

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

FILED

MAY 20 1991

OSAGE CRUDE OIL PURCHASING,)
INC.,)
)
Debtor,) Bankruptcy Case No. 84-01032-W
)
BANK OF OKLAHOMA, N.A.,) Adversary No. 85-0008-W
)
Appellant,)
)
vs.) District Court No. 89-C-628-C
)
OSAGE CRUDE OIL PURCHASING,)
INC., by way of the Official)
Committee of Unsecured)
Creditors,)
)
Appellee.)

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

O R D E R

Now before the Court for its consideration is appellant Bank of Oklahoma, N.A.'s ("BOK") motion for rehearing and reconsideration of the Court's ruling of August 16, 1990 in this case. In that ruling, this Court affirmed the bankruptcy court's determination in favor of appellee, the Official Committee of Unsecured Creditors of the debtor, Osage Crude Oil Purchasing, Inc. ("Crude").

In its motion, BOK contends that the Court's August 16, 1990 order failed to address or decide a number of issues raised in its appeal of the bankruptcy court's decision. The Court has reexamined the record in this case and has reviewed the parties' briefs, as well as the applicable statutory and case law. From its review, the Court has determined that the bankruptcy court's

decision, and this Court's order of August 16, 1990, affirming that decision, contain legal error. Correction of that error requires the Court to remand this action to the bankruptcy court for further fact-finding.

BACKGROUND

As the Court has previously noted, Crude was formed in February, 1981, as a wholly-owned subsidiary of Osage Oil and Transportation, Inc. ("Transportation"). In forming a separate corporation to conduct the crude oil purchasing business which Transportation had previously conducted as part of its operations, Transportation hoped to avoid having to prepay windfall profits taxes to the United States.

Prior to Crude's incorporation, Transportation had a number of other facets to its business operations besides the purchase and resale of crude oil. As the bankruptcy court noted, Transportation provided trucking services for hire for the hauling of crude oil and salt water. Transportation's other operations included the construction business, the ownership, leasing and maintenance of gasoline storage tanks and pumping equipment, and the construction and operation of retail gasoline station outlets.

As part of its crude oil purchasing and resale business (prior to the incorporation of Crude), Transportation maintained thousands of division orders with producers from whom it purchased crude oil. Transportation likewise had a number of contracts with refineries who purchased crude oil from Transportation.

In March, 1972, Transportation executed a loan agreement with

BOK, obtaining a revolving line of credit of \$200,000. Transportation gave BOK a security interest "in all of [Transportation's] and/or [its subsidiaries'] accounts receivables, and contract rights, whether now existing or hereafter arising" See Defendant's Ex. 1, p. 5. The security agreement described the collateral as "all moneys and claims for moneys due and to become due . . . [under] all contracts now existing or hereafter acquired . . . and all proceeds of accounts receivable arising therefrom." See Defendant's Ex. 2, ¶ 3. The agreement also provided that the collateral could serve as security for any future advances BOK made on the loan. Id. Transportation warranted to BOK that it had not transferred those contract rights to any other person. Id., ¶ 8(B) and (C). The security agreement was deemed to be binding upon the "successors and assigns" of Transportation. Id., ¶ 12.

In October, 1977, Transportation entered into a revolving credit and term loan agreement with BOK, in which BOK committed to loan Transportation four million dollars, comprised of a three million dollar "revolving commitment" and a one million dollar "line commitment". See Defendant's Ex. 4. Transportation granted BOK a security interest in Transportation's accounts receivable, contract rights, and proceeds. See Defendant's Ex. 5, Security Agreement. The security agreement likewise provided that the collateral could serve as security for future advances made by BOK on the loan. Id. Transportation agreed that it would not sell or "otherwise dispose" of the collateral, unless as authorized in the

security agreement. See Defendants' Ex. 4.

Transportation and BOK amended the October, 1977 revolving credit and term loan agreement at various times between 1978 and February, 1981. Under the first amendment, dated June 30, 1978, BOK agreed to increase the revolving commitment to \$3,500,000 and to extend the maturity of the one million dollar line commitment. Under the second amendment, dated June 26, 1980, BOK agreed to combine Transportation's outstanding indebtedness under the revolving and line commitments as a term note in the amount of \$2,648,400 and to create a new one million dollar line commitment. See Defendant's Ex. 6. Under the third amendment, dated December 29, 1980, BOK made a new term loan to Transportation to finance its acquisition of new equipment, to repay the outstanding balance on the "new" line commitment and to extend its maturity. See Defendant's Ex. 7.

BOK apparently made all necessary filings to continuously perfect its security interest in Transportation's collateral, including its accounts receivable. See Defendant's Ex. 11-19.

After Crude was incorporated in February, 1981, Transportation transferred to Crude its division orders, contracts with refineries, and outstanding accounts payable and accounts receivable. Crude later entered into agreements with the producers of crude oil and required them to execute division orders which identified Crude as the purchaser of the crude oil. Transportation had notified its producers of Crude's formation and that future crude oil purchases would be made by Crude. Similarly, Crude

later entered into agreements with the refineries, identifying Crude as the seller of crude oil.

On September 23, 1981, Transportation and BOK made a fourth amendment to the October, 1977 loan agreement and increased the revolving line commitment to \$1,500,000 and extended that line's maturity. See Defendant's Ex. 9. On March 10, 1982, by letter agreement, BOK extended a temporary line of credit in the amount of \$500,000 with a maturity date of May 31, 1982. See Defendant's Ex. 10.

On December 16, 1982, Transportation and BOK entered into a "Restated Credit Agreement." Under that agreement, the term commitment and new term commitments were consolidated into a new term loan, which was also increased by one and a half million dollars. The line commitment was to be decreased by \$500,000 to one million dollars. Transportation gave a new promissory note which was to represent a "renewal, extension, change-in-form of and substitution for" its previous promissory note. The term loan in this agreement represented a consolidation of term loans previously extended by BOK "plus an increase therein equal in amount to the line commitment under the original agreement." See Joint Trial Exhibit 1a. Transportation also executed a "Restated Security Agreement", in which it reaffirmed the security interests previously given to BOK in its collateral, including the accounts receivable. See Joint Trial Ex. 1b. In that security agreement, Transportation continued to warrant that it owned the collateral, including the accounts receivable.

Transportation and BOK entered into a "Second Restated Credit Agreement" on March 23, 1983. Under this agreement, the line commitment was increased to five million dollars, a \$500,000 second revolving line of credit was established, and the term loan was increased by \$400,050 and its maturity extended. The agreement acknowledged that the term loan represented an increase of the term loans previously consolidated. See Joint Trial Ex. 2a. Crude gave BOK a security interest in its "present and future Accounts, contract rights, General Intangibles, Inventory, and any and all proceeds and products." Id. at §4.1B. Crude also guaranteed all of Transportation's obligations to BOK. Id. at §4.4. Transportation reaffirmed BOK's continuing security interest in all of the collateral previously pledged in prior loan transactions. Id. at §4.2.

By a Letter Agreement dated March 29, 1983, Transportation, Crude and BOK agreed to the establishment of a manual balance transfer system, or cash management system, which related to the funds held in the Transportation and Crude bank account at BOK. See Plaintiff's Ex. 8. The purpose of the manual balance transfer system was to benefit the two companies on a consolidated basis by reducing the amount of borrowing from BOK on the revolving line of credit and thus reducing the costs of interest on borrowed funds by Crude and Transportation. Under the system, Crude and Transportation used each others' available cash first, before drawing down on the revolving line of credit from BOK. If excess cash was available, after paying checks clearing that day, that

cash was used to pay down the BOK revolving line of credit, so that the lowest possible loan balance on the revolving line of credit could be maintained. In practice, the system produced a consistent pattern of transfers between Transportation, Crude and BOK. The Crude account was kept at a minimal balance. When Crude issued checks to pay for oil purchased on account from the previous month, funds necessary to cover those checks were transferred from Transportation's account. If Transportation's account had insufficient funds, then BOK advanced funds from the revolving line of credit into Transportation's account, which were then transferred to Crude's account. When Crude received payment for the crude oil it sold to the refineries, those funds were transferred to Transportation's account and used by BOK to pay down any outstanding balance on the revolving line of credit.

DISCUSSION

Among other issues raised on appeal, BOK contends that it held a continuously perfected security interest in all accounts receivable from the sale of crude oil to refiners, from March, 1972 until it released that security interest in May, 1984; according to BOK, that security interest covered the accounts receivable transferred by Transportation when Crude was incorporated in 1981.¹

¹ In response to BOK's assertion of its security interest, the Committee argued that the collection of the accounts receivable from the sale of crude oil cut off BOK's security interest in the accounts receivable transferred to Crude in February, 1981. According to the Committee, the accounts receivable as they existed prior to Crude's formation in February, 1981, were collected and no longer in existence by the end of March, 1981.

In its decision, the bankruptcy court found that, at the time of Crude's incorporation, no steps were taken to encumber Crude's assets, including its accounts receivable from refiners, with Transportation's indebtedness to BOK. 103 B.R. 256, 259 (Bnkrtcy. N.D. Okla. 1989). The bankruptcy court also noted that BOK's restructured loan to Transportation in December, 1982 was secured by "essentially all of the assets of Transportation including all accounts receivable generated by the purchase of crude oil (of which there were none by virtue of the fact that a separate entity, Crude, was performing that function)." Id. The bankruptcy court viewed Crude's assets, including its accounts receivable as

Although not precisely in answer to the Committee's argument, the reasoning of the Kansas Court of Appeals in United Co-op v. Libel Oil Co., 699 P.2d 1040 (Kan. App. 1985), is nonetheless responsive.

Accounts receivable by their very nature change from day to day It would be unreasonable . . . to conclude that the Bank would collateralize its loan with a security interest in accounts due only on a specific date. Collection of the accounts by the debtor would reduce the collateral to nothing unless the creditor also had a security interest in after-acquired accounts and inventory.

Id. at 1043.

The Committee's argument ignores the provisions in the security agreements executed by Transportation which included "after-acquired" accounts receivable as among the collateral pledged for BOK's loans. Under Okla. Stat. tit. 12A §9-204(1), a security agreement may provide that any or all obligations covered by the security agreement may be secured by after-acquired collateral. In Smiley v. Wheeler, the Oklahoma Supreme Court held that an after-acquired property clause in a security agreement covered not only the equipment of the original debtor, but also equipment obtained by the transferee who is bound by the original security agreement. 602 P.2d 209, 211-12 (Okla. 1979).

unencumbered, and that Crude created a security interest in favor of BOK in those receivables on March 23, 1983. The bankruptcy court thus determined that the March 23, 1983 agreements which gave rise to that security interest and Crude's guaranty of Transportation's debt to BOK met the test for a fraudulent transfer which could be avoided. This Court, in its order of August 16, 1990, did not question the bankruptcy court's view that Crude's assets, including its accounts receivable, were unencumbered until March 23, 1983.

However, upon review, the Court has determined that it was error to conclude that Transportation's transfer of the contract rights and accounts receivable to Crude in February, 1981 cut off BOK's security interest in those assets. Under Oklahoma law,² BOK held a security interest in Crude's accounts receivable and contract rights from the time of Crude's incorporation.

A debtor cannot destroy a perfected security interest by transferring the collateral. Smiley v. Wheeler, 602 P.2d 209, 211 (Okla. 1979). In Smiley, the Oklahoma Supreme Court recognized that

Section 9-311 allows a debtor to transfer his rights in collateral. But the interest so transferred is still subject to the creditor's security interest if it is properly perfected.

² From the facts presented here, the applicable state law is that of Oklahoma. "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." Butner v. United States, 440 U.S. 48, 55 (1979).

Id. at 211 (emphasis original). That BOK retained its perfected security interest in the contract rights and accounts receivable transferred to Crude is also supported by Okla. Stat. tit. 12A §9-306(2) which provides

Except where this article otherwise provides, a security interest continues in collateral, notwithstanding sale, exchange or other disposition thereof, unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

Section 9-306(2) does not require a secured party to take any action to preserve its security interest. Poteau State Bank v. Denwalt, 597 P.2d 756, 761 (Okla. 1979). However, BOK's actions, taken after Crude's incorporation, could affect whether BOK continued to maintain its perfected security interest in the accounts receivable transferred to Crude.

Under section 9-306(2), if BOK had expressly authorized or consented to Transportation's transfer of its assets to Crude, BOK's security interest in those transferred assets would have been extinguished. The record, however, does not reflect that BOK expressly authorized or consented to that transfer.

Oklahoma law also permits an "implied" consent or authorization to be inferred from a secured party's conduct or actions. See National Livestock Credit Corp. v. Schultz, 653 P.2d 1243, 1247 (Okla. App. 1982). An implied authorization may be found "when, from the circumstances, general language and conduct of the parties, it is found that he intended to authorize the sale." Poteau, 597 P.2d at 760 (emphasis original). More than the

secured party's inaction to preserve his security interest is required to find an implied authorization for the transfer of collateral. Id. at 761.

In National Livestock Credit Corp., a pattern of conduct had developed over time in which the lender permitted the borrower to sell the collateral without the lender's written consent, in contravention of the security agreement, so long as the borrower remitted the proceeds to the lender. 653 P.2d at 1247. The lender sued when the borrower failed to remit the proceeds from a sale of the collateral. Id. at 1241. The Oklahoma Court of Appeals affirmed the trial court's finding that the lender's long-term course of conduct in permitting the sale of the collateral without written permission could be deemed a waiver of the security agreement's provisions intended to protect the lender's security interest in the collateral. Id. In the present case, the record does not demonstrate any pattern of conduct by BOK that can be construed as a waiver of its security interest in Transportation's collateral. From its review of the record, the Court finds no intent by BOK to authorize or consent to Transportation's transfer of collateral to Crude.

The survival of BOK's security interest in the accounts receivable transferred to Crude may be affected, however, by the operation of other Code sections. Okla. Stat. tit. 12A 9-307(2) provides that

A buyer other than a buyer in the ordinary course of business takes free of a security interest to the extent that it secures future advances made after the secured party acquired knowledge of the purchase or more than

forty-five (45) days after the purchase, whichever first occurs, unless made pursuant to a commitment entered into without knowledge of the purchase and before the expiration of the forty-five day period.

In applying this subsection here, it appears that Crude is at least a "buyer". Okla. Stat. tit. 12A §1-201(32) defines a "purchase" as including a taking by pledge or gift "or any other voluntary transaction creating an interest in property." While the evidence is unclear whether Transportation actually received value for its transfer of assets to Crude, the evidence does indicate that that transfer was voluntarily made by Transportation. That Crude is a buyer other than in the ordinary course of business can be determined by reference to the definition of a "buyer in the ordinary course of business" as set forth in Okla. Stat tit. 12A §1-201(9). That definition provides that "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights of a third party . . ." is a buyer in the ordinary course of business. Since Crude was formed by the officers, directors and shareholders of Transportation, Crude obviously had knowledge of BOK's security interest in the accounts receivable and contract rights transferred to it from Transportation. Crude thus is a buyer not in the ordinary course of business.

There can be no dispute that BOK amended the 1977 agreement and entered into the Restated and Second Restated Agreements with Transportation more than forty-five days after Transportation transferred the accounts receivable to Crude in February, 1981. Likewise, the forty-five day period after the transfer to Crude

would have passed, before BOK can be said to have made any commitment to make a future advance to Transportation.

The critical issue is whether BOK made "future advances" to Transportation after Crude's incorporation and Transportation's transfer of assets to Crude. If BOK made such future advances, Crude would take the transferred accounts receivable and contract rights free of BOK's security interest as to those amounts loaned by BOK and deemed to be "future advances."

The term "future advances" is not defined by the Code. No published decision from the Oklahoma courts construing the term "future advances" in §9-307(2) was located. However, in Blue v. H-K Corp., 629 P.2d 790 (Okla. App. 1981), the Oklahoma Court of Appeals discussed future advances in determining the priority of competing security interests.

A future advance is an advance of new value. The situation before us is not one where the creditor gives new value relying on a prior security interest to secure the new advance granted. Rather, here the original debt was merely refinanced, and the debtor received an extension of time to satisfy that debt. A renewal, extension or refinancing of an existing debt is not a future advance.

Id. at 792.

In its decision, the bankruptcy court found that the major consideration for Transportation in executing the Restated and Second Restated Credit Agreements was the restructuring, refinancing and continuation of pre-existing loans from BOK. 103 B.R. at 259. The evidence may support this finding. However, the evidence also indicates the possibility that BOK may have advanced "new value" to Transportation after February, 1981 in connection

with the amended and restated credit agreements. For example, in September, 1981, BOK agreed to increase the revolving line of credit to \$1,500,000. In March, 1982, Transportation obtained a \$500,000 temporary line of credit from BOK. The Court recognizes that the commitment to loan additional amounts does not necessarily mean that amount was actually loaned.

The bankruptcy court must determine whether the lending activity between BOK and Transportation between February, 1981 and May, 1984 was in fact merely a refinancing and restructuring of Transportation's outstanding debt to BOK, or whether BOK advanced "new value" to Transportation in that time period. If it determines that BOK did advance "new value" to Transportation, the bankruptcy court will then have to analyze BOK's transactions with Transportation after February, 1981 to determine the amounts advanced by BOK that qualify as "future advances". The bankruptcy court's analysis of any "future advances" will be further complicated by its consideration of the manual balance transfer system, instituted after March 30, 1983. The evidence appears to suggest that under that system, Transportation's loans were paid down, or completely paid off, while new advances were made to Transportation thereafter on the revolving line of credit to cover checks issued by Crude for the crude oil it purchased.

If the bankruptcy court determines that BOK made future advances, then Crude would be deemed to have taken free of BOK's security interest as to those amounts found to be future advances under Okla. Stat. tit. 12A § 9-307(2). The bankruptcy court then

must decide whether the March 23, 1983 transactions formed the basis of a fraudulent transfer as to that part of the collateral which Crude took free of the security interest in relation to the future advances made by BOK. If the bankruptcy court finds that BOK made no "future advances" to Transportation after February, 1981, then pursuant to Okla. Stat. tit. 12A § 9-306(2), BOK's perfected security interest would have continued to attach to the accounts receivable and contract rights transferred to Crude until May, 1984, when BOK foreclosed on its interest.

This action is remanded to the bankruptcy court for fact-finding consistent with this Order.

It is so Ordered this 17th day of May, 1991.


H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JOHN H. SEXTON; MORRIS VERNON)
 KING; RONALD B. ADWERS; OKLAHOMA)
 CENTRAL CREDIT UNION; SECURITY)
 PACIFIC FINANCIAL SERVICES, INC.)
 f/k/a Security Pacific Finance)
 Corporation; COUNTY TREASURER,)
 Tulsa County, Oklahoma; and)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

F I L E D

MAY 20 1991

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

CIVIL ACTION NO. 90-C-928-C

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17 day
of May, 1991. The Plaintiff appears by Tony M.
Graham, United States Attorney for the Northern District of
Oklahoma, through Peter Bernhardt, Assistant United States
Attorney; the Defendants, County Treasurer, Tulsa County,
Oklahoma, and Board of County Commissioners, Tulsa County,
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, Morris Vernon
King, appears by his attorney David W. Cole; the Defendant,
Ronald B. Adwers, appears not, having previously filed his
Disclaimer; and the Defendants, John H. Sexton, Oklahoma Central
Credit Union, and Security Pacific Financial Services, Inc. f/k/a
Security Pacific Finance Corporation, appear not, but make
default.

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

The Court being fully advised and having examined the court file finds that the Defendant, John H. Sexton, acknowledged receipt of Summons and Complaint on December 21, 1990; that the Defendant, Morris Vernon King, acknowledged receipt of Summons and Complaint on November 15, 1990; that the Defendant, Ronald B. Adwers, acknowledged receipt of Summons and Complaint on November 9, 1990; that the Defendant, Oklahoma Central Credit Union, acknowledged receipt of Summons and Complaint on November 6, 1990; that the Defendant, Security Pacific Financial Services, Inc. f/k/a Security Pacific Finance Corporation, acknowledged receipt of Summons and Complaint on November 5, 1990; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on November 5, 1990; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on November 6, 1990.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on November 26, 1990; that the Defendant, Morris Vernon King, filed his Answer on November 27, 1990; that the Defendant, Ronald B. Adwers, filed his Disclaimer on November 14, 1990; and that the Defendants, John H. Sexton, Oklahoma Central Credit Union, and Security Pacific Financial Services, Inc. f/k/a Security Pacific Finance Corporation, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on June 15, 1987, Morris Vernon King filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 87-B-1602. On September 22, 1987, the United States Bankruptcy Court for the Northern District of Oklahoma entered a Discharge of Debtor releasing the debtor from all dischargeable debts. On May 25, 1988, subject bankruptcy case was closed.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a 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), in Block Two (2), NORTHGATE ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded plat thereof.

The Court further finds that on October 1, 1976, the Defendant, John H. Sexton, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, his mortgage note in the amount of \$13,750.00, payable in monthly installments, with interest thereon at the rate of nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, John H. Sexton, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now

known as Secretary of Veterans Affairs, a mortgage dated October 1, 1976, covering the above-described property. Said mortgage was recorded on October 4, 1976, in Book 4234, Page 361, in the records of Tulsa County, Oklahoma.

