

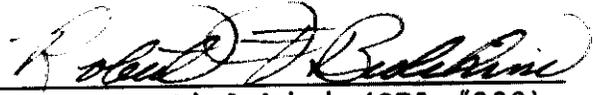
SIGNED this ____ day of _____, 1992.

S/ JAMES O. ELISON

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND
CONSENT AND ENTRY REQUESTED BY:

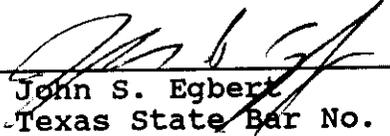
DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON
320 South Boston, Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211

By: 

Robert F. Biolchini (OBA #800)
John J. Carwile (OBA #10757)

ATTORNEYS FOR PLAINTIFF
PENNWELL PUBLISHING COMPANY

HARRISON & EGBERT
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Houston, Texas 77002
(713) 223-4034

By: 

John S. Egbert
Texas State Bar No. 06479550

ATTORNEYS FOR DEFENDANT
INTERNATIONAL EXHIBITIONS, INC.

ENTERED ON DOCK

DATE 7-31-92

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DANNY R. COOK a/k/a DANNY RAY)
 COOK; MACIE COOK a/k/a MACIE A.)
 COOK a/k/a MACIE AVELAN COOK;)
 NOWATA WESTCO, INC.; STATE OF)
 OKLAHOMA ex rel. OKLAHOMA)
 EMPLOYMENT SECURITY COMMISSION;)
 COUNTY TREASURER, Nowata County,)
 Oklahoma; and BOARD OF COUNTY)
 COMMISSIONERS, Nowata County,)
 Oklahoma,)
)
 Defendants.)

FILED

JUL 30 1992

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

CIVIL ACTION NO. 91-C-924-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 30 day
of July, 1992. The Plaintiff appears by Tony M.
Graham, United States Attorney for the Northern District of
Oklahoma, through Phil Pinnell, Assistant United States Attorney;
the Defendant, State of Oklahoma ex rel. Oklahoma Employment
Security Commission, appears not, having previously filed its
Disclaimer and Consent to Judgment By Defendant, disclaiming any
interest, title or lien on the subject property; and the
Defendants, Danny R. Cook a/k/a Danny Ray Cook, Macie Cook a/k/a
Macie A. Cook a/k/a Macie Avelan Cook, Nowata Westco, Inc.,
County Treasurer and Board of County Commissioners, Nowata
County, Oklahoma appear not, but make default.

The Court, being fully advised and having examined the
court file, finds that the Defendant, Nowata Westco, Inc.,
acknowledged receipt of Summons and Complaint on December 8,

1991; the Defendant, State of Oklahoma ex rel. Oklahoma Employment Security Commission, acknowledged receipt of Summons and Complaint on December 16, 1991; the Defendant, County Treasurer, Nowata County, Oklahoma, acknowledged receipt of Summons and Complaint on December 17, 1991; and the Defendant, Board of County Commissioners, Nowata County, Oklahoma, acknowledged receipt of Summons and Complaint on December 17, 1991.

The Court further finds that the Defendants, Danny R. Cook a/k/a Danny Ray Cook and Macie Cook a/k/a Macie A. Cook a/k/a Macie Avelan Cook, were served by publishing notice of this action in the Nowata Star, a newspaper of general circulation in Nowata County, Oklahoma, once a week for six (6) consecutive weeks beginning April 30, 1992, and continuing to June 4, 1992, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, Danny R. Cook a/k/a Danny Ray Cook and Macie Cook a/k/a Macie A. Cook a/k/a Macie Avelan Cook, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the

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

It appears that the Defendant, State of Oklahoma ex rel. Oklahoma Employment Security Commission, filed its Disclaimer and Consent To Judgment By Defendant on December 19, 1991; and that the Defendants, Danny R. Cook a/k/a Danny Ray Cook, Macie Cook a/k/a Macie A. Cook a/k/a Macie Avelan Cook, Nowata Westco, Inc., County Treasurer and Board of County Commissioners, Nowata County, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage

securing said mortgage note upon the following described real property located in Nowata County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lots Twenty (20), Twenty-One (21) & Twenty-Two (22) in Block Eight (8), Wettack Addition to Lenapah, Oklahoma, "subject, however, to all valid outstanding easements, rights-of-way, mineral leases, mineral reservations, and mineral conveyances of record."

The Court further finds that on September 10, 1986, the Defendants, Danny Ray Cook and Macie A. Cook, executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of \$37,710.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Danny Ray Cook and Macie A. Cook, executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated September 10, 1986, covering the above-described property. Said mortgage was recorded on September 11, 1986, in Book 569, Page 558, in the records of Nowata County, Oklahoma.

The Court further finds that on September 10, 1986, the Defendants, Danny Ray Cook and Macie A. Cook, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on January 16, 1987, the Defendants, Danny R. Cook and Macie A. Cook, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on September 18, 1987, the Defendants, Danny R. Cook and Macie A. Cook, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on June 29, 1988, the Defendants, Danny Ray Cook and Macie Avelan Cook, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that the Defendants, Danny R. Cook a/k/a Danny Ray Cook and Macie Cook a/k/a Macie A. Cook a/k/a Macie Avelan Cook, made default under the terms of the aforesaid note, mortgage, and interest credit agreements by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Danny R. Cook a/k/a Danny Ray Cook and Macie Cook a/k/a Macie A. Cook a/k/a Macie Avelan Cook, are indebted to the Plaintiff in the principal sum of \$37,794.38, plus accrued

interest in the amount of \$5,874.71 as of March 5, 1991, plus interest accruing thereafter at the rate of 9.5 percent per annum or \$9.8369 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of \$6,220.21, plus interest on that sum at the legal rate until paid, and the costs of this action in the amount of \$264.35 (\$256.35 publication fees, \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, Danny R. Cook a/k/a Danny Ray Cook, Macie Cook a/k/a Macie A. Cook a/k/a Macie Avelan Cook, Nowata Westco, Inc., County Treasurer and Board of County Commissioners, Nowata County, Oklahoma, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Danny R. Cook a/k/a Danny Ray Cook and Macie Cook a/k/a Macie A. Cook a/k/a Macie Avelan Cook, in the principal sum of \$37,794.38, plus accrued interest in the amount of \$5,874.71 as of March 5, 1991, plus interest accruing thereafter at the rate of 9.5 percent per annum or \$9.8369 per day until judgment, plus interest thereafter at the current legal rate of 3.51 percent per annum until paid, and the further sum due and owing under the interest credit agreements of \$6,220.21, plus interest on that sum at the current legal rate of 3.51 percent per annum until paid, plus the costs of this action in the amount of \$264.35 (\$256.35 publication fees, \$8.00 fee for recording Notice of Lis Pendens),

plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Danny R. Cook a/k/a Danny Ray Cook, Macie Cook a/k/a Macie A. Cook a/k/a Macie Avelan Cook, Nowata Westco, Inc., County Treasurer and Board of County Commissioners, Nowata County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Employment Security Commission, disclaims any right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Danny R. Cook a/k/a Danny Ray Cook and Macie Cook a/k/a Macie A. Cook a/k/a Macie Avelan Cook, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisal, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the

Plaintiff, including the costs of sale of
said real property;

Second:

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

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

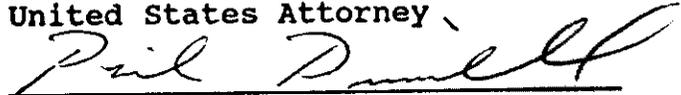
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from
and after the sale of the above-described real property, under
and by virtue of this judgment and decree, all of the Defendants
and all persons claiming under them since the filing of the
Complaint, be and they are forever barred and foreclosed of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

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney



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

Judgment of Foreclosure
Civil Action No. 91-C-924-E

PP/esr

ENTERED ON DOCKET
DATE 7-31-92

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

RESOLUTION TRUST CORPORATION,
as Conservator for ATLANTIC
FINANCIAL FEDERAL,

Plaintiff,

vs.

Case No. 89-C-668-E

MATTHEW J. KRAUSKOPF,
JOANNA M. KRAUSKOPF, FIRST
SECURITY MORTGAGE COMPANY, and
RESOLUTION TRUST CORPORATION,
successor to the Federal Savings
and Loan Insurance Corporation,
as Receiver of Cross Roads Savings
and Loan, a State Banking Association,

Defendants,

and

RESOLUTION TRUST CORPORATION,
successor to the Federal Savings
and Loan Insurance Corporation as
Conservator of Cross Road Savings
and Loan Association, F.A.,

Cross-Claimant.

FILED
JUL 30 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

AMENDED ORDER AND JUDGMENT

Now on this 30th day of July, 1992, upon review of the Joint Application for Order of Dismissal with Prejudice filed herein by the Resolution Trust Corporation as Receiver for Atlantic Financial Federal, F.A. (formerly the Resolution Trust Corporation as Conservator for Atlantic Financial Federal) ("RTC/Atlantic"), the Resolution Trust Corporation as Receiver of Cross Roads Savings and Loan ("RTC/Old Cross Roads"), the Resolution Trust Corporation as Receiver for Cross Roads Savings and Loan Association, F.A. (formerly the Resolution Trust Corporation as Conservator of Cross Roads Savings and Loan Association, F.A.) ("RTC/New Cross Roads"), and Matthew J. Krauskopf and Joanna M. Krauskopf (collectively the "Krauskopfs") and for good cause shown, the Court

hereby dismisses with prejudice **any** and all claims asserted in this action by RTC/Atlantic against RTC/Old Cross Roads and/or against RTC/New Cross Roads and/or against the Krauskopfs; the Court **further** dismisses with prejudice any and all claims asserted in this action by RTC/Old Cross Roads and/or RTC/New Cross Roads against RTC/Atlantic; and the Court **further dismisses** with prejudice any and all claims asserted in this action by the Krauskopfs **against** RTC/Atlantic, RTC/Old Cross Roads and/or RTC/New Cross Roads.

IT IS FURTHER ORDERED that **all** parties hereto are to pay their respective costs and attorney's fees incurred herein **respecting** the dismissed claims.

IT IS FURTHER ORDERED that **this** Order does not affect any right of either RTC/Atlantic, RTC/Old Cross Roads, RTC/New Cross Roads, or the Krauskopfs, to pursue any and all claims arising out of **the** subject transaction which they or any of them have, or may have against First **Security** Mortgage Company, or any other person or entity. This dismissal is without **prejudice** to the continued assertion, or assertion, of such claims.

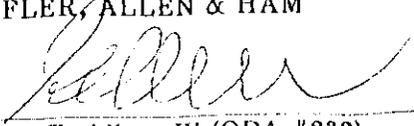
IT IS FURTHER ORDERED that **this** Order does not affect the note and mortgage currently outstanding from the Krauskopfs to RTC/New Cross Roads.


UNITED STATES DISTRICT COURT
JUDGE

APPROVED AS TO FORM AND CONTENT:

LOEFFLER, ALLEN & HAM

By

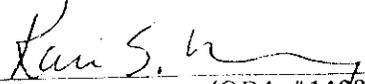


Sam T. Allen, IV (OBA #232)
P.O. Box 230
Sapulpa, OK 74066
PHONE: (918) 224-5302

Attorneys for Plaintiff, the Resolution
Trust Corporation as Receiver for Atlantic
Financial Federal, F.A.

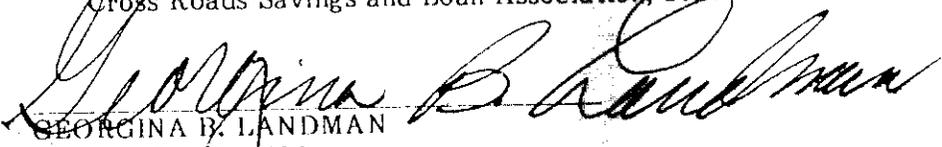
GABLE & GOTWALS, INC.

By



Kari S. Moroney, (OBA #14784)
2000 Fourth National Bank Building
Tulsa, Oklahoma 74119
(918) 582-9201

Attorneys for the Resolution Trust Corporation,
as Receiver for Cross Roads Savings and Loan and
the Resolution Trust Corporation as Receiver for
Cross Roads Savings and Loan Association, F.A.



GEORGINA B. LANDMAN
P. O. Box 700636
Tulsa, Oklahoma 74170

Attorney for Matthew J. Krauskopf and
Joanna M. Krauskopf

SIGNED this 30th day of July, 1992.


UNITED STATES DISTRICT JUDGE

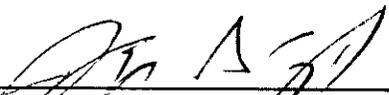
APPROVED AS TO FORM AND
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320 South Boston, Suite 500
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By: 
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PENNWELL PUBLISHING COMPANY

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Houston, Texas 77002
(713) 223-4034

By: 
John S. Egbert
Texas State Bar No. 06479550

ATTORNEYS FOR DEFENDANT
INTERNATIONAL EXHIBITIONS, INC.

CLOSED

DATE 7 31 92

ENTERED

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

DANNY LEE GREEN,)
)
 Petitioner,)
)
 v.)
)
 RON CHAMPION and THE ATTORNEY)
 GENERAL OF THE STATE OF)
 OKLAHOMA,)
)
 Respondents.)

91-C-859-E

FILED

JUL 30 1992

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

ORDER

Having been informed by petitioner by letter dated December 20, 1991 that this case was improperly filed in the District Court for the Northern District of Oklahoma and has since been refiled in the Western District of Oklahoma, the court finds that this case should be and is dismissed.

Dated this 29th day of July, 1992.



 JAMES O. ELLISON
 UNITED STATES DISTRICT JUDGE

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

KEVIN PARK,

Plaintiff,

vs.

ARABESQUE CORPORATION, an
Oklahoma corporation; and
MONTE MORRIS FRIESNER, a
bankrupt, by and through
Ada Wynston, Trustee, and
BETTE MITCHELL, an individual,

Defendants.

Case No. 91 C-198-B ✓

FILED

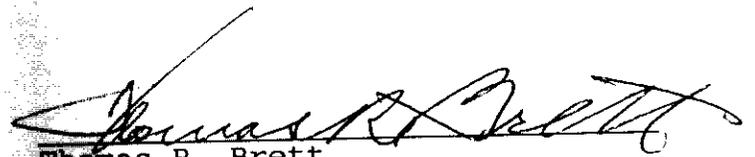
JUL 31 1992

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

ORDER VACATING DEFAULT AND GRANTING STAY

NOW on this 31st day of ~~March~~ ^{July}, 1992, comes on for review the motion to vacate entry of default and ~~for order staying this action~~ as to Defendant, Monte Morris Friesner. For good cause shown, the Court finds that the motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the clerk's default is vacated, ~~and this matter is stayed as to the Defendant, Monte Morris Friesner, pending resolution of his Canadian Bankruptcy.~~


Thomas R. Brett
United States District Court Judge

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

DATE 7-31-92

REPUBLIC FINANCIAL CORPORATION,)
)
 Debtor,)
)
 R. DOBIE LANGENKAMP,)
)
 Plaintiff-Appellee,)
)
 v.)
)
 W.K. BAKER, II, M.D., et al,)
)
 Defendants-Appellants.)

FILED

JUL 30 1992

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

92-C-548-E

ORDER

Now before this Court is the Appellee's Motion To Dismiss (docket #2). Appellee filed the motion on July 9, 1992. Pursuant to Local Rule 15, a memorandum in opposition to a motion to dismiss must be filed within 15 days. That means Appellant should have filed his opposition to the Motion To Dismiss no later than July 24, 1992. As of July 27, 1992, no opposing brief had been filed. In addition, during a July 27, 1992, telephone call with the United States Magistrate Judge's law clerk, Appellant's counsel (Mr. Paul McBride) said he had not filed a brief.¹ Therefore, Appellants have confessed the Motion to Dismiss.

However, even setting aside Local Rule 15, Appellee's Motion To Dismiss should be granted on the merits. The motion focuses upon Appellee's argument that Appellants did not timely file an appeal from the decision of the Bankruptcy Court. The pertinent facts

¹ A hearing was scheduled for July 27, 1992. However, Appellant's attorney (Paul McBride) requested a continuance, saying that Appellee's counsel had no objection. The hearing was eventually stricken after Mr. McBride telephoned the Magistrate Judge's chambers the day of the hearing, saying he was in Oklahoma City. In addition, Mr. McBride said he had not filed a brief opposing the Motion To Dismiss.

are noted below:

On April 21, 1992, the Bankruptcy Court entered judgment. On May 4, 1992 -- 13 days later -- Appellants filed a Motion For A New Trial. On June 17, 1992, the motion was denied by the Bankruptcy Court, and, on June 26, 1992, the instant appeal was filed.

Bankruptcy Rule 8002(a) provides that a Notice of Appeal must be filed within 10 days of the bankruptcy court's entry of judgment. Intermediate Saturdays, Sundays and legal holidays are not excluded. *Deyhimy v. Rupp*, No. 91-4064, slip. op. at page 2 (10th Cir. July 7, 1992). However, the time period can be extended if a party files a timely motion for a new trial.

A party has 10 days (again, excluding Saturdays, Sundays and legal holidays) to file a motion for a new trial.² That means Appellants should have filed their motion no later than May 1, 1992. They filed it on May 4, 1992. Although Appellants just missed the deadline, the filing mandates in bankruptcy matters are strictly construed and requires strict compliance. *See Deyhimy at page 3*. Therefore, on the merits, the undersigned finds that the Motion To Dismiss should be and hereby is granted.³

SO ORDERED THIS 29th day of July, 1992.


JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

² Under Bankruptcy Rule 9006(a), which applies here, Saturdays, Sundays and legal holidays are included in the calculation.

³ The same result obviously obtains applying Local Rule 15(a).

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

JUL 30 1992

Cs

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

DENJAC MUSIC COMPANY, MCA, INC.,)
QUARTET MUSIC, INC., RANGE ROAD)
MUSIC, INC., JOBETE MUSIC CO., INC.)
and FRANK MUSIC CORP.,)

Plaintiffs,)

vs.)

CASE NO. 92-C-317-E

URBAN LIVE, INC. and JEFF LUND,)

Defendants.)

CONSENT JUDGMENT

The Complaint in this action, having been filed on April 16, 1992, and both defendants, Urban Live, Inc. and Jeff Lund, having been personally served on May 4, 1992, the parties hereby agree that judgment may be entered in favor of plaintiffs and against defendants based upon the following agreed findings of fact:

1. The plaintiffs were the respective owners of valid copyrights in the songs listed on Schedule "A" to the Complaint on the dates alleged.

2. The plaintiffs' songs were publicly performed at the defendants' establishment, OuterUrban Grill/Jeffrey's, located 7141 South Yale in Tulsa, Oklahoma on December 7, 1991, without the permission of the plaintiffs or license by their performing rights licensing organization, the American Society of Composers, Authors and Publishers (ASCAP).

3. Such performances of plaintiffs' copyrighted songs were wilful infringements of the plaintiffs' copyrights.

4. There is a danger that such infringing conduct will continue, thereby causing irreparable injury to plaintiffs for which damages cannot be accurately computed, and necessitating the granting of injunctive relief against defendants' continued infringing conduct.

Upon the written joint application of the parties and by their express consent and agreement, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Defendants are hereby permanently enjoined and restrained from publicly performing any and all of the plaintiffs' copyrighted musical compositions or the copyrighted musical compositions of any other member of ASCAP at the OuterUrban Grill/Jeffrey's or any other facility owned, operated or conducted by defendants, and from aiding and abetting public performances of such compositions, unless defendants have previously obtained permission to render such performances either directly from the plaintiffs, or by license from ASCAP.

2. Judgment is hereby entered in favor of the plaintiffs and against the defendants, Urban Live, Inc. and Jeff Lund, jointly and severally, in the sum of \$6,500.00, (the "judgment amount"), said judgment amount to bear interest at a rate of 12% per annum.

3. Provided, however, that defendant Jeff Lund may completely satisfy his personal obligations in and to said judgment amount upon his payment of (a) \$500.00 made payable to ASCAP, on behalf of the plaintiffs, on or before July 20, 1992, or (b) defendant Jeff Lund may pay to ASCAP, on behalf of the plaintiffs,

the amount of \$1,000.00, payable in installments in the following manner:

<u>Installment Date</u>	<u>Installment Amount</u>
July 15, 1992	\$ 100.00
August 15, 1992	\$ 100.00
September 15, 1992	\$ 100.00
October 15, 1992	\$ 100.00
November 15, 1992	\$ 100.00
December 15, 1992	\$ 100.00
January 15, 1993	\$ 100.00
February 15, 1993	\$ 100.00
March 15, 1993	\$ 100.00
April 15, 1993	\$ 100.00
Total:	\$1,000.00

All payments owed ASCAP pursuant to the schedule set forth above shall be made by certified or cashier's check and delivered to the plaintiffs' counsel, Mr. Peter L. Wheeler, Pierce Couch Hendrickson Johnston & Baysinger, P.O. Box 26350, Oklahoma City, Oklahoma 73126, on or before the due date.

4. Any payments made by defendant Jeff Lund pursuant to paragraph 3 above shall be credited to the judgment amount owed by defendants, jointly and severally, but said payments shall not extinguish or satisfy the subsequent remaining amount owed on the judgment by defendant Urban Live, Inc.

5. Upon execution of this Consent Judgment, ASCAP shall offer defendant Jeff Lund and/or OuterUrban Too, Inc., the appropriate license agreement for OuterUrban Too Restaurant located at 10032 South Sheridan in Tulsa, Oklahoma, for the annual licensing period commencing January 1, 1992 and defendant Jeff Lund shall thereupon execute said license and pay ASCAP the annual license

fees of \$317.00 due under said license on or before August 15, 1992.

6. As to defendant Jeff Lund only, execution on this Judgment shall be stayed provided that defendant Jeff Lund (a) makes timely payment(s) as provided in paragraph 3 above; and (b) complies with all of the terms and conditions of the ASCAP license for OuterUrban Too, including payment of the annual license fees owed thereunder; provided further, however, that nothing in this paragraph shall be construed to prevent the plaintiffs from having immediate execution issue on this judgment as to defendant Urban Live, Inc.

7. As to defendant Jeff Lund, failure to comply with the provisions of paragraph 3 and/or paragraph 4 above shall entitle plaintiffs to have immediate execution issue on this judgment, for his personal liability, without further notice, in the sum of \$6,500.00, less any payments made and applied to principal pursuant to paragraph 3 above.

8. Plaintiffs and defendants agree that the stipulations of fact contained in this Consent Judgment shall have collateral estoppel effect against the parties in any future litigation between them.

DATED THIS 29th DAY OF JULY, 1992.


UNITED STATES DISTRICT JUDGE

We consent to entry of the foregoing judgment.

Peter L. Wheeler

Hugh A. Baysinger (#000617)
Peter L. Wheeler (#012929)
PIERCE COUCH HENDRICKSON
JOHNSTON & BAYSINGER
Post Office Box 26350
Oklahoma City, OK 73126
(405) 235-1611
Attorneys for Plaintiffs

Jeff Lund

Jeff Lund
10032 South Sheridan #J
Tulsa, OK 74133
(918) 299-8883
Pro Se, for Defendants

DATE JUL 31 1992

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA JUL 30 1992

IVA WILSON,
Plaintiff,

vs.

LOUIS W. SULLIVAN, M.D.,
Secretary of Health and
Human Services,
Defendant.

CLERK OF COURT
NORTHERN DISTRICT OF OK

Case No. 90-C-273-B

ORDER

This matter comes on for consideration of the objections of the Plaintiff, Iva Wilson, to the Report and Recommendation of the United States Magistrate Judge affirming the Administrative Law Judge's denial of disability insurance benefits.

Plaintiff filed the instant action pursuant to 42 U.S.C. § 405(g) seeking a review of the decision of the Secretary of Health and Human Services. The matter was referred to the United States Magistrate who entered his Report and Recommendation on January 16, 1992. The Magistrate Judge recommended to affirm the Secretary's decision. (Report and Recommendation of the United States Magistrate Judge ("R & R") at 7).

The only issue before the Magistrate Judge was whether substantial evidence in the record supported the Secretary's decision that the Plaintiff is not disabled within the meaning of the Social Security Act. The Social Security Act entitles every individual who "is under a disability" to disability insurance benefits. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful

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activity by reason of any medically determinable physical or mental impairment." Id. § 423(d)(1)(A). An individual

"shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

Id. § 423(d)(2)(A).

Under the Social Security Act the claimant bears the burden of proving a disability, as defined by the Act, which prevents her from engaging in her prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the ability to do other work activity and that jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987). The Secretary meets this burden if the decision is supported by substantial evidence. See Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Campbell v. Bowen, 822 F.2d

at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

"is not merely a quantitative exercise. Evidence is not substantial 'if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.'"

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985) (quoting Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985)). Thus, if the claimant establishes a disability, the Secretary's denial of benefits must be supported by substantial evidence that the claimant could do other work activity in the national economy.

The Secretary has established a five-step process for evaluating a disability claim. See Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes v. Bowen, 845 F.2d at 243, proceed as follows:

- (1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).
- (2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).
- (3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).
- (4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).
- (5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the

national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

The inquiry begins with step one, and if at any point the claimant is found to be disabled or not disabled, the inquiry ceases. Reyes, 845 F.2d at 242; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. §416.920 (1991).

Plaintiff here allegedly suffers from mental problems, back and headache pain, and drug and alcohol abuse. The present appeal focuses on the effects of these ailments, and specifically whether these problems permit her to hold substantial gainful employment. Several physicians examined Plaintiff over the period from January of 1980 through May of 1988 in order to understand the extent of her emotional and physical difficulties and her substance abuse problems. The ALJ found that, based on all the symptoms, the Plaintiff failed to satisfy the third section of the test since her impairments did not meet the strictures of 20 C.F.R. § 404, subpt. P, app. 1, Listing 12.04. (Record on Appeal, p. 21). The ALJ further concluded that Ms. Wilson's mental and physical condition allowed her to perform jobs which are available in the national economy, thus failing to prove a disability under the Act. (Record on Appeal, p. 7).

Plaintiff objects to the ALJ's evaluation of the medical evidence and the Magistrate Judge's recommendation to affirm that decision. Plaintiff argues that insufficient weight was given to her testimony regarding her mental problems, subjective pain, and dependency problems. Wilson believes that this incorrect

evaluation of her testimony, coupled with the improper questioning of the vocational expert, resulted in the incorrect conclusion that she is able to work on a sustained and reasonably regular basis.¹ Id. The Magistrate found no error in the ALJ's evaluation of the medical evidence and the testimony of the Plaintiff, or his questioning of the vocational witness. The Court agrees with the recommendation of the Magistrate Judge.

EVIDENCE OF DISABILITY

The Tenth Circuit gives substantial credence to the opinions of treating physicians on the subject of medical disability. A treating physician's opinion is binding on the fact finder unless it is contradicted by "substantial evidence," and the opinion is entitled to extra weight due to the physician's greater familiarity with the claimant's medical situation. Kemp v. Bowen, 816 F.2d 1469, 1476 (10th Cir. 1987); Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). None of the treating physicians felt that Wilson was afflicted with any disorder that could be considered "disabling" under the Act. In fact, Drs. Berkey and

¹ Plaintiff argues that the ALJ asked an improper hypothetical to the vocational expert and that, once her attorney asked a "proper" hypothetical, the expert stated that Wilson would not be able to work in the economy. This claim is specious. The "proper" hypothetical which Plaintiff refers to was more than 300 words long and misrepresented Wilson's impairments. When the judge asked Plaintiff's counsel to be more specific, he asked the expert about a hypothetical person who could not stand after lifting or could not get out of bed. (Record on Appeal, pp. 92-104). The medical records, relied upon by the ALJ in evaluating Plaintiff's testimony, disputes this hypothetical. The ALJ hypothetical, more closely descriptive of the facts of this case, is certainly not improper. Thus Plaintiff's reliance on Hargis v. Sullivan, Slip Opinion 90-6188 (10th Cir. October 4, 1991), is misplaced.

Norfleet both reported that the Plaintiff could work. (Record on Appeal, p. 17-18). The ALJ properly considered all the medical and nonmedical evidence and the Magistrate Judge correctly found that there was substantial evidence to support the ALJ's ruling.

SUBJECTIVE PAIN

Plaintiff also contends that the ALJ and the Magistrate Judge failed to properly weigh the medical evidence and her subjective claims of the pain she was suffering. The Tenth Circuit requires that, where a pain-causing impairment is isolated, the court must consider all evidence relating to the extent of the pain in this particular plaintiff. Luna v. Bowen, 834 F.2d 161, 164 (10th Cir. 1987). In the present case, the ALJ considered not only Plaintiff's medical records, but also the testimony of Ms. Wilson, evaluating all the symptoms and treatments. (Record on Appeal, pp. 14-18).

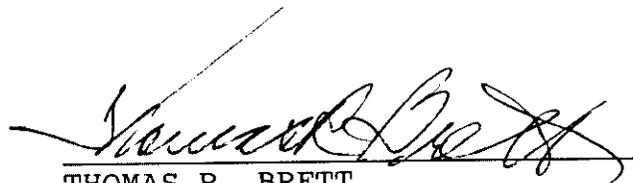
Nobody questions that Ms. Wilson has mental problems, headaches, back aches, or substance abuse difficulties. However, the ALJ must only determine if these problems are disabling to the point that Wilson cannot be expected to hold substantial gainful employment. The ALJ made his determination, based on all the relevant facts and the credibility of all the testimony, that Wilson's pain is not disabling under the Act. This judgment is binding on the district court if there is substantial probative evidence to support it. See Richardson v. Perales, 402 U.S. at 399; Broadbent v. Harris, 698 F.2d 407, 413 (10th Cir. 1983).

Wilson testified that she is able to conduct household

activities, proving that her afflictions do not significantly affect her daily life. (Record on Appeal, p. 17). Her alcohol and drug abuse problems have been under control since 1987. Id. The vocational expert who testified at the administrative hearing listened to the testimony of Wilson and understood her limitations. The expert noted several jobs that existed in the Oklahoma economy which she could perform. (Record on Appeal, p. 18). That determination was based on the expert's opinion of this particular claimant's ability to handle specific jobs available in the national economy, and is therefore substantial evidence that Wilson is not disabled. See Ellison v. Sullivan, 929 F.2d 534, 537 (10th Cir. 1991). Given the record below, it is clear that there was substantial evidence on which to base the ALJ's decision that Plaintiff could participate in the national economy performing sedentary work.

Therefore the court agrees with the Magistrate Judge's Report and Recommendation, and orders that the decision of the Secretary be AFFIRMED.

IT IS SO ORDERED this 30th day of July, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 30 1992

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

FEDERAL DEPOSIT INSURANCE)
CORPORATION, as Receiver of VICTOR)
SAVINGS AND LOAN ASSOCIATION OF)
MUSKOGEE, OKLAHOMA,)

Plaintiff,)

vs.)

Case No. 91-C-571-B

LAWRENCE A. HUBERT, a single person;)
OAKIE ALVIRA HUBERT, a single person, and)
former spouse of Lawrence A. Hubert; JIMMY)
L. REAGAN and MILDRED S. REAGAN, husband)
and wife; LARRY T. GROTHEER and LINDA L.)
GROTHEER, formerly LINDA L. HUBERT,)
husband and wife; LAUREN PAULS and SPOUSE,)
if any; ROGERS COUNTY TREASURER and)
BOARD OF COUNTY COMMISSIONERS OF)
ROGERS COUNTY, OKLAHOMA,)

Defendants.)

JOURNAL ENTRY OF JUDGMENT

This action came on for hearing before the Court, the Honorable Thomas R. Brett, Judge of the United States District Court for the Northern District, presiding, on Plaintiff's Motion for Summary Judgment, and the issues having been heard,

Judgment is rendered in the above styled and numbered cause as follows:

Based upon the statements filed in support of and in opposition to the motion, the Court finds that there is no substantial controversy as to the following facts or issues:

1. On July 28, 1988, the Federal Savings and Loan Insurance Corporation ("FSLIC") was appointed Receiver for Victor Savings and Loan Association, Muskogee, Oklahoma, ("VICTOR") pursuant to Resolution No. 88-627P adopted by the Federal Home

Loan Bank Board on July 28, 1988. As **Receiver**, the FSLIC succeeded to all rights, titles, interests and privileges of VICTOR.

