painter v. Rockwell International case, supra, was appealed to the Tenth Circuit Court of Appeals, and on August 4, 1978, a mandate was issued affirming the Trial Court. However, it is further noted that the Tenth Circuit Court of Appeals did not address the problem of the applicability of the State Statute of Limitation, having resolved the action on the question of untimely filing of the original claim with the EEOC.

Plaintiff has cited no cases in support of her position but states at page 3 of her brief:

"***Title VII on the other hand has its own Statute of Limitations, 42 U.S.C. Sec. 2000e-5(f)(1), as amended by Pub. L. 92-261. Therefore the Oklahoma Statute of Limitations does not control as the Statute of Limitations under 42 U.S.C. Sec. 2000e et seq. ***."

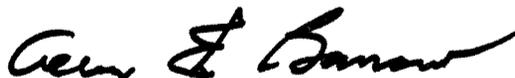
This Court does not construe the language contained in the statute relied on by the plaintiff in the same manner as does the plaintiff, this Court finding such language applies only to jurisdictional prerequisites to the institution of litigation.

Further this Court finds that even if plaintiff can prove the filing of her claim with the Oklahoma Human Rights Commission, such filing only applies to the jurisdictional prerequisites.

The Court finds nothing propounded by plaintiff to alter its original decision handed down on July 13, 1978.

IT IS, THEREFORE, ORDERED that the Plaintiff's Motion to Reconsider be and the same is hereby overruled.

ENTERED this 10th day of August, 1978.



CHIEF UNITED STATES DISTRICT JUDGE

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

DONNA SUE SHARBUTT,)
Administratrix of the Estate)
of JERRY WALTER McCRARY,)
Deceased,)
)
Plaintiff,)
)
v.)
)
VERNON MICHAEL BAUER and)
AUTO OWNERS INSURANCE)
COMPANY,)
)
Defendants.)

No. 77-C-518-B

FILED

AUG 10 1978

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

ORDER

The Court has for consideration defendants' Motion to Dismiss for Lack of Jurisdiction and Improper Venue and has reviewed the file, the briefs and all of the recommendations concerning the motion, and being fully advised in the premises, finds:

That the defendants' Motion to Dismiss for Lack of Jurisdiction and Improper Venue should be sustained for the following reasons.

This is an action by the Administratrix of the Estate of Jerry Walter McCrary, deceased, for alleged damages as a result of a traffic accident in which Jerry Walter McCrary was killed. The accident occurred on November 3, 1976, within the State of Texas. The plaintiff is a citizen of Oklahoma. She was appointed Administratrix of the Estate of Jerry Walter McCrary in the Probate Court in the State of Texas. The defendant, Vernon Michael Bauer is a citizen of the State of South Dakota. The defendant, Auto Owners Insurance Company has its principal place of business in the State of Michigan. It had insured the automobile owned by McCrary which was being operated by Bauer at the time of the accident. The plaintiff alleges that "brokers, underwriters and adjusters" are doing business for Auto Owners Insurance

Company in the State of Oklahoma. Jurisdiction is based solely upon diversity of citizenship.

The pleadings and affidavits show that neither of the defendants were served in the State of Oklahoma, but were served pursuant to the Oklahoma Long-Arm Statutes outside of the State of Oklahoma.

Plaintiff claims that this Court has jurisdiction over Auto Owners Insurance Company under the provisions of 12 O.S.A. § 1701.03(a)(7) which provides in part as follows:

"(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's:

* * * *

(7) maintaining any other relation to this state or to persons or property including support for minor children who are residents of this state * * *"

The plaintiff argues that at the time of his death, McCrary was obligated to make child support payments in the sum of \$200.00 per month under a decree of divorce entered by the District Court of Tulsa County, Oklahoma to his former wife Mrs. Sharbutt for the benefit of his minor child Monica; that following his death, the defendant Auto Owners Insurance Company commenced making the \$200.00 monthly child support payments under the provisions of its automobile policy which it had issued on McCrary's automobile prior to his death; that said policy also provided for uninsured motorist coverage and contained a "Minnesota No-Fault Insurance Endorsement" which provides for payment of "dependent survivor's loss" in accordance with the policy provisions. "Survivor's Loss" is defined as:

"(a) loss, in the event of the death of an eligible injured person occurring within one year from the date of the accident, of

contributions of money or tangible things of economic value, not including services, that his surviving dependents would have received from him for their support during their dependency had he not suffered the fatal bodily injury;"

and that since McCrary was obligated to pay child support prior to his death and carried automobile insurance with the defendant, Auto Owners Insurance Company, it thereby subjected itself to personal jurisdiction under the Long-Arm Statutes of the State of Oklahoma. Plaintiff relies principally on the case of Perdue v. Saied, 566 P.2d 1168, Okl. 1977.

Neither of the defendants Bauer or Auto Owners Insurance Company transacted any business in the State of Oklahoma or otherwise had any contact with the State of Oklahoma. Following the death of McCrary the defendant Auto Owners Insurance Company did agree to pay \$200.00 per month pursuant to the Survivor's-No-Fault Coverage under the automobile policy together with the funeral expenses, and further agreed to continue making the \$200.00 monthly support payments until the maximum under the policy of \$10,000.00 had been paid, or until the death of the defendant child, whichever occurred first. These acts, however, on the part of Auto Owners Insurance Company occurred after the death of its insured as a result of the automobile accident. The defendant Auto Owners Insurance Company had no other contact with the State of Oklahoma and none prior to the accident. Its insured, the deceased McCrary, was not a resident of the State of Oklahoma at the time the insurance policy was issued.

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" within the State of Oklahoma. These provisions require both minimum 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 (Okla. 1968).

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 the defendant is an individual, such as Vernon Michael Bauer 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. See also the recent United States Supreme Court case, Kulko v. Superior Court of California, 436 U.S. _____, 56 L. Ed. 2d 132, 98 S. Ct. 1690, 46 U.S. L.W. 4421 (1978).

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

"To assert personam jurisdiction over a foreign corporation by 12 O.S. (1971) § 187, the record should show a voluntary committed act of the defendant by which that defendant purposefully availed

himself 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 such as Vernon Michael Bauer never entered the State of Oklahoma nor had any contact with the State of Oklahoma and the defendant Auto Owners Insurance Company never contracted to nor did business in the State of Oklahoma, then Oklahoma's Long-Arm Statutes simply do not apply. Jem Engineering and Mfg., Inc. v. Toomer Elec. Co., 413 F.Supp. 481 (N.D.Okl. 1976); Vacu-Maid, Inc. v. Covington, 530 P.2d 137 (Ct. App. Okl. 1974).

IT IS, THEREFORE, ORDERED that the defendants' Motion to Dismiss for Lack of Jurisdiction and Improper Venue be and is hereby sustained.

Dated this 10th day of August, 1978.

William F. 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

ROY F. MILLER and wife,)
ANNA LOU MILLER,)
)
Plaintiff,)
)
v.)
)
FRANKIE B. JARRETT and)
FRANK ALBERTINI,)
)
Defendants.)

FILED

AUG 10 1978

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

No. 78-C-90-B

ORDER

The Court has for consideration Defendants' Motion to Produce and Defendant, Frank Albertini's Motion to Dismiss, and has reviewed the file, the briefs and all of the recommendations concerning the motions, and being fully advised in the premises, finds:

That the Motion to Dismiss of the Defendant, Frank Albertini, should be sustained, and that the Defendants' Motion to Produce should be sustained in part.

This is a diversity action brought pursuant to Title 28, U.S.C., Sec. 1332, by Roy F. Miller and Anna Lou Miller, Plaintiffs, against Frankie B. Jarrett and Frank Albertini, Defendants. The requisite amount in controversy is present.

The Plaintiffs allege that on the 22nd day of August, 1976, the Plaintiffs were involved in an accident on U. S. Highway 59 in Craig County, Oklahoma; that they were traveling south on that highway when their vehicle was struck by another vehicle driven by the Defendant, Frankie B. Jarrett; that the vehicle driven by the Defendant, Jarrett, was owned by the Defendant, Frank Albertini; and that the Defendant, Frankie B. Jarrett was negligent in failing to keep a proper lookout, and failing to yield the right-of-way to the Plaintiff's vehicle. In their petition, the Plaintiffs allege that the

vehicle was being driven by the Defendant, Frankie B. Jarrett, with the permission and consent of the owner, the Defendant, Frank Albertini. The Plaintiffs bring this action for their personal injuries arising out of this accident.

In his Motion to Dismiss, the Defendant, Frank Albertini, urges that the mere ownership of an automobile does not give the imputation of negligence from the driver of the vehicle to the owner. The Defendant further states that the law of Oklahoma does not give a basis of a cause of action against the owner of a vehicle for the alleged negligence by a person other than the owner in the operation of the motor vehicle on the highways of the State of Oklahoma. In support of his Motion, the Defendant relies upon Deskins v. Woodward, 483 P.2d 1134 (Okla. 1971), Gilbert v. Walker, 356 P.2d 346 (Okla. 1960), Lakeview, Inc. v. Davidson, 26 P.2d 760 (Okla. 1933) and Randolph v. Schuth, 90 P.2d 880 (Okla. 1939).

The Plaintiffs have offered no argument or authority in opposition to the Defendant's Motion to Dismiss.

There is no support in the law of the State of Oklahoma for a cause of action based upon the mere ownership of a vehicle for damages arising out of the negligent operation of a person other than the owner of that vehicle. The plaintiffs' petition does not allege any acts of negligence which are the basis of a cause of action against the Defendant, Frank Albertini, and therefore, the Defendant must be dismissed from this action.

In their Motion to Produce, the Defendants ask that the Plaintiffs produce for inspection and allow the Defendants to copy all medical statements and bills received and incurred by the Plaintiffs as a result of their alleged injuries,

including:

1. Any medical reports in their possession from any of the attending physicians that submitted any of the bills alleged in Plaintiffs' complaint.

2. Any copies of hospital records obtained by the parties having to do with treatment alleged to have been necessary as a result of the incident involved in Plaintiffs' complaint.

3. Copies of the income tax returns for the years 1975, 1976 and 1977.

The Defendants further state that the Plaintiffs have alleged an element of damage having to do with incurred medical treatment and expenses, and that the Plaintiffs have alleged a loss of income or earning capacity as a result of the Defendants' alleged negligence. In support of their Motion to Produce, the Defendants rely upon the Federal Rules of Procedure, specifically F.R.C.P. 34, Production of Documents, and F.R.C.P. 26(B.)

The Plaintiffs have responded to the Defendants' Motion to Produce by producing copies of those documents and reports listed in Item # 1 and Item # 2. In the Plaintiffs' response to Item #3, they state that no income tax returns were filed for the years 1975, 1976 and 1977.