The Court further finds that John H. Sexton conveyed his interest in the subject property to Shirley Adwers by General Warranty Deed dated July 25, 1978, and recorded on July 26, 1978, in Book 4342, Page 1896 in the records of Tulsa County, Oklahoma. By letter dated October 3, 1978, John H. Sexton was released from personal liability to the Veterans Administration.

The Court further finds that Shirley Adwers conveyed her interest in the subject property to Morris Vernon King by General Warranty Deed dated August 28, 1981, and recorded on August 31, 1981, in Book 4566, Page 814 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Morris Vernon King, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Morris Vernon King, is indebted to the Plaintiff in the principal sum of \$12,258.82, plus interest at the rate of 9 percent per annum from December 1, 1986 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad

valorem taxes in the amount of \$216.00, plus penalties and interest, for the year 1990. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$2.00 which became a lien on the property as of 1989. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, John H. Sexton, Oklahoma Central Credit Union, and Security Pacific Financial Services, Inc. f/k/a Security Pacific Finance Corporation, are in default and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, Ronald B. Adwers, disclaims any right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendant, Morris Vernon King, in the principal sum of \$12,258.82, plus interest at the rate of 9 percent per annum from December 1, 1986 until judgment, plus interest thereafter at the current legal rate of 6.07 percent per annum until paid, plus the costs 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 Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$216.00, plus penalties and interest, for ad valorem taxes for the year 1990, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$2.00 for personal property taxes for the year 1989, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, John H. Sexton, Ronald B. Adwers, Oklahoma Central Credit Union, Security Pacific Financial Services, Inc. f/k/a Security Pacific Finance Corporation, and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$216.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$2.00, personal property taxes which are currently due and owing.

The surplus from said sale, 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 the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

APPROVED:

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United States Attorney

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Morris Vernon King

J. Dennis Semler

J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 90-C-928-C

PB/css

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

FILED

MAY 20 1991

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 VALVEETA BOYD,)
)
 Defendant.)

No. 91-G-188-C
No. 88-CR-124-C

ORDER

Before the Court is the motion of the defendant pursuant to 28 U.S.C. §2255. Defendant pleaded guilty on June 5, 1989 to a charge of possession of approximately 495 grams of cocaine, a schedule II narcotic controlled substance, in violation of Title 21 U.S.C. §§841(a)(1) and 841(b)(1)(B)(ii) and Title 18 U.S.C. §2. After sentencing, she appealed solely on the ground that this Court improperly applied the Sentencing Guidelines. The sentence was affirmed. United States v. Boyd, 901 F.2d 842 (10th Cir. 1990).

In the present motion, defendant argues (1) that the indictment was improper and (2) that she was entrapped. The motion must be denied for two reasons. First, by entering a voluntary plea of guilty, defendant waived all nonjurisdictional defenses. United States v. Nooner, 565 F.2d 633, 634 (10th Cir. 1977). Thus, the issues which defendant raises could not even have properly been raised on appeal. Second, "[section] 2255 is not available to test the legality of matters which should have been raised on appeal."

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United States v. Khan, 835 F.2d 749, 753 (10th Cir. 1987). The issues raised are those which, in normal circumstances, should have been presented to the appeals court. By pleading guilty, defendant is doubly foreclosed from raising them by the present motion.

It is the Order of the Court that the motion of the defendant pursuant to 28 U.S.C. §2255 is hereby DENIED.

IT IS SO ORDERED this 20th day of May, 1991.



H. DALE COOK
Chief Judge, U. S. District Court

Elsie Draper

ELSIE DRAPER
Attorney for Defendant
HAYS WEIGHT LOSS, INC.

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

FILED

MAY 8 0 1991

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

BANK OF OKLAHOMA, N.A.,)
Grove Branch, formerly)
Bank of Oklahoma, Grove,)
)
Plaintiff,)

v.)

THE ISLANDS MARINA, LTD., an)
Oklahoma corporation; et al.,)
)
Defendants.)

Case No. 88-C-1335-E

and

GENMAR INDUSTRIES, INC.,)
)
Plaintiff,)

v.)

FIRST NATIONAL BANK & TRUST)
COMPANY OF VINITA,)
)
Defendant.)

Case No. 88-C-1499-E
(Consolidated)

JUDGMENT

This action came on for hearing before the Court, Honorable James O. Ellison, District Judge, presiding, and pursuant to the Findings of Fact and Conclusions of Law of April 9, 1991, and the Order of April 9, 1991, the issues have been duly heard and a decision has been duly rendered,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That The First National Bank and Trust Company of Vinita take nothing by way of its claim against Emery Urfer and that such claim be dismissed on the merits;

2. That Genmar-Wellcraft take nothing by way of its claim against The First National Bank and Trust Company of Vinita and that such claim be dismissed on the merits;
3. That The First National Bank and Trust Company of Vinita take nothing by way of its claim against Roger King and that such claim be dismissed on the merits.

Dated this 20th day of May, 1991.



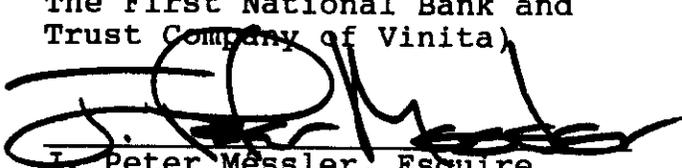
 JAMES O. ELLISON
 UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

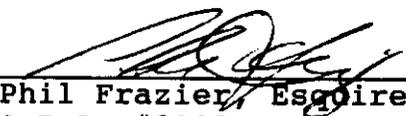


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 1424 Terrace Drive
 Tulsa, Oklahoma 74104
 (Attorneys for Defendant
 Emery Urfer)

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

FILED

MAY 20 1991

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

SCOTT FURMAN MAXEY, a minor,)
by his mother and next friend)
DIANNA MAXEY,)
)
Plaintiff,)
)
vs.)
)
ROBERT FULTON, et al.,)
)
Defendants.)

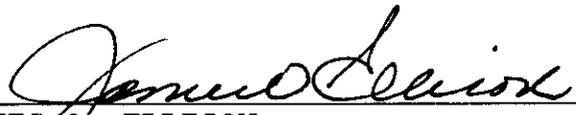
No. 85-C-438-E

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

ORDERED this 20th day of May, 1991.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED

MAY 20 1991

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

REKHA PATEL,

Plaintiff,

vs.

UNITED STATES ENERGY CORP.,
JOE A. CHAVEZ, JOSE G. CHAVEZ,
GAYLORD SWAGNER, and
DONALD R. WHITE,

Defendants.

Case No. 89-C-701-C

JOURNAL ENTRY OF JUDGMENT

This matter came on for evidentiary hearing on damages on the 17th day of April, 1991 before the Court, the Honorable H. Dale Cook, Chief District Judge, presiding, the Court having previously ordered that default judgment be entered against Defendants United States Energy Corp., Joe A. Chavez, Jose G. Chavez, and Gaylord Swagner (a.k.a. Gaylord Wagner). Plaintiff appeared personally and through her attorney, Jerry Williams, while Defendants appeared not.

After hearing arguments of counsel, an offer of proof, and reviewing the evidence in the court file, the Court finds that there is due Plaintiff a judgment against United States Energy Corp., Joe A. Chavez, Jose G. Chavez, and Gaylord Swagner (a.k.a. Gaylord Wagner) upon the written employment contract annexed to the Complaint, the sum of \$8,390.52 for wages earned but not paid to the Plaintiff, the sum of \$8,439.53 for expenses incurred but not reimbursed to the Plaintiff, statutory damages in the sum of \$8,390.52 as prescribed by 40 O.S. 1991, §165.3, with pre-judgment interest in the

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

amount of \$1,656.35, post-judgment interest thereon at the rate of 6.26%, the sum of \$1,683.00 in attorney's fees, and the sum of \$146.50 for costs incurred by Plaintiff in bringing this action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff is awarded judgment against United States Energy Corp., Joe A. Chavez, Jose G. Chavez, and Gaylord Swagner (a.k.a. Gaylord Wagner), in the amount of \$8,390.52 for wages earned by Plaintiff, \$8,439.53 for expenses incurred but not reimbursed to Plaintiff, with pre-judgment interest in the amount of \$1,656.35, statutory damages in the sum of \$8,390.52 as prescribed by 40 O.S. 1991, §165.3, post-judgment interest thereon at the rate of 6.26%, \$1,683.00 in attorney's fees and \$146.50 for costs incurred by Plaintiff in bringing this action.

Dated this 20 day of May, 1991.

(Signed) H. Dale Cook

DISTRICT COURT JUDGE

Budder plaintiff alleges state pendent claims of assault and battery (including a beating which resulted in the hospitalization of his son and episodes involving exchange of gun fire), and breaking and entering his residence. He also asserts claims of destruction of property (vandalism of his truck and several other vehicles) and arson (setting fire to his home and farm).

Plaintiff names Ramsey, Sloan and Goodecke as defendants asserting that they wrongfully "let this feud grow to such epic perportions" [sic]. After his son was allegedly beaten, plaintiff contends he went to the District Attorney's Office but they would not let him file charges against the Stallers and Budders. Plaintiff also contends that defendant Ramsey brought charges against plaintiff, without bringing charges against the Budders and Stallers.

As against undersheriff Sloan and deputy sheriff Goodecke, plaintiff asserts that they "never once allowed the DiCesare's the benefit of the doubt when they investigated any confrontation between the DiCesare's and Staller-Budder feud"[sic]. Plaintiff also contends that Ramsey, Sloan and Goodecke did not intercede to prevent the feud in order to "break" the DiCesares. Plaintiff further asserts that due to the deputy sheriff's failure to adequately investigate these acts of violence, plaintiff was forced to hire a private investigator at an expense exceeding \$6,000.

The Court has independently reviewed the record and finds as follows. The Magistrate correctly determined that defendant Ramsey is entitled to absolute immunity in his capacity as a state prosecutor. The plaintiff is challenging Ramsey's exercise of

prosecutorial discretion in initiating and prosecuting a case. Since this task is central to his official function as an assistant district attorney, Ramsey is absolutely immune from liability. See, Imbler v. Pachtman, 424 U.S. 409, 424-427 (1976).

The allegations pled against defendants Sloan and Goodecke are not of sufficient substance to support a claim under §1983. Plaintiff pleads mere conclusory allegations that the actions taken by the sheriff's office were inadequate. Although plaintiff readily admits that he and his family participated in the "feud", he contends that the sheriff's office should be responsible for ending it. However, subsequent pleadings in the case indicate efforts were made by the sheriff's office. Both sides were in fact charged with varying criminal offenses over the turbulent history of this "family feud". Accordingly, plaintiff has failed to plead a sufficient factual bases to support his conclusory claims against Sloan and Goodecke.¹

Plaintiff has improperly named Budder and Staller in this action. Plaintiff seeks to include private citizens by asserting state pendent claims against them. However, the provisions of §1983 only apply to persons who both deprive others of a right

¹ See, Hurney v. Carver, 602 F.2d 993, 995 (1st Cir, 1979) (courts need not "conjure up" unpled facts to support conclusory allegations); Fisher v. Flynn, 598 F.2d 663, 665 (1st Cir. 1979) (civil rights complaint must do more than state simple conclusions); Cohen v. Illinois Inst. of Technology, 581 F.2d 658, 663 (7th Cir. 1978) (some particularized facts demonstrating a constitutional deprivation are needed to sustain cause of action under Civil Rights Act), cert. denied, 439 U.S. 1135 (1979); and Coopersmith v. Supreme Court, 465 F.2d 993, 994 (10th Cir. 1972) (under federal rules, complaint must state factual basis for claim asserted).

secured by the Constitution or laws of the United States and who act under color of state statute, ordinance, regulation, custom or usage. See, Adickes v. S.H. Kress & Co., 398 U.S. 144,150 (1970). When a §1983 claim is asserted against private parties, to be classified as state actors under color of law, the private parties must be jointly engaged with state officials in the conduct allegedly violating the federal right. See, Carey v. Continental Airlines, Inc., 823 F.2d 1402, 1404 (10th Cir. 1987). This concerted action constitutes both the state action necessary to establish a constitutional violation, and action under color of state law. Id.

The Second Circuit has stated:

Where a plaintiff fails to support a conspiracy allegation, a district court may, in its discretion, refuse to permit discovery and grant summary judgment ... Courts must be particularly cautious to protect public officials from protracted litigation involving specious claims.

Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97, 106-7 (2nd Cir. 1981).

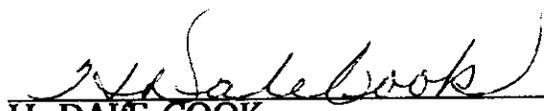
In the instant case, plaintiff did not allege any fact which would lead to the conclusion that his complaint is founded upon concerted action, whether conspiracy, prearranged plan, customary procedure, or policy between the private and public defendants. Absent a factual bases establishing some type of concerted action, plaintiff's complaint is fatally flawed. Plaintiff's case against Staller and Budder is founded solely on pendent jurisdiction. "A federal court may not exercise pendent jurisdiction over state law claims when the federal claim is insubstantial." Carey, supra.

In conclusion, the Court finds that defendant Ramsey is not a proper defendant in that he is entitled to absolute immunity.

Defendants Sloan and Goodecke can not carry plaintiff's case since plaintiff has plead mere conclusory allegations without a factual bases showing constitutional deprivation. Defendants Staller and Budder, as private citizens, are not proper defendants absent a showing of concerted action with public officials. Accordingly, summary dismissal is appropriate. This action clearly involves a dispute between private citizens without any showing of a civil rights violation perpetrated under color of state law.

The Report and Recommendation of the Magistrate Judge is affirmed and adopted by the Court. Plaintiff's complaint is dismissed as frivolous. This Order renders all other outstanding motions moot.

IT IS SO ORDERED this 17th day of May, 1991.



H. DALE COOK
Chief Judge, U. S. District Court

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

UNITED SIDING SUPPLY, INC.,)
)
Plaintiff,)
)
v.)
)
GRADY BROTHERS, INC.; JACK HOKE;)
and RANDY GRADY,)
)
Defendants.)

90-C-594-C

FILED
MAY 20 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER

This order pertains to defendant Randy Grady's Motion for Stay of Proceedings to Enforce Judgment (Docket #51)¹ and plaintiff's Objection thereto (#53).

On February 27, 1991, the court granted plaintiff's Motion for Summary Judgment as to defendant Randy Grady, who personally guaranteed indebtedness due from Grady Brothers, Inc. ("Grady Bros.") to United Siding Supply, Inc. There is no dispute between the parties as to the underlying debt and the failure of Grady Bros. to pay it. Grady Bros. has counterclaimed, alleging accord and satisfaction and interference with contracts. Randy Grady has filed his notice of intent to appeal the entry of summary judgment.

Randy Grady asks the court to stay proceedings under Fed.R.Civ.P. 62 to enforce the judgment, claiming he is entitled to reimbursement by Grady Bros. of any money collected from him by plaintiff. Randy Grady also alleges that it is still at issue whether Grady Bros. will owe money to plaintiff if it is awarded judgment on its counterclaims against plaintiff and whether Grady Bros. has assets to satisfy any claim if judgment is entered against it.

¹ "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

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Plaintiff seeks to enforce the judgment, saying that Randy Grady's assertion that he is entitled to reimbursement by Grady Bros. is not sound since he has not filed a claim against Grady Bros. for indemnity. Plaintiff also claims that the pending counterclaim of Grady Bros. is not sufficient grounds to avoid the entry of judgment under Rule 54(b), as the claims are different and severable. Plaintiff notes that no evidence is before the court regarding the ability of Grady Bros. to pay any judgment entered against it. Plaintiff asks the court to condition any stay of execution of judgment upon the posting of a supersedeas bond by Randy Grady in the event judgment is stayed.

Rule 56 of the Fed.R.Civ.P. pertains to summary judgment and 56(d) states that such a judgment can be granted which does not dispose of a whole case:

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Rule 54(b) of the Fed.R.Civ.P. provides that a court may enter final judgment upon the claim in a case involving multiple claims or parties:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and

liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Rule 62 of the Fed.R.Civ.P. gives the court authority to stay enforcement of a judgment in various situations. Rule 62(h) pertains to a stay in a case involving multiple claims and parties:

When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

The Tenth Circuit has held that partial summary judgment is not a final order and the district court must make it final by certifying it as such under Rule 54(b). Wheeler Machinery v. Mountain States Mineral Enterprises, Inc., 696 F.2d 787, 789 (10th Cir. 1983). In making the determination required by statute that there is no just reason for delay and that judgment should be entered under Rule 54, the court must find that the judgment is an "ultimate disposition of an individual claim entered in the course of a multiple claims action." Id. (citing Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 7 (1980)). If a court reserves issues such as the amount of interest and attorney fees, it is an interlocutory determination of liability and partial damages. Id. The court should consider "whether the claims under review [are] separable from the others remaining to be adjudicated and whether the nature of the claims already determined [is] such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals." McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988), citing Curtiss-Wright Corp., 446 U.S. at 8 (1980). If the salient facts with respect to other

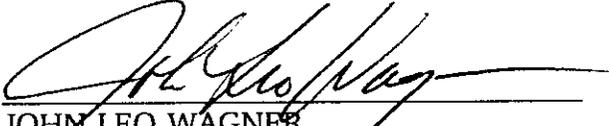
defendants differ significantly and remaining claims involve completely different facts, final judgment is proper under Rule 54(b). Id. at n.5.

The Supreme Court in Curtiss-Wright Corp. discussed the burden on a court in making determinations under Rule 54(b) and noted that "not all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims". 446 U.S. at 8. The judges also stated that the mere presence of nonfrivolous counterclaims does not render a Rule 54(b) certification inappropriate, but that their significance "turns on their interrelationship with the claims on which certification is sought". 446 U.S. at 9. The Court pointed out that Fed.R.Civ.P. 62(h) allowed a court certifying a judgment under Rule 54(b) to stay its enforcement until the entering of a subsequent judgment or judgments and to prescribe conditions to secure the benefit of the judgment to the party in whose favor it is entered. 446 U.S. at 13, n.3.

The court has not made the entry of summary judgment final by certifying it under Rule 54(b). It now concludes that the summary judgment against Randy Grady was an ultimate disposition of the claim against him and in some sense separable from the remaining unresolved claims. However, the nature of the claim was such that the appellate court would have to examine very similar issues again if judgment is subsequently entered against the other defendants and they appeal. The facts with respect to other defendants do not differ significantly and involve the same issues. The entry of summary judgment against Randy Grady was an interlocutory determination of liability.

The court finds that, for reasons of judicial economy, the case should proceed at this time without entry of final judgment against Randy Grady which could be enforced by plaintiff. At such time as the court determines the issues of liability of the other defendants, final judgment will be entered. Defendant Randy Grady's Motion for Stay of Proceedings to Enforce Judgment (#51) is therefore moot.

Dated this 15th day of May, 1991.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

*entered
does not
close*

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

UNITED SIDING SUPPLY, INC.,)
)
Plaintiff,)
)
v.)
)
GRADY BROTHERS, INC.; JACK HOKE;)
and RANDY GRADY,)
)
Defendants.)

90-C-594-C **FILED**
MAY 20 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

AMENDED JUDGMENT

Plaintiff, United Siding Supply, Inc., is entitled to judgment against the defendants, Grady Brothers, Inc. and Randy Grady, individually, in the principal sum of \$106,258.48, accrued interest through March 31, 1991, in the sum of \$31,389.32, plus interest from April 1, 1991 on the principal balance at 18% per annum.

This judgment should be considered interlocutory. Upon reflection, the court concludes that the entry of final judgment against defendant Randy Grady on plaintiff's claim would result in piecemeal appeals and is not justified. The Final Journal Entry of Judgment Against Defendants, Grady Brothers, Inc. and Randy Grady, filed in error on April 22, 1991, is expressly withdrawn.

It is ordered that plaintiff, United Siding Supply, Inc., have and recover judgment against the defendants, Grady Brothers, Inc. and Randy Grady in the principal sum of \$106,258.48, accrued interest through March 31, 1991, in the sum of \$31,389.32, interest on the principal sum from April 1, 1991, at 18% per annum, plus the costs of this action, accrued and accruing.

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It is further ordered that plaintiff's entitlement to attorney's fees against defendants shall be reserved for future determination by this court.

Dated this 20th day of May, 1991.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
) Plaintiff,)
 vs.)
)
) GARY B. MILLION; COUNTY)
) TREASURER, Creek County,)
) Oklahoma; and BOARD OF COUNTY)
) COMMISSIONERS, Creek County,)
) Oklahoma,)
)
) Defendants.)

FILED

MAY 20 1991

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

CIVIL ACTION NO. 89-C-846-E

ORDER

NOW, on this 20th day of May, 1991, there came on for consideration the Motion of the United States to amend the Judgment of Foreclosure previously entered on August 28, 1990. The Court finds said Motion is well taken.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Judgment of Foreclosure previously entered on August 28, 1990, be and is amended by deleting the words, "with appraisalment," appearing in the second paragraph on page 4 of the Judgment and inserting in lieu thereof the words, "without appraisalment."