2. On August 9, 1989, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), Public Law 101-73, effective on the date of enactment, whereby the FSLIC was abolished [FIRREA §401(a)(1)]. Section 215 of said Act provided that all assets and liabilities of FSLIC were transferred to the FSLIC Resolution Fund, a separate fund maintained and managed by the Federal Deposit Insurance Corporation ("FDIC"), 12 U.S.C.A. §1821(a). Pursuant to said Act, the FDIC became manager of the FSLIC Resolution Fund and succeeded to all the rights, titles and interests of the FSLIC as Receiver of VICTOR.

3. On or about July 21, 1978, Defendants, JIMMY L. REAGAN and MILDRED S. REAGAN, husband and wife, executed and delivered to VICTOR their Promissory Note in the original principal amount of \$64,000.00, the same bearing interest at the rate of 10.25% per annum. That on July 25, 1980, the Defendants, LAWRENCE A. HUBERT and LINDA L. GROTHEER, formerly LINDA L. HUBERT, executed an Assumption Agreement, thereby assuming the original debt and mortgage of the Defendants, JIMMY L. REAGAN and MILDRED S. REAGAN, and which Assumption Agreement was approved by VICTOR. Defendants, LAWRENCE A. HUBERT and LINDA L. GROTHEER, formerly LINDA L. HUBERT, were subsequently granted a Decree of Divorce on July 12, 1984, and the subject real estate ordered sold and the sale proceeds ordered divided equally between the parties. Said real estate was never sold.

4. There is a balance due, owing and unpaid on the promissory note described

above, in the principal sum of \$58,269.88, with interest accrued thereon to July 30, 1991, in the sum of \$16,381.63, and interest accruing thereafter at \$16.36 per diem, until date of judgment, and post-judgment interest accruing thereafter at the statutory rate of 3.51 % per annum, until paid.

5. To secure the payment of the Promissory Note referred to in paragraph 3 above, Defendants, JIMMY L. REAGAN and MILDRED S. REAGAN, made, executed and delivered that Mortgage herein sued upon against the real estate situated in Rogers County, Oklahoma and described as follows:

Lot 11, in Block 2, of WILDWOOD ACRES ADDITION, a Subdivision in Section 22, Township 21 North, Range 16 East of the I.B. & M., according to the recorded plat thereof;

Said mortgage, together with the indebtedness thereon, was assumed by the Defendants, LAWRENCE A. HUBERT and LINDA L. GROTHEER, formerly LINDA L. HUBERT, as a part and parcel of the assumption transaction described above in Paragraph 3.

6. Any and all right, title or interest which the Defendants have or claim to have in or to said real estate and premises is subsequent, junior and inferior to the Mortgage and lien of the Plaintiff with the exception of the sum of \$666.43 due and owing to Defendants, ROGERS COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS OF ROGERS COUNTY, OKLAHOMA, for unpaid real estate ad valorem taxes.

7. Defendants, LAWRENCE A. HUBERT and LINDA L. GROTHEER, formerly LINDA L. HUBERT, have defaulted in the performance of the terms and conditions of said Note and Mortgage and the FDIC is entitled to immediate possession of the collateral securing said Note and foreclosure of the Mortgage against all Defendants.

8. The Mortgage owned, held and sued upon by the FDIC herein expressly waives appraisalment or not at the option of the owner and holder thereof, said option to be exercised at the time the Complaint was filed herein and the FDIC has elected to have said property sold with appraisalment.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. Plaintiff shall have judgment in personam and in rem against the Defendants, LAWRENCE A. HUBERT, LINDA L. GROTHEER, formerly LINDA L. HUBERT, and JIMMY L. REAGAN and MILDRED S. REAGAN, for the principal sum of \$58,269.88, with interest in the amount of \$16,381.63 to July 30, 1991, and interest accruing thereafter at the rate of \$16.36 per diem, until date of judgment, and thereafter at the post-judgment interest rate of 3.51 % per annum, until paid; for costs of this action, including a reasonable attorney's fee and expenses of foreclosure and sale.

2. Further, the amounts set out in paragraph 1 above are secured by the Mortgage herein sued upon and constitute a good and valid first, prior and superior lien upon that real estate and premises located in Rogers County, the same being described as follows:

Lot 11, in Block 2, of WILDWOOD ACRES ADDITION, a Subdivision in Section 22, Township 21 North, Range 16 East of the I.B. & M., according to the recorded plat thereof;

and that said Mortgage lien of the Plaintiff be and the same is hereby established and adjudged to be prior and superior to the right, title and interest of all Defendants herein and all persons claiming under them since the commencement of this action, with the

exception of the sum of \$666.43 due and owing to Defendants, ROGERS COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS OF ROGERS COUNTY, OKLAHOMA, for unpaid real estate ad valorem taxes, for all of which execution shall issue.

3. The Mortgage and lien of the Plaintiff in the amounts hereinabove set forth is found and adjudged to be foreclosed and a Special Execution and Order of Sale shall be issued out of the office of the Clerk of United States District Court for the Northern District of Oklahoma, in this cause directed to the Sheriff of Rogers County to levy upon, advertise and sell, after due and legal appraisal, the real estate and premises hereinabove described subject to unpaid taxes, advancements by Plaintiff for taxes, insurance premiums or any expenses necessary for the preservation of the subject property, if any, and pay the proceeds of said sale to the Clerk of this Court as provided by law for application as follows:

- FIRST: To the payment of the costs herein accrued and accruing;
- SECOND: To the payment of the sum of \$666.43 due and owing to the Defendants, ROGERS COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS OF ROGERS COUNTY, OKLAHOMA, for unpaid real estate ad valorem taxes.
- THIRD: To the payment of the judgment and lien of the Plaintiff in the amounts herein set out and any advancements by Plaintiff for taxes, insurance premiums or expenses necessary for the preservation of the subject property;
- FOURTH: The balance, if any, to be paid to the Clerk of this Court, all to await the further order of this Court.

4. From and after the sale of said real estate as herein directed and upon the confirmation of such sale by the Court, the Defendants herein, and each of them, shall be forever barred, foreclosed, enjoined and restrained from setting upon or asserting any lien upon or any right, title or interest or equity of redemption in or to said real estate adverse

to the right and title of the purchaser at such sale if the same be had and confirmed.

5. Upon proper application by the purchaser, said Clerk of the United States District Court for the Northern District shall issue a Writ of Assistance to the Sheriff of Rogers County, or to such other officer so designated by law, who shall thereupon and forthwith place said purchaser in full and complete possession and enjoyment of the premises and real estate described.


JUDGE OF THE U. S. DISTRICT COURT

APPROVED:


Richard H. Ruth, OBA #7850
Attorney for Plaintiff, FDIC
Post Office Box 26208
Oklahoma City, Oklahoma 73126
(405) 841-4319

HUBERTJE

ENTERED ON DOCKET
JUL 30 1992
DATE FILED

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

JUL 30 1992

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

JERRY CARL BARNES,

Petitioner,

vs.

RON CHAMPION, et al

Respondents.

Case No. 91-C-517-B

O R D E R

This matter comes on for consideration of multiple motions, applications and objections filed by Petitioner, Jerry Carl Barnes.

These pleadings are:

- (1) Motion of Petitioner for appointment of counsel.
- (2) Motion of Petitioner to set hearing before then Chief Judge H.Dale Cook.
- (3) Motion of Petitioner for evidentiary hearing.
- (4) Application of Petitioner for writ of habeas corpus ad testificandum.
- (5) Motion of Petitioner for Magistrate Judge to rule on merits.
- (6) Motion of Petitioner to dismiss this case without prejudice.
- (7) Objection of Petitioner to Report and Recommendation of Magistrate Judge recommending the case be dismissed.
- (8) Motion of Petitioner for leave to submit a more definite statement.
- (9) Motion of Petitioner to add as authority the Tenth Circuit Court of Appeals recent decision on "Cap Law".
- (10) Motion of Petitioner for leave to amend his writ of habeas corpus pleading to substitute the name of H.W.Sonny Scott in place of Ron Champion.

In his Report and Recommendation, entered October 10, 1991, the Magistrate Judge, concluding that the Court only has power to grant a habeas writ to petitioners who are in custody on the conviction they attack, 28 U.S.C. §2241(c)(3), recommended that the Petition For Writ Of Habeas Corpus be denied because: (1) a

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petitioner is not in custody under a conviction when the sentence imposed for that conviction has expired (citing Maleng v. Cook, 109 S.Ct. 1923 (1989)); and (2) Petitioner Barnes discharged the sentence under attack on July 31, 1991.

Petitioner filed his Objection to the Magistrate Judge's Report and Recommendation on October 28, 1991.

Overlooked in this matter is Petitioner's Motion To Dismiss Without Prejudice, filed October 2, 1991, wherein Petitioner seeks dismissal because:

"There is a certain Ground/Argument that is Dispositive of all claims herein. However, the said ground/argument will be dismissed under Rose-V-Lundy, 455 U.S. 509, 102 S.Ct.1198, 71 L.Ed.2d 379 (March 3, 1982) for failure to exhaust State-Remedy."

Thus, the petitioner request this (court) to dismiss his petition today."

In pleadings filed subsequent to the Motion To Dismiss Petitioner has failed to repudiate or seek to withdraw such motion. The Court concludes Petitioner's Motion should be and the same is hereby GRANTED. This matter is DISMISSED WITHOUT PREJUDICE. The Magistrate Judge's Report and Recommendation is vacated as moot. Also moot are Petitioners various motions, applications and objections and any pending motions of Respondents.

IT IS SO ORDERED this 30th day of July, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE JUL 30 1992

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

DEBORAH C. KENDALL,

Plaintiff,

vs.

JAMES D. WATKINS, Secretary
of the Department of Energy
of the United States,
SOUTHWESTERN POWER
ADMINISTRATION, an agency of
the United States, J.M.
SHAFER, GEORGE GRISAFFE,
RICHARD MORIN, and COLIN
KELLEY,

Defendants.

Case No. 91-C-0292-B ✓

FILED

JUL 30 1992

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

JUDGMENT

In accord with the Order filed July 29, 1992, granting Defendants' Motion for Summary Judgment, the Court hereby enters judgment in favor of Defendants, James D. Watkins, Southwestern Power Administration, J.M. Shafer, George Grisaffe, Richard Morin, and Colin Kelley, and against the Plaintiff Deborah C. Kendall. Costs are assessed against the Plaintiff and each party is to pay its respective attorney's fees.

Dated, this 29th day of July, 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 7-30-92

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

*does not
close*

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

No. 91-C-861-C

THIRTEEN COLT, M-203,)
40 MM GRENADE LAUNCHERS,)
et al.,)

Defendants.)

FILED

JUL 28 1992 *rm*

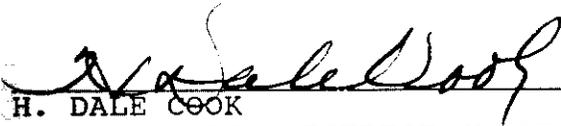
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court is the motion of William Hugh Fleming for return of property. The identical motion has been denied by Judge Ellison in the corresponding criminal matter, Case No. 91-CR-168-E by Order filed March 6, 1992. Accordingly, by reason of collateral estoppel, the motion shall be denied in this case as well.

It is the Order of the Court that the motion of William Hugh Fleming for return of property is hereby denied.

IT IS SO ORDERED this 28 day of July, 1992.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

DATE JUL 30 1992

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

DEBORAH C. KENDALL,

Plaintiff,

vs.

Case No. 91-C-0292-B ✓

JAMES D. WATKINS, Secretary
of the Department of Energy
of the United States,
SOUTHWESTERN POWER
ADMINISTRATION, an agency of
the United States, J.M.
SHAFER, GEORGE GRISAFFE,
RICHARD MORIN, and COLIN
KELLEY,

Defendants.

FILED

JUL 29 1992

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

ORDER

This matter comes on for consideration of the Report and Recommendation ("R & R") of the Magistrate Judge concerning: Defendants' Motion to Strike Jury Trial Setting; Defendants' Motion to Dismiss Claims and Counts Based Upon 42 U.S.C. §§ 1983, 1985, 1986, and 1988 and the Fifth and Fourteenth Amendments to the Constitution; Defendants' Motion to Dismiss the Amended Complaint as to the Defendants Southwestern Power Administration, an Agency of the United States, J.M. Shafer, George Grisaffe, Richard Morin, and Colin Kelley; and Defendants' Motion for Summary Judgment, and Plaintiff's Motion to Amend the Amended Complaint. The Magistrate Judge recommends that Plaintiff's Motion to Amend the Amended Complaint be denied and that all Defendants' motions be granted. The Court agrees with the Magistrate's recommendation.

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FACTS

This action arises from the alleged discriminatory hiring practices of the Southwestern Power Administration ("SWPA") and that agency's alleged mistreatment of the Plaintiff, Deborah Kendall ("Kendall"). Kendall's tenure at SWPA, where she worked as a typist, was a stormy one. From September of 1987 until March of 1988, Kendall worked for the Administration on a probationary basis. Plaintiff was terminated in March of 1988, prior to completing her probationary period, and she appealed this termination. During the summer of 1989 Kendall, assisted by counsel, entered into settlement negotiations with SWPA. By September she had executed an agreement that granted her reinstatement with back pay, provided she also execute an irrevocable resignation effective May 4, 1990.

On November 17, 1989, Plaintiff deposited her check for back pay, and three days later she attempted to have the resignation nullified due to alleged duress in the inducement to sign the agreement. In June of 1990, when efforts to nullify the agreement failed and Kendall's resignation became effective, she submitted two applications for federal employment at SWPA. Both were returned due to the settlement agreement's provision that SWPA would have "no further obligation" to Plaintiff after May 4, 1990. On January 4, 1991, Kendall received an adverse judgment in the District Court for Tulsa County, where she appealed the Oklahoma Employment Security Commission's decision to deny her unemployment benefits. The Tulsa District Court held that

Kendall's settlement agreement was voluntary and valid, and that her resignation was irrevocable. Kendall then filed this action on May 3, 1991, based on the alleged discriminatory treatment of her two applications to SWPA. The complaint was amended on October 17, 1991, and it is this amended complaint which Plaintiff presently moves to amend.

PLAINTIFF'S MOTION TO AMEND THE AMENDED COMPLAINT

Leave to amend the pleadings is at the discretion of the district court, although amendment is freely allowed where justice so requires. Fed.R.Civ.P. 15(a); Federal Insurance Co. v. Gates Learjet Corp., 823 F.2d 383, 387 (10th Cir. 1987) ("Gates"). The district court is allowed to deny the privilege to amend, but it must give a reason for its refusal of the motion. Triplett v. LeFlore County, Okla., 712 F.2d 444, 446-47 (10th Cir. 1983) ("Triplett"). Reasons justifying denial of a motion to amend include the risk of "undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, [or] futility of an amendment." Id. at 446.

Plaintiff asks the Court for permission to amend the amended complaint very late in this proceeding. The amendment was first proposed in March of 1992, two months after discovery in this action was supposed to be completed and five months after amendments to the pleadings were due. The proposed amendment is not minor; it makes several factual allegations that are completely outside the scope of both the original and the amended

complaint.¹ Plaintiff cites as concerns justifying the amendment: the time constraints and urgency of the initial filing, the Defendants' complaints of lack of specificity, the fact that some matters now alleged were first discovered during formal discovery, and that the amendment serves the ends of justice and specificity. (Brief in Support, pp. 1-2). These are important considerations, and the Court must weigh them carefully against the interests of efficient administration of justice and fairness to the Defendants.

Plaintiff justifies the lateness of this proposed amendment primarily on the ground that the urgency surrounding the initial filing, coupled with her mental state at the time the Complaint was filed, prevented her from pleading all of the factual bases underlying her claim. This action was originally filed on May 3, 1991. Most of the occurrences now plead by Plaintiff took place either during or prior to her reinstatement period from September of 1989 to May of 1990.² (Plaintiff's Motion to Amend the

¹ Exhibit 1 of the Plaintiff's Motion to Amend the Amended Complaint proposes to change paragraph 5 from a two sentence allegation to a six-subdivision claim, introducing complaints about Ms. Kendall's experiences both while reinstated at SWPA and after she was terminated from the Administration. Neither time was implicated in either of the first two versions of the complaint.

² Plaintiff fails to cite specific dates of occurrences in the proposed amendment. After examining the record, the facts which support Plaintiff's new claims all occurred prior to the date of the original filing of the present action, May 3, 1991. However, allegation 5(d) (blacklisting) could be interpreted as continuing after the date of the initial filing. Since Plaintiff has not alleged blacklisting after the filing of the original suit, the Court assumes that this is not claimed and finds that all of the new allegations concern occurrences prior to May 3, 1991.

Amended Complaint, Exhibit A). Accordingly, Plaintiff not only knew of her alleged mistreatment while reinstated at SWPA when she filed, but she must have known of the discriminatory treatment more than one year prior to the commencement of this cause.

It is unclear to the Court why these new allegations, concerning facts known by Plaintiff for years, are finally able to come to light now, shortly before the trial was to begin. In fact, Kendall was allowed to amend her initial Complaint on October 17, 1991. Certainly the facts concerning these important events, notwithstanding her "distraught" mental state and the urgency of her first filing, could have been plead then. Yet Plaintiff amended the original Complaint only to perfect jurisdictional concerns in Counts II and III, which were discovered during discussions at the first status conference. (Defendant's Response, pp. 2-3). The court finds this justification to amend suspect at best.

Weighed against the Plaintiff's justification for amendment is the undue delay and prejudice that the proposed amendment may cause in this action. See Triplett, 712 F.2d at 446; Gates, 823 F.2d at 387. In Gates, the Federal Insurance Company ("Federal Insurance"), insurer of a plane owned by Gates Learjet Corporation ("Gates"), was forced to pay for the wrongful death of five passengers. Federal Insurance then filed a subrogation action against Gates to recover its losses. Late in the litigation Gates filed a motion to amend its answer by adding a

statute of limitations defense that had not been previously asserted, which the district court denied. The Tenth Circuit held that the district court **did not** abuse its discretion in denying the motion to amend when "at the time the lawsuit was filed Gates possessed the documents from which it could have discovered and asserted the defense." Id.

In the present case, Kendall knew of her treatment at SWPA at the time she filed this action. She certainly had all the information necessary by July 31, 1991, the cutoff date for discovery.³ Furthermore, these allegations raise entirely different issues than those germane to the current action. Her Complaint alleges discrimination only with regard to SWPA's failure to hire her after the termination pursuant to the settlement agreement. (Amended Complaint, p.3). All of Defendants' discovery and trial preparation has dealt with this allegation. The proposed amendment concerns alleged discriminatory acts while Plaintiff was working at SWPA, discrimination in the handling of employment information concerning her, and improprieties in executing the settlement agreement. (Plaintiff's Motion to Amend the Amended Complaint, Exhibit A). The amendment is not simply for the purpose of specificity, except insofar as it specifies entirely new causes of action. Forcing Defendants to answer these allegations would require further discovery, additional time to prepare, and undue

³ Plaintiff has not asked for any further discovery since the July 31 deadline, and her proposed amendment fails to allege any actions against her that occurred after this date.

delay. Therefore the Plaintiff's motion to amend is denied.

APPLICABILITY OF 1991 CIVIL RIGHTS ACT

Plaintiff claims that the rights to jury trial and to compensatory damages attach under the 1991 Civil Rights Act. (Supplemental Objections to R & R, p. 1); See 42 U.S.C. § 1981. The 1991 Civil Rights Act became effective November 21, 1991. Any rights under § 1981 can only apply in this case, where the alleged violations occurred prior to May of 1991, if the Act's provisions were intended to apply retroactively. This court has held previously, in accordance with the decisions of several circuit courts, that the 1991 Civil Rights Act is not retroactive. See Jackson v. Readnour, No. 91-C-411-B (N.D.Okla. June 15, 1992); Horner v. Management and Training Corp. and Tulsa Job Corps, No. 91-C-835-B (N.D.Okla. June 15, 1992); Mozee v. American Commercial Marine Service Co., 963 F.2d 929 (7th Cir. 1992); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992); Vogel c. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992). The Court maintains this position, and finds that the 1991 Civil Rights Act is inapplicable in this matter.

PLAINTIFF'S CLAIMS UNDER 42 U.S.C. §§ 1983, 1985, 1986, 1988

AND THE FIFTH AND FOURTEENTH AMENDMENTS

Plaintiff claims that federal employees should be afforded the same rights as other citizens in the employment context. Her primary complaint is that Title VII provides no means of suing a federal employer for emotional damages caused by reprisal discrimination. (Objection by Plaintiff to R & R, p. 4).

Kendall feels that Brown v. General Services Administration, 425 U.S. 820 (1976), limiting federal employees' legal rights in discrimination suits to those protected by Title VII, should be overruled. The Supreme Court of the United States clearly and unambiguously set out in Brown that the Title VII remedies are exclusive for federal employees, and that is the law of the Tenth Circuit. Keesee v. Orr, 816 F.2d 545, 547 (10th Cir. 1987). While Plaintiff may disagree with Brown, its holding controls this matter, and she is precluded from raising a claim under §1981, et seq. Trotter v. Todd, 719 F.2d 346, 350 (10th Cir. 1983). Accordingly, Plaintiff's claims of discrimination in contravention of 42 U.S.C. §§ 1983, 1985, 1986, 1988 and the Fifth and Fourteenth Amendments are dismissed. The actions against J.M. Shafer, George Grisaffe, Richard Morin, Colin Kelley, and Southwestern Power Association are also dismissed, since in Title VII actions, "the head of the department, agency, or unit, as appropriate, shall be the defendant."⁴ 42 U.S.C. § 2000e-16(c); see Johnson v. U.S. Postal Service, 861 F.2d 1475,

⁴ Even if these five parties remained in the suit, Defendants are correct in relying on the settlement agreement's validity as their defense in this case. Federal officials have a qualified immunity from suit in cases where they have not violated a clearly established statutory or constitutional right of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Powell v. Mikulecky, 891 F.2d. 1454, 1456 (10th Cir. 1989). Plaintiff here claims that her termination pursuant to the voluntary resignation clause in the settlement agreement violated her clearly established right to be free from discriminatory hiring decisions by SWPA. These allegations do not overcome the burden described in Harlow. Although the Plaintiff's right to be free from discriminatory hiring policies is a clearly established one, Defendants had no reason to believe that their actions pursuant to the settlement agreement were plainly violative of that right.

1476 (10th Cir. 1988), cert. denied, 493 U.S. 811 (1989).

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

All that remains is Plaintiff's claim against James D. Watkins as head of the Department of Energy. Kendall alleges that the SWPA discriminated against her in refusing to consider her two job applications of June 1990. She further claims that her settlement agreement with SWPA on September 1, 1990 is invalid because she was coerced into signing it. Defendants believe that the refusal to accept the applications was proper and they move for summary judgment pursuant to Fed.R.Civ.P. 56(c). The Court agrees with the Magistrate Judge's assessment of the case and grants summary judgment.

According to Rule 56(c) of the Federal Rules of Civil Procedure, if a party fails to show sufficient proof on an element essential to proving her case and on which she will have the burden of proof at trial, she loses as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In evaluating a summary judgment claim, the Court makes all reasonable inferences which can be drawn from the record in a light most favorable to the party opposing summary judgment. Abercrombie v. City of Catoosa, 896 F.2d 1228, 1230 (10th Cir. 1990). In order to withstand the Motion for Summary Judgment the record must reflect that a genuine issue of material fact exists as to the settlement agreement's validity and, if the agreement is invalid, the allegations of discriminatory behavior on the part of SWPA. The record reflects neither.

An employee may waive his or her Title VII rights by entering into a settlement agreement so long as consent to the agreement is knowing and voluntary. Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974). In the present case, the questions of voluntariness and knowledge of the waiver were previously adjudicated in the District Court for the County of Tulsa, Oklahoma. Defendants claim, and the Court agrees, that Plaintiff is collaterally estopped from raising the issue again here. Where an issue has been previously litigated between the same parties or privies of the original parties, and that issue was necessary for the determination, then the first court's conclusion is binding as to the parties in subsequent litigation. Amoco Production Co. v. Heimann, 904 F.2d 1405, 1417 (10th Cir. 1990), cert. denied, _____ U.S. _____, 111 S.Ct. 350 (1990).

Furthermore, the totality of the circumstances are considered when evaluating the question of voluntariness or knowledge of the waiver. Torrez v. Public Service Co. of New Mexico, Inc., 908 F.2d 687 (10th Cir. 1990) ("Torrez"). In Torrez, the Tenth Circuit found a question of material fact existed on the issue of voluntariness in the waiver of the plaintiff's Title VII rights. Plaintiff there signed an agreement which waived "any and all claims which I have or might have" against his employer, Public Service Company of New Mexico. The plaintiff had no attorney, did not get to negotiate the terms of the release, and the language concerning the waiver was ambiguous. Here, the District Court of Tulsa County found that

under the circumstances Kendall did voluntarily waive her rights under Title VII, and she was accordingly denied unemployment benefits. The Court agrees that, viewing the totality of the circumstances, the District Court of Tulsa's decision is consistent with Torrez.⁵ Kendall had an attorney and both of them negotiated the terms of the release. Kendall signed the release on the advice of counsel. The release expressly states that SWPA will have "no further obligation" to Kendall after her resignation. (Supplement to Defendants' Response to Plaintiff's Motion to Amend the Amended Complaint, Exhibit 7). These facts are sufficient to prove that Kendall knew or should have known that the release she negotiated did not obligate SWPA to consider her applications after her voluntary resignation. SWPA's refusal to consider Kendall's applications, in reliance on the voluntary release, does not give rise to a Title VII action.

Therefore, the Court adopts the Magistrate Judge's Report

⁵ Kendall points to facts surrounding the negotiation of the settlement agreement which she contends, when viewed in a light most favorable to her, show coercion or duress. Plaintiff claims that her long period of unemployment prior to the settlement put her under substantial financial pressure, and that her attorney and the negotiators for SWPA forced her to sign the agreement. The court in Brees v. Hampton, 877 F.2d 111 (D.C. Cir. 1989), cert. denied, 493 U.S. 1057 (1990) was faced with a plaintiff in a similar predicament. Mr. Brees was found to have voluntarily committed to an irrevocable resignation where he had time to review the proposed agreement and picked the effective date of his resignation, even though he was under financial strain and other pressures to sign the agreement. Id. at 118. The court in Brees found no issue of material fact to prevent summary judgment on the issue of voluntariness and consent to the resignation. Kendall's situation is nearly identical; she was under pressure to resolve her problems but was able to negotiate with the assistance of her attorney the terms and date of her resignation, including a provision for back pay.

and Recommendation, and orders that the Plaintiff's Motion to Amend the Amended Complaint is DENIED, the actions against Defendants J.M. Shafer, George Grisaffe, Richard Morin, Colin Kelley, and Southwest Power Association are DISMISSED, and Defendants' Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED, this 29th day of July, 1992.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE JUL 30 1992

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

JUL 29 1992

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

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

Plaintiff,

vs.

DYNASTY AUTO RENTAL AND LEASING,
INC., a Massachusetts corporation,
RICHARD E. THIBAUT, KENNETH
DEMARCO and MICHAEL SCARDUZIO,
individuals,

Defendants.

No. 90-C-146-B

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law entered herein this date, Judgment is hereby entered in favor of Plaintiff, Thrifty Rent-A-Car System, Inc., and against the Defendants, Dynasty Auto Rental and Leasing, Inc., a Massachusetts corporation, Richard E. Thibault, Kenneth DeMarco and Michael Scarduzio, in the amount of Nineteen Thousand Eight Hundred Forty Five and 75/100 Dollars (\$18,845.75), as and for attorney's fees, and interest to run thereon at the rate of 3.51% per annum from this date.

DATED this 29th day of July, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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Entered

ENTERED ON DOCKET

DATE JUL 30 1992

FILED

JUL 30 1992

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

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

DAVID A. WHITE,)
)
 Plaintiff,)
)
 v.)
)
 UNIVERSITY OF TULSA, THE)
 UNIVERSITY OF TULSA COLLEGE)
 OF LAW, PROFESSORS CHAPMAN,)
 HAGER, LIMAS, TANAKA, CLARK,)
 ADAMS; AND SHEILA POWERS,)
)
 Defendants.)

Case No. 90-C-421-B

ORDER

Before the Court are Plaintiff's motion to alter or amend the Court's order and judgment entered on February 26, 1992; Plaintiff's request for admission; Plaintiff's objection to the Magistrate Judge's order releasing protected matter; and Defendants' motion for sanctions and attorney fees.

Plaintiff David White ("White"), in his First Amended Complaint, alleged ten causes of action against the University of Tulsa, the University of Tulsa College of Law (collectively, "the University"), and Professors Chapman, Hager, Limas, Tanaka, Clark, Adams and Sheila Powers. The causes of action arise from White's contention that he was denied certain honors while attending the University.

Plaintiff brought four claims solely against Defendants University and Adams: Count I: intentional and/or negligent infliction of emotional distress; Count II, negligence; Count III,

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invasion of privacy and Count IV, a civil rights violation of the Family Education Right to Privacy Act, based on Plaintiff's assertion that the University is a state actor. These claims arise from a dispute between Plaintiff and Defendant Adams, who had an attendance policy in his Law School Civil Procedure class. Adams, believing that Plaintiff had arranged for other students to put Plaintiff's initials on the attendance list, lodged a Student Conduct Code complaint with the Dean of the law school. Since the conduct hearing could not be held until the fall semester, Adams gave Plaintiff an "N" (no grade) on his transcript. The hearing was resolved in Plaintiff's favor, and the "N" was replaced with the "A" Plaintiff had earned in the class.

Plaintiff alleges that the University informed the law school student body about the charges, which was an invasion of privacy; he claims he suffered severe emotional distress and damage to his potential lifetime earning capacity by the dispute, which he claims arose out of willful and wanton acts by the University.

Count V, alleging breach of contract, is asserted against the University, former student Sheila Powers and all Defendant professors except Adams. Plaintiff alleges that, although qualified for the University's highest honor of Order of the Curule Chair, he was passed over by the selection committee. Also arising from this issue are Count VI, intentional and/or negligent infliction of emotional distress; Count VII, negligence; Count VIII, invasion of privacy; Count IX, civil rights violation of §1983; and Count X, antitrust, based on Plaintiff's contention that Defendants are

attempting to exclude him from the practice of law.

Of those ten claims, four remained¹ until February 26, 1992, when the Court entered judgment dismissing the case with prejudice for failure to prosecute, pursuant to Fed.R.Civ.P. 41(b). Plaintiff did not appear for jury trial, and Defendants had moved for dismissal with prejudice.

Plaintiff now asks the Court to alter or amend its judgment to keep before the Court a summary judgment motion on the breach of contract count. He also asks that the dismissal as to the other counts be made without prejudice and without adjudication upon the merits. In the alternative, Plaintiff asks that the Court vacate the judgment, and not enter an order or judgment until after it has ruled on the summary judgment motion.

A district court may, within its discretion, dismiss an action for want of prosecution. Link v. Wabash Railroad Co., 370 U.S. 626 (1962); United States v. Berney, 713 F.2d 568 (10th Cir. 1983); Food Basket v. Albertson's, 416 F.2d 937 (10th Cir. 1969).

Plaintiff has made no excuse for his nonappearance at the scheduled trial on February 26, 1992. In Plaintiff's objection to Defendants' application for a pretrial conference, filed February 3, 1992, he stated that "Plaintiff has consistently presented himself to the Court as being unable to proceed this cause to trial primarily because of his pauper status." Plaintiff, a licensed

¹Count IV, civil rights violation due to Adams placing an "N" on Plaintiff's law school transcript; Count V, breach of contract; Count IX, civil rights violation for denying Plaintiff the Order of the Curule Chair; and Count X, antitrust.

attorney in Texas, has proceeded on a pro se basis and stated that he was unable to hire a Tulsa attorney. Plaintiff stated in previous pleadings that he does not intend to take this case to trial, desiring instead a ruling on his summary judgment motion in hopes that a favorable outcome will convince a Tulsa attorney to take his case on the remaining issues.

