

FILED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEC 20 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
PHYLLIS HARLAND,)
)
Defendant.)

Civil Action No. 91-C-559-B

DEFAULT JUDGMENT

This matter comes on for consideration this 20th day of Dec., 1991, the Plaintiff appearing by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendant, Phyllis Harland, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Phyllis Harland, was served with Summons and Complaint on October 1, 1991. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Phyllis Harland, for the principal amount of \$845.65, plus administrative costs in the amount of \$87.00, plus accrued interest of \$848.27 as of June 14, 1991, plus interest thereafter at the rate of 7 percent

per annum until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus interest thereafter at the current legal rate of 4.41 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:



KATHLEEN BLISS ADAMS, OBA# 13625
Assistant United States Attorney
333 West 4th Street
Tulsa, Oklahoma 74103
(918)581-7463

FILED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA** DEC 20 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

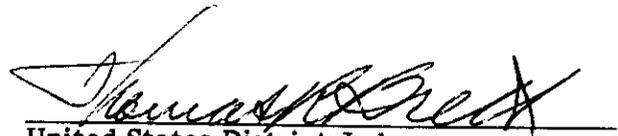
AMYBETH KAUFFMAN,)
)
 Plaintiff,)
)
 vs.)
)
 PRINCIPAL MUTUAL LIFE INSURANCE)
 COMPANY,)
)
 Defendant.)

Case No. 90-C-844-B ✓

ORDER

All parties to this action having stipulated to the dismissal with prejudice of this action pursuant to F.R.Civ.P. 41(a), this action shall be and is hereby dismissed with prejudice.

SO ORDERED this 20th day of December, 1991.


United States District Judge

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

FILED

DEC 20 1991

THRIFTY RENT-A-CAR SYSTEM, INC.,)
an Oklahoma corporation,)

Plaintiff,)

vs.)

HAZELHEAD, INC.,)
a foreign corporation; and)

SYDNEY C. LOVE and VERONICA M.)
LOVE, individuals,)

Defendants.)

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

PS

Case No. 91-C-262-B ✓

ADMINISTRATIVE CLOSING ORDER

Thrifty Rent-A-Car System, Inc. ("Thrifty") and the Defendants, Hazelhead, Inc., Sydney C. Love, and Veronica M. Love, have settled this action pursuant to the terms of a Settlement and Release Agreement dated as of December 10, 1991. Under the terms of that Agreement, the Defendants have made representations regarding their financial conditions and have agreed to pay Thrifty a sum of money over time. The Agreement gives Thrifty the right to move the Court for the entry of a Judgment in the future, if certain circumstances exist.

It is hereby Ordered that the Clerk administratively terminate this action in his records, without prejudice to the right of Thrifty to reopen this action for the purpose of enforcing its rights under the terms of the Settlement and Release Agreement.

IT IS SO ORDERED this 20 day of Dec, 1991.


UNITED STATES DISTRICT JUDGE

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

FILED

DEC 20 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA *ps*

STATE FEDERAL SAVINGS
ASSOCIATION, by and through
its Conservator, Resolution
Trust Corporation, as successor-
in-interest to certain assets
of State Federal Savings and
Loan Association,

Plaintiff,

vs.

No. 90-C-802-B ✓

BASIL W. THOMAS, a/k/a B. W.
THOMAS, and LORENE E. THOMAS;
B. W. THOMAS, INC.; JOHN F.
CANTRELL, COUNTY TREASURER,
TULSA COUNTY and THE BOARD
OF COUNTY COMMISSIONERS, Tulsa
County, Oklahoma; and BANK OF
OKLAHOMA, N.A., formerly known
as Bank of Oklahoma-Mercantile
Center, Successor to Mercantile
Bank and Trust Company,

Defendants.

DEFICIENCY JUDGMENT

NOW, on this 20 day of dec, 1991, this
matter comes on to be heard upon the Report and Recommendation of
the Magistrate Judge in the above-entitled cause as to the Motion
for Leave to Enter Deficiency Judgment filed herein by Plaintiff,
State Federal Savings Association, by and through its Receiver,
Resolution Trust Corporation ("State Federal"), as successor-in-
interest to certain assets of State Federal Savings and Loan
Association, against the Defendants Basil W. Thomas, a/k/a B. W.
Thomas and Lorene E. Thomas. State Federal appeared by and through
its attorney Burk E. Bishop of Boesche, McDermott & Eskridge and
the Defendants Basil W. Thomas a/k/a B. W. Thomas and Lorene E.
Thomas appeared by and through their attorneys Steven M. Harris and

Douglas R. Haughey. The Court, having examined the Report and Recommendation of the Magistrate Judge and the court file as to the proceedings herein and having reviewed the statements and arguments of counsel, finds as follows:

1. State Federal's Motion for Leave to Enter Deficiency Judgment against the Defendants Basil W. Thomas a/k/a B. W. Thomas and Lorene E. Thomas, was properly filed pursuant to 12 O.S. §686 on September 24, 1991, said date being within the 90 days of the date of the sale of the real estate by the Sheriff of Tulsa County in this proceeding on June 27, 1991.

2. The Court further finds that on June 27, 1991, the property foreclosed in the instant action (the "Property") was sold at Sheriff's Sale to State Federal for the sum of \$201,000.00, the property having previously been appraised under the direction of the Sheriff of Tulsa County, Oklahoma, for the sum of \$300,000.00, which the Court finds to have been the fair and reasonable market value of the Property as of the date of Sheriff's sale.

3. The Court further finds that the market value of the Property of \$300,000.00 was less than the amount of the judgment of State Federal as of the date of sale. As a result, the judgment of State Federal was not satisfied in full by the sale of the Property, and thus there is a deficiency due and owing on State Federal's judgment against the Defendants Basil W. Thomas a/k/a B. W. Thomas and Lorene E. Thomas, after all appropriate credits, in the amount of \$116,000.00, plus interest thereon at the statutory rate of 11.71% per annum until paid.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that State Federal be granted a judgment in personam against the Defendants Basil W. Thomas, a/k/a B. W. Thomas, and Lorene E. Thomas, jointly and severally, for the sum of \$116,000.00, with interest thereon at the statutory rate of 11.71% per annum until paid, plus expenses accrued after date of sale, together with all costs, accrued and accruing in this action, and let execution issue.



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

APPROVED FOR ENTRY:



Burk E. Bishop, OBA #000813
Of BOESCHE, McDERMOTT & ESKRIDGE
800 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 583-1777

ATTORNEYS FOR PLAINTIFF,
STATE FEDERAL SAVINGS ASSOCIATION,
by and through its Receiver,
Resolution Trust Corporation



Steven M. Harris, OBA #3913
Douglas R. Haughey, OBA#13290
DOYLE & HARRIS
2341 East 61st Street, Suite 260
Tulsa, Oklahoma 74136

ATTORNEYS FOR BASIL W. THOMAS a/k/a
B. W. THOMAS AND LORENE E. THOMAS

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

JOHN A. HAWORTH)
)
 Plaintiff,)
)
 v.)
)
 THE FEDERAL SAVINGS AND LOAN)
 INSURANCE CORPORATION, as)
 Receiver for PHOENIX FEDERAL)
 SAVINGS AND LOAN ASSOCIATION,)
 et al.,)
)
 AND)
)
 AMERICAN BANK AND TRUST)
 COMPANY, an Oklahoma baking)
 corporation,)
)
 Third Party Plaintiff,)
)
 v.)
)
 AMERICAN BANK OF MUSKOGEE AND)
 BANK OF OKLAHOMA,)
)
 Third Party Defendants.)

FILED

DEC 20 1991 7⁵

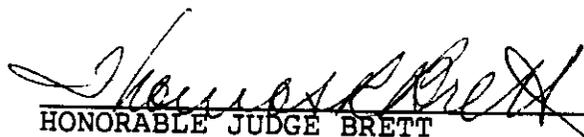
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 88-C-1355-B

ORDER OF DISMISSAL WITH PREJUDICE

Upon consideration of the parties' Joint Stipulation of Dismissal With Prejudice, the Court hereby orders that this action is dismissed with prejudice pursuant to Federal Rules of Civil Procedures Rule 41(a)(1)(ii). It is further ordered that the parties shall bear their own respective attorneys' fees and costs incurred in connection with this action.

Dated this 20 day of Dec, 1991.


HONORABLE JUDGE BRETT
UNITED STATES DISTRICT JUDGE
FOR THE NORTHERN DISTRICT OF
OKLAHOMA

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

FILED

DEC 18 1991

INSURANCE COMPANY OF NORTH)
AMERICA, a corporation,)
)
Plaintiff,)

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

vs.)

Case No. 90-C-580-B ✓

PAT McINTOSH and TERESA McINTOSH,)
husband and wife; THE McINTOSH)
HOLDING CORPORATION, an Oklahoma)
corporation; THE McINTOSH SERVICE)
COMPANY, INC., an Oklahoma)
corporation; and THE McINTOSH)
COMPANY, INC., an Oklahoma)
corporation,)
)
Defendants.)

OF **JOINT STIPULATION**
FOR DISMISSAL WITH PREJUDICE

Pursuant to Rule 41, F.R.C.P., the parties stipulate that this matter should be dismissed with prejudice. In support hereof, the parties would show the Court that they have reached a settlement of claims which are the subject of this lawsuit and that, accordingly, this matter may be shown as dismissed with prejudice by stipulation of the parties.

Respectfully submitted,

FELDMAN, HALL, FRANZEN,
WOODARD & FARRIS

By Joseph R. Farris
Joseph R. Farris, OBA #2835
525 South Main
1400 Park Centre
Tulsa, Oklahoma 74103
918/583-7129

ATTORNEYS FOR PLAINTIFF
INSURANCE COMPANY OF NORTH AMERICA

FRAZIER, SMITH & PHILLIPS

By Phil Frazier

Phil Frazier, OBA #3112
1424 Terrace Drive
Tulsa, Oklahoma 74104
918/744-7200

ATTORNEYS FOR DEFENDANTS

ina.stp

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

DEC 19 1991

RESOLUTION TRUST CORPORATION)
AS CONSERVATOR FOR SAVERS)
SAVINGS ASSOCIATION,)
)
Substituted)
Plaintiff,)
)
v.)
)
LARRY W. McGRAW, et al,)
)
Defendants.)

89-C-970-B ✓

PS

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Comes now before me on this 18th day of December, 1991, Plaintiff's Motion and Brief Requesting Deficiency Judgment. The Plaintiff, Resolution Trust corporation as Receiver for Savers Saving Association ("RTC"), appears by and through its attorneys of record, Robinson, Lewis, Orbison, Smith & Coyle, by Scott E. Coulson. No appearance was made by Defendant. The Court, being fully advised in the premises, finds as follows:

1. Plaintiff filed its Motion and Brief Requesting Deficiency Judgment (the "Motion") on July 3, 1991, and notified the Defendant, Larry W. McGraw ("McGraw"), of said Motion by mailing a copy of same by U.S. Mail with postage prepaid thereon, to the Defendant, McGraw, and to his attorney of record, Warren G. Morris, on July 3, 1991. Defendant, McGraw has failed to object or respond to the Motion.

2. A Journal Entry of Judgment in the instant case ordering judgment in favor of RTC and against the Defendant, Larry W. McGraw, was entered by this Court on

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December 14, 1990, and filed of record with the U.S. District court Clerk on January 25, 1991.

3. On the date of the Sheriff's Sale herein, April 16, 1991, the unpaid balance on said judgment to RTC equaled the sum of \$50,634.13 for Note No. 1 covering Tract No. 1, which sum includes interest, costs and disbursements; and the sum of \$63,487.58 for Note No. 2 covering Tract No. 2, which sum includes principal, interest, costs and disbursements.

4. Tract No. 1 was duly appraised on November 6, 1990, at \$31,000.00 by Jeffrey L. Swafford, SRA, and Michael J. gray, SRA, duly qualified real estate appraisers. Tract No. 2 was duly appraised on November 7, 1990, at \$37,000.00 by Jeffrey L. Swafford, SRA, and Michael J. Gray, SRA. A copy of said appraisals and an Affidavit of Appraisers was attached as Exhibit "A" to Plaintiff's Motion and Brief Requesting Deficiency Judgment filed herein on July 3, 1991.

5. The Sheriff's sale of the subject real property was properly conducted on the 16th day of April, 1991, with both properties being sold by said Sheriff to RTC, as the highest and best bidder therefor. The sales price of Tract No. 1 was \$28,700.00 and the sales price of Tract No. 2 was \$30,118.00.

6. Pursuant to 12 O.S. §686, RTC should be entitled to a deficiency judgment against the Defendant, Larry W. McGraw, for the sum of \$19,634.13 on Tract No. 1 and the sum of \$26, 487.58 on Tract No. 2 for a total of \$46,121.71, representing the difference in the value of the properties and the sum of Plaintiff's and all prior liens against the subject property on the date of Sheriff's Sale.

Therefore, the United States Magistrate Judge recommends that Plaintiff, Resolution Trust Corporation as Conservator for Savers Savings Association, should be awarded a deficiency judgment against the Defendant, Larry W. McGraw, in the sum of \$46,121.71.

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.¹

Dated this 19th day of Dec., 1991.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

¹ See Moore v. United States of America, No. 91-7083, slip op. at 6 (10th Cir. December 1, 1991).

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

DEC 18 1991 *mw*

RTC AS CONSERVATOR FOR)
 CIMARRON FEDERAL SAVINGS)
 ASSOCIATION,)
)
 Plaintiff,)
)
 vs.)
)
 ALBERT E. WHITEHEAD, et al.,)
)
 Defendants.)
)
 and)
)
 FEDERAL DEPOSIT INSURANCE)
 CORPORATION, in its capacity as)
 receiver for Phoenix Federal)
 Savings and Loan Association,)
)
 Intervenor.)

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 90-C-549-C ✓

JOURNAL ENTRY OF JUDGMENT

This cause comes on for Hearing before me, the undersigned Judge of the District Court, this 17th day of November, 1991, the Plaintiff, Resolution Trust Coloration as Conservator for Cimarron Federal Savings Association ("RTC"), appearing by its attorneys, Kimball, Wilson, Walker & Ferguson, by Paul M. Kimball and Mark Alan Harter.

The Defendants, Albert E. Whitehead and Lacy E. Whitehead, husband and wife ("Whiteheads"), appear by their attorney, Lloyd E. Cole, Jr.

Defendant Meghan Coves Association, Inc. ("MCAI") appears by its representative, Mr. Pete Cherry, President of Meghan Coves Association, Inc.

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809 12-AB

The Intervenor, Federal Deposit Insurance Corporation, ("FDIC"), appears by its attorney, Huffman, Arrington, Kihle, Gaberino & Dunn, by Barry K. Beasley.

1. The Court finds that the Defendant Albert E. Whitehead, was personally served with a Summons and Petition by the service of such Summons and Petition upon his wife on November 20, 1989, more than twenty three (23) days prior hereto. Such Defendant has fully answered the allegations of Plaintiff by responsive pleading and the issues presented as between those parties may be adjudicated.

2. The Court further finds that the Defendant Lacy E. Whitehead, was personally served with a Summons and Petition by certified mail, the receipt of which is filed of record in this case, more than twenty three (23) days prior hereto. Such Defendant has fully answered the allegations of Plaintiff by responsive pleading and the issues presented as between those parties may be adjudicated.

3. The Court further finds that the Defendant, Meghan Coves Association, Inc. was personally served with a Summons and Petition by certified mail, the receipt of which is filed of record in this case, more than twenty three (23) days prior hereto. Such Defendant has fully answered the allegations of Plaintiff by responsive pleading and the issues presented as between those parties may be adjudicated.

4. The Intervenor, FDIC, has been made a party to this action and has filed responsive pleadings to the Plaintiff's Petition, but has asserted no claim against any other party to the action.

5. Thereupon, the case came on for Trial and being triable to the Court without the intervention of a jury, the Court proceeded to examine the pleadings and the Note and Mortgage being sued upon herein, which were introduced into evidence and being fully advised finds that:

- 5.1 All of the allegations and averments of the Plaintiff's Petition are true;
- 5.2 RTC is the owner and holder of the Note and Mortgage described in Plaintiff's Petition;
- 5.3 There is due the Plaintiff upon the Note described in Plaintiff's Petition the principal sum of \$160,092.48, together with interest thereon at the rate of nine and one quarter percent (9.25%) per annum from February 1, 1989 through November 14, 1991 in the amount of \$40,690.93 and at the rate of \$41.14 per diem from and after November 14, 1991 until paid; abstracting and other expenses in the amount of \$1,050.00; unpaid escrows in the amount of \$2,426.71; late charges of \$2,195.20 any amounts Plaintiff has been required to advance due to the default of the Whiteheads, including, but not limited, taxes, insurance and preservation of the subject property, (the "Default Expenses"), all pursuant to the terms of the Note and Mortgage; and all costs of this action accrued and accruing together with an attorney's fee as determined by the Court upon motion by the Plaintiff.