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED, AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

FILED

MAY 20 1991

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

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

JERALD M. SCHUMAN)	
)	
Plaintiff,)	
)	
vs.)	No. 86-C-744-C
)	
UNITED STATES OF AMERICA)	
)	
Defendant.)	
)	
vs.)	
)	
RALPH W. JACKSON and)	
ARTHUR POOL,)	
)	
Defendants on)	
Counterclaim.)	

ORDER

Before the Court is the motion of counterclaim defendant Ralph W. Jackson for judgment notwithstanding the verdict. After jury trial, on March 5, 1991, the jury returned verdicts in favor of the United States of America and against plaintiff Jerald M. Schuman and movant Jackson. On April 8, 1991, judgment was entered against Jackson and others in the amount of \$265,608.66 plus interest. Jackson, who moved for a directed verdict at all appropriate times, now asks the Court for judgment n.o.v.

This action involves the assessment of civil penalties pursuant to 26 U.S.C. §6672. On such a claim, once the government presents an assessment of liability, the taxpayer bears the risk of nonpersuasion. Fidelity Bank v. United States, 616 F.2d 1181, 1186

(10th Cir. 1980). It is permissible for a Court to grant a directed verdict in favor of the party with the burden of proof. Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 499 (10th Cir. 1984). That court continued:

When the party with the burden of proof moves for a directed verdict the evidence must be viewed from a different perspective. Rather than considering the evidence for its sufficiency to support a finding for the opposing party as is done when the party not having the burden of proof has made such a motion, the evidence is tested for its overwhelming effect. The test is a strict one, and a directed verdict for the party having the burden of proof may be granted only where he has established his case by evidence that the jury would not be at liberty to disbelieve.

In considering the propriety of granting a directed verdict, the court may not weigh the evidence or make credibility determinations. A directed verdict for the party bearing the burden of proof may be granted only if the evidence is such that without weighing the credibility of the witnesses the only reasonable conclusion is in his favor. The court "must take as true 'testimony concerning a simple fact capable of contradiction, not incredible, and standing uncontradicted, unimpeached and in no way discredited by cross examination'"

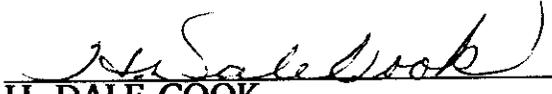
Id. (citations omitted)

For a person to be liable under section 6672, he must be (1) a "responsible person", required to collect and pay over the taxes due and (2) he must have "willfully" failed to have performed the duty to collect and pay over the taxes. See Burden v. United States, 486 F.2d 302 (10th Cir. 1973), cert. denied, 416 U.S. 904 (1974). In his motion, Jackson points to abundant evidence that would have supported a jury verdict in his favor. However, in its response, the government has pointed to at least some evidence which contradicts that relied upon by Jackson. On the "responsible person" issue, plaintiff Schuman testified that Jackson was not "shut out" of the corporation as he claimed. On the "wilfulness" issue, Mary Braum testified that she had told Jackson of the non-payment of taxes and that no action was taken. If the Court were permitted to make credibility determinations, its conclusion would

be different from that of the jury. The Court may not do so in considering a motion of this type. Under the strict standard set forth in Hurd, supra, the motion will not be granted.

It is the Order of the Court that the motion of the counterclaim defendant Ralph W. Jackson for judgment notwithstanding the verdict is hereby denied.

IT IS SO ORDERED this 17th day of May, 1991.



H. DALE COOK
Chief Judge, U. S. District Court

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

FILED
MAY 16 1991

JACK C. CLEVER, CLERK
U.S. DISTRICT COURT

FRANCES NEAL,

Plaintiff,

vs.

MEDICAL CARE ASSOCIATES OF
TULSA, INC.

Defendant.

Case No. 90-C-272-B ✓

J U D G M E N T

In accordance with the Order entered herein on May 16, 1991, sustaining the Defendant's Motion for Summary Judgment on Plaintiff's Age Discrimination in Employment claim, the Court hereby enters judgment in favor of the Defendant, Medical Care Associates of Tulsa, Inc., and against the Plaintiff, Frances Neal. Costs are assessed against the Plaintiff if timely applied for under Local Rule 6. Each party is to pay its respective attorney's fees.

Dated this 16th day of May, 1991.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY 17 1991

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)

vs.)

WILLIAM D. BARRY a/k/a WILLIAM)
DON BARRY; ROBERTA CLARINE BARRY)
a/k/a ROBERTA CLARINE MESSER;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; and BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)

Defendants.)

CIVIL ACTION NO. 89-C-622-B

DEFICIENCY JUDGMENT

This matter comes on for consideration this 17th day
of May, 1991, upon the Motion of the Plaintiff, United
States of America, acting on behalf of the Secretary of Veterans
Affairs, for leave to enter a Deficiency Judgment. The Plaintiff
appears by Tony M. Graham, United States Attorney for the
Northern District of Oklahoma, through Phil Pinnell, Assistant
United States Attorney, and the Defendant, William D. Barry a/k/a
William Don Barry, appears neither in person nor by counsel.

The Court being fully advised and having examined the
court file finds that a copy of Plaintiff's Motion was mailed to
William D. Barry a/k/a William Don Barry, 9720 East 33rd Street,
#332, Tulsa, OK 74146, and all other counsel and parties of
record.

The Court further finds that the amount of the Judgment
rendered on February 1, 1990, in favor of the Plaintiff United
States of America, and against the Defendant, William D. Barry

a/k/a William Don Barry, with interest and costs to date of sale is \$27,112.79.

The Court further finds that the appraised value of the real property at the time of sale was \$15,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered February 1, 1990, for the sum of \$13,282.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on the 8th day of May, 1991.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendant, William D. Barry a/k/a William Don Barry, as follows:

Principal Balance as of 2-1-90	\$21,225.50
Interest	4,742.66
Late Charges to Date of Judgment	177.84
Management Broker Fees to Date of Sale	256.70
Abstracting	306.00
Publication Fees of Notice of Sale	179.09
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$27,112.79
Less Credit of Appraised Value	- <u>15,000.00</u>
DEFICIENCY	\$12,112.79

plus interest on said deficiency judgment at the legal rate of _____ percent per annum from date of deficiency judgment until

paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendant, William D. Barry a/k/a William Don Barry, a deficiency judgment in the amount of \$12,112.79, plus interest at the legal rate of 6.07 percent per annum on said deficiency judgment from date of judgment until paid.

~~S/ THOMAS R. BRETT~~
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

PP/esr

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY 17 1991

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
DAVID THOMAS CHANEY; KATHRYN A.)
CHANEY; COUNTY TREASURER, Tulsa)
County, Oklahoma; and BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)
)
Defendants.)

CIVIL ACTION NO. 89-C-612-B

DEFICIENCY JUDGMENT

This matter comes on for consideration this 17 day of May, 1991, upon the Motion of the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, for leave to enter a Deficiency Judgment. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendants, David Thomas Chaney and Kathryn A. Chaney, appear neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that a copy of Plaintiff's Motion was mailed to David Thomas Chaney and Kathryn A. Chaney, 1318 Euchee Creek Boulevard, Sand Springs, OK 74063 and all other counsel and parties of record.

The Court further finds that the amount of the Judgment rendered on April 11, 1990, in favor of the Plaintiff United States of America, and against the Defendants, David Thomas

Chaney and Kathryn A. Chaney, with interest and costs to date of sale is \$72,136.46.

The Court further finds that the appraised value of the real property at the time of sale was \$45,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered April 11, 1990, for the sum of \$39,850.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on 8th day of May, 1991.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendants, David Thomas Chaney and Kathryn A. Chaney, as follows:

Principal Balance as of 4-11-90	\$57,706.70
Interest	11,845.08
Late Charges to Date of Judgment	514.28
Appraisal by Agency	425.00
Management Broker Fees to Date of Sale	285.00
Abstracting	335.00
Taxes - 1988	199.24
Taxes - 1989	451.31
Publication Fees of Notice of Sale	149.85
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$72,136.46
Less Credit of Appraised Value	- <u>45,000.00</u>
DEFICIENCY	\$27,136.46

plus interest on said deficiency judgment at the legal rate of 6.07 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

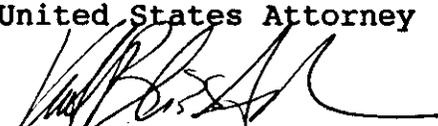
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendants, David Thomas Chaney and Kathryn A. Chaney, a deficiency judgment in the amount of \$27,136.46, plus interest at the legal rate of 6.07 percent per annum on said deficiency judgment from date of judgment until paid.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney



KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

KBA/esr

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

LARRY DON WESLEY MAYNARD,)
)
Plaintiff,)

v.)

Case No. 90-C-693-B

JULIE NEELY, THE X-SHERIFF OF)
OSAGE COUNTY, GEORGE WAYMAN,)
THE CITY OF PAWHUSKA,)
OKLAHOMA OFFICER ST. PETER,)
DISTRICT ATTORNEY LARRY STUART)
(STEWART), JUDGE RICHARD)
PEARMAN, VIRGINIA KENDRICK)
(KENDRICK) JAILER, BOB NANCE,)
ATTORNEY GENERAL OF THE STATE)
OF OKLAHOMA,)
Defendants,)

FILED

MAY 17 1991

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

and

LARRY DON WESLEY MAYNARD,)
)
Plaintiff,)

v.)

Case No. 90-C-849-B

CHARLES PATTERSON, M.D.,)
MARCIE HOGAN, LOIS BOOTH,)
J. A. NUNEZ, M.D., NITA)
CHESSER, R.N.)
Defendants.)

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed April 4, 1991, in which the Magistrate Judge recommended that Defendants' Motions to Dismiss be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

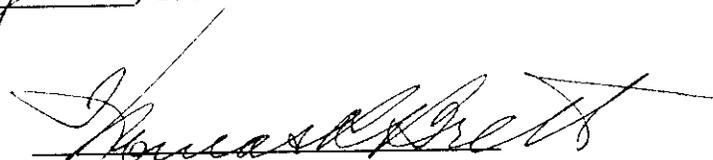
After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

It is therefore Ordered that the Motion to Dismiss of Defendants Judge Richard Pearman and Robert A. Nance (Docket #7)¹, the Motion of Defendants City of Pawhuska and Kevin St. Peter to Dismiss Plaintiff's Complaint (#11), the Motion to Dismiss on Behalf of Defendant Larry Stuart, District Attorney (#13), the Motion to Dismiss on Behalf of Defendants, the X-Sheriff of Osage County George Wayman and Virginia Kendrick, Osage County Jailer (#15), and the Motion to Dismiss of Defendants Marcie Hogan, J. A. Nunez, M.D., Charles Patterson, M.D., Nita Chesser, and Lois Booth (#26) are granted.

Defendant Kevin St. Peter's First Motion for Summary Judgment (#28) is moot.

Defendant Julie Neely has not been served in this case and the complaint is dismissed against her for plaintiff's failure to prosecute.

Dated this 17 day of May, 1991.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹ "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

a petition for a writ of habeas corpus in the Oklahoma Court of Criminal Appeals in Case No. H-90-1220, which was denied on December 28, 1990. Petitioner raises three grounds for relief: (1) that under both the United States Constitution and the Oklahoma Constitution, he had a "vested interest" in receiving "120-days CAP-credits" on each occasion that the Governor declared an emergency for prison overcrowding, as he had already been receiving them before 57 O.S. § 574.1 was amended; (2) that the Petitioner should have been released from prison on September 1, 1990; and (3) that 57 O.S. § 574.1, as amended, which reduced the emergency CAP-credits to 60 days, is an ex post facto law as applied to the Petitioner.

First, it should be noted that matters involving sentencing traditionally involve only an issue of state law and are not reviewable in a federal habeas corpus action. Hill v. Page, 454 F.2d 679, 680 (10th Cir. 1971); Handley v. Page, 279 F. Supp. 878, 879 (W.D. Okla.), aff'd, 398 F.2d 351 (10th Cir. 1968), cert. den. 394 U.S. 935 (1969). Federal courts must accept a state court's interpretation of its laws unless it is inconsistent with fundamental principles of liberty and justice. Ewing v. Winans, 749 F.2d 607, 609 (10th Cir. 1984).

In Barnes v. State, 791 P.2d 101 (Okla. Crim. App. 1990), the Oklahoma court discussed whether the Oklahoma Prison Overcrowding Act, referred to as the "CAP law," and its subsequent amendments, were ex post facto in nature. The court determined that, while a change in the CAP law may disadvantage an inmate, changes in the law are not retrospective in nature and therefore do not violate the prohibition against the passage of an ex post facto law. The court noted that the effects of the CAP law cannot be seen as

a consequence of the crime committed, but are triggered only by events that occur after the law's enactment.

The federal court also considered the ex post facto nature of amendments to the CAP law in Arnold v. Bellmon, Case No. 89-437-C (E.D. Okla. March 26, 1990). In that action the Petitioner alleged that the state was depriving him of his constitutional rights under the Fourteenth Amendment by denying him emergency time credits and the CAP law was being applied in an ex post facto manner. The court found that plaintiff's complaint concerning emergency time credits was a matter of state law and its administration by defendants, and that the law was not being applied ex post facto, as the plaintiff claimed, and it was being properly administered by defendants.

Petitioner was awarded CAP credits until he was denied parole in December of 1989 (see Ex. D. to respondent's response). Title 57 of the Oklahoma Statutes, § 574.1, states that an inmate who is denied parole may not receive emergency time credits. Petitioner has not been denied any rights, since the amendment to the Oklahoma CAP law has not been construed to be ex post facto in nature. He had no vested interest in receiving 120-day CAP credits after the law was amended, and he is not "owed" any credits. Therefore, Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is denied.

Dated this 17 day of May, 1991.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

MAY 17 1991

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

90-C-958-C

JUANITA J. LONG,)
)
Plaintiff,)
)
v.)
)
MARY INEZ TAPP,)
)
Defendant.)

ORDER

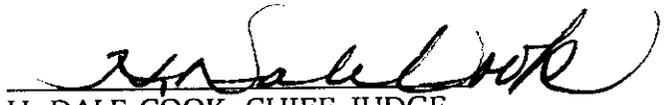
The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed April 16, 1991 in which the Magistrate Judge recommended that Defendant's Motion to Dismiss be granted.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that Defendant's Motion to Dismiss is granted.

Dated this 16th day of May, 1991.


H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

17

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DONALD H. BLEVENS a/k/a DONALD
HUSTON BLEVENS; LAURA M. BLEVENS
a/k/a LAURA MAY BLEVENS a/k/a
LAURA M. BROWN; BOBBY
BROWN; FRED W. WOODSON,
Bankruptcy Trustee; COUNTY
TREASURER, Tulsa County,
Oklahoma; and BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

F I L E D

MAY 17 1991

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

CIVIL ACTION NO. 90-C-946-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17th day
of May, 1991. The Plaintiff appears by Tony M.
Graham, United States Attorney for the Northern District of
Oklahoma, through Peter Bernhardt, Assistant United States
Attorney; the Defendants, County Treasurer, Tulsa County,
Oklahoma, and Board of County Commissioners, Tulsa County,
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, Fred W. Woodson,
Bankruptcy Trustee for the Chapter 7 Estate of Donald Huston
Blevens, Case No. 86-00587-W, appears by Fred W. Woodson; and the
Defendants, Donald H. Blevens a/k/a Donald Huston Blevens, Laura
M. Blevens a/k/a Laura May Blevens a/k/a Laura M. Brown and Bobby
Brown, appear not, but make default.

The Court, being fully advised and having examined the
court file, finds that the Defendant, Donald H. Blevens a/k/a
Donald Huston Blevens, acknowledged receipt of Summons and

Complaint on November 20, 1990; that the Defendant, Fred W. Woodson, Bankruptcy Trustee, acknowledged receipt of Summons and Complaint on November 8, 1990; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on November 8, 1990; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on November 8, 1990.

The Court further finds that the Defendants, Laura M. Blevens a/k/a Laura May Blevens a/k/a Laura M. Brown and Bobby Brown were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning January 10, 1991, and continuing to February 14, 1991, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, Laura M. Blevens a/k/a Laura May Blevens a/k/a Laura M. Brown and Bobby Brown, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, Laura M. Blevens a/k/a Laura May Blevens a/k/a Laura M. Brown and Bobby Brown. The

Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Farmers Home Administration, and its attorneys, Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on November 26, 1990; that the Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on November 26, 1990; that the Defendant, Fred W. Woodson, Bankruptcy Trustee, filed his Answer and Counterclaim on November 20, 1990; and that the Defendants, Donald H. Blevens a/k/a Donald Huston Blevens, Laura M. Blevens a/k/a Laura May Blevens a/k/a Laura M. Brown and Bobby Brown, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on March 21, 1986, Donald Huston Blevens filed his voluntary petition in bankruptcy in

Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 86-00587, and was discharged on July 15, 1986.

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

Lot Nine (9), Block Four (4), ROLLING MEADOWS, an Addition to the Town of Glenpool, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on October 21, 1981, the Defendants, Donald H. Blevens and Laura M. Blevens, executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of \$37,000.00, payable in monthly installments, with interest thereon at the rate of 13.25 percent (13.25%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Donald H. Blevens and Laura M. Blevens, executed and delivered to the United States of America, acting through Farmers Home Administration, a mortgage dated October 21, 1981, covering the above-described property. Said mortgage was recorded on October 21, 1981, in Book 4576, Page 67, in the records of Tulsa County, Oklahoma.

The Court further finds that on or about January 21, 1982, the Defendants, Donald H. Blevens and Laura M. Blevens,

executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on or about September 21, 1982, the Defendants, Donald H. Blevens and Laura M. Blevens, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on or about July 16, 1984, the Defendants, Donald H. Blevens and Laura M. Blevens, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on or about August 21, 1985, the Defendant, Laura M. Blevens, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that the Defendants, Donald H. Blevens a/k/a Donald Huston Blevens and Laura M. Blevens a/k/a Laura May Blevens a/k/a Laura M. Brown, made default under the terms of the aforesaid note, mortgage, and interest credit agreements, by reason of their failure to make the monthly

installments due thereon, which default has continued, and that by reason thereof the Defendants, Donald H. Blevens a/k/a Donald Huston Blevens and Laura M. Blevens a/k/a Laura May Blevens a/k/a Laura M. Brown, are indebted to the Plaintiff in the principal sum of \$39,063.46, plus accrued interest in the amount of \$17,067.25 as of January 23, 1990, plus interest accruing thereafter at the rate of \$14.1805 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of \$16,583.44, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action in the amount of \$340.30 (\$20.00 docket fees, \$320.30 publication fees).

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$555.00, plus penalties and interest, for the year of 1990. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, Bobby Brown, is in default and has no right, title or interest in the subject real property.

The Court further finds that the Defendant, Fred W. Woodson, Bankruptcy Trustee, has a lien on the property which is the subject matter of this action by virtue of a two Caveats; one

filed May 5, 1986 in Book 4940 at Page 413 in the records of Tulsa County, Oklahoma, and the second one filed June 16, 1986 in Book 4948 at Page 2714 in the records of Tulsa County, Oklahoma, based on a judgment awarded to Mr. Blevens in a divorce decree in the amount of \$8,500.00 with interest at 8.5 percent per annum. Said lien is inferior to the interest of the Plaintiff, United States of America.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendants, Donald H. Blevens a/k/a Donald Huston Blevens and Laura M. Blevens a/k/a Laura May Blevens a/k/a Laura M. Brown, in the principal sum of \$39,063.46, plus accrued interest in the amount of \$17,067.25 as of January 23, 1990, plus interest accruing thereafter at the rate of \$14.1805 per day until judgment, plus interest thereafter at the current legal rate of 6.07 percent per annum until paid, and the further sum due and owing under the interest credit agreements of \$16,583.44, plus interest on that sum at the legal rate from judgment until paid, plus the costs of this action in the amount of \$340.30 (\$20.00 docket fees, \$320.30 publication fees) 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 Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$555.00, plus penalties and

interest, for ad valorem taxes for the year 1990, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Board of County Commissioners, Tulsa County, Oklahoma, and Bobby Brown have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Fred W. Woodson, Bankruptcy Trustee, have and recover judgment in the amount of \$8,500.00 plus interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$555.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein
in favor of the Plaintiff;

Fourth:

In payment of Defendant, Fred W. Woodson,
Bankruptcy Trustee, in the amount of
\$8,500.00 plus interest.

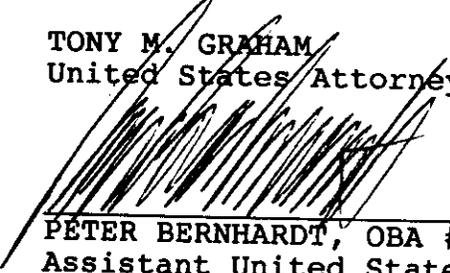
The surplus from said sale, if any, shall be deposited with the
Clerk of the Court to await further Order of the Court.