It is agreed by the parties that in their depositions, the Plaintiffs testified under oath that income tax returns were filed for the years 1975, 1976 and 1977.

The Plaintiffs have adequately responded to Items # 1 and #2 of the Defendants' Motion to Produce, by producing copies of those documents and records requested. Therefore, those portions of the Defendants' Motion to Produce are moot. The depositions of the Plaintiffs reveal that income tax returns might have been filed for the years 1975, 1976

and 1977. Therefore the Defendants' Motion to Produce must be sustained as to those documents and records requested in Item # 3.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss of the Defendant, Frank Albertini, be and is hereby sustained, and that the Defendants' Motion to Produce be and is hereby sustained as to copies of income tax returns for the years 1975, 1976 and 1977.

Dated this 10th day of August,
1978.


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

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

OKLAHOMA BEVERAGE COMPANY,)
)
Plaintiff,)
vs.)
)
DR. PEPPER LOVE BOTTLING)
COMPANY (of Muskogee), et al.,)
)
Defendants.)

No. 74-C-170-(BOH)

FILED

AUG 9 1978 *pm*

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

O R D E R

The court heretofore entered Findings of Fact, Conclusions of Law and Judgment in this case. Thereafter, plaintiff counsel called the court's attention to the fact that the court had stated there would be a further hearing in the case. The court, overlooking such statement, entered Findings of Fact, Conclusions of Law and Judgment herein. Upon being apprised of the oversight, the court entered an Order staying the Findings of Fact, Conclusions of Law and Judgment and set the matter for hearing August 7, 1978, to hear evidence and arguments as to any error in the court's Findings, etc. On hearing, plaintiff counsel had no evidence to offer, but complained that the costs had not been properly recorded with the Clerk of the Court and therefore were improper. The costs recited in the Findings of Fact and Conclusions of Law are costs not required to be filed with the Clerk but are costs incurred by the defendants in overcoming the torts committed by the plaintiff.

IT IS, THEREFORE, ORDERED that the Findings of Fact and Conclusions of Law and Judgment heretofore rendered are reinstated in all things, except that the time for appeal shall begin to run with the filing of this Order.

Dated this 8th day of August, 1978.

Ruth B. Johnson
UNITED STATES DISTRICT JUDGE

the transcript of the plea:

"THE COURT: Tell me how you committed the act, Mr. Lee.

"THE DEFENDANT: I was in the employ of Illini Motor Company in Springfield, Illinois. I was a salesman. Approximately the last week of August, we received our first shipment of '77 model cars, they were Cadillacs and Oldsmobiles, they were the distributorships here. And since they could not be sold until September the 25th because we didn't have prices, they elected to give each of the twenty salesmen employed there a '77 model car as their demonstrator. We could drive them but we couldn't sell them.

"And on September the 21st, I believe on Tuesday morning, I just up and left with my demonstrator and I came to Claremore, Oklahoma.

"THE COURT: In other words, you took the car, knowing it was stolen and crossed the state line as charged?

"THE DEFENDANT: I did, Your Honor."

A guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted, under oath, in open Court that he is in fact guilty of the offense with which he is charged, his voluntary plea of guilty is a waiver of all non-jurisdictional defects and defenses occurring prior to the plea. Tollett v. Henderson, 411 U. S. 258 (1973); United States v. Levine, 457 F.2d 1186 (10th Cir. 1972); Corn v. State of Oklahoma, 394 F.2d 478 (10th Cir. 1968) cert. denied 393 U. S. 917 (1968); Chaney v. United States, No. 76-1116, unpublished (10th Cir. January 4, 1977); Brown v. Cox, 347 F.2d 936 (10th Cir. 1965); Barker v. United States, ___ F.2d ___ (10th Cir. 1978).

Further, under the circumstances herein, the failure of Movant to assert the ground raised in this present motion in his prior motion is not excusable. An evidentiary hearing is not required and the motion should be denied and dismissed.

IT IS, THEREFORE, ORDERED that this second and successive motion pursuant to 28 U.S.C. § 2255 of Robert Jerry Lee be and it is hereby denied and dismissed.

Dated this 9th day of August, 1978, at Tulsa, Oklahoma.


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

In a cause of action brought pursuant to the Federal Tort Claims Act, the time for commencing an action under such Act is governed by the period of limitations fixed in the Federal statute and not by state law. Foote v. Public Housing Commissioner of United States, 107 F. Supp. 270, 274 (U.S.D.C. Mich.--1952).

In accordance with Title 28, Section 2401(b):

"A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

Because the written claim of the Defendant was filed subsequent to the two year period prescribed by the statute, it is obvious that the necessary jurisdiction is lacking.

The Plaintiff attempted to avoid his failure to follow the statute by alleging his injuries made him unable to "comprehend his condition" and that "...delay in said claim as well as the filing of this suit is directly attributable to said mental incapacity resulting from the negligence of the Defendant." There is no exception by implication to 28 U.S.C. 2401(b).

In Mann v. United States, 399 F.2d 672, 673 (9th Cir.--1968) the Court stated:

"Although exceptions to the applicability of the limitations period might occasionally be desirable, we are not free to enlarge that consent to be sued which the Government, through Congress, has undertaken so carefully to limit."
"The limitations period established by Congress must be strictly observed and exceptions thereto are not to be implied."

Even if Plaintiff were found to be "mentally incompetent" or insane, this would not toll the statute. Casias v. United States, 532 F.2d 1339 (10th Cir.--1976). In Jackson v. United States, 234 F. Supp. 586 (U.S.D.C. S.C.--1964), the Court stated: "The law is clearly established that insanity or mental incompetency does not suspend or toll a Federal Statute of Limitations."

In light of the authority cited herein, it is evident that Plaintiff has unquestionably failed to invoke the jurisdiction of the Court as required by 28 U.S.C. 2401(b). Furthermore, a Motion to Dismiss is the proper defense of the Government in a situation where the Court has never acquired jurisdiction. Caton v. United States, 495 F.2d 635 (9th Cir.--1974); Jordan v. United States, 333 F. Supp. 987, (E.D. Pa.--1971).

IT IS THEREFORE ORDERED that the Defendant's Motion to Dismiss be and the same is hereby sustained *and the Cause of Action & Complaint are hereby dismissed.*
Dated this 8th day of August, 1978.

Allen E. Barrett

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

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

FILED

AUG 7 1978

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

_____)	
GENE W. BRILEY,)	
	)	Plaintiff,
)	
VS.	)	NO. 77-C-420-C
)	
MARY E. BAUGHMAN,)	
	)	Defendant.
_____)	

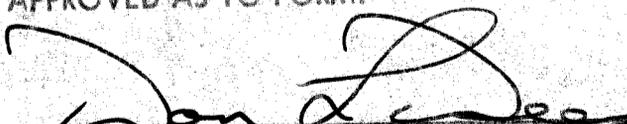
JOURNAL ENTRY OF JUDGMENT

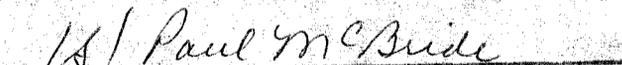
The above entitled action came on regularly for trial before the Court and a jury, the Honorable H. Dale Cook, District Judge, presiding, the plaintiff appearing in person and by his attorney, Don L. Dees, and the defendant appearing in person and by her attorney, Paul McBride, and the issues having been tried and the jury having returned its verdict, which was accepted by the Court;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Gene W. Briley, plaintiff, have and recover from Mary E. Baughman, defendant, the sum of \$30,000.00, with pre-judgment interest thereon at the rate of 6% per annum from October 11, 1977, to July 18, 1978, or ~~\$1,234.51~~ ^{\$1,380.00} and his costs in the amount of \$293.04, with interest thereon at the rate of 10% per annum from July 18, 1978.

Dated this 7th day of August, 1978.

APPROVED AS TO FORM:


DON L. DEES, Attorney for the Plaintiff


PAUL MC BRIDE, Attorney for the Defendant


H. DALE COOK, United States District Judge

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

KANSAS CITY FIRE AND MARINE)
INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
HENRY NEHRING, d/b/a NEHRING)
SUPPLY COMPANY, and RICHARD B.)
HINES and WANDA J. HINES,)
)
Defendants.)

No. 77-C-334-B

FILED

AUG 8 1978

ORDER OF DISMISSAL

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

ON this 8th day of August, 1978, 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.

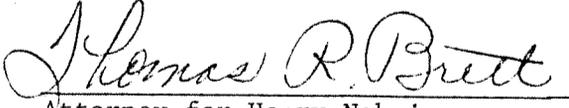
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the plaintiff filed herein against the defendant be and the same hereby is dismissed with prejudice to any future action.



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

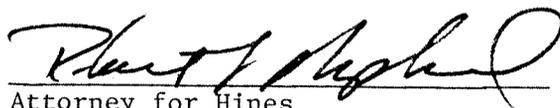
APPROVALS:

THOMAS R. BRETT



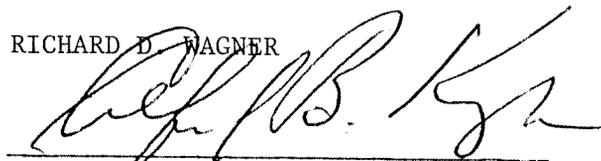
Attorney for Henry Nehring

ROBERT SHEPHERD



Attorney for Hines

RICHARD D. WAGNER



Attorney for the Plaintiff

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

AUG 8 1978

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 NOVALE L. THOMPSON,)
)
 Defendant.)

CIVIL ACTION NO. 78-C-316-C

NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff herein, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action, without prejudice.

Dated this 7th day of August, 1978.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney



ROBERT P. SANTEE
Assistant United States Attorney

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

DANIEL FITZSIMMONS,)
)
 Plaintiff,)
 vs.) No. 78-C-80-C
)
 JAMES RICHARD HARVEY, OIL)
 CAPITAL TRASH SERVICE, INC., an)
 Oklahoma corporation, RICHARD)
 L. SKEITH and KAR-RENU OF)
 AMERICA, INC., an Oklahoma)
 corporation,)
)
 Defendants.)

FILED

AUG 8 1978

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

JOURNAL ENTRY OF JUDGMENT

Defendant, KAR-RENU OF AMERICA, INC., an Oklahoma corporation, has been regularly served with process. It has failed to appear and answer the plaintiff's complaint filed herein. The default of defendant has been entered, and it appears from the files and records herein that this Court has in personam jurisdiction over the defendant, Kar-Renu of America, Inc.

It is ordered and adjudged that plaintiff recover from defendant Kar-Renu of America, Inc., the sum of \$250,000, with interest thereon at the rate of ten percent (10%) per annum from this date forward, until paid, together with all properly taxable Court costs.