6. The Court further finds, and it is hereby **ORDERED,**
ADJUDGED AND DECREED that:

- 6.1 The Plaintiff has a valid first lien, upon the real estate and premises described on Exhibit "A" attached hereto and made a part hereof by virtue of the Mortgage executed by the Whiteheads which is recorded in Book 469, Pages 366 through 374 in the records of the County Clerk of Delaware County, Oklahoma.
- 6.2 The defaults have occurred under the terms and conditions of the Note and Mortgage as alleged in Plaintiff's Petition and that the Plaintiff is entitled to foreclosure of its Mortgage sued upon in this case as against all of the Defendants in and to this cause, and each of them.
- 6.3 The Defendant, Meghan Coves Association, Inc. claims a lien in the real estate and premises herein sued upon for unpaid "association dues" (the "Association Lien"). The Association Lien is junior, inferior and subsequent to the mortgage lien of the Plaintiff. Pursuant to 60 O.S. 1981, §524, the purchaser of the subject property at judicial sale shall not be liable for the share of common expenses or assessments by the council of unit owners chargeable to the subject property which became due prior to acquisition of title by such purchaser. Any such unpaid expenses shall be deemed to be common expenses collectible from all unit owners, including the purchaser of the subject property.
- 6.4 The Plaintiff, RTC, shall have and recover on its Petition herein Judgment in personam against the Defendants, the Whiteheads, in the principal sum of \$160,092.48 together with interest thereon at the rate of nine and one quarter percent (9.25%), from February 1, 1989 through November 14, 1991 in the amount of \$40,690.93 and at the rate of \$41.14 per diem

from and after November 14, 1991 until paid; abstracting and other expenses of \$1,050.00; unpaid escrows in the amount of \$2,426.71; late charges of \$2,195.20; any amounts which Plaintiff has been required to advance due to the default of the Whiteheads, including, but not limited to, taxes, insurance and preservation of the subject property (the "Default Expenses"); and all costs of this action, accrued and accruing (all amounts recovered herein shall be collectively referred to as the "Judgment") together with an attorney's fee as determined by the Court upon motion by the Plaintiff.

6.5 Plaintiff RTC shall be entitled to file its Motion for Deficiency Judgment after confirmation of the sale as authorized by law. The Court finds in favor of the Plaintiff and against the Defendants Albert E. and Lacy E. Whitehead on all issues raised by the counterclaim asserted against Plaintiff by such Defendants and orders that such Defendants take nothing by virtue of such counterclaim.

6.6 The Mortgage of the Plaintiff is, and the same is hereby foreclosed; that the real estate and premises are hereby Ordered to be sold to satisfy the Judgment herein; that a special execution and order of sale with appraisal shall issue, commanding either the United States Marshall or the Sheriff of Delaware County, Oklahoma, as Plaintiff may elect, to levy upon the real estate and premises, and after having the same appraised as provided by law, shall proceed to advertise and sell the same as provided by law; and that the proceeds arising from the sale of the real estate and premises shall be applied as follows:

FIRST: In payment of the costs of the sale and of this action;

SECOND: In payment to the Plaintiff on its Judgment;

THIRD: In payment to the Defendant, Meghan Coves Association, Inc., on its Association Lien; and

FOURTH: The residue, if any, be held to await the further Order of this Court.

6.7 From and after the sale of the real estate and premises under and by virtue of this Judgment and Decree, the Defendants, and each of them, and all persons claiming under them or any of them, be and they are hereby forever barred and foreclosed of and from any and all right, title or interest, estate or equity in and to the real estate and premises or any part thereof and enjoined from asserting or claiming any right, title, interest, estate or equity of redemption in or to said real estate and premises, or any part thereof.



JUDGE OF THE DISTRICT COURT

EXHIBIT "A"

Unit 77, Meghan Coves Condominium Estates, a unit ownership estate, according to the recorded declaration thereof, recorded August 4, 1983, in Book 451, Pages 355-407, inclusive, in the records of the County Clerk, Delaware County, State of Oklahoma, and the undivided interest in the common elements appertaining thereto, situated on the real estate more particularly described hereinafter, together with all appurtenances thereunto belonging, all in Delaware County, Oklahoma, such real estate being more particularly described as follows:

Part of the East 1/2 of the SW 1/4 of Section 17, Township 24 North, Range 24 East, Delaware County, Oklahoma, being more particularly described as follows: Beginning at the SE corner of the SE 1/4 of the SW 1/4 of Sec. 17, Twp. 24 N., Rge. 24 E.; thence along the centerline of Lake Road No. 6, N. 89° 26' 56" W. a distance of 1116.66'; thence N. 00° 53' 17" E. a distance of 622.00'; thence N. 88° 56' 56" W. a distance of 210.00'; thence N. 00° 53' 17" E. a distance of 365.45'; thence S. 89° 35' 56" E. a distance of 329.62'; thence N. 00° 46' 56" E. a distance of 284.50'; thence N. 35° 05' 56" E. a distance of 34.56'; thence N. 26° 00' 00" E. a distance of 111.21'; thence N. 31° 29' 36" E. a distance of 58.49' to a point on the Grand River Dam Authority Taking Line; thence along said Taking Line S. 42° 36' 00" E. a distance of 17.56'; thence S. 42° 38' 00" E. a distance of 336.80'; thence S. 19° 36' 00" E. a distance of 284.00'; thence N. 61° 21' 00" E. a distance of 128.40'; thence S. 34° 32' 00" E. a distance of 231.20'; thence S. 86° 35' 00" E. a distance of 160.40'; thence S. 76° 02' 00" E. a distance of 143.71'; thence leaving the aforesaid Taking Line South a distance of 760.79' to the point of beginning and containing 28.091 acres. Property is subject to the right of way of Lake Road No. 6 on the South side.

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

FILED

DEC 18 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

GABRIELLE REIB,

Plaintiff,

vs.

CANTEEN CORPORATION,
a corporation,

Defendant.

Case No. 91-C-286-E

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes before the Court on the Joint Stipulation of Dismissal with Prejudice by the parties. The parties represent to the Court they have entered into an agreement for Order of Dismissal in this Order with no finding of employment discrimination.

IT IS THEREFORE ORDERED that this matter is dismissed with prejudice with no finding of employment discrimination on the part of the Defendant. Each party shall bear their own attorney's fees and costs.

BY JAMES O. EDWARDS

JUDGE OF THE DISTRICT COURT

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
-vs-)
)
JESSIE M. ROBBINS,)
447 54 5693)
)
Defendant,)

CIVIL NO. 91-C-800 C

FILED

DEC 13 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CONSENT JUDGMENT

The Court, having been advised by the parties of their desire to enter into a consent judgment, finds:

1. The Court has jurisdiction over the subject matter and the parties to this litigation.

2. The parties have agreed on the entry of judgment in favor of the plaintiff, United States of America, against defendant, JESSIE M. ROBBINS, as follows:

3. Defendant, JESSIE M. ROBBINS, is indebted or liable to the plaintiff in the principal amount of \$1,500.00, accrued interest and costs through July 31, 1991, in the amount of \$763.52, and interest thereafter on the principal amount at the rate of 7.0% per annum to the date of this judgment and thereafter at the rate of 4.41 % until paid and the costs of this action.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED.

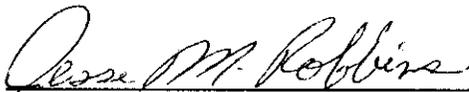
DATED this 17th day of Dec., 1991.


UNITED STATES DISTRICT JUDGE

APPROVAL AND CONSENT
TO ENTRY OF JUDGMENT
CLIFTON R. BYRD
District Counsel



CLIFTON R. BYRD
Department of Veterans Affairs
Office of District Counsel
125 South Main Street
Muskogee, OK 74401
918/687-2191



JESSIE M. ROBBINS
Defendant

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

FILED

DEC 14 1991

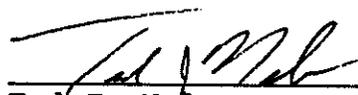
SOUTH HOLLAND TRUST AND SAVINGS BANK, successor in interest to THE FIRST NATIONAL BANK IN DOLTON,
Plaintiff,
vs.
HALE-HALSELL COMPANY,
an Oklahoma corporation,
Defendant.

U.S. District Court
Northern District of Oklahoma

Case No. 91-C-906 *φ B*

Notice of DISMISSAL WITH PREJUDICE

Plaintiff, South Holland Trust and Savings Bank, successor in interest to The First National Bank in Dolton, hereby dismisses the above-styled and numbered cause against the Defendant, Hale-Halsell Company, with prejudice.


Ted J. Nelson, OBA #10108
Joyce and Pollard
515 South Main Mall, Suite 300
Tulsa, Oklahoma 74103
(918) 585-2751

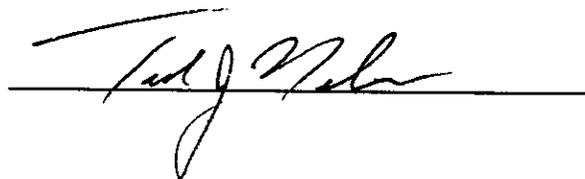
Attorneys for Plaintiff

Certificate of Mailing

I, the undersigned, hereby certify that on the 18th day of December, 1991, I mailed a true and correct copy of the Dismissal With Prejudice to the following with proper postage attached.

Robert D. Hawk, Registered Agent
9111 East Pine Street
Tulsa, Oklahoma 74115

James R. Ryan
Conner & Winters
2400 First National Tower
Tulsa, Oklahoma 74103

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

FILED

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

1991

Clerk
COURT AS

BUILDERS STEEL CO., et al.,)
)
Plaintiffs,)
v.)
)
MAX ALEXANDER HEIDENREICH,)
)
Defendant.)

90-C-261-B
90-C-345-B

ORDER

This matter comes on for consideration upon the Defendant's objection to and appeal from the Magistrate Judge's Report and Recommendation entered herein on October 3, 1991.

The issue before the Court is whether the Magistrate Judge's Report and Recommendation, recommending affirmance of the Bankruptcy Court herein¹, correctly interpreted 42 O.S. § 152(2) by holding that private parties cannot circumvent this statute's effect by private agreement. The facts giving rise to this issue are as follows:

The Defendant, Max Heidenreich, (Heidenreich), who controlled Brookside Realty Limited Partnership (Brookside) and Hycore Commerical Realty (Hycore), began developing the Brookside Center, Tulsa, Oklahoma, in 1987. As a part of the development, Brookside purchased certain parcels of real property for \$1.4 million from Republic Savings & Trust, who also financed the purchase.

Brookside later borrowed from Republic \$1.15 million for

¹ The Report and Recommendation considers issues ruled upon by the Bankruptcy Court other than the single issue considered herein.

"construction and remodeling" costs for the project. The loan agreement provided that \$203,721.06 would be used for "soft or indirect" costs by Hycore and Brookside, with the remaining funds, \$819,978.94 scheduled to go for construction costs.

Brookside received \$1,023,700 of the \$1.15 original loan amount, transferring the entire sum to Hycore who then made direct payments to project materialmen, mechanics and laborers in the amount of \$820,033. Hycore kept \$203,667, of which \$181,947.11 was spent by Hycore for overhead, salaries and other expenses, including \$98,038.40 in salary directly to Heidenreich.

Heidenreich and his companies experienced financial problems, as a result of which Heidenreich filed a Chapter 7 Bankruptcy proceeding listing therein three unpaid materialmen, mechanics and laborers who had filed liens on the project real estate.² The Bankruptcy Court refused to allow the discharge of these debts and Heidenreich filed this appeal.

The thrust of the Bankruptcy Court's ruling was that 42 O.S. § 152, a statute imposing trust status on mortgage funds for the benefit of lienable claims, was applicable to the entire disbursed fund of \$1,023,700 notwithstanding the parties private agreement that \$203,721.06 of loan fund was to go for "soft costs".

42 O.S. § 152(2) provides, in part, as follows:

(2) The monies received under any mortgage given for the purpose of construction or remodeling any structure shall upon receipt by

² The three materialmen, mechanics and laborers were Builders Steel Co., Inc., Commerical Ceilings and Drywall, Inc., and Gaines Plumbing and Piping Co., claiming a total amount due of \$91,409.87.

the mortgagor be held as trust funds for the payment of all valid lienable claims due and owing or to become due and owing by such mortgagor by reason of such building or remodeling contract.

A Bankruptcy Court's findings of facts should not be disturbed unless clearly erroneous. See, Bankruptcy Rule 8013. See also, In Re Ruti-Sweetwater, Inc., 836 F.2d 1263 (10th Cir.1988). However, the standard of review for a Bankruptcy Court's conclusions of law is *de novo*. Ruti-Sweetwater, *supra*.

Heidenreich urges Karen Meyers, Ltd, v. The Law Co., 794 P.2d 766 (Okl.App.1990), in support of his argument that a private agreement can override the impact of §152(2). In that case Phoenix Federal Savings loaned money for the construction of Sugarberry Apartments. By agreement, Phoenix retained part of the loan proceeds for interest, an origination fee, a developer's fee and attorney's fees. The Law Co., the general contractor of Sugarberry Apartments, sought, unsuccessfully, payment for its valid liens from the retained funds. The Court, in denying such payment held that §152(2) applies to mortgagors (Sugarberry), not mortgagees (Phoenix Federal).

This Court has no quarrel with the Oklahoma Appellate Court's interpretation of §152(2) in Karen Meyer, Ltd., *supra*. However, the case seems not in direct point with the instant matter. In that case, the mortgage money retained by Phoenix *was never received by the mortgagor*; therefore, such monies could not, it would seem, be held *by the mortgagor . . . as trust funds for the payment of all valid lienable claims. . .*

The Court concludes the Report and Recommendation of the Magistrate Judge, as to all issues discussed therein, should be and the same is hereby adopted and affirmed. The Court further concludes the Bankruptcy Court's Order was, in the instant matter, a proper application of 42 O.S. §152(2) and such Order is herewith adopted as to all issues considered therein. Such Order should be and the same is hereby affirmed.

IT IS SO ORDERED this 18 day of December, 1991.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

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

1991 OCT 10

Deborah A. Brown, Clerk
U.S. DISTRICT COURT PS

BUILDERS STEEL CO., et al.,)
)
Plaintiffs,)
v.)
)
MAX ALEXANDER HEIDENREICH,)
)
Defendant.)

90-C-261-B
90-C-345-B

ORDER

This matter comes on for consideration upon the Defendant's objection to and appeal from the Magistrate Judge's Report and Recommendation entered herein on October 3, 1991.

The issue before the Court is whether the Magistrate Judge's Report and Recommendation, recommending affirmance of the Bankruptcy Court herein¹, correctly interpreted 42 O.S. § 152(2) by holding that private parties cannot circumvent this statute's effect by private agreement. The facts giving rise to this issue are as follows:

The Defendant, Max Heidenreich, (Heidenreich), who controlled Brookside Realty Limited Partnership (Brookside) and Hycore Commerical Realty (Hycore), began developing the Brookside Center, Tulsa, Oklahoma, in 1987. As a part of the development, Brookside purchased certain parcels of real property for \$1.4 million from Republic Savings & Trust, who also financed the purchase.

Brookside later borrowed from Republic \$1.15 million for

¹ The Report and Recommendation considers issues ruled upon by the Bankruptcy Court other than the single issue considered herein.

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The thrust of the Bankruptcy Court's ruling was that 42 O.S. § 152, a statute imposing trust status on mortgage funds for the benefit of lienable claims, was applicable to the entire disbursed fund of \$1,023,700 notwithstanding the parties private agreement that \$203,721.06 of loan fund was to go for "soft costs".

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The Court concludes the Report and Recommendation of the Magistrate Judge, as to all issues discussed therein, should be and the same is hereby adopted and affirmed. The Court further concludes the Bankruptcy Court's Order was, in the instant matter, a proper application of 42 O.S. §152(2) and such Order is herewith adopted as to all issues considered therein. Such Order should be and the same is hereby affirmed.

IT IS SO ORDERED this 18 day of December, 1991.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

DEC 17 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC.,)
an Oklahoma Corporation,)
)
Plaintiff,)
)
vs.)
)
P.F.T. ENTERPRISES, INC.,)
a Foreign Corporation, and)
PASQUALE F. TURANO,)
an individual,)
)
Defendants.)

Case No. 91-C-553-B

JUDGMENT

This matter comes before the Court upon Motion and Affidavit of the Plaintiff, Thrifty Rent-A-Car System, Inc. ("Thrifty"), duly made for entry of Judgment by default. Having considered the evidence and the arguments of counsel, the Court makes the following findings:

1. On July 26, 1991, Thrifty filed a Complaint against Defendants P.F.T. Enterprises, Inc. ("P.F.T.") and Pasquale F. Turano ("Turano").
2. The Summons and Complaint were served upon Turano on August 21, 1991, and the return of service for Turano was filed on August 26, 1991.
3. On October 11, 1991, Defendant, P.F.T., filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, Case No. 91-42586, in the United States Bankruptcy Court of Massachusetts at Boston. Thus, entry of a Judgment against P.F.T. is not proper at this time.
4. Defendant Turano has neither formally entered an

appearance in this matter nor filed an answer to Plaintiff's Complaint. That Defendant is thus in default, and Plaintiff is entitled to a Default Judgment pursuant to Rule 55(b) of the Federal Rules of Civil Procedure.

5. The Defendant is not an infant or incompetent person, and is not in the military service of the United States.

6. The Defendant is indebted to Plaintiff in the sum of \$207,733.38 for failure to pay certain obligations pursuant to written contracts and promissory notes.

7. The Master Lease Agreement and the promissory notes, which together comprise the majority of Thrifty's claims against this Defendant, all provide that Thrifty shall recover its attorney's fees incurred herein.