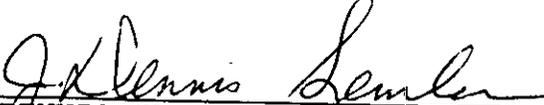
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from
and after the sale of the above-described real property, under
and by virtue of this judgment and decree, all of the Defendants
and all persons claiming under them since the filing of the
Complaint, be and they are forever barred and foreclosed of any
right, title, interest or claim in or to the subject real
property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney


PETER BERNHARDT, OBA #741
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



FRED W. WOODSON, OBA #9868
Attorney for Defendant,
Fred W. Woodson, Bankruptcy Trustee
for the Chapter 7 Estate of Donald Huston Blevens,
Case No. 86-00587-W

Judgment of Foreclosure
Civil Action No. 90-C-946-B

PB/esr

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

F I L E D

MAY 17 1991

EDO CORPORATION,)
)
 Plaintiff,)
)
 v.)
)
 HELIO AIRCRAFT LTD., et al,)
)
 Defendants.)

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

M-1263-B

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed April 22, 1991 in which the Magistrate Judge recommended that the United States Marshal deliver the seized assets to the purchaser Corser Ventures, Inc. together with an executed Marshal's Bill of Sale for the same; and that Corser's Motion to Confirm Sale be granted and Kovacic's Motion for Determination from Proceeds of Sale be denied insofar as any proceeds payable to the Treasurer of Crawford County, Kansas.

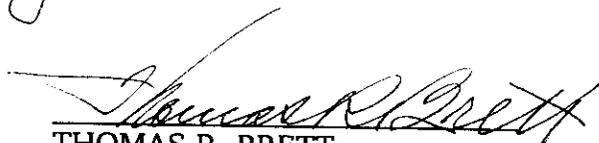
No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that the United States Marshal deliver the seized assets to the purchaser Corser Ventures, Inc. together with an executed Marshal's Bill of Sale for the same; and that Corser's Motion to Confirm Sale is granted and Kovacic's Motion for

Determination from Proceeds of Sale is denied insofar as any proceeds payable to the
Treasurer of Crawford County, Kansas.

Dated this 17th day of May, 1991.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

APR 22 1991

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

EDO CORPORATION,)
)
 Plaintiff,)
)
 v.)
)
 HELIO AIRCRAFT LTD., et al,)
)
 Defendants.)

M-1263-B

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

Now before the Court is the Motion to Confirm Sale of Corser Ventures, Inc. ("Corser") and the Motion for Determination from Proceeds of Sales of John Kovacic, Treasurer, Crawford County, Kansas.

A Judgment against Aerospace Technologies, Inc. ("Aerospace") was filed in this Court on February 24, 1986. Corser was substituted as judgment creditor on July 7, 1989.

On November 20, 1990, pursuant to a Writ of Execution and Order of Sale instituted by Corser, the United States Marshal seized assets of Aerospace, and said assets were sold at public sale on January 8, 1991. On February 20, 1991, Aerospace sought bankruptcy protection.

Prior to ruling on Corser's Motion to Confirm Sale, this Court must determine whether 11 U.S.C. §362, the "automatic stay" provision of the Bankruptcy Code, prevents this hearing from going forward. Upon review, the United States Magistrate finds that it does not.

The issue turns on whether Aerospace had any interest remaining at the time of its Bankruptcy filing. If it did, a continuation of this hearing would violate §362. Were this an execution on real property, Aerospace would hold some interest up until the final confirmation of sale, and the bankruptcy stay would be effective. See, *Hays v. Burton*, 321 P.2d 701 (Okla. 1958). However, as the property subject of Corser's Motion to Confirm Sale involves personal property only, Aerospace's interest in the property was extinguished at the time of the U.S. Marshal's sale. See, *Gilles v. Norman Plumbing Supply Co. of Oklahoma City*, 549 P.2d 1351 (Okla. Ct. App. 1975) ("We conclude when execution was levied upon the Pontiac the sheriff's sale operated to extinguish appellee's interest.") Because Aerospace's interest was extinguished by the United States Marshal's sale prior to filing of Bankruptcy, no interest remained to fall into the bankruptcy estate. The automatic stay does not act to stay this proceeding. Therefore, it is proper that the confirmation hearing continue.

Upon review, the United States Magistrate Judge finds that the execution, levy and sale of the personal property were carried out in accordance with Oklahoma law (12 O.S. §§731, et seq).¹ Rule 69(a) Fed.R.Civ.P.

Mr. Kovacic, Treasure for Crawford County, Kansas, however, asserts a right to \$120,158.43 of the sale proceeds, claiming same is superior to Corser's right. Kovacic claims the superior right arose as follows. Tax Warrants were issued out of Crawford County, Kansas in 1984, 1985, and 1986.² Kovacic claims that under Kansas law such

¹ Title 18 U.S.C. §§2001-2004 does not apply to this type of proceeding. 12 *Wright & Miller* §3012, fn. 12.

² It should be noted that the three warrants are directed to "Helio Aircraft, Ltd.", Aerospace's predecessor in interest as of September 7, 1984.

warrants become "judgments" as a matter of law. Kovacic then filed copies of said warrants in Tulsa County District Court, in Tulsa, Oklahoma, on September 20, 1990, as foreign "judgments". Thereafter, Kovacic delivered to the Tulsa County Sheriff a Writ of Execution, but the writ was returned with "no assets found".

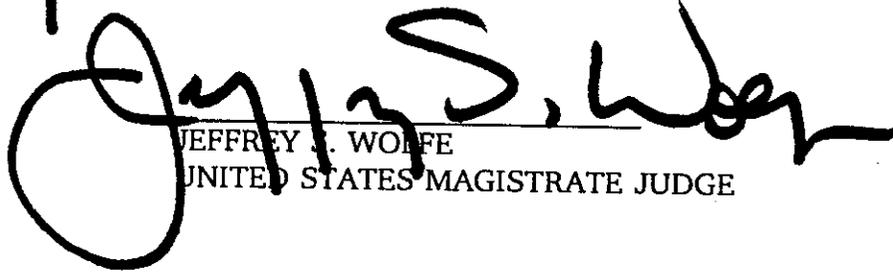
Undaunted, Kovacic argues that the county sheriff and the United States Marshal should be treated conceptually as a single entity such that delivery of a writ of execution to, or levy by one should have the same effect as if it were the other. Kovacic then concludes that when he delivered the writ to the sheriff on November 5, 1990 it was the same as delivering it to the Marshal, and that as a result, when the Marshal levied on Aerospace's assets the Marshal was doing so in satisfaction of Kovacic's warrant/judgment, first, and Corser's judgment, second.³ Kovacic offers no authority.

The Court finds Kovacic's arguments to be untenable and holds that Corser's rights to the proceeds of the United States Marshal's are superior to Kovacic's rights (if any). Therefore, it is the recommendation of the United States Magistrate Judge that the United States Marshal deliver the seized assets to the purchaser Corser Ventures, Inc. together with an executed Marshal's Bill of Sale for the same; and that Corser's Motion to Confirm Sale be granted and Kovacic's Motion for Determination from Proceeds of Sale be denied insofar as any proceeds payable to the Treasurer of Crawford County, Kansas.

Pursuant to Local Rule 32(D), parties are given ten (10) days from the above filing date to file any objections with supporting brief.

³ Corser also notes that in the Crawford County, Kansas case of Kovacic v. Helio Aircraft Inc., Case No. 88-C-75 GD, in an opinion issued December 27, 1990, the Kansas Court held that the Kansas Statute of Limitations (K.S.A. 79-2110) is a complete bar to Kovacic's action against Helio on the tax obligations referenced in the above-mentioned tax warrants.

Dated this 22nd day of April, 1991.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

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

F I L E D
MAY 17 1991 *AK*

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

MICHAEL WAYNE CARNAGEY,)
)
 Plaintiff,)
)
 v.)
)
 D.M. MACDONNELL, et al,)
)
 Defendants.)

91-C-13-B ✓

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed April 22, 1991 in which the Magistrate Judge recommended that Defendants' Motion for Partial Dismissal be **granted** in accord with Local Rule 15(A) and the pendent claims brought by Plaintiff be dismissed.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that Defendants' Motion for Partial Dismissal is **granted** in accord with Local Rule 15(A) and the pendent claims brought by Plaintiff are dismissed.

Dated this 17th day of May, 1991.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

LARRY DON WESLEY MAYNARD,)

Plaintiff,)

v.)

Case No. 90-C-693-B

JULIE NEELY, THE X-SHERIFF OF)

OSAGE COUNTY, GEORGE WAYMAN,)

THE CITY OF PAWHUSKA,)

OKLAHOMA OFFICER ST. PETER,)

DISTRICT ATTORNEY LARRY STUART)

(STEWART), JUDGE RICHARD)

PEARMAN, VIRGINIA KENDRICK)

(KENDRICT) JAILER, BOB NANCE,)

ATTORNEY GENERAL OF THE STATE)

OF OKLAHOMA,)

Defendants,)

FILED
MAY 17 1991

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

and

LARRY DON WESLEY MAYNARD,)

Plaintiff,)

v.)

Case No. 90-C-849-B

CHARLES PATTERSON, M.D.,)

MARCIE HOGAN, LOIS BOOTH,)

J. A. NUNEZ, M.D., NITA)

CHESSER, R.N.)

Defendants.)

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed April 4, 1991, in which the Magistrate Judge recommended that Defendants' Motions to Dismiss be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

17

c/m

After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

It is therefore Ordered that the Motion to Dismiss of Defendants Judge Richard Pearman and Robert A. Nance (Docket #7)¹, the Motion of Defendants City of Pawhuska and Kevin St. Peter to Dismiss Plaintiff's Complaint (#11), the Motion to Dismiss on Behalf of Defendant Larry Stuart, District Attorney (#13), the Motion to Dismiss on Behalf of Defendants, the X-Sheriff of Osage County George Wayman and Virginia Kendrick, Osage County Jailer (#15), and the Motion to Dismiss of Defendants Marcie Hogan, J. A. Nunez, M.D., Charles Patterson, M.D., Nita Chesser, and Lois Booth (#26) are granted.

Defendant Kevin St. Peter's First Motion for Summary Judgment (#28) is moot.

Defendant Julie Neely has not been served in this case and the complaint is dismissed against her for plaintiff's failure to prosecute.

Dated this 17 day of May, 1991.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹ "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 17 1991

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 NINETEEN THOUSAND FIVE)
 HUNDRED EIGHTY-THREE DOLLARS)
 (19,583.00) IN UNITED STATES)
 CURRENCY,)
)
 Defendant.)

CIVIL ACTION NO. 90-C-676-C

JUDGMENT OF FORFEITURE

IT NOW APPEARS that the forfeiture proceeding herein has been fully compromised and settled, as more fully appears in the written Stipulation For Compromise entered into by and between the Claimant, Donald Michael Deerfield, and executed by his attorney, Scott D. Keith, and the plaintiff, United States of America, and executed by Catherine J. Depew, Assistant United States Attorney for the Northern District of Oklahoma, filed herein, to which Stipulation for Compromise reference is hereby made and incorporated herein.

It further appearing that no other claims to the defendant currency have been filed since such property was seized, and that no other persons have any right, title, or interest in and to the following-described defendant property:

Nineteen Thousand Five Hundred
Eighty-three Dollars.

Now, therefore, on motion of Catherine J. Depew, Assistant United States Attorney, and with the consent of Claimant, Donald Michael Deerfield, it is

ORDERED, ADJUDGED, AND DECREED that the claim of Donald Michael Deerfield in the related administrative action be, and the same hereby is, dismissed with prejudice and without costs, and it is

FURTHER ORDERED, ADJUDGED, AND DECREED that Seventeen Thousand Dollars (\$17,000.00) in United States Currency, be, and it hereby is, condemned as forfeited to the United States of America and shall remain in the custody of the United States Marshals Service for disposition according to law, and it is

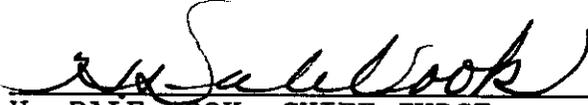
FURTHER ORDERED, ADJUDGED, AND DECREED that the United States Marshals Service shall withhold from the defendant currency seized from the Claimant on the 15th day of March, 1990, the sum of One Thousand Four Hundred Forty-eight Dollars (\$1,448.00), which shall be disbursed by the United States Marshals Service to the United States Department of the Treasury, Internal Revenue Service, to be applied toward the outstanding income tax liability of the Claimant, Donald Michael Deerfield, Social Security No. 383 62 7909; and it is

FURTHER ORDERED, ADJUDGED, AND DECREED that the United States Marshals Service shall return to the Claimant, Donald Michael Deerfield, from the defendant currency seized from the

Claimant on the 15th day of March, 1990, the sum of One Thousand One Hundred Thirty-five Dollars (\$1,135.00); and it is

FURTHER ORDERED, ADJUDGED, AND DECREED that the United States Marshals Service shall disburse the cost bond in the amount of One Thousand Nine Hundred Fifty-eight Dollars (\$1,958.00) posted by the Claimant, Donald Michael Deerfield, in the related administrative action to the Internal Revenue Service, to be applied toward the outstanding income tax liability of the Claimant, Donald Michael Deerfield, Social Security No. 383 62 7909.

DATED this 16th day of May, 1991.


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

CJD/ch
01479

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

REBECCA G. FRENGER,)
)
) Plaintiff,)
)
 vs.)
)
) CENTRAL STATES ORTHOPAEDIC)
) AND SPORTS MEDICINE CENTER,)
) formerly Tulsa Orthopaedic)
) Associates, an Oklahoma general)
) partnership, HENRY H. MODRAK,)
) M.D., Inc., HENRY H. MODRAK,)
) individually, R. CLIO ROBERTSON,)
) M.D., Inc., R. CLIO ROBERTSON,)
) individually, DON L. HAWKINS, M.D.,)
) Inc., DON L. HAWKINS, individually,)
) MICHAEL W. TANNER, M.D., Inc.)
) and MICHAEL W. TANNER, individually)
)
) Defendants.)

No. 89-C-922-B

FILED

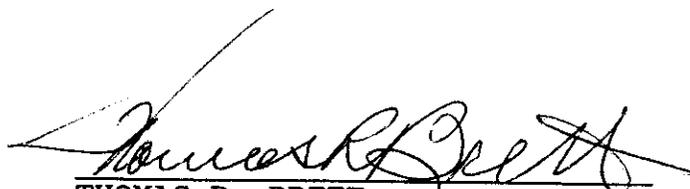
MAY 17 1991

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

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law entered this date, Judgment is hereby entered in favor of Central States Orthopaedic and Sports Medicine Center, formerly Tulsa Orthopaedic Associates, an Oklahoma general partnership, Henry H. Modrak, M.D., Inc., Henry H. Modrak, individually, R. Clio Robertson, M.D., Inc., R. Clio Robertson, individually, Don L. Hawkins, M.D., Inc., Don L. Hawkins, individually, Michael W. Tanner, M.D., Inc., and Michael W. Tanner, individually, Defendants, and against the Plaintiff, Rebecca G. Frenger, on Plaintiff's alleged sex discrimination in employment claim. Costs are hereby assessed against the Plaintiff if timely applied for pursuant to Local Rule 6 and each party is to pay their own

respective attorney fees.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
May 17, 1991

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

REBECCA G. FRENGER,)
)
 Plaintiff,)
)
 vs.)
)
 CENTRAL STATES ORTHOPAEDIC)
 AND SPORTS MEDICINE CENTER,)
 formerly Tulsa Orthopaedic)
 Associates, an Oklahoma general)
 partnership, HENRY H. MODRAK,)
 M.D., Inc., HENRY H. MODRAK,)
 individually, R. CLIO ROBERTSON,)
 M.D., Inc., R. CLIO ROBERTSON,)
 individually, DON L. HAWKINS, M.D.,)
 Inc., DON L. HAWKINS, individually,)
 MICHAEL W. TANNER, M.D., Inc.)
 and MICHAEL W. TANNER, individually)
)
 Defendants.)

No. 89-C-922-B

F I L E D

MAY 17 1991

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

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This is an alleged sex discrimination in employment action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(f).

Plaintiff asserts that she was demoted in her employment with Defendants in July 1987 due to sex discrimination and was subsequently discharged in early August 1987 when the Defendant employer retaliated against her for contacting the Oklahoma Human Rights Commission (OHRC) regarding her rights. In response the Defendants deny that Plaintiff was demoted and assert that while Plaintiff was terminated in early August 1987 it was for legitimate business reasons and followed Plaintiff's announced intention to voluntarily resign September 1, 1987. Defendants deny that they

retaliated against Plaintiff following her contacting the OHRC.

After a trial to the Court on May 2, 3 and 6, 1991 and a review of the evidence, arguments of counsel and the applicable legal authority, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Plaintiff is a female resident of Tulsa County, Oklahoma and was employed by Tulsa Orthopaedic Associates (TOA) starting in September 1986 as a Systems and Collections Administrator with TOA.

2. The Defendant Central States Orthopaedic and Sports Medicine Center is an Oklahoma general partnership, consisting of the individual corporations of the orthopaedic physician members above named, and was formerly known as Tulsa Orthopaedic Associates, an Oklahoma general partnership.

3. The Plaintiff worked for the predecessor, TOA, in Tulsa, Oklahoma until the 4th day of August, 1987.

4. For operational purposes in the practice of orthopaedics TOA was divided into two sides: the business side and the clinical side. The business side involved such areas as finance and accounting, record keeping, and the hiring and firing of employees on the business side. As Systems and Collections Administrator the Plaintiff, Rebecca G. Frenger, was the manager of the business side. Wanda Young, a radiology technician by education, training and experience, was the longtime manager of the clinical side which centered in the medical aspects of the orthopaedic practice,

overseeing surgical scheduling, providing surgical technicians, patient follow-up care, physical therapy, etc.

5. The Plaintiff's background and experience was in accounting and she was well qualified to manage the business side of the TOA. TOA acknowledged that Plaintiff was a very good employee in this regard. The Plaintiff had no prior experience in medical or allied health fields and lacked qualifications to oversee the clinical side of TOA.

6. In the latter part of 1986 Plaintiff also assumed responsibility from Wanda Young regarding the operation of the front desk. It was thought best that since the front desk was closer in proximity and perhaps more related to the business side of the orthopaedic practice that it should fall within the responsibilities of Plaintiff as the business manager. Other than this change Plaintiff's responsibilities remained essentially the same with the title of Systems and Collections Administrator throughout her tenure of employment with TOA.

7. In the latter part of January 1987 Plaintiff became frustrated due to the stress of her job from the long hours required to properly do her work as business manager and because of communication problems and dissension among the physician members of TOA. In the latter part of January 1986 the Plaintiff abruptly announced to some of the physician members of TOA that she could not continue and would resign. In response Drs. James Mayoza and Don L. Hawkins, physician members of TOA, hastily concluded that the Plaintiff should be talked into staying with TOA as business

manager. To get her to remain said two physicians concluded an offer should be made to the Plaintiff raising her salary from \$30,000.00 a year to \$40,000.00 a year. The Plaintiff responded to the offer that the problem was not money or the level of her salary, but was the stress caused by the long hours and the physicians' failure to communicate. The Plaintiff further responded by stating she would remain with TOA on a probationary basis for six months but if things did not improve by approximately August 1, 1987, she would terminate with TOA. Concerning the proposed salary increase, Plaintiff stated she would not accept it because the finances of TOA would not permit the salary raise at that time and other employees were not being given a salary increase which would be appropriate if the Plaintiff's salary were raised. Drs. Robertson and Tanner of TOA were not consulted about nor did they approve the \$10,000.00 annual raise offered to Plaintiff. It was TOA stated policy that expenses in excess of \$500.00 were to be approved by the five physicians. (Plaintiff's Exhibit 14). In early February 1987 the four remaining partners decided that Dr. Mayoza should no longer be a partner. In February 1987 Dr. Mayoza ceased being a partner of TOA but remained at the office operating a separate practice and paying his share of the overhead until late August 1987.

8. Plaintiff indicated in late January 1987 that she did not wish to be "hounded" regarding her decision whether or not she would remain as business manager after six months. By early July 1987 Plaintiff had not yet made up her mind whether or not she

would remain with TOA as business manager following August 1, 1987. Previous to mid-July 1987, when a TOA physician would inquire of Plaintiff if she had made up her mind regarding remaining with TOA, Plaintiff would respond with an equivocal answer indicating the job was still quite stressful and she had other employment readily available to her. On one occasion she advised Dr. Robertson that things seemed to be improving at TOA.

9. In early July 1987 Dr. Robertson became concerned, after a conversation with Plaintiff, that Plaintiff was not going to stay beyond August 1, 1987. Dr. Robertson, with approval of the partners, began looking for a replacement for Plaintiff as business manager or perhaps an overall TOA administrator who would report only to the physician partners. TOA learned of the availability of Mr. Ron Livengood who had many years experience as the chief administrator of a multiphysician orthopaedic clinic in Wichita, Kansas. Mr. Livengood is a college graduate with a B.S. in Business Administration and is a Fellow of the American College of Medical Administrators with experience in promotion and public relations of a sports medicine clinic. Mr. Livengood's qualifications to be administrator (both business side and clinic side) of TOA exceeded the qualifications of Plaintiff in that regard both in education and experience. In mid-July TOA decided to employ Mr. Livengood at a salary of \$48,000.00 per year as the TOA head administrator. It was further decided that Plaintiff could remain as business manager but subordinate to Mr. Livengood.