Witness my hand this 8th day of August, 1978.

H. Dale Cook
UNITED STATES DISTRICT JUDGE

FILED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

AUG 7 1978

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

United States of America,)	
)	
Plaintiff,	)	✓ CIVIL ACTION NO. 76-C-337-C
)	
vs.	)	This action applies only to
	)	the Oil Leasehold Interest
25.00 Acres of Land, More or	)	in the estate taken in:
Less, Situate in Osage County,)	
State of Oklahoma, and South-	)	Tract No. 427ME
land Drilling and Production)	
Corporation, et al., and)	
Unknown Owners,)	
	)	(Included in D.T. filed in
Defendants.	)	Master File #401-2)

J U D G M E N T

1.

Now, on this 7th day of August, 1978, this matter comes on for disposition on application of the Plaintiff, United States of America, for entry of judgment on a stipulation of the parties agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for Plaintiff, finds:

2.

This judgment applies to all matters involved in the captioned civil action. The tract of land involved, the estate condemned in such tract and the interest therein included in this case are as set forth and described in the Complaint filed in this action.

3.

The Court has jurisdiction of the parties and subject matter of this action.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause who are interested in subject tract.

5.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right, power and authority to condemn for public use the property described in such Complaint. Pursuant thereto, on June 24, 1976, the United States of America filed its Declaration of Taking of such described property, and title to the described estate in such property should be vested in the United States of America as of the date of filing the Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court, as estimated compensation for the taking of subject property a certain sum of money, and none of this deposit has been disbursed, as set out below in paragraph 12.

7.

The defendants named in paragraph 12 as owners of the subject property are the only defendants asserting any interest in such property. All other defendants having either disclaimed or defaulted, the named defendants were, as of the date of taking, the owners of the subject property and, as such, are entitled to receive the just compensation awarded by this judgment.

8.

The owners of the subject property and the United States of America have executed and filed herein a Stipulation As To Just Compensation wherein they have agreed that just compensation for the taking of subject property is in the amount shown as compensation in paragraph 12 below, and such Stipulation should be approved.

9.

This judgment will create a deficiency between the amount deposited as estimated compensation for the taking of subject property and the amount fixed by the Stipulation As To Just Compensation, and the amount of such deficiency should be deposited for the benefit of the owners. Such deficiency is set out in paragraph 12 below.

10.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use Tract No. 427ME, as such tract is particularly described in the Complaint filed herein; and such tract, to the extent of the estate and interest therein as described in such Complaint, is condemned, and title thereto is vested in the United States of America, as of June 24, 1976, and all defendants herein and all other persons interested in such property are forever barred from asserting any claim to such property.

11.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking, the owners of the property condemned by the subject action were the defendants whose names appear below in paragraph 12; and the right to receive the just compensation for the taking of such property is vested in the parties so named.

12.

It Is Further ORDERED, ADJUDGED and DECREED that the Stipulation As To Just Compensation described in paragraph 8 above, hereby is confirmed; and the sum thereby fixed is adopted as the award of just compensation for the taking of subject property as follows:

TRACT NO. 427ME
Subordination of Oil Leasehold Interest Only
(as described in Complaint)

OWNERS:

H. C. Wachtman, Jr. ----- 1/4
Dean H. Schroeder ----- 1/4
David A. Brierley ----- 1/4
Charles V. Welch ----- 1/4

Award of just compensation		
pursuant to Stipulation -----	\$3,320.00	\$3,320.00
Deposited as estimated compensation --	\$600.00	
Disbursed to owners -----		None
Balance due to owners -----		\$3,320.00
Deposit deficiency -----	\$2,720.00	

At the time of the hearing before the Administrative Law Judge. plaintiff was 54 years of age and had an eighth grade education (TR 25). He was married (TR 25) and has four children over the age of 20 (TR 25). His wife works for the Inter-Tribal in Miami, Oklahoma (TR 26). He testified his source of income was a disability check from the Veterans Administration and that he was classified 100% disabled (service connected) (TR 26-27); that he has been receiving the 100% disability for a year that coming September (TR 27); that he received 50% disability starting in 1971 (TR 27). Plaintiff testified that his last employment was "self-employed with my own 'dozer and the last paying job that I worked for somebody else was for Herschel Benz (PHOENTIC) in Groves, Oklahoma, as a 'dozer operator.'" (TR 28). He further testified that he last worked in 1974 or 1975 (TR 28). At page 27 of the transcript the plaintiff testified:

"A. I've got three sows. I sold my cattle here, oh, two or three months ago on account of I couldn't take care of them. I sold my 'dozer' on account of every time I got on it, I'd start bleeding again. So as of the time I sold my "dozer" and cattle, I haven't been doing nothing except sitting around and looking after my hogs."

The Administrative Law Judge found that plaintiff had a past work history, in addition to the "dozer" operation of plumber, truck driver, and a drilling equipment operator. (TR 13)

Plaintiff's complaints are stomach trouble, headaches, and other complications.

The record furnished in the transcript reveals the following:

Plaintiff was admitted to Grove General Hospital on December 4, 1970, with complains of gastritis. X-Rays of the gallbladder, chest, colon, and gastrointestinal system were all normal. Plaintiff was discharged on December 7, 1970, with a diagnosis of duodenal ulcer. Plaintiff was then sent to Dr. Wooldridge for treatment of the ulcer. Dr. Wooldridge diagnosed chronic scarring of the duodenum and recommended surgery. Plaintiff was admitted to the Grove General Hospital on December 14, 1970. A subtotal gastric resection, which is a partial re-

moval of the stomach was performed and plaintiff had a normal recovery. He was discharged on December 24, 1970, with instructions to stay on a bland diet and not to return to work for six weeks.

Plaintiff was admitted to the Veterans Hospital in Muskogee on May 7, 1971, complaining of stomach pain. An EKG was within normal limits. Plaintiff was put on a bland diet and medication and left the hospital on May 13, 1971, because he felt nothing else could be done at the hospital.

Plaintiff was admitted to Grove General Hospital on August 1, 1972, with abdominal distress. Plaintiff was diagnosed as having chronic pancreatitis and either colitis or some low grade intermitten obstructive bowel syndrome. Plaintiff was discharged from the hospital on August 4, 1972, with his ulcer medicine. Dr. Cotner reported on May 16, 1972, that plaintiff had a duodenal ulcer and was unable to work. Dr. Cotner stated on September 20, 1972, that his diagnosis was unchanged.

There are progress notes in the record covering a period of treatment at the Veterans Administration Hospital for the period from November 1972 to June 1976. On February 4, 1975, plaintiff was reported as having arthritis of the shoulder. On March 27, 1975, the notes indicate that plaintiff was obtaining some relief with exercise and traction. On May 7, 1975, plaintiff was reported as having headaches. On August 9, 1975, plaintiff was reported as having a burning sensation in his stomach. Plaintiff was given antacids. On December 8, 1975, plaintiff was reported as having considerable pain from headaches. On April 2, 1976, plaintiff's headaches were felt to be musculoskeletal in nature and plaintiff was also reported as having depressive neurosis. On June 6, 1976, plaintiff was again reported as having headaches. Dr. Cotner reported on November 17, 1976, that in his opinion plaintiff was totally disabled.

At pages 29 and 30 of the transcript plaintiff testified as follows:

"Q. Let's see, your -- (PERUSING DOCUMENTS) -- application -- indicated that you were a dozer operator in -- said you were a dozer operator but had been too sick to work.

"On your application, you stated that you'd been self-employed at the time you filed the application. Can you tell me what your problems are, your medical problems are, at this time?

"A. Well, if I take my medication, I just stay kind of groggy like. And if I don't take them, I get some of the darndest headaches and I would up in Jay (PHONETIC) Hospital twice.

"Q. All right. Your problem then is related to your stomach problems, is that correct?

"A. The stomach is part of it. My neck is worse. One sharp move and my head starts hurting and if I turn my head too much, my ears start going numb. I'll reach up and I'll -- just like a foot goest to sleep or something like that is the way my ears feel. I don't drive hardly any anymore, just up to get hog feed or something like that. I limit my driving to that. My wife drives me the rest of the time.

"Q. What is the problem on your spine and your neck. What causes it?

"A. They say they broke all of the calcium and what not loose in my neck and it's causing pressure on the nerves and it's giving me these headaches. That's the way it was explained to me the last time that I was in there when they gave me this collar. Dr. Russo or something like that.

"Q. Well, your main symptom -- is it your ulcers or is it your neck or --

"A. My stomach, I can take care of that by limiting my diet and what I eat, but I can't do a darn thing about this neck and the headaches. If you'd want -- now, they've changed my medication. ***."

He further testified (TR 30) that he went to Dr. Walker in Tulsa who do a brain scan and "whatnot" and said it was a "covert depression".

The role of the Court is limited, on judicial review, to whether there is substantial evidence to support the fact findings and/or decision of the Secretary and not to try the issue de novo, or substitute the judgment of the Court for that of the Secretary. 42 U.S.C. §405(g); Trujillo v. Richardson, 429 F.2d 1149 (10th Cir. 1970).

If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. Richardson v. Pearles, 402 U.S. 389 (1971).

The Administrative Law Judge found, in pertinent part
page 13 of the Transcript:

"3. The claimant alleges disability due to removal of 60% of his stomach and headaches. Medical evidence of the record and diagnosis of the evidence do not indicate a physical or medical impairment of such a severity as to meet the disability requirements of Title II of the Social Security Act on or before June 30, 1975, the date the claimant's eligibility requirements expired. There was medical evidence in the record to indicate the claimant presently suffered some osteoarthritis, mild, and neck pain, asymptomatic.

"4. The testimony and medical history of the claimant reflected the claimant has a condition of impairment capable of producing pain; however, the evidence did not indicate a level of severity of pain which would preclude the claimant from engaging in substantial gainful activity, on or before June 30, 1974.

"5. Considering the claimant's physical and mental ability, age, education, and work history on and before June 30, 1975, he should have been able to do jobs similar to or related to work he had performed in the past. These jobs were present in significant numbers in the region where the claimant lives and in several regions of the country."

A claimant claiming disability insurance benefits in a Social Security case has the burden of proving his disability. *Valentine v. Richardson*, 468 F.2d 588 (10th Cir. 1972). To meet this burden and establish disability, he must prove that he is unable to engage in any substantial gainful activity. *Keating v. Secretary of Health, Education and Welfare*, 468 F.2d 788 (10th Cir. 1972). Plaintiff must also establish a physical impairment lasting at least 12 months that prevents his engaging in substantial gainful activity. *Alexander v. Richardson*, 451 F.2d 1185 (10th Cir. 1971) cert. denied, 407 U.S. 911 (1972).