8. Plaintiff has incurred \$793.15 in costs and \$7,539.75 in attorney fees, all of which the Court finds were reasonably and necessarily incurred in the prosecution of this case, and for all of which Plaintiff is entitled to judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Judgment is entered in favor of the Plaintiff, Thrifty Rent-A-Car System, Inc., and against the Defendant, Pasquale R. Turano, in the amount of \$207,733.38, together with the costs of this action in the amount of \$793.15, and a reasonable attorney's fee in the amount of \$7,539.75, making a total Judgment of \$216,066.28, for all of which execution shall issue. Interest shall accrue on this Judgment at

the rate of 11.71% per year, or \$69.32 per day, until paid.
Judgment rendered this 17th day of December, 1991.

S/ THOMAS H. BRETT

UNITED STATES DISTRICT JUDGE

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

REPUBLIC TRUST AND SAVINGS)	
COMPANY, et al,)	
)	
Debtor,)	
)	
v.)	91-C-249-B ✓
)	
DOBIE R. LANGENKAMP, et al,)	
)	
Plaintiff,)	
)	
v.)	
)	
RICHARD WOLFENBARGER, and)	
DAISY WOLFENBARGER,)	
)	
Defendants.)	

FILED
DEC 17 1991
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Now before the Court is Defendant's Motion For Withdrawal Of Reference. Defendant Richard A. Wolfenbarger requests the withdrawal of this case from the United States Bankruptcy Court pursuant to 28 U.S.C. Sec. 157(d). Defendant wants the case transferred to this Court so he can have a jury trial.

According to Plaintiff's brief, the adversary proceeding began September 22, 1986 to avoid and recover a preferential transfer under 11 U.S.C. §§547 and 550. *Plaintiff's Response And Brief In Opposition To Defendant's Motion For Withdrawal Of Reference (docket #2)*.¹ Defendant then filed an answer on October 22, 1986, demanding a jury trial. *Id.*

Subsequently, Defendant files the instant motion for withdrawal of reference on

¹ Defendant does not support its motion with a summary of facts.

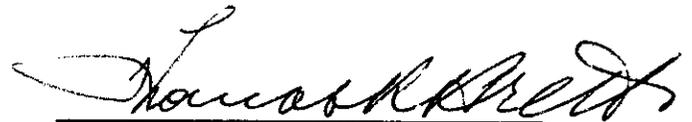
April 17 1991 -- more than four years after the October 22, 1986 Answer.

The Tenth Circuit recently ruled that a party seeking a jury trial must combine their request with a request for transfer to the district court. *In Re Latimer*, 918 F.2d 136, 137 (10th Cir. 1990). If the requests are not combined, the party waives its right to a jury trial. *Id.*

Defendant Wolfenbarger failed to combine his requests. Instead, he asked for a jury trial in 1986. He then filed the instant motion in 1991. As a result, he waived his right to a jury trial.

Under 28 U.S.C. § 157(d), the district court "may withdraw, in whole or in part, any case or proceeding referred under this section...for cause shown." Defendant has not shown a sufficient cause.² Therefore, the Motion For Withdrawal Of Reference is denied.

SO ORDERED THIS 17 day of Dec, 1991.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

² Defendant bases his motion on a February 23, 1991 Bankruptcy Court Order Allowing Jury Trial And Providing For Transfer To United States District Court For Jury Trial. (See Exhibit 1 attached to Motion For Withdrawal Of Reference (docket #1). However, that order was vacated (See Exhibit B attached to Plaintiff's Response (docket #2).

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

FILED

DEC 17 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

REPUBLIC TRUST AND SAVINGS)
COMPANY, et al,)
)
Plaintiff,)
)
v.)
)
DOBIE LANGENKAMP, et al,)
)
Defendants.)

91-C-357-B

91-C-358-B

ORDER

Now before this Court is Holliman, Langolz, Runnels & Dorwart's ("Holliman") Motion To Withdraw Proceeding From Bankruptcy Judge (docket #1). Holliman filed the motion pursuant to 28 U.S.C. §157(d).

Facts

On September 24, 1984, Holliman filed three separate Chapter 11 Bankruptcy petitions in the United States Bankruptcy Court For The Northern District Of Oklahoma on behalf of Republic Bancorporation, Inc., ("RBI") Republic Financial Corporation ("RFC") and Republic Trust & Savings Company ("RTS"). Holliman served as counsel for RFC and RTS until October 30, 1984 when a trustee was appointed for the two entities by the Bankruptcy Court.

In March of 1985, Holliman filed an application for attorney fees to the Bankruptcy Court for the law firm's work for RFC and RTS. Six years later, on May 30, 1991, while the fee application was still pending, Holliman filed this instant motion. Nearly a month

later, on June 25, 1991, the Bankruptcy Court issued an order that reimbursed Holliman for its expenses. The Court, however, refused to award Holliman attorney fees. On July 5, 1991, Holliman appealed the decision.¹

Legal Analysis

Holliman asserts that the case should be withdrawn pursuant to 28 U.S.C. §157(d).

That statute reads:

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

In its initial brief in support of the instant motion, Holliman offered a recap of the evidence presented before the Bankruptcy Court. *Brief Of Holliman, Langholz, Runnels and Dorwart In Support Of HLR&D Motion To Withdraw Proceeding From Bankruptcy Judge*, pages 2-7 (docket #2). The evidence, argues Holliman, overwhelmingly supports the awarding of attorney fees to the law firm. *Id.* However, nowhere in the initial May 30, 1991 brief does Holliman specifically state a legitimate cause for the withdrawal.²

On October 21, 1991, Holliman submitted a supplemental brief. In that brief, Holliman alleges that the cause for withdrawing the case from the Bankruptcy Court is bias on the part of the bankruptcy judge. *Brief Of Holliman, Langholz, Runnels & Dorwart In*

¹ On July 26, Holliman filed a motion to consolidate this case with three others. On September 26, 1991, this Court granted the motion in part, consolidating 91-C-357-B and 91-C-358-B. Two other cases (91-C-478-C and 91-479-C) also were consolidated as a separate case. See Amended Order (docket # 21).

² In that first brief, Holliman suggests that the evidence presented to the Bankruptcy Court supports only its position. Holliman then appears to argue that since the evidence is in its favor, this Court should have withdrawn the case from the Bankruptcy Court. That argument does not constitute cause pursuant to 28 U.S.C. §157(d).

Support Of Its Motion To Withdraw The Reference Of Its Attorney Fee Applications To The Bankruptcy Court, page 7 (docket #26). Such bias, Holliman contends, denied it due process. *Id. at page 9.* In addition, Holliman claims that the judge misinterpreted the evidence when making his ruling. *Id.*

Both briefs share a common denominator: Holliman believes that it should have been awarded attorney fees. The first brief took place prior to the Bankruptcy Court's decision. It simply restated the evidence presented in support of the attorney fee award. The Bankruptcy Court then issued a June 25, 1991 order denying Holliman attorney fees. Subsequent to that order, Holliman's second brief accuses the bankruptcy judge of bias. Much of its bias argument stems from the language used in the June 25, 1991 order.³

Conclusion

Based on the record, Holliman has not identified any sufficient cause pursuant to 28 U.S.C. §157(d) that supports its motion to withdraw the case from the Bankruptcy Court.⁴ Holliman's briefs focus on the merits of its argument, and how the Bankruptcy Court erred in reaching any conclusion other than the one Holliman desired. Such arguments are more appropriate to examine on appeal, which this Court will do.⁵

In addition, given the fact that the Bankruptcy Court already has made a decision on the issues, judicial economy would not be served by withdrawing the case at this

³ *Holliman identified no sufficient cause prior to the June 25, 1991 order. In addition, it waited six years before filing the instant motion.*

⁴ *See Valley Forge Plaza v. Fireman's Fund Ins., 107 B.R. 514 (E.D. Pa. 1989) where the court discusses some factors used in deciding whether the district court should withdraw a case for cause.*

⁵ *At this point, this Court is not deciding the merits of Holliman's argument; that will be done on appeal. The issue here is whether Holliman has shown a sufficient cause as to why the case should be withdrawn from the Bankruptcy Court. Holliman has not done so.*

juncture. It appears that Holliman is using §157(d) as a tool to appeal. The statute was not designed to be a substitute for an appeal. Instead, Holliman's appropriate avenue is to re-urge its arguments on appeal.

As a result, this Court denies the Motion To Withdraw Proceeding From Bankruptcy Judge.

SO ORDERED THIS 16th day of Dec., 1991.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

DEC 17 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

REPUBLIC TRUST AND SAVINGS)
COMPANY, et al,)
)
Plaintiff,)
)
v.)
)
DOBIE LANGENKAMP, et al,)
)
Defendants.)

91-C-357-B ✓

91-C-358-B

ORDER

Now before this Court is Holliman, Langolz, Runnels & Dorwart's ("Holliman") Motion To Withdraw Proceeding From Bankruptcy Judge (docket #1). Holliman filed the motion pursuant to 28 U.S.C. §157(d).

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As a result, this Court denies the Motion To Withdraw Proceeding From Bankruptcy Judge.

SO ORDERED THIS 16th day of Dec., 1991.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA,

-vs-

ALICIA A. WHERRY,
448 70 7061

Plaintiff,

Defendant,

CONSENT JUDGMENT

CIVIL NO. 91-C-799 B

FILED

DEC 17 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

The Court, having been advised by the parties of their desire to enter into a consent judgment, finds:

1. The Court has jurisdiction over the subject matter and the parties to this litigation.

2. The parties have agreed on the entry of judgment in favor of the plaintiff, United States of America, against defendant, ALICIA A. WHERRY, as follows:

3. Defendant, ALICIA A. WHERRY, is indebted or liable to the plaintiff in the principal amount of \$767.70, accrued interest and costs through March 6, 1991, in the amount of \$194.22, and interest thereafter on the principal amount at the rate of 9.0% per annum to the date of this judgment and thereafter at the rate of 4.98 % until paid and the costs of this action.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED

DATED this 10th day of December, 1991.

S/ RICHARD M. LAWRENCE

UNITED STATES DISTRICT JUDGE

APPROVAL AND CONSENT
TO ENTRY OF JUDGMENT
CLIFTON R. BYRD
District Counsel



CLIFTON R. BYRD
Department of Veterans Affairs
Office of District Counsel
125 South Main Street
Muskogee, OK 74401
918/687-2191



ALICIA A. WHERRY
Defendant

FILED

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

DEC 17 1991

DL

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 NOEL F. GLENN; BILLIE M. GLENN;)
 DOUG ROPER; LAJEAN ROPER;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma, and STATE OF OKLAHOMA)
ex rel. OKLAHOMA TAX COMMISSION,)
)
 Defendants.)

**Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA**

CIVIL ACTION NO. 88-C-520-E ✓

DEFICIENCY JUDGMENT

This matter comes on for consideration this 16th day of December, 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 Peter Bernhardt, Assistant United States Attorney, and the Defendants, Noel F. Glenn and Billie M. Glenn, 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 Noel F. Glenn and Billie M. Glenn, Lot 56, Grove Trailer Park, Marion, AR 72364, and all other counsel and parties of record.

The Court further finds that the amount of the Judgment rendered on December 16, 1988, in favor of the Plaintiff United States of America, and against the Defendants, Noel F. Glenn and Billie M. Glenn, with interest and costs to date of sale is \$43,275.18.

The Court further finds that the appraised value of the real property at the time of sale was \$18,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered December 16, 1988, for the sum of \$12,001.00 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 December 6, 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, Noel F. Glenn and Billie M. Glenn, as follows:

Principal Balance as of 12-16-88	\$26,653.86
Interest	13,542.31
Late Charges to Date of Judgment	567.12
Appraisal by Agency	550.00
Management Broker Fees to Date of Sale	1,487.60
Abstracting	95.00
Publication Fees of Notice of Sale	154.29
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$43,275.18
Less Credit of Appraised Value	<u>-18,000.00</u>
DEFICIENCY	\$25,275.18

plus interest on said deficiency judgment at the legal rate of 4.41 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of

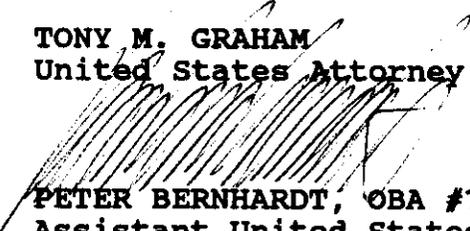
Judgment rendered herein and the appraised value of the property herein.

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, Noel F. Glenn and Billie M. Glenn, a deficiency judgment in the amount of \$25,275.18, plus interest at the legal rate of 4.41 percent per annum on said deficiency judgment from date of judgment until paid.


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

PB/esr

File No: 06.2-5

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

GEORGE W. OWENS,

Plaintiff,

vs.

TED J. STEVENS,

Defendant and
Third Party Plaintiff

vs.

DEL MAR ANGUS FARMS, INC.,
an Oklahoma corporation; DON
SUMTER, an individual; and
JERRY L. CRAWFORD, an individual,

Third-Party Defendants

vs.

MORSE-SEXTON, INC., an Oklahoma
Corporation; MARVIN MORSE, an
individual; and CHARLES T.
SEXTON, an individual.

Additional
Third-Party Defendants.

Case No: 88-C-358-B

FILED

DEC 17 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter comes before the Court on Plaintiff's Motion to Dismiss filed herein on the 12th day of November, 1991. Upon consideration of the argument and authorities set forth by Plaintiff, this Court finds that it does not have jurisdiction of the claims between George W. Owens and Del Mar Angus Farms, Inc., Jerry L. Crawford and Don Sumter because the claims do

not involve a federal question and there is no diversity of citizenship between these parties. All claims between George W. Owens and Del Mar Angus Farms, Inc., Jerry L. Crawford and Don Sumter should therefore be and are hereby dismissed.

IT IS SO ORDERED.

DATED THIS 17th DAY OF December, 1991

S/ THOMAS R. BRETT

THOMAS R. BRETT,
UNITED STATES DISTRICT JUDGE

7339r

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

GEORGE W. OWENS,)
)
) Plaintiff,)
)
 vs.)
)
 TED J. STEVENS,)
)
) Defendant and)
) Third-Party Plaintiff,)
)
 vs.)
)
 DEL MAR ANGUS FARMS, INC.,)
) an Oklahoma Corporation; DON)
) SUMTER, an individual; and)
) JERRY L. CRAWFORD, an individual,)
)
) Third-party Defendants,)
)
 vs.)
)
 MORSE-SEXTON, INC., an Oklahoma)
) Corporation; MARVIN MORSE, an)
) individual; and CHARLES T.)
) SEXTON, an individual,)
)
) Additional)
) Third-Party Defendants.)

Case No. 88-C-358-B

FILED

DEC 17 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Defendant Ted J. Stevens's Motion to Dismiss Claims Against Third Party Defendants Jerry L. Crawford and Del Mar Angus Farms, Inc. is hereby granted. Each party is to bear its own costs and attorney fees.

SO ORDERED this 17th day of December, 1991.

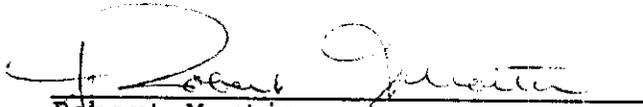
S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:



D. Kevin Ikenberry
Attorney for Defendant,
Ted J. Stevens



Robert Martin
Attorney for Third-Party
Defendant, Don Sumter

Jerry L. Crawford, pro se

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

DEC 18 1991
CLERK OF COURT
NORTHERN DISTRICT OF OK

DANIEL FRY, et al,)
)
 Plaintiffs,)
)
 v.)
)
 TODAY'S HOMES, INC., et al,)
)
 Defendants.)

90-C-925-C ✓

ORDER

Now before the Court is an appeal from The United States Bankruptcy Court For The Northern District Of Oklahoma by Citicorp National Services, Inc. ("Citicorp"). The appeal focuses on whether the Bankruptcy Court's \$57,468.33 judgment against Citicorp - which included a \$25,000 punitive damage sanction -- was valid.

Upon review, the Bankruptcy Court's decision is **affirmed** in respect to actual damages and the attorneys fees and costs. The decision to punish Citicorp by awarding \$25,000 in punitive damages is **reversed**.

Facts

Daniel and Marla Fry bought a mobile home from Today's Homes on October 21, 1981. Today's Homes assigned the retail installment contract and security agreement to Citicorp. Citicorp perfected its security interest in the mobile home. The Frys defaulted on the contract. *Journal Entry of Judgment, page 2, January 24, 1989.*

After the default, in May of 1983, a Citicorp representative told Today's Homes to repossess the mobile home. On June 7, 1983, the Frys filed bankruptcy. According to the

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clerk

Bankruptcy Court's factual findings, Today's Homes and Citicorp received notice of the bankruptcy on that same day.¹ Today's Homes received its second notice of the bankruptcy petition on June 15. *Id.* The next day Citicorp officials talked to the owner of Today's Homes about whether the Frys filed bankruptcy.

Subsequently, on June 18, 1983, Today's Homes repossessed the Frys' mobile home. On June 27, 1983, Citicorp and Today's Homes received what the Bankruptcy Court concluded was their third notice about Frys' bankruptcy petition. However, despite the repeated notices, neither Today's Homes nor Citicorp returned the Frys' mobile home or its contents.² The mobile home and its contents remained on the Today Homes' lot until January of 1984. The Frys say nearly all of their property inside the mobile home was "damaged, destroyed or lost." *Appellees' Brief In Response, page 1 (docket #10).*

On October 28, 1983, Citicorp filed a Motion For Relief from the Automatic Stay. On November 30, 1983, the Bankruptcy Court granted Citicorp's motion. Nearly three years later, on June 27, 1986, the Frys filed a complaint in Bankruptcy Court, claiming Citicorp violated the automatic stay.