Plaintiff has requested and received numerous extensions of time, often over Defendants' objections, arguably a pattern of delay. This alleged delay also provides, in part, the basis for Defendants' motion for sanctions and attorney's fees, pursuant to Fed.R.Civ.P. 11.

On July 20, 1990, the Magistrate Judge found five² of Plaintiff's claims to be frivolous. (See Second Report and Recommendation of the Magistrate Judge, Doc. Entry No. 15 of this case). Plaintiff, in his objection to the Magistrate's Report, stated in regard to his antitrust claim that he "does not have time to sufficiently research and respond intelligently to the Magistrate's recommendation ... Since antitrust has a four year statute of limitations, Plaintiff will amend his complaint at a later date should further research and better understanding of antitrust actions advocate such." (Plaintiff's objection, Doc. Entry No. 26). After receiving two extensions of time in which to file a response to the Motion to Dismiss, Plaintiff instead moved for leave to file a First Amended Complaint, stating that his

²Count I, defamation; Count III, negligence; Count VI, antitrust; Count VII, Family Education Right to Privacy Act violation pursuant to 42 U.S.C. §1983; and Count VIII, negligence.

defamation claim "may be dismissed as frivolous." He did not respond to the Motions to Dismiss.

The Court declined to follow the Magistrate Judge's Recommendation, although noting that "the recommendation of the Magistrate may well be correct in all respects." Plaintiff was given another opportunity to "fully respond, or reconsider the merit of any or all of his claims" in light of Defendants' intention to seek Rule 11 sanctions (See Order, Doc. Entry No. 34). Plaintiff was granted 15 days to respond to Defendants' Motion to Dismiss because Plaintiff, "obviously unfamiliar with federal procedure, has asked that he not be required to respond to the motions to dismiss until the Court adopts or rejects the Report and Recommendation." Plaintiff also was given leave to file his First Amended Complaint.

Plaintiff's First Amended Complaint omitted the defamation claim, but did contain the four other claims the Magistrate Judge had found frivolous. In February 1991, Defendants filed a Motion to Dismiss Defendant Tanaka from all claims and a Motion to Dismiss First Amended Complaint Counts IV, IX and X. Plaintiff requested and was granted two extensions of time to respond to the new Motions to Dismiss, but failed to do so.

On March 22, 1991, Plaintiff filed a Motion for Leave to file a Second Amended Complaint. On April 8, 1991, the Court granted the two pending Motions to Dismiss for failure of Plaintiff to respond. On April 17, 1991, the Court denied leave to amend the complaint, stating that the proposed amendment would not survive a motion to

dismiss for failure to state a claim because the new claim was based on inapplicable case law (Order, Doc. Entry No. 58).

On May 8, 1991, Plaintiff appealed the dismissal order without certification from the District Court as to the appealability of the question.³ On May 30, 1991, Plaintiff filed a Motion for Relief from the dismissal order, pursuant to Fed.R.Civ.P 56(c), stating that his failure to respond to the Motions to Dismiss was excusable neglect because his computer broke down, his handwriting is illegible, he was too busy with a separate case and he was looking for and moving into new office space. The Court denied the motion, noting that it was evidence of "a pattern of delay on plaintiff's part. Plaintiff is not a layman, but an attorney.... The present motion, finally accompanied by a response to the motions to dismiss, was filed almost four months after the motions to dismiss themselves were filed. He had been granted two extensions of time but willfully declined to request a third. The Court has been lenient with plaintiff, but his culpability is obvious." (Order, Doc. Entry No. 80).

A scheduling order was entered that established a trial date of February 18, 1992. However, on August 19, 1991, Plaintiff filed a Motion to Set Aside the Scheduling Order until the Court ruled on a Plaintiff's pending Summary Judgment motion concerning Count V. Defendants allege that, although the motion was not ruled upon by the Court, Plaintiff ignored the scheduling order by not sending a

³The Tenth Circuit dismissed the appeal on May 11, 1992, at Plaintiff's request.

witness list by August 23, 1991, the deadline in the scheduling order. The motion to set aside the scheduling order later was denied by the Magistrate Judge.

The Magistrate Judge, in his November 20, 1991, order denying Plaintiff's motion to reconsider, warned Plaintiff of the Court's increasing impatience. He noted that Plaintiff was told on October 22, 1991, that the scheduling order would not be set aside. However, Plaintiff waited until November 12, 1991, to file a motion to reconsider. "The instant motion, for all practical purposes, appears only to be a dilatory tactic - yet another example of what this Court sees as questionable conduct by a licensed attorney.

"Throughout this case, there are examples where White - hiding behind his pro se and in forma pauperis status - has not timely filed his pleadings or where he has repeatedly requested extensions." The Magistrate Judge also stated that "there is little question that White's behavior has further slowed the lawsuit." (Order, Doc. Entry No. 126).

Defendants allege that, despite this clear warning, Plaintiff exchanged no premarked exhibits; submitted no deposition designations nor written objections to Defendants' submissions; prepared none of the pretrial order and refused to sign or discuss it; and prepared no jury instructions, voir dire or trial brief.

During a pretrial conference before the Magistrate Judge on December 4, 1991, Plaintiff stated that he had no claim against Defendant Powers. This was 19 months after he filed the lawsuit. Plaintiff also stated that he did not intend to go to trial in this

matter. The Magistrate recommended that Defendants' Motion for Summary Judgment, filed on October 4, 1991, be granted as to Counts VI, VII and VIII due to Plaintiff's failure to respond. The Court affirmed the recommendation on January 14, 1992.

On December 13, 1991, Plaintiff moved for a dismissal with prejudice of three of the four remaining claims: Counts I, II and III. Defendants objected and moved for involuntary dismissal with prejudice based on Plaintiff's intention not to go to trial. At the trial date, February 24, 1992, Defendants appeared for trial, but Plaintiff did not. The Court dismissed the case with prejudice.

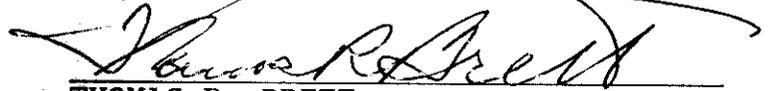
The Court concludes this case has been subject to numerous delays caused by Plaintiff, as illustrated by the record. The Court further concludes it did not abuse its discretion by dismissing the case with prejudice. The Court declines to alter or amend its judgment, nor will the Court vacate the judgment. Plaintiff's motion to alter or amend the judgment is hereby DENIED. This order renders moot Plaintiff's motion to grant requests for admission and Plaintiff's motion to reverse the Magistrate Judge's order releasing protected matter.

Defendants move for Rule 11 sanctions and attorney's fees based upon Plaintiff's pattern of delay, Plaintiff's admission during deposition that he did ask another student to sign the attendance record in Defendant Adams' class (indicating that Plaintiff knew Adams had a good-faith complaint to take to the student conduct board), and Plaintiff's admission that he did not research a good-faith antitrust claim. Monetary sanctions, although

arguably appropriate, will not be imposed at this time. Pursuant to Local Rule 6, Defendants may timely apply for attorney fees, if appropriate, and costs.

The Court hereby enjoins Defendant, as a sanction, from pursuing in any state or federal trial court, any action based upon the claims herein involved. If the Court's injunction is violated by Defendant, monetary sanctions and/or other appropriate sanctions, will be considered by the Court.

IT IS SO ORDERED, this 29th day of July, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Entered

ENTERED ON DOCKET
DATE JUL 30 1992

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

F I L E D

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

Plaintiff,)

vs.)

DYNASTY AUTO RENTAL AND LEASING,)
INC., a Massachusetts corporation,)
RICHARD E. THIBAUT, KENNETH)
DEMARCO and MICHAEL SCARDUZIO,)
individuals,)

Defendants.)

JUL 29 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 90-C-146-B

FINDINGS OF FACT AND CONCLUSIONS OF LAW
REGARDING PLAINTIFF'S APPLICATION FOR ATTORNEY FEES

The Court has before it Plaintiff's application for attorney fees and related expenses, affidavit in support with itemization, and brief in support filed on January 21, 1992. The Defendants' response has also been reviewed by the Court. The Defendants have not filed a response to Plaintiff's supplemental application for attorney fees filed July 14, 1992.

The Court finds that by virtue of the Plaintiff, Thrifty Rent-A-Car System, Inc., being the prevailing party, the contractual documents herein, and Okla. Stat. tit. 12, § 936, Plaintiff is entitled to the award of a reasonable attorney's fee. The Court finds Plaintiff's attorney's fee request as and for its counsel, Lipe, Green, Paschal, Trump & Gourley, P.C., in the amount of \$19,845.75 is both reasonable and necessary as is reflected by the record before the Court.

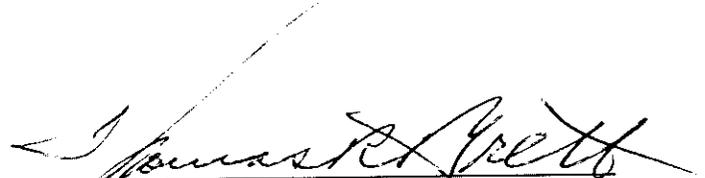
Further, the Court concludes the requested attorney's fee is reasonable in light of the cases of Oliver's Sport Centers v. Nat.

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Standard Ins., 615 P.2d 291 (Okla. 1980), and State ex rel. Burk v. Oklahoma City, 598 P.2d 659 (Okla. 1979).

A separate Judgment in keeping with the Findings of Fact and Conclusions of Law herein shall be filed this date.

DATED this 29th day of July, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Zink is correct in disputing the arbitration of his federal claims. According to Coffey 1, SEC Rule 15c2-2, which provides that a customer who purchases securities may exercise the option to litigate any dispute arising out of that purchase, includes transactions signed prior to December 28, 1983, the effective date of the rule. 891 F.2d 263. This is because the Rule itself provided for notice to customers who had signed arbitration agreements prior to December 18, 1983. In the present case, much like in Coffey 1, Plaintiff filed an action after 15c2-2 was in effect and asks for the opportunity to litigate his federal claims. The Tenth Circuit's ruling in Coffey 1 mandates that Plaintiff be allowed to litigate his federal claims instead of arbitrate them.

However, Zink has already received an adverse ruling by the arbitrator panel concerning his state securities fraud claims that arose from the same transactions. Defendants rightly question the collateral estoppel effects of the arbitration decision. In Coffey v. Dean Witter Reynolds, Inc., 961 F.2d 922 (10th Cir. 1992) ("Coffey 2"), Plaintiff was found to be collaterally estopped from litigating her federal claims after receiving an adverse judgment from her arbitrator. See Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352 (11th Cir. 1985) ("Greenblatt"). Plaintiff here objects to the use of collateral estoppel in this case for two reasons; he claims that the arbitration decision is not a "final decision" that could have preclusive effects, and he believes that the state issues

resolved in arbitration are incommensurate with the federal ones now at issue. He is wrong on both counts.

The decision of the arbitrator panel is a "final decision" for purposes of collateral estoppel. Plaintiff argues that the arbitration has not gone through the full appellate process and is not entitled to issue preclusive effects. This certainly may be a consideration where a state arbitration award is pending in the state court system¹, however the arbitration in this case is appealed directly to this court. So long as the district court is satisfied that an arbitration is conducted in a manner that "affords the basic elements of adjudicatory procedure, such as an opportunity for presentation of evidence," it can be given preclusive effect just as other determinations of the court might. Greenblatt, 763 F.2d at 1360; Restatement (Second) of Judgments § 84(3) and comment c (1982). Here Plaintiff grants that he had a "full and fair opportunity to litigate" the state issues in front of the arbitrators. (Response to Order of May 28, 1992, p. 5). The order of the arbitration panel was intended to be the final determination of the Plaintiff's claims, concerning both liability and damages. See Michaels v. Mariforum Shipping, S.A., 624 F.2d 411, 413 (2d Cir. 1980). Therefore the arbitration of the state issues is final for the purposes of evaluating their preclusive effect on Zink's federal claims.

In order for an arbitration of a state issue to preclude a

¹ This was the case in Coffey 2, where the state arbitration of the state claims was appealed to the Supreme Court of Colorado.

subsequent federal one, the fact issue precluded must be identical to the issue litigated at arbitration. Coffey 1, 961 F.2d at 925; see Greenblatt, 763 F.2d at 1360. Zink's argument here is that the federal statutes which were violated require a lower level of proof than their state counterparts at the arbitration, and thus he should have an opportunity to try to prove a federal violation in this court.

The state issues litigated in the earlier arbitration are identical to the issues Zink would have to prove in this Court, and they are therefore precluded from relitigation. Plaintiff's First Amended Complaint contains two federal counts (six and seven) identifying three federal statutes which were violated (42 U.S.C. § 78t, 42 U.S.C. § 77j(b), and 42 U.S.C. § 77q(a)). (First Amended Complaint, pp. 7-8). The central question for the Court is whether the issues settled in the arbitration of the state claims would also satisfy the required showing on these federal claims.²

Plaintiff's first federal claim is under Section 20 of the Securities Exchange Act of 1934 (42 U.S.C. § 78t) and concerns liability of controlling persons. It is invoked by Zink to join

² Plaintiff's brief on this issue is incomplete. He speaks primarily of the varied burdens under Section 17(a) of the 1934 Securities and Exchange Act and 71 O.S. § 408(a)(2). While he does add a sentence describing two other state counts, Plaintiff fails to show any federal counts which compare to these state claims. Since the Court affirms the arbitration of the state claims, the only issue is if the facts litigated concerning these state claims preclude litigating the federal ones. There are three federal claims made. Thus, out of fairness to Plaintiff, the Court will examine and rule on all federal claims raised in the Amended Complaint.

Merrill Lynch to this action. Liability under this section only attaches where the controlled person is found "liable under any provision of this chapter or of any rule or regulation thereunder." 42 U.S.C. § 78t(a). Before this section can have any impact, Mr. Childs must have violated either § 77j(b) or § 77q(a), and if that is not proven, § 78t has no effect. Furthermore, the identical burden is placed on state litigants through 71 O.S. § 408(b). Thus, unless the Court finds a federal violation, the issue of Merrill Lynch's liability will not be relitigated here.

Plaintiff's second federal claim concerns Sections 10(b) of the Securities and Exchange Act of 1934 (42 U.S.C. § 77j(b)) and 17(a) of the Securities Act of 1933 (42 U.S.C. § 77q(a)). The issues necessary to prove both of these claims were litigated in the earlier arbitration of Plaintiff's state claims. Section 10(b) (§ 77j(b)) concerns the prospectus which must be issued to the purchaser of a security. Oklahoma Law has a similar provision. See 71 O.S. §§ 408(a), 304(d). Neither Plaintiff nor Defendant have identified any differences between federal and state regulations regarding the prospectuses.³ Again, the resolution of the state claims regarding the prospectuses precludes their litigation here.

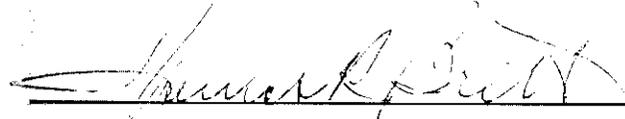
³ Since the parties have failed to establish any difference in the burdens regarding the prospectus, the Court assumes that they simply refer to these provisions so that the prospectuses are specifically included when considering the fraud counts. In any event, the burden to identify the difference between state and federal prospectus regulations has not been met.

The crux of Plaintiff's argument is his third federal claim that the bond transaction was secured in a fraudulent manner. The provisions under Sections 17(a) (federal) and 408(a)(2) (state) both make it unlawful to sell securities "by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they [are] made, not misleading." Zink notes that the language of the Oklahoma statute, while substantially similar, contains limiting language not used in its federal counterpart. In addition to proving that untrue information was used, the Defendants are relieved from state liability if they "did not know, and in the exercise of reasonable care could not have known, of the untruth or omission." 71 O.S. § 408(a)(2). Although Plaintiff is correct in noting the difference in language between the two statutes, he is incorrect in asserting that the issues below were different. The federal law, while not containing the language of the Oklahoma statute, does require proof of knowledge or intent. Aaron v. Securities and Exchange Commission, 446 U.S. 680 (1980). Therefore, the issue of knowledge or intent, which was litigated in favor of Defendants below, is an element under the federal statute. Since the burden under the federal and state laws is identical, the Plaintiff will not be afforded another opportunity to litigate the issue.

Therefore, the Motion of Defendants Merrill Lynch Pierce Fenner & Smith, Inc. and Peter A. Childs to Confirm the Award of

Arbitrators and Enter Judgment Thereon is GRANTED with respect to Plaintiff's state claims. Plaintiff is collaterally estopped from raising his federal claims in this court due to the arbitration, and his request for a hearing regarding those issues is hereby DENIED.

IT IS SO ORDERED, this 29th day of July, 1992.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
JUL 29 1992

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

FILED

JUL 28 1992

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

TRANSOK, INC., f/k/a TRANSOK
PIPELINE COMPANY, an Oklahoma
corporation,

Plaintiff,

v.

KOCH HYDROCARBON COMPANY, a
division of KOCH INDUSTRIES,
INC., a Kansas corporation,

Defendant.

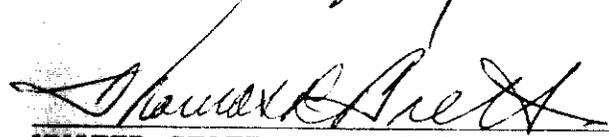
Case No. 92-C-159-B ✓

ADMINISTRATIVE CLOSING ORDER

The Court has before it the parties' Joint Application for Administrative Closing Order. The Court has been advised by the parties to this action that a settlement in principal has been reached and that the parties are currently negotiating a Release and Satisfaction Agreement.

Accordingly, for good cause shown, this action will be administratively closed until September 1, 1992, at which time, unless the Court is advised otherwise, this matter will be dismissed with prejudice.

IT IS SO ORDERED this 28th day of July, 1992.


UNITED STATES DISTRICT COURT JUDGE

13

ENTERED ON DOCKET
DATE JUL 29 1992

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

FILED

JUL 29 1992

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

FRANCES STANLEY,)
)
 Plaintiff,)
)
 v.)
)
 LOUIS SULLIVAN, M.D.,)
)
 Defendant.)

91-C-259-E

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed May 15, 1992 in which the Magistrate Judge recommended that the Secretary's decision be remanded.

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

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

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

SO ORDERED THIS 29th day of July, 1992.



JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

DATE 7-29-92

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

FILED

JUL 28 1992

RECEIVED
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
MUSKOGEE, OKLAHOMA

KANSAS CITY LIFE INSURANCE COMPANY,
a Missouri insurance company,

Plaintiff,

vs.

HEALTH ECONOMICS CORPORATION,
a Texas corporation,

Defendant.

No. 91-C-210-B

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law filed this date, Judgment is hereby entered in favor of the Defendant, Health Economics Corporation, and against the Plaintiff, Kansas City Life Insurance Company, and Plaintiff's action is hereby dismissed. Costs are assessed against the Plaintiff, Kansas City Life Insurance Company, if timely applied for pursuant to Local Rule 6. The parties are to pay their own respective attorney fees.

DATED this 27th day of July, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE ~~JUL 29~~ 1992

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

FILED

JUL 29 1992

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

SHARON MANUEL,)
)
 Plaintiff,)
)
 v.)
)
 METROPOLITAN LIFE INSURANCE COMPANY,)
 CANADIAN PACIFIC HOTEL AND RESORTS,)
 INC., and DOUBLETREE HOTELS, INC.,)
)
 Defendants.)

No. 91-C-224-B ✓

ORDER

Before the Court is the motion for summary judgment filed by the defendant, Metropolitan Life Insurance Company ("Metropolitan").¹ Metropolitan argues that its motion for summary judgment should be granted because the undisputed facts show that 1) Metropolitan was not her employer; 2) Metropolitan was not named as respondent in the Oklahoma Human Rights Commission (OHRC) charge of racial discrimination; and 3) plaintiff has failed to state a claim of racial discrimination. The Court agrees and therefore grants Metropolitan's motion.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106

¹ Although the plaintiff named them as defendants in her petition, neither Canadian Pacific Hotel and Resorts, Inc. nor Doubletree Hotels, Inc. has been served. Metropolitan, therefore, is the only defendant remaining in this lawsuit.

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

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

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

The following facts are undisputed.

The plaintiff, Sharon Manuel, was hired on July 24, 1989 by DTM Tulsa, Inc. ("DTM") as a housekeeper at the Doubletree Hotel Warren Place ("Doubletree") in Tulsa, Oklahoma. Plaintiff held the position of housekeeper until she was discharged on June 15, 1990.

During the time of her employment, DTM, a wholly owned subsidiary of DT Management, Inc., an Arizona corporation, managed the Doubletree. Although an owner of the Doubletree, Metropolitan has not and does not participate in DTM's decisions to hire, transfer, discipline, compensate or promote Doubletree employees.

In May 1990, the plaintiff requested a transfer from housekeeping to the PBX department. (Defendant's Exhibit B). Renee J. Reed, Doubletree's Human Resources Director, denied plaintiff's request on May 22, 1990 citing two advisory notices on January 15,

1990 and February 13, 1990 as preventing "any consideration to transfer at this time." (Defendant's Exhibit C). To be eligible for a promotion or transfer at Doubletree an employee must have been employed 120 days and not been issued an Advisory or Suspension Notice within six months prior to the employee's application for promotion or request for transfer. (Affidavit of Renee J. Reed, ¶11).

From August 1989 until June 1990, plaintiff received the following advisory/suspension notices which were placed in her personnel file:

- 8/20/89 - Insubordination - Verbal warning (Ex. A-1);²
- 8/30/89 - Insubordination - Written warning and suspension (Ex. A-2);
- 9/30/89 - Reporting to work late - Written warning (Ex. A-3);
- 10/4/89 - Reporting to work late - Written warning (Ex. A-4);
- 10/24/89 - Insubordination - Verbal warning (Ex. A-5);
- 11/13/89 - Removal of Floor Master Key 6B from hotel - Written warning (Ex. A-6);
- 11/14/89 - Reporting to work late - Written warning (Ex. A-7);
- 1/15/90 - Poor Work Performance - Written warning (Ex. A-8);
- 2/13/90 - Lost Floor Master Key - Written warning that next infraction could result in suspension or termination (Ex. A-9);
- 3/18/90 - Reporting to work late - Written warning (Ex. A-10);
- 5/29/90 - No Show/ No Call - Written warning that next attendance offense would result in suspension or termination (Ex. A-11);
- 6/13/90 - Removal of Master Keys from Doubletree - Written warning that any more infractions would result in termination (Ex. A-12);
- 6/15/90 - Reporting to work late - Written notice of discharge (Ex. A-13).

Plaintiff's employment at Doubletree was terminated on June 15, 1990.

On July 16, 1990, the plaintiff filed a charge of

² All numbered A exhibits refer to exhibits attached to the affidavit of Renee J. Reed.

discrimination with the OHRC alleging that she had been denied a promotion to PBX operator and discharged because she is black. (Defendant's Exhibit D). In the OHRC charge, plaintiff named Doubletree Hotel as respondent. (Defendant's Exhibit D).

The plaintiff originally filed this action in the Tulsa County District Court on March 7, 1991. Plaintiff's petition alleged that she was denied a promotion and wrongfully discharged as a result of the defendants' "discriminatory practices." Metropolitan removed the case to this Court on April 5, 1991 contending that the Court had original jurisdiction pursuant to 28 U.S.C. §1331 because the acts alleged by plaintiff "constitute discrimination in employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq." On April 10, 1991, plaintiff filed a motion to remand arguing that the Court lacked jurisdiction because the plaintiff "does not seek more than \$50,000," and the other named defendants did not join in the removal.³ In order to determine the nature of plaintiff's claim and rule on plaintiff's motion to remand, the Court directed the parties to supplement the record clarifying whether plaintiff intended to state a claim under Title VII. Due to plaintiff's failure to file any supplement and

³ In its response to plaintiff's motion to remand Metropolitan submitted the affidavits of William Atkinson and Gregory L. Kelsoe to support its position that the other named defendants did not exist and therefore did not join in removal. William Atkinson attested that "there is no legal entity known as Doubletree Hotels, Inc." (Defendant's Exhibit B). Gregory L. Kelsoe, the Human Resources Manager of Doubletree, Inc., 410 North 44th Street, Suite 700, Phoenix, Arizona, further attested that Doubletree, Inc. is a Delaware corporation and that he "was informed and believe that Canadian Pacific Hotels and Resorts, Inc. named as a defendant in this action, does not exist." (Defendant's Exhibit C).

Metropolitan's information that "[i]n a telephone conference, Plaintiff's counsel indicated that she would no longer contest the Court's jurisdiction over this lawsuit,"⁴ the Court concluded in its Order of October 24, 1991 that "the plaintiff has stated a claim under Title VII and that the case has been properly removed."⁵

The proper defendant in an employment discrimination action under Title VII is the plaintiff's employer. 42 U.S.C. 2000e-2. Metropolitan states that DTM, as the management company for Doubletree, is the plaintiff's employer and that Metropolitan does not participate in any of DTM's decisions to hire, transfer, discipline or promote employees. In support of its position, Metropolitan submits the affidavit of Renee J. Reed. (Defendant's Exhibit A, ¶¶ 5 and 7). The record also reflects that plaintiff's 1990 Wage and Tax Statement names DTM as plaintiff's employer. (Defendant's Opposition to Plaintiff's Motion to Remand, Exhibit D(a)). On the other hand, plaintiff offers no evidence that Metropolitan, rather than DTM, was her employer. Nor does the plaintiff allege or show that Metropolitan controlled DTM.⁶ The

⁴Metropolitan's Supplemental Brief, p. 4.

⁵ The plaintiff did not refute the Court's conclusion that plaintiff's action was brought under Title VII either in subsequent briefs or during the July 17, 1992 pretrial conference.

⁶ Plaintiff does not allege that DTM is a mere instrumentality or alter ego of Metropolitan. However, even if this allegation were made, plaintiff has presented no evidence of any interrelation of operations, common management, centralized control of labor relations, common ownership or financial control to warrant such a finding. See Baker v. Stuart Broadcasting Co., 560 F.2d 389 (8th

Court, therefore, concludes from the undisputed facts before it that Metropolitan is not the proper party defendant to plaintiff's Title VII claim.

The Court further finds that plaintiff failed to name Metropolitan as respondent in her OHRC charge. (Defendant's Exhibit D; Affidavit of Raymond T. Max, Defendant's Exhibit E). Although the Tenth Circuit Court of Appeals in Romero v. Union Pacific Railroad, 615 F.2d 1303 (10th Cir. 1980), rejected the argument that a defendant must be specifically named as respondent in an EEOC charge as a jurisdictional prerequisite to a subsequent Title VII action, the Court finds that plaintiff has not met the test set forth in Glus v. G.C. Murphy Co., 562 F.2d 880 (3rd Cir. 1977), and adopted by the Tenth Circuit as a substitute for naming the defendant.⁷ The Court, therefore, concludes that Metropolitan was

Cir. 1977) (weighing above factors in applying "single employer" test); Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983); Sargent v. McGrath, 685 F. Supp. 1087 (E.D. Wis. 1988); Brenimer v. Great Western Sugar Co., 567 F. Supp. 218 (D. Colo. 1983).

- 7
- 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint;
 - 2) whether, under the circumstances, the interests of a named [sic] are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings;
 - 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party;
 - 4) whether the unnamed party has in some way represented to the

without notice of the alleged discrimination to allow it to respond to the charge during the OHRC/EEOC investigation and have an opportunity to comply voluntarily with any administrative mandate. See Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890 (7th Cir. 1981).

Finally, even if Metropolitan were responsible for the denial of plaintiff's request for transfer and her subsequent discharge, and had notice of the OHRC charge, the Court finds that the plaintiff has failed to establish a prima facie case of racial discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). In support of her allegations, plaintiff relies only on her deposition testimony, which was submitted by Metropolitan. The relevant excerpts in the record are as follow:

Q (By Mr. Broussard) Okay. Now, you have claimed that you were discriminated against, because you're black; is that right?

A Yes.

Q And I want you to tell me every reason why you believe that you were discriminated against, because you're black.

A Because Brett O'Kelley told me that the lady he had hired, was much prettier than I was.

Q Okay.

A And she was a white lady; white.

Q Okay. Anything else?

A Not at this point.

(Deposition of Sharon Manuel, Defendant's Exhibit F, p. 36);

complainant that its relationship with the complainant is to be through the named party.

Romero, 615 F.2d at 1312, quoting Glus v. G.C. Murphy Co., 562 F.2d 880, 888 (3rd Cir. 1977).

Q Okay. Do you know what the qualifications were, of the woman who eventually got the PBX position?

A No, I don't.

(Deposition of Sharon Manuel, Defendant's Exhibit F, p. 89);

Q Okay. You said something about scrubbing bathroom floors and scrubbing up dirt in cracks, door hinges, and vents, you thought that that was because you're black?

A No.

Q Okay. Well, why did they make you do those things? Do you know?

A It's just the way they wanted it cleaned.

Q So that had nothing to do with your race then?

A No.

(Deposition of Sharon Manuel, Defendant's Exhibit F, pp. 39-40).

These statements by the plaintiff do not create a reasonable inference that the denial of transfer and discharge were racially motivated. Gill v. Westinghouse Electric Corp., 594 F. Supp. 48 (N.D. Ill. 1984).

Furthermore, even if plaintiff established her prima facie case, Metropolitan has sustained its burden "to articulate some legitimate, nondiscriminatory reason" for its denial of the transfer and discharge of the plaintiff. McDonnell Douglas, 411 U.S. at 802; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Plaintiff does not dispute that she received thirteen Advisory/Suspension Notices. Neither does she contest DTM's policy concerning an employee's eligibility for transfer or promotion. Finally, plaintiff does not dispute that she failed to report to work on time on June 15, 1990, after she had been warned on June 13, 1990 that any more infractions would result in

termination.

For the reasons stated above, the Court grants Metropolitan's motion for summary judgment.

IT IS SO ORDERED, this 28th day of July, 1992.

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

JUL 29 1992



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

HOLDEN DUNFORD, JR.,)
)
 Plaintiff,)
)
 v.)
)
 EARL MCCLAFLIN, et al,)
)
 Defendants.)

91-C-764-E ✓

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed June 30, 1992 in which the Magistrate Judge recommended that all of Plaintiff's claims pursuant to §1915(d), except his allegation about interference with his legal mail be dismissed.

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

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

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above. Plaintiff shall have until August 17, 1992 to file a Reply Brief to the question whether summary judgment should be granted Defendants on the issue whether they tampered with Plaintiff's legal mail. Plaintiff should attach any affidavits or other evidence, supported by affidavits to his Reply Brief.

Dated this 29th day of July, 1992.



JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 7-29-92

already closed

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

FEDERAL DEPOSIT INSURANCE CORPORATION,)
in its corporate capacity,)
)
Plaintiff,)

vs.)

Case No. 91-C-44-C

J. F. STOABS & SONS, INC., an Oklahoma)
corporation, CHARLES J. NELSON, an)
individual, DONNA J. NELSON, an)
individual, JOHN J. FLORER, an indivi-)
dual, LODEMA P. FLORER, an individual,)
JACK STOABS, an individual, STAN)
STEVENS, Washington County Treasurer,)
WILMA BLUE, Osage County Treasurer, and)
the STATE OF OKLAHOMA ex rel. OKLAHOMA)
TAX COMMISSION,)
Defendants.)

FILED

JUL 28 1992

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

DEFICIENCY JUDGMENT

Now on this 28 day of July, 1992, this matter comes before the Court upon the Report and Recommendation of the United States Magistrate Judge concerning the Motion for Leave to Enter Deficiency Judgment filed by the Plaintiff herein. An evidentiary hearing was held before the Magistrate Judge on the 22nd day of January, 1992, to determine the fair market value of certain real estate located in Washington County, Oklahoma and to calculate a deficiency amount. Plaintiff appeared by and through its attorney Sheila M. Powers of Boesche, McDermott & Eskridge. The Defendants, J.F. Stoabs & Sons, Inc., an Oklahoma corporation, Donna J. Nelson, Charles J. Nelson and John J. Florer, appeared by and through their attorney Robert P. Kelly of Kelly & Gambill, and Defendant, Lodema P. Florer, appeared by and through her attorney, Jerry T. Pierce.