The Court has carefully reviewed the entire record and the briefs of the parties, and finds, that the decision of the Secretary is supported by substantial evidence to support the findings and decision and, therefore, must be affirmed.

IT IS, THEREFORE, ORDERED that judgment should be entered in favor of the defendant and against the plaintiff.

ENTERED this 17th day of August, 1978.



CHIEF UNITED STATES DISTRICT JUDGE

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

FILED

AUG 7 1978

MERRITT TOWNE GALBRAITH d/b/a)
GALBRAITH AVIATION INSURANCE)
SERVICE,)

Plaintiff,)

vs.)

NATIONAL AIR COLLEGE, a)
California corporation,)

Defendant.)

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

No. 77-C-188-B

O R D E R

NOW on this 7th day of August, there comes on for consideration the Motion to Dismiss filed by the Plaintiff. The Court finds that the parties have entered into a settlement, which settlement resolves the underlying issues of this action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Complaint and the cause of action in the above captioned matter be and the same are hereby dismissed with prejudice to a new action.

Allen E. Benbow

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

**NOTE: THIS ORDER IS TO BE MAILED
BY MOVANT TO ALL COUNSEL AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.**

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

FILED

AUG 24 1978

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

UNITED STATES OF AMERICA; and)
KENNETH L. HARRIS, Revenue)
Officer, Internal Revenue Service,)
)
Petitioners,)
)
vs.) No. 78-C-248-B
)
CAROL MORTON,)
d/b/a TOOT'S SUPER CLUB,)
)
Respondent.)

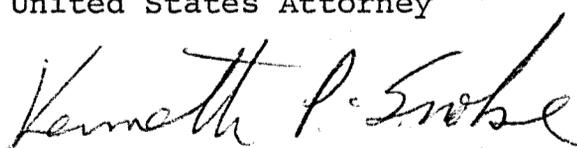
NOTICE OF VOLUNTARY DISMISSAL

COMES NOW the petitioners, United States of America and Kenneth L. Harris, Revenue Officer, Internal Revenue Service, and pursuant to Rule 41(a)(1), Federal Rules of Civil Procedure, hereby give notice of, and do dismiss this cause of action without prejudice.

Petitioners would show the Court that respondent was never served with this Court's Order to Show Cause dated June 9, 1978, nor has respondent answered or otherwise plead. Further, it is now believed that respondent is a resident of Kansas City, Missouri, within the jurisdiction of the Western District of Missouri, where this matter will, if necessary, be reinstated.

Respectfully submitted,

HUBERT H. BRYANT
United States Attorney


KENNETH P. SNOKE
Assistant United States Attorney

FILED

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

AUG 4 1978

LENNOX INDUSTRIES, INC.,)
 a corporation,)
)
 Plaintiff,)
)
 vs.)
)
 MARVIN LASATER, d/b/a Lasater)
 Electric Company; and THURSTON)
 FIRE & CASUALTY INSURANCE)
 COMPANY,)
)
 Defendants.)

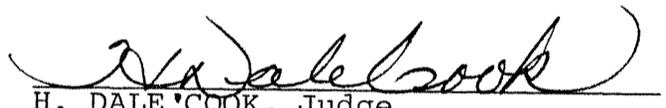
By Jack C. Silver, Clerk
U. S. DISTRICT COURT

✓ No. 77-C-90

O R D E R

The Court, upon consideration of the stipulation of the parties filed in this action, hereby orders that all claims and counterclaims asserted by the parties hereto be dismissed with prejudice and that each party shall bear its own costs incurred in this action.

DATED 3rd August, 1978.


 H. DALE COOK, Judge
 United States District Court for
 the Northern District of Oklahoma

2. That the plaintiff's Motion for Summary Judgment be and the same is hereby overruled.

3. That the Defendants' Motions for Summary Judgment be and the same are hereby sustained.

ENTERED this 4th day of August, 1978.

Cullen E. Barron

CHIEF UNITED STATES DISTRICT JUDGE

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

BUELL CABINET COMPANY, INC.,

Plaintiff,

vs.

RICHARD S. SUDDUTH and STEVEN H.
JANCO, individually and as general
partners in WORLD PRODUCTS, A
general partnership; STEVEN H.
JANCO and RICHARD S. SUDDUTH, d/b/a
WORLD PROPERTIES, a joint venture;
and OLD WORLD PRODUCTS CORPORATION,
a corporation; McKEE INCOME REALTY
TRUST, a business trust organized
under the laws of the Commonwealth
of Massachusetts; and SOONER FEDERAL
SAVINGS AND LOAN ASSOCIATION OF
TULSA,

Defendants.

77-C-169-B

FILED

AUG 4 1978

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

FINDINGS OF FACT AND CONCLUSIONS OF
LAW

The plaintiff has filed a Motion for Summary Judgment and the defendants have filed Motions for Summary Judgment in this litigation. This Court, has simultaneously with these Findings of Fact and Conclusions of Law entered an order overruling plaintiff's Motion for Summary Judgment and sustaining defendants' Motions for Summary Judgment, after a hearing had before the Magistrate and Findings and Recommendations having been filed.

The Court has carefully perused the entire file, including all exhibits, transcripts and the deposition on file herein, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The real estate involved in this litigation is described as follows:

"Lots 19-26 inclusive, Block 8, KATY FREEWAY INDUSTRIAL PARK, an addition to the City of Tulsa, Tulsa County, Oklahoma."

2. John A. Rupe and Anne B. Rupe conveyed the "Commerce

Center" to Seven H. Janco and Richard S. Sudduth, d/b/a World Properties by General Warranty Deed, dated March 25, 1975, filed of record with the Tulsa County Clerk on July 9, 1975, in Book 4172 at page 2152. This deed was in error and a correction deed was later filed on August 13, 1975.

3. The correction deed of John A. Rupe and Anne B. Rupe to World Properties, a general partnership, was executed on August 5, 1975, and recorded with the Tulsa County Clerk on August 13, 1975, in Book 4177 at Page 1571. This correction deed contained the following language: "This correction deed given to correct prior deed of March 25, 1975, from John A. Rupe and Anne B. Rupe, husband and wife, to Steven H. Janco and Richard S. Sudduth d/b/a World Properties, which was purchased by World Properties, a General Partnership, and this deed is therefore given to make that correction."

4. Two days after the deed referred to in paragraph 3 above the following took place: On August 15, 1975, World Properties, a general partnership, record title owner of the Commerce Center, granted Riverside National Bank a mortgage on the Commerce Center. The mortgage was filed of record with the Tulsa County Clerk on August 26, 1975, in Book 4179 at page 1141. The mortgage was for \$7,530.96.

5. On September 29, 1975, World Properties, the record title owner of the Commerce Center, granted Riverside National Bank a mortgage on the Commerce Center. The mortgage was filed of record with the Tulsa County Clerk on October 9, 1975, in Book 4186 at Page 820. The mortgage was for \$35,381.22.

6. On February 24, 1976, World Properties, a general partnership, conveyed the Commerce Center by General Warranty Deed to Old World Products Corporation. The deed was recorded with the Tulsa County Clerk on February 24, 1976, in Book 4203 at page 2173.

7. Between February 24, 1976, and April 9, 1976, Old World Products Corporation entered into negotiations with McKee Income Realty Trust to see McKee, the Commerce Center. Immediately prior to consummating the sale and conveyance of the Commerce Center to McKee, various title requirements needed to be satisfied. In addition to the encumbrances referenced at Paragraphs 7, 8 and 17 of the complaint which were released as referenced at paragraph 17 of the complaint, a quit-claim deed was executed by Steven H. Janco and Richard S. Sudduth, as individuals and as d/b/a World Properties. This quit-claim deed was filed of record April 8, 1976, in Book 4210 at page 948.

8. Subsequent to these title requirements being satisfied, Old World Products Corporation, the record title owner, conveyed the Commerce Center, by General Warranty Deed, to McKee Income Realty Trust. The deed was executed on April 9, 1976, and filed of record with the Tulsa County Clerk in Book 4210 at Page 954. McKee Income Realty Trust remains the record title owner.

9. On October 16, 1975, plaintiff in this litigation brought suit against Richard S. Sudduth on a promissory that Richard S. Sudduth is alleged to have executed on the 18th day of March, 1975, in the face amount of \$18,000.00, with interest thereon at the rate of 10% per annum upon the unpaid balance. A judgment was rendered in the District Court of Tulsa County, Oklahoma, in Cause Number C-75-2521 against Richard S. Sudduth in the sum of \$17,250.00, plus interest thereon at the rate of 10% per annum from May 20, 1975, together with interest on the composite amount at the rate of 10% per annum from date of judgment until paid, plus a reasonable attorney fee in the sum of \$1,750.00 and the costs of the action.

10. The Court finds:

(a) That Steven H. Janco and Richard S. Sudduth, d/b/a World Properties was not a joint venture;

(b) That partnership funds were used to purchase the Commerce Center;

(c) That title was taken in the partnership entity known as Richard S. Sudduth and Steven H. Janco, d/b/a World Properties;

(d) That plaintiff does not stand in the posture of a bona fide purchaser;

(e) That the original Rupe deed and correction Rupe deed did convey the property in question to the same entity, a partnership;

(f) That Steven H. Janco and Richard S. Sudduth d/b/a World Properties meet the statutory requirements of a partnership and later applied for the use of the fictitious name "World Properties" as the partnership's fictitious name;

(g) That the Commerce Center was intended to be a partnership asset, was purchased with partnership funds that had been borrowed by the partnership and deposited in a partnership checking account;

(h) That Plaintiff's Judgment Lien cannot attach to partnership property, since its judgment was only as to an individual.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court enters the following Conclusions of Law:

1. This Court has jurisdiction pursuant to 28 U.S.C. §1332 and the amount in controversy, exclusive of interest and costs exceeds the sum of \$10,000.00.

2. In *Crest v. Insurance Co. of North America*, 417 F.Supp. 564 (WD Okl. 1976) the following guidelines were set forth in the determination of a partnership, to-wit:

"The essential elements of a partnership are (1) an intent by the parties to form a partnership, (2) participation by all parties in both profits and losses, and

(3) such a community of interest as far as third parties are concerned as enables each partner to make contracts, manage the business and dispose of partnership property."

3. Property that is acquired with partnership funds is partnership property. The rule is set forth in Oklahoma's Uniform Partnership Act at 54 O.S. §209:

"(a) Unless the contrary intention appears, property acquired with partnership funds is partnership property."