On October 19, 1988, the Bankruptcy Court found that Citicorp violated the stay by authorizing and directing Today's Home to repossess the mobile home. No sanctions were issued by the court. Citicorp appealed the decision to this Court. On November 27,

¹ *Meredith McKammon, an employee of Fry's attorney, called the secretary of attorney Orlin Woodie Hopper and told her that the Frys had filed bankruptcy. Hopper represented both Today's Homes and Citicorp.*

² *Citicorp had no security interest in the contents of the mobile home. The Frys say they asked Citicorp numerous times to return their personal property. In February of 1984, Marla Fry took some of the items and noticed that other property was either damaged or missing. The Frys asked Citicorp to locate the missing items and return all of the property. Citicorp refused. Nearly three years later, Marla Fry "took everything of hers that had been stored by Citicorp which was still in usable condition." Citicorp asked Fry to sign a form relinquishing rights to pursue Citicorp for loss of goods. When Fry refused, she was denied further access. Appellees' Brief In Response, page 6 (docket #16).*

1989, this Court instructed the Bankruptcy Court to determine whether Citicorp's actions amounted to a contempt of court, and, if so, to assess appropriate damages.

On August 24 and on September 20 of 1990, the Bankruptcy Court held contempt hearings. The court then concluded that repossessing the mobile home and then failing to return the Frys' property constituted two violations of the automatic stay and found Citicorp in contempt. The court sanctioned Citicorp for \$57,468.33, including \$25,000 in punitive damages. *Memorandum Opinion, October 18, 1990, page 2*. On October 31, 1990, Citicorp again appealed to this Court.³

Standard of Review

This Court cannot disturb the bankruptcy court's findings of fact unless they are clearly erroneous. *Hall v. Vance, 887 F.2d 1041, 1043 (10th Cir. 1991)*. A factual finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* However, this court may exercise de novo review over the bankruptcy court's conclusions of law. *In Re Branding Iron Motel, 798 F.2d 396, 399 (10th Cir. 1986)*. See also, In re Red Ash Coal & Coke Corp., 83 B.R. 399, 400-401 (W.D. Va. 1988).

³ *The issues raised by Appellant are: 1)The Bankruptcy Court erred in permitting the Frys' to maintain a private right of actions for damages in a manner other than prescribed by Bankruptcy Rule 9020; 2)The Bankruptcy Court erred in imposing vicarious liability on Citicorp for the acts of Today's Homes; 3)The Bankruptcy Court erred in finding that Citicorp's temporary possession of the Frys' personal property constituted either a common law conversion or a violation of the automatic stay; 4)The Bankruptcy Court erred in finding Citicorp in contempt and, even should this court affirm the Bankruptcy Court's finding, the Bankruptcy Court imposed an excessive punitive sanction; 5)The Bankruptcy Court erred in failing to find that repossession of the Frys' mobile home constituted a transfer of possession pursuant to Okla. Stat. tit. 12A, §9-504(5); 6) The Bankruptcy Court erred in failing to find that the Frys' withdrawal of their objection to Citicorp's Motion For Relief from the Stay constituted a waiver of their right to maintain an action for damages, and 7)The Bankruptcy Court erred in the amount of attorney fees and costs it awarded the Frys.*

The Bankruptcy Courts Findings Of Fact

The Bankruptcy Court made the following findings of fact: Citicorp authorized and directed Today's Homes to repossess the Frys' mobile home in May. The Frys filed bankruptcy on June 7, 1983. Today's Homes -- which received two notices of the bankruptcy petition -- repossessed the mobile home on June 18, 1983. Today's Homes and Citicorp then kept the mobile home and its contents until January of 1984. Journal Entry of Judgment, January 24, 1989.

Appellant, who requests a *de novo* review of all issues, does not question these findings of fact.⁴ Nevertheless, a review of the record shows that findings are not clearly erroneous.

Did Today's Homes Act On Behalf Of Citicorp?

The first issue to consider is whether Today's Homes acted as Citicorp's agent when it repossessed the Frys' mobile home after the automatic stay and then failed to return it. Agency is ordinarily a question of fact. Gilmore v. Constitution Life Ins. Co., 502 F.2d 1344, 1350 (10th Cir. 1974). If it appears from the facts and circumstances of case that there was at least implied intent between the parties to create an agency relationship, the relationship will be held to exist between them. *In re Brown*, 412 F.Supp. 1066, 1071 (W.D. Okla. 1975).⁵

⁴ Appellant primarily asserts that the Bankruptcy Court erred as a matter of law. They do not challenge the Bankruptcy Court's findings of fact, except the finding of agency. Opening Brief Of Citicorp National Services, Inc. In Support Of De Novo Review Of Judgment Order Of Bankruptcy Court (docket #5).

⁵ Also, see 2A C.J.S. Agency § 42.

The Bankruptcy Court found that Citicorp authorized and directed Today's Homes to repossess the trailer. Citicorp had a security interest in the trailer. When the Frys defaulted, Citicorp officials made the decision to repossess the mobile home. They communicated that to Today's Homes owner Don Thomason.⁶ Meanwhile, the Frys filed bankruptcy. Thomason, despite talking to Citicorp and receiving notices of the bankruptcy, repossessed the home.

No contract existed between the parties concerning the repossession of the mobile home. However, a contract is not necessary. An implied agency is also an actual agency, the existence of which is implied from the conduct of the parties. *Id.* The conduct of Citicorp in instructing Today's Homes to repossess the trailer implies an agency relationship. The Bankruptcy Court's decision on this issue was not clearly erroneous.

Therefore, Today's Homes -- as Citicorp's agent -- repossessed the mobile home after twice receiving notice of the Fry's bankruptcy petition. Neither Today's Homes nor Citicorp returned the mobile home or its contents after receiving notice of the petition from the bankruptcy court clerk. As a result, the Bankruptcy Court did not err when it concluded that Citicorp violated the automatic stay.⁷

The next issue focuses on whether the Bankruptcy Court properly exercised its

⁶ *Said Thomason at the trial: "About the first of June or the latter part of May, David Crouch -- this is not, I don't know the exact words, but he said, we've verified that they haven't filed bankruptcy but we want to get the home before their bankruptcy is filed. As so, move on that home and get it picked up." Transcript at page 113.*

⁷ *Citicorp argues first that Okla. Stat. tit. 12A 9-504(5) protects them from any violation of the automatic stay. The argument is unpersuasive. Citicorp directed Today's Homes to repossess the trailer. Today's Homes did so. The stay was violated. Nothing in the cases cited by Citicorp or in the language of 9-504(5) indicates that Citicorp should not be held responsible for the automatic stay violation. Also, this Court finds Citicorp's bailment argument difficult to follow. The Bankruptcy Court found that Citicorp, as a matter of fact, kept the mobile home and its contents -- despite having knowledge of the bankruptcy petition. That violation of the automatic stay cannot now be characterized as a "bailment."*

power in citing Citicorp for contempt for its violation of the automatic stay. Citicorp Citicorp argues that the Bankruptcy Court did not abide by Bankruptcy Rule 9020. It also asserts that the sanctions imposed by the court were excessive.

The Bankruptcy Court's Contempt Order Against Citicorp

The Bankruptcy Court awarded the Frys \$8,665 in actual damages and an additional \$23,803 in costs and attorney fees. Those damages and costs are not pertinent to this issue. What is important is whether the Bankruptcy Court had the power to mete out a further \$25,000 sanction for punitive damages. A federal bankruptcy court in Pennsylvania summarizes the issue:

These courts express concern that punitive damages would render an otherwise civil contempt remedy one for criminal contempt and that bankruptcy judges are without power to find criminal contempt. *In Re Grosse*, 84 B.R. 377, 388 (Bkrcty. E.D. Pa. 1988).

The distinction between civil and criminal contempt is important in this case. In 1983, a statute expressly stated that bankruptcy courts did not have criminal contempt power. 28 U.S.C. § 1481. But the Tenth Circuit has recently held that bankruptcy courts do possess civil contempt power pursuant to 11 U.S.C. § 105.⁸ *In Re Skinner*, 917 F.2d 444, 450 (10th Cir. 1991).

⁸ 28 U.S.C. § 105 states: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, from taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of the process."

The issue would likely be moot under 11 U.S.C. § 362(h).⁹ That statute grants bankruptcy courts the authority to assess punitive damages against parties who willfully violate an automatic stay. However, Citicorp's actions took place in 1983, about a year prior to the enactment of § 362(h). See, e.g., In re Promower, Inc., 56 B.R. 619, 623 (Bankr. D. Md. 1986) ("The court finds no authority prior to the enactment of §362(h) for the award of punitive damages for violation of the bankruptcy stay") (emphasis in original).

The question in this case is whether the Bankruptcy Court's assessment of a \$25,000 punitive damages sanction constituted a criminal or civil contempt order. Bankruptcy courts had civil contempt power in 1983 pursuant to §105; they did not have criminal contempt authority because of 28 U.S.C. §1481.

Civil contempt sanctions are employed only to coerce compliance with the court's order or to compensate an injured party for losses sustained because of the contemptuous behavior. *In Re Magwood*, 785 F.2d 1077, 1081 (D.C. Cir 1986). The primary beneficiaries of such an order are the individual litigants. *Agee v. Jane C. Stormont Hospital & Training*, 622 F.2d 496, 499 (10th Cir. 1980). Furthermore, the remedial aspects outweigh the punitive considerations. *Id. at 500*.

A criminal contempt order, however, punishes someone who defies a court's judicial authority. *Id.*¹⁰ The beneficiaries of such a contempt are the courts and the public

⁹ 11 U.S.C. § 362(h) states: "An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." Also, see *Budget Service Co. v. Better Homes of Virginia*, 804 F.2d 289 (4th Cir. 1986) where the court found that bankruptcy judges may enforce the sanctions of § 362(h) without reference to a finding of civil contempt.

¹⁰ Also, see *Petroleos Mexicanos v. Crawford Enterprises, Inc.*, 826 F.2d 392, 399 (5th Cir. 1987).

interest. *Norman Bridge Drug Co. v. Banner*, 529 F.2d 822 (5th Cir. 1976). *If monetary assessment of a specific amount is neither compensatory nor conditioned on the occurrence of future violation of court orders, it raises a presumption that the fine is punitive in nature. In Re Kave*, 760 F.2d 343, 351 (1st Cir. 1985).

In this case, the Bankruptcy Court ordered the \$25,000 sanction for punitive damages after a detailed discussion of Citicorp's behavior. The Court described how Citicorp repossessed the mobile home and the Fry's personal belongings, concluding that - in effect, the corporation left the family homeless. The Court also emphasized that Citicorp refused to remedy the situation, despite more than 200 calls from the Fry's attorney. As a result of that behavior, the Bankruptcy Judge wrote:

The Court finds that the actions of Citicorp in the present case meet the standards needed to impose punitive damages. Citicorp acted with actual knowledge that they were violating a federal protected right and acted with a reckless disregard to the rights of the Debtors in the property. Their conduct was oppressive and egregious and punitive or exemplary damages should be awarded to set an example and to punish the offender. The evidence here shows a complete reckless and wanton disregard of another's rights and evil intent may be inferred.

The Bankruptcy Court ordered the punitive damages, based, in part, on two decisions from the same federal bankruptcy court. The first concerned actions that took place after the enactment of § 362(h) and will not be discussed here. *In Re Wagner*, 74 B.R. 898, 903 (Bkrtcy. E.D.Pa. 1987).¹¹ The second decision, mentioned above, noted in dicta that bankruptcy courts have criminal contempt power. However, the judge did not reach the issue of whether he had the power to award punitive damages. *In Re Grosse* at 388.

¹¹ Concerning the power of punitive damages, the judge noted: "If nothing else, 362(h) lays to rest any doubt about the bankruptcy court's power to award punitive damages for a willful violation of the automatic stay."

In the instant case, the judge did not label his contempt order. He awarded actual damages, attorney fees and punitive damages. Actual damages and the awarding of attorney fees and costs are clearly products of a civil contempt finding. However, the punitive damages assessed against Citicorp do not meet that definition.

The tone and language of the punitive damage assessment is clear: the judge used the contempt to "set an example" and to "punish" Citicorp. The judge arbitrarily chose the \$25,000 amount, without any calculation or consideration of the damage done by Citicorp to the Frys. Furthermore, since Citicorp violated the stay seven years prior to his decision, the judge was not trying to coerce the corporation into compliance.

The Frys benefitted from the court's order. The \$25,000 will go to them in addition to the actual damages. A typical criminal contempt fine usually goes to the court's or the government's coffers. But that, in itself, does not mean the court and the public do not reap benefits. The judge -- by holding up banking giant Citicorp as an example -- apparently wanted to warn other creditors of the possible consequences in violating an automatic stay. The District of Columbia Circuit, which dealt with a similar case, wrote:

When cut to its core, the disputed contempt order appears designed solely to serve punitive ends. The purpose of a criminal contempt proceeding is the vindication of the court's authority by punishing for a past violation of a court order. We can find no other purpose here...With this punitive basis as the sole justification for its action, we find that the bankruptcy court exceeded its statutory authority. *In Re Magwood*, 785 F.2d 1077, 1083,1084 (D.C. Cir. 1986).

The facts of the instant case differs with that in *Magwood*. *Magwood* involved a creditor who repeatedly violated a bankruptcy court order. In response, the court's issued a contempt order that offered the creditor a list of options it could do to "purge herself of

contemptuous [sic] conduct." *Id. at 1080.*

In this case, the bankruptcy court awarded actual damages, attorney fees and costs, which fall within the definition of a civil contempt order. Then the court, similar to the one in *Magwood*, punished the creditor for a violation of a court order. The \$25,000 punitive damages sanctions, when cut to its core, appears designed solely to serve punitive ends. **Therefore, the \$25,000 sanction constituted a sanction for criminal contempt.**¹²

Having decided that the punitive damages constituted a criminal contempt order, this Court finds that the Bankruptcy Court -- in 1983 -- did not have power to issue such a contempt order.¹³ Even if a bankruptcy court could impose such damages as a matter of raw judicial power, it is inequitable to do so against a creditor for actions taken in 1983 given the unsettled state of the law at that time. Therefore, the \$25,000 award of punitive damages is reversed.¹⁴

Reasonableness of Attorney Fees

The Bankruptcy Court awarded \$18,475 to the Debtors' attorney, which was one-half of what they requested. Citicorp argues that the Bankruptcy Court's award of attorney fees "was not determined by any objective method." *Brief, page 21 (docket #5).*

¹² *The decision is a close call, and if § 362(h) was in effect at the time of Citicorp's actions, this issue would be moot. However, the Bankruptcy Court declared it was punishing Citicorp for the automatic stay violation. Based on a review of the above cases, such an action does not fit into the concept of civil contempt.*

¹³ *In addition to statute 28 U.S.C. § 1481, which was in effect in 1983, two circuits have ruled that bankruptcy courts do not have criminal contempt power. See Matter of Hipp, Inc., 895 F.2d 1503 (5th Cir. 1990), and In Re Magwood, supra. The Tenth Circuit has not yet decided the issue. In Re Skinner, 917 F.2d at 447, note 2.*

¹⁴ *In respect to Citicorp's argument that Bankruptcy Rule 9020 was not followed, Citicorp did have notice and a hearing on the contempt issue. The Bankruptcy Court did not follow the procedure set out in Rule 9020 in its contempt proceeding, but this Court still finds that the Bankruptcy Court was within its power in awarding actual damages and attorney fees. It is absurd to suggest that Citicorp did not receive adequate notice, given the history of this litigation.*

A bankruptcy court's award of attorney fees will not be disturbed unless there is an abuse of discretion or an erroneous application of law. *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986).

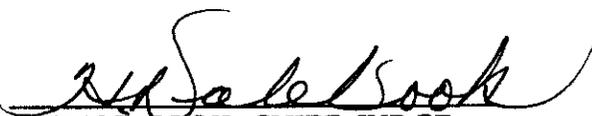
In this case, the Bankruptcy Court examined affidavits of the various attorneys. They submitted fee requests for \$36,950. The Bankruptcy Court analyzed those affidavits as well as other pertinent factors. It then concluded that fees should be cut in half to \$18,475. Such a decision is not an abuse of discretion. Therefore, the Bankruptcy Court's decision on this issue is **affirmed**.

Conclusion

As a matter of law, the Bankruptcy Court did not err when it found Citicorp violated the automatic stay. Nor did it err, as a matter of law, when it awarded the Frys attorneys fees and costs. It did err by meting out \$25,000 in punitive damages in an effort to punish Citicorp.

As a result, the Bankruptcy Court's decision that Citicorp violated the automatic stay is **AFFIRMED** as is its decision awarding \$8,665.00 in actual damages and \$23,803.00 in attorney fees and costs. However, the Bankruptcy Court's decision in respect to the \$25,000 in punitive damages is **REVERSED**.

SO ORDERED THIS 9th day of December, 1991.


H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT JUDGE

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

JOHN R. KOVACIC,)
)
 Plaintiff,)
)
 v.)
)
 OTASCO, INC., et al,)
)
 Defendants.)

90-C-914-C ✓

FILED

DEC 16 1991

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ORDER

Now before this Court is an appeal of an October 16, 1990 decision of the United States Bankruptcy Court of the Northern District of Oklahoma. Appellant John R. Kovacic raises two issues: 1) Whether the Bankruptcy Court erred in relying upon 11 U.S.C. §545 in denying Crawford County's objection to a joint motion, and 2) Whether the Bankruptcy Court erred in finding no property of the debtor's was transferred in Kansas.