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

The Court, having examined the Report and Recommendation and Plaintiff's objection to the Recommendation and having reviewed the evidence de novo, finds that an Agreed Journal Entry of Judgment was entered on June 18, 1991, granting judgment in favor of Plaintiff and against Defendants, J.F. Stoabs & Sons, Inc., Charles J. Nelson, Donna J. Nelson, John J. Florer and Lodema P. Florer, on Note A-1 for the principal sum of \$383,691.32, with interest accrued through May 3, 1991, in the amount of \$94,396.52 and interest accruing thereafter at the rate of \$105.12 per diem, plus a reasonable attorney fee and all costs and expenses of this action, accrued and accruing, all to bear interest at the maximum rate allowed by law from the date of judgment until paid.

The Court further finds that pursuant to the Agreed Journal Entry of Judgment and a Special Execution and Order of Sale issued out of the Office of the Court Clerk, the Sheriff of Washington County, Oklahoma, sold the following real property situated in Washington County, Oklahoma, to-wit:

Lot One (1), WILLOWHILL Section I Addition, Bartlesville, Washington County, Oklahoma, also a tract in the Northwest Quarter (NW $\frac{1}{4}$) of Section Fifteen (15) Township Twenty-Six (26) North, Range Thirteen (13) East more particularly described as follows: Beginning at a point that is 60 feet east and 350 feet south of the Northwest Corner of said Section; thence East parallel with the North Section Line for a distance of 250 feet; thence south parallel with the west section line for a distance of 250 feet; thence west parallel with the north section line for a distance of 250 feet to a point that is 60 feet east of the west section line; thence north parallel with the west section line for a distance of 250 feet to the point of beginning (the "Property")

to Federal Deposit Insurance Corporation, in its corporate capacity ("FDIC"), at a sale conducted on the 20th day of August, 1991, at

the County Courthouse in Washington County, Oklahoma, situated in Bartlesville, Oklahoma.

The Court further finds that the Property was sold to FDIC for the sum of \$120,000.00, which was the highest and best bid for the Property, such bid being more than two-thirds of the Sheriff's appraised value of \$180,000.00 and that the sale of the Property was confirmed by this Court on November 13, 1991.

The Court further finds that FDIC filed its Motion for Leave to Enter Deficiency Judgment on November 14, 1991, seeking a Deficiency Judgment of \$313,542.70, plus interest on that amount at the rate of 10% per annum until paid and that proper notice of the motion and the Court's Order and Notice of Hearing was given as shown by the Affidavit of Service on file in this action.

The Court further finds that FDIC employed the services of Dennis L. Wood, M.A.I. to conduct an appraisal of the Property, and Mr. Wood's appraisal report indicates that the fair market value of the Property as of the date of Sheriff's Sale, August 20, 1991, was the sum of \$145,000.00.

The Court further finds that Defendants, J.F. Stoabs & Sons, Inc., Charles J. Nelson, Donna J. Nelson, John J. Florer and Lodema P. Florer, employed the services of Bruce L. Dill, Appraiser, and Mr. Dill's appraisal opinion indicates that the fair market value of the Property as of the date of Sheriff's Sale, August 20, 1991, was the sum of \$430,000.00.

The Court further finds that the Property's fair and reasonable market value on August 20, 1991, was \$300,000.00 and

that the total amount of Deficiency Judgment to which FDIC is entitled is the sum of \$193,542.70, which amount represents the difference in the fair and reasonable market value of the Property on or about August 20, 1991, and the sum of FDIC's lien against the Property on August 20, 1991.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Report and Recommendation of the Magistrate Judge involving Plaintiff's Motion for Leave to Enter Deficiency Judgment and the appraisal of a certain parcel of land is not affirmed and adopted by this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the fair and reasonable market value of the Property as of the date of Sheriff's sale, August 20, 1991, was \$300,000.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff FDIC is granted a Deficiency Judgment in personam against the Defendants, J.F. Stoabs & Sons, Inc., an Oklahoma corporation, Charles J. Nelson, Donna J. Nelson, John J. Florer and Lodema P. Florer, and each of them, jointly and severally, on Note A-1 in the amount of \$193,542.70, plus interest at the rate of 10.0% per annum, until paid.

(Signed) H. Dale Cook

H. DALE COOK
JUDGE OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF OKLAHOMA

Approved:

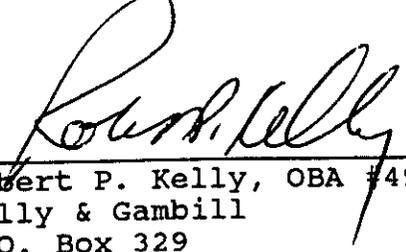


Bradley K. Beasley, OBA #628
Sheila M. Powers, OBA #013757
Of BOESCHE MCDERMOTT & ESKRIDGE
800 Oneok Plaza
100 West 5th Street
Tulsa, Oklahoma 74103
(918) 583-1777

ATTORNEYS FOR PLAINTIFF, FEDERAL
DEPOSIT INSURANCE CORPORATION,
in its corporate capacity

alt/Stoabs.DJ/SMP#27

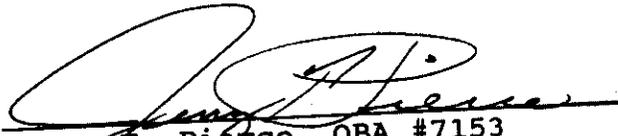
APPROVED AS TO FORM:



Robert P. Kelly, OBA #4939
Kelly & Gambill
P.O. Box 329
Pawhuska, OK 74056
(918) 287-4185

ATTORNEY FOR DEFENDANTS, J.F.
STOABS & SONS, INC., CHARLES
J. NELSON, DONNA J. NELSON and
JOHN J. FLORER

APPROVED AS TO FORM:

A handwritten signature in black ink, appearing to read "Jerry T. Pierce", is written over a horizontal line.

Jerry T. Pierce, OBA #7153
P.O. Box 666
Bartlesville, OK 74005
(918) 336-0611

ATTORNEY FOR DEFENDANT, LODEMA
P. FLORER

DATE JUL 29 1992

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

SHARON MANUEL,

Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE
COMPANY, CANADIAN PACIFIC HOTEL
AND RESORTS, INC., and
DOUBLETREE HOTELS, INC.,

Defendants.

No. 91-C-224-B

FILED

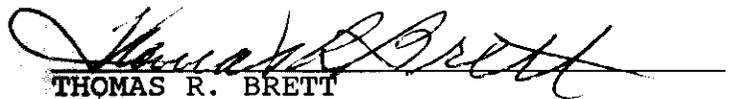
JUL 29 1992

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

J U D G M E N T

In keeping with the Order filed this date regarding the Fed.R.Civ.P. 56 motion on behalf of the Defendant, Metropolitan Life Insurance Company, Judgment is hereby entered in favor of Metropolitan Life Insurance Company and against the Plaintiff, Sharon Manuel; and the action of Sharon Manuel is hereby dismissed. Costs are hereby assessed against the Plaintiff. Each party is to pay their own respective attorney fees.

DATED this 29 day of July, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

NANETTE D. LEES,
Plaintiff,
vs.
STATE FARM FIRE AND CASUALTY
COMPANY, an Insurance Company,
Defendant.

JUL 29 1992 ENTERED ON DOCKET
JUL 29 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
Case No. CIV-91-451-B

FINDINGS OF FACT AND CONCLUSIONS OF LAW
REGARDING ATTORNEY'S FEE APPLICATION

Now on the 16th day of July, 1992, the Court having received evidence and arguments of counsel makes the following findings with respect to Plaintiff's application for attorney's fees and costs:

I.

That Plaintiff suffered a fire loss on property owned by her and insured by the Defendant. That a Proof of Loss was accepted on the 22nd day of February, 1992, by the Defendant. That it refused payment under the policy alleging that the loss occurred by reason of arson either caused or procured by the Plaintiff.

II.

That Plaintiff's suit on the contract of insurance resulted in a verdict including pre and post judgment interest in her favor in the amount of \$258,556.40. That as such she is the prevailing party under 36 O.S.A. §3629 and is entitled

RC 61

to a reasonable attorney fee from the Defendant. That the Plaintiff also sued the Defendant in tort for bad faith failure to pay under the policy and recovered a verdict on that cause of action in the amount of \$12,600.00. That Plaintiff does not seek an attorney fee from the Defendant on that cause of action.

III.

That Plaintiff entered into a contingency fee contract with the firm of Brown & Breckinridge with respect to her claim under the policy. That said contract provided for payment of attorney fees in the amount of 20% of any sums obtained by settlement or 40% of anything recovered at trial. That the contingency contract was a reasonable method by which Plaintiff could obtain the services of counsel, and that the percentages contained therein were very reasonable in the light of community standards.

IV.

That the Plaintiff seeks recovery from the Defendant of attorney fees only in the amount provided for in the contingent fee contract. That that amount is \$103,426.56, and the same constitutes a reasonable attorneys fee under 36 O.S.A. §3629 for the reasons shown in these findings.

V.

That the parties have stipulated that Plaintiff's lawyers spent 556.8 hours in their representation of her in this case, and that the amount of time involved was

reasonable and necessary to the prosecution of Plaintiff's claim.

VI.

That each of the lawyers of the firm of Brown & Breckinridge have practiced law for over thirty (30) years and are experienced, able, and highly qualified attorneys with regard to the litigation involved herein.

VII.

From the Court's observation throughout the trial the case was well and effectively tried by counsel both for the Plaintiff and Defendant.

VIII.

That if the number of hours spent on the case were multiplied by a rate of \$200.00 per hour the fee would be \$111,360.00 an amount in excess of that which has been applied for pursuant to the contingency fee contract.

IX.

That the tort and contract claims involved herein are not in and of themselves particularly novel and could be handled by any lawyers with the trial experience of Plaintiff's attorneys. However, the issue raised as a defense was arson which gave criminal overtones to the case, as it was tried on that issue. Mr. Brown has vast experience as an attorney handling criminal matters, and he was, therefore, uniquely qualified to try this matter.

X.

That while there was testimony of preclusion of other employment by Plaintiff's attorneys and certain time limits and constraints in connection with the case, the Court finds that while relevant, these factors are not especially important to this decision.

XI.

The Court does find that the case was exceptionally undesirable from the standpoint of non-recovery. Defendant and its counsel skillfully presented a case for arson and Plaintiff's complicity in that arson which could have readily been believed by the jury. The Court is of the opinion that the jury could have easily found for the Defendant. The case was, therefore, one of "high risk" for Plaintiff and her attorneys. The very real chance existed that the Plaintiff could have received nothing as a result of her lawsuit.

XII.

In the same fashion the attorneys for Plaintiff could have received nothing. The Court deems it extremely important that the case was taken on a contingency basis by reason of which Plaintiff's attorneys could have expended 556.8 hours and received no fee whatsoever.

XIII.

The amount involved on the contract claim was substantial, and the result obtained by Plaintiff's attorneys was excellent in that they recovered everything for which they had sued.

XIV.

That an hourly rate of \$150.00 per hour would be on the low side for handling this type of case under all the circumstances as shown herein. That taking into account the enhancing factors under the applicable cases an hourly rate of \$200.00 per hour would be ~~more~~^{SRP} than reasonable. Indeed the Court finds that ~~the~~^{SRP} hourly rate of \$225.00 per hour would not be ~~in the least~~ unreasonable. That the figures are arrived at by applying to a minimum rate of \$150.00 per hour the enhancing factors set forth above, particularly the difficulty of the case because of the issue of arson and the contingent basis upon which Plaintiff's attorneys agreed to represent her.

XV.

~~That as noted above the hourly rate to be applied to the stipulated hours of time spent in the amount of \$225.00 per hour is not at all unreasonable.~~^{SRP} Therefore, applying a rate of only \$200.00 per hour to the 556.8 number of hours would justify a fee of \$111,360.00. Since the Plaintiff only requests that the fee be set at the amount of the contingent fee contract, ie. \$103,426.56 that fee is eminently reasonable and should be approved by the Court.

XVI.

The Court has considered all the criteria set forth in Oliver Sporting Goods vs. National Standard, 615 P.2d 291, ~~and other Oklahoma Supreme Court, U.S. Supreme Court, and~~^{SRP} (Okla. 1980), and State ex rel. Burk v. Oklahoma City, 598 P.2d 659 (Okla. 1979).

^{ACB}
~~10th Circuit cases~~ with respect to the manner in which it should arrive at a reasonable fee. Having considered all these together with all the evidence in this case that a fee of \$103,426.56 is ~~more than~~ ^{ACB} reasonable and should be awarded to Plaintiff for her attorneys. In addition the Court finds that costs and expenses in the amount of \$1,235.60 should be awarded to Plaintiff as part of their fee.

XVII.

That prior to her representation by Brown & Breckinridge, and at the initial period directly following her fire loss the Plaintiff was represented by one David Cotter. Mr. Cotter charged the Plaintiff at the rate of \$100.00 per hour for his services. He spent 49.5 hours in his representation of the Plaintiff and also advanced on her behalf \$200.00 in expenses. That the time spent by Mr. Cotter was reasonable and necessary and the rate of \$100.00 per hour for the type of work he did was also reasonable. The expenses advanced were necessary. Therefore, the Defendant should be required to pay in addition to the fees and expenses for Brown & Breckinridge the sum of \$4,950.00 for David Cotter. A separate Judgment in keeping with these Findings of Fact and Conclusions of Law shall be filed herewith.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 7-29-92

F I L E D

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

JUL 23 1992

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

RAYMOND WAMSLEY,)
)
)
 Plaintiff,)
)
 vs.)
)
 RICHARD H. MOSIER, Individually)
 and in his official capacity as)
 President of Rogers State College;)
 TOBIE TITSWORTH, Individually)
 and in his official capacity as)
 Vice President of Rogers State)
 College; ROGERS STATE COLLEGE;)
 and THE BOARD OF REGENTS OF)
 ROGERS STATE COLLEGE,)
)
 Defendants.)

No. 90-C-665-B

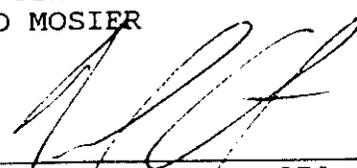
JOINT STIPULATION OF DISMISSAL

Pursuant to F.R.C.P. 41(a), the Plaintiff, Raymond Wamsley, by and through his attorney, Louis W. Bullock, and the Defendants, Richard H. Mosier and Rogers State College, by and through their attorney, Tom L. Armstrong, and The Board of Regents of Rogers State College and Tobie Titsworth, by and through their attorney, Sue Wycoff, jointly stipulate that the Plaintiff's action against these Defendants shall be dismissed with prejudice.

THE BOARD OF REGENTS OF ROGERS STATE COLLEGE and TOBIE TITSWORTH

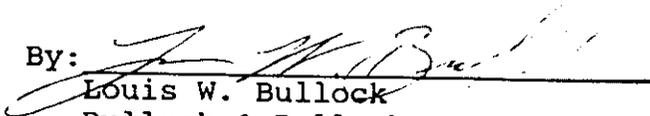
ROGERS STATE COLLEGE and RICHARD MOSIER

By: Sue Wycoff by TLA
Sue Wycoff
Office of Attorney General
420 West Main, Ste 550
Oklahoma City, OK 73102
Attorney for Defendants Board of Regents of Rogers State College & Tobie Titsworth

By: 
Tom L. Armstrong, OBA #329
TOM L. ARMSTRONG & ASSOC.
601 South Boulder, Ste 706
Tulsa, OK 74119-1337
Attorney for Defendants Rogers State College & Richard Mosier

RAYMOND WAMSLEY

By:



Louis W. Bullock
Bullock & Bullock
320 S. Boston, Suite 718
Tulsa, OK 74103-3708
Attorney for Plaintiff

ENTERED ON DOCKET

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

DATE ~~JUL 29 1992~~

FILED

JUL 29 1992

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

NANETTE D. LEES,)
)
 Plaintiff,)
)
 vs.)
)
 STATE FARM FIRE AND CASUALTY)
 COMPANY, an insurance company,)
)
 Defendant.)

No. 91-C-451-B

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law filed this date, Judgment is hereby entered in favor of the Plaintiff, Nanette D. Lees, as and for attorney fees and expenses against the Defendant, State Farm Fire and Casualty Company, as follows: Judgment is hereby entered in favor of the Plaintiff and against the Defendant for attorney fees in the amount of One Hundred Three Thousand Four Hundred Twenty Six and 56/100 Dollars (\$103,426.56), and expenses in the amount of One Thousand Two Hundred Thirty Five and 60/100 Dollars (\$1,235.60), for services rendered by Plaintiff's attorneys, Brown & Breckinridge.

Further, Judgment is entered in favor of the Plaintiff and against the Defendant in the sum of Four Thousand Nine Hundred Fifty and No/100 Dollars (\$4,950.00), plus Two Hundred Dollars (\$200.00) in expenses advanced, as attorney fees for services rendered by attorney David Cotter.

Post-judgment interest is hereby awarded on said judgments at the rate of 3.51% per annum from this date.

58

DATED this 29th day of July, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

December 17, 1991; and the Defendant, Board of County Commissioners, Nowata County, Oklahoma, acknowledged receipt of Summons and Complaint on December 17, 1991.

The Court further finds that the Defendant, Linda C. Hayden a/k/a Linda Carol Hayden, was served by publishing notice of this action in the Nowata Star, a newspaper of general circulation in Nowata County, Oklahoma, once a week for six (6) consecutive weeks beginning April 16, 1992, and continuing to May 21, 1992, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, Linda C. Hayden a/k/a Linda Carol Hayden, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstractor filed herein with respect to the last known address of the Defendant, Linda C. Hayden a/k/a Linda Carol Hayden. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Farmers Home Administration, and its attorneys, Tony M. Graham, United States Attorney for the

Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

The Court further finds that on April 15, 1987, Clarence Eugene Hayden filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 87-00982, was discharged on October 28, 1987, and the case was closed on March 10, 1989.

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

The S 1/2 of the NE 1/2; and the N 1/2 of the SE 1/4; and The SE 1/4 of the NW 1/4; of Section 16, Township 28 North, Range 16 East.

The Court further finds that on May 7, 1980, the Defendants, Clarence E. Hayden and Linda C. Hayden, executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of \$42,100.00, payable in eight installments, with interest thereon at the rate of 12 percent (12%) per annum.

The Court further finds that on July 27, 1981, the Defendants, Clarence E. Hayden and Linda C. Hayden, executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of \$19,990.00, payable in yearly installments, with interest thereon at the rate of 15 percent (15%) per annum.

The Court further finds that on July 27, 1981, the Defendants, Clarence E. Hayden and Linda C. Hayden, executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of \$7,160.00, payable in yearly installments, with interest thereon at the rate of 5 percent (5%) per annum.

The Court further finds that on September 2, 1981, the Defendants, Clarence E. Hayden and Linda C. Hayden, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Assumption Agreement, in which Clarence E. Hayden and Linda C. Hayden assumed a Promissory Note dated April 11, 1980 from Kenneth G. Hayden and Sharon K. Hayden to the United States of America, acting through the Farmers Home Administration, in the amount of \$73,000.00, payable in yearly installments, plus accrued interest in the amount of \$4,796.00, with interest at the rate of 10 per cent per annum.

The Court further finds that on September 2, 1981, the Defendants, Clarence E. Hayden and Linda C. Hayden, executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount

of \$24,750.00, payable in yearly installments, with interest thereon at the rate of 13 1/4 percent (13.25%) per annum.

The Court further finds that on September 2, 1981, the Defendants, Clarence E. Hayden and Linda C. Hayden, executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of \$10,000.00, payable in yearly installments, with interest thereon at the rate of 15 percent (15%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Clarence E. Hayden and Linda C. Hayden, executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated September 2, 1981, covering the above-described property. Said mortgage was recorded on September 2, 1981, in Book 529, Page 414, in the records of Nowata County, Oklahoma.

The Court further finds that on May 20, 1982, the Defendants, Clarence E. Hayden and Linda C. Hayden, executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of \$10,850.00, payable in two installments, with interest thereon at the rate of 15 percent (15%) per annum.

The Court further finds that the Defendants, Clarence E. Hayden a/k/a Clarence Eugene Hayden and and Linda C. Hayden a/k/a Linda Carol Hayden, made default under the terms of the aforesaid notes and mortgage by reason of their failure to make the monthly installments due thereon, which default has

continued, and that by reason thereof, the Defendants, Clarence E. Hayden a/k/a Clarence Eugene Hayden and Linda C. Hayden a/k/a Linda Carol Hayden, are indebted to the Plaintiff in the principal sum of \$162,608.50, plus accrued interest in the amount of \$141,364.42 as of September 20, 1990, plus interest accruing thereafter at the rate of \$51.4806 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$251.90 (\$243.90 publication fees, \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, Clarence E. Hayden a/k/a Clarence Eugene Hayden, Jolene M. Hayden, Linda C. Hayden a/k/a Linda Carol Hayden, County Treasurer and Board of County Commissioners, Nowata County, Oklahoma, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendants, Clarence E. Hayden a/k/a Clarence Eugene Hayden and Linda C. Hayden a/k/a Linda Carol Hayden, in the principal sum of \$162,608.50, plus accrued interest in the amount of \$141,364.42 as of September 20, 1990, plus interest accruing thereafter at the rate of \$51.4806 per day until judgment, plus interest thereafter at the current legal rate of 4.11 percent per annum until paid, plus the costs of this action in the amount of \$251.90 (\$243.90 publication fees, \$8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff

for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Clarence E. Hayden a/k/a Clarence Eugene Hayden, Jolene M. Hayden, Linda C. Hayden a/k/a Linda Carol Hayden, County Treasurer and Board of County Commissioners, Nowata County, Oklahoma have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisalment, the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants

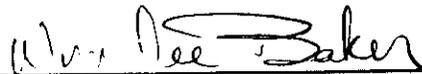
and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney



WYN DEE BAKER, OBA #465
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 91-C-940-E

WDB/esr

ENTERED ON DOCKET
DATE JUL 29 1992

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

F I L E D

JUL 29 1992 *dl*

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

FLOYD HARRIS,)
)
 Plaintiff,)
)
 v.)
)
 RON CHAMPION, et al,)
)
 Defendants.)

92-C-643-E ✓

ORDER TO TRANSFER CAUSE

The Court having examined the Petition for Writ of Habeas Corpus which the Petitioner has filed finds as follows:

(1) That the Petitioner was convicted in Commanche County, Oklahoma, which is located within the territorial jurisdiction of the Western District of Oklahoma.

(2) That the Petitioner demands release from such custody and as grounds therefor alleges he is being deprived of his liberty in violation of rights under the Constitution of the United States.

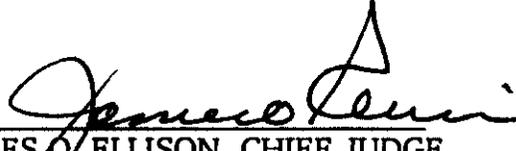
(3) In the furtherance of justice this case should be transferred to the United States District Court for the Western District of Oklahoma.

IT IS THEREFORE ORDERED:

(1) Pursuant to the authority contained in 28 U.S.C. §2241(d) and in the exercise of discretion allocated to the Court, this cause is hereby transferred to the United States District Court for the Western District of Oklahoma for all further proceedings.

(2) The Clerk of this Court shall mail a copy of this Order to the Petitioner.

Dated this 29th day of July, 1992.



JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET.

DATE JUL 28 1992

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

LYNDA K. DOSS,

Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY,
a foreign insurance company,

Defendant.

Case No.: 92-C-578-B

FILED

JUL 27 1992

**JOINT STIPULATION OF
DISMISSAL WITH PREJUDICE**

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

Pursuant to Rule 41(a)(1)(ii) Fed. R. Civ. P., the parties hereto, hereby stipulate and agree that Plaintiff's Petition and claims for relief against the Defendant shall be and hereby are dismissed with prejudice.

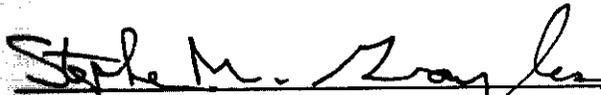
It is further stipulated and agreed that each party shall bear its own cost.

DATED this 17th day of July, 1992.

Respectfully submitted,

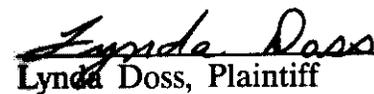
MICHAEL C. TAYLOR & ASSOCIATES

By:



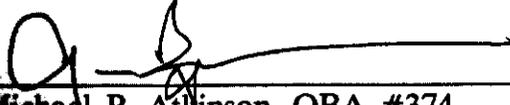
Stephen M. Grayless, OBA # 1849
1718 South Cheyenne Avenue
Tulsa, Oklahoma 74119
(918) 587-3366

ATTORNEYS FOR PLAINTIFF


Lynda Doss, Plaintiff

**THOMAS, GLASS, ATKINSON, HASKINS,
NELLIS & BOUDREAUX**

By:



**Michael P. Atkinson, OBA #374
Galen L. Brittingham, OBA #12226
525 South Main, Suite 1500
Tulsa, Oklahoma 74103-4524**

ENTERED ON CLERK
DATE JUL 28 1992

FILED

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

JUL 27 1992

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
MICHAEL WEST,)
)
Defendant.)

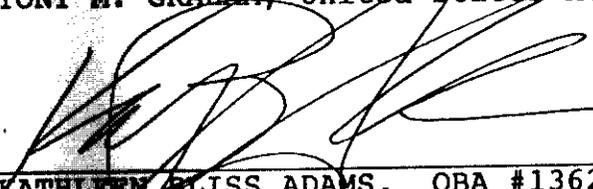
CIVIL ACTION No.
92-C-551-B

**ACKNOWLEDGMENT OF COMPROMISE SETTLEMENT AND
NOTICE OF DISMISSAL OF ACTION WITH PREJUDICE**

Plaintiff, United States of America, by Tony M. Graham,
United States Attorney for the Northern District of Oklahoma,
through Kathleen Bliss Adams, Assistant United States Attorney,
hereby acknowledges payment of compromise settlement in full for
the indebtedness sued on herein and hereby dismisses this action
WITH PREJUDICE to the refiling of same pursuant to Federal Rule
of Civil Procedure 41(a).

DATE: 20 July 1992

UNITED STATES OF AMERICA,
TONY M. GRAHAM, United States Attorney



KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3900 United States Courthouse
333 West 4th Street
Tulsa, OK 74103

ENTERED ON DOCKET
JUL 28 1992
DATE JUL 28 1992

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

FEDERAL DEPOSIT INSURANCE)
CORPORATION, in its Corporate)
Capacity as successor to BANK OF)
COMMERCE AND TRUST COMPANY,)

Plaintiff,)

vs.)

THOMAS EDWARD SHERMAN, a/k/a)
THOMAS E. SHERMAN and DONNA DIANNE)
SHERMAN, a/k/a DONNA D. SHERMAN,)
husband and wife; JOHN F. CANTRELL)
COUNTY TREASURER OF TULSA COUNTY,)
OKLAHOMA; and THE BOARD OF COUNTY)
COMMISSIONERS OF TULSA COUNTY,)
OKLAHOMA,)

Defendants.)

Case No. 91-C-785-B ✓

F I L E D

JUL 27 1992 ✓

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

ORDER

This matter comes on for consideration of Plaintiff's Motion For Summary Judgment.

The material undisputed facts herein are as follows:

On or about December 16, 1985, Defendants Thomas Edward Sherman and Donna Dianne Sherman (Shermans), executed and delivered to the Bank of Commerce and Trust Company (BOC) a promissory note (First BOC note) in the amount of \$260,000.00 with interest thereon at 10% per annum, plus a default interest rate of 18%, and providing for a reasonable attorneys' fee and costs in the event of default. On the same date the Shermans executed a real estate mortgage on the following described property:

5

Lot Sixteen (16), Block Six (6), THOUSAND OAKS, an Addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof, a/k/a 8939 South Quebec, Tulsa, Oklahoma 74137

which mortgage, with the required mortgage tax paid thereon, was recorded on December 18, 1985, in Book 4913 at Page 1785, records of Tulsa County, Oklahoma.

On or about March 27, 1985, Defendant Thomas E. Sherman (Sherman) executed a promissory note (Second BOC note) in the amount of \$90,000.00 with interest thereon at BOC prime floating.

On or about October 23, 1987, Sherman executed a promissory note to Plaintiff, Federal Deposit Insurance Corporation (FDIC) in the amount of \$17,000.00 (Renewal note) with interest thereon in the amount of 12% until paid plus a default interest rate of 5% above the note rate and providing for a reasonable attorney's fee and costs if in default.

On or about May 8, 1986, the Oklahoma State Banking Commissioner closed the Bank of Commerce and Trust Company and appointed FDIC as the Liquidating Agent. FDIC, Receiver transferred all assets of BOC to FDIC, Corporate, including the promissory notes and mortgage involved herein. Also assigned¹ to FDIC, Corporate was a security agreement dated January 3, 1986, in favor of BOC securing a \$20,477.10 debt with a 1983 Jaguar XJ-6, Ser.#SAJAV134DC357628.²

¹ It is unclear from the record when this assignment took place or whether it was part of the BOC asset sale.

² Defendant Sherman's affidavit in response to Plaintiff's Motion for Summary Judgment states that on January 3, 1986, a loan was executed by Sherman in favor of First National Bank of Oklahoma

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In Celotex, 477 U.S. at 317 (1986), it is stated:

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

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585, 106 S.Ct. 1348, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., *supra*, wherein the Court stated that:

which listed a 1983 Jaguar XJ-6, Ser.#SAJAV134DC357628 as security; that such loan was purchased by First National Bank of Tulsa.

". . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384 (10th Cir. 1988).

The Shermans argue that the indebtedness secured by the Jaguar has been paid; that FDIC refuses to release the lien; that Sherman has thereby been prevented from utilizing the asset to reduce other Sherman indebtedness to FDIC which contributed to/and or caused the default of such notes now being sued upon.

In response, FDIC avers that this defense is barred by the principles enunciated in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942) and its progeny. The general rule is that defenses to the enforcement of notes and mortgages that are based upon promises, representations, acts and omissions of a bank's employees cannot be asserted against the FSLIC, the FDIC, the RTC or any such successor in interest in notes and mortgages. D'Oench, Duhme & Co. v. FDIC. See, also, Porras v. Petroplex Savings Association, 903 F.2d 379 (5th Cir.1990). The maker of a note in favor of a bank may not rely on a secret side agreement with the bank as a defense to suit on the note by FDIC as receiver of the bank after it has failed. D'Oench, Duhme & Co. The policy embodied in such rule is that bank examiners and the FDIC are entitled to rely on a bank's books and records on their face, for the protection of depositors

and creditors of the institution, and FDIC's insurance fund. See, also, Langley v. FDIC, 484 U.S. 86 (1987).

The enforcement of such agreements is prohibited by statute. Section 1823(e) of title 12 of the United States Code provides:

No agreement which tends to diminish or defeat the interest of the [Federal Deposit Insurance] Corporation in any asset acquired by it under this section or section 1921 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement --

- (1) is in writing,
- (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
- (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
- (4) has been, continuously, from the time of its execution, an official record of the depository institution.

Section 1823(e) also prohibits undocumented agreements and fraud as defenses against the FSLIC, the FDIC or the RTC.

Further, FDIC argues that its refusal to release the Jaguar lien is proper because the Security Agreement itself provides that it also secures any other debt Sherman may owe BOC, past, present and future, citing the agreement itself and the affidavit of FDIC Account Officer, Tim B. Cravens.³ Cravens' affidavit recites the

³ Cravens Affidavit purports to have attached thereto a copy of the security agreement in issue. None is attached. A somewhat illegible copy of the agreement was attached to Plaintiff's Response to Defendants' Amended Answer.

execution of the security agreement by Sherman; that "FDIC has succeeded to all the rights of BOC under the Security Agreement". What it does not explain is the purchase by, and assignment of the security agreement to, First National Bank of Oklahoma City as alleged in the Shermans' Amended Answer. The Shermans also allege the note was paid before it later was transferred to FDIC.