4. A judgment creditor has not the protection of a bona fide purchaser. *Gilheath v. Smith*, 159 P. 719 (Ok1. 1915); *Oklahoma State Bank of Wapanusha v. Burnett*, 162 P. 1124, 4 ALR 430 (Ok1.).

5. That the plaintiff's Motion for Summary Judgment should be overruled and the defendants' Motions for Summary Judgment should be sustained.

ENTERED this 4th day of August, 1978.



CHIEF UNITED STATES DISTRICT JUDGE

this action should be dismissed with prejudice".

On December 20, 1976, plaintiff, by and through its attorney, filed an Application to Vacate Order of Dismissal. Plaintiff contended that there was an error in the settlement that resulted in the Order of Dismissal With Prejudice.

On May 3, 1977, a hearing was had before this Court on the Plaintiff's Application to Vacate Order of Dismissal. In open Court the Application was overruled. At said hearing the Court directed the plaintiff to file a statement within 10 days and defendants to respond within 5 days thereafter on "dismissal with or without prejudice".

Thereafter and on May 6, 1977, plaintiff filed a Motion for New Trial, stating in said Motion:

"COMES NOW the plaintiff and moves for a new trial upon the ruling of the Court in overruling plaintiff's Motion to Vacate dismissed(sic). A brief in support is filed herewith."

In the brief filed the plaintiff states:

"The court has clear authority to set aside a dismissal which is obtained as a result of fraud, mistake, inadvertence, or excusable neglect, as per FRCP 60(b). ***."

Plaintiff then, in said brief, makes the following request:

"The court should reconsider its ruling based upon those authorities and make a ruling the dismissal was improper or without prejudice and vacate the dismissal."

Rule 60(b)(1) of the Federal Rules of Civil Procedure, which is apparently the Rule relied on by plaintiff states, in pertinent part:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; *** (3) fraud, misrepresentation, or other misconduct of the adverse party; ***. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. ***."

Additionally, on May 6, 1977, plaintiff filed a Motion to Enforce Settlement Agreement or Vacate the Same and Order Dismissal Without Prejudice. On the same date, plaintiff, by separate pleading, tendered the sum of \$12,000 "part payment of settlement" to the defendants.

On August 29, 1977, the Court entered an order stating, in pertinent part:

"The Court finds, that due to the various positions of the parties herein, that in the interests of justice, this case should be referred to the United States Magistrate for a full evidentiary hearing on the instant motions [Motion for New Trial; Motion to Enforce Settlement Agreement or Vacate the Same and Order Dismissal Without Prejudice] and findings and recommendations to the Court. IT IS SO ORDERED."

Pursuant to said Order, the Magistrate had a hearing, including testimony and evidence, and his Findings and Recommendations were filed on May 19, 1978. The defendants, John Park Development Company, Inc., B & B Development Company, a partnership, Warren G. Morris, John C. Bright and Gladys M. Bright, filed their objections to said Findings and Recommendations, and the matters for determination by this Court have been fully briefed by the parties.

At the evidentiary hearing before the Magistrate the defendant, Mr. Warren G. Morris testified. The Magistrate summarized his testimony as follows:

"Morris testified that he had offered to settle the case for \$12,000 but that Mr. Johnson advised Morris that he could not settle the case for less than \$15,000. Morris further testified that he agreed to settle the case for \$15,000. Morris further testified that he received a call from Johnson after Christmas and that Johnson told him that at the time he filed the settlement papers in this case for \$12,000 that he was in the process of settling another case for \$12,000 and became confused and had gotten the two cases mixed up which caused him to mistakenly sign the dismissal documents in this case."

At the hearing the Magistrate admitted two depositions on the limited basis of proving whether the plaintiff authorized the settlement of this action for \$15,000 or \$12,000. The depositions so admitted were of Mr. George Quinnelly, treasurer of the plaintiff corporation, and Mr. William L. Green, corporate counsel, taken on October 27, 1977, in Birmingham, Alabama.

The testimony adduced in these two depositions is basically that on December 7, 1976, a telephone conversation was had with Mr. Larry Johnson (a conference call) and that Mr. Johnson advised

that he had an offer to settle from the Defendants for the sum of \$15,000.00 (Green deposition, p. 8). At pages 9 and 10 Mr. Green testified:

"A. Well, the substance was that the case would be settled for the \$15,000.00. Of course, we didn't like the fact that we were coming down from our original claim of \$18,000-plus, but we felt like under the circumstances that it was in the best interest to go ahead and settle the claim for the \$15,000.00.

"Q. Did you authorize Mr. Johnson to settle the case for \$15,000.00?

"A. Yes, we did.

"Q. Okay. Was there any mention of a settlement for any figure lower than \$15,000.00, Mr. Green?

"A. For any figure lower, no.

"Q. Was there any mention during the conversation of the figure \$12,000.00?

"A. No."

At pages 6 and 7 of his deposition, Mr. Quinnelly testified:

"Q. Okay. Did you or Mr. Green authorize Mr. Johnson to accept that \$15,000.00 on behalf of U.S. Pipe?

"A. Yes, we did.

"Q. Okay. Do you recall any settlement figure less than \$15,000.00 being mentioned in that conversation, Mr. Quinnelly?

"A. To the best of my recollection, the only settlement figure that was mentioned was \$15,000.00.

"Q. Okay. Do you recall any mention of the figure \$12,000.00 during that telephone conversation?

"A. No, I do not."

Mr. Quinnelly testified, commencing at page 6 of his deposition:

"Q. Okay. Could you tell us how that conversation came about and the substance of the conversation, please, sir, the telephone conversation?

"A. Well, apparently Mr. Johnson and Mr. Green were discussing the case, and Mr. Green called me, and on a three-way conversation, advised me that we had been offered some \$15,000.00 as a settlement. Although the original amount was in excess of that, we felt under the circumstances that it would be to our advantage to settle on that basis, and we did agree to the \$15,000.00 settlement figure.

"Q. When you say we agree, you and Mr. Green agreed?

"A. Mr. Green and I agreed together.

"Q. Okay. Did you or Mr. Green authorize Mr. Johnson to accept that \$15,000.00 on behalf of U.S. Pipe?

"A. Yes, we did.

"Q. Okay. Do you recall any settlement figure less than \$15,000.00 being mentioned in that conversation, Mr. Quinnelly?

"A. To the best of my recollection, the only settlement figure that was mentioned was \$15,000.00.

"Q. Okay. Do you recall any mention of the figure \$12,000.00 during that telephone conversation?

"A. No, I do not."

Messrs Ted Gibson and Richard E. Wright III, partners of plaintiff's attorney, Mr. Johnson, filed an affidavit stating in essence that on the 7th day of December, 1976, Mr. Johnson stated that he had settled this case for \$15,000 and the reason that they recalled this conversation was that they discussed the proper fee for the work involved in the case. Mr. Johnson filed an affidavit that he was offered, on December 7, 1976, a settlement of \$15,000 by defendants' attorney, Mr. Sanders; that without the knowledge of Mr. Sanders he taped the conversation "for the truth of the matter involved".

The defendant, Mr. Warren G. Morris filed an affidavit, which stated in pertinent part:

"1. That David H. Sanders called him to his office on or about Friday, December 3, 1976, to prepare a suggested pretrial order to submit to counsel for the plaintiff. That in discussing the case with David H. Sanders, your affiant stated that a poor settlement would be better than a good lawsuit and requested David H. Sanders to call Lawrence A. Johnson, attorney for the plaintiff, to make an offer to settle the case for \$12,000.00.

"2. That while your affiant was in the office of David H. Sanders on Friday, December 3, 1976, at Room 205 Denver Building, Tulsa, Oklahoma, he called Lawrence A. Johnson by telephone and offered to pay \$12,000.00. That Sanders informed your affiant that Mr. Johnson stated that his client would not accept \$12,000.00, but believed that the plaintiff would accept \$15,000.00. That your affiant authorized David H. Sanders to see if the case could be settled for \$15,000.00. That Sanders made said order (sic) in affiant's presence and then informed your affiant that Lawrence A. Johnson had advised him that he would submit the offer to his client.

"3. That when your affiant left the office of attorney, of attorney, David H. Sanders, on December 3, 1976, he did not know whether or not the plaintiff would accept \$15,000.00 and did not know whether or not a settlement

had been made.

"4. Affiant further states that the next business he transacted with reference to his case was on or about December 7, 1976, when he received a call from David H. Sanders informing him that he had in turn received a call from Johnson's office advising his office that the case could be settled for \$12,000.00. Your affiant did not know why Lawrence A. Johnson informed affiant's counsel that the case could be settled for \$12,000.00, other than the plaintiff would accept same in settlement. That upon receiving the information that the case could be settled for \$12,000.00, your affiant directed the payment of same and endorsed a certificate of deposit payable to John Parks Development Company and the United States Fidelity and Guaranty Company in order that the settlement could be consummated.

"5. Affiant further states that his attorney transmitted the check for \$12,000.00 by letter of transmittal, spelling said sum out to Lawrence A. Johnson and that neither your affiant nor his attorney tricked the plaintiff and his counsel to accept the \$12,000.00. That your affiant states that he made no statements, representations, or inducements to get Lawrence A. Johnson and plaintiff to accept \$12,000.00.

"6. Affiant further states that he did not cheat the plaintiff or his attorney, and he knows of no act on behalf of his attorney which could be considered as cheating the plaintiff.

"7. Affiant further states that on December 13, 1976, he had an occasion to be in the office of David H. Sanders when Lawrence A. Johnson called and your affiant overheard a conversation wherein the settlement for \$12,000.00, plus the dismissal of claims of one against the other, was discussed between Sanders and Johnson and that Sanders stated that he would sign a stipulation with Johnson that call claims had been settled as Johnson had expressed dissatisfaction with the edited court order of dismissal with prejudice as entered by the Court."

The affidavit of David H. Sanders, attorney, filed January 5, 1977, reflects the following:

"1. That on or about Friday, December 3, 1976, that your affiant called Warren G. Morris to his office to confer with him to prepare a pre-trial order. In discussing the matter that Warren G. Morris stated that a poor settlement was better than a good lawsuit and affiant called Lawrence A. Johnson, attorney for plaintiff, to see if the case could be settled for \$12,000.00.

"2. In the presence of Warren G. Morris, your affiant called Lawrence A. Johnson, attorney for plaintiff, and made an offer of \$12,000.00.

"3. That Lawrence A. Johnson stated that his client would not accept \$12,000.00, but that he believed that they would accept \$15,000.00.

"4. That your affiant relayed this information to Warren G. Morris while Lawrence A. Johnson remained on the phone and Warren G. Morris said to go ahead and see if the case could be settled for \$15,000.00. That thereupon,

your affiant informed Lawrence A. Johnson that Warren G. Morris was willing to pay \$15,000.00 in settlement.