10. On July 22, 1987 Dr. Robertson, on behalf of TOA, advised Plaintiff of the decision to employ Livengood as head administrator of TOA. Plaintiff was surprised by this news and discussed with Dr. Robertson that the office employees might perceive it as a demotion for her. Dr. Robertson informed Plaintiff that she could remain as manager of the business side of TOA but would be subordinate to Livengood. Plaintiff advised Dr. Robertson she would think about it and report back, as she might not desire to remain with TOA under the circumstances. On July 24, 1991 Plaintiff advised Dr. Robertson it was her choice to resign as business manager. In order to get Plaintiff to remain to September 1, 1987 to help acquaint Livengood with the business side of TOA, Dr. Robertson offered to honor pro rata the \$10,000.00 annual raise previously offered in late January 1987 by Drs. Mayoza and Hawkins. Dr. Robertson concluded that from January 29, 1987 to September 1, 1987 would be approximately 60% or \$6,000.00 of the total \$10,000.00 raise. Dr. Robertson told Plaintiff on July 24, 1987 she could receive her regular salary, plus \$3,000.00 immediately, and the balance of \$3,000.00 on September 1, 1987, if she remained until then. Plaintiff agreed to remain on this basis. (Defendants' Exhibit 37, pp. 23-24).

11. On August 4, 1987 Plaintiff was terminated by TOA because her performance indicated she no longer had the best interests of TOA which became disruptive and the physician partners concluded she had overpaid herself the last two weeks of July, on the basis of a \$40,000.00 a year salary, when the \$6,000.00 payment

understanding had already included the salary raise. (Plaintiff's Exhibit 18). TOA compensated Plaintiff, as per agreement, to September 1, 1987.

12. The Plaintiff orally contacted the OHRC about July 27, 1987 and then completed by filling out Complaint Intake Questionnaire Forms on July 30, 1987 provided by the OHRC. These forms, with attachments, were not provided to the OHRC by Plaintiff until January 29, 1988. The attachments referred to Plaintiff's alleged demotion and also her discharge on August 4, 1987 for alleged retaliation due to her contacting the OHRC. On March 15, 1988 Plaintiff received a request from the OHRC for more information concerning her "demotion and discharge" complaint. Plaintiff responded on April 28, 1988. In September 1988 Plaintiff received a complaint form from the OHRC, signed it before a Notary Public, and returned it for filing on October 17, 1988. The sworn complaint stated, "I was demoted from my position as Systems and Collections Administrator on July 22, 1987." On December 9, 1988 the OHRC notified the Defendant that a formal charge had been filed. On March 31, 1989 an OHRC order was received terminating its investigation and on August 7, 1989 the Equal Employment Opportunity Commission furnished Plaintiff a right-to-sue letter. This federal court complaint was filed on November 3, 1989.

The Plaintiff relied in good faith on the adequacy of the Complaint Intake Questionnaire filed with the OHRC on January 29, 1988, as a properly filed complaint. Any failure on the Plaintiff's part to file a verified complaint within the required

300-day period, resulted from the OHRC's failure to provide Plaintiff proper instructions and additional appropriate forms until September 19, 1988. The Court concludes the Plaintiff has timely exhausted her administrative remedies and timely filed this action following receipt of a right-to-sue letter.

13. The Court concludes the legitimate business reasons given by Defendant, TOA, for the termination of Plaintiff were not a pretext for sex discrimination. Plaintiff was not demoted. Plaintiff announced her resignation on July 24, 1987, effective September 1, 1987, and was terminated on August 4, 1987 as aforesaid. Plaintiff was not terminated in retaliation for contacting the OHRC.

14. As the evidence has failed to establish sex discrimination in Plaintiff's employment and termination, she cannot prevail regarding the material allegations of her alleged sex discrimination in employment complaint against the Defendants herein.

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction of this case pursuant to 28 U.S.C. §§ 1331(a), and jurisdiction over the parties pursuant to Title VII of the 1964 Civil Rights Act, as Amended, 42 U.S.C. § 2000e *et seq.*

2. Any Finding of Fact above which might be properly characterized a Conclusion of Law is incorporated herein.

3. The Defendant, Central States, is an employer within the meaning of 42 U.S.C. § 2000e(b) and subject to the provisions of

the Equal Employment Opportunity Act. The Plaintiff was an employee protected by the provisions of said Act.

4. The Plaintiff has timely exhausted her administrative remedies and timely commenced this action for alleged sex discrimination following receipt of her notice of right-to-sue from the EEOC on August 7, 1989.

5. The nature of the *prima facie* case under McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), was examined by the Supreme Court in Furnco Construction Corporation v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978), *aff'd*, Board of Trustees of Keene St.Col. v. Sweeney, 439 U.S. 24, 99 S.Ct. 295, 99 L.Ed.2d 295 (1978), and clarified in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981). *See also*, Hernandez v. Alexander, 607 F.2d 920 (10th Cir. 1979).

6. Plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the Act." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 52 L.Ed.2d 396 (1977), and Furnco Const. Corp. v. Waters, *supra*.

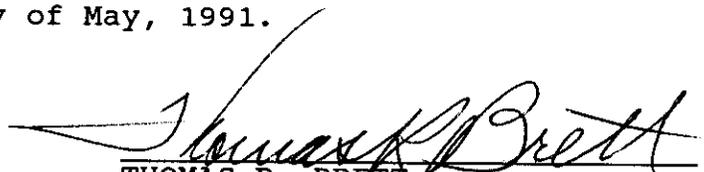
7. Once the plaintiff has established a *prima facie* case of discrimination, the burden shifts to the employer to prove that it based its employment decision on a legitimate nondiscriminatory

consideration, rather than discriminatory one. Furnco Const. Corp. v. Waters, *supra*. The *prima facie* case rests on presumption and the presumption can be dispelled by an articulation of valid reasons. Hernandez v. Alexander, *supra*.

8. The Court concludes, under all of the evidence and the foregoing Findings of Fact, although Plaintiff established a *prima facie* case, the Defendant produced credible evidence the Plaintiff was neither demoted nor discharged for discriminatory or retaliatory reasons, but to the contrary was terminated for legitimate nondiscriminatory business reasons. Ammons v. Zia Company, 448 F.2d 117, 120-1 (10th Cir. 1971), and Hernandez v. Alexander, *supra*.

9. In keeping with these Findings of Fact and Conclusions of Law a separate Judgment should be filed contemporaneous herewith this date.

ENTERED this 17th day of May, 1991.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES D. BROWN, SR. a/k/a
JAMES DUARD BROWN; EFFIE JEAN
BROWN a/k/a EFFIE J. BROWN a/k/a
JEAN E. BROWN;
BARCLAYSAMERICAN/FINANCIAL
SERVICES; SERVICE COLLECTION
ASSOCIATION, INC.; COUNTY
TREASURER, Tulsa County,
Oklahoma; and BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

MAY 17 1991

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

CIVIL ACTION NO. 90-C-915-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17 day
of May, 1991. The Plaintiff appears by Tony M.
Graham, United States Attorney for the Northern District of
Oklahoma, through Kathleen Bliss Adams, Assistant United States
Attorney; the Defendants, County Treasurer, Tulsa County,
Oklahoma, and Board of County Commissioners, Tulsa County,
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, Service
Collection Association, Inc., appears not, having previously
filed its Disclaimer; and the Defendants, James D. Brown, Sr.
a/k/a James Duard Brown, Effie Jean Brown a/k/a Effie J. Brown
a/k/a Jean E. Brown, and Barclaysamerican/Financial Services,
appear not, but make default.

The Court, being fully advised and having examined the
court file, finds that the Defendant, Effie Jean Brown a/k/a

Effie J. Brown a/k/a Jean E. Brown, was served with Summons and Complaint on December 19, 1990; Defendant, Barclaysamerican/Financial Services, acknowledged receipt of Summons and Complaint on November 2, 1990; that the Defendant, Service Collection Association, Inc., was served with Summons and Complaint on December 28, 1990; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on October 30, 1990; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on October 30, 1990.

The Court further finds that the Defendant, James D. Brown, Sr. a/k/a James Duard Brown, was served by publishing notice of this action in The Tulsa Daily Commerce & Legal News of Tulsa, Oklahoma, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning February 19, 1991, and continuing to March 26, 1991, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, James D. Brown, Sr. a/k/a James Duard Brown, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter

filed herein with respect to the last known address of the Defendant, James D. Brown, Sr. a/k/a James Duard Brown. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Farmers Home Administration, and its attorneys, Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on November 15, 1990; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on November 15, 1990; that the Defendant, Service Collection Association, Inc., filed its Disclaimer on November 15, 1990; and that the Defendants, James D. Brown, Sr. a/k/a James Duard Brown, Effie Jean Brown a/k/a Effie J. Brown, and Barclaysamerican/Financial Services, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on December 29, 1980, James D. Brown, Sr. and Jean E. Brown filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 80-B-1606, were discharged on April 23, 1981, and the case was closed on December 11, 1981.

The Court further finds that on June 28, 1988, James Duard Brown and Effie Jean Brown filed their voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 88-B-1852, and the case was closed on April 27, 1989.

The Court further finds that on December 6, 1988, James Duard Brown and Effie Jean Brown filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 88-B-3709, were discharged on March 14, 1989, and the case was closed on April 25, 1989.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a 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-three (23), Block One (1),
SCOTTSDALE ADDITION, an Addition in Tulsa
County, Oklahoma, according to the recorded
Plat thereof.

The Court further finds that on August 15, 1979, the Defendants, James D. Brown, Sr. and Effie Jean Brown, executed

and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of \$25,880.00, payable in monthly installments, with interest thereon at the rate of 9 percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, James D. Brown, Sr. and Effie Jean Brown, executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated August 15, 1979, covering the above-described property. Said mortgage was recorded on August 15, 1979, in Book 4420, Page 832, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, James D. Brown, Sr. and Effie Jean Brown, executed and delivered to the United States of America, acting through the Farmers Home Administration, a Reamortization and/or Deferral Agreement dated March 15, 1985, pursuant to which the entire debt due on that date was made principal.

The Court further finds that the Defendants, James D. Brown a/k/a James Duard Brown and Effie Jean Brown a/k/a Effie J. Brown a/k/a Jean E. Brown, made default under the terms of the aforesaid note, mortgage, and reamortization and/or deferral agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, James D. Brown a/k/a James Duard Brown and Effie Jean Brown a/k/a Effie J. Brown a/k/a Jean E. Brown, are indebted to the Plaintiff in the principal sum of

\$27,429.14, plus accrued interest in the amount of \$8,268.68 as of June 5, 1990, plus interest accruing thereafter at the rate of 9 percent per annum or \$6.7634 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$342.97 (\$20.00 docket fees, \$11.52 fees for service of Summons and Complaint, \$311.45 publication fee).

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$233.00, plus penalties and interest, for the year of 1990. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$4.00 which became a lien on the property as of July 2, 1990. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, Service Collection Association, Inc., disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, James D. Brown, Sr. a/k/a James Duard Brown, Effie Jean Brown a/k/a Effie

J. Brown a/k/a Jean E. Brown, and Barclaysamerican/Financial Services, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, James D. Brown, Sr. a/k/a James Duard Brown and Effie Jean Brown a/k/a Effie J. Brown a/k/a Jean E. Brown, in the principal sum of \$27,429.14, plus accrued interest in the amount of \$8,268.68 as of June 5, 1990, plus interest accruing thereafter at the rate of 9 percent per annum or \$6.7634 per day until judgment, plus interest thereafter at the legal rate of 6.07 percent per annum until fully paid, and the costs of this action in the amount of \$342.97 (\$20.00 docket fees, \$11.52 fees for service of Summons and Complaint, \$311.45 publication fee), 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 Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$233.00, plus penalties and interest, for ad valorem taxes for the year 1990, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$4.00 for personal property taxes for the year 1989, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Board of County Commissioners, Tulsa County, Oklahoma, James D. Brown, Sr. a/k/a James Duard Brown, Effie Jean Brown a/k/a Effie J. Brown a/k/a Jean E. Brown, and Barclaysamerican/Financial Services have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Service Collection Association, Inc., disclaims any right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, James D. Brown, Sr. a/k/a James Duard Brown and Effie Jean Brown a/k/a Effie J. Brown a/k/a Jean E. Brown, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$233.00, plus penalties and interest, for

ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$4.00, personal property taxes which are currently due and owing.

The surplus from said sale, 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 the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney



KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 90-C-915-B

KBA/esr

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

FILED

MAY 17 1991

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

BRENDA GAYLE MULLIN and)
JIM MULLIN, Husband and Wife,)
)
Plaintiffs,)
)
VS.)
)
MAURINE PADGETT and NATIONAL)
CAR RENTAL SYSTEM, INC.,)
)
Defendants.)

NO. 91-C-277-~~P~~B

NOTICE OF DISMISSAL

COME NOW the Plaintiffs, Brenda Gayle Mullin and Jim Mullin, by and through their attorneys of record, Morris and Morris, by Mary W. Morris, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure dismiss Defendant National Car Rental System, Inc. from this cause. Said dismissal is filed without prejudice since Defendant has not served an answer to the causes of action filed by Plaintiff in their Complaint.

Respectfully submitted,

MORRIS & MORRIS



Mary W. Morris
OBA # 10539
1616 South Denver
Tulsa, Oklahoma 74119
(918) 587-5514

Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document was mailed with proper postage affixed thereon on the 17th day of May, 1991 to the following:

Mr. Steven Wilkerson
Knight & Wilkerson
P. O. Box 1560
Tulsa, Oklahoma 74101-1560



Mary W. Morris

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

VERNON O. HOLLAND and JAMES
DAVIS DRANE MAULDIN, JR.,

Plaintiffs,

vs.

DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE,

Defendant.

No. 90-C-419-E

FILED

MAY 16 1991

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

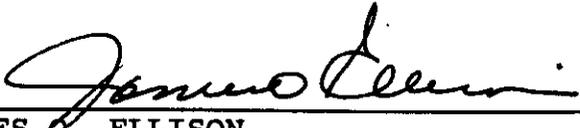
ORDER

The Court has for consideration Plaintiff's renewed motion for expedited de novo review.

The Court's previous Order of January 22, 1991 is withdrawn because it was erroneously entered. Since the matter is set for criminal trial before the Honorable Judge Thomas R. Brett in 90-CR-10-B the civil process cannot be used as an alternative to the rules of criminal procedure regarding discovery. Thus, the instant action is dismissed without prejudice and Plaintiffs should proceed before Judge Brett in the criminal case to obtain the information sought here.

IT IS THEREFORE ORDERED that the instant case is dismissed without prejudice.

ORDERED this 15th day of May, 1991.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

clm

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

FILED

MAY 16 1991

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

JOSEPH ANGELO DICESARE,)
)
 Plaintiff,)
)
 vs.)
)
 JESS WALKER, et al.,)
)
 Defendants.)

No. 90-C-983-E
90-C-1005-E
90-C-1006-E

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate filed February 1, 1991 in which the Magistrate Judge recommended that Plaintiff's civil rights complaint filed pursuant to 42 U.S.C. §1983 was without merit and should be dismissed.

While an objection to the Report and Recommendation was filed, it was unpersuasive. After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate should be and hereby is adopted and affirmed.

IT IS THEREFORE ORDERED that Plaintiff's complaint is without merit and is dismissed under 28 U.S.C. §1915(d).

ORDERED this 15th day of May, 1991.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED
MAY 16 1991
JACK C. SILVER, CLERK
U.S. DISTRICT COURT

LARRY WHITAKER, }
 }
 Plaintiff, }
 }
 vs. }
 }
 PACIFIC ENTERPRISES OIL }
 COMPANY (USA), }
 }
 Defendant. }

No. 90-C-512-C ✓

ORDER

Before the Court is the motion filed by defendant Pacific Enterprises Oil Company (USA) (hereinafter "Pacific Enterprises") for summary judgment on plaintiff's complaint brought under the Fair Labor Standards Act (FLSA), as amended, 29 U.S.C. §201 et seq., for alleged uncompensated overtime wages. Defendant contends that, under the facts as set forth by plaintiff, it is entitled to summary judgment as a matter of law.

Plaintiff was hired by Terra Resources (now Pacific Enterprises) as head drafter in 1979 or 1980. Plaintiff worked continuously for defendant until his termination in September 1989. Plaintiff was terminated, with severance pay, when Pacific Enterprises relocated its corporate headquarters from Tulsa to Dallas, Texas.

Plaintiff is seeking recovery of alleged uncompensated overtime for a twenty-month period from January 1988 through August 1989. Prior to 1988, plaintiff's supervisor was Mike

Bryant. From October 1987 through February 1988 Kent Samuel was plaintiff's supervisor. From March 1988 until the end of plaintiff's employment, plaintiff's supervisor was Jim Elledge. During his employment with the defendant, plaintiff was paid on an hourly basis (approximately \$12 per hour) with overtime pay (time and a half) for work in excess of forty hours per week. Plaintiff was solely responsible for completing his bi-monthly time sheets. Time sheets were handwritten and reflected the number of hours worked, and vacation, sick time, holiday and overtime hours. Plaintiff submitted his time sheets to his supervisor for authorization of payment. Plaintiff admits that his supervisor relied upon plaintiff's reported time in authorizing payment. During plaintiff's employment his office was located on a separate floor from the offices of his respective supervisors.

Over the twenty-month period of time here in controversy, plaintiff reported and was paid for 279 hours of overtime. Plaintiff contends that during this same period he worked an additional 638 hours of overtime, which he did not report on his time sheets, but recorded privately on a personal calendar. Plaintiff admits that he did not inform his respective supervisors or any other officials at Pacific Enterprises of this alleged additional overtime until approximately two months after his termination.

Plaintiff claims that he stopped reporting all of his overtime sometime after 1986 for fear of losing his job. Plaintiff contends that sometime in 1986 or 1987 his then supervisor, Mike Bryant, stated to him "Can't you handle it? Can't you handle your job?"

(Plaintiff's deposition p.22). Plaintiff interpreted this comment to mean that he would be fired if he could not complete his work within the forty hour work week. Plaintiff relies on this comment as his basis for justifying his voluntary choice not to report overtime to the defendant.

Plaintiff contends that Pacific Enterprises was not justified in relying on his time sheets by asserting that he would deliberately walk by the office of his supervisor on most occasions that he worked after regular hours. Plaintiff contends that his conduct should have put defendant on notice that his time sheets were not accurate and that defendant should have inquired as to whether he was properly recording his overtime. Plaintiff also contends that on one occasion he told Jim Elledge that he had not recorded all of his hours on the time sheet submitted. In deposition, plaintiff was asked to identify any other conduct of the defendant that he was relying upon:

- Q. What, in your opinion, did Pacific Enterprises Oil Company do that was willful, or demonstrated that they willfully did not pay you overtime?
- A. Well, what else they did willfully, was not to hire a draftsman, knowing that I was overloaded with work. It all stems back to Mike Bryant. And he did not want me to charge overtime.

(plaintiff's deposition, p.48).

Plaintiff admits that he was never denied overtime pay for the time he reported, was never requested to work overtime without being compensated, and was not discharged for failing to work overtime or for reporting overtime. Plaintiff contends that out of fear of losing his job, he only reported overtime when he was working on special projects or preparing for meetings, or during

big work loads, or when working extra hours at the request of his supervisor or another company official.

The Court has carefully considered the record including all exhibits offered by the parties, and has considered the facts of the case in a light most favorable to the plaintiff. Under the facts, as alleged by plaintiff, the Court concludes that defendant is entitled to summary judgment as a matter of law.

The Court finds that plaintiff is estopped from claiming overtime compensation under the FLSA by his voluntary failure to report such alleged overtime accurately on his self-prepared time sheets, and that the defendant was reasonably justified in relying on the time sheets as prepared by plaintiff. There is no indication in the record that defendant had sufficient notice of plaintiff's alleged uncompensated overtime to impose upon the defendant the duty to inquire into the accuracy of plaintiff's reported overtime.

Plaintiff contends that defendant is liable under the FLSA, 29 U.S.C. §203(g) in that the defendant "suffered or permitted" plaintiff to work uncompensated overtime. Plaintiff relies primarily upon Wirtz v. Bledsoe, 365 F.2d 277 (10th Cir. 1966). In Wirtz, the defendant operated a cattle auction yard and employed plaintiff as a foreman to manage the yard. Plaintiff was paid a flat salary of \$350 per month. His duties included physical labor and supervising four other employees in the yard. Plaintiff lived in a house on the yard and worked irregular hours, night and day, seven days a week. No record was kept of his actual time spent in defendant's employment. Defendant denied liability for overtime by

asserting that he had instructed the plaintiff not to work overtime. The Circuit held:

It has long been established that the purpose of the Fair Labor Standards Act cannot be frustrated by an employer's instructions or even a contract not to work overtime. (citation omitted). Although the defendants testified that they had no actual knowledge that any employee was putting in overtime it is not disputed that Linville's [plaintiff's] duties were well known to the defendants and that the overtime hours of the other employees appeared upon their time sheets. Under such circumstances the provisions of the Act are applicable.