Facts

In 1987 and 1988, Appellee Otasco, Inc. owned and operated a store in Crawford County, Kansas. Otasco engaged in retail merchandise sales. Part of those sales were on credit terms extended directly by Otasco. Otasco financed the credit sales by extending credit to a customer, charging interest and other finance charges. Ameritrust Company National Association ("AmeriTrust"), Otasco's principal secured lender, asserted a lien in nearly all Otasco property.¹

¹ According to Appellee's brief, AmeriTrust asserted a lien in all Otasco property, including all "retail inventory, furniture, fixtures, equipment, leasehold interest, intangibles, other tangible property, and all of the customer accounts receivable credit accounts owed to Otasco by retail customers." Response Brief Of Appellee, page 2 (docket #7).

Pursuant to Kansas Statute Ann. 79-309, all personal property in Kansas is assessed for taxation on January 1st of each year and owners of said property are required to file a personal property tax statement on or before April 1st each year.

On April 1, 1988, Otasco, Inc. filed a Kansas Personal Property return for the 1988 tax year. Based upon this return, Appellant, who was the Crawford County Treasurer, levied a \$6,176.35 personal property tax against Otasco. Seven months later, on November 6, 1988, Otasco filed for bankruptcy. It had not paid the \$6,176.35 in property tax. On that day, records show that Otasco owed Ameritrust more than \$87 million. *See Order And Judgment Approving The Settlement Agreement Between Otasco and AmeriTrust, page 6.* Ameritrust filed its proof of claim on November 17, 1988. *Id.*

On December 8, 1988, Crawford County filed a proof of claim for \$6,176.35. Subsequently, on September 20, 1990, Otasco and the Ameritrust Company National Association filed a joint motion seeking an order for various reasons.² One of the purposes of the order was approval of a settlement agreement between Otasco and Ameritrust. Under the Joint Motion and the Settlement Agreement, all Otasco assets not transferred to Ameritrust would remain Otasco property which would remain subject to any valid creditor claims pursuant to the Bankruptcy Code.

Kovacic filed an objection to the joint motion, claiming that Kansas Statute 79-309 granted Crawford County a lien on Otasco's assets which was in preference to all other claims against such property.

² Otasco sought an order (1) approving a proposed settlement agreement; (2) allowance of Ameritrust's secured claim against Otasco; (3) allowing transfer of certain assets free and clear of liens and, (4) assignment or rejection of leases and executory contracts.

On October 15, 1990, the Bankruptcy Court conducted a hearing on the Joint Motion. A day later, the Bankruptcy Court entered an Order and Judgment Approving the Settlement Agreement between Otasco and Ameritrust. Kovacic filed this appeal on October 26, 1990.

Legal Analysis

This Court may set aside findings of fact only if they are clearly erroneous. Conclusions of law, however, are subject to de novo review. *In Re Herd*, 840 F.2d 757, 759 (10th Cir. 1988).

The foundation of Appellant's argument is Kansas Statute Ann. 79-2020 (1988 Supp.). It reads in part:

If any owner of personal property surrenders or transfers such property to another after the date such property is assessed and before the tax thereon is paid, whether by voluntary repossession or any other voluntary act in reduction or satisfaction of indebtedness, then the taxes on the personal property of such taxpayer shall fall due immediately, and a lien shall attach to the property so surrendered or transferred, and shall become due and payable immediately. Such lien shall be in preference to all other claims against such property...

Otasco argues that the Bankruptcy Court held, as a finding of fact, that no personal property of the Otasco store in Crawford County, Kansas was ever transferred. As a result, Otasco argues that the above statute does not apply.

The Bankruptcy Court found that no personal property was ever surrendered or transferred from Crawford County, Kansas. The Bankruptcy Court apparently made that factual finding after discussing the issue with Kovacic's counsel on the telephone.³ The

³ Neither Kovacic nor his counsel appeared at the Bankruptcy Court hearing on this issue. Instead, the Bankruptcy Judge talked to Kovacic's counsel on the telephone.

Bankruptcy Judge asked counsel what property was in Kansas. Replied Counsel: "I don't have that in front of me." *Response Brief of Appellee, Otasco, Inc., Exhibit A.* In fact, during the entire telephone conversation, Kovacic's counsel never told the Bankruptcy Court what property had been located in Kansas prior to the bankruptcy.

After reviewing the record, this Court finds that the Bankruptcy Court was not "clearly erroneous" in concluding that none of Otasco's personal property was ever located in Crawford County. Logic would dictate that some type of property may have been present, given the fact that Otasco had a store in Crawford County. But without any proof on the record, this Court cannot now reverse the Bankruptcy Court's factual finding. And with the factual finding remaining intact, the Bankruptcy Court cannot be said to have erred as a matter of law when it did not apply Kansas Statute Ann. 79-2020.⁴

Conclusion

Therefore, this Court **AFFIRMS** the decision of the Bankruptcy Court in its Order and Judgment Approving The Settlement Agreement Between Otasco, Inc. And AmeriTrust Company National Association.

SO ORDERED THIS 16th day of December, 1991.


H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

⁴ Kovacic asserts that Board of County Commissioners Of Saline County v. Knights Athletic Goods, Inc., 98 B.R. 553 (D. Kan. 1989) applies here. However, that case dealt with 15 U.S.C. §646. This one does not.

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PLAINTIFFS

KOVACIC, JOHN R. (1), COUNTY
TREASURER, CRAWFORD CTY, KS
(PLTF & APPELLANT)

DEFENDANTS

OTASCO, INC. (1), A NEVADA
CORPORATION (DEFT, APPELLEE &
DEBTOR)
AMERITRUST COMPANY NATIONAL (2)
ASSOCIATION (DEFT)
(2A)

VP

Entered

CAUSE: BANKRUPTCY; Appeal 28 USC 158

COUNSEL FOR PLAINTIFF(S)

BARRY K. DISNEY
105 E. PRAIRIE - BOX 163
GIRARD KS 66743
(316)724-4115
For:
KOVACIC, JOHN R. (1), COUNTY TRE

COUNSEL FOR DEFENDANT(S)

GARY M. MCDONALD
JOHN J. CARWILE
DOERNER, STUART, SAUNDERS, ET AL
1000 ATLAS LIFE BUILDING
TULSA OK 74103
(918)582-1211
For:
OTASCO, INC. (1), A NEVADA CORPO

RONALD W. HANSON
DOUGLAS BACON, JONATHAN FEIGER
LATHAM & WATKINS
5800 SEARS TOWER
CHICAGO IL 60606
For:
AMERITRUST COMPANY NATIONAL (2)

GARY H. BAKER
BAKER, HOSTER, MCSPADDEN, ET AL
800 KENNEDY BUILDING
TULSA OK 74103
For:
(2A)

DATE	NR.	PROCEEDINGS	Page 1
10/26/90	1	NOTICE OF APPEAL TO COURT OF APPEALS from Bkcy Ct. (88-03410-W). hc (fees pd in bkcy)	
10/26/90	---	MO REFERRING case to Mag Wolfe for resolution on all future disc. (HDC-J) hc	
11/06/90	2	NOTICE of amended appeal by John Kovacic, creditor. pw	
12/20/90	3	RECORD on appeal from bky. ltr sent pw LAYING IN BROWN FOLDER	
01/02/91	--	BRIEFING schdl will be stayed until all trans frm Bkcy are fld; a new briefing schdl will be sent.a	
01/07/91	4	AMENDMENT of Otasco to ctr-desgs of Rcrd to w/draw req/trnscrpt.p	
02/19/91	5	BRIEF of appellant (Kovacic) pw	
02/20/91	6	ADDENDUM to record on appeal. ag	
03/05/91	7	RESPONSE BRIEF of Otasco. pw	
06/13/91		ORDER that case rfrd to MAG for advisory hrg. (HDC-J/pw) c/ds	
06/20/91	---	MO: ADVISORY HRG set before Mag Wolfe on 7-24-91 @ 10:30am. (JSW-MAG) jcm c/mld	
07/15/91	8	MOTION of Kovacic for cont of advis hrg. (02BN) pw	
07/24/91	9	ORDER for cont of advis hrg until 8-19 @ 9:30.(JSW-MAG) c/m pw	
08/19/91	---	MIN: ADV HRG held; Mag takes u/advisement.(JSW-MJ) jcm #24 tele.	
12/16/91	10	ORDER that Bky decision AFFIRMED in Order & jmnt approving stlmnt agrmnt btwn Otasco & AmeriTrust. Entered(HDC-J)c/m,bky p EOD 12-16	

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 16 1991

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 FIROUZ NOURI,)
)
 Defendant.)

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 91-C-531-B

DEFAULT JUDGMENT

This matter comes on for consideration this 16th day of December, 1991, the Plaintiff appearing by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendant, Firouz Nouri, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Firouz Nouri, was served with Summons and Complaint on September 13, 1991. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

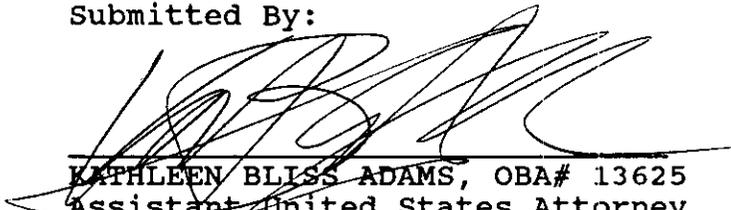
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Firouz Nouri, for the principal amount of \$1,275.00, accrued interest of \$423.65 as of May 28, 1991, administrative costs in the amount of \$87.00, interest thereafter at the rate of 3 percent per annum

until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus interest thereafter at the current legal rate of 4.41 percent per annum until paid, plus costs of this action.

S/ THOMAS R. BRETT

United States District Judge

Submitted By:



KATHLEEN BLISS ADAMS, OBA# 13625
Assistant United States Attorney
3900 United States Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

are in arrears on payments due under their respective first mortgages to William J. Wade, Trustee ("Wade").

In each Chapter 13 Plan, the arrearages due Wade were scheduled to be paid with the contractual \$5.00 penalty for each late month, but without interest on the total arrearages, although the defaults were not to be immediately cured upon confirmation. In addition, although attorney fees were provided for in these plans to Wade's attorney, no interest was to be paid on the allowed secured claims for these attorney fees.

In each case the Chapter 13 Plans were confirmed by the Bankruptcy Court and no interest on arrearages or on attorney fees was awarded. Appellant appeals from the lower courts' denials of interest.

Appellant relies on In Re Thomas, 115 B.R. 305 (Bankr. E.D. Okla. 1990), In Re Latimer, 110 B.R. 968 (W.D. Okla. 1989), Hardzog v. Federal Land Bank of Wichita, 901 F.2d 858 (10th Cir. 1990), and U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989). However, the court finds these authorities unpersuasive.

The courts in In Re Thomas and In Re Latimer relied on In Re Colegrove, 771 F.2d 119 (6th Cir. 1985), in determining that interest was due on arrearages. The court in In Re Colegrove held that interest was required by § 1325(a)(5)¹ of Title 11 of the

¹ Title 11 of the Bankruptcy Code, § 1325(a), states in pertinent part as follows:

- (a) Except as provided in subsection (b), the court shall confirm a plan if --
- (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;
 - (2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;
 - (3) the plan has been proposed in good faith and not by any means forbidden by law;

Bankruptcy Code, despite the fact that the creditor's rights had not been subjected to modification pursuant to that provision. The majority based its conclusion on the fact that it had previously held that even unsecured creditors were entitled to interest under § 1325 in some cases under the best interests of creditors test, so it would be anomalous to deny interest to a secured creditor in a cure situation. The dissent in Colegrove pointed out that neither the present value test of § 1325(a)(5), nor the best interest of creditors test of § 1325(a)(4), applies where a default is cured pursuant to § 1322(b)(5).²

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- (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;
 - (5) with respect to each allowed secured claim provided for by the plan --
 - (A) the holder of such claim has accepted the plan;
 - (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
 - (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
 - (C) the debtor surrenders the property securing such claim to such holder; and
 - (6) the debtor will be able to make all payments under the plan and to comply with the plan.

² Title 11 of the Bankruptcy Code, § 1322(b), states in part:

- (b) Subject to subsections (a) and (c) of this section, the plan may --
 - (1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims;
 - (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;
 - (3) provide for the curing or waiving of any default;

Section § 1322(b)(5) merely requires that a Plan may provide for the curing of any default within a reasonable time. When a default is cured under § 1322(b)(5), a creditor's rights are not modified. The contract terms remain in force, except for the injunction against foreclosure. However, under the present values tests of § 1325(a), a creditor is compensated when his rights have been modified by a reduction in payments, interest charges, or the total amount due. Under § 1322(b)(5), the creditor receives the interest, charges and costs to which he is entitled under the contract and non-bankruptcy law. Usually a creditor is not entitled under its contract to receive interest on previously accrued interest or attorney's fees and costs.

The dissent in Colegrove noted that to grant interest on the default would improperly modify a contract between a creditor and a debtor, contravening section 1322(b)(2). The contracts in the appeals before this court provide that the Creditor, now Wade, is to receive as compensation for late payments no more than 5% of each delinquent installment, not to exceed \$5 per installment. Therefore, if the court grants interest on delinquent amounts under the cure provisions of section 1322(b)(5), the rights of the Debtors will be modified to their detriment, since Wade is asserting a right to both late payment charges and 10% on all arrearage amounts, including the late charges.

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The Supreme Court's decision in U.S. v. Ron Pair Enterprises, Inc. indicated that the holder of an oversecured claim should be allowed interest on its claim, as well as on reasonable fees, costs or charges provided for under the agreement under which such claim arose under 11 U.S.C. 506(b).³ While § 506 applies to Chapter 13 proceedings (see 11 U.S.C. § 103(a)), and therefore an oversecured creditor is entitled to postpetition interest on a secured claim under Chapter 13, the oversecured creditor's right to the interest is qualified by the interplay between §§ 1322(b) and 1325(a) with respect to modification and cure. Under Chapter 11, the holder of a claim which is secured must be paid a stream of payments equal to the present value of the entire secured claim as of the effective date of the confirmed Chapter 11 Plan. This provision of the Bankruptcy Code, § 1129 of Title 11, is not applicable to the "cure" provisions of Section 1322(b)(5). The Chapter 11 proceeding in Ron Pair did not involve the provisions of § 1322(b)(5) of the Bankruptcy Code.

The Tenth Circuit's decision in Hardzog v. The Federal Land Bank of Wichita dealt only with the determination of interest rates in a Chapter 12 proceeding.

³ Title 11 of the Bankruptcy Code, § 506, reads in part as follows:

- (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.
- (b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

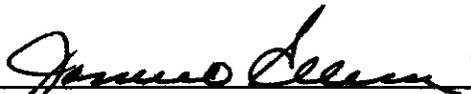
This court finds the reasoning in Shearson Lehman Mortgage Corp. v. Laguna, 944 F.2d 542 (9th Cir. 1991), persuasive. In that case the judges concluded that the majority of courts since the Ron Pair decision have properly found that an oversecured creditor is not entitled to postpetition interest on the debtor's prepetition mortgage arrearages. The court said:

We find the reasoning of the Third, Fourth, and Eleventh Circuits, as well as of Judge Celebrezze in his dissent [in In Re Colegrove], to be persuasive and adopt it as the rule of this Circuit. We therefore hold that the [bankruptcy appellate panel] did not err by affirming the bankruptcy court's denial of SLMC's request for postpetition interest on the debtors' prepetition arrearages, as their repayment constituted a cure of the default and not a modification of the underlying contract. Because SLMC is not being deprived of its property, either in the form of principal or interest, since the cure merely reinstates the parties' original agreement, we find that there is no fifth amendment violation.

Congress determined the treatment to be afforded the curing of defaults in Chapter 13 proceedings in §§ 1322(b)(2) and 1322(b)(5). These sections do not alter the contract between the parties governing such matters as the interest, if any, to be paid on arrearage. Since the contracts between the parties in the appeals at issue provide that penalties for late payments are limited to 5%, not to exceed \$5 per delinquent payment, any other amount of interest would be improper.

It is ordered that the Bankruptcy Court's decisions should be and hereby are affirmed.

Dated this 16th day of December, 1991.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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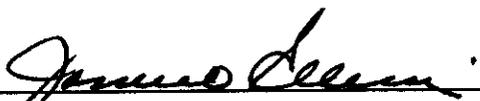
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It is ordered that the Bankruptcy Court's decisions should be and hereby are affirmed.

Dated this 16th day of December, 1991.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

FILED
DEC 16 1991

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

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
PS

BONITA HYATT,)
)
 Plaintiff,)
)
 v.)
)
 CNG PRODUCING COMPANY,)
)
 Defendant.)

No. 91-C-708-B ✓

ORDER

Before the Court is the motion to transfer filed by the defendant, CNG Producing Company ("CNG").

The plaintiff, Bonita Hyatt, filed this action on September 20, 1991 under Title VII, 42 U.S.C. §2000e *et seq.* and under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, alleging that she was discriminated on the basis of her religion, sex and age. The plaintiff also alleges negligent and intentional misrepresentation, negligent and intentional infliction of emotional distress, breach of employment contract and breach of implied covenant of good faith and fair dealing.