"5. That Lawrence A. Johnson stated that he would inform his client of the offer and would see if the case could be settled for that amount and advise the affiant.

"6. That no firm agreement was made on December 3, 1976, that the defendants would pay \$15,000.00 in settlement and that the plaintiff would accept \$15,000.00 in settlement.

"7. That on December 7, 1976, at 10 a.m., Lawrence A. Johnson called the office. That this call was diaried in our 'phone message book'.

"8. That Lawrence A. Johnson informed affiant's secretary that the case was settled for \$12,000.00.

"9. Affiant then called Warren G. Morris and told him that Lawrence A. Johnson had called the office and said the case could be settled for \$12,000.00.

"10. That Warren G. Morris came to the office and endorsed a C.D. for the sum of \$19,064.97, which was payable jointly to the United States Fidelity and Guaranty Company and John Park Development Company.

"11. That there was a discussion between Warren G. Morris and your affiant as to why Lawrence A. Johnson had called and advised that the case could be settled for \$12,000.00 when on the previous Friday he had stated that it would take \$15,000.00. In settlement of cases there is negotiating and bargaining and that Warren G. Morris concluded and affiant concluded that the plaintiff was willing to accept \$12,000.00 and had joked and tried to negotiate for a greater sum but had for reasons known to it and unknown to affiant, elected to take \$12,000.00.

"12. That your affiant endorsed the said Certificate of Deposit for United States Fidelity and Guaranty Company and then negotiated same through the Trust Account of Sanders, McElroy & Carpenter. That a check for \$12,000.00, payable to the order of plaintiff and Lawrence A. Johnson was mailed to Mr. Johnson on December 8, 1976, wherein the sum of \$12,000.00 was spelled out in order that there would be no misunderstanding in the conclusion of the case. ***.

"13. That Lawrence A. Johnson returned an application to dismiss with prejudice and order of dismissal which was transmitted with the check executed and approved by him to your affiant.

"14. That on December 10, 1976, that Warren G. Morris picked said application and order up at affiant's office and took them to the Court for filing. He returned with two certified copies of same. That upon receipt of a certified copy of same that after deduction of a nominal fee, that your affiant remitted the balance held in trust to Warren G. Morris.

"15. That your affiant has read the reply to defendants' answer. Affiant states that on December 28, 1976, that Lawrence A. Johnson did not inform your affiant that he was taping the conversation. That affiant does not dispute said conversation, save and except on page 3. Affiant further states that the transcript is untrue in that affiant did not state that 'the mistake was made in this office'. Affiant further states that no mistake was made by him and Warren G. Morris in sending Lawrence A. Johnson the sum

\$12,000.00. That the sum of \$12,000.00 was sent to Lawrence A. Johnson because he called affiant's office on December 7, 1976, and informed affiant's office the case was settled for the sum of \$12,000.00, otherwise, affiant would not have remitted the sum of \$12,000.00, with a letter of transmittal. Affiant further states that he made no misrepresentations, statements or inducements to Lawrence A. Johnson to get him to call and say that the case was settled for \$12,000.00.

"16. Affiant further states that the United States Fidelity and Guaranty Company had sufficient moneys on hand and secured a certificate of deposit to save it free and harmless of and from all liability in this case and that relying upon the settlement negotiated by Lawrence A. Johnson that it released the balance and excess to Warren G. Morris, believing in good faith that he had accepted the money on December 8, 1976, in full payment, having executed an application and dismissal with prejudice, and further that if there had been an error, that the letter of transmittal and the check would have precipitated and brought forth the fact that the parties had not agreed upon \$12,000.00 as a settlement figure.

"17. Affiant further states that he relief solely upon the call from Lawrence A. Johnson to his office on December 7, 1976, in the handling of the case from and after that date, and without which cause, said matter would not have been handled and concluded as it was.

"18. Affiant further states that on Monday, December 13, 1976, Lawrence A. Johnson called your affiant before noon concerning the editing of the order by the Court. That Lawrence A. Johnson inquired whether or not we had a settlement and your affiant informed him that the claims of the defendant on their cross petition had been settled and that the payment of \$12,000.00 wound the case up and that if Lawrence A. Johnson wanted to draw a stipulation to that effect that your affiant would execute same.

"19. Affiant further states that there was only one agreement made and that is that plaintiff's offer to settle the case for \$12,000.00 was accepted and the amount timely paid by the defendants. That there never was an agreement that defendants would pay \$15,000.00 and that plaintiff would accept \$15,000.00.

"20. Affiant further states that neither he nor Warren G. Morris intended to or have 'cheated' the plaintiff and counsel. That Warren G. Morris and your affiant relied upon statements made to them in concluding the case for a settlement of \$12,000.00, payment in cash, plus the dismissal of the counterclaim of the defendants."

The conversation between Messrs. Johnson and Sanders, recorded on December 28, 1976, has been transcribed by Mr. Johnson (and the original tape introduced into evidence before the Magistrate). The conversation (transcribed) is contained in a pleading filed January 3, 1977, and marked Plaintiff's Exhibit 3 at the Magistrate hearing. It reflects the following:

It is to be noted in that in quoting the transcription "DS" stands for Dave Sanders and "LAJ" stands for Lawrence A. Johnson.

"DS Larry?
LAJ Yeah.
DS Dave Sanders.
LAJ Yes sir.
DS I'm getting out this brief and I wanted to check with you because I didn't want to make any mistake on stating the facts. We've got a telephone book over here and it shows a call from you to me on December 7th. My meory is, and I don't state it with unequivocalness, is that I saw a slip on my desk that says \$12,000 settlement is alright with Larry. Then I sent you the money on the 8th.about the letter of transmittal. Now, did you talk to the girl and give her the word that the \$12,000.....
LAJ I just said that our offer in the case was settled. Dave, I have notes where we settled the thing for \$15,000.
DS Well, how did the 12 get in there?
LAJ Hell if I know how it got there. But you talked to me and made me an offer of \$15,000.
DS I know, I know, but ah...
LAJ Why would I say 12 if you offered me \$15?
 (laughter)
DS I wondered why that the girl said, now you didn't tell me 12, did you?
LAJ No.
 (continued)
DS And then you said that they would take 15, and you would call them on that.
LAJ Yeah, now why would I take 12?
DS Well, I don't know. I don't know. But...
LAJ I admit that you've got problems with your client, running off with that money, Dave, but Jesus Christ, when you offer me 15 I'm certainly not going to settle for 12.
DS But, we got the word...I got the word, that you would take 12 and I sent it to you by plain letter of transmittal.
LAJ Dave. It screams at logic. If you offer my client 15, why in...other than the fact it's during Christmas, would he take 12?
DS Ha ha ha.....
LAJ I haven't gone that crazy. My fee is contingent

what I collect, you know, and I was...right after I talked to you on the thing, I was talking to the man in the office what my fee should be on that thing. We were talking about 15, so I don't know why in the devil I would take 12.

DS I don't know when the error was made. I agree...

LAJ Well, I don't either, but I mean that we've got a case...we've got a settlement for 15. If you can't do it, let's open it up and continue and I'll send the 12 back to you.

DS Well, I want you to get the 12. I...I want you to get 3 more out of Warren, not out of USF&G.

LAJ Well, as you well know, that's pretty futile. Ha ha.

DS Ha ha ha.

LAJ I mean, I really can't. I hate to see you even put you to writing a brief on the thing. I don't even think it commands a response brief on the deal. Our deal was \$15,000, and you've never backed up your word on me yet...

DS I'm not going to back up what the conversation I had with you. No sir. Hell no.

LAJ Well...

DS I'll die that way.

LAJ Tell the Court we settled for 15, but by inadvertence or mistake a check was sent for 12 and 3 more is owing. Because I'm sitting here on \$12,000 in my account that I've got to do something with.

DS Well, ah...

LAJ The only thing that I can suggest is, have USF&G a loan for 3, and have him pay you. Have you talked to him recently?

DS Yeah. Yeah. He's...he's just as judgment-proof as...and hell, I released that money, see?

LAJ Well, I understand you're in bad shape on the deal, but...

DS Right.

LAJ But, I mean, I've got to...you know, my client authorized me for 15 and no less.

DS Well, the mistake was made in this office, that's the heck of it. And ah, and so, I thought maybe you were bargaining with me, so I sent you the 12 and I wrote you a letter and spelled the 12 out, you know.

LAJ Dave, why would I bargain for you...entitled to, now, you know better than that.

DS Well, OK.

In the Findings and Recommendations of the Magistrate filed herein, the Magistrate made the following finding on the issue of fraud:

"The court finds that there is no evidence of fraud on the part of any of the defendants or their attorney David H. Sanders; ***that at the time Johnson executed the settlement documents he was in the process of settling another case for \$12,000 and was confused and mistaken as to the amount of the settlement at the time he executed the settlement papers authorizing settlement of this case for \$12,000.***."

The Magistrate further found that the defendant, USF&G had no personal knowledge of the settlement negotiations and transactions between Sanders and Morris with plaintiff's attorney; that USF&G had a certificate of deposit in the sum of \$19,064.97, to secure the payments of plaintiff's claims against the defendant, USF&G; that USF&G relied upon the statement of its attorney that the case had been settled and that it could release the certificate of deposit and authorize the proceeds to be distributed with \$12,000 being paid to the plaintiff and the balance of the \$7,064.97 being paid to the defendant, Warren G. Morris.

The Magistrate made the following recommendation:

"For the reasons stated herein, it is recommended that Plaintiff's Motion for New Trial be overruled, Plaintiff's Motion to Set Aside the Order of Dismissal With Prejudice filed herein on December 10, 1976, be overruled as to the Defendant, USF&G, a corporation, and sustained as to the Defendant John Park Development Company, B & B Development Company, Warren G. Morris, John C. Bright, and Gladys M. Bright, and Plaintiff's Motion to Enforce Settlement Agreement of \$15,000 (\$3,000 in addition to the \$12,000 heretofore paid to Plaintiff) be overruled as to Defendant, USF&G, and sustained as to Defendants John Park Development Company, B & B Development Company, Warren G. Morris, John C. Bright and Gladys M. Bright."

In connection with this recommendation, it is noted that heretofore and on May 3, 1988. the Court overruled the Plaintiff's Application to Vacate Order of Dismissal and directed the parties to file a statement within 10 days on the questions of "dismissal with or without prejudice". Instead, plaintiff has filed the Motions and Application presently pending before this Court for disposition.