365 F.2d at 278.

The instant case is clearly distinguishable from Wirtz. Plaintiff herein was obligated to keep track of own time sheets. He was employed to work a regular forty hour week and was responsible for recording any deviation from the regular work hours. Plaintiff did report 279 hours of overtime which he thought would reasonably be accepted by his supervisor. Aside from plaintiff's allegation that he deliberately walked past his supervisor's office when he worked after regular hours, there is no indication that his supervisor or the company knew or should have known that plaintiff was putting in more than the amount of overtime he actually submitted. In Wirtz, the employer was charged with notice by comparing the work of other employees who reported their time with the plaintiff's work which was not reported on an hourly basis. In the instant case, plaintiff Whitaker worked completely independent of his supervisor and other employees. Accordingly, there was no comparison available to put this defendant on notice of any discrepancies.

Plaintiff also relies on Mumbower v. Callicott, 526 F.2d 1183 (8th Cir. 1975). In Mumbower a switchboard operator agreed to work a fifty-line switchboard by herself for \$80 per week, from 8:00

a.m. until 6:00 p.m., six days a week. She was her own supervisor. No time sheets or employment records were maintained. She testified that she arrived early each day around 7:30 a.m. to receive instructions from her employer for the day's work. During this early period, the employer would specifically request her to perform extra work (e.g., opening mail, posting checks, receiving customers, making appointments). Plaintiff was also instructed by her employer to remain on duty after the switchboard officially closed to transmit daily messages to customers calling in. She complained to her employer that she was unable to take lunch breaks because there was no one available to replace her. Plaintiff testified that she occasionally worked when she was ill and eventually was hospitalized for fatigue. In Mumbower the Court held:

The term "work" is not defined in the FLSA, but it is settled that duties performed by an employee before and after scheduled hours, even if not requested, must be compensated if the employer 'knows or has reason to believe' the employee is continuing to work, 29 C.F.R. §785.11 (1974), and the duties are an 'integral and indispensable part' of the employee's principal work activity.

526 F.2d at 1188

Mumbower is clearly distinguishable from the instant case. The critical differences are that in Mumbower the employer did not keep employment records, the plaintiff had not received any overtime compensation and, not only was the employer aware of the uncompensated overtime but had in fact instructed plaintiff to work overtime and had not compensated plaintiff for the after hours work.

In Pfarr v. Food Lion, Inc., 851 F.2d 106 (4th Cir. 1988) the court held that to state a claim for uncompensated overtime, it is

necessary for plaintiffs to show that their employer had knowledge, either actual or constructive, of their overtime work. 851 F.2d at 109. In Pfarr two plaintiffs offered testimony that their supervisor was aware of three or four instances when they worked "off-the-clock" including instances when their supervisor specifically requested them to work after hours. Although the employees did not keep a record of their alleged overtime, one employee estimated overtime to be 636 hours for a two-year period of time. The other employee estimated 937 hours for a three-year time period. The circuit court held that the record could not support such a large number of off-the-clock hours on such a few incidents of employer knowledge. Id. A necessary part of plaintiff's burden is a showing that the employer allowed uncompensated overtime work to occur either by actual knowledge or through a pattern or practice of the employer acquiescence in such conduct. In Pfarr, the court held that the relevant inquiry is the number of overtime hours an employee worked with the knowledge and consent of the employer. This burden may be met by a "just and reasonable inference". 851 F.2d at 109-110.

In the case at bar, plaintiff is relying upon his own conduct to establish objective knowledge on the part of the defendant. Plaintiff's only basis for asserting that his supervisors had actual knowledge that he allegedly worked overtime is his own testimony that he walked by their offices. However, as pointed out in Pfarr, a few isolated instances of knowledge on the part of a supervisor is insufficient, standing alone. Plaintiff herein did report overtime. The mere allegation that the reported overtime

was inaccurate does not support the argument that his supervisors acquiesced in the plaintiff's willingness to work overtime without compensation or that they permitted the practice.

Plaintiff's own conduct of failing to accurately report his alleged overtime work prevents his recovery under the doctrine of equitable estoppel. See Forrester v. Roth's I.G.A., 475 F. Supp. 630, aff'd, 646 F.2d 407 (9th Cir. 1981). Plaintiff contends that he recorded his actual overtime on his personal calendar and did not report it to his supervisor for fear of losing his job. Plaintiff also contends that the origin of his fear was a comment made by a former supervisor in 1986 or 1987; however, plaintiff asserts no facts which would justify his continued reliance on that comment. There is no allegation that either Kent Samuel or Jim Elledge left plaintiff with the impression that he would lose his job if he reported excessive overtime. Neither is there any allegation that plaintiff was warned not to work uncompensated overtime nor that he was required to work overtime in order to keep his job. As plaintiff has testified, his alleged fear of termination "all stems back to Mike Bryant". However that conversation is too remote in time to be relevant to this case. Both Kent Samuel and Jim Elledge have provided affidavits in which they attest that they had no knowledge that plaintiff was working uncompensated overtime and that they relied upon the time sheets prepared by the plaintiff in authorizing the payment for time actually reported.

The Court finds that the principals espoused in Forrester, supra, are controlling under the facts of this case. In Forrester,

the employee claimed that he worked ten hours of uncompensated overtime for each week he worked over a two-year period of time. The employee was aware that he was working unreported overtime and contemporaneously compiled a separate monthly list of "all the free and unpaid time" that he put in. Forrester, 475 F. Supp. at 631. The employee was paid based upon the information he provided in his time sheets. In Forrester, the employee was aware of his obligation to report overtime, and was also aware that his employer regularly paid for overtime that was reported. The only evidence that his employer was aware of this alleged unpaid overtime was the employee's statement that he visited with his supervisor during the periods when he was putting in the unpaid overtime work. There was no evidence that the employee's supervisor inquired as to the accuracy of the time sheets submitted to him, and the court in Forrester found that the employee intended that his supervisor rely on the time sheets as reported by him. In affirming the trial court's issuance of summary judgment in favor of the employer, the circuit court held:

An employer must have an opportunity to comply with the provisions of the FLSA. This is not to say that an employer may escape responsibility by negligently maintaining records required by the FLSA, or by deliberately turning its back on a situation. However, where the acts of an employee prevent an employer from acquiring knowledge, here of alleged uncompensated overtime hours, the employer cannot be said to have suffered or permitted the employee to work in violation of [the FLSA].

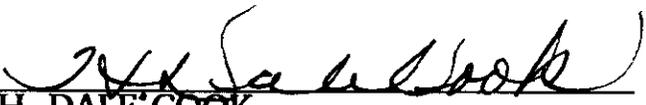
646 F.2d at 414-415.

The Court therefore finds that plaintiff has failed to meet his burden of coming forward to show that defendant suffered or permitted him to work in violation of the FLSA. Additionally plaintiff's claim that he deliberately withheld reporting overtime

work for fear of losing his job is unreasonable under the circumstances of this case. Defendant's reliance on the time sheets prepared by plaintiff was reasonable, and plaintiff has failed to offer any credible evidence to show that this reliance was unjustifiable.

Accordingly, it is the Order of the Court that the motion for summary judgment filed by the defendant is hereby granted.

IT IS SO ORDERED this 16th day of May, 1991.


H. DALE COOK
Chief Judge, U. S. District Court

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

FILED

MAY 16 1991

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

LARRY WHITAKER, }
 }
 Plaintiff, }
 }
 vs. }
 }
 PACIFIC ENTERPRISES OIL }
 COMPANY (USA), }
 }
 Defendant. }

No. 90-C-512-C

J U D G M E N T

This matter came before the Court for consideration of defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for defendant Pacific Enterprises Oil Company (USA), and against plaintiff Larry Whitaker, on plaintiff's complaint filed under the Fair Labor Standards Act, as amended, 29 U.S.C. §201 et seq.

IT IS SO ORDERED this 16th day of May, 1991.


H. DALE COOK
Chief Judge, U. S. District Court

41

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

FILED

MAY 16 1991

FELIX ADAMS,)
)
 Petitioner,)
)
 vs.)
)
 MIKE PARSONS,)
)
 Respondent.)

No. 90-C-525-E Jack C. Silver, Clerk
U.S. DISTRICT COURT

O R D E R

The Court has for consideration the Report and Recommendation of the Magistrate filed January 31, 1991. After careful consideration of the record and the issues, including the briefs and memoranda filed herein by the parties, the Court has concluded that the Report and Recommendation of the Magistrate should be and hereby are adopted by the Court.

IT IS THEREFORE ORDERED that the Report and Recommendation of the Magistrate filed January 31, 1991 are affirmed and adopted by the Court.

ORDERED this 15th day of May, 1991.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

clerk

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

FILED

MAY 16 1991

DA

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

FRANCES NEAL,)
)
 Plaintiff,)
)
 vs.)
)
 MEDICAL CARE ASSOCIATES OF)
 TULSA, INC.)
)
 Defendant.)

Case No. 90-C-272-B ✓

ORDER

This matter comes on for consideration upon the Motion for Summary Judgment filed by Defendant, Medical Care Associates of Tulsa, Inc. (MCAT) on April 25, 1991, with supporting Brief and Exhibits. Plaintiff's Response was due May 10, 1991. Local Rule 15, Northern District of Oklahoma. Failure to comply with Rule 15 constitutes waiver of objection by the party not complying, and such failure to comply will constitute a confession of the matters raised by such pleadings.¹ Accordingly the Court will consider the

¹ Local Rule 15 A. provides, in part: "Memoranda in opposition to such motion . . . shall be filed within fifteen (15) days in a civil case . . .". * * * "Failure to comply with this paragraph will constitute waiver of objection by the party not complying, and such failure to comply will constitute a confession of the matters raised by such pleadings."

Local Rule 15 B. provides, in part:

"B. Summary Judgment Motions. A brief in support of a motion for summary judgment (or partial summary judgment) shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be numbered and shall refer with particularity to those portions of the record upon which movant relies. The brief in opposition to a motion for summary judgment (or partial summary judgment) shall begin with a section which contains a concise statement of material

AK

statement of facts set forth in Defendant's brief as the operative facts herein for the purpose of summary judgment.²

MCAT is in the business of providing health care service to its patients, and employs a number of physicians at its four medical facilities. MCAT also employs nursing personnel, including "triage nurses", "medical assistants" and "float nurses".

Triage nurses are assigned to accept telephone calls from patients, take information from patients, determine the nature of the patients' illness or complaint, schedule appointments, take and deliver messages to other nursing personnel physicians, and sometimes discuss with patients scheduling, medication and treatment. A triage nurse must have the same skills as any other type of MCAT nurse.

Medical assistants are assigned to work directly with MCAT physicians, and perform a variety of functions, including accompanying patients to exam rooms, determining the nature of patients' complaints, taking vital signs, preparing patients for examinations or treatment, assisting in examinations and treatment, following up with patients on treatment, taking phone calls on behalf of MCAT physicians, and making phone calls to patients and

facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.

² It is the conclusion of the Court that Movant's statement of material facts is substantially supported by the record.

other. They also prepare reports, charts and similar documents relative to patient care. In some instances medical assistants also perform functions typically performed by MCAT triage nurses and float nurses when needed and when time permits.

Float nurses often perform duties as medical assistants to MCAT physicians and perform other duties as instructed, including triage duties, as well as cleaning and maintaining facility equipment. Pursuant to MCAT's policies and procedures, the float nurse, triage nurse and medical assistant positions are all at the same level or grade in MCAT's hierarchy, require the same or similar qualifications and skills, have the same pay level, and provide the same benefits and privileges.

Plaintiff, Frances Neal, was born March 24, 1930, became a licensed practical nurse (LPN) in 1973, and in August 1983, at age 53, became employed with MCAT as a triage nurse. In December, 1983, Plaintiff became medical assistant to Dr. Michael McCormick, an MCAT physician, who left MCAT in June, 1984, at which time Plaintiff was transferred to the position of float nurse. Plaintiff did not consider that transfer a demotion.

Plaintiff was then medical assistant to another MCAT physician, Dr. Casey Truett, on a temporary basis, to train another nurse for that position. After completing that assignment, Plaintiff was selected as medical assistant to Dr. Kent Farish which continued from late 1984 until approximately June 1986. At that time, Plaintiff asked to be transferred because she believed her relationship with Dr. Farish was untenable due to personality

conflicts. Plaintiff felt there was no chance to revive the relationship.

In approximately June, 1986, Plaintiff interviewed for and was selected as medical assistant to Dr. Truett. Plaintiff, then age 56, was selected over younger applicants. Dr. Truett became dissatisfied with Plaintiff's performance, complaining about Plaintiff's failure to consistently perform certain functions or follow various procedures he requested, such as consistently recording vital signs, making entries as to medications patients were taking at the time of examination, recording patients' chief complaints, reviewing progress reports, and performing similar functions which were important to Dr. Truett's practice. Dr. Truett also disliked being required to perform nursing-type functions that Plaintiff should have been doing.

After a series of discussions with Plaintiff by various MCAT personnel Plaintiff was offered these options: (1) Continue as Dr. Truett's medical assistant and attempt to work out the problems and re-establish the relationship, or; (2) transfer to a float nurse position, or; (3) resign. After several days off to consider the choices Plaintiff chose, on June 29, 1988, the transfer to float nurse, with no reduction in pay. Float nurse transfers were accorded other employees when leaving the position of medical assistant as an alternative to being terminated.

On July 1, 1988, Plaintiff filed a charge³ of discrimination

³ On August 24, 1989, EEOC issued a determination that MCAT did not unlawfully demote Plaintiff.

with the Oklahoma Human Rights Commission, alleging MCAT had discriminated against her because of her age by demoting her with no reduction in pay from the position of medical assistant to float nurse. Plaintiff also filed an internal grievance pursuant to MCAT's policies and procedures.

The grievance process was completed after a final appeal by Plaintiff to Dr. Rebsamen, MCAT's President, by Rebsamen's conclusion that Plaintiff had been treated fairly and was not entitled to sick leave for the time off she incurred (the only relief sought by Plaintiff in the grievance).

After receiving Dr. Rebsamen's letter, Plaintiff filed a second OHRC charge⁴ of discrimination, alleging she was a victim of retaliation as evidenced by Dr. Rebsamen's letter of August 18, 1988, informing Plaintiff of the grievance decision. No disciplinary action was taken against Plaintiff, and she sustained no loss of position, salary or benefits as a result of or after receipt of Rebsamen's letter.

Certain positions opened at MCAT's Sand Springs Medical Facility in late 1988 and early 1989, and Plaintiff expressed interest because she lived in Sand Springs. Plaintiff declined to apply for or consider one position, that of triage nurse, because she did not like performing triage duties. A medical assistant position became available and Plaintiff contacted MCAT employee Rosa Blackburn who advised Plaintiff she did not "think it will

⁴ On August 7, 1989, EEOC issued a determination that MCAT did not unlawfully retaliate against Plaintiff.

work. There are too many hard feelings." Notwithstanding, Plaintiff applied for the position. On March 2, 1989, Plaintiff asked that her application be withdrawn from consideration and tendered her resignation to MCAT. Plaintiff resigned because she saw a newspaper advertisement regarding the Sand Springs medical assistant position and "immediately assumed that they were not going to hire me after what she had said and it being published in the Tulsa World. So, that is when I decided to quit."

MCAT routinely advertises positions in newspapers whether or not MCAT employees have applied for such positions, in order to obtain the best qualified candidates.

Plaintiff did not file a charge of discrimination with OHRC after her resignation urging constructive discharge. In her Complaint Plaintiff alleges she was forced to resign her position because of the conditions under which she was being forced to work, amounting to a constructive discharge.

Plaintiff has previously resigned from nursing positions because she did not enjoy the work, the working conditions, or the hours which she was required to work.⁵

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548,

⁵ Plaintiff has testified she resigned from Springer Clinic because she disliked performing paperwork, and resigned her employment at Hissom Memorial Center because she believed it to be too depressing.

91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

To establish a *prima facie* case, based on her alleged demotion, Plaintiff must show: (1) that she is in the protected age group; (2) that she was demoted; (3) that at the time of the demotion she was performing her job to her employer's legitimate expectations; and (4) that following her demotion she was replaced by someone outside the protected class. Woodfield v. Heckler, 591 F.Supp. 1390 (E.D.Pa.1984); E.E.O.C. v. Western Electric, Inc., 713 F.2d 1011 (4th Cir. 1983).

Plaintiff unquestionably satisfies the first requirement. On requirement (2) Defendant has established that a transfer from medical assistant to float nurse is, within MCAT structuring, a

lateral or horizontal transfer with no reduction of pay or status. According to the undisputed evidence of Defendant float nurses are not last among equals; they are equal among equals. Plaintiff also fails as to requirement (3). It is undisputed that Dr. Truett was dissatisfied with Plaintiff's job performance for legitimate reasons. While requirement (4) is established,⁶ MCAT more than satisfies its burden to articulate a legitimate non-discriminatory reason for the action taken as will be shown, *infra*.

If a Plaintiff establishes a *prima facie* case, the burden of production shifts to the defendant to articulate a legitimate non-discriminatory reason for the action taken. Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). If a defendant meets that burden, a Plaintiff must then prove the reason articulated is a pretext for discrimination. McDonnell Douglas Corp. v. Green, *supra*. If a Plaintiff fails to present specific facts by which reasonable jurors could conclude he or she is entitled to a verdict, summary judgment in favor of a defendant is appropriate. Branson v. Price River Coal Corp., 853 F.2d 768 (10th Cir.1988).

As noted above, Plaintiff has failed to establish a *prima facie* case on requirements (2) and (3). As to requirement (4), Defendant has established Plaintiff was replaced by a 32 year old female who had previously been that physician's medical assistant. Further

⁶ Plaintiff was replaced by a 32 year old employee.

Plaintiff "was planning to leave the physician because she had submitted a transfer to another of Respondent's facility in another town." EEOC's determination, dated August 24, 1989, Defendant's Exhibit 21 to Motion for Summary Judgment. Further, the EEOC determination significantly noted: "Moreover, the record demonstrates the Respondent had laterally transferred two nurses not in the protected age group." *Ibid.*

The Court concludes Plaintiff cannot establish the required *prima facie* case on the issue of her alleged demotion. Accordingly Defendant's Motion for Summary Judgment on this issue should be and the same is hereby GRANTED.

The Court also concludes Plaintiff's charge of retaliation is equally lacking. The alleged retaliation consists of Dr. Rebsamen's letter of August 18, 1988, which the Court does not read to be either threatening or intimidating. The letter did not constitute or take any disciplinary action against Plaintiff, nor was there any adverse action taken against Plaintiff in connection with her receipt of the letter as in the nature of a suspension, demotion, or loss of pay. The Court reads Dr. Rebsamen's letter as constituting MCAT's final response to Plaintiff's grievance.

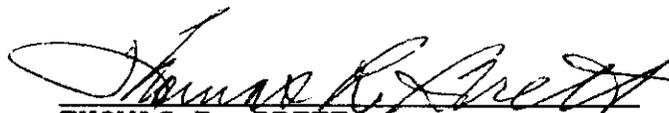
The Court concludes Defendant's Motion for Summary Judgment on the issue of retaliation should be and the same is hereby GRANTED.

The Court further concludes Plaintiff's issue of constructive

discharge⁷ is subsumed by the Court's ruling as to the alleged demotion and is therefore included within the summary judgment grant to Defendant on such issue.

It is within the discretion of the Court to consider *vel non* Plaintiff's remaining pendent state claim.⁸ The Court declines to exercise jurisdiction over Plaintiff's alleged pendent state claim and the same is DISMISSED, without prejudice.

IT IS SO ORDERED this 16th day of May, 1991.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

⁷ Plaintiff filed no EEOC charge as to the alleged constructive discharge. Arguably, Plaintiff failed to preserve for litigation the constructive discharge issue. Carrillo v. Illinois Bell Telephone Co., 538 F.Supp. 793 (N.D. Ill. 1982); Vinson v. Ford Motor Co., 806 F.2d 686 (6th Cir. 1986), *cert. denied*, 482 U.S. 906, 107 S.Ct. 2482, 96 L.Ed.2d 375 (1987).

⁸ In the Court's opinion Plaintiff has the laboring oar to establish a valid claim under Burk v. K-Mart, 770 P.2d 24 (Okla. 1989).

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

FILED

MAY 15 1991

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

MELVIN CHAD MAHORNEY,)
)
Petitioner,)
)
vs.)
)
TED WALLMAN,)
)
Respondent.)

No. 86-C-642-E

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by Attorney General Robert H. Henry that pursuant to the Mandate of the Tenth Circuit the state commenced proceedings to retry Petitioner, whereupon Petitioner entered his plea of guilty to the charge of rape in the District Court of Tulsa County. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that further litigation is necessary.

ORDERED this 13th day of May, 1991.



JAMES C. ELLISON
UNITED STATES DISTRICT JUDGE

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

MAY 15 1991

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

ATLANTIC RICHFIELD COMPANY,)
)
Plaintiff,)
)
v.)
)
AMERICAN AIRLINES, INC., ET. AL.,)
)
Defendants.)

ATLANTIC RICHFIELD COMPANY,)
)
Plaintiff,)
)
v.)
)
SOLVENTS RECOVERY CORP., ET. AL.,)
)
Defendants.)