The plaintiff was employed by CNG on April 11, 1988 as an attorney in CNG's Tulsa office. In February 1989, CNG's legal department was transferred to the New Orleans office. At the plaintiff's request, her transfer was delayed and she was allowed to remain in Tulsa until May 1989 to enable her children to finish school prior to her relocation. On September 12, 1990, over a year after the plaintiff relocated to CNG's New Orleans office, she was terminated. After her termination, the plaintiff filed a charge

with the Equal Employment Opportunity Commission ("EEOC") in New Orleans, alleging that she had been laid off as a result of CNG's discrimination against her religion, sex and age. The EEOC dismissed the charge finding no violation of Title VII or ADEA.

The Court concludes that this case should be transferred to the United States District Court for the Eastern District of Louisiana in accordance with the venue provision of Title VII. Section 2000e-5 (f)(3) provides that venue is established

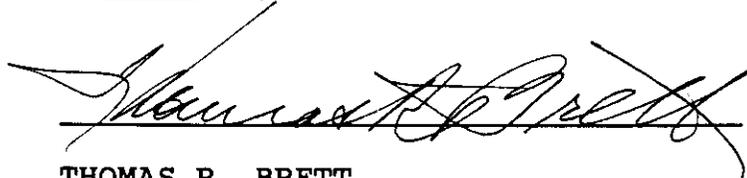
. . . in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of Sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

The Eastern District of Louisiana is the judicial district where the plaintiff's employment was terminated, the employment records are kept, and the plaintiff would have worked had she continued her employment. Because the plaintiff's Title VII claim arises from CNG's alleged discrimination in the termination of her employment, venue for the plaintiff's Title VII claim properly lies in the Eastern District of Louisiana.

Although venue is proper in this Court under 28 U.S.C. §1391 for plaintiff's remaining claims, the Court concludes that in the

interest of justice the case should be transferred to the Eastern District of Louisiana where all claims can be heard. 28 U.S.C. §1404(a).

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

A handwritten signature in cursive script, appearing to read "Thomas R. Brett", written over a horizontal line.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

DEC 15 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TULSA DENTAL PRODUCTS, LTD.,)
an Oklahoma limited partnership,)
)
Plaintiff,)
)
v.)
)
HI-TECH COMPANY, a foreign)
corporation,)
)
Defendant.)

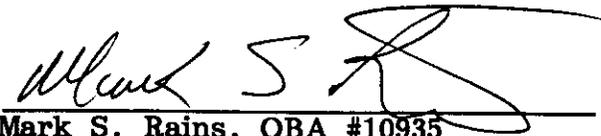
Case No. 91-C-0043B

**JOINT STIPULATION OF
DISMISSAL WITH PREJUDICE**

The plaintiff, Tulsa Dental Products, Ltd. ("TDP"), and the Defendant, Hi-Tech Company, stipulate that this case, including all claims, causes of actions and counterclaims, be dismissed with prejudice pursuant to Federal Rule 41(a)(1), for the reason that the parties have entered into a full and final settlement of the issues and controversies pending between them, with each side to bear their respective costs and attorney fees.

WHEREFORE, based on the settlement of the case, the parties stipulate that this case is dismissed with prejudice.

TULSA DENTAL PRODUCTS, LTD.

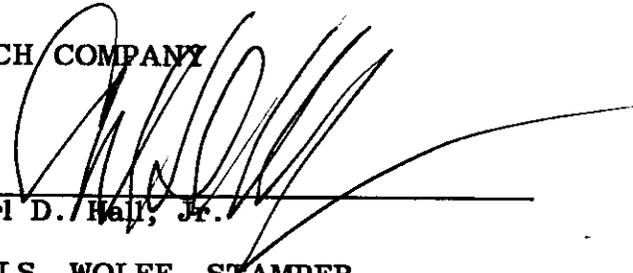
By: 

Mark S. Rains, OBA #10935

ROSENSTEIN, FIST & RINGGOLD
525 South Main, Suite 300
Tulsa, OK 74103
(918) 585-9211

Attorneys for Tulsa Dental Products, Ltd.

HI-TECH COMPANY

By: 

Carl D. Hall, Jr.

NICHOLS, WOLFE, STAMPER,
NALLY & FALLIS, INC.
124 East 4th Street, Suite 400
Tulsa, OK 74103

(918) 584-5182

mar/tdp/HT-Dis-wPrej

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

WILLIAM J. WADE, TRUSTEE,)
)
) APPELLANT,)
)
 VS.)
)
)
)
) RONNIE HANNON AND ROSETTA HANNON,)
)
) APPELLEES,)
)
)
)
) WILLIAM J. WADE, TRUSTEE,)
)
) APPELLANT,)
)
)
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 VS.)
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)
) DONALD NEAL RAKE AND LINDA JEAN)
)
) RAKE,)
)
) APPELLEES,)
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) WILLIAM J. WADE, TRUSTEE,)
)
) APPELLANT,)
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 VS.)
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)
)
) EARNEST WILLIAM YELL AND MARY)
)
) KATHRYN YELL,)
)
)
)
) APPELLEES.)

FILED

11 6 1991

Richard L. Howard, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 91-C-477-E ,
(Consolidated)
91-C-572-E, and
91-C-632-E

ORDER

The Appellees are debtors in three separate Chapter 13 bankruptcy proceedings in the United States Bankruptcy Court for the Northern District of Oklahoma. All Appellees

are in arrears on payments due under their respective first mortgages to William J. Wade, Trustee ("Wade").

In each Chapter 13 Plan, the arrearages due Wade were scheduled to be paid with the contractual \$5.00 penalty for each late month, but without interest on the total arrearages, although the defaults were not to be immediately cured upon confirmation. In addition, although attorney fees were provided for in these plans to Wade's attorney, no interest was to be paid on the allowed secured claims for these attorney fees.

In each case the Chapter 13 Plans were confirmed by the Bankruptcy Court and no interest on arrearages or on attorney fees was awarded. Appellant appeals from the lower courts' denials of interest.

Appellant relies on In Re Thomas, 115 B.R. 305 (Bankr. E.D. Okla. 1990), In Re Latimer, 110 B.R. 968 (W.D. Okla. 1989), Hardzog v. Federal Land Bank of Wichita, 901 F.2d 858 (10th Cir. 1990), and U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989). However, the court finds these authorities unpersuasive.

The courts in In Re Thomas and In Re Latimer relied on In Re Colegrove, 771 F.2d 119 (6th Cir. 1985), in determining that interest was due on arrearages. The court in In Re Colegrove held that interest was required by § 1325(a)(5)¹ of Title 11 of the

¹ Title 11 of the Bankruptcy Code, § 1325(a), states in pertinent part as follows:

- (a) Except as provided in subsection (b), the court shall confirm a plan if --
- (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;
 - (2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;
 - (3) the plan has been proposed in good faith and not by any means forbidden by law;

Bankruptcy Code, despite the fact that the creditor's rights had not been subjected to modification pursuant to that provision. The majority based its conclusion on the fact that it had previously held that even unsecured creditors were entitled to interest under § 1325 in some cases under the best interests of creditors test, so it would be anomalous to deny interest to a secured creditor in a cure situation. The dissent in Colegrove pointed out that neither the present value test of § 1325(a)(5), nor the best interest of creditors test of § 1325(a)(4), applies where a default is cured pursuant to § 1322(b)(5).²

-
- (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;
 - (5) with respect to each allowed secured claim provided for by the plan --
 - (A) the holder of such claim has accepted the plan;
 - (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
 - (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
 - (C) the debtor surrenders the property securing such claim to such holder; and
 - (6) the debtor will be able to make all payments under the plan and to comply with the plan.

² Title 11 of the Bankruptcy Code, § 1322(b), states in part:

- (b) Subject to subsections (a) and (c) of this section, the plan may --
 - (1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims;
 - (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;
 - (3) provide for the curing or waiving of any default;

Section § 1322(b)(5) merely requires that a Plan may provide for the curing of any default within a reasonable time. When a default is cured under § 1322(b)(5), a creditor's rights are not modified. The contract terms remain in force, except for the injunction against foreclosure. However, under the present values tests of § 1325(a), a creditor is compensated when his rights have been modified by a reduction in payments, interest charges, or the total amount due. Under § 1322(b)(5), the creditor receives the interest, charges and costs to which he is entitled under the contract and non-bankruptcy law. Usually a creditor is not entitled under its contract to receive interest on previously accrued interest or attorney's fees and costs.

The dissent in Colegrove noted that to grant interest on the default would improperly modify a contract between a creditor and a debtor, contravening section 1322(b)(2). The contracts in the appeals before this court provide that the Creditor, now Wade, is to receive as compensation for late payments no more than 5% of each delinquent installment, not to exceed \$5 per installment. Therefore, if the court grants interest on delinquent amounts under the cure provisions of section 1322(b)(5), the rights of the Debtors will be modified to their detriment, since Wade is asserting a right to both late payment charges and 10% on all arrearage amounts, including the late charges.

-
- (4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim;
 - (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due

The Supreme Court's decision in U.S. v. Ron Pair Enterprises, Inc. indicated that the holder of an oversecured claim should be allowed interest on its claim, as well as on reasonable fees, costs or charges provided for under the agreement under which such claim arose under 11 U.S.C. 506(b).³ While § 506 applies to Chapter 13 proceedings (see 11 U.S.C. § 103(a)), and therefore an oversecured creditor is entitled to postpetition interest on a secured claim under Chapter 13, the oversecured creditor's right to the interest is qualified by the interplay between §§ 1322(b) and 1325(a) with respect to modification and cure. Under Chapter 11, the holder of a claim which is secured must be paid a stream of payments equal to the present value of the entire secured claim as of the effective date of the confirmed Chapter 11 Plan. This provision of the Bankruptcy Code, § 1129 of Title 11, is not applicable to the "cure" provisions of Section 1322(b)(5). The Chapter 11 proceeding in Ron Pair did not involve the provisions of § 1322(b)(5) of the Bankruptcy Code.

The Tenth Circuit's decision in Hardzog v. The Federal Land Bank of Wichita dealt only with the determination of interest rates in a Chapter 12 proceeding.

³ Title 11 of the Bankruptcy Code, § 506, reads in part as follows:

- (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.
- (b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

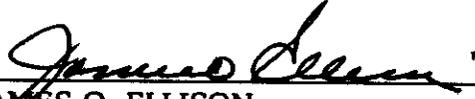
This court finds the reasoning in Shearson Lehman Mortgage Corp. v. Laguna, 944 F.2d 542 (9th Cir. 1991), persuasive. In that case the judges concluded that the majority of courts since the Ron Pair decision have properly found that an oversecured creditor is not entitled to postpetition interest on the debtor's prepetition mortgage arrearages. The court said:

We find the reasoning of the Third, Fourth, and Eleventh Circuits, as well as of Judge Celebrezze in his dissent [in In Re Colegrove], to be persuasive and adopt it as the rule of this Circuit. We therefore hold that the [bankruptcy appellate panel] did not err by affirming the bankruptcy court's denial of SLMC's request for postpetition interest on the debtors' prepetition arrearages, as their repayment constituted a cure of the default and not a modification of the underlying contract. Because SLMC is not being deprived of its property, either in the form of principal or interest, since the cure merely reinstates the parties' original agreement, we find that there is no fifth amendment violation.

Congress determined the treatment to be afforded the curing of defaults in Chapter 13 proceedings in §§ 1322(b)(2) and 1322(b)(5). These sections do not alter the contract between the parties governing such matters as the interest, if any, to be paid on arrearage. Since the contracts between the parties in the appeals at issue provide that penalties for late payments are limited to 5%, not to exceed \$5 per delinquent payment, any other amount of interest would be improper.

It is ordered that the Bankruptcy Court's decisions should be and hereby are affirmed.

Dated this 16th day of December, 1991.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 ORVILLE K. BODIFORD AND)
 LYNN M. BODIFORD)
)
 Defendants.)

Civil Action No. 91-C-322-E

F I L E D
DEC 18 1991

DEFAULT JUDGMENT

Richard L. ...
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

This matter comes on for consideration this 13th day of December, 1991, the Plaintiff appearing by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendants, Orville K. Bodiford and Lynn M. Bodiford, appearing not.

The Court being fully advised and having examined the court file finds that Defendants, Orville K. Bodiford and Lynn M. Bodiford, was served with Summons and Complaint on July 25, 1991. The time within which the Defendants could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendants have not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendants, Orville K. Bodiford and Lynn M. Bodiford, for the principal amount of

\$5,130.00, plus accrued interest of \$1,514.47 as of February 28, 1991, plus interest thereafter at the rate of 4 percent per annum until judgment, plus interest thereafter at the current legal rate of 4.41 percent per annum until paid, plus costs of this action.

BY JAMES D. ELISON

United States District Judge

Submitted By:



KATHLEEN BLISS ADAMS, OBA# 13625
Assistant United States Attorney
333 West 4th Street
Tulsa, Oklahoma 74103
(918)581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Civil Action No. 91-C-550-E
v.)	
)	
RAE ANN BENSON,)	
)	
Defendant.)	

DEFAULT JUDGMENT

This matter comes on for consideration this 15th day of Dec, 1991, the Plaintiff appearing by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendant, Rae Ann Benson, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Rae Ann Benson, was served with Summons and Complaint on August 18, 1991. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Rae Ann Benson, for the principal amount of \$1,000.00, plus administrative charges in the amount of \$87.00, plus accrued interest of \$323.47 as of June 19, 1991, plus interest thereafter at the rate of 5

percent per annum until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus interest thereafter at the current legal rate of 4.41 percent per annum until paid, plus costs of this action.

S/ JAMES D. ELISON

United States District Judge

Submitted By:



~~KATHLEEN BLISS ADAMS, OBA# 13625~~
Assistant United States Attorney
333 West 4th Street
Tulsa, Oklahoma 74103
(918) 581-7463

FILED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA DEC 13 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
ALPHONSO POST,)
)
Defendant.)

CIVIL ACTION NO. 91-C-467-B

DEFAULT JUDGMENT

This matter comes on for consideration this 13th day of December, 1991, the Plaintiff appearing by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendant, Alphonso Post, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Alphonso Post, was served with Summons and Complaint on September 25, 1991. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Alphonso Post, for the principal amount of \$1,202.50, accrued interest of \$342.03 as of March 25, 1991, administrative costs in the amount of \$87.00, interest thereafter at the rate of 3 percent per annum

until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus interest thereafter at the current legal rate of 4.78 percent per annum until paid, plus costs of this action.

THOMAS R. BRETT
United States District Judge

Submitted By:



KATHLEEN BLISS ADAMS, OBA# 13625
Assistant United States Attorney
3900 United States Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

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

FILED

DEC 13 1991 *rm*

THOMAS M. LAWRENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DANIEL B. McDEVITT,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant and
Counterclaim Plaintiff,
vs.
WALTER H. McKENZIE, CLARENCE
EUTSLER, TROY EUTSLER and
RICHARD W. EUTSLER,
Counterclaim Defendants.

No. 89-C-576-C ✓

JUDGMENT

This matter came before the court for consideration on non-jury trial. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for plaintiff and against defendant in the amount of \$80.00 as to plaintiff's claim and that judgment is entered in favor of plaintiff and against defendant as to defendant's counterclaim and that defendant take nothing thereby.

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

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

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

FILED

DEC 13 1991

CLARENCE
CREEK
COURT
HOUSE

DANIEL B. McDEVITT,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Defendant and)
Counterclaim Plaintiff,)
)
vs.)
)
WALTER H. MCKENZIE, CLARENCE)
EUTSLER, TROY EUTSLER and)
RICHARD W. EUTSLER,)
)
Counterclaim Defendants.)

No. 89-C-576-C

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This action was tried to the Court without a jury on June 10, 11, 12, 26 and 27, 1991. Upon consideration of the pleadings, the briefs of the parties, the stipulations of fact, the evidence presented at trial and the proposed findings of fact and conclusions of law of the parties, the Court hereby enters its Findings of Fact and Conclusions of Law.

Nature of the Action

On February 6, 1985, the plaintiff Daniel B. McDevitt and others were assessed a 100 percent penalty pursuant to the provision of 26 U.S.C. §6672 in the amount of \$340,968.29 in connection with their activities at the Ace-Hi Equipment Company,

in 1981 and 1982. The assessment related to the unpaid trust fund taxes that arose at Ace-Hi during the first, second and fourth quarters of 1981, and the first, second, and third quarters of 1982. On or about May 13, 1986, the Internal Revenue Service (IRS) abated \$12,844.25 against McDevitt for the quarter ending March 31, 1981 because this amount had been paid by the corporation, and abated \$75,531.00 for the quarter ending June 30, 1982 and \$39,826.10 for the quarter ending September 30, 1982 because McDevitt resigned from Ace-Hi on April 12, 1982 and was therefore not responsible for any payroll taxes owed by the corporation thereafter. Therefore, the amount of \$212,766.21 remains assessed against McDevitt for the following quarters in the following amounts:

<u>Quarters</u>	<u>Amount</u>
2nd Quarter 1981	\$74,714.52
4th Quarter 1981	56,582.67
1st Quarter 1982	74,601.83
2nd Quarter 1982	<u>6,867.19</u>
	212,766.21

This assessment arises because of the underlying withholding tax liability of Ace-Hi. Ace-Hi has failed to pay the federal withholding tax liability for the periods at issue. McDevitt has failed to pay any of such assessment except \$80.00, and the government seeks from McDevitt the sum of \$212,686.21, plus interest according to law.

McDevitt was denied an IRS administrative refund claim, and filed this suit for refund of \$80.00. United States filed counterclaims of \$212,686.21 against McDevitt, and \$328,124.04 against Walter H. McKenzie, Clarence Eutsler, Richard W. Eutsler and Troy Eutsler.