In the case of L. E. Smith Const. Co. v. Bearden Plumbing

& Heat. Co., 372 P.2d 229 (Okla. 1962) the Oklahoma Supreme Court considered an action by a contractor to recover of the subcontractor an amount allegedly overpaid as a result of an error in tendering the amount which the subcontractor claimed due rather than the lesser amount the contractor admitted to be due. (In other words, this case involved an overpayment, rather than an underpayment.) The Supreme Court of the State of Oklahoma held that the contractor was not entitled to recover the amount paid under the settlement agreement, where both sides knew all the facts before entering into the agreement and the contractor allegedly overpaid because of a mistake of itself and/or its attorney, and it was not claimed that the subcontractor labored under a mistake. At page 232 the Court said:

"We are of the opinion that the record wholly fails to show facts that would relieve plaintiff from the compromise and settlement that was reached in connection with the first action. In the first paragraph of the syllabus to *Tulsa Interstate Petroleum Co. v. Allison et al.*, 112 Okla. 47, 239 P. 633, we said in part:

"'Voluntary settlements are so favored that if a doubt or dispute exists between parties with respect to their rights, and all have the same knowledge, concerning the circumstances involving these rights, and there is no fraud, misrepresentation, concealment, or other misleading incident, a compromise into which they thus voluntarily entered must stand and be enforced, although the final issue may be different from that which was anticipated, and although the disposition made by the parties in their agreement may not be that which the court would have decreed had the controversy been brought before it for decision.'

"In order to impeach a compromise and settlement of a disputed claim for mistake of fact, it must be shown that it was a mutual mistake of fact. See *Coates v. First Nat. Bank & Trust Co. of Oklahoma City et al.*, 176 Okla. 322, 55 P.2d 441. In the instant case \$495.50 of the claim was disputed and it is not contended that defendant labored under a mistake of fact as to said amount when it accepted said amount under the settlement agreement."

In *Reid v. Graybeal*, 73 F.R.D. 626 (USDC WD Okla., 1977) it was said:

"The cases indicate that in certain circumstances the Court may summarily enforce a compromise settlement agreement. This is so when the settlement agreement appears to be valid on its face and no legal defense to enforcement is present. But where factual issues are present which would constitute a defense to the

purported compromise settlement agreement, plenary proceedings should be conducted to consider evidence in regard to the validity of the purported and disputed compromise settlement agreement. *Autera v. Robinson*, 136 U.S.App.d.c. 216, 419 F.2d 1197 (1969); *Pearson v. Ecological Science Corp.*, 522 F.2d 171 (Fifth Cir. 1975), and see footnote 5 at page 176. The case of *Autera v. Robinson*, supra, indicates that the Motion now before the Court should be considered as a Motion to Enforce Settlement Agreement. Courts have held that a trial Court has authority to enforce on Motion a settlement agreement covering the primary litigation. (citing cases)."

In *Pearson v. Ecological Science Corp.*, 522 F.2d 171, 176 (5th Cir. 1975) it was stated:

"***Further, we are guided throughout our decision by the principle that '[s]ttlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits.'"

See also *Autera v. Robinson*, 419 F.2d 1197 (1969).

In line with these cases, it is noted that a full evidentiary hearing was afforded the parties before the Magistrate in these proceedings and the parties offered the opportunity to introduce the evidence they desired to substantiate their position.

In *Harrop v. Western Airlines, Inc.*, 550 F.2d 1143 (9th Cir. 1977) [a case involved in interpreting California law], the Ninth Circuit had before it a proceeding which was instituted on motion of plaintiffs to set aside an order dismissing an action after settlement. The Court of Appeals, in substance held, that even if the attorney for the defendants was advised by opposing counsel that the proposed settlement was satisfactory to plaintiffs, the question of whether the settlement was binding and the dismissal of the action was proper could not be determined in the absence of a finding that plaintiffs authorized their attorney to settle their case or to consent to a dismissal of the action. At page 1145 the Court said:

"A settlement agreement may be binding, in some circumstances, even if it is an oral one. Nevertheless, at least under California law, which is arguably applicable here, an attorney has no authority, either actual or implied, to settle an action without the express permission of his client. (citing cases) There is no finding in the record before us that the plaintiffs authorized their attorney to settle their case or to consent to a dismissal of the action.***."

In Markel Service, Inc. v. National Farm Lines , 426 F.2d 1123 (10th Cir. 1970), at 1126 it is stated:

"Oklahoma recognizes the general principle that money voluntarily paid on a debt with full knowledge of the facts under which it was demanded cannot be recovered. E.g., L. E. Smith Const. Co. v. Bearden Plumbing & Heating Co., 372 P.2d 229 (Okla. 1962); Tulsa Interstate Petroleum v. Allison, 112 Okla. 47, 239 P. 633 (1925). ***."

In 15A Am.Jur.2d, Compromise and settlement, §25, it is stated:

"A compromise and settlement is generally binding upon the parties although it resolves a controversy differently from what the court would have decided if the controversy had been brought before it for decision. If a settlement made in good faith resulted in one party's paying more than he was legally bound to pay, he cannot get it back, nor can a party obtain any more if it turns out that the settlement provided him with less than he was legally entitled to receive."

Further, in 15A Am.Jr.2d, §34, it is stated:

"Even if a mistake is not accompanied by elements of fraud, duress, or undue influence, it may be the basis for invalidating a compromise and settlement, assuming that the mistake did not pertain to a matter that was disputed or believed to be uncertain and that was intended to be resolved through the compromise. Thus, a compromise and settlement may be invalidated if there is a basic mistake as to matters not believed by the parties to be doubtful. Thus, before a compromise settlement will be set aside for mutual mistake, it must be established that the mistake was of such a nature that the parties were unintentionally caused to do something they did not intend to do.

"In order for a mistake to constitute a basis for invalidating a compromise and settlement, the mistake must be a material one; it must be one in the absence of which the party who made it would not have entered into the compromise. If a party is mistaken as to certain facts when he enters into a compromise but the compromise and settlement would not have been any more favorable to him in the absence of the mistake, the mistake is not a material one and is not a ground for invalidating the compromise and settlement.

"The materiality of a mistake may depend not only on the nature of the matter to which the mistake relates, but also on the specific purpose of the compromise and surrounding factual circumstances.

"In determining the validity of compromises challenged on the ground of mistake, the courts, in addition to considering whether a mistake is material in certain factual situations, have often considered whether a mistake was mutual or unilateral and whether it was a mistake of fact or of law. It is generally agreed that a compromise and settlement may be invalidated for a mutual mistake as to a material fact. And it has also been held that a compromise and settlement may be invalidated for a mutual mistake as to the law. A unilateral mistake, however, is generally held insufficient to invalidate a compromise and settlement. Although a unilateral

mistake as to a material fact has often been held no basis for invalidating a compromise and settlement, there is some judicial support for the contrary position, and it has been recognized that the factual situation may sometimes reveal extraordinary circumstances justifying the invalidation of a compromise and settlement for a unilateral mistake as to a material fact."

The Court is of the opinion that the mistake claimed here is not a mutual mistake of the parties, but a unilateral mistake on the part of plaintiff's counsel. This Court agrees with the Magistrate, based on the evidence, that there was no fraud on the part of defendants' counsel or defendants.

The Court has reviewed the circumstances surrounding the negotiations and settlement and finds that the circumstances surrounding such compromise and settlement are not so extraordinary to invalidate the agreement.

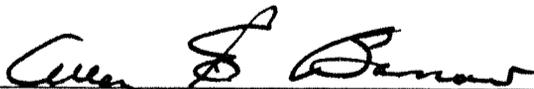
Additionally, the Court has heretofore refused to reopen this case, but specifically directed the parties to brief the question of whether the order of dismissal with prejudice should be amended to an "order of dismissal without prejudice".

Based on all the evidence adduced in this matter, including the evidence adduced at the plenary hearing before the Magistrate,

IT IS ORDERED that the Plaintiff's Motion for New Trial filed May 6, 1977 and the Plaintiff's Motion to Enforce Settlement Agreement or Vacate the Same, and Order of Dismissal Without Prejudice filed May 6, 1977, be and the same are hereby overruled.

IT IS FURTHER ORDERED that the Objections filed herein be and the same are hereby sustained.

ENTERED this 3rd day of August, 1978.



CHIEF UNITED STATES DISTRICT JUDGE

AUG 3 1978 760

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

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

RICHARD A. MILLER, # 91244,)
)
) Petitioner,)
)
) v.)
)
) MACK H. ALFORD, et al.,)
)
) Respondents.)

NO. 78-C-102-B /

O R D E R

The Court has for consideration the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed pro se, in forma pauperis, by Richard A. Miller. Petitioner when filing his petition was incarcerated in the Stringtown Correctional Center, Stringtown, Oklahoma. In Case No. CRF-73-549, in the District Court of Washington County, State of Oklahoma, Petitioner, upon his plea of guilty, was convicted of grand larceny, and on January 3, 1974, a three year suspended sentence was imposed. During this suspended sentence, on November 12, 1975, Petitioner commenced service of a sentence to three years imprisonment upon conviction of burglary in the second degree in the District Court of Texas County, State of Oklahoma. Thereafter, on December 15, 1975, his suspended sentence in Case No. CRF-73-549 was revoked, and a detainer was placed against him so that the three year grand larceny sentence would follow the new sentence for second degree burglary.

Petitioner presents to this Court that his constitutional rights are being violated in that he is held in custody under a sentence that has expired in that he served the sentence on the second conviction prior to the sentence on the first conviction, and he should have been given credit on his sentence on his first conviction for the time he was free on suspended sentence.

Petitioner has exhausted his State remedies by petition for writ of habeas corpus in the State of Oklahoma, Case No. H-78-36, wherein he asserted the issues presented to this Court, and the Oklahoma Court of Criminal Appeals denied the petition by Order dated February 7, 1978.

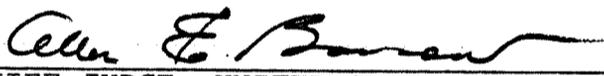
The issues presented by Petitioner are a matter of State law and absent a showing of discriminatory application of the statutes, which does not exist in the present proceeding, no issue cognizable in Federal habeas corpus is presented. Handley v. Page, 398 F.2d 351 (10th

Cir. 1968) cert. denied 394 U. S. 935 (1969); Burns v. Crouse, 339 F.2d . 883 (10th Cir. 1964) cert. denied 380 U. S. 925 (1965). Under Oklahoma law, if a person is incarcerated to serve a sentence on a new offense committed while on suspended sentence, the sentence upon revocation of the suspended sentence is served after the sentence on the new offense. See, Thurman v. Anderson, Okl. Cr., 500 P.2d 1074 (1972). Further, the time spent free on a suspended sentence is not credited against the time to be served upon revocation of the suspended sentence. Hansen v. Page, Okl. Cr., 440 P.2d 211 (1968).