This matter would typically be controlled by the principles set forth in D'Oench, Duhme. FDIC Corporate took over the assets, including the notes and mortgage herein involved, free and clear of the claims and defenses of the Defendants. D'Oench, Duhme, its progeny, and Section 1823 of Title 12, effectively bar Defendants' defenses to the enforcement of the facially unconditional Notes and Mortgage. However, these principles operate upon unpaid notes, in default, due and owing. The Court has been shown no authority for the premise that the FDIC may legally collect upon a paid-in-full note (the Jaguar security agreement) if, in fact, such indebtedness has been paid in full as alleged by the Sherman.

It would seem to the Court that transfer of the security agreement to a bank other than BOC, followed by full payment of the indebtedness secured by the Jaguar, could operate to equitably release the security lien. However, that issue is not before the Court for decision. FDIC is not seeking to have any alleged security rights in the Jaguar automobile determined herein nor are the Shermans attempting to have the lien extinguished. The Shermans plead the withholding of the lien release, if improperly done, as a defense to other Sherman/FDIC debt. Such a defense implicates

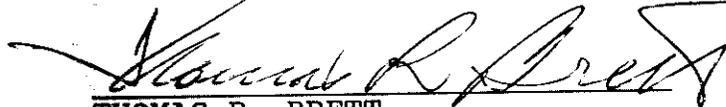
D'Oench, Duhme.

The Court concludes FDIC is entitled to Judgment on the Notes and Mortgage as a matter of law, there being no dispute as to the material facts herein relating to such notes and mortgage.⁴

To the extent the Shermans' Amended Answer is a Counterclaim the Court ruling herein bars the same and Judgment should be entered in favor of Plaintiff and against the counterclaimants. Trigo v. FDIC, 847 F.2d 1499 11th Cir.1988).

Plaintiff is directed to submit for the Court's signature, within 10 days from the date hereof, a Judgment Of Foreclosure consistent with the views expressed herein, providing for attorneys fees and costs in favor of Plaintiff, if timely applied for pursuant to Local Rule 6.

IT IS SO ORDERED this 28 day of July, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

⁴ This ruling in no way precludes any right or rights the Shermans may have, if any, in relation to the Jaguar automobile and the release of any security lien thereof.

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

ENTERED ON DOCKET
DATE JUL 28 1992
FILED

JUL 27 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JEFFLINE CORPORATION, BRUCE
HINLEIN, JEFFREY HINLEIN and
JOHN A. KENNEDY Jr.,

Plaintiffs,

vs.

THRIFTY RENT-A-CAR SYSTEM, Inc.,
and PENTASTAR TRANSPORTATION
GROUP, Inc.,

Defendants.

Case No. 91-C-841-B

ORDER

Before the Court is Defendants' Motion to Dismiss two counts of Plaintiff's complaint for failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12(b)(6). Plaintiffs Jeffline Corporation, Bruce Hinlein, Jeffrey Hinlein and John A. Kennedy Jr. ("Jeffline") allege in a five-count complaint¹ that Defendants Thrifty Rent-A-Car System ("Thrifty") and Pentastar Transportation Group, Inc., ("Pentastar") breached franchise license and vehicle supply agreements ("agreements") between Jeffline and Thrifty.

Bruce Hinlein, Jeffrey Hinlein and John A. Kennedy, Jr., through Jeffline, entered into the two agreements on August 1,

¹Plaintiffs allege: Count I, violation of the franchise and vehicle supply agreements; Count II, breach of the implied covenant of good faith; Count III, violation of Florida's Sale of Business Opportunities Act; Count V, fraud; and Count VI, violation of the Sherman and Clayton antitrust acts. Plaintiffs skipped Count IV. Counts III and VI are at issue here.

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1990, thereby giving Jeffline the right to operate a Thrifty franchise at the Tampa, Florida, airport. The agreements were negotiated and executed in Philadelphia, Pennsylvania. As part of the franchise agreement, Jeffline alleges, Thrifty agreed to refrain from granting a similar license that would allow any third party to operate a Thrifty franchise within Jeffline's licensed territory. A disclosure statement dated May 29, 1990, stated that Thrifty and its affiliates did not intend to establish other franchises or company-owned outlets offering similar products or services within Jeffline's franchise territory.

Also on August 1, 1990, as a requirement of the franchise agreement, Jeffline and Thrifty entered into a Vehicle Supply Agreement, which obligated Jeffline to lease or purchase at least 70 percent of its vehicles from Chrysler Corporation for use in its franchise. Thrifty is a wholly owned subsidiary of Pentastar, which in turn is a wholly owned subsidiary of Chrysler. According to the franchise agreement, Jeffline was required to have at least 420 vehicles in its initial inventory and to increase inventory to 615 vehicles by the 43rd month of the franchise.

On or before June 26, 1990,² however, Pentastar purchased the Dollar Rent-A-Car franchise that served the Tampa Airport. Subsequently, the Tampa Dollar Rent-A-Car was operated as a company-owned outlet in direct competition with Jeffline's Thrifty franchise at the Tampa airport. In addition, Plaintiffs allege that

²This was before the parties entered into the agreements in question, but after the date of the disclosure statement given to Plaintiffs by Defendants.

Pentastar-owned Snappy Car Rental also competed with Jeffline's franchise, although Defendants represented to Jeffline that there would be no direct competition between Snappy and Jeffline.

Jeffline filed this complaint in the United States District Court for the Eastern District of Pennsylvania. The suit was transferred to this Court on October 28, 1991. Defendants move to dismiss two counts of the complaint: Count III, violation of Florida's Sale of Business Opportunities Act, and Count VI, violation of §1 of the Sherman Act and §14 of the Clayton Act. Plaintiffs have conceded that Count III, violation of the Florida act, is inapplicable and the Court concludes it should be dismissed. Plaintiffs apparently plan to amend the complaint to substitute under Count III a claim under the Florida Franchise Law, and Defendants state that they have agreed to stipulate to such an amendment. However, no such amendment is before the Court. Therefore, Defendants' Motion to Dismiss Count III of the complaint is hereby GRANTED due to Plaintiffs' failure to respond.

To dismiss a complaint and action for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). Motions to Dismiss under Fed.R.Civ.P. 12(b) admit all well-pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970). The allegations of the complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. Olpin v. Ideal

National Ins. Co., 419 F.2d 1250 (10th Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970).

Defendants allege in their Motion to Dismiss Count VI of the complaint that parent corporations and their wholly owned subsidiaries cannot conspire to violate the Sherman Act³ and the Clayton Act.⁴ The Court agrees insofar as the Sherman Act is concerned. A parent corporation and its wholly owned subsidiary are incapable of conspiring with each other in violation of §1 of the Sherman Act. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777 (1984). U.S. v. Suntar Roofing, Inc., 897 F.2d 469 (10th Cir. 1990). Commonwealth of Pennsylvania v. Pepsico, 836 F.2d 173 (3rd Cir. 1988). "If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for §1 scrutiny." Copperweld, 467 U.S. at 771.

However, §1 does not deal with conspiracy claims only. The statute states that "[e]very contract, ... or conspiracy, in restraint of trade ... is declared to be illegal" Plaintiffs alleged in their complaint that Defendants "have unlawfully conspired and agreed to tie the purchase of the franchise with a separate product, namely Chrysler vehicles. The tying of these two products was a conspiracy and restraint of trade for which there

³The Sherman Act is found in 15 U.S.C. §§1-7.

⁴The Clayton Act is found in 15 U.S.C. §§12-27.

was no legal reason to justify such restraint." (Complaint, ¶43, emphasis added). The Plaintiffs have alleged a cause of action sufficiently separate from their conspiracy claim such that, if proved, could constitute a violation of §1 of the Sherman Act. Plaintiffs have met the minimal standards necessary to survive a Rule 12(b)(6) motion. The Court concludes that Defendants' Motion to Dismiss for failure to state a claim should be and is hereby DENIED regarding the Sherman Act, except as to conspiracy claim in violation of §1.

Defendants state that Copperweld also applies to Plaintiffs' Clayton Act allegation. The Court disagrees. Copperweld does not involve the Clayton Act; it holds only that a corporation and its wholly owned subsidiary cannot conspire to violate §1 of the Sherman Act. Copperweld provides no basis for dismissal of a claim under the Clayton Act.

Section 14 of the Clayton Act states that "[i]t shall be unlawful for any person ... to ... make a ... contract for sale of goods ... where the effect of such ... contract for sale ... may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Plaintiffs allege that Defendants' actions "are deliberate, predatory acts to suppress competition, which pose a dangerous possibility of creating a monopoly and thus constitute an attempt to monopolize trade and commerce in violation of the Clayton and Sherman Acts." (Complaint, ¶44). The Court concludes that Plaintiffs have stated a cause of action under §14 of the Clayton Act sufficient to survive a Rule 12(b)(6) motion.

In the alternative, Defendants state that Count VI should be dismissed because of the parties' agreement to arbitrate all disputes arising under, or relating to, the Vehicle Supply Agreement.⁵ The contract between Plaintiff and Defendants contains the following arbitration clause:

If a dispute arises among purchaser and seller regarding any rights or obligations under this Agreement ... then the issue shall be submitted to arbitration ... in accordance with the following: (1) Any controversy or claim arising out of or relating to this agreement, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules ...

(Plaintiff's Exhibit C, ¶10(b)).

There is strong federal policy favoring arbitration for dispute resolution. 9 U.S.C. §1; Shearson/American Express, Inc., v. McMahon, 482 U.S. 220, 107 S.Ct. 2332 (1987). When a contract mandates arbitration, courts generally will enforce the arbitration clause absent a waiver. Moses H. Cone Memorial Hospital v. Mercury Construction Co., 460 U.S. 1 (1983); Peterson v. Shearson/American Express, Inc., 849 F.2d 464 (10th Cir. 1988). The party asserting a waiver of arbitration has a heavy burden of proof. Peterson, 849 F.2d at 466; Belke v. Merrill Lynch, 693 F.2d 1023, 1025 (11th Cir. 1982).

Plaintiffs argue that the antitrust allegations are not subject to the contract's arbitration clause because antitrust is not a contractual dispute; further, Plaintiffs aver there is a

⁵Defendants seek dismissal of Count VI because of the arbitration clause. Defendants have not filed a Motion to Compel arbitration.

judicially recognized exception to the Federal Arbitration Act when plaintiffs are seeking to enforce statutory rights. Plaintiffs have cited only one authority for this proposition that was decided after McMahon. In Bowman v. Township of Pennsauken, 709 F.Supp. 1329 (D.N.J. 1989), the court held that the policy favoring arbitration is inapplicable where the rights that plaintiffs seek to vindicate are not merely contractual, but arise from a federal statute. However, this case also is based on pre-McMahon precedent in the District of New Jersey.

The Supreme Court in McMahon held that the court's duty to rigorously enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights. McMahon, 107 S.Ct. at 2337. "Absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that would provide grounds for the revocation of any contract ... the Arbitration Act provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability." Id. at 2337, citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 437 U.S. 614 (1985).

Plaintiffs have alleged a fraud claim against Defendants, which, if proven, could revoke the contract, including the arbitration clause. Plaintiffs' fraud allegation allows Plaintiffs to meet the minimum standards necessary to survive a Rule 12(b)(6) motion. Defendants' Motion to Dismiss the Clayton and Sherman Act claims is hereby DENIED, except that as to the "conspiracy" claim

under §1 of the Sherman Act, the Motion is hereby GRANTED.

However, the Court is concerned about how the fraud issue could or would impact the arbitration issue. The Court will allow the parties sufficient time to pursue Rule 56 motions, if desired, regarding the fraud issue. Parties are directed to adhere to the following schedule:

Complete all discovery by October 16, 1992;

File all dispositive motions by October 26, 1992;

Responses to dispositive motions by November 10, 1992;

Replies by November 17, 1992.

IT IS SO ORDERED, this 28th day of July, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE JUL 28 1992

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

FILED

JUL 28 1992

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

DAWN ROBINSON, a minor by James
Robinson, her father and next
friend,

Plaintiff,

vs.

DOMINO'S PIZZA, INC.,
a Michigan corporation,

Defendant.

Case No. 91-C-112-B

ORDER

This matter comes on for consideration of Defendant's Motion For Judgment As A Matter Of Law Or In The Alternative For New Trial Or Amendment Of The Judgment By Remittitur.

In Proposition I Defendant argues it is entitled to a new trial because the Court admitted evidence of the dismissal of a third party claim against Lance Ward, the operator of the vehicle in which Plaintiff was a passenger at the time of the accident in question. This action was filed February 20, 1991. Defendant moved to join, as a third party defendant, Lance Ward, stipulating to dismiss Ward with prejudice on December 20, 1991.¹

Plaintiff responds that evidence of Ward's dismissal was admissible in an attempt to show bias of the witness and is part of

¹ Ward filed a Motion for Summary Judgment on December 6, 1991, to which the Third Party Plaintiff Domino's responded December 16, 1991. At a pre-trial conference held December 20th, Domino's announced the third party Complaint against Ward would be dismissed.

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proper cross-examination, citing Rule 408, Federal Rules of Evidence. That Rule provides, in part:

" . . . This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, . . .".

The Court has not been favored with a transcription of the actual trial testimony and can therefore not give verity to Defendant's allegations of what Plaintiff's counsel asked, what Defendant's counsel objected to and/or what a particular bench conference entailed except through the frailties of memory. However, subject to the limitation referred to above, the Court concludes Plaintiff's counsel's questioning of Defendant's sole fact witness, Lance Ward, was well within the confines of proper cross-examination. The Court further concludes Plaintiff's counsel's questioning regarding dismissal of Ward was not in violation of the Federal Rules of Evidence, specifically Rule 408.

Defendant also argues that Plaintiff's counsel engaged in improper argument in closing remarks by discussing the third party defendant dismissal issue and referring to the Defendant as a "heartless corporation". The Court, having concluded that cross-examination of Ward regarding his dismissal as a third party defendant was proper, also concludes it was not improper for Plaintiff's counsel to direct comments to this issue. In response to the "heartless corporation" remarks, which Plaintiff's counsel does not repudiate and of which the Court has memory,² Plaintiff

² It is the Court's recollection that Defendant failed to object to "heartless corporation" remark.

purports to quote from the transcribed deposition of Defendant's driver, Michael Campbell. This testimony, quoted in Plaintiff's response,³ could be fairly summarized to reflect that driver Campbell paid little or no attention to the possibly injured Plaintiff at the accident scene but did call a substitute delivery person to presumably complete the pizza delivery. The Court concludes this assignment of error lacks merit.

Further, Defendant argues the Court erred by allowing the deposition testimony of its driver Campbell regarding his receipt of a "failure to yield" citation. At one point deponent Campbell testified⁴ he did plead guilty to a failure to yield right-of-way citation; later Campbell testified he did not recall whether he pled "guilty or no contest on those tickets?" Defendant argues that "Obviously, the driver did not understand the legal definitions of various pleas when he originally responded to Plaintiff's counsel's question." Campbell's testimony could also reflect he well knew the legal difference between guilty and no contest pleas but simply did not remember which one he entered.

The Court concludes such excerpted testimony is not violative of either Rule 403 or 410, Federal Rules of Evidence.

Lastly, Defendant complains of the Court's exclusion of

³ The Court presumes the quoted testimony of Campbell is essentially accurate since Defendant's counsel, having a copy of same, failed to request permission to reply thereto to correct any misquotations.

⁴ Again, the Court accepts the quoted testimony of Campbell since the parties have copies of same and Plaintiff has raised no objection to the quoted language.

evidence regarding Plaintiff's non-use of a seat belt. The Oklahoma Mandatory Seat Belt Use Act⁵ precludes "the use or non-use of seat belts" evidence in a civil case in Oklahoma. Defendant complains Court preclusion of non-use evidence violates Defendant's rights under the 5th and 14th Amendments to the U.S. Constitution. No citation of authority accompanied such averment. The Court concludes Defendant's argument is not well taken.

In McHarque v. Stokes Div. of Pennwalt Corp., 912 F.2d 394 (10th Cir.1990) the Court stated:

In ruling on a motion for a new trial, the trial judge has broad discretion. Scholz Homes Inc. v. Wallace, 590 F.2d 860, 864 (10th Cir.1979). He has the obligation or duty to ensure that justice is done, and, when justice so requires, he has the authority to set aside the jury's verdict. Seven Provinces Inc. Co. Ltd. v. Commerce & Industry Ins. Co., 65 F.R.D. 674, 688 (W.D.Mo.1975). He may do so when he believes the verdict to be against the weight of the evidence or when prejudicial error has entered the record. Holmes v. Wack, 464 F.2d 86, 88 (10th.Cir.1972).

The Court is of the view the instant verdict was not against the weight of the evidence nor does it believe the record reflects prejudicial error. Defendant's Motion For New Trial should be and the same is herewith DENIED.

In Proposition II Defendant argues it is entitled to remittitur based upon an alleged lack of competent medical evidence regarding the severity or duration of Plaintiff's injuries.

As to Defendant's Motion For Remittitur the Court concludes the amount of the verdict was not excessive and did not shock the conscience of the Court. Henryetta Const. Co. v. Harris, 408 P.2d

⁵ 47 O.S. §§12-416 et seq.

522 (Okla. 1965).

Remittitur is peculiarly within the discretion of the trial court. Brown v. Skaggs-Albertson's Properties, Inc., 563 F.2d 983 (10th Cir. 1977). The Court concludes Motion For Remittitur should be and the same is hereby DENIED.

In Proposition III Defendant urges it is entitled to judgment as a matter of law. Defendant acknowledges there was sufficient evidence for jury deliberation on the issues of negligence and damages but that the evidence as to causation was lacking. Defendant has not presented the Court with any credible evidence (or any evidence) that the element of causation was not proven. The jury was instructed that Plaintiff had the burden of proving "such negligence was a direct cause of the injury sustained by the claiming party." "Direct cause" as well as "negligence" was defined to the jury by instruction. The jury heard the evidence of the intersection accident and decided in favor of Plaintiff on these issues. The Court concurs with that decision.

The Court concludes Defendant's Motion For Judgment As A Matter Of Law should be and the same is hereby DENIED.

IT IS SO ORDERED this 28 day of July, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

JUL 28 1992

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

RESOLUTION TRUST CORPORATION, as
CONSERVATOR for CIMARRON FEDERAL
SAVINGS ASSOCIATION,

Plaintiff,

vs.

JIMMY M. SMITH; ROBERT D.
MARSTERS; LONNIE E. SILER;
LENA M. SILER; DONALD H.
DINWIDDIE and MARY ANN DINWIDDIE,
husband and wife; LAKELAND REAL
ESTATE DEVELOPMENT, INC.;
JAMES M. HENRY and KAREIN
HENRY a/k/a KAREIN L. HENRY,
husband and wife; QUINTON R. DODD
and VICKIE E. DODD, husband and
wife; UNITED STATES OF AMERICA,
DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,

Defendants.

CASE NO. 91-C-609-B

ORDER

This matter comes on for consideration of Plaintiff's Renewed Motion For Summary Judgment And Decree Of Foreclosure. Defendants against whom summary judgment is sought have not responded to Plaintiff's Renewed Motion, filed May 5, 1992.

The material undisputed facts herein are as follows: Defendants Jimmy M. Smith (Smith), Robert D. Marsters (Marsters), Donald H. Dinwiddie and Mary Ann Dinwiddie (Dinwiddies), and Lonnie E. Siler and Lena M. Siler (Silers) executed four separate promissory notes, dated September 23, 1985, in the amounts of \$49,900.00, \$24,950.00, \$24,950.00, \$24,950.00, respectively .

Plaintiff, Resolution Trust Corporation, as Conservator for Cimarron Federal Savings Association (RTC/Conservator) is the holder of these notes, respectively referred to as the Smith, Marsters, Dinwiddies and Silers notes. These parties (collective parties) have failed to pay the notes in full and the same are in default. After application of all payments and offsets these parties are indebted to Plaintiff in the amounts of \$71,262.66, \$36,423.78, \$36,368.72, \$38,255.91, respectively, all as of March 10, 1992, together with interest accruing on each amount at the rates of \$12.65, \$6.32, \$6.32 and \$6.32, respectively, per diem thereafter.

As security for the notes the collective parties executed and delivered a mortgage, recorded on October 11, 1985, in Book 649 at page 639 in the records of the County Clerk of Mayes County, Oklahoma, the mortgage tax thereon being duly paid, covering the following described property:

Lot Numbered Two (2), in Block Numbered Six (6), of the VILLAS OF LAKELAND, a Subdivision in Mayes County, State of Oklahoma, according to the official Survey and Plat filed for record in the office of the County Clerk of said County and State.

RTC/Conservator is the holder of the Mortgage by the terms of which it is provided that upon the default in payment secured thereby when due, the mortgage may be foreclosed. Defendant United States of America, Department of the Treasury, Internal Revenue Service, claims an interest in the undivided one-fifth interest of Lonnie and Lena Siler in the mortgaged property by virtue of a federal tax lien filed in the records of the County Clerk of Mayes

County, Oklahoma, on June 8, 1987, in Book 674 at Page 352.

On January 22, 1988, Phoenix Federal Savings and Loan Association (Phoenix), predecessor in interest in the Notes and Mortgage securing the Notes, brought an action to foreclose the Notes and Mortgage in the District Court of Mayes County, Oklahoma, and to assert and protect interests in two savings accounts pledged as collateral, and to enforce guaranties by Defendants Lakeland Real Estate Development, Inc., James M. Henry and Karein L. Henry, Quinton Dodd and Vickie E. Dodd. Lakeland, the Henrys and the Dodds have since been dismissed from this action and therefore the guaranties are no longer at issue.

Defendants, Smith, Marsters and the Dinwiddies, answered the Petition and alleged affirmative defenses and counterclaims against Phoenix based upon alleged fraud and alleged breach of oral agreements in the transaction out of which the Notes and Mortgage emerged, and alleged identical cross-claims against Defendants Lakeland and Quinton B. Dodd. The purported agreements and representations upon which the collective parties based their defense were not reduced to writing nor executed by agents of Phoenix contemporaneously with the execution of the Notes and Mortgage nor were reflected in the minutes of any meeting of the board of directors or loan committee of Phoenix nor were part of the official records of Phoenix.

On August 31, 1988, the Federal Home Loan Bank Board (FHLBB) declared Phoenix insolvent. Pursuant to 12 U.S.C. §1464(d)(6)(A), the Federal Savings and Loan Insurance Corporation (FSLIC) was

appointed Receiver of the insolvent savings and loan association's assets, including the Notes, Mortgage and savings accounts. FSLIC assigned all right, title and interest in the instruments and related documents which are the subject matter of this case, to Cimarron Federal Savings and Loan Association (Old Cimarron) on August 31, 1988, as reflected in the resolutions of the Federal Home Loan Bank Board. Old Cimarron became a "transferee" of the notes, mortgages and savings accounts. FSLIC did not assign liabilities to Old Cimarron, other than secured and deposit liabilities (to the extent of the security). The counterclaims asserted by Defendants against Phoenix were not assumed by Old Cimarron, remaining against FSLIC as Receiver, later the FDIC. The claims and defenses to the Notes alleged by the Defendants were based upon promises, representations, acts and omissions of agents of Phoenix that did not appear in the files and records of Phoenix, Old Cimarron or New Cimarron.

On September 14, 1989, FDIC/Receiver removed this action to this Court.¹ On October 23, 1989, FDIC/Receiver filed its Motion to Dismiss the counterclaims that had been retained by FDIC. On January 3, 1990, Old Cimarron filed its Motion for Summary Judgment of Substituted Party Plaintiff, Cimarron Federal Savings and Loan Association.² On July 6, 1990, this Court granted FDIC's Motion To Dismiss to the extent that punitive damages were sought against

¹ From the Mayes County, OK district court. 89-C-751-B.

² This is the motion that RTC/Conservator has renewed by its filing of May 5, 1992.

FDIC and found that the other claims for relief should be asserted against Old Cimarron and Lakeland. Because FDIC was dismissed from the action, this Court declined to exercise jurisdiction over the pendent claims and remanded the action to the District Court for Mayes County, Oklahoma, for ultimate resolution.

On April 19, 1991, pursuant to the Home Owners Loan Act of 1933, as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), the Director of the Office of Thrift Supervision placed Old Cimarron in receivership and assumed exclusive custody and control of the property and affairs of Old Cimarron. The Director appointed RTC as Receiver for Old Cimarron, to have "all the powers of a conservator or receiver, as appropriate, granted under the Federal Deposit Insurance Act, and (when not inconsistent therewith) any other rights, powers, and privileges possessed by conservators or receivers, as appropriate, of savings associations under this Act and any other provisions of law."

The Director organized Cimarron Federal Savings Association (New Cimarron) as a newly federally chartered mutual savings association, appointing RTC as conservator of New Cimarron. Certain assets of Old Cimarron were sold and transferred by RTC as the Receiver for Old Cimarron to New Cimarron, by and through its Conservator, RTC, including the Notes, Mortgage and accounts involved in this action. On May 16, 1991, the RTC/Conservator was substituted as Plaintiff in this action. RTC/Conservator timely removed this action from the District Court of Mayes County,

Oklahoma, to the United States District Court for the District of Columbia. On August 14, 1991, this action was transferred *sua sponte* from the District of Columbia to this Court.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In Celotex, 477 U.S. at 317 (1986), it is stated:

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

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585, 106 S.Ct. 1348, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Anderson v.

Liberty Lobby, Inc., *supra*, wherein the Court stated that:

" . . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384 (10th Cir. 1988).

The Defendants, Smith, Marsters and the Dinwiddies, have asserted defenses of failure of consideration, fraud and illegality, alleging that Phoenix made representations and oral promises that Phoenix, Dodd and Lakeland would fund and build a marina, restaurant, recreation center, that the promised construction would enhance the value and otherwise misled the collective parties and breached oral agreements.

These purported representations and promises, if made, were not evidenced in the records of Phoenix or any of its successors. Defenses to the enforcement of notes and mortgages that are based upon promises, representations, acts and omissions of Phoenix employees cannot be asserted against the FSLIC, the FDIC, the RTC or any successor in interest in the Notes and Mortgage herein. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942) and its progeny. See, also, Porras v. Petroplex Savings Association, 903 F.2d 379 (5th Cir.1990). The maker of a note in favor of a bank may not rely on a secret side agreement with the bank as a defense to suit on the note by FDIC as receiver of the bank after it has failed.

D'Oench, Duhme & Co.. The policy embodied in such rule is that bank examiners and the FDIC are entitled to rely on a bank's books and records on their face, for the protection of depositors and creditors of the institution, and FDIC's insurance fund. See, also, Langley v. FDIC, 484 U.S. 86 (1987).

The enforcement of such agreements is prohibited by statute. Section 1823(e) of title 12 of the United States Code provides:

No agreement which tends to diminish or defeat the interest of the [Federal Deposit Insurance] Corporation in any asset acquired by it under this section or section 1921 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement --

- (1) is in writing,
- (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
- (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
- (4) has been, continuously, from the time of its execution, an official record of the depository institution.

Section 1823(e) also prohibits undocumented agreements and fraud as defenses against the RTC.

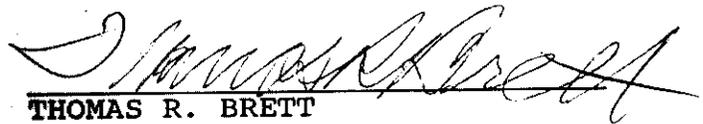
The Court concludes this matter is a typical D'Oench, Duhme situation. New Cimarron, by and through RTC/Conservator, took over the assets, including the notes, mortgage and savings accounts herein involved, free and clear of the claims and defenses of the Defendants, collective parties. D'Oench, Duhme, its progeny, and

Section 1823 of Title 12, effectively bar Defendants', collective parties, defenses to the enforcement of the facially unconditional Notes and Mortgage. The Court ruling herein amends its Order of July 6, 1990, to the extent that any counterclaims asserted against the RTC/Conservator by the defendants or any of them is barred and Judgment should be entered in favor of Plaintiff and against the counterclaimants. Trigo v. FDIC, 847 F.2d 1499 11th Cir.1988).

The mortgage was duly recorded in the records of the County Clerk of Mayes County, Oklahoma, on October 11, 1985. The federal tax lien of the United States of America was filed of record on June 8, 1987. A federal tax lien is invalid against a mortgagee until notice of such lien is properly filed. 26 U.S.C. §6323(a) and (f). If the tax lien is invalid against a prior mortgagee under § 6323(a), the priority of the superior mortgage extends to all accrued and accruing interest, charges, costs of preserving property, expenses, costs and reasonable attorneys fees incurred in collecting and enforcing the obligation secured by the mortgage to the extent that state law confers such priority. 26 U.S.C. §6323(e). Because the tax lien was filed subsequent to the mortgage, the mortgage constitutes a lien upon the mortgaged property that is prior and superior to the federal tax lien. RTC/Conservator is entitled to judgment as a matter of law declaring the mortgage to be a prior and superior lien upon the mortgaged property, to the extent of the obligation secured by the mortgage, subject to the right of redemption of the United States of America as provided by 28 U.S.C. §2410(c).

The Court concludes RTC/Conservator is entitled to Judgment on the Notes and Mortgage as a matter of law, there being no dispute as to the material facts herein. Plaintiff is directed to submit for the Court's signature a Judgment Of Foreclosure consistent with the views expressed herein, providing for attorneys fees and costs in favor of Plaintiff, if timely applied for pursuant to Local Rule 6.

IT IS SO ORDERED this 27 day of July, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE JUL 28 1992

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

FILED

JUL 27 1992

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

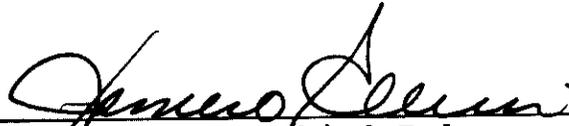
RESOLUTION TRUST CORPORATION,)
as Conservator,)
Plaintiff,)
vs.)
MATTHEW KRAUSKOPE, et al.,)
Defendants.)

No. 89-C-668-E

ORDER AND JUDGMENT

Pursuant to this Court's Order of June 18, 1992, this matter is hereby dismissed with prejudice.

So ORDERED this 27th day of July, 1992.



JAMES G. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

53

DATE JUL 28 1992

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

FILED

JUL 28 1992 *[Signature]*

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

RESOLUTION TRUST CORPORATION, as)
CONSERVATOR for CIMARRON FEDERAL)
SAVINGS ASSOCIATION,)

Plaintiff,)

vs.)

CASE NO. 91-C-692-B ✓

RANDY WALLIS and CONNIE WALLIS,)
husband and wife; JOHN C. FLUD,)
SR. and MARILYN FLUD, husband and)
wife; JOHN C. FLUD, JR. and)
JANTHA K. FLUD, husband and wife;)
RICHARD L. ATKINSON and ROBBIE L.)
ATKINSON, husband and wife; BETTY)
B. HESS; LAKELAND REAL ESTATE)
DEVELOPMENT, INC.; JAMES M. HENRY)
and KARIEN HENRY a/k/a KARIEN L.)
R. DODD and VICKIE E. DODD,)
husband and wife,)

Defendants.)

ORDER

This matter comes on for consideration of Plaintiff's Renewed Motion For Summary Judgment And Decree Of Foreclosure. Defendants against whom summary judgment is sought have not responded to Plaintiff's Renewed Motion, filed April 24, 1992.

The material undisputed facts herein are as follows: Defendants Randy Wallis (Wallis), John E. Flud, Sr. and Marilyn Flud (Fluds, Sr.), John C. Flud, Jr. and Jantha Flud (Fluds, Jr.), Richard L. Atkinson and Robbie L. Atkinson (Atkinsons), and Betty B. Hess (Hess) executed five separate promissory notes, dated December 20, 1985, each in the amount of \$28,700.00. Plaintiff, Resolution Trust Corporation, as Conservator for Cimarron Federal

Savings Association (RTC/Conservator) is the holder of these notes, respectively referred to as the Wallis, Flud, Sr., Flud, Jr., Atkinson and Hess notes. These parties (collective parties) have failed to pay the notes in full and the same are in default. After application of all payments and offsets these parties are indebted to Plaintiff in the amounts of \$40,307.43, \$40,307.43, \$40,319.51, \$40,307.44 and \$40,307.43, respectively, all as of March 10, 1992, together with interest accruing on each respective amount at the rate of \$6.13 per diem thereafter.

As security for the notes the collective parties executed and delivered a mortgage, recorded on January 21, 1986, in Book 653 in the records of the County Clerk of Mayes County, Oklahoma, the mortgage tax thereon being duly paid, covering the following described property:

Lot Numbered One (1), in Block Numbered Two (2), of the VILLAS OF LAKELAND, a Subdivision in Mayes County, State of Oklahoma, according to the official Survey and Plat filed for record in the office of the County Clerk of said County and State. [a/k/a 507 Apple ridge]

RTC/Conservator is the holder of the Mortgage by the terms of which it is provided that upon the default in payment secured thereby when due, the mortgage may be foreclosed.

On January 22, 1988, Phoenix Federal Savings and Loan Association (Phoenix), predecessor in interest in the Notes and Mortgage securing the Notes, brought an action to foreclose the Notes and Mortgages in the District Court of Mayes County, Oklahoma, and to assert and protect interests in two savings accounts pledged as collateral, and to enforce guaranties by

Defendants Lakeland Real Estate Development, Inc., James M. Henry and Karein L. Henry, Quinton Dodd and Vickie E. Dodd. Lakeland, the Henrys and the Dodds have since been dismissed from this action and therefore the guaranties are no longer at issue.

Defendants, the collective parties, answered the Petition and alleged affirmative defenses and counterclaims against Phoenix based upon alleged fraud and alleged breach of oral agreements in the transaction out of which the Notes and Mortgage emerged, and alleged identical cross-claims against Defendants Lakeland and Quinton B. Dodd. The purported agreements and representations upon which the collective parties based their defense were not reduced to writing nor executed by agents of Phoenix contemporaneously with the execution of the Notes and Mortgage nor were reflected in the minutes of any meeting of the board of directors or loan committee of Phoenix nor were part of the official records of Phoenix.

On August 31, 1988, the Federal Home Loan Bank Board (FHLBB) declared Phoenix insolvent. Pursuant to 12 U.S.C. §1464(d)(6)(A), the Federal Savings and Loan Insurance Corporation (FSLIC) was appointed Receiver of the insolvent savings and loan association's assets, including the Notes, Mortgage and savings accounts. FSLIC assigned all right, title and interest in the instruments and related documents which are the subject matter of this case, to Cimarron Federal Savings and Loan Association (Old Cimarron) on August 31, 1988, as reflected in the resolutions of the Federal Home Loan Bank Board. Old Cimarron became a "transferee" of the notes, mortgages and savings accounts. FSLIC did not assign

liabilities to Old Cimarron, other than secured and deposit liabilities (to the extent of the security). The counterclaims asserted by Defendants against Phoenix were not assumed by Old Cimarron, remaining against FSLIC as Receiver, later the FDIC. The claims and defenses to the Notes alleged by the Defendants were based upon promises, representations, acts and omissions of agents of Phoenix that did not appear in the files and records of Phoenix, Old Cimarron or New Cimarron.

On September 14, 1989, FDIC/Receiver removed this action to this Court.¹ On October 23, 1989, FDIC/Receiver filed its Motion to Dismiss the counterclaims that had been retained by FDIC. On January 3, 1990, Old Cimarron filed its Motion for Summary Judgment of Substituted Party Plaintiff, Cimarron Federal Savings and Loan Association.² On July 6, 1990, this Court granted FDIC's Motion To Dismiss to the extent that punitive damages were sought against FDIC and found that the other claims for relief should be asserted against Old Cimarron and Lakeland. Because FDIC was dismissed from the action, this Court declined to exercise jurisdiction over the pendent claims and remanded the action to the District Court for Mayes County, Oklahoma, for ultimate resolution.

On April 19, 1991, pursuant to the Home Owners Loan Act of 1933, as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), the Director of the Office of

¹ From the Mayes County, OK district court. 89-C-757-B.

² This is the motion that RTC/Conservator has renewed by its filing of April 24, 1992.

Thrift Supervision placed Old Cimarron in receivership and assumed exclusive custody and control of the property and affairs of Old Cimarron. The Director appointed RTC as Receiver for Old Cimarron, to have "all the powers of a conservator or receiver, as appropriate, granted under the Federal Deposit Insurance Act, and (when not inconsistent therewith) any other rights, powers, and privileges possessed by conservators or receivers, as appropriate, of savings associations under this Act and any other provisions of law."

The Director organized Cimarron Federal Savings Association (New Cimarron) as a newly federally chartered mutual savings association, appointing RTC as conservator of New Cimarron. Certain assets of Old Cimarron were sold and transferred by RTC as the Receiver for Old Cimarron to New Cimarron, by and through its Conservator, RTC, including the Notes, Mortgage and accounts involved in this action. On May 16, 1991, the RTC/Conservator was substituted as Plaintiff in this action. RTC/Conservator timely removed this action from the District Court of Mayes County, Oklahoma, to the United States District Court for the District of Columbia. On September 5, 1991, this action was transferred *sua sponte* from the District of Columbia to this Court.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106

S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In Celotex, 477 U.S. at 317 (1986), it is stated:

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

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585, 106 S.Ct. 1348, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., *supra*, wherein the Court stated that:

". . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384 (10th Cir. 1988).

The Defendants, collective parties, have asserted defenses of

failure of consideration, fraud and illegality, alleging that Phoenix made representations and oral promises that Phoenix, Dodd and Lakeland would fund and build a marina, restaurant, recreation center, that the promised construction would enhance the value and otherwise misled the collective parties and breached oral agreements.

These purported representations and promises, if made, were not evidenced in the records of Phoenix or any of its successors. Defenses to the enforcement of notes and mortgages that are based upon promises, representations, acts and omissions of Phoenix employees cannot be asserted against the FSLIC, the FDIC, the RTC or any successor in interest in the Notes and Mortgage herein. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942) and its progeny. See, also, Porras v. Petroplex Savings Association, 903 F.2d 379 (5th Cir.1990). The maker of a note in favor of a bank may not rely on a secret side agreement with the bank as a defense to suit on the note by FDIC as receiver of the bank after it has failed. D'Oench, Duhme & Co. The policy embodied in such rule is that bank examiners and the FDIC are entitled to rely on a bank's books and records on their face, for the protection of depositors and creditors of the institution, and FDIC's insurance fund. See, also, Langley v. FDIC, 484 U.S. 86 (1987).

The enforcement of such agreements is prohibited by statute. Section 1823(e) of title 12 of the United States Code provides:

No agreement which tends to diminish or defeat the interest of the [Federal Deposit Insurance] Corporation in any asset acquired by it under this section or section 1921 of this title, either as security for a loan or by

purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement --

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

Section 1823(e) also prohibits undocumented agreements and fraud as defenses against the RTC.

The Court concludes this matter is a typical D'Oench, Duhme situation. New Cimarron, by and through RTC/Conservator, took over the assets, including the notes, mortgage and savings accounts herein involved, free and clear of the claims and defenses of the Defendants, collective parties. D'Oench, Duhme, its progeny, and Section 1823 of Title 12, effectively bar Defendants', collective parties, defenses to the enforcement of the facially unconditional Notes and Mortgage. The Court ruling herein amends its Order of July 6, 1990, to the extent that any counterclaims asserted against the RTC/Conservator by the collective parties is barred and Judgment should be entered in favor of Plaintiff and against the counterclaimants. Trigo v. FDIC, 847 F.2d 1499 11th Cir.1988).

The Court concludes RTC/Conservator is entitled to Judgment on the Notes and Mortgage as a matter of law, there being no dispute

as to the material facts herein. Plaintiff is directed to submit for the Court's signature a Judgment Of Foreclosure consistent with the views expressed herein, providing for attorneys fees and costs in favor of Plaintiff, if timely applied for pursuant to Local Rule 6.

IT IS SO ORDERED this 27 day of July, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE JUL 28 1992

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

FILED

JUL 28 1992

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

IN THE MATTER OF THE WILL OF OMER LOUIS JEFFERSON, JR., Unallotted Osage, Deceased,)
)
Plaintiff,)
)
vs.)
)
MANUEL LUJAN, Secretary of the Interior Department, United States of America,)
)
Defendant.)

No. 90-C-628-B

O P I N I O N

Before the Court is an appeal of the Secretary of the Interior's decision affirming the order of the Superintendent of the Osage Agency, Bureau of Indian Affairs, approving the will of Omer Louis Jefferson, Jr. ("Jefferson"). The standard for judicial review of the Secretary's decision is found in the Osage Indian Act of 1978, which states that the decision "shall be binding and shall not be reversed unless the same is against the clear weight of evidence or erroneous in law." 92 Stat. 1661, §5(a).

Jefferson, a member of the Osage Tribe, executed his Last Will and Testament on June 20, 1986. The Superintendent approved the will, following recommendations of the Special Attorney who conducted hearings regarding validity of the will.

Jefferson was an unallotted Osage Indian. He had two children by his first wife whom he had divorced, daughters Anna Marie Jefferson and Tracey Dawn Seago, each of whom survived him. Jefferson had no children by either his deceased second wife, or

his third wife and surviving widow, Elvita Louise Jefferson (also known as Sally Jefferson). Elvita Jefferson, Anna Jefferson and Tracey Seago are the contestants herein. Proponents of the will are Christina Louise Irons Bledsoe, the testator's niece, designated executrix and beneficiary, and Bill Heskett, guardian *ad litem* for Joyce Marie Washington, a minor.

Jefferson died on September 19, 1986, when he was 50 years old. (Document 10, Transcript of Appeal, Order Approving Will, Finding of Fact No. 1). His principal property consisted of a 1.80082 Osage Headright Interest and other property subject to the jurisdiction of the Secretary of the Interior.

Pertinent provisions of the will include:

I hereby state that I am married to Elvita Jefferson, and that we are now legally separated and in the process of a divorce. I state that I have three children, two daughters, Anna Marie Jefferson and Tracey Dawn Seago and a child born to Theresa Washington of 8864 Highway 151, Ignacio, Colorado on May 23, 1986.

ARTICLE II.

1. I hereby give, devise and bequeath unto my two daughters, Anna Marie Jefferson and Tracey Dawn Seago, a one-half (1/2) Osage Indian Headright Interest to each of them. I further state that I am the natural father of a child born on May 23, 1986 to Therese [sic] Washington of 8864 highway 151, Ignacio, Colorado and do give, devise and bequeath unto said child a one-half (1/2) Osage Indian Headright Interest.

2. I hereby give, devise and bequeath unto my neice [sic], Christina Louise Irons Bledsoe, all of the rest, residue and remainder of my property and estate, both

real, personal and mixed of whatsoever kind and character and wheresoever situated, without any conditions or restrictions.

The contestants objected to the validity of the will, asserting that Jefferson lacked testamentary capacity due to the effects of approximately thirty years of alcoholism. The parties concede that Jefferson was an alcoholic.

In October 1984, Jefferson and his wife, Elvita Jefferson, separated.¹ In the spring of 1985, Jefferson entered the Southern Ute residential Alcoholism and Addiction Recovery Center in Ignacio, Colorado, where he participated in an Antabuse program and worked as a secondary cook. He began seeing a waitress, Theresa Lynn Washington, in May 1985.

In July 1985, he became an outpatient at the Southern Ute recovery center and moved in with Theresa Washington and her family in Ignacio, Colorado. His wife, Elvita Jefferson, filed for divorce in August 1985, but the divorce was never adjudicated. In September 1985, Jefferson and Theresa Washington moved to Colorado Springs, Colorado, and it was determined that Theresa Washington was pregnant in October 1985.

On December 2, 1985, Theresa Washington and Jefferson sought prenatal care from the Southern Ute Health Center in Ignacio. Also on that date, at the Southern Ute Tribal Court Clerk's office, Jefferson signed an affidavit acknowledging himself as father of the child Theresa Washington was carrying. The affidavit was

¹Exhibit 12, Petition for Dissolution of Marriage.

notarized by the Southern Ute Tribal Court Clerk and was filed at the Indian Health Service Center in Ignacio. Such was standard procedure at the Indian Health Center for providing medical care of a non-Indian woman, as was Theresa Washington, who was carrying an unborn child of an Indian.

By May 1986, Jefferson had moved back to Oklahoma, where he lived with his niece, Christina Irons Bledsoe, in Fairfax, Oklahoma, before moving to Pawhuska. On May 31, 1986, Theresa Washington gave birth to Joyce Washington in Durango, Colorado.

In mid-June 1986, Jefferson conferred with attorney Kelly Young in Fairfax, Oklahoma, about his will. Jefferson executed the self-proving will on June 20, 1986, which is the subject of this lawsuit. The parties do not dispute that at the time the will was executed, Jefferson had been adjudicated an incompetent and was under the care of a guardian. Jefferson died on September 22, 1986.

The Secretary's recommendation to approve the will was remanded by the Court on August 1, 1991, due to the Court's determination that an improper standard of review was used, that of clear and convincing evidence. Upon remand, the Secretary determined that the preponderance of the evidence, the correct standard, showed Jefferson possessed testamentary capacity when he executed his will. Contestants now appeal the remand decision.

The decision of the Secretary must be affirmed unless it is erroneous in law or against the weight of evidence. 92 Stat. 1660, §5(a). As long as the Secretary's view of the evidence is plausible in light of the record as a whole, the Court will not reverse the

decision. Anderson v. Bessemer City, 470 U.S. 564, 574 (1985).

The standards by which the testamentary capacity of an alcoholic is to be judged were set forth in In re Anderson's Estate, 142 Okla. 197, 200, 286 P. 17, 20 (1929):

The general principles of testamentary capacity apply in cases where the testator is affected by the use of alcohol or drugs. In such case a person may have the capacity which the law requires for making a will, if, in spite of the use of alcohol or drugs, he has sufficient mind and memory to understand the nature and extent of his property, the proper objects of his bounty and the nature of the testamentary act ... As in other cases, the question to be determined is solely that of the capacity of the testator at the time of making his will. The fact that he was habitually intoxicated or under the influence of drugs does not render his will invalid, if he had the requisite understanding at the time that he made it."

See also Matter of Estate of Lambe, 710 P.2d 772 (Okla.App. 1985).

Therefore, the issue here is whether, at the time Jefferson made his will, he had the requisite understanding regarding the nature and extent of his property, the proper objects of his bounty and the nature of the testamentary act. The attorney who prepared the will, Kelly Young, testified that when Jefferson first visited him about the will, a few days before June 20, 1986, they discussed the terms and conditions that the will would include. (Hearing Transcript at 146.5-.9). Young also testified that Jefferson told Young about his family and that he "wanted to take care of his children and his niece, Christina Irons Bledsoe, because she had been good to him and that the other members of his family hadn't been good about taking care of him and paying attention to him." (Tr. at 148.13 - 149.13). Young testified that Jefferson appeared

sober, that he appeared to understand what he wanted and who the bounty of his affection were, and that he appeared to understand the nature and extent of his property. (Tr. at 149.17-.25).

Jefferson's guardian of 21 years, Melvin Tolson, testified that Jefferson had discussed with him plans to prepare a will. Tolson testified that Jefferson told him whom he wished to consider when making the will. (Tr. at 193.23). Tolson also testified that Jefferson appeared to know the nature and extent of his property. (Tr. at 194.1).

While neither of these witnesses saw Jefferson on June 20, 1986, when he signed the will, their testimony indicates that Jefferson had given sober thought to the making of a will, made appointments to do so and kept them. Contestants point to many instances before the signing of the will that show Jefferson's bouts with alcoholism, including numerous arrests for public intoxication. Conversely, Proponents offer evidence showing that Jefferson had periods of sobriety in which he was capable of rational thought. As the Anderson court stated, "the fact that he was habitually intoxicated ... does not render his will invalid, if he had the requisite understanding at the time that he made it."

The testimony of the witnesses to Jefferson's signing of the will indicate that he was sober and rational when he executed the will. Betty Wayman and Montalu Renfro witnessed the execution of Jefferson's will on the morning of June 20, 1986, at the First State Bank of Fairfax, Oklahoma. Wayman testified that, at the time of the execution, Jefferson "was real clean, real nice, real

mannerly." (Tr. at 6.5). She also testified as to the soundness of his mind, that "he appeared alright [sic] to me." (Tr. at 7.6). She testified that he was coherent, that she had no difficulty in understanding what he said, and that she did not smell alcohol on his breath, although she knew he was an alcoholic. (Tr. at 9.3-.11). Wayman said that she had known Jefferson for about 30 years, and the day of the execution "he looked better than I'd seen him in a long time." (Tr. 10.15). She testified that she believed he knew the bounty of his affection. (Tr. 10.21). She also said that Jefferson told the witnesses he had read the will and it was as he wanted it. (Tr. 16.19-.24).

Renfro also testified that Jefferson knew the objects of his bounty and his property (Tr. at 36.17-.19), and that he appeared sober when executing the will (Tr. at 35.15). Renfro stated that Jefferson "looked real good. I had seen him in the past when he was in bad shape, but he looked so good that day...I thought he was in real good condition." (Tr. at 36.11-.16). Renfro said she had known Jefferson for many years.

Contestants offer no evidence to show that Jefferson lacked testamentary capacity when he executed the will. They do, however, provide evidence that Jefferson was arrested for public intoxication on the day the will was executed. However, this occurred after the will was executed, and Contestants have provided no evidence to show that Jefferson had been drinking before he signed the will.

Contestants cite three Oklahoma cases in which the testator's

acts were declared invalid due to a lack of testamentary capacity. However, those cases provide more recent medical testimony than is offered here. The court in In re Estate of Bailess, 569 P.2d 543 (Okl.App. 1977), had medical evidence from a doctor who had treated the decedent as a patient for a year before death. That doctor and other witnesses testified that they believed the decedent was incompetent. In Jefferson's case, none of the doctors who provided him long-term care had done so within a year of the will, and no witness to the execution of his will has testified that Jefferson appeared incompetent.

Also, in In re Estate of Bennight, 503 P.2d 203 (Okla. 1972), medical testimony was provided by a doctor who treated the decedent for several years, including ten times between March 22, 1966, and May 31, 1966. The will was executed on May 4, 1966. The doctor, as well as other witnesses, testified that the testatrix was incompetent at the time the will was executed. Again, Contestants have provided no such evidence here.

Finally, in Albright v. Miller, 467 P.2d 475 (Okla. 1970), the court found that a chronic alcoholic did not have testamentary capacity although he appeared sober at the time he executed his will. A month later, the testator entered the hospital. His attending physician conducted tests a few days before the testator died that showed the testator had "manifestations of very severe alterations in mental processes." Id. at 476. The trial court "placed strong reliance on contestants' medical testimony." Id. at 478. Again, there is no similar medical evidence in this case.

Proponents and Contestants offer conflicting medical testimony as to whether Jefferson had the capacity to understand the purpose and effect of a will. Neither side offers evidence from medical experts obtained in June 1986, the time of the execution of the will.

Contestants offer medical testimony from two doctors who stated that Jefferson lacked testamentary capacity. They regularly treated Jefferson, but one hadn't seen him for 19 months, and the other hadn't seen Jefferson for a year. Dr. J.E. Cook, a gastroenterologist who treated Jefferson in 1985, testified that Jefferson was a chronic alcoholic with impaired cerebral functions. (Cook Deposition at 13.9-.10). Cook testified that tests showed that Jefferson's brain had atrophied. (Deposition at 12.2). He said he doubted that Jefferson in 1985² could understand a will. (Deposition at 15.2). He also acknowledged, however, that Jefferson could improve if he stopped drinking. (Deposition at 29.18).

Dr. Richard Conde, a psychiatrist, treated Jefferson from September 1982 through September 1984. He testified that, at that time, Jefferson exhibited bad judgment and faulty memory (Conde Deposition at 17.3, .14) and could not understand a will (Deposition at 28.25). Conde also testified that tests in 1983 showed that Jefferson's brain had atrophied, but he did not ascertain the extent. (Deposition at 21.15). He testified that whether Jefferson would know the objects of his bounty depended upon his state of intoxication, but that Conde didn't believe

²Nearly a year before the will was executed.

Jefferson did. (Deposition at 27.17, 28.1).

Proponents offer medical testimony showing that Jefferson had testamentary capacity. This testimony was from doctors who treated Jefferson nearer to the time he executed his will, but none was a doctor who regularly treated Jefferson. Dr. Richard Bost, a counseling psychologist at the Center for Behavioral Medicine of the Oklahoma College of Osteopathic Medicine and Surgery, stated that he met Jefferson on April 24, 1986, at the hospital's Chemical Dependency Unit, and that he conducted a psychological evaluation of Jefferson. (Bost Deposition at 4.15-5.16). After a clinical interview and a standardized psychological test, Bost found Jefferson to be experiencing severe depression (Deposition at 24.5). He testified that, based on Jefferson's responses during the testing, that Jefferson would know the objects of his bounty and the extent of his property. (Deposition at 7.5-.14).

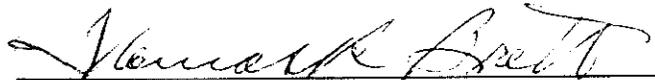
Two other medical experts testified that, in 1986, Jefferson would have known the objects of his bounty and the nature and extent of his property. Frank A. Noble, clinical supervisor of the Southern Ute Alcoholism and Addiction Recovery Center testified that Jefferson was admitted to the center for a second time on February 24, 1986, and was released on March 10, 1986. (Noble Deposition at 15). He testified that Jefferson was of sound mind, articulate and probably a person of above average IQ. (Noble Deposition at 6.3).

Dr. William Sam Cornish, who treated Jefferson at the Addiction Recovery Unit in Durango on April 2, 1986, testified that

Jefferson "seemed in his right mind. He was oriented in person, place and time, and understood his problems." (Cornish Deposition at 5.7). Cornish testified that Jefferson was aware of everything, like most alcoholics when they are not drinking, unless they have brain damage. (Deposition at 6.8). He testified that when brain atrophy is found, it doesn't necessarily mean that a person cannot function, and that some people can function while having brain atrophy. (Deposition at 11.8).

Contestants have failed to show that Jefferson lacked testamentary capacity at the time he executed his will. Witnesses to the signing of his will testified that he appeared sober and lucid. Medical testimony is contradictory. Therefore, the Court cannot say that the Secretary's ruling is against the clear weight of evidence. The Secretary's ruling is hereby AFFIRMED.

IT IS SO ORDERED, this 28th day of July, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE JUL 28 1992

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

FILED

JUL 28 1992

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

PROFESSIONAL INVESTORS LIFE
INSURANCE COMPANY,

Plaintiff,

v.

ANDREW J. STONE; GREGG-MILLER
AND ASSOCIATES; BENEFIT
PARTNERS, INC.; WAKELY AND
ASSOCIATES, INC., as Admin-
istrators for RELIANCE
STANDARD LIFE INSURANCE
COMPANY; SUNCOAST, as Admin-
istrator for RELIANCE STANDARD
LIFE INSURANCE COMPANY,
RELIANCE STANDARD LIFE
INSURANCE COMPANY, ELLEN
HANFORD-HOOPER, an individual,
LINCOLN NATIONAL LIFE and
UNIFIED LIFE INSURANCE,

Defendants.

No. 91-C-756-B

ORDER

Before the Court are the motions to dismiss of the defendants. Plaintiff filed its Amended Complaint on November 8, 1991, alleging eight causes of action. Four claims are brought pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Counts 1 and 3 allege individual RICO violations (18 U.S.C. §1962(c)) and Counts 2 and 4 allege conspiracies to violate RICO provisions (18 U.S.C. §1962(d)). Counts 5-8 are pendent state claims for tortious interference with contract, tortious interference with prospective economic advantage, deceptive trade practices, and breach of contract.

Plaintiff, an Oklahoma company which sells life insurance,

alleges that defendant Stone, a former employee, now sells life insurance and annuities for defendant Benefit Partners, Gregg-Miller and Wakely. Further, that the defendants formed an "association in fact for the purpose of siphoning off" plaintiff's clients and resources (Amended Complaint, ¶14), and that the alleged improper activity took place from January 1, 1991 through June 30, 1991. (Id. at ¶¶ 28, 52). This activity consisted of misrepresentations to plaintiff's clients (Id. at ¶15) and attempting to have plaintiff's agent Unified Life Insurance (Unified), bypass plaintiff's six-month waiting period for surrendering life insurance policies. Unified was named as a defendant but was dismissed by Order of March 23, 1992. All remaining defendants are foreign to Oklahoma.

The defendants have moved to dismiss the Amended Complaint for failure to state a claim. The standard for deciding motions brought under Rule 12(b)(6) F.R.Cv.P. requires that "[a]ll well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." Cayman Exploration Corp. v. United Gas Pipe Line, 873 F.2d 1357, 1359 (10th Cir. 1989). In granting such a motion, the Court must determine that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Id.

Defendants contend that plaintiff has failed to allege the requisite "pattern" of racketeering activity. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985). To satisfy this requirement, plaintiff must demonstrate at least two racketeering

predicates that are related and that amount to, or threaten the likelihood of, continued racketeering activity. J.D. Marshall Intern. v. Redstart, Inc., 935 F.2d 815, 820 (7th Cir. 1991). Plaintiff here has, in a pro forma manner, alleged at least two predicate acts, but these acts are clearly encompassed by a single scheme, directed at a single victim, and only covering a six-month period of time. There is no requirement that a RICO pattern include multiple schemes and victims. Id. at 821. However, such allegations are "highly relevant" to the inquiry. H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 240 (1989). "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. Congress was concerned in RICO with long-term criminal conduct." Id. at 242. The Court concludes that plaintiff has failed to properly plead a pattern of racketeering activity, and dismissal is appropriate.

Assuming arguendo that the Court is incorrect in its analysis above, it will address other grounds raised in pending motions. Defendants Wakely and Suncoast move for dismissal on the ground that this Court lacks personal jurisdiction over them because they have insufficient contacts with Oklahoma. Plaintiff responds that defendants' citation of authority is inapposite because the basis of jurisdiction is federal question (28 U.S.C. §1331), not diversity of citizenship (28 U.S.C. §1332). It is true that in a federal question case the Constitution only requires that the defendant have the requisite "minimum contacts" with the United

States, rather than with the particular forum state. United Elec. Workers v. 163 Pleasant Street Corp., 960 F.2d 1080, 1085 (1st Cir. 1992). However, the above principle applies only when Congress has authorized nationwide service of process. Otherwise, Rule 4(e) F.R.Cv.P. commands that the Court look to the state long-arm statute. See Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 107-108 (1987). The relevant provisions are contained in 18 U.S.C. §1965:

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

. . .

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

It is established that RICO does provide for nationwide service of process, although there is some uncertainty in the case law as to whether 18 U.S.C. §1965(b) or §1965(d) is the controlling provision. Cf. Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 671 (7th Cir. 1987), cert. denied, 485 U.S. 1007 (1988) (§1965(b) creates personal jurisdiction by authorizing service) and Bridge v. Invest America, Inc., 748 F. Supp. 948, 951 (D.R.I. 1990) (§1965(d) is the general nationwide service of process provision in RICO; §1965(b) is a special venue provision). Under either interpretation, the Court concludes that personal jurisdiction exists over all defendants.

All defendants except Reliance and Lincoln move to dismiss for improper venue pursuant to Rule 12(b)(3) F.R.Cv.P. The burden of establishing venue is on the plaintiff. See Shuman v. Computer Associates Intern., Inc., 762 F. Supp. 114, 115 (E.D. Pa. 1991). The general federal venue statute, 28 U.S.C. §1391, provides in pertinent part as follows:

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Plaintiff concedes that it does not allege jurisdiction based upon diversity of citizenship (Response to defendant Wakely's motion to dismiss at 5). Therefore, §1391(b) is the applicable provision. Plaintiff also effectively concedes that none of the three subsections of this statute are met (Response to Suncoast's Motion to Dismiss at 14), but instead relies upon the RICO venue statute, 18 U.S.C. §1965(a). This section provides:

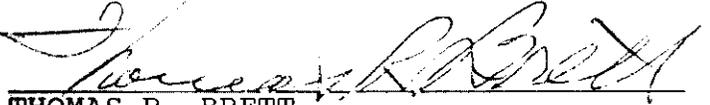
(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

There is no evidence before the Court that any defendant resides, is found, has an agent, or transacts its affairs in Oklahoma. No defendant being properly before this Court, it is not necessary to determine whether, venue being proper as to one or more defendants, "the ends of justice" require the haling of all other defendants

before the Court pursuant to §1965(b). Again, dismissal is appropriate. Finally, having dismissed the federal claims, the Court has applied the factors in Curtis Ambulance v. Shawnee Cty. Bd. of Cty. Com'rs, 811 F.2d 1371, 1386 (10th Cir. 1987) and concluded that it should not exercise pendent jurisdiction over the state law claims. They are dismissed without prejudice.

It is the Order of the Court that the motions of the defendants to dismiss are hereby granted.

IT IS SO ORDERED this 28th day of July, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

SECRET
DATE JUL 28 1992
FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
Honorable M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IRENE DeQUATTRO,

Plaintiff,

v.

PARTS, INC.,

Defendant.

*
*
*
*
* Civil Action No. 91-C-667-B ✓
*
*
*

AGREED ORDER OF DISMISSAL WITH PREJUDICE

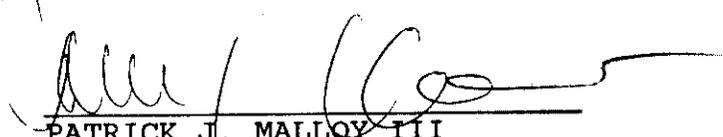
Pursuant to the agreement of the parties, as evidenced by the signatures of their counsel set forth below, it is hereby ordered that this action is dismissed with prejudice, each party to bear its own attorneys' fees, costs, and expenses.

SO ORDERED THIS 27 DAY OF July, 1992.

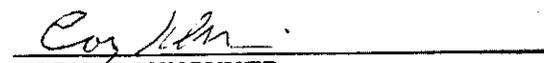


THE HONORABLE THOMAS R. BRETT

SO AGREED:



PATRICK J. MALLOY III
OBA #5647
Counsel for Plaintiff



CARY SCHWIMMER
TBA #014026
Counsel for Defendant

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

FILED

JUL 28 1992

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

IN THE MATTER OF THE WILL OF:)
)
 HELEN MAE BURNETT,)
 UNALLOTTED OSAGE,)
)
 Deceased.)
)
 CHERYL ANN BURNETT BEAR,)
)
 Plaintiff,)
)
 v.)
)
 MANUEL LUJAN, SECRETARY OF THE)
 DEPARTMENT OF THE INTERIOR, UNITED)
 STATES OF AMERICA, and SHEENA KAY)
 BURNETT, by and through EVELYN KAY)
 BURNETT, MOTHER AND NEXT FRIEND OF)
 SHEENA KAY BURNETT,)
)
 Defendants.)

Case No. 91-C-238-B.

ORDER

Before the Court is Plaintiff's objection to the report of the Magistrate Judge, recommending that decedent Helen Mae Burnett's will be approved as written, with one exception.

Helen Mae Burnett ("Helen Mae") was an unallotted Osage Indian who owned a 0.38056 Osage headright interest. She died testate January 5, 1989, leaving to her mother, Evelyn Kay Burnett ("Evelyn"), a life estate in her property, with remainder interest in fee simple to her sister, Sheena Kay Burnett ("Sheena"), and half-brother, Tommy Sunday Jr. ("Tommy"). Because the headright interest is subject to the jurisdiction of the Secretary of the Interior, Helen Mae's will was submitted for validation as to the

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disposition of the headright interest.¹

Helen Mae's half-sister, Cheryl Ann Burnett Bear ("Cheryl Ann"), contested the will on the grounds that Helen Mae lacked testamentary capacity and that federal law prohibits non-Osage Indians from receiving headright interest in fee.² Cheryl Ann claimed that Sheena and Tommy are not Osage Indians, therefore they could not inherit the remainder in fee. Tommy does not deny the contention that he is not Osage, but Sheena claims to be Osage.

Sheena was born to Evelyn during Evelyn's marriage to Ben Joseph Burnett ("Ben Joseph"), an Osage Indian. However, Ben Joseph was not named on Sheena's birth certificate and she was not listed as his child on Osage Agency marriage cards. Evelyn testified that she was unsure of the father's identity. She said that she and Ben Joseph were separated when Sheena was conceived, and that while Ben Joseph could be the father, it is possible that a second man is the father. When Evelyn and Ben Joseph were divorced several years after Sheena's birth, Evelyn did not claim that Sheena was his daughter, nor did she make that claim when Ben Joseph's estate was probated (Hearing Transcript at 117-124). The final decree as to the estate recognized only two heirs, Cheryl Ann and Helen Mae.

¹As required by the Act of April 18, 1912, §8, 37 Stat. 86, 88, as amended by the Act of October 21, 1978, §5(a), 92 Stat. 1660, 1661, the Osage Tribe of Indians Technical Corrections Act of 1984, 98 Stat. 3163, and regulations published at 25 C.F.R. §§17.1-17.14.

²Act of October 21, 1978, Pub. L. No. 95-496, §7, 92 Stat. 1663, as amended by the Act of October 30, 1984, Pub. L. No. 98-605, § 2, 98 Stat. 3164. The Act prevents non-Osage Indians from receiving any headright interest other than a life estate.

The Acting Field Solicitor recommended that Helen Mae's will be approved, except that the remainder interest in her Osage headright bequeathed to Sheena and Tommy should be disapproved because they were ruled not to be Osage Indians. That remainder, the Acting Field Solicitor held, should be vested in Cheryl Ann, an Osage, pursuant to the Oklahoma law of intestate succession. (Administrative Record, No. 21, p.3). The Superintendent of the Osage Agency accepted the Acting Field Solicitor's recommendation and approved Helen Mae's will, with this one exception.

Sheena and Evelyn appealed the decision to the Regional Solicitor, who disagreed with the Superintendent, and held that Sheena and Tommy could receive a life estate interest that would follow Evelyn's life estate, with the remainder interest in Cheryl Ann, who was determined to be Helen Mae's sole Osage heir. The Regional Solicitor found that 92 Stat. 1663, §7 allowed for successive life estates in non-Osage Indians.

Cheryl Ann appeals the Regional Solicitor's legal interpretation, contending that federal law allows for only one life estate in a non-Osage beneficiary, which must be followed by a remainder in an Osage beneficiary or heir. Sheena also appeals, disputing the Regional Solicitor's determination that she is not an Osage Indian. Tommy did not appeal.

The standard for judicial review of the Secretary's decision regarding an Osage will is found in the Osage Indian Act of 1978, which provides that the Secretary's decisions "shall be binding and shall not be reversed unless the same is against the clear weight

of the evidence or erroneous in law." 92 Stat. 1661, §5(a); Akers v. Hodel, 871 F.2d 924, 933 (10th Cir. 1989).

The Acting Field Solicitor, the Osage Agency Superintendent and the Regional Solicitor found that Sheena is not an Osage Indian, and therefore not entitled to the remainder of the headright, because she is not the daughter of Ben Joseph. However, Oklahoma law applies to this issue,³ and Oklahoma law presumes that children born during a marriage are legitimate. 10 O.S. §1; Secondine v. Secondine, 311 P.2d 215 (Okla. 1957). The presumption can be disputed only by the husband and wife and their descendants. 10 O.S. §3. Therefore, Sheena is presumptively the daughter of Ben Joseph, an Osage Indian.

According to 10 O.S. §3, Cheryl Ann bore the burden of rebutting that presumption. Evelyn testified that she is uncertain if Ben Joseph were the father. She testified that she had intercourse with Ben Joseph during the time that Sheena was conceived, and that Ben Joseph could have been the father. Apparently, there never has been a paternity determination as to Sheena. That Evelyn is uncertain as to paternity does not rebut the presumption that Ben Joseph is the father, since he could be.

The state court divorce and probate decrees are not conclusive as to Sheena's parentage. There is no mention of Sheena. Federal courts are required to give preclusive effect to state-court judgments when another state court would do so,⁴ but Oklahoma law

³See 25 U.S.C. §331

⁴Title 28 U.S.C. §1738.

holds that the party against whom an earlier judicial decision is asserted must have had a "full and fair opportunity to litigate" the issue. Adamson v. Dayton Hudson Corp., 774 P.2d 478, 480 (Okla.App. 1989).

While Oklahoma recognizes non-mutual offensive collateral estoppel, it cannot apply "when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." Id. at 480, citing Allen v. McCurry, 449 U.S. 90, 95 (1980). The Adamson court held that four additional requirements must be met before a party is collaterally estopped: 1) The issue sought to be precluded must be the same as that in the prior case; 2) the issue was litigated in the prior case; 3) the issue was determined in the prior case; and 4) that determination was essential to the judgment in the prior case. Id. at 480, citing Guenther v. Holmgreen, 738 F.2d 879, 884 (7th Cir. 1984), cert. den. 469 U.S. 1212 (1985).

Sheena did not have the opportunity to litigate the issue of her parentage during the divorce and probate proceedings, which determined that Ben Joseph had only two daughters, Cheryl Ann and Helen Mae. Because she has not had the opportunity to contest those rulings, she should not be collaterally estopped from claiming that she is Ben Joseph's daughter.

Cheryl Ann claims that Oklahoma law precludes a collateral attack on a decree of distribution in a probate case. However, Sheena is not attempting to collaterally attack any issue regarding the determination of her parents' divorce or Ben Joseph's estate.

Because Cheryl Ann did not rebut the presumption that Sheena is Ben Joseph's daughter and therefore Osage, the Regional Solicitor erred when he determined that Sheena is not Osage.

The Regional Solicitor also erred in holding that successive life estates in headright can be held by non-Osage beneficiaries. Pub. L. 95-496, §5(d)(2) states, in pertinent part, that no Osage Indian may provide by the terms of a will that any interest in any headright which such Osage Indian had, and

in which any individual was granted a life estate by such Osage Indian, may be transferred to or held for the benefit of any individual who is not an Osage Indian upon the death of the individual who held such life estate.

The Regional Solicitor's decision regarding Helen Mae's will is hereby REVERSED. Helen Mae's will is approved as written, with the exception of the bequest to Tommy, who is not an Osage Indian. The remainder interest devised to Tommy instead is awarded in fee to Sheena as an Osage Indian and heir and beneficiary of Helen Mae.

IT IS SO ORDERED, this 28 day of July, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE JUL 28 1992
FILED

JUL 28 1992

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

BOBBY LEE and ANNA LEE, as)
Co-Trustees of the BOBBY LEE)
REVOCABLE TRUST dated)
May 14, 1991,)
)
Plaintiffs,)
)
vs.)
)
SOUTHWESTERN BELL TELEPHONE)
COMPANY,)
)
Defendant.)

Case No. 92-C-18-B ✓

ORDER

This matter comes on for consideration of Plaintiffs' Motion To Dismiss Action Without Prejudice filed April 8, 1992.

In this matter Plaintiffs allege that Defendant has certain telephone lines and equipment running across Plaintiff's property for which it has no easement, thereby constituting a trespass. Defendant claims that the lines were placed pursuant to a statute granting it the right to use public lands and public rights-of-way to place its telephone equipment, 18 O.S. §601. A factual question exists for the trial court to determine whether the lines and equipment are within or outside of public rights-of-way.

This matter was removed from Creek County District court by Southwestern Bell Telephone Company (SWB) on January 9, 1992, predicated upon federal diversity jurisdiction. Plaintiffs filed their Motion to Remand on January 13, 1992, alleging lack of the requisite jurisdictional amount (\$50,000). By this Court's Order of

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April 1, 1992, Plaintiffs' Motion To Remand was denied because, when injunctive relief is sought (as in this case), the interest of either party or both parties may be looked to in determining the amount in controversy. The Court concluded Plaintiffs' prayer coupled with Defendant's response as to cost of being required by injunction to remove its lines more than established the requisite jurisdictional amount.

Plaintiffs argue their motion should be granted because: (1) state court was their choice of forum; (2) this matter is essentially a trespass action, preferably heard by a court of general jurisdiction in the county where the land is located; (3) the case is still in its infancy, with discovery¹ and dispositive motions² limits well ahead; (4) when refiled in state court it will not be subject to removal again, and (5) a plaintiff should reasonably have the right to dismiss an action it chose to instigate.

Defendant responds that dismissal will not end the litigation; that it desires to avoid the burden of repeating what has already been extensively litigated; that the case is well into discovery; that it exercised a substantial right in removing the case to federal court.

The parties agree a dismissal without prejudice under Rule 41

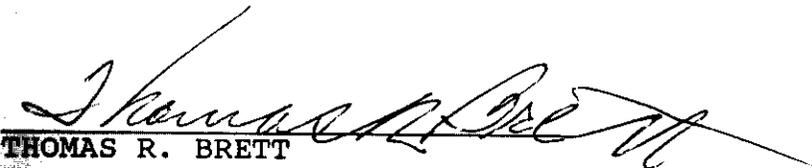
¹ discovery cutoff is September 25, 1992.

² dispositive motions to be filed by October 9, 1992.

(a)(2),³ F.R.Civ.P. is within the sound discretion of the Court. Maryland Cas. Co. v. Quality Foods, 8 F.R.D. 359 (E.D.Tenn.1948)); Hannah v. Lowden, 3 F.R.D. 52 (W.D.Okla.1943); Stevens v. Red Barn Chemicals, Inc., 76 F.R.D. 111 (W.D.Okla.1977); Chase v. Ware, 41 F.R.D. 521 (N.D. Okla. 1967).

The Court concludes, in the interest of judicial economy and considering the status and stature of the parties herein, Plaintiffs should be permitted to dismiss this action without prejudice conditioned upon the payment to Defendant of reasonable attorneys fees and costs incurred in this Court. The Court, in the exercise of its discretion, herewith DISMISSES WITHOUT PREJUDICE this action subject to the payment to Defendant of reasonable attorneys fees and costs incurred in this Court. Defendant shall, within 15 days from the date hereof, file an itemized statement of attorneys fees and costs. Plaintiffs shall have 10 days thereafter to file their objection thereto, if any. If no objection is filed within the 10 day period this matter will stand DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED this 28 day of July, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

³ Rule 41 (a)(2) provides that "upon order of the Court and upon such terms and conditions as the Court deems proper" the Plaintiff may dismiss his case without prejudice.

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

FILED

JUL 27 1992

LOLA A. SPEERS,
Plaintiff,
v.
KWIKSET CORPORATION,
Defendants.

RECEIVED
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

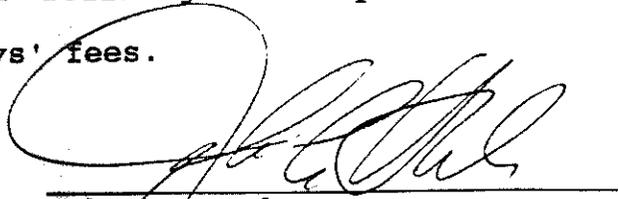
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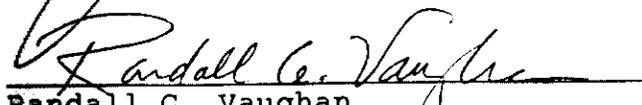
DATE JUL 28 1992

STIPULATION OF DISMISSAL

The Plaintiff, Lola Speers, and the Defendant, Kwikset Corporation, hereby stipulate that Plaintiff's claim shall be dismissed with prejudice to refiling. The parties shall bear their own costs and attorneys' fees.



John L. Harlan
Attorney for Plaintiff



Randall G. Vaughan
Attorney for Defendant

FILED

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

JUL 27 1992

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

UNITED STATES OF AMERICA,)
)
vs.)
)
SHIRLEY A. REDNOUR,)
)
Defendant.)

CIVIL ACTION NO. 91-C-913-E

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.
2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.
3. The defendant hereby agrees to the entry of Judgment in the principal sum of \$3,104.32, plus accrued interest of \$2,702.79, as of September 16, 1991, administrative costs in the amount of \$87.00 plus interest at the rate of 12% 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 legal rate until paid, plus costs of this action, until paid in full.

4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided and the defendant's express representation to Plaintiff that she is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that she will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 15th day of July, 1992, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$60.00, and a like sum on or before the 15th day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney, Debt Collection Unit, 3900 U.S. Courthouse, 333 West 4th Street, Tulsa, Oklahoma 74103.

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

5. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

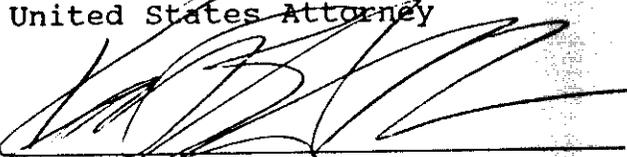
6. The defendant has the right of prepayment of this debt without penalty.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Shirley A. Rednour, in the principal sum of \$3,104.32, plus accrued interest of \$2,702.79, as of September 16, 1991, administrative costs in the amount of \$87.00 plus interest at the rate of 12% 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 legal rate until paid, plus costs of this action, until paid in full.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

TONY M. GRAHAM
United States Attorney


KATHLEEN BLISS ADAMS
Assistant United States Attorney


SHIRLEY A. REDNOUR

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

FILED

JUL 27 1992

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

RMP CONSULTING GROUP, INC.,)
and RMP SERVICE GROUP, INC.,)
Plaintiffs,)
v.)
DANA COMMERCIAL CREDIT)
CORPORATION,)
Defendant.)

No. 91-C-199-~~B~~E

ENTERED ON DOCKET
JUL 27 1992
DATE

SECOND STIPULATED PARTIAL JUDGMENT

Now, on this 27th day of July, 1992, there comes on for consideration the motion for entry of Second Stipulated Partial Judgment filed herein by RMP Consulting Group, Inc. and RMP Service Group, Inc. (collectively "RMP"), and Dana Commercial Credit Corporation ("Dana"). RMP appears by and through its counsel of record, J. Daniel Morgan, and Dana appears by and through its counsel of record, Mack J. Morgan III.

The Court finds that the parties have stipulated, as evidenced by the signatures of the respective counsel set forth herein below, to the terms of this partial judgment. The Court finds that the parties have now stipulated that the following judgment should be entered in this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. RMP is hereby determined to have no right, title or interest in and to Dana's lease with HCA Presbyterian Hospital, Dana Lease No. 184111, including any lease payments thereunder or any of the specified equipment leased thereunder, or any residual interest in the equipment after termination of the Dana lease.

2. RMP should be, and hereby is, permanently enjoined from contacting HCA Presbyterian Hospital with respect to any matter relating to the lease including, but not limited to, payments under the lease, or equipment subject to the lease.

3. RMP should be, and hereby is, permanently enjoined from bringing any action or other legal proceeding against HCA Presbyterian Hospital relating to any alleged copier management program agreement covering equipment which is the subject of the Dana lease.

4. Each party hereto shall bear its own costs, expenses and attorney's fees.

5. This Second Stipulated Partial Judgment does not apply to the leases, CMP agreements, equipment or any other issues relating to the customers listed on Schedule "3" to the Stipulated Partial Judgment entered in this action on January 30, 1992, other than HCA Presbyterian Hospital.

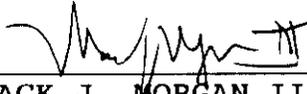
S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED FOR ENTRY:



J. DANIEL MORGAN
-Of the Firm-
Gable & Gotwals
2000 Fourth National Bank Building
15 West Sixth Street
Tulsa, OK 74119-5447
ATTORNEYS FOR PLAINTIFFS



MACK J. MORGAN III, OBA #6397
-Of the Firm-
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, OK 73102
(405) 235-7700
ATTORNEYS FOR DEFENDANT

258.92A.MJM

FILED

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

JUL 1992

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

AW DIRECT, INC.

Plaintiff

v.

JAMES W. BRACKIN and
TOW DOLLY RENTAL, INC.

Defendants

CASE NO. 91-C-928-B

CONSENT JUDGMENT

Plaintiff having filed its complaint herein demanding that Defendants be enjoined from acts of copyright infringement and seeking damages for such infringement, all as appears more fully in the complaint and prayer for relief therein, and Defendant James W. Brackin having represented to the Plaintiff and to this Court that he has been engaged in business individually under the trade styles "Tow Dolly Rental" and "Tow Dolly Enterprises", and the parties having agreed upon a basis for the adjudgment of the matters alleged in the complaint and the entry of a judgment in this action, and having stipulated to entry of judgment herein, and due deliberation being had thereon,

IT IS ORDERED, ADJUDGED AND DECREED that final judgment be entered in favor of Plaintiff and against Defendants as follows:

1. This is an action for copyright infringement, and this Court has jurisdiction of the subject matter and of the parties hereto.

2. Plaintiff is the owner of copyrights in catalogs which it publishes on towing equipment and of United States copyright registrations with respect thereto.

3. These copyrights and registrations are good and valid at law.

4. The parties had previously entered into an agreement in which Defendant had warranted that he would cease all acts of copyright infringement.

5. Thereafter and without authorization of Plaintiff, Defendants have printed and distributed catalogs containing original illustrations copied from Plaintiff's copyrighted catalogs, namely those set forth in Exhibit A hereto. Such acts constitute infringement of Plaintiff's copyrights.

6. Defendant and any of his employees, agents, representatives and others acting in concert with him, are hereby permanently enjoined from printing, publishing, distributing, selling or otherwise disposing of the catalogs which have been charged to infringe, and from printing, publishing, distributing, selling or otherwise disposing of any other catalogs or other materials including copyrighted materials of Plaintiff.

7. Defendant shall delivery to Plaintiff for destruction all copies of catalogs and other materials containing Plaintiff's copyrighted materials.

8. Defendant shall pay to Plaintiff its costs and attorneys' fees in connection with the filing of this action in the amount of Four Thousand Five Hundred Dollars (\$4,500) in accordance with the schedule attached hereto as Exhibit B.

Dated:


UNITED STATES DISTRICT JUDGE

Approved as to form and consented to:

Attest:

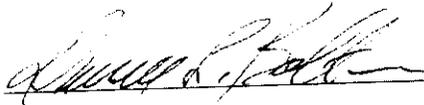
AW DIRECT, INC.



By 
Patrick D. Thibadeau
President

Date:

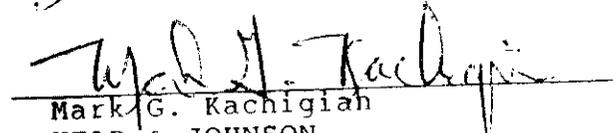
Witness:




JAMES W. BRACKIN

Date:

Date:

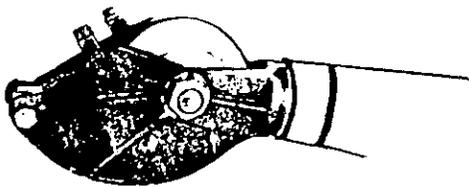
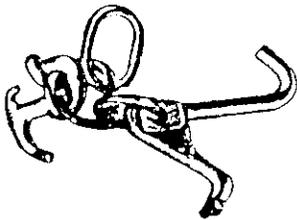

Mark G. Kachigian
HEAD & JOHNSON
228 West 17th Place
Tulsa, Oklahoma 74119
(918) 587-2000

Date:


Darrell Bolton
1717 South Boulder, Suite 910
Tulsa, Oklahoma 74119

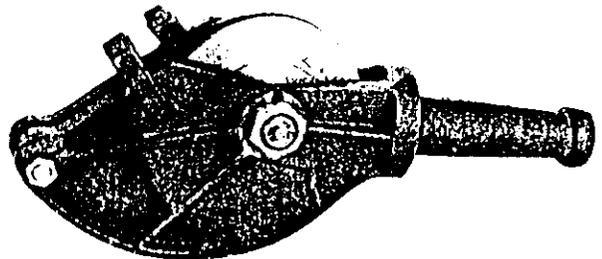
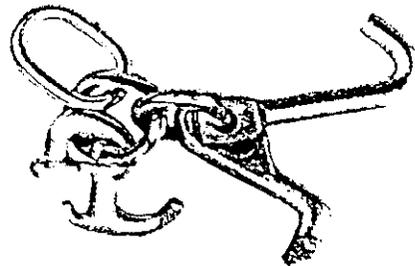
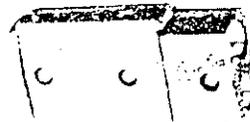
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Tow Dolly Inc.



U

AW Direct, Inc.



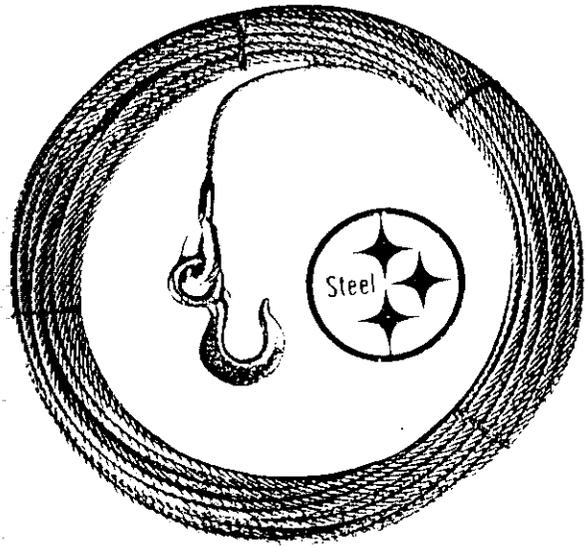
NO

NO

Tow Dolly Inc.

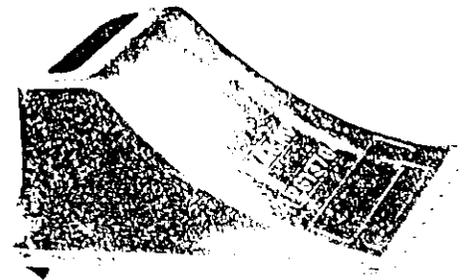
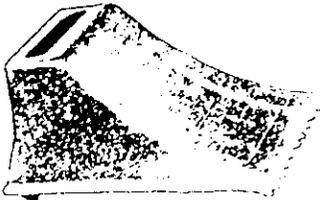


AW Direct, Inc.

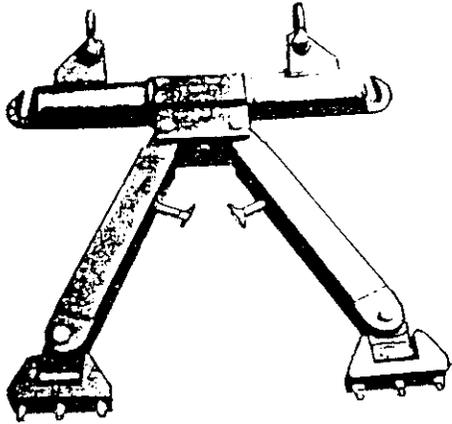


These vernier throttle cables are simple to operate and built to last. Turn knob counter-clockwise to raise idle and press center button to release. The center release button covers the internal cable mechanism to make it weatherproof. The cable is duraflex coated to keep water out. Does not include installation hardware.

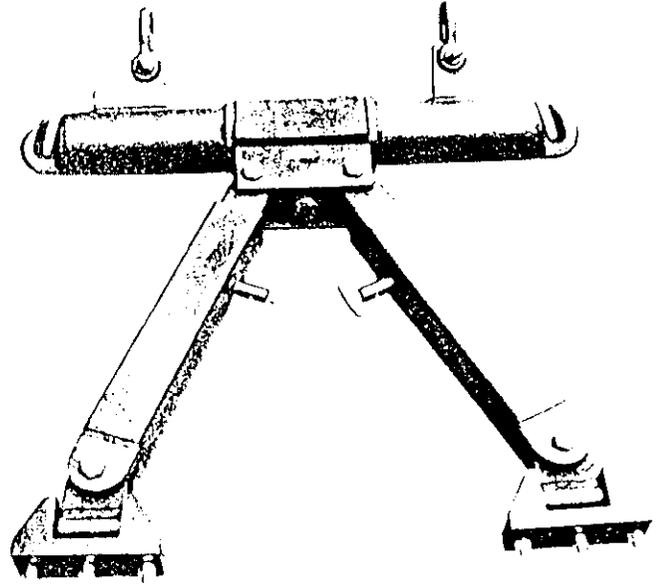
These vernier throttle cables are simple to operate and built to last. Turn knob counter-clockwise to raise idle and press center button to release. The center release button covers the internal cable mechanism to make it weatherproof. The cable is duraflex coated to keep water out. Does not include installation hardware.



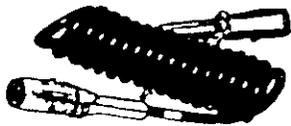
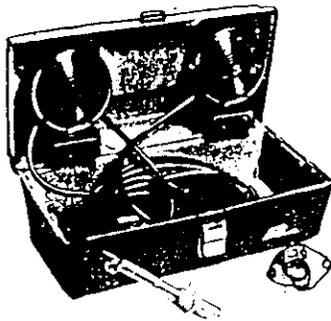
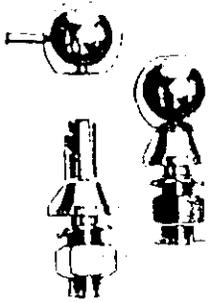
Tow Dolly Inc.



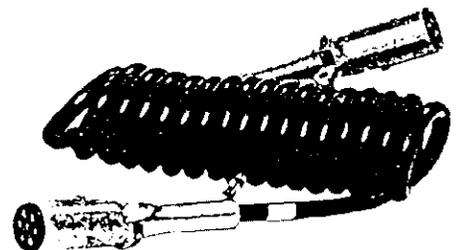
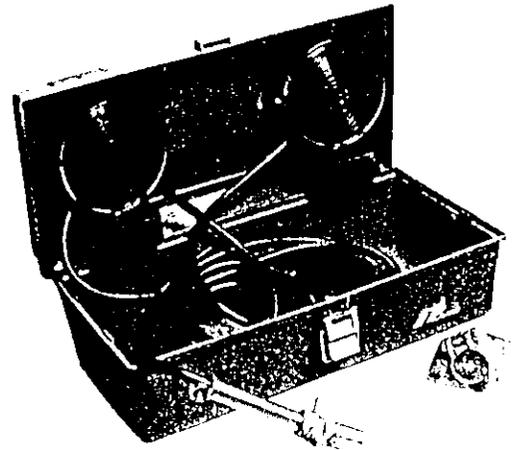
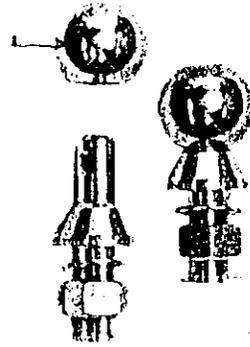
AW Direct, Inc.



Tow Dolly Inc.



AW Direct, Inc.



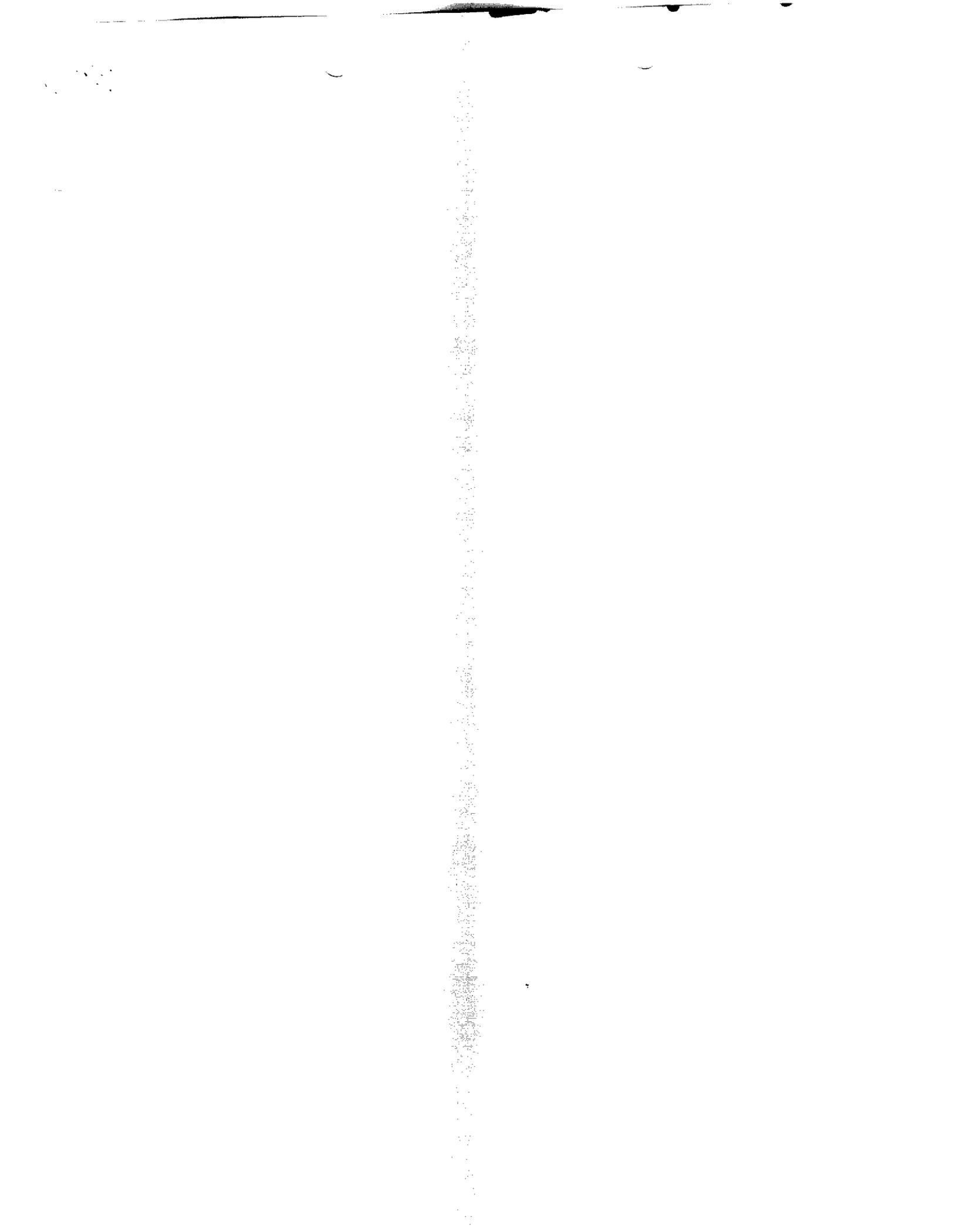


EXHIBIT B

SCHEDULE OF PAYMENTS

The amount of \$4,500 shall be paid as follows:

\$1,000 to be received as of the date of this Agreement; and

\$3,500 to be paid in equal monthly installments with the full amount paid within one year thereafter.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE JUL 27 1992

HARDY C. NORTHCROSS,)
)
 Plaintiff,)
)
 vs.)
)
 LOUIS W. SULLIVAN, M.D.,)
 SECRETARY OF HEALTH AND)
 HUMAN SERVICES,)
)
 Defendant.)

FILED
JUL 27 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CASE NO. 91-C-185-E

ORDER

This matter comes on for consideration upon plaintiff's motion for attorneys' fees under the Equal Access to Justice Act. The court finds that the parties have agreed upon an amount for plaintiff to recover under the Equal Access to Justice Act and the court finds that this amount is reasonable.

It is therefore ORDERED, ADJUDGED AND DECREED that plaintiff is entitled to recover attorneys' fees under the Equal Access to Justice Act in the amount of \$3,569.85, which represents payment for 35.55 hours at \$100 per hour, plus \$14.85 for copy costs.

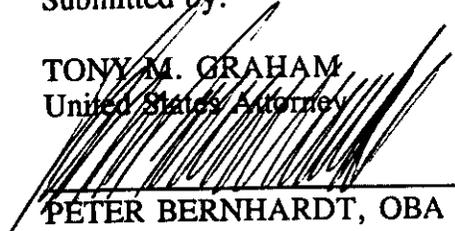
DATED this 27th day of July, 1992.

S/ JAMES O. ELLISON

JAMES O. ELLISON
Chief United States District Judge

Submitted by:

TONY M. GRAHAM
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103

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

ENTERED ON DOCKET
DATE JUL 27 1992

WORLD HIGH INVESTMENTS, INC.,
a Panamanian corporation,

Plaintiff,

vs.

Case No. 91-C-892-E

JAMES W. McCABE, W. JAMES
HUGHES, HCM SYSTEMS CORPORATION,
a Florida corporation, HORIZONTAL
SYSTEMS, INC., a Florida
corporation, UNITED PETRO-CORP.,
a Florida corporation, MICHAEL B.
BURTON, RONALD J. GORDON-SMITH,
LORIE W. LOVEJOY, COLUMBUS
FINANCIAL CO. LTD., a foreign
corporation, J. DAVID LaPRADE,
and KENT P. KOLODZIEJ,

Defendants.

and

JAMES W. McCABE; W. JAMES HUGHES;
HCM SYSTEMS CORPORATION, a Florida
corporation; and UNITED PETRO-CORP.,
a Florida corporation,

Third-Party Plaintiffs,

vs.

JOHN E. NASH and ANTONY J. NASH,

Third-Party Defendants.

FILED
JUL 27 1992

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

ORDER DISMISSING DEFENDANT KENT P. KOLODZIEJ

Upon the stipulation of all parties who have filed their appearances in this action, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the Court hereby dismisses, without prejudice, Defendant Kent P. Kolodziej from this action.

DATED this 27th day of July, 1992.

S/ JAMES O. ELLISON

JAMES O. ELLISON
United States District Judge

DATE 7/24/92

FILED

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

JUL 7 1992 *[Signature]*

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

FRED P. LEIDING, an individual,)
)
 Plaintiff,)
)
 vs.)
)
 FEDERAL DEPOSIT INSURANCE)
 CORPORATION, THE KEMPTON COMPANY,)
 AS PLAN ADMINISTRATOR OKLAHOMA)
 BANKERS ASSOCIATION INSURANCE)
 TRUST, and, AS TRUSTEES, ROBERT)
 HOLLIS, GEORGE HAUGER, HARRY)
 LEONARD, JOHN LOWRY, RALPH)
 MCCALMONT, and F.A. SEWELL, III.)
)
 Defendants.)

Case No. 88-C-1567-B

ORDER

Before the Court for consideration is Plaintiff's motion for relief from judgment, pursuant to Fed.R.Civ.P. 60(b)(6), and Plaintiff's motion to file a reply brief in support of the motion.¹ Plaintiff contends a change in law has occurred since judgment was rendered, and that justice requires relief from the judgment.

Plaintiff Leiding served as Chief Executive Officer of the Town and Country Bank of Bixby ("Bixby") until it was placed in receivership in September 1988. While there, he received health plan coverage through Bixby's participation in the Oklahoma Bankers Association Insurance Trust ("OBA"), and that plan was administered by Defendant Kempton Company. Defendant FDIC was appointed receiver

¹Plaintiff's motion to file a reply brief is granted. The Court has considered the reply brief, as well as the surreply filed by FDIC, in rendering its decision.

for Bixby, and, at that time, both Plaintiff's employment and the insurance program were terminated.

This Court granted summary judgment November 22, 1989, in favor of Defendants on Plaintiff's claim that Defendants had wrongfully denied him COBRA continuation health insurance coverage. Plaintiff appealed this Court's decision to the Tenth Circuit, which affirmed the ruling "in all particulars" on August 12, 1991. Leiding v. FDIC, et al., Nos. 90-5078, and 90-5180, slip opinion. Plaintiff did not file a petition for a writ of certiorari with the United States Supreme Court.

Plaintiff now files a motion for relief from final judgment, stating that, since resolution of the case, Congress has imposed an obligation upon Defendants FDIC and, Plaintiff alleges, OBA members to provide COBRA coverage available to bank employees terminated in a bank failure. Section 451 of the FDIC Improvement Act² ("Act") requires the FDIC to provide a group health plan comparable to one a depository institution would have been required to provide had it not failed.³ Plaintiff alleges that the Act should be applied to this case and asks relief from final judgment pursuant to Fed.R.Civ.P. 60(b)(6).

Rule 60(b)(6) states that the Court may relieve a party from

²Pub. L. 102-242 (1991), 1992 U.S. Code Cong. & Admin. News (105 Stat.) 2236 (1991).

³The plan must meet the requirements of Section 602 of the Employee Retirement Income Security Act of 1974, which allows employees, who would lose group health coverage in certain circumstances (such as termination of employment), to continue that coverage for a certain time at their own expense but at the group insurance rate. See 29 U.S.C. §§ 1161-1168.

final judgment for any reason "justifying relief from the operation of the judgment." The Rule is discretionary and is warranted only in exceptional circumstances. Van Skiver v. United States, 952 F.2d 1241 (10th Cir. 1991); Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co., 909 F.2d 1437 (10th Cir. 1990).

In extraordinary situations, relief from final judgment may be allowed by the Court when such action is appropriate to accomplish justice. However, a later change in the law is not such an extraordinary situation as to warrant Rule 60(b)(6) action. Collins v. City of Wichita, 254 F.2d 837 (10th Cir. 1958). The court in Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., --- F.2d. ---, 1992 WL 90331 (10th Cir. May 6, 1992) reiterated the holding in Collins, stating that Collins remains the law in the Tenth Circuit. The CIG court, in considering whether a judgment should be set aside because of a later state supreme court decision that would have changed the outcome of the diversity case in question, also stated that:

We are convinced that Rule 60(b)(6) cannot be properly used to alter the substantive content of a judgment once it has been affirmed on appeal except in extraordinary circumstances. To hold otherwise would be to permit a district court to violate our mandate that a judgment be entered "in accordance with the opinion of this court."

The CIG court held that changing the content of a judgment affirmed by the Tenth Circuit is "unsupported by an extraordinary reason to justify relief."

The Tenth Circuit allowed a Rule 60(b)(6) motion in Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975). Pierce involved two

lawsuits arising from the same automobile accident, one in federal court and one in state court. The federal court entered judgment against the plaintiff based on state precedent. The state court decision, on appeal, later overturned the precedent on which the federal court relied. The court held that such extraordinary circumstances justified granting Rule 60(b)(6) relief.

However, as the Van Skiver court later pointed out, Pierce granted Rule 60(b)(6) relief when there had been a post-judgment change in the law in a case "arising out of the same accident as that in which the [federal court] plaintiffs ... were injured." Van Skiver, 952 F.2d at 1245, citing Pierce, 518 F.2d at 723. The Van Skiver court continues, "However, when the post-judgment change in the law did not arise in a related case, we have held that a change in the law or in the judicial view of an established rule of law does not justify relief under Rule 60(b)(6)." Van Skiver, 852 F.2d at 1245.

Plaintiff points to Adams v. Merrill Lynch, 888 F.2d 696 (10th Cir. 1989), in which the court states that "a change in relevant case law by the United States Supreme Court warrants relief" under Rule 60(b)(6). However, this Court believes Adams is not controlling here. The Adams court based its ruling on Pierce,⁴ and the Tenth Circuit in a more recent case - CIG - stated that Collins remains good law: judgments affirmed on appeal are not subject to

⁴Pierce does not control in the instant case because the change in relevant law did not arise from the same transaction on which Plaintiff's claim is based. Pierce remains only a narrow exception to Collins.

a Rule 60(b)(6) motion without extraordinary circumstances. In Adams, the 60(b)(6) motion was made before appeal. In addition, the change in law in this case is not a change made by the Supreme Court.

While a 60(b)(6) motion was granted in Professional Assets Management v. Penn Square Bank, 616 F.Supp. 1418 (D.C.Okla. 1985), vacating the order in question did not "run afoul of the interest in finality espoused in Collins" because final judgment had not yet been entered in the Penn Square case. Id. at 1420, n. 1.

Plaintiff also relies on System Federation No. 91 Railway Employees' Department v. Wright, 364 U.S. 642 (1961), as further support for a Rule 60(b)(6) motion. However, System Federation deals with seeking relief from an injunction that governed the future conduct of the parties, and the district court had specifically reserved the power to modify the decree. System Federation is inapplicable to the issue of whether 60(b)(6) relief should be granted from a final judgment.

The question remains whether the Act was meant to be applied retroactively. The Tenth Circuit addressed the issue of whether a congressional statute applies retroactively in DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377 (10th Cir. 1990) cert. den. --- U.S. ---, 111 S.Ct. 799 (1991). The DeVargas court, when faced with the irreconcilable Supreme Court positions on the retroactivity issue,⁵ held that a statute is to be given only

⁵Compare Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974) ("a court is to apply the law in effect at the time it renders its decision" except where application of the law would

prospective effect unless a contrary legislative intent appears. Id. at 1390-93.

The court stated that retroactive intent will not be implied; it must be expressed in the statute. "The standard of 'clear congressional intent' for the retroactive application of statutes requires articulated and clear statements on retroactivity, not inferences drawn from the general purpose of the legislation." Id. at 1387. Regardless of whether the statute in question is new or is amended, "we will not imply such an intent where Congress chose to remain silent. For us to imply intent derogates from Congress' power to determine the retroactive effect of its own laws." Id. at 1392.

Plaintiff correctly points out that the majority of Tenth Circuit precedent deals with cases in which there had been a change in judicial law rather than change in statutory law. However, the Tenth Circuit does not distinguish between types of laws in that manner when considering retroactivity in general. Rather, it distinguishes between procedural law and substantive law, regardless of whether it is due to a change in statute or a change in judicial interpretation. DeVargas considered a statute that affected substantive rights and liabilities, and stated it would not be applied retroactively. In Arnold v. Maynard, 942 F.2d 761 (10th Cir. 1991), the court stated that "the presumption has always

result in "manifest injustice."), and Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), ("congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").

been to the contrary with respect to statutes that address matters of procedure and jurisdiction. ... [A procedural statute] applies to all actions - to those which have accrued or are pending, and to future actions." Id. at 752, n. 1. In this case, however, the change in FDIC requirements is not procedural.

Section 451(d) delineates when the Act, enacted on December 19, 1991, goes into effect:

This section shall apply to plan years beginning on or after the date of the enactment of this Act, regardless of whether the qualifying event under section 603 of the Employee Retirement Income Security Act of 1974⁶ occurred before, on, or after such date.

Looking at the face of the statute, it appears clear the statute covers lending institutions with insurance plan years that begin on or after December 19, 1991, regardless of when the employee was terminated (or met other such qualifying events as outlined in Section 603 of ERISA). The statute says nothing about application to plan years, such as Plaintiff's, that ended before the Act went into effect. There is no "clear congressional intent" - as required by DeVargas - for retroactive application of the Act to cases already litigated and determined before the enactment.

Plaintiff points to legislative history excerpts, stating that Congress intended retroactive application. However, the statements

⁶The section states a "qualifying event" includes termination, for a reason other than the employee's gross misconduct.

Plaintiff includes do not mention retroactivity.⁷ While Congress appeared to be concerned about a loophole that the Act corrects, and even states that the loophole should be closed as soon as possible, it does not specifically mention retroactivity. The Tenth Circuit states that inferences drawn from the general purpose of the statute are a not clear enough expression of intent to apply a statute retroactively. DeVargas, 911 F.2d at 1387.

Plaintiff also relies on General Motors Corp. v. Romein, --- U.S. ---, 112 S.Ct. 1105 (1992) for his contention that the Act should be applied retroactively. However, the statute in question in Romein contained a clear expression of the legislature's intent to apply the statute retroactively to injuries "occurring before March 31, 1992." In this case, the Act contains no such clear statement of congressional intent.

This Court finds that the Act was not intended to apply to cases such as Plaintiff's, which involve plan years before the Act went into effect. Since the Act is not applied retroactively in such cases, Plaintiff's argument that Section 451 incorporates the equitable tolling doctrine is rendered moot. This Court also finds that a Rule 60(b)(6) motion should be granted only in extraordinary circumstances, and a change in the law after a case has been

⁷Statement of Hon. Brian Donnelly, 137 No. 121 Congressional Record, at E2901 (August 2, 1991), in which Donnelly states, in part: "[I]t appears that when a bank or S&L fails and is taken over by the federal government, the COBRA requirement can be avoided. This is inexcusable, and this loophole was never intended by Congress.

"My legislation corrects it, and it is absolutely imperative that we enact this legislation as soon as possible."

decided is not an extraordinary circumstance. Therefore, Plaintiff's motion for relief from judgment pursuant to Fed.R.Civ.P. 60(b)(6) is hereby DENIED.

IT IS SO ORDERED, this 7th day of July, 1992.



THOMAS R. BRET
UNITED STATES DISTRICT JUDGE

FILED

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

JUL 24 1992

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

PAULA J. QUILLIN,
Plaintiff,

v.

TRANSOK, INC.,
Defendant.

Case No. 90-C-1020-E

ENTERED ON DOCKET
DATE JUL 24 1992

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, Plaintiff Paula J. Quillin and Defendant Transok, Inc. hereby dismiss the captioned case with prejudice, each party to bear her or its own costs, expenses, and attorneys' fees.

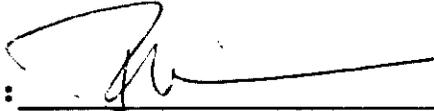
PATTERSON BOND
STEVEN K. BALMAN

By: *Patterson Bond*
Patterson Bond, OBA #942

BOND & BALMAN
800 Beacon Building
Tulsa, Oklahoma 74103
(918) 583-0303

Attorneys for Plaintiff
PAULA J. QUILLIN

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

By: 

J. Patrick Cremin, OBA #2013
Judith A. Colbert
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

Attorneys for Defendant
TRANSOK, INC.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 24 1992

FEDERAL DEPOSIT INSURANCE CORPORATION,)
in its corporate capacity,)

Plaintiff,)

vs.)

ARTHUR O. NAYLOR and MICHELLE M.)
NAYLOR, husband and wife,)
COUNTY TREASURER, TULSA COUNTY)
OKLAHOMA; BOARD OF COUNTY)
COMMISSIONERS, TULSA COUNTY,)
OKLAHOMA.)

Defendants.)

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

Civil Action No. 92-C-605 E

ENTERED ON DOCKET
DATE JUL 24 1992

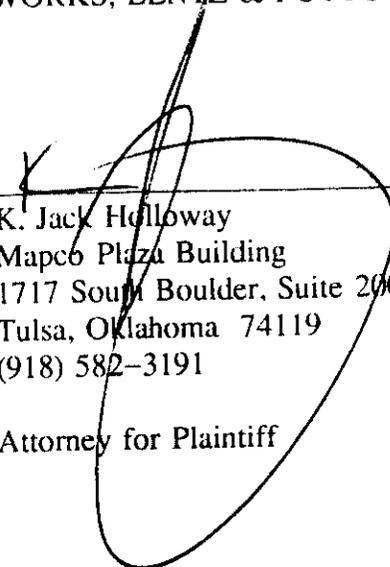
DISMISSAL

COMES NOW the plaintiff and hereby dismisses the above cause without
prejudice.

Dated this 24 day of July, 1992.

WORKS, LENTZ & POTTORF, INC.

By


K. Jack Holloway
Mapco Plaza Building
1717 South Boulder, Suite 200
Tulsa, Oklahoma 74119
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Attorney for Plaintiff

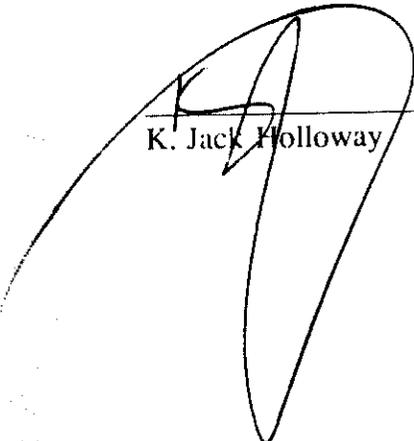
CERTIFICATE OF MAILING

I, K. Jack Holloway, hereby certify that on the 24 day of July, 1992, I mailed a true and correct copy of the above and foregoing pleading, by depositing same in the United States Mail, with proper postage thereon fully prepaid, as follows:

Arthur O. Naylor
Michelle M. Naylor
304 W Quanah
Broken Arrow OK 74011

John F. Cantrell
Tulsa County Treasurer
500 S Denver
Tulsa OK 74103

Board of County Commissioners
Tulsa County
500 South Denver
Tulsa OK 74103


K. Jack Holloway

2675.001

blc

OBA #8382

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

FIDELITY SOUTHERN INS. CO.,)
)
 Plaintiff,)
)
 -vs-)
)
 KENNETH EUGENE McCLAIM, LOIS)
 McCLAIN, MARCUS WILLIAM)
 McCLAIN, KAREN S. HILL, as)
 mother and next friend of)
 BENJAMIN HILL, a minor,)
)
 Defendants.)

ENTERED ON DOCKET
JUL 22 1992
DATE _____

No. 92-C-544-E

FILED

JUL 22 1992

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

DISMISSAL

Comes now the Plaintiff, Fidelity Southern Ins. Co., and dismisses its action against the named Defendants without prejudice. The Plaintiff advises the Court that the underlying action has been settled and this action is moot.

Respectfully submitted,

KNOWLES, KING & SMITH

By Brad Smith

BRAD SMITH - OBA # 8382
603 Expressway Tower
2431 East 51 Street
Tulsa, OK 74105
(918) 749-5566

CERTIFICATE OF MAILING

I, BRAD SMITH, hereby certify that on the _____ day of July, 1992, I mailed a true and correct copy of the above and foregoing instrument with proper postage thereon fully prepaid to:

Ms. Karen S. Hill
4216 Sunglo Parkway
Sand Springs, OK 74063

Mr. Kenneth Eugene McClain
Ms. Lois McClain
Marcus William McClain
4806 Nassau Circle
Sand Springs, OK 74063



BRAD SMITH

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

TRACY W. LAYTON,
PLAINTIFF,

VS.

DEE W. ROSELL and JEFFREY J.
HARRISON,
DEFENDANTS.

No. 91-C-945-B

JUL 21 1992

U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, Tracy W. Layton, pursuant to Rule 41(a)(i)(ii), and enters into a Joint Stipulation of Dismissal Without Prejudice, of the above entitled cause of action.

Respectfully submitted,

Gary L. Richardson
GARY L. RICHARDSON, OBA #7547
GREGORY G. MEIER, OBA #6122
KEVON V. HOWALD, OBA #12119
RICHARDSON, MEIER & STOOPS
5727 South Lewis, Suite 520
Tulsa, Oklahoma 74105
(918) 492-7674

ATTORNEY FOR PLAINTIFF

APPROVED AS TO FORM:

Tracy Layton
Tracy W. Layton

David L. Pauling
David L. Pauling

CERTIFICATE OF MAILING

I hereby certify that on this 21 day of July, 1992, a true and correct copy of the above and foregoing document was hand delivered to:

David L. Pauling
200 Civic Ceter, Rm. 316
Tulsa, OK 74103

Tracy Layton
914 Delaware
Perry, OK 73077

Ray Richardson

DATE JUL 22 1992

FILED

JUL 10 1992

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

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

WILBURN ROLLO MANSFIELD,)
)
 Plaintiff,)
)
 vs.)
)
 RON CHAMPION, et al.,)
)
 Defendant.)

Case No. 90-C-683-B

ORDER

Before the Court is Petitioner's objection to the Magistrate Judge's recommendation to deny Petitioner's request for a Writ of Habeas Corpus. Petitioner Wilburn Rollo Mansfield seeks habeas relief on two 1987 robbery convictions, which he claims were enhanced by invalid prior convictions. He also claims double jeopardy, ineffective assistance of counsel, and a violation of his due process rights because the trial court did not determine whether there was a factual basis for his guilty pleas in prior convictions.

In 1984, Mansfield was convicted of two counts of robbery with a firearm after two or more felony convictions. He was sentenced to 50 years on each count, to run consecutively. Mansfield and co-defendant Ronnie Dean Storm had robbed the Holiday Hills liquor store and the store clerk. They stole the clerk's wallet, three bottles of whiskey and \$327 from the cash register. The conviction and sentence were affirmed by the Oklahoma Court of Criminal Appeals on April 30, 1987, in Storm v. State, 736 P.2d 1000 (Okla.

Crim. App. 1987).

Mansfield filed for post-conviction relief on two separate occasions. In his October 19, 1989, motion, Mansfield alleged he was subject to double jeopardy because he was charged with two counts of robbery for the same incident. He also claimed he had ineffective counsel because his current sentence was enhanced by earlier convictions obtained under a Texas statute later ruled unconstitutional.¹ Tulsa County denied relief on December 6, 1989, and the Court of Appeals affirmed on January 26, 1990.

Mansfield again filed for post-conviction relief on April 6, 1990, repeating his allegations of ineffective counsel and double jeopardy. On May 7, 1990, Tulsa County District Court again denied relief. On June 13, 1990, the Court of Criminal Appeals affirmed, stating that all issues previously ruled upon were barred by res judicata; all issues that should have been raised previously, but were not raised, were deemed waived.

Mansfield filed this petition on August 24, 1990. He alleges he was denied effective assistance of trial and appellate counsel because both attorneys were prohibited from raising the unconstitutionality of the prior convictions used to enhance the 1984 sentences for robbery.

¹Texas had in place at the time of Mansfield's 1953 convictions a statute similar to Title 10 O.S.1971 §1101, which required certification hearings for females ages 16 to 18 before they could be tried as an adult, but males age 16 and older could be tried as an adult without a certification hearing. Both statutes later were ruled unconstitutional, saying they violated the Equal Protection Clause of the 14th Amendment. Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972), Ex Parte Matthews, 488 S.W.2d 434 (Tex. Crim. App. 1973).

The Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), set out a two-pronged test to determine whether counsel was ineffective:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result was reliable.

Id. at 687. The proper standard for attorney performance, the first prong of the test, is that of reasonably effective assistance. Id. at 688; United States v. Vader, 630 F.2d 792 (10th Cir. 1980). The court must evaluate the attorney's performance from that attorney's perspective at the time. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id. at 689. A convicted defendant must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. Id. at 690. Even if the first prong of the test is met, the conviction is not set aside if the error had no effect on the judgment. The defendant has the burden of proving that the error was prejudicial, and "it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693.

Mansfield alleges that his trial and appellate counsel were inadequate because they were prevented by statute from challenging

the constitutionality of the prior convictions used to enhance Mansfield's current sentence. In his brief, Mansfield did not specify the statute that prevented this challenge. Oklahoma statutes do not prevent counsel from raising the issue of constitutionality of prior convictions. State law requires only that a convicted defendant use the Post-Conviction Relief Act, rather than a writ of habeas corpus or mandamus, to attack prior convictions after the defendant has been convicted and the judgment and sentence have been confirmed on appeal.

In addition, Mansfield's petition states that his public defender did submit a motion at trial to suppress evidence of the prior convictions, but the court overruled the motion. Mansfield provides no other evidence that the representation was deficient, as required by the Supreme Court in Strickland. "Petitioner's counsel ... could not reasonably be expected to investigate or challenge the validity of petitioner's [earlier] conviction" if the petitioner has not told counsel of the potential invalidity. Bailey v. Cowley, 914 F.2d 1438 (10th Cir. 1990). Merely losing the case is not necessarily a reflection of counsel's skill or performance, and will not alone support a claim of inadequate representation. United States v. Miller, 643 F.2d 713 (10th Cir. 1981). In addition, a mere showing of counsel's possible errors or lack of success does not meet Mansfield's burden of proving his counsel was ineffective. United States v. Nelson, 582 F.2d 1246 (10th Cir. 1978).

Mansfield also alleges that using his prior convictions to

enhance his present sentence is unconstitutional. In 1964, Mansfield was found guilty of one count of robbery and one count of robbery after a former conviction of a felony. His sentences of five years and fifteen years, respectively, were enhanced by five Texas convictions that occurred in 1953, when Mansfield was a juvenile. However, in 1978, Tulsa County District Court granted post-conviction relief in the 1964 cases, holding that the juvenile convictions were invalid for enhancement purposes. The court then modified his sentences to five years each, but did not reverse the 1964 robbery convictions.

As noted by the Oklahoma Court of Criminal Appeals in its denial of post-conviction relief in the 1984 case, using the 1953 juvenile convictions for enhancement purposes in the 1964 convictions did not render the 1964 convictions invalid; rather, it rendered only the 1964 sentences invalid. The statute governing Mansfield's current sentence, 21 O.S. §51(1983), states that convictions, not sentences, are the determining factor for enhancement purposes:

Every person who, having been twice convicted of a felony offense, commits a third, or thereafter, felony offenses within 10 years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of not less than twenty (20) years.

The Tulsa County District Court corrected the error when it modified the 1964 sentence, and the 1964 convictions were still available for use as enhancement of Mansfield's current sentence. The 1964 convictions, and a 1975 conviction for burglary after a

former felony conviction were used to enhance the 1984 sentence. Mansfield's current sentence of 50 years each on two robbery counts after two or more felony convictions is in compliance with the statute.

Mansfield also alleges that the two separate robbery convictions, one for robbing the Holiday Hills liquor store and one for robbing the store clerk while there, placed him in double jeopardy. He alleges that both crimes were committed in the same place and the same time, so therefore he should have been charged with only one count of robbery.

According to Johnson v. State, 611 P.2d 1137 (Okla. Crim. App. 1980), a court must determine "whether the offenses charged were parts of the same criminal act, occurrence, episode or transaction." If so, multiple punishments should be barred. A "single legal transaction may be punished under several statutory provisions if conviction under each statutory provision requires proof of a fact not required for conviction under the other statutory provisions." Timberlake v. United States, 767 F.2d 1479, 1481 (10th Cir. 1985), citing Blockburger v. United States, 284 U.S. 299, 304 (1932).

Mansfield was charged with two counts of robbery with a firearm. Oklahoma statute 21 §791 defines robbery as the "wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Mansfield was found guilty of wrongfully taking personal property from the store clerk, against his will and

by means of force or fear. He also was found guilty of robbing the store of cash and whiskey. Each charge requires separate facts to be alleged and proven, although both acts took place at the same location. As Respondent points out, following Mansfield's contention to the fullest would allow a person to kill two people at the same time, yet only be charged for one homicide because both acts occurred in rapid succession at the same location and are punishable under the same statute. Mansfield was not placed in double jeopardy when convicted of two separate acts of robbery with a firearm.

Mansfield also alleges that his due process rights were violated in two ways: because the trial court did not determine whether there was a factual basis for his guilty pleas in the 1964 and 1975 convictions, and because he was not advised of his constitutional rights before using the 1964 and 1975 pleas to enhance his current sentence. Mansfield points to Boykin v. Alabama, 395 U.S. 238 (1969), in which the Supreme Court ruled that a guilty plea cannot be assumed to be knowledgeable and voluntary if the record does not disclose an affirmative showing. A bare record of a guilty plea, without supporting evidence, cannot be presumed to be knowledgeable and voluntary. Id. Here, the record does not disclose whether Mansfield's guilty pleas were knowledgeable and voluntary. There are no transcripts in the record of the hearings in which the pleas were accepted.

Mansfield states that using the bare record of a guilty plea for enhancement purposes has been declared unconstitutional by the

Sixth Circuit Court of Appeals in Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989) cert. den. 494 U.S. 1061 (1990). The Dunn court says that the fact that a guilty plea was entered in earlier convictions is not enough to presume validity, when considering whether to convict the defendant of being a persistent felony offender under Kentucky law. The state has the burden of proving that the plea was intelligently and voluntarily given when using prior convictions as a basis for convicting someone as a persistent felony offender. Id. at 1279.

However, Oklahoma declines to apply Boykin retroactively. Stowe v. Oklahoma, 612 P.2d 1363 (Okla. Crim. App. 1980). The court in Smith v. Oklahoma City, 513 P.2d 1327 (Okla. Crim. App. 1973) outlined the procedure Oklahoma courts should use when a prisoner enters a guilty plea, in order to preserve the record for later appeals regarding whether the plea was made knowledgeably and voluntarily. This procedure required, among other things, that the judge inform the prisoner of his rights to a jury trial, to court-appointed counsel, and to not incriminate himself. "An affirmative waiver of these requirements must be reflected in the record prior to the acceptance of a plea of guilty." Id. at 1329. However, the Smith court states that the procedure will be used in "all future cases." Because of this, and because Boykin is not applied retroactively, Smith and Boykin² do not apply in this case.

²Also, Boykin deals with direct appeals; it does not hold that a trial court, when considering prior convictions for enhancement purposes, must look to the merit of the plea, as is the issue here.

Smith and Boykin do apply to Mansfield's 1975 burglary conviction. However, the court in Allen v. Raines, 360 P.2d 949 (Okla. Crim. App. 1961), stated that Oklahoma courts "do not look with favor upon a case where a person acquiesces in a sentence pronounced against him for a long period of time, 16 years in this case, and then seeks to have the judgment, regular on its face, set aside by asserting that his constitutional rights were denied him in the proceedings before the trial court, especially where the proof consists wholly of the statement of the petitioner." Id. at 951.

The Allen court also stated:

The right to relief by habeas corpus may be lost by laches, when the petition for habeas corpus is delayed for a period of time so long that the minds of the trial judge and court attendants become clouded by time and uncertain as to what happened, or due to dislocation of witnesses, the grim hand of death and the loss of records, the rights sought to be asserted have become mere matters of speculation, based upon faulty recollection, or figments of imagination, if not out-right falsification.

Id. at 952 (citations omitted).

In Application of Lewis, 339 P.2d 799 (Okla. Crim. App. 1959), the court held that the petitioner, who filed a habeas corpus petition alleging that his constitutional rights were violated when he entered a guilty plea, had waived his right to appeal because he waited 24 years to do so. "One cannot sit by and wait until lapse of time handicaps or makes impossible the determination of the truth of a matter, before asserting his rights. This is in accordance with the uniform holding of this court over a long period of years." Id. at 799. The court also pointed to a long list

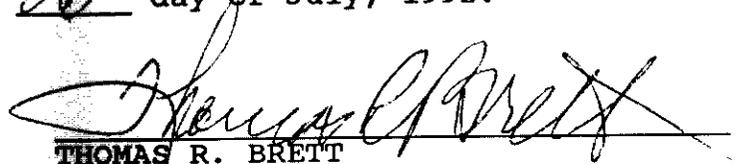
of cases in which the right to a habeas corpus petition was lost by laches.³

The Court holds that Mansfield has lost the right to appeal this issue due to laches. Mansfield did not, either directly or collaterally, appeal the 1975 guilty plea until he raised it in his first application for post-conviction relief in the 1984 case, which was filed in 1989. By that time, he had lost the right to appeal the issue due to res judicata since he should have raised the issue in his direct appeal.

The Court holds that Mansfield has failed to meet the burden of showing that his trial and appellate counsel were ineffective. He also failed to show that using his 1964 convictions to enhance his current sentence was in error. Mansfield was not placed in double jeopardy by being charged with two counts of robbery for his actions at the Holiday Hills liquor store; he robbed both the store and the store clerk. Smith and Boykin are not applied retroactively, therefore they do not apply to Mansfield's 1964 convictions. Mansfield waived the right to appeal his guilty plea in the 1975 case due to laches. Mansfield's request for a Writ of Habeas Corpus is DENIED.

³Ex parte Motley, 193 P.2d 613 (Okla. Crim. App. 1948), where eleven years expired prior to application; Ex parte Ray, 198 P.2d 756 (Okla. Crim. App. 1948), where eight years had expired; Ex parte Cole, 208 P.2d 193 (Okla. Crim. App. 1949), where 16 years expired; Ex parte French, 240 P.2d 818 (Okla. Crim. App. 1952), where 15 years expired.

IT IS SO ORDERED, this 20th day of July, 1992.



THOMAS R. BRET
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 20 1992

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

CLARKSON CONSTRUCTION COMPANY,)
a Missouri Corporation,)
)
Plaintiff,)
)
v.)
)
DARYL BOND CONSTRUCTION, INC.,)
an Oklahoma Corporation,)
)
and)
)
SEWELL BROS., INC., an)
Oklahoma Corporation,)
)
Defendants.)

No. 91-C-327-E

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1)(ii) Plaintiff Clarkson Construction Company and Defendants, Daryl Bond Construction, Inc. and Sewell Bros., Inc., all the parties who have appeared in this action, stipulate that this cause shall be dismissed with prejudice and that each party shall bear its own costs and attorneys' fees.

Respectfully submitted,

MILLER LAW FIRM, P.C.

By



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FAX: (816) 561-6361

ATTORNEYS FOR PLAINTIFF,
CLARKSON CONSTRUCTION COMPANY

23

And

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124 East Fourth Street
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ATTORNEYS FOR PLAINTIFF,
CLARKSON CONSTRUCTION COMPANY