89-C-868-C
89-C-869-C
90-C-859-C
(Cases Consolidated)

ATLANTIC RICHFIELD COMPANY,)
)
Plaintiff,)
)
v.)
)
UNIT RIG & EQUIPMENT CO., ET. AL.,)
)
Defendants.)

NOTICE OF DISMISSAL, AND VOLUNTARY DISMISSAL WITH PREJUDICE UNDER
RULE 41(a)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Pursuant to Federal Rule of Civil Procedure 41(a)(1), all
claims which the Plaintiff Atlantic Richfield Company has filed

in this action against the following named Defendants are hereby dismissed with prejudice:

Sooner Transport Corporation

Dated _____, 1991

Gary A. Eaton, OBA #2598
Attorney for Plaintiff
1717 East 15th St.
Tulsa, OK 74104
918 743 8717

CERTIFICATE OF MAILING

The undersigned certifies that on May 15, 1991, a true and correct copy of the above instrument / pleading was mailed with postage prepaid to the following persons:

Mr. William Anderson, Attorney at Law and Liaison Counsel and Co-Lead Counsel for Owners and Non-Operator Lessees Group, 320 South Boston Building, Suite 500, Tulsa, OK 74103

Mr. C. S. Lewis, III, Attorney at Law and Co-Lead Counsel for Owners and Non-Operator Lessees Group, P. O. Box 1046, Tulsa, OK 74101

Mr. John Tucker, Lead Counsel for Non Group Generators and Transporters, 2800 Fourth National Bank Building, Tulsa, OK 74119

Mr. Steven Harris, Attorney at Law and Lead Counsel for Operators Group, Suite 260 Southern Hills Tower, 2431 East 61st Street, Tulsa, OK 74136

Mr. Charles Shipley, Attorney at Law and Settlement Coordinator, 3401 First National Tower, Tulsa, OK 74103

Ms. Claire V. Eagan, Attorney at Law and Lead Counsel for
the Sand Springs PRP Group, 4100 Bank of Oklahoma Tower,
One Williams Center, Tulsa, OK 74172

Mr. Larry Gutteridge, co-counsel for the Plaintiff, c/o
Sidley & Austin, Attorneys at Law, 633 West 5th Street,
Suite 3500, Los Angeles, California 90071

Name

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

FILED

MAY 14 1991

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

GLEN HURT and SUE HURT,
Plaintiffs,

vs.

ADAMS TRUSS, INC.,
an Arkansas corporation,

Defendant.

No. 90-C-381-B

DISMISSAL WITH PREJUDICE BY STIPULATION

COME NOW the Plaintiffs, Glen and Sue Hurt, by and through their attorney, Mark S. Thetford, and Defendant, Adams Truss, Inc., by and through its attorney, Richard Carpenter, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, and stipulate to dismiss the above-captioned case with prejudice.

Respectfully submitted,

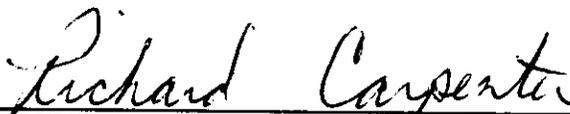
By



MARK S. THETFORD, OBA 12893
Attorney for Plaintiffs

STIPE, GOSSETT, STIPE, HARPER,
ESTES, McCUNE & PARKS
P.O. Box 701110
Tulsa, Oklahoma 74170
(918) 745-6084

By



RICHARD CARPENTER, OBA 1504
Attorney for Defendant

SANDERS & CARPENTER
624 South Denver, Suite 202
Tulsa, Oklahoma 74119
(918) 582-5181

FILED

MAY 14 1991

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

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

JEROME MAREK,

Plaintiff,

vs.

K-MART CORPORATION,

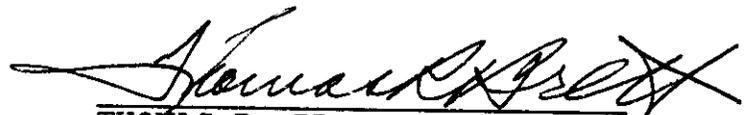
Defendant.

No. 87-C-790-B

ORDER

NOW on this 14th day of May, 1991, there comes on for consideration Defendant's Motion to Tax Attorney Fees and, being fully advised in the premises and for good cause shown, the Court finds that the parties are in agreement that said attorney fees should be taxed in the amount of \$1,652.50, and the Court so orders that said amount should be taxed as attorney fees to be paid by Plaintiff to Defendant in this matter.

IT IS SO ORDERED.


THOMAS R. BRETT,
United States District Judge

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

FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff,

v.

No. 90 C-910-B

DON ADAMS AND SHIRLEY A. ADAMS, a/k/a SHIRLEY ANN ADAMS; WAGONER COUNTY TREASURER; THE BOARD OF COUNTY COMMISSIONERS OF WAGONER COUNTY, OKLAHOMA; TRANSAMERICA COMMERCIAL FINANCE CORPORATION; ROGERS COUNTY TREASURER; THE BOARD OF COUNTY COMMISSIONERS OF ROGERS COUNTY, OKLAHOMA; KAMPGROUNDS OF AMERICA, INC.; and STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION,

Defendants.

FILED

MAY 13 1991

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

JOURNAL ENTRY OF JUDGMENT

NOW on this 13th day of May, 1991, the above captioned case comes on before me the undersigned Judge upon stipulation and agreement of the parties appearing herein for entry of final Journal Entry of Judgment as follows:

<u>AGAINST</u>	<u>IN FAVOR OF</u>	<u>JUDGMENT AMOUNT¹</u>	<u>NATURE</u>
Don Adams and Shirley A. Adams	FDIC in its corporate capacity as holder of assets of the failed Bank of Commerce & Trust Co., Tulsa, OK	\$205,897.00, plus interest, costs, and attorney fees	<u>In rem</u> foreclosure judgment

¹Interest on amounts hereinafter specifically set forth.

Plaintiff, Federal Deposit Insurance Corporation in its corporate capacity as holder of assets of the failed Bank of Commerce & Trust Company, Tulsa, Oklahoma ("FDIC"), appearing by and through its attorney of record, R. Pope Van Cleef, Jr.; Defendants, Rogers County Treasurer and The Board of County Commissioners of Rogers County, appearing by and through their attorney of record, Bill Shaw; Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appearing by and through its attorney of record, Lisa Haws; and Defendants, Don Adams, Shirley A. Adams a/k/a Shirley Ann Adams, Wagoner County Treasurer, The Board of County Commissioners of Wagoner County, Transamerica Commercial Finance Corporation, and Kampgrounds of America, Inc., appearing not.

The Court being thereupon fully advised of the premises and after examining the stipulations of the parties and hearing representations of counsel, trial by jury having been waived and no necessity existing for additional pretrial conferences, and having examined the Court files, Complaint and the original Note and Mortgages and other instruments offered by Plaintiff, specifically finds as follows:

1. FDIC is a corporation organized and existing under the authority of the Federal Deposit Insurance Corporation Act, as amended, 12 U.S.C. § 1811 et seq.

2. On the 8th day of May, 1986, the Bank Commissioner of the State of Oklahoma declared Bank of Commerce & Trust Company, Tulsa, Oklahoma ("Bank"), insolvent, and pursuant to Title 6 O.S. § 1202, took possession of the assets of the failed Bank. Pursuant to Title 6 O.S. § 1205, the Bank Commissioner of

the State of Oklahoma appointed FDIC as liquidator of the State Bank.

3. Pursuant to 12 U.S.C. § 1823, FDIC in its corporate capacity purchased and now holds certain assets of the Bank, including the Promissory Note and Mortgages executed by the Defendants and sued upon herein.

4. This Court has jurisdiction over the parties and subject matter pursuant to 12 U.S.C. § 1819 and 28 U.S.C. § 1345. Property which is the subject of this action is located in the Northern District of Oklahoma.

5. Shirley A. Adams is one and the same person as Shirley Ann Adams, defendant herein.

6. Regular service of Summons with a copy of Plaintiff's Complaint attached has been made upon the Defendants, Rogers County Treasurer, The Board of County Commissioners of Rogers County, and State of Oklahoma ex rel. Oklahoma Tax Commission, Wagoner County Treasurer and The Board of County Commissioners of Wagoner County, and each of them as provided by law, and said Summons and said service thereof is legal and regular in all respects. Further, with the exception of Wagoner County Treasurer and The Board of County Commissioners of Wagoner County, all of said parties heretofore have filed their Entries of Appearance, Answers and/or Counter Claims to Plaintiff's Complaint on file herein.

7. Regular service of Summons with a copy of Plaintiff's Complaint attached has been made upon the Defendant, Transamerica Commercial Finance Corporation, as provided by law,

and said Summons and said service thereof is legal and regular in all respects. Said Defendant has failed to answer or otherwise plead or appear herein and is in default and because of such default can claim no right, title or interest in or to the property which is the subject of this action.

8. Defendants, Don Adams, Shirley Adams and Kampgrounds of America, Inc., were duly and regularly served with Summons and process by and through Notice of Service by Publication, published in The Tusla Daily Commerce & Legal News on January 14, 21, 28, February 4, 11, and 18, 1991, pursuant to Order of the Court entered December 12, 1990. Said Defendants have failed to answer or otherwise plead and are in default and can claim no interest in or to the property which is the subject of this action.

9. The Court has conducted a judicial inquiry into the sufficiency of FDIC's search to determine the whereabouts of the Defendants, Don Adams, Shirley Adams and Kampgrounds of America, Inc., who were served herein by publication, and based upon the evidence adduced the Court finds that FDIC has exercised due diligence and has conducted a meaningful search of all reasonably available sources at hand. The Court approves the publication service given herein as meeting both statutory requirements and the minimum standards of state and federal due process.

10. On or about the 8th day of February, 1986, Defendants, Don Adams and Shirley A. Adams, for good and valuable consideration, made, executed and delivered, payable to the order of the Bank their certain Promissory Note No. 74772 (which is a

renewal of a previous obligation of the Debtors to the Bank) in the principal amount of \$250,000.00 with interest thereon at the rate of 12 1/4% per annum floating at 1 1/2% above the Bank's prime floating rate with final maturity thereon August 7, 1986. The Note provides for the recovery of reasonable costs of collection and attorney's fees of a minimum of 15% of all sums due on default.

11. The Defendants, Don Adams and Shirley Adams, are in default under the terms of the Note by failing to make the payments when due.

12. There is now due and owing from Don Adams and Shirley Adams on the Note described in Paragraph 10 above the principal sum of \$205,897.00. Interest has accrued on the outstanding principal obligation through the 16th day of October, 1990, in the amount of \$157,257.44, and interest is accruing at the per diem rate of \$101.54, until paid.

13. As part and parcel of the foregoing and for the purpose of securing the Note referred to in paragraph 10 above (and the previous obligations of the Debtors to the Bank), the Defendants, Don Adams and Shirley A. Adams, made, executed and delivered to the Bank a certain Mortgage of Real Estate dated November 8, 1984, covering the following described real property situated in Wagoner County, Oklahoma, to-wit:

Tract One

Lots Two (2) thru Twelve (12), inclusive, Block One (1) and Lots One (1), Two (2), Three (3), Four (4), Five (5), Seven (7) and Eight (8), Block Two (2) in McClintock Acres and Estates, an Addition to

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Wagoner County, Oklahoma, according to the recorded plat thereof.

Mortgage tax was paid on the referenced mortgage as receipted by endorsement on the face of the mortgage which mortgage was recorded November 15, 1984, in Book 662 at Page 58 in the Office of the County Clerk of Wagoner County, Oklahoma.

14. The mortgage provides that in the event of a default, the Bank is entitled to foreclose same, with or without appraisalment, the election of which may be exercised by the holder thereof, to have said premises sold and proceeds applied to the outstanding principal balance and accrued interest then due and owing, together with all legal and necessary expenses and costs. FDIC hereby elects to have said property sold with appraisalment.

15. Said amounts described in Paragraph 12 above are secured by said Mortgage and constitutes a first lien upon the real estate and premises hereinabove described as Tract One, and any right, title or interest which the other Defendants herein, or any of them, have or claim to have in or to said real estate and premises is subsequent, junior and inferior to the mortgage and lien of FDIC save and except any interest claimed in the property by the Wagoner County Treasurer for unpaid ad valorem taxes.

16. The Wagoner County Treasurer and The Board of County Commissioners of Wagoner County have failed to answer or otherwise plead herein and are in default. However, the Wagoner County Treasurer has a valid lien against the property hereinabove described for unpaid ad valorem taxes, if any,

together with interest thereon as provided by law. The lien of the Wagoner County Treasurer as and for unpaid ad valorem taxes, if any, is a lien against the property hereinabove described. Although not identified herein as a "first" lien, the lien of the Wagoner County Treasurer for unpaid ad valorem taxes, if any, is superior to the interests of all parties hereto. The lien of the Wagoner County Treasurer for unpaid personal property taxes, if any, is subordinate and inferior to the first mortgage and lien of FDIC.

17. As part and parcel of the foregoing and for the purpose of securing the Note referred to in Paragraph 10 above (and the previous obligations of the Debtors to the Bank), the Defendants, Don Adams and Shirley A. Adams, made, executed and delivered to the Bank a certain Mortgage of Real Estate dated November 8, 1984, covering the following described real property situated in Rogers County, Oklahoma, to-wit:

Tract Two

A tract of land in Lot Four (4) and the Southeast Quarter (SE/4) of the Southwest Quarter (SW/4) of Section Thirty-one (31), Township Twenty (20) North, Range Fifteen (15) East of the I.B. & M., Rogers County, Oklahoma, according to the U.S. Government Survey thereof, described as: Beginning at a point 1072.77 feet North and 111.24 feet East of the Southwest corner of Lot 4, thence North 89°56' East 1129.76 feet, more or less, to a point that is 50 feet North of the Northeast corner of a tract conveyed to John I. Armstrong and wife, recorded in Book 454, Page 946 of the records of the County Clerk of Rogers County, Oklahoma; thence North 247.23 feet, more or less, to the

North line of the SE/4 of the SW/4; thence West on the North line of the SE/4 of the SW/4 and Lot 4 to the East line of a tract conveyed by Warranty Deed to Rogers County, Oklahoma, recorded in Book 194, Page 206 of the records of the County Clerk of Rogers County, Oklahoma; thence Southwesterly along the Easterly line of said tract to the East line of a tract conveyed by Warranty Deed to Rogers County, Oklahoma, recorded in Book 428, Page 395 of the records of the County Clerk of Rogers County, Oklahoma; thence South along said East line to the point of beginning, less and except the West 712.88 feet thereof as measured along the North line thereof.

Mortgage tax was paid on the referenced mortgage as receipted by endorsement on the face of the mortgage which mortgage was recorded November 15, 1984, in Book 690 at Page 800 in the Office of the County Clerk of Rogers County, Oklahoma.

18. The Mortgage provides that in the event of a default, the Bank is entitled to foreclose same, with or without appraisalment, the election of which may be exercised by the holder thereof, to have said premises sold and proceeds applied to the outstanding principal balance and accrued interest then due and owing, together with all legal and necessary expenses and costs. FDIC hereby elects to have said property sold with appraisalment.

19. Said amounts described in Paragraph 12 above are secured by said Mortgage and constitutes a first lien upon the real estate and premises hereinabove described as Tract Two subject only to the interest of the Rogers County Treasurer for unpaid ad valorem taxes, if any; further, any right, title or

interest which the other Defendants herein, or any of them, have or claim to have in or to said real estate and premises is subsequent, junior and inferior to the mortgage and lien of FDIC.

20. The Defendants, Rogers County Treasurer and The Board of County Commissioners of Rogers County, Oklahoma, have a valid lien against the property hereinabove described as Tract Two for unpaid ad valorem, if any. The lien of the Rogers County Treasurer and Board of County Commissioners of Rogers County as and for any unpaid ad valorem taxes is a valid lien against the property hereinabove described and is superior to the interests of all parties hereto. The Rogers County Treasurer and Board of County Commissioners of Rogers County have claimed no lien for unpaid personal property taxes.

21. The Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has a valid lien against the property hereinabove described as Tract Two by virtue of a tax lien recorded in Book 89 at Page 358 in the Office of the County Clerk of Rogers County, Oklahoma. The lien of State of Oklahoma ex rel. Oklahoma Tax Commission is subordinate and inferior to the mortgage and lien of FDIC and the claim of the Rogers County Treasurer for unpaid ad valorem taxes.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, Federal Deposit Insurance Corporation in its corporate capacity as holder of assets of the failed Bank of Commerce & Trust Company, Tulsa, Oklahoma, have and recover judgment in rem against Defendants, Don Adams and Shirley Adams, in the principal sum of \$205,897.00 plus accrued interest through

October 16, 1990, in the amount of \$157,257.44 plus interest accruing thereafter at the per diem rate of \$101.54, until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that said above described amounts are secured by said Mortgages and constitute first, prior and superior liens upon the real estate and premises located in Wagoner and Roger Counties, State of Oklahoma, and described as follows:

Tract One

Lots Two (2) thru Twelve (12), inclusive, Block One (1) and Lots One (1), Two (2), Three (3), Four (4), Five (5), Seven (7) and Eight (8), Block Two (2) in McClintock Acres and Estates, an Addition to Wagoner County, Oklahoma, according to the recorded plat thereof.

Tract Two

A tract of land in Lot Four (4) and the Southeast Quarter (SE/4) of the Southwest Quarter (SW/4) of Section Thirty-one (31), Township Twenty (20) North, Range Fifteen (15) East of the I.B. & M., Rogers County, Oklahoma, according to the U.S. Government Survey thereof, described as: Beginning at a point 1072.77 feet North and 111.24 feet East of the Southwest corner of Lot 4, thence North 89°56' East 1129.76 feet, more or less, to a point that is 50 feet North of the Northeast corner of a tract conveyed to John I. Armstrong and wife, recorded in Book 454, Page 946 of the records of the County Clerk of Rogers County, Oklahoma; thence North 247.23 feet, more or less, to the North line of the SE/4 of the SW/4; thence West on the North line of the SE/4 of the SW/4 and Lot 4 to the East line of a tract conveyed by Warranty Deed to Rogers County, Oklahoma, recorded in Book 194,

Page 206 of the records of the County Clerk of Rogers County, Oklahoma; thence Southwesterly along the Easterly line of said tract to the East line of a tract conveyed by Warranty Deed to Rogers County, Oklahoma, recorded in Book 428, Page 395 of the records of the County Clerk of Rogers County, Oklahoma; thence South along said East line to the point of beginning, less and except the West 712.88 feet thereof as measured along the North line thereof,

and that any and all right, title and interest which any other persons have or claim to have, in or to said real estate and premises is subsequent, junior and inferior to the mortgages and liens of FDIC, except as to the Rogers County Treasurer and Wagoner County Treasurer for any unpaid ad valorem taxes, if any.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Defendants, Wagoner County Treasurer and The Board of County Commissioners of Wagoner County, have a valid lien against the property hereinabove described as Tract One as and for unpaid ad valorem taxes, if any. The lien of said Defendants as and for unpaid ad valorem taxes, if any, is a valid lien against the property hereinabove described as Tract One and is superior to the interest of all parties hereto. Any lien for unpaid personal property taxes is subordinate and inferior to the Mortgage and lien of FDIC.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Defendants, Rogers County Treasurer and The Board of County Commissioners of Rogers County, have a valid lien against the property hereinabove described as Tract Two as and for unpaid ad valorem taxes, if any. The lien of said Defendants

as and for unpaid ad valorem taxes, if any, is a valid lien against the property hereinabove described as Tract Two and is superior to the interest of all parties hereto.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has a valid lien against the property hereinabove described as Tract Two by virtue of a tax lien recorded in Book 89 at Page 358 in the Office of the County Clerk of Rogers County, Oklahoma. The lien of State of Oklahoma ex rel. Oklahoma Tax Commission is subordinate and inferior to the mortgage and lien of FDIC and the lien of the Rogers County Treasurer for unpaid ad valorem taxes.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the mortgages and liens of Federal Deposit Insurance Corporation in its corporate capacity as holder of assets of the failed Bank of Commerce & Trust Company, Tulsa, Oklahoma, in the amounts hereinabove found and adjudged should be foreclosed and Special Execution and Order of Sale issue out of the Office of the U.S. District Court Clerk in this cause or such other office as may be provided by law, directed to the U.S. Marshal or such other duly authorized officer as may be authorized by law to separately levy upon, advertise and sell, after due and legal appraisement, the real estate and premises hereinabove described, subject to unpaid ad valorem taxes, advancements by FDIC for taxes, insurance premiums, or expenses necessary for the preservation of the subject property, if any, and pay the proceeds of said sale to the Clerk of this Court, as provided by law, for application as follows:

TRACT ONE

- FIRST: To the payment of the costs herein accrued and accruing.
- SECOND: To the payment of the Wagoner County Treasurer for unpaid ad valorem taxes, if any.
- THIRD: To the payment of the judgment and lien of the Defendant, Federal Deposit Insurance Corporation in its corporate capacity as holder of assets of the failed Bank of Commerce & Trust Company, Tulsa, Oklahoma, together with interest and attorney's fees.
- FOURTH: To the payment of the lien of the Wagoner County Treasurer for unpaid personal property taxes, if any.
- FIFTH: The balance to be paid into the Court pending further order of the Court.