Petitioner's petition for writ of habeas corpus is without merit and should be denied. Further, Petitioner has been released from custody as of May 4, 1978, and Respondent's motion to dismiss should be sustained.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 of Richard A. Miller be and it is hereby denied and the case is dismissed.

Dated this 3rd day of August, 1978, 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

THERMO KING CORPORATION,)
a Delaware corporation,)
and THERMO KING de PUERTO)
RICO, INC., a Delaware)
corporation,)
Plaintiffs,)

vs.)

No. 78-C-58-B

THERMO KING OF TULSA, INC.,)
LLOYD A. ANDERSON and SANDRA)
ANDERSON, husband and wife,)
and BOULDER BANK AND TRUST)
COMPANY,)
Defendants.)

FILED

AUG 3 1978

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

LLOYD A. ANDERSON, SANDRA L.)
ANDERSON, et ux; THERMO KING)
OF TULSA, INC., TRUCK)
REFRIGERATION CENTER, INC.,)
THERMO KING OF FT. SMITH,)
INC., WEST SKELLY INVESTMENT)
COMPANY,)
Plaintiffs,)

vs.)

No. 78-C-92-B

THERMO KING CORPORATION, a)
Delaware corporation, and)
THERMO KING de PUERTO RICO,)
INC., a Delaware corporation.)
Defendants.)

ORDER

NOW on this 19th day of June, 1978, Thermo King Corporation and Thermo King de Puerto Rico appeared by their attorneys, James L. Kincaid and Laurence L. Pinkerton of Conner, Winters, Ballaine, Barry & McGowen, and Thermo King of Tulsa, Inc., Lloyd A. Anderson and Sandra Anderson appeared by their attorney, Jim Linger, and Boulder Bank and Trust Company appeared by its attorney, Thomas J. Elkins of Ungerman, Ungerman, Marvin, Weinstein & Glass, and the Magistrate having heard statements from all attorneys concerning the motions and applications pending herein, and having submitted Findings and Recommendations, the Court finds as follows:

1. The Motion to Dismiss, filed on March 2, 1978, as amended by the Amendment to Motion to Dismiss, filed on March 13, 1978, in No. 78-C-58-B by Thermo King of Tulsa, Lloyd A. Anderson and Sandra Anderson is overruled, because Thermo King Corporation and Thermo King de Puerto Rico have not engaged in or transacted, nor are they engaging in or transacting, business within this state such that they, individually or jointly, should not be permitted to maintain an action in the State of Oklahoma pursuant to 18 O.S. 1971, §1.201, and, in any event, the action in which Thermo King Corporation and Thermo King de Puerto Rico were Plaintiffs, No. 78-C-58-B, has now been consolidated with Lloyd A. Anderson et al. v. Thermo King Corp. et al., No. 78-C-58-B.

2. The Application for Enlargement of Scope of Writ of Replevin and the Application for a Temporary Restraining Order filed on March 6, 1978, in No. 78-C-58-B by Thermo King Corporation and Thermo King de Puerto Rico is still pending. By letter dated March 17, 1978, the attorneys for Thermo King Corporation and Thermo King de Puerto Rico requested certain documents pertaining to the claims of T-KOT to ownership of materials replevied pursuant to Writ of Replevin issued herein and materials stored at the warehouse of Lloyd A. Anderson as set forth in said Application. The requested documents should be produced on or before July 5, 1978, by Thermo King of Tulsa, Inc. and Lloyd A. Anderson. Following the review of such materials and any additional discovery, Thermo King Corporation and Thermo King de Puerto Rico may withdraw their Application, or set it for an evidentiary hearing.

3. Thermo King of Tulsa, Inc., Lloyd A. Anderson and Sandra Anderson are in default on Boulder Bank and Trust Company's Note and Security Agreement as set forth in Boulder Bank and Trust Company's cross-claim filed in No. 78-C-58-B. Accordingly, Boulder Bank and Trust Company of Tulsa ("Boulder Bank") is entitled to summary judgment in its favor on its cross-claim

against Thermo King of Tulsa, Inc., Lloyd Anderson and Sandra Anderson.

4. Boulder Bank has a prior security interest to that held by Thermo King Corporation and Thermo King de Puerto Rico in certain collateral specified in Boulder Bank's counter-claim filed in No. 78-C-58-B. Accordingly, Boulder Bank is entitled to summary judgment on its counter-claim, but the Court finds that Boulder Bank as stipulated by its attorney shall not be given possession of the goods in accordance with its Motion, but such goods shall remain in possession of Thermo King Corporation and Thermo King de Puerto Rico subject to disposition as hereinafter ordered.

5. Thermo King of Tulsa, Inc., Lloyd A. Anderson and Sandra Anderson, all of whom are Defendants in No. 78-C-58-B filed on March 10, 1978, their Application for Restraining Order, an Accounting, and Redelivery of Chattel Property. Plaintiffs in No. 78-C-58-B, Thermo King of Tulsa and Thermo King de Puerto Rico, have indicated they will present to the applicants the most recent statement of account on or before July 5, 1978. Accordingly, the Motion for an accounting is moot, as is the Application for a Restraining Order because the Plaintiffs in No. 78-C-58-B are not at this time seeking to replevin or seize any goods belonging to the applicants except by motion before this Court. Finally, the Application for Redelivery of Chattel Property is also moot because of the judgment herein rendered for Boulder Bank and Trust Company in its cross-complaint against Thermo King of Tulsa, Inc., Lloyd Anderson and Sandra Anderson, and in its counterclaim against Thermo King Corporation and Thermo King de Puerto Rico.

IT IS THEREFORE ORDERED that the Motion to Dismiss filed on March 2, 1978, as amended by the Amendment to Motion to Dismiss filed on March 13, 1978, in No. 78-C-58-B is overruled without prejudice to the Defendant's refiling the same should

any additional information come to light through the course of discovery that might divest this Court of its jurisdiction.

IT IS FURTHER ORDERED that judgment be entered in favor of Boulder Bank on its Motion for Summary Judgment against Thermo King of Tulsa, Inc., Lloyd A. Anderson, individually, and Sandra Anderson, individually, in the sum of \$17,035.76 plus an attorney fee in the sum of \$1,725.00, which judgment shall first be satisfied from the sale of the replevied property in possession of Thermo King Corporation and Thermo King de Puerto Rico as hereinafter ordered.

IT IS FURTHER ORDERED that judgment be entered in favor of Boulder Bank on its Motion for Summary Judgment against Thermo King Corporation and Thermo King de Puerto Rico whereby the prior security interest of Boulder Bank in the goods and property seized by Thermo King Corporation and Thermo King de Puerto Rico pursuant to Writ of Replevin issued by the Clerk of this District on February 16, 1978, is recognized, that Thermo King Corporation and Thermo King de Puerto Rico are allowed to retain possession of such goods, but are ordered to release them to Boulder Bank on the date established for the sale of such goods which sale shall be held pursuant to 12A O.S. 1971, §9-504(3). The proceeds of such sale are to be paid into Court, from which sum the attorney fee of Boulder Bank awarded herein in the amount of \$1,725.00 should first be disbursed, then the costs and expenses of seizure and storage of the replevied goods, including attorney fees therein, of Thermo King Corporation and Thermo King de Puerto Rico, then the sum of \$17,035.76 awarded herein to Boulder Bank as judgment on the note held by it of Thermo King of Tulsa, Inc., Lloyd A. Anderson and Sandra Anderson, and the remaining sum, if any, shall then be retained to satisfy any judgment awarded Thermo King Corporation and/or Thermo King de Puerto Rico herein.

IT IS FURTHER ORDERED that on or before July 5, 1978, Thermo King of Tulsa, Inc. and Lloyd A. Anderson are to supply

the T-KOT documents requested by letter from James L. Kincaid to R. Allen Benningfield, dated March 17, 1978, and filed with the records of the Court.

IT IS FURTHER ORDERED that upon presentation to Thermo King of Tulsa, Inc., Lloyd A. Anderson and Sandra Anderson on or before July 5, 1978, of the most recent statement of the account of Thermo King of Tulsa, Inc., with Thermo King Corporation and Thermo King de Puerto Rico that the Application for an Accounting filed by Thermo King of Tulsa, Inc., Lloyd A. Anderson and Sandra Anderson shall be moot and, therefore, the Application is overruled pending compliance by Thermo King Corporation and Thermo King de Puerto Rico.

IT IS FURTHER ORDERED that the Application for a Restraining Order filed by Thermo King of Tulsa, Inc., Lloyd A. Anderson and Sandra Anderson is moot because Thermo King Corporation and Thermo King de Puerto Rico are not attempting to seize any goods of Thermo King of Tulsa, Inc., Lloyd A. Anderson or Sandra Anderson, except by motion before this Court, and, therefore, the Application is overruled.

IT IS FURTHER ORDERED that Defendants' Motion for Redelivery of Chattel Property of Thermo King of Tulsa, Inc., Lloyd A. Anderson and Sandra Anderson is moot, because of the findings and recommendations herein concerning the award of judgment to Boulder Bank, and, therefore, the Motion is overruled.


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

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

FILED

MSD AUG 3 1978

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

FIRST NATIONAL BANK)
COMPANY, a Massachusetts)
business trust with)
transferable shares,)
)
Plaintiff,)
)
v.)
)
INLAND MILLS, INC., a)
corporation,)
)
Defendant.)

No. 78-C-125-B ✓

JOURNAL ENTRY OF JUDGMENT

This cause comes on for hearing this 31st day of August, 1978, 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, finds as follows:

That this matter was set by this Court on the 26th day of May, 1978, on Motion for Default Judgment for failure to answer. That on the 26th day of May, 1978, the Defendant having been called three times in open Court appearing not nor by his representative or counsel the Court granted default judgment against said Defendant 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, the Court finds that the Plaintiff, First National Bank Financial Company, a Massachusetts business trust with transferable shares, should have judgment in the amount of \$33,171.35 with interest thereon at the rate of 10% per annum from December 26, 1976, until paid; that the Plaintiff should have judgment for its costs herein accrued and accruing; that the Plaintiff should have

judgment for a reasonable attorney's fee for the use and benefit of its attorney, Theodore P. Gibson, in the amount of \$7,500.00.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that judgment be and is hereby entered in favor of the Plaintiff and against this Defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, First National Bank Financial Company, a Massachusetts business trust with transferable shares, have judgment in the amount of \$33,171.35 with interest thereon at the rate of 10% per annum from December 26, 1976, until paid; that the Plaintiff have judgment for its costs herein accrued and accruing; and that the Plaintiff have judgment for a reasonable attorney's fee for the use and benefit of its attorney, Theodore P. Gibson, in the amount of \$7,500.00.


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