For various reasons, the other counterclaim defendants are not before the Court. Only McDevitt and the United States proceeded to trial.

Findings of Fact as to Responsibility

1. From April 1, 1981 through April 12, 1982, the plaintiff was the Vice-President and Secretary of Ace-Hi. (Testimony of plaintiff McDevitt).
2. From April 1, 1981 through April 12, 1982, the plaintiff had authority to sign checks on behalf of Ace-Hi. (Testimony of plaintiff McDevitt).
3. This signature authority of plaintiff was for the general corporate account of Ace-Hi maintained in the First National Bank of Broken Arrow. (Testimony of plaintiff McDevitt; Defendant Exhibit 116).
4. From April 1, 1981 through April 12, 1982, the plaintiff did in fact sign some checks on behalf of Ace-Hi. The number of checks signed was small, however. (Testimony of plaintiff McDevitt; Defendant Exhibits 38, 45, 47, 109, and 110).
5. These checks were written to entities or individuals other than the Internal Revenue Service. Several were in the nature of c.o.d. payments. None were payroll checks. (Testimony

of plaintiff McDevitt; Defendant Exhibits 38, 45, 47, 109, and 110).

6. Only one signature was required for checks drawn on the general corporate operating account maintained in the First National Bank at Broken Arrow over which plaintiff had signature authority. (Testimony of Walter McKenzie and Gregory Jones; Defendant Exhibit 49).

7. McDevitt resigned as Treasurer on May 29, 1981 (Plaintiff's Exhibit 5).

8. McDevitt left Oklahoma on May 30, 1981, and did not return until July 5, 1981. (Plaintiff's Exhibit 54). McDevitt was not active on behalf of Ace-Hi during months of June and July, 1981, and did not invoice for services or expenses for both months per agreement. (Plaintiff's Exhibit 52, 11, 56). (McDevitt & McKenzie testimony).

9. After McDevitt's resignation (May 29, 1981) as Treasurer, Jones assumed the duties of banking receipts and paying disbursements until control was assumed by Clarence E. and Richard W. Eutsler, in late November, 1981. (McKenzie testimony).

10. McDevitt resumed part-time activity with Ace-Hi in early August, 1981.

11. From April 1, 1981 through April 12, 1982, the plaintiff owned 15% of the stock of Ace-Hi. (McDevitt testimony).

12. From April 1, 1981, through December 1, 1981, Gregory Jones directly prepared, along with plaintiff, documents detailing the financial status of Ace-Hi. (Testimony of Gregory Jones).

13. From April 1, 1981 through late November 1981, plaintiff had the authority to authorize the issuance of payroll checks on behalf of Ace-Hi. (Testimony of Walter McKenzie, Clarence Eutsler and Gregory Jones).

14. From April 1, 1981 through late November, 1981, plaintiff oversaw and participated in the decisions regarding the financial matters pertaining to Ace-Hi. (Testimony of Walter McKenzie, Clarence Eutsler and Gregory Jones).

15. Plaintiff negotiated with the Marine bank for the financing of an oil right purchased by Ace-Hi during 1981. (Testimony of Gregory Jones, Walter McKenzie and Clarence Eutsler).

16. From April 1, 1981 through April 12, 1982, plaintiff guaranteed certain loans of Ace-Hi.

17. After Clarence Eutsler and Richard Eutsler moved their office to the Ace-Hi quarters in Tulsa, Oklahoma, which was in late November, 1981, Clarence Eutsler and Richard Eutsler took total control of the disbursement of funds for Ace-Hi, and all checks had to be approved by the Eutslers. (Testimony of McDevitt and Gregory Jones). The McKenzie testimony to the contrary is discredited by his generally poor memory. The Court finds Clarence Eutsler's testimony to the contrary not credible.

18. After 11/20/81 meeting with IRS's Revenue Officer Wayne E. King, it was understood that Clarence Eutsler would see that Ace-Hi paid current withholding tax on time and catch up with delinquent periods. McDevitt would only act as liaison with IRS as

current withholding taxes were paid. (McDevitt, Jones and McKenzie testimony).

19. McKenzie testified that it was his duty, not McDevitt's, to pay any delinquent withholding taxes.

20. McDevitt's duties did not include deciding on creditor payment preference or payment of taxes.

21. McDevitt did not have the power to compel McKenzie or the Eutslers to pay any creditor, including the IRS.

22. Plaintiff's authority to hire and fire personnel was limited to the Sales Department. (McKenzie testimony).

23. The bank account at the First National Bank at Broken Arrow, upon which plaintiff was a signatory, had more than sufficient funds to pay the withholding taxes herein issue, at least from April 1, 1981 through April 6, 1982. (Defendant's Exhibits 25-27, 31-37). Plaintiff was a "responsible person" from April 1, 1981 until late November, 1981.

Findings of Fact as to Willfulness

1. There is conflicting testimony as to when McDevitt learned of the Ace-Hi withholding delinquency. McDevitt testified that he learned at his 11/20/81 meeting with an IRS representative. Gregory Jones testified that he sent monthly lists of accounts payable to the company officers, including plaintiff. However, there was testimony that not all reports were received by the officers. The Court finds credible McDevitt's testimony as to the date and to his belief that in any event the deficiencies were being handled by others.

2. From April 1, 1981 through December 1, 1981, at least once a month, a list of the accounts payable of Ace-Hi was distributed to all owners of Ace-Hi, including plaintiff, by the comptroller, Gregory Jones. (Testimony of Gregory Jones).

3. This list of accounts payable included all withholding taxes owed by Ace-Hi. (Testimony of Gregory Jones).

4. From at least April 1, 1981 through December 1, 1981, Gregory Jones paid the bills of Ace-Hi as he was directed to by the owners of Ace-Hi, including plaintiff. (Testimony of Gregory Jones).

5. While plaintiff met with IRS representatives he merely served as company liaison. He resigned as liaison upon learning of a deficiency.

6. Plaintiff did not willfully fail to pay the delinquent withholding taxes, either by paying other creditors with knowledge that withholding taxes were due at the time or by acting with reckless disregard of a known or obvious risk that the tax withholdings would not be paid.

Conclusions of Law

1. This Court has jurisdiction of this matter pursuant to 26 U.S.C. §7402(a), and 28 U.S.C. §§1340, 1345 and 1346.

2. Venue is proper in this district pursuant to 28 U.S.C. §1402.

3. On a claim under 26 U.S.C. §6672, 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).

4. For a person to be liable under §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).

5. The phrase "responsible person" as contemplated by §6672 includes an officer or employee of a corporation who is under a duty to collect, account for, or pay over the withheld tax. 26 U.S.C. §6671(b). Also, responsibility is a "matter of status, duty and authority, not knowledge." Factors to be considered in determining whether one is a "responsible person" include whether the person in question held corporate office, the degree to which the person exercised control over financial affairs of the corporation, authority to disburse corporate funds, and the person's ability to hire and fire employees. More than one person may be a responsible officer of the corporation under §6672.

Scott v. United States, 702 F.Supp. 261, 263 (D.Colo. 1988) (citations omitted).

The central question is whether an individual had the effective power to pay taxes. Morgan v. United States, 937 F.2d 281, 284 (5th Cir. 1991).

6. The second element, "willfully", as used in §6672, means a "voluntary, conscious and intentional decision to prefer other creditors over the Government. It does not require bad motive as in a criminal case."

Scott, 702 F.Supp. at 263.

7. For the reasons detailed above, plaintiff sustained his burden of proof and was not a "responsible person" under 26 U.S.C. §6671(b) after late November, 1981, and did not willfully fail to collect and pay over taxes at any time.

To the extent any Findings of Fact constitute Conclusions of Law or any Conclusions of Law constitute Findings of Fact, they shall be so considered.

It is the Order of the Court that Judgment be entered in favor of the plaintiff and against the defendant.

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



H. DALE COOK

Chief Judge, U. S. District Court

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

VERDA BERGMAN,

Plaintiff,

vs.

W.H. BERGMAN and BETTY JANE
BERGMAN, Husband and Wife;
UNITED STATES OF AMERICA,
ex rel., FARMERS HOME
ADMINISTRATION, UNITED STATES
DEPARTMENT OF AGRICULTURE,

Defendants,

and

UNITED STATES OF AMERICA on
behalf of the Farmers Home
Administration,

Third-Party Plaintiff,

vs.

COUNTY TREASURER, Mayes County,
Oklahoma; and BOARD OF COUNTY
COMMISSIONERS, Mayes County,
Oklahoma,

Third-Party Defendants.

~~FILED~~

~~DEC 11 1991~~

~~Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA~~

FILED

DEC 12 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Civil Action No. 90-C-761-E

Case No. C-90-357

Mayes County District Court

AGREED DEFICIENCY JUDGMENT

This matter comes on for consideration this 12th day
of December, 1991, upon the Motion of the Third-Party
Plaintiff, United States of America, acting on behalf of the
Farmers Home Administration, for leave to enter an Agreed
Deficiency Judgment. The Third-Party Plaintiff appears by
Tony M. Graham, United States Attorney for the Northern District
of Oklahoma, through Phil Pinnell, Assistant United States
Attorney, and the Defendants, W.H. Bergman and Betty Jane
Bergman, appear by their attorney, Phyllis A. DeWitt.

The Court being fully advised and having examined the court file finds that a copy of Third-Party Plaintiff's Motion was mailed to Phyllis A. DeWitt, Esq., 9726 East 42nd St., Ste. 221, Tulsa, OK 74146, Attorney for Defendants, W.H. Bergman and Betty Jane Bergman, and all other counsel and parties of record.

The Court further finds that the amount of the Judgment rendered on January 30, 1991, in favor of the Third-Party Plaintiff United States of America, and against the Defendants, W.H. Bergman and Betty Jane Bergman, with interest and costs to date of sale is \$264,049.51.

The Court further finds that the appraised value of the real property at the time of sale was \$200,800.00.

The Court further finds that Plaintiff, Verda Bergman, is the first lienholder, with a prior note and mortgage on the subject property, with a total debt of \$145,310.51.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered January 30, 1991, for the sum of \$135,000.00.

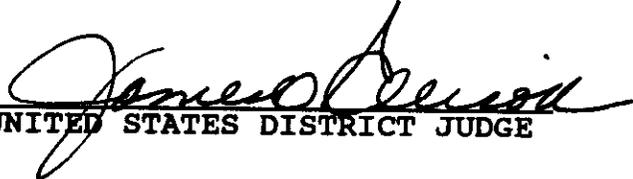
The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on 12/10, 1991.

The Court further finds that the Third-Party Plaintiff, United States of America on behalf of the Farmers Home Administration, is accordingly entitled to a deficiency judgment against the Defendants, W.H. Bergman and Betty Jane Bergman, computed as follows:

Principal Balance as of 1-30-91	\$161,529.95
Interest	101,947.59
Title Opinion	125.00
Publication Fees of Notice of Sale	221.97
Court Appraisers' Fees	<u>225.00</u>
THIRD-PARTY PLAINTIFF'S JUDGMENT	\$264,049.51
PLAINTIFF'S JUDGMENT	<u>\$145,310.51</u>
TOTAL SUM OF JUDGMENTS	\$409,360.02
LESS APPRAISED VALUE	- <u>\$200,800.00</u>
DEFICIENCY	\$208,560.02

plus interest on said deficiency judgment at the legal rate of 4.98 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the sum of the Judgments rendered herein and the appraised value by the court appointed appraisers of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Farmers Home Administration have and recover from Defendants, W.H. Bergman and Betty Jane Bergman, a deficiency judgment in the amount of \$208,560.02, plus interest at the legal rate of 4.98 percent per annum on said deficiency judgment from date of judgment until paid.


 UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney


PHIL PINNELL, OBA #7169
Assistant United States Attorney


PHYLLIS A. DEWITT, OBA #2333
Attorney for W.H. and Betty Jane Bergman

Agreed Deficiency Judgment
Civil Action No. 90-C-761-E

PP/esr

FILED

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

DEC 12 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BARBARA L. MORTON,)
)
 Plaintiff,)
)
 v.)
)
 SUN REFINING & MARKETING COMPANY,)
 a Pennsylvania Corporation; and)
 TOM FEWOX, DENNIS HOLLAND, and)
 TOM COLLINS, individuals,)
)
 Defendants.)

Case No. 91-C-0033-E

ORDER

This matter having come before the Court this 12th day
of December, 1991, upon the parties' Joint Stipulation of
Dismissal With Prejudice and for good cause shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this action
be dismissed with prejudice to the filing of a future action, the
parties to bear their own costs and attorneys' fees.

5/ JAMES O. ELLISON

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

F I L E D

DEC 11 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LEONARD DEWAYNE DICK and,)
 ELIZABETH ANNE DICK,)
)
 Debtors,)
)
 LEONARD DEWAYNE DICK,)
)
 Appellant,)
)
 v.)
)
 WESTSTAR BANK, N.A.,)
 BARTLESVILLE,)
)
 Appellee,)
)
 WESTSTAR BANK, N.A.,)
 BARTLESVILLE,)
)
 Cross-Appellant,)
)
 v.)
)
 LEONARD DEWAYNE DICK,)
)
 Cross-Appellee.)

91-C-306-B ✓

ORDER

Now before the Court is Leonard Dewayne Dick's appeal of a 1991 decision of the United States Bankruptcy Court For The Northern District Of Oklahoma. The Bankruptcy Court found that Dick's \$25,916.35 debt to Weststar Bank was not dischargeable pursuant

to 11 U.S.C. 523 (a)(2)(b).¹

Facts

Weststar, a Bartlesville bank, developed a loan program in 1989 called the "Executive Resource Account". *Trial Transcript*, p. 13. The account, which targeted the borrowing needs of high income individuals, allowed qualified bank customers to obtain a \$25,000 unsecured line of credit.² In an effort to market the Executive Resource Account, Weststar mailed applications to selected individuals who had been "pre-approved".

Dick, a 14-year employee of Phillips Petroleum, mistakenly received one of the pre-approved applications in 1989.³ Dick, who admittedly needed the money, then filled out the application. However, Dick testified that he did not use correct information on the application. *Id. at page 40*. When asked about his "balance of loans and credit cards outstanding", Dick estimated his debt at \$30,000 -- \$137,000 less than what it should have been. *Id. at page 40*. In addition, Dick estimated his monthly payments at \$1,200, which was \$2,100 less than the actual figure. *Id. at page 40 See Exhibit I, Appendix to Appellant's Brief (docket #9)*.

Once Dick mailed in the application with the incorrect information, Weststar approved it without further investigation on March 21, 1989. *Tr. Transcript at page 24*.

¹ The applicable part of the statute states: "A discharge...does not discharge an individual debtor from any debt for money, property, services, or an extension, renewal, or refinancing for credit, to the extent obtained by...use of a statement in writing - (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive. Both parties admit that the focus of this appeal is on elements iii and iv.

² To qualify for the program, individuals must meet three categories: 1) An annual income of at least \$50,000; 2) Their monthly payments cannot exceed 45% of gross monthly income, and 3) Their debt to net worth ratio could not be higher than one-to-one. *Appellee's Brief*, page 4 (docket #18).

³ Weststar officials thought they had mailed the application to a Leo Dick. That Dick worked for IBM, not Phillips. The appellant, Leonard Dewayne Dick, testified that he had been banking at Weststar since 1975. *Trial Transcript*, page 59.

Dick then participated in the program for a year before bank officials discovered Dick had misled them about his debt. Weststar terminated Dick from the program on March 28, 1990, nine days after Dick had supplied them with a more accurate four-page statement of his financial condition.

Four months later, on July 2, 1990, Dick -- whose financial situation deteriorated -- filed for bankruptcy. On September 21, 1990, Weststar filed a Complaint, arguing that Dick's debt was not dischargeable. On October 11, 1990, Dick filed an Answer, contending the debt should be discharged. Following an April 29, 1991 trial, the Bankruptcy Court found that the debt was not dischargeable pursuant to § 523(a)(2)(b). Dick filed this appeal on May 8, 1991.

Standard of Review

Factual findings of the bankruptcy court are reviewed under a clearly erroneous standard.⁴ The clearly erroneous standard does not permit a trier of fact to be overturned because an appellate court is convinced it would have decided the case differently. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511 (1985). Instead, where two permissible conclusions can be drawn, the factfinder's choice cannot be clearly erroneous.

Legal Analysis

There are two issues to be considered on appeal. Both parties agree that the first two elements of §523(a)(2)(b) are met: (i) the information placed by Dick on the

⁴ *Conclusions of law by the bankruptcy court are reviewed de novo. However, both parties agree the "clearly erroneous" standard applies in this case. In addition, a bankruptcy court's determination of dischargeability is subject to a clearly erroneous standard of review. Matter of Bonnett*, 895 F.2d 1155, 1157 (7th Cir. 1989).

application was materially false, and (ii) the information respected the debtor's financial condition. Therefore, this appeal focuses on the final two elements of the statute. The first issue is whether the Bankruptcy Court's factual finding that Dick had requisite intent to commit fraud on Weststar is clearly erroneous. Secondly, Dick asserts the Bankruptcy Court erred when it found that Weststar reasonably relied on the incorrect application when it granted the \$25,000 line of credit to Dick.

A. Did The Bankruptcy Court Err When It Found That Dick Defrauded Weststar?

Dick argues that the Bankruptcy Court's finding of fact that he intentionally defrauded Weststar by incorrectly filling out the application is clearly erroneous. Dick asserts that "no extrinsic evidence of possible intent to defraud" appears in the trial transcript with the exception of the incorrect information on the application. *Appellant Brief, page 8 (docket #8)*. This fact alone, Dick contends, is not enough evidence to allow the Bankruptcy Court to find the requisite intent needed in §523 (a)(2)(b).

Weststar, on the other hand, maintains that "the huge discrepancy" between the information reflected on the application and on the four-page financial statement establishes "such a reckless disregard for the truth than an intent to deceive may be expressly inferred from the evidence." *Appellee Brief, page 13 (docket #13)*.

The application asked Dick to supply information for eleven different subjects, including his name, telephone number, social security number and address. In addition, it requested that Dick put his household's annual salary, the balance of loans and credit cards outstanding and the amount of his monthly debt payments. Dick gave incorrect information on each of the three categories. No one disputes that the information he

supplied on the application improved his chances of getting the line of credit.

Dick testified that he did not intentionally deceive Weststar when he placed incorrect information on the application. *Trial Tr., page 41.* He testified that he filled in the application with numbers "off the top of my head." *Id.* But Dick also testified that the information he put on the application was false.

The focus of Dick's appellant argument is that he did not intentionally set out to deceive Weststar. However, the requisite intent in § 523(a)(2)(b) may be inferred from a sufficiently reckless disregard of the facts. *In Re Black, 787 F.2d 503, 506 (10th Cir. 1986).* In addition, a statement need only be made with reckless disregard for the truth to make the underlying debt nondischargeable under §523(a)(2)(b). *In Re Liming, 797 F.2d 895, 897 (10th Cir. 1986).* Further, "the debtor's unsupported assertions of honest intent will not overcome the natural inferences from admitted facts." *Id.*

The issue then becomes whether the Bankruptcy Court was clearly erroneous when if found that Dick's actions in filling out the application was done with a reckless disregard of the facts. The facts were that Dick owed \$167,000; he indicated on his application he only owed \$30,000. His monthly payments hovered around \$3,300; he indicated on his application that it was only \$1,200. The combined annual salaries of he and his wife was some \$81,000; he indicated on his application they made \$85,000 a year.

In each case, Dick put the number on his application that could have only helped him secure the line of credit. A \$137,000 discrepancy on his debt, coupled with a monthly payment nearly three times what he put on the application, creates a natural inference that Dick's actions constituted a reckless disregard of the facts. He could have overestimated

his debt and monthly payments. He could have underestimated his annual salary. But he did not. In addition, there is no evidence that Dick was a novice at filling out such applications. He held a high-paying job at Phillips for 14 years. In addition, given the amount of his debt, it is apparent that he had dealt with credit applications numerous times. Therefore, this Court does not find the Bankruptcy Court's factual finding on this matter clearly erroneous.

B. Did Weststar Reasonably Rely on Dick's Application When Issuing The Line Of Credit?

Weststar mailed the application to the wrong Leo Dick. Appellant Dick received the application, supplied wrong information and then returned the application to Weststar. Weststar did not attempt to double-check or verify the information; it simply approved the \$25,000 line of credit. The issue is whether the Bankruptcy Court was clearly erroneous when it found that Weststar **reasonably** relied on the application when issuing the line of credit.⁵

The standard of reasonableness places a measure of responsibility upon a creditor to ensure that there exists some basis for relying upon the debtor's representation. *In Re Mullett*, 817 F.2d 677, 679 (10th Cir. 1987). Such reasonableness, however, will be evaluated according to the particular facts and circumstances present in a given case. *Id.* In addition, §523(a)(2)(B) does not require that a creditor rely exclusively on the false financial statement. *In Re Liming*, 797 F.2d 895, 897 (10th Cir. 1986). Partial reliance is enough. *Id.* at 898.

Glenn Bonner, Weststar's executive vice-president, testified that Weststar used a

⁵ Wrote the Bankruptcy Court: "I am thoroughly convinced that the bank relied on the particular information given, and further, it seems to me that certainly the reliance was reasonable." *Trial Transcript*, page 100.

formula to determine whether someone would receive the \$25,000 line of credit.⁶ Bonner said the number supplied by Dick initially passed the formula, which is why the application was approved. Bonner and others also said that if Dick had supplied the correct information, he would not have qualified for the Executive Resource Account. Bonner also testified that Weststar's reliance on Dick application -- without doing further investigation - was reasonable. No testimony at trial contradicted Bonner's statement.

The testimony of Charles Brannon, a Weststar vice-president, mirrored that of Bonner's. He said Dick's application would not have been approved had the correct information been supplied. *Tr. Tran., page 33*. Cecil Epperley, another Weststar vice-president, testified that the his bank anticipated that any information put on a credit application should be accurate. *Id. at page 58*. Testimony at trial also indicated that Dick was the only individual that supplied wrong information on the application for the line of credit.

Testimony at the trial indicates that Weststar relied on Dick's application in granting the line of credit. Testimony also showed that Weststar had no reason to doubt the validity of the information by Dick until it discovered that he was not the one targeted for its Executive Resources Account number. Furthermore, testimony by the bank officials indicated that the "pre-approved" line of credit would only be granted if the figures in the initial application would have been correct.

There is little question that had Weststar officials double-checked Dick's application this lawsuit may have been avoided. Given the problems of the banking industry in dealing

⁶ See footnote 2.

with bad loans, a further investigation of such an application is logical. However, this Court's review is limited to a clearly erroneous standard. Therefore, a permissible conclusion can be drawn from the testimony that Weststar acted reasonably in relying on Dick's application, given the particular facts and circumstances of this case.⁷ As a result, this Court finds that the Bankruptcy Court did not err on this issue.

C. Should Weststar Be Awarded Attorney Fees?

The Bankruptcy Court held that Weststar, as the creditor, should not be awarded attorney fees. Weststar disagrees, citing *In Re Martin*, 761 F.2d 1163, 1168 (6th Cir. 1985) for the proposition that "creditors are entitle to recover attorney's fees in bankruptcy claims if they have a contractual right." Weststar admits there is no contractual right in this case, but argues that 12 O.S. § 936 (1991) mandates such an attorney fee.⁸

The Sixth Circuit in *Martin* discussed why Congress did not expressly make provisions for attorney fees to creditors. It emphasized that Congress was concerned about creditors using the threat of litigation to induce consumer debtors to settle for reduced sums. In addition, the court quoted the following legislative history:

The bill does not award the creditor attorney's fees if the creditor prevails. Though such a balance might seem fair at first blush, such a provision would restore the balance back in favor of the creditor by inducing debtors to settle no matter what the merits of their cases. In addition, the creditor is generally better able to bear the costs of the litigation than a bankrupt debtor, and it is likely that a creditor's attorney's fees should be substantially higher than a debtor's, putting an additional disincentive on the debtor to

⁷ However, it should be noted that this Court thinks the bank's conduct in sending out a "pre-approved" application to the wrong person and then compounding the error by not verifying Dick's application is suspect. However, the standard of review for this Court on this issue is whether the Bankruptcy Court's finding is clearly erroneous. It is not. See, *Anderson*, 105 S.Ct. at 1512.

⁸ That statute provides, in part, that in "any action to recover an open account, a statement of account, account stated [or] note...the prevailing party shall be allowed a reasonable attorney fee."

litigate. *H.R. Rep. No. 595, 95th Cong., 1st Sess. 364 (1977)*. Also, see *In Re Martin* at page 1168.

Based on the above public policy argument, coupled with the fact that there was no contractual right for Weststar to receive attorney fees in this litigation, this Court finds that the Bankruptcy Court did not err as a matter of law when it refused to award attorney fees to Weststar .

Conclusion

Had Weststar not mailed its pre-approved credit application to the wrong person or had the bank double-checked Dick's application, perhaps the \$25,000 line of credit would have not been awarded to the Appellant. However, it is not the role of this Court to second-guess banking practices. Instead, the issue is whether the Bankruptcy Court was clearly erroneous when it found that the elements of §523(a)(2)(B) were met.

Based on the evidence, there is little question that Dick showed a reckless disregard for the facts when he underestimated his debt by \$137,000. In addition, he told the bank his monthly payments were \$1,200 -- instead of the correct \$3,300. The bank should be able to rely on such applications to be accurate. As a result, the Bankruptcy Court did not err when it found that Dick committed fraud on Weststar .

Secondly, the Bankruptcy Court found that Weststar reasonably relied on Dick's incorrect information when it granted the \$25,000 line of credit. The testimony indicates that such a view is a permissible one based on the facts. This Court will not interfere with that ruling.

Finally, Weststar -- the creditor -- requests attorney fees in this action. The Bankruptcy Court denied such a request. After examining both parties' arguments on the

issue, this Court finds that the Bankruptcy Court did not err as a matter of law when it denied attorney fee's to Weststar . Accordingly, the Bankruptcy Court's decision is **AFFIRMED.**

SO ORDERED THIS 15th day of Dec., 1991.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

DEC 11 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JEFFERY DEAN KING,)
)
Petitioner,)
)
vs.)
)
RON CHAMPION, Warden, et al.,)
)
Respondents.)

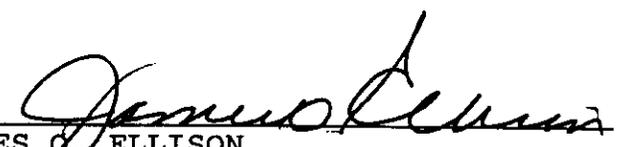
No. 91-C-21-E ✓

ORDER

This Order will serve to ratify the Court's original Order affirming the Magistrate's Report and Recommendation. It has been brought to the Court's attention that the Petitioner did file an Objection to the Report and Recommendation. The Objection was styled as a "Motion" and appeared as a motion entry in the case docket sheet. The Court has now considered the objection of Petitioner to the Magistrate's Report and Recommendation and finds that this matter should be dismissed for failure to exhaust administrative remedies.

IT IS THEREFORE ORDERED that the Court's original Order affirming the Magistrate's Report and Recommendation is hereby ratified. This case is dismissed.

So ORDERED this 11th day of December, 1991.



JAMES C. ELLISON
UNITED STATES DISTRICT JUDGE

FILED

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

DEC 11 1991

dl

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MOUNTAIN STATES FINANCIAL)
RESOURCES, CORP.,)
)
Plaintiff,)
)
vs.)
)
DODSON AND COCHRAN AIR)
CONDITIONING, INC., AND)
RUSSELL G. DODSON, an)
individual,)
)
Defendants.)

No. 91-C-89-E ✓

ORDER

Now before this Court is Plaintiff's Motion for Summary Judgment. The motion is granted for the following reasons.

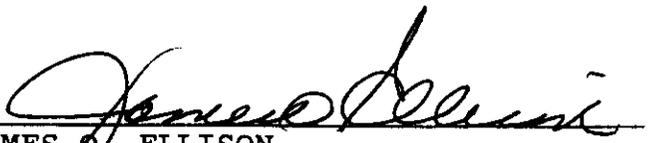
Rule 56(c) of the Federal Rules of Civil Procedure provides for summary judgment against a party who, after time for discovery, fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Defendants have failed to respond to Plaintiff's motion. However, the Court has made an independent assessment of Defendants' position as it appears on the record. And the Court finds that under Celotex and its progeny, the motion should be granted.

IT IS THEREFORE ORDERED that Plaintiff's motion for summary judgment is granted.

24

ORDERED this 11th day of December, 1991.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED

DEC 11 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

PATSY WEGLEY,

Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

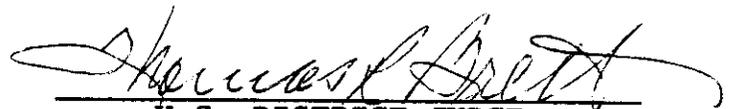
Defendant.

Case No. 91-C-183-B ✓

ORDER OF DISMISSAL WITH PREJUDICE

THIS MATTER comes before the Court on the Joint Application of the parties hereto. The Court finds that all of the issues between the parties have been completely settled and compromised, and therefore dismisses the above-entitled cause of action with prejudice as to any future actions.

SO ORDERED this 10th day of November, 1991.


U.S. DISTRICT JUDGE

PREPARED BY:

JOHN A. GLADD OBA #3398
Attorney for Defendant
2642 East 21st, Suite 150
Tulsa, Oklahoma 74114-1739
(918) 744-5657

JAG:pm
11/18/91
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIS E. WARREN, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 G. F. LACAEYSE TRANSPORT, INC.,)
 et al.,)
)
 Defendants,)

Case No. 90-C-91-C

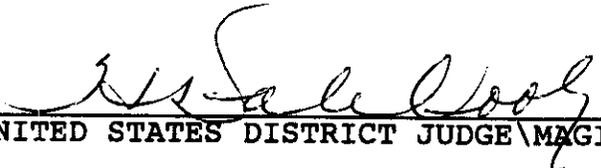
FILED

DEC 11 1991

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL WITH PREJUDICE

Now on this 11 day of December, 1991, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of future action.


UNITED STATES DISTRICT JUDGE/MAGISTRATE

FILED

DEC 11 1991

RICHARD L. WOODRUFF
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLA

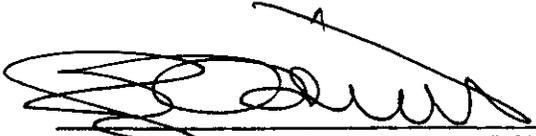
IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WESLEY MARTIN and JORLEAN MARTIN,)
)
 PLAINTIFFS,)
)
 v.)
)
 DON L. HAWKINS, M.D., individually)
 and d/b/a CENTRAL STATES)
 ORTHOPAEDIC AND SPORTS MEDICINE)
 CENTER; DON L. HAWKINS, M.D., INC.,)
 an Oklahoma Professional)
 corporation; BENJAMIN G. BENNER,)
 M.D.; NEUROLOGICAL SURGERY, INC.,)
 an Oklahoma corporation, and)
 SAINT FRANCIS HOSPITAL, INC., an)
 Oklahoma Nonprofit corporation,)
)
 DEFENDANTS.)

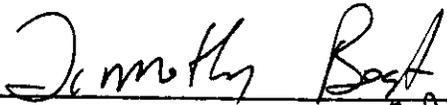
CASE NO. 91-C-547-B ✓

STIPULATION OF DISMISSAL

COME NOW the Parties, through their respective counsel,
pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure,
and stipulate to the dismissal of the above-styled and numbered action
in its entirety, without prejudice to the filing of a future action,
with each party to bear its own costs.


JOHN M. MERRITT - OBA #6146

MERRITT & ROONEY, INC.
P O BOX 60708
OKLAHOMA CITY, OKLAHOMA 73146
(405)236-2222
ATTORNEY FOR PLAINTIFF(S)



TIMOTHY BEST *2 gn*
100 W. Fifth Street
Tulsa, Oklahoma 74103
(918) 582-1234
ATTORNEY FOR DEFENDANTS,
DON L. HAWKINS, M.D., individually
and d/b/a/ CENTRAL STATES
ORTHOPAEDIC AND SPORTS MEDICINE
CENTER; DON L. HAWKINS, INC.;
BENJAMIN G. BENNER, M.D.;
NEUROLOGICAL SURGERY, INC.



MICHAEL BARKLEY *Barry L. Smith*
401 S. Boston Avenue
Tulsa, Oklahoma 74103
(918) 599-9991
ATTORNEY FOR DEFENDANT(S),
SAINT FRANCIS HOSPITAL, INC.

KAB/tb

12/06/91

*Entered as
to Harrower
only*

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

NATIONAL INSURANCE UNDERWRITERS,)
)
Plaintiff,)
)
v.)
)
MID-STATES AIRCRAFT ENGINES,)
INC., and JAMES K. HARROWER,)
)
Defendants.)

Case No. 91-C-642-C

F I L E D

DEC 11 1991

Richard H. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTRY OF DEFAULT JUDGMENT

This matter comes before the Court on the application of plaintiff, National Insurance Underwriters, for a default judgment against defendant James K. Harrower. The clerk of the court, having reviewed the Court's file in this matter, has confirmed that service was made on James K. Harrower on October 15, 1991 pursuant to Rule 4(c)(2)(C)(2i) of the Federal Rules of Civil Procedure. The judgment requested by the plaintiff is for a declaration of no coverage under a certain policy issued by National Insurance Underwriters to James K. Harrower's co-defendant, Mid-States Aircraft Engines, Inc.

This Court finds that defendant James K. Harrower is in default and that plaintiff is entitled to judgment as requested in plaintiff's complaint.

The Court therefore enters judgment in favor of the plaintiff and against James K. Harrower and hereby declares that the liability policy issued by National Insurance Underwriters to Mid-States Aircraft Engines, Inc. does not provide any coverage

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for the claims made by defendant James K. Harrower against Mid-States Aircraft Engines, Inc. in a case styled James K. Harrower, plaintiff, v. Mid-States Aircraft Engines, Inc., an Oklahoma corporation and John Does 1 through 5, defendants, being case number A88-426-Civil filed in the United States District Court for the District of Alaska or in the case styled James K. Harrower, plaintiff, v. Mid-States Aircraft Engines, Inc. an Oklahoma corporation and John Does 1 through 5, defendants, being case number 3AN-88-8166-CI filed in the Superior Court for the State of Alaska, Third Judicial District at Anchorage or for any other claims which James K. Harrower has made or may make against Mid-States Aircraft Engines, Inc., arising out of an aircraft crash on August 14, 1986 in the Stony River in Alaska.

Dated this 10th day of December, 1991.


H. DALE COOK
UNITED STATES DISTRICT JUDGE