TRACT TWO

- FIRST: To the payment of the costs herein accrued and accruing.
- SECOND: To the payment of the Rogers County Treasurer for unpaid ad valorem taxes, if any.
- THIRD: To the payment of the judgment and lien of the Defendant, Federal Deposit Insurance Corporation in its corporate capacity as holder of assets of the failed Bank of Commerce & Trust Company, Tulsa, Oklahoma, together with interest and attorney's fees.
- FOURTH: To the payment of State of Oklahoma ex rel. Oklahoma Tax Commission for for tax lien recorded in Book 89 at Page 358 in the Office of the County Clerk of Rogers County, Oklahoma.
- FIFTH: The balance to be paid into the Court pending further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that upon confirmation of the said sale, the Defendants herein, and each of them, and all persons claiming by, through or under them since the commencement of this action, be forever

barred, foreclosed and enjoined from asserting or claiming any right, title, interest, estate or equity of a redemption in or to said real estate and premises or any part thereof.

For all of which let execution issue.

3/ THOMAS R. BRETT

UNITED STATES DISTRICT COURT JUDGE

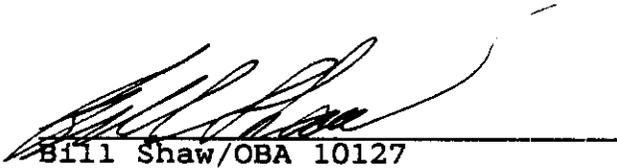
SEPARATE SIGNATURE PAGES ATTACHED HERETO

APPROVED:

~~R. Pope Van Sleaf, Jr./OBA 9176~~
Attorney for Federal Deposit
Insurance Corporation

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APPROVED:



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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 GREG D. MILLER a/k/a GREGORY D.)
 MILLER; COUNTY TREASURER, Tulsa)
 County, Oklahoma; and BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
 Defendants.)

MAY 13 1991

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

CIVIL ACTION NO. 91-C-0085-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 13 day
of May, 1991. The Plaintiff appears by Tony M.
Graham, United States Attorney for the Northern District of
Oklahoma, through Kathleen Bliss Adams, Assistant United States
Attorney; the Defendants, County Treasurer, Tulsa County,
Oklahoma, and Board of County Commissioners, Tulsa County,
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; and the Defendant, Greg D.
Miller a/k/a Gregory D. Miller, appears not, but makes default.

The Court being fully advised and having examined the
court file finds that the Defendant, Greg D. Miller a/k/a
Gregory D. Miller, acknowledged receipt of Summons and Complaint
on March 5, 1991; that Defendant, County Treasurer, Tulsa County,
Oklahoma, acknowledged receipt of Summons and Complaint on
February 20, 1991; and that Defendant, Board of County
Commissioners, Tulsa County, Oklahoma, acknowledged receipt of
Summons and Complaint on February 13, 1991.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on March 4, 1991; that the Defendant, Greg D. Miller a/k/a Gregory D. Miller, has failed to answer and his default has therefore been entered by the Clerk of this Court.

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

Lot Thirty-five (35), Block Four (4), VALLEY GLEN THIRD ADDITION, to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on March 19, 1990, the Defendant, Greg D. Miller a/k/a Gregory D. Miller, executed and delivered to the United States of America, acting on behalf of the Secretary of Veterans Affairs, his mortgage note in the amount of \$65,000.00, payable in monthly installments, with interest thereon at the rate of seven and one-half percent (7.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Greg D. Miller a/k/a Gregory D. Miller, executed and delivered to the United States of America, acting on behalf of the Secretary of Veterans Affairs, a mortgage dated March 19, 1990, covering the above-described property. Said mortgage was recorded on

March 20, 1990, in Book 5242, Page 195, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Greg D. Miller a/k/a Gregory D. Miller, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Greg D. Miller a/k/a Gregory D. Miller, is indebted to the Plaintiff in the principal sum of \$65,000.00, plus interest at the rate of 7.5 percent per annum from May 1, 1990 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$96.00, plus penalties and interest, for the year 1990. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against Defendant, Greg D. Miller a/k/a Gregory D. Miller, in the principal sum of \$65,000.00, plus interest at the rate of 7.5 percent per annum from May 1, 1990 until judgment, plus interest thereafter at the current legal rate of 6.07 percent per annum until paid, plus

the costs 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 Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$96.00, plus penalties and interest, for ad valorem taxes for the year 1990, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, has no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Greg D. Miller a/k/a Gregory D. Miller, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$96.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein
in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the
Clerk of the Court to await further Order of the Court.

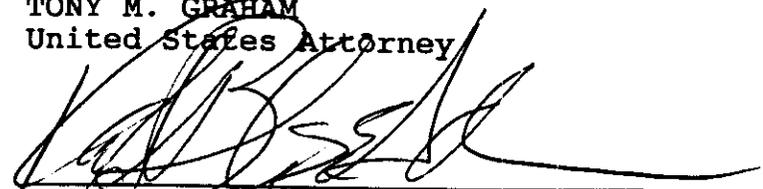
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from
and after the sale of the above-described real property, under
and by virtue of this judgment and decree, all of the Defendants
and all persons claiming under them since the filing of the
Complaint, be and they are forever barred and foreclosed of any
right, title, interest or claim in or to the subject real
property or any part thereof.

S/ THOMAS R. BRETT

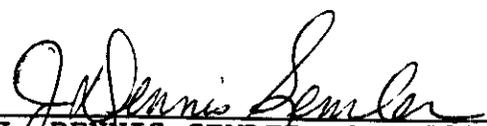
UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney



KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 91-C-0085-B

KBA/css

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

MAY 13 1991

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

JAMES F. QUINLAN,)
)
 Plaintiff,)
)
 vs.)
)
 KOCH OIL COMPANY, a)
 division of KOCH)
 INDUSTRIES, INC.,)
)
 Defendant.)

Case No. 90-C-295-B ✓

ORDER

This matter comes on for consideration upon the Plaintiff James F. Quinlan's Motion for Partial Summary Judgment pursuant to Rule 56, F.R.Civ.P..

The undisputed facts appear as follows: Plaintiff is the mineral owner¹ of an oil lease located in Creek County, Oklahoma, from which Defendant, Koch Oil Company (Koch) and Defendant's

¹ Defendant Koch Oil Company suggests Plaintiff may not be the owner of the entire mineral interest because of a contract entered into, in 1989, between Plaintiff and International Searchers, Inc. (ISI), the gist of which was that ISI was to receive 50% of any funds which it discovered were due and owing to Plaintiff. Exhibits in the record reflect that an Agency Agreement was entered into by and between Farmers Royalty Pool (through Frank R. Fox, President) and International Searchers, Inc. (through Mark Snead, President) where the Principal (Farmers Royalty Pool) "does hereby grant and convey unto the Agent (ISI), its heirs, successors and assigns Fifty (50%) percent of the Principals right, title and interest, in and to all of the above mentioned funds and the corpus from which said funds have originated, . . .". The Court concludes the record is devoid of any evidence of Plaintiff's suggested conveyance or assignment of title to ISI.

70

c/m

predecessor² purchased oil prior to and after Plaintiff's acquisition of his mineral interest. Plaintiff acquired his mineral interest in the lease by conveyance from his father, Felix Quinlan, dated May 6, 1965. Between the dates of November 17, 1976 and December 31, 1989, certain monies due Plaintiff in the amount of \$166,608.58³ were suspended by Koch because of Plaintiff's alleged failure to provide Koch with a signed Division Order documenting Plaintiff's ownership and proportionate interest in the lease property.

Prior to the institution of this suit, on January 1, 1990, Defendant paid Plaintiff the sum of \$166,608.58 and has tendered checks for interest of \$25,227.52 and \$52,826.95 on 1/20/90 and 4/1/90, respectively,⁴ alleged by Koch to be 6% simple interest on

² Rock Island

³ Koch alleges these monies related to other leases also. The Court's examination of exhibits in the record reveals that only the sums of \$125.98, \$115.86 and \$35.45, representing payments for the months of March, May and October, 1987, for Lease # 71397, should be separated from the total suspended funds (\$166,608.56). The lease in issue herein is Lease #25734. Because of the mathematical implications of calculating interest on the above amounts and the *de minimis* results thereof, the Court will consider for the purposes of this Order that all suspended funds emanated from Lease #25734.

⁴ It is unclear whether Plaintiff has accepted the interest checks or refused same. In his Amended Complaint Plaintiff alleges he has refused the smaller interest check (\$25, 227.52) but in his Brief In Support Of Motion For Partial Summary Judgment Plaintiff refers to the two interest checks (\$25,227.52 and \$52,826.95), as if same had been paid by Koch and accepted by Plaintiff, in his calculations of amounts allegedly still due and owing. For the purpose of this Order the Court will consider the above interest amounts as if paid.

the amount suspended as required by 52 O.S. §540 A. ⁵

Plaintiff contends he is entitled to interest on the sum paid by Defendant at the annual rate of 12%, compounded annually, pursuant to 52 O.S. §540 D, by reason of Koch's violation of that statute in wrongfully suspending the funds in question. Plaintiff contends he is due interest from the effective date of the statute, July 1, 1980.

Defendant, in counter position, contends Plaintiff is only entitled to 6% simple interest under the statute on the basis of Plaintiff's title to the mineral interest being allegedly unmarketable.

52 O.S. §540 A. provides, in part, as follows:

Provided, however, that in those instances where such proceeds cannot be paid because the title thereto is not marketable, the purchasers of such production shall cause all the proceeds due such interest to earn interest at the rate of six percent (6%) per annum *to be compounded annually, calculated from date of first sale*, until such time as the title to such interest has been perfected. (the part italicized was added by Amendment, Laws 1989, c. 241, §1, effective July 1, 1989)

52 O.S. §540 D. provides as follows:

D. Any said first purchasers or owner of the right to drill and produce substituted for the first purchaser as provided herein that violates this section shall be liable to the persons legally entitled to the proceeds from

⁵ Apparently the parties are not in dispute that the two interest checks tendered accurately reflect 6% simple interest upon the amounts held as of July 1, 1980 plus the monthly production amounts thereafter.

production for the unpaid amount of such proceeds with interest thereon at the rate of twelve percent (12%) per annum *to be compounded annually, calculated from date of first sale.* (the part italicized was added by Amendments as follows: "to be compounded annually" by 1989 amendment, effective July 1, 1989, *supra*, and "calculated from date of first sale" by 1985 Amendment, Laws 1985, c. 141)

As noted above the phrase "calculated from date of first sale" first appeared in the 1985 amendment. The Attorney General of Oklahoma issued an opinion in 1982 relative to 52 O.S. §540. Attempting to divine the legislative mind, the Court assumes the 1985 legislature acted with knowledge of the 1982 Attorney General's opinion.

In such opinion, Oklahoma Attorney General's Opinion 82-108, dated December 2, 1982, the following question was presented and answered:

Do the interest provisions of 52 O.S. 1981, § 540(B) apply only to proceeds from the sale of oil and gas which is produced and sold from and after the effective date of the statute, July 1, 1980, or is statutory interest computed on any proceeds (monies) owed to the royalty or working interest owner, which monies are held by the purchaser (or operator) from and after the effective date of the statute, irrespective of when the hydrocarbons were produced?

The Opinion compared the difference between proceeds which had accumulated prior to July 1, 1980, and were therefore "held" as of that date and proceeds from production which occurred after that date which is clearly within the statute's pall. The Opinion's final conclusion was that interest applies to monies held on the effective date from production which production had occurred prior

to July 1, 1980, the interest accruing from July 1, 1980.

The Court concludes the addition of "calculated from date of first sale" is a more or less surgical inclusion of a specific thought, i.e. when to begin the calculation of interest. If the 1985 legislature had intended to affirm the Attorney General's 1982 opinion it would or could have added "if such first sale is subsequent to July 1, 1980 but if prior to such date interest shall be calculated from July 1, 1980". This the legislature did not do. Therefore the Court must conclude the legislature intended for "penalty interest"⁶, i.e. the 12% rate, to be calculated from the date when proceeds were first created by a sale of the production regardless of whether this was after or before July 1, 1980.

The Court finds little comfort in the words of Judge Hough, in Edwards v. Slocum, 287 Fed. 651 (1923):

"Algebraic formulae are not lightly to be imputed to legislators." Ibid. at 654.

Notwithstanding, the Court is, in the matter presently before it, not required to determine interest calculations prior to July 1, 1980, since the Plaintiff seeks interest only from that date. But this does not resolve the issue of "compound" interest and its alleged retroactivity as urged by Plaintiff.

52 O.S. §540, as altered by the 1989 amendment, effective July

⁶ The Court distinguishes the 12% penalty interest of paragraph D from the 6% investment command interest of paragraph A. The latter paragraph commands that the purchasers of such production "*shall cause all proceeds due such interest to earn interest at the rate of six percent (6%) per annum to be compounded annually, calculated from date of first sale, . . .*"

1, 1989, now provides that each the 6% and the 12% provisions are to be compounded annually. Did the Oklahoma legislature intend these provisions to be retroactive?

The principal rule of statutory construction is to give effect to the intent of the Legislature. Riffe Petroleum Co. v. Great Nat'l Corp., Inc., 614 P.2d 576 (Okl. 1980); A presumption exists that statutes are to operate prospectively only, and a clear expression of legislative purpose is required to justify retroactive application of a law. Wilson v. State, 594 P.2d 1210 (Okl. 1979). Wickham v. Gulf Oil Corp., 623 P.2d 613 (Okl. 1981); Jeffcoat v. Highway Contractors, Inc., 508 P.2d 1083 (Ok.App.1972).

Oklahoma Attorney General's Opinion 89-53, dated October 31, 1989, reaffirms its earlier opinion⁷ that July 1, 1980 is the date from which interest is to run and, perhaps in innocent statement, concludes that interest due under 52 O.S. §540 is be compounded annually. OK-AG 89-53 provides in part:

It is, therefore, the official opinion of the Attorney General that:

* * *

2. The statute as amended is to be applied prospectively as previously determined in Oklahoma A.G. Opin. No. 82-108. Therefore, proceeds, and any interest due thereon, which are due and payable under the statute, do not attach until and after July 1, 1980. Interest due under the Act is to be compounded annually. Proceeds held under the unmarketable title provisions of the act are to have interest calculated from the date of first sale if the date of first sale is subsequent to July 1, 1980 or from July 1, 1980 if date of first sale is prior to July 1, 1980.

⁷ OK-AG Opinion No. 82-108, December 2, 1982.

It is unnecessary for today's decision for the Court to determine the correctness of the Attorney General's opinions as to the non-applicability of 6% interest for production which occurred prior to July 1, 1980, for three reasons: (1) The Court agrees with the Attorney General that any proceeds which had accumulated from prior production and was therefore "held" on July 1, 1980, would be subject to the 6% interest provision;⁸ (2) Plaintiff seeks interest only from July 1, 1980; and (3) 6% interest would not be applicable to the facts herein as the Court will delineate, *infra*.⁹

Prior to reaching a determination on the retroactive application of interest provisions the Court will next consider which rate is to apply under the facts in the present matter, 6% or 12%. The former rate is applicable "where such proceeds cannot be paid because the title thereto is not marketable," and continues to apply "until such time as the title to such interest has been perfected." The 12% rate applies where the first purchaser violates the statute.

The payment of royalties from an oil or gas lease is expressly governed by 52 O.S. §540. Seal v. Corporation Comm'n, 725 P.2d 278

⁸ The Court conceives the 6% interest provision to be in the nature of an "investment command", requiring the purchaser of production to "cause all proceeds due . . . to earn interest at the rate of six percent (6%) . . .".

⁹ Reserved for consideration another day is the issue of whether the 6% interest provision is to be applied retroactively. The Court wonders whether retroactive application would be possible for the 6% interest provision since it seems one cannot today "cause all proceeds" . . . "to earn interest at the rate of six percent (6%) per annum to be compounded annually, calculated from . . ." a date in the past.

(Okla. 1986). The only condition precedent to recovery under 52 O.S. §540 is a showing of marketable title. Hull v. Sun Refining and Marketing Company, 789 P.2d 1272 (Okla. 1989).

Koch argues that Plaintiff has never shown a marketable title. Yet it has paid Plaintiff oil royalties prior to the suspended period, and has since paid the sum of \$166,608.56 for suspended proceeds.¹⁰ Koch's employee, June Walburn, a Division Order Department employee for 20 years and a supervisor for the past 10 years, testified Plaintiff had a "clear" title; that Plaintiff's proceeds would not have been placed in suspense under the category "title requirements". The Court concludes there is no genuine issue as to the material facts relating to Plaintiff's marketable title.

The record adequately demonstrates the reason Koch suspended Plaintiff's funds was because the latter had failed to execute a Division Order. The practice of requiring execution of a Division Order as a condition precedent to payment of royalty proceeds did not survive the enactment of 52 O.S. §540. Hull, *supra*.

The Court concludes Koch violated 52 O.S. §540 by its actions in withholding the proceeds based upon Plaintiff's failure to execute a Division Order. Such violation thereby implicates the 12% interest rate. Hull, *supra*.¹¹

¹⁰ Koch argues it paid Plaintiff \$166,608.56 under the warranty of title contained in the division order signed by Plaintiff.

¹¹ The Court reads Hull as almost suggesting the elimination of any "good faith" contest of marketable title on the part of first purchasers of production, i.e. if lessors can prove marketable title (as of the time title was contested) the 12% penalty will apply regardless of the lack of malign purpose on the

Koch argues Plaintiff is barred by 12 O.S. 95 for any claim to interest prior to March 12, 1987. The logic of Defendant's argument escapes the Court. If the statute of limitations bars the interest portion of Plaintiff's claim it could arguably also apply (although perhaps at a different time increment) to Plaintiff's claim for payment of the production proceeds itself, the latter argument not being urged by Koch.

The Court concludes Defendant's statute of limitation argument is invalid for several reasons. Koch has acknowledged its debt to Plaintiff by paying it with no apparent reservation of right to attempt recovery. Certainly Koch's purchase of Plaintiff's production created at least an implied contract and duty to pay, supplementing § 540's directive to pay. Assuming *arguendo* Plaintiff's claim became stale, there are several ways a stale claim may be revived, one of which is the part payment of principal and interest. 12 O.S. 1981 §101, which provides, in part, as follows:

"In any case founded on contract, when any part of the principal or interest shall have been paid, . . . an action may be brought in such case within the period prescribed for the same, after such payment, . . ."

Also, see Drakos v. Edwards, 385 P.2d 459 (Okl. 1963).

Secondly, Koch has not refuted Plaintiff's claim that he only became aware of the suspended funds in 1989, which lack of actual knowledge (and no showing of imputed knowledge other than the

part of the first purchaser. It resolves down to what constitutes a "legitimate question as to marketability of title", Hull, at 1277.

allegation that Plaintiff should have known something was amiss which the checks stopped in 1976) would toll the running of the statute of limitation. Smedley v. State Indus. Court, 562 P.2d 847 (Okl.1977). The Court concludes as a matter of law that Plaintiff's claims are not barred by 12 O.S. § 95.

Lastly the Court considers whether the 12% penalty interest, "to be compounded annually, calculated from the date of first sale" is to be applied retroactively. As stated earlier the words "calculated from the date of first sale" were added by the 1985 amendment to the 12% interest provision only. The Court also concluded earlier herein that the Oklahoma legislature was not merely hitting "fungoes"¹² when it added the language and therefore the legislature meant interest will be calculated from the date of first sale even if that date preceded the effective date of the act, July 1, 1980. The Court further concludes the phrase "calculated from the date of first sale" qualifies the phrase "to be compounded annually" and therefore directs its retroactive application. This is because if any part of the 12% penalty interest calculation is retroactive, the entire calculation is. Additionally, the recent Attorney General's Opinion, OK-AG 89-53, observes "Interest due under the Act is to be compounded annually." Ibid, p.4.

The Court concludes Plaintiff is entitled to 12% interest compounded annually on the amount of Plaintiff's proceeds held as

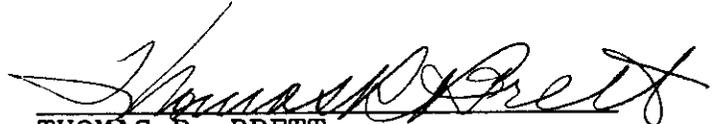
¹² Acknowledgement to Hon. Wayne Alley, United States District Judge for the Western District of Oklahoma.

of July 1, 1980, and on the various amounts suspended thereafter as calculated by the statutory periods (e.g. 60 days after the end of the calendar month within which subsequent production is sold).

The Court further concludes that Plaintiff should be denied attorneys fees and costs at this time on the ground that such request is premature, there being other unresolved issues in the matter.

The Court concludes Plaintiff's Motion for Summary Judgment should be and the same is hereby Granted as to the issue of the applicability of 12% compounded interest retroactively applied (from July 1, 1980 as requested by Plaintiff), and is DENIED as to Attorneys fees and costs, as premature.

IT IS SO ORDERED this 13th day of May, 1991.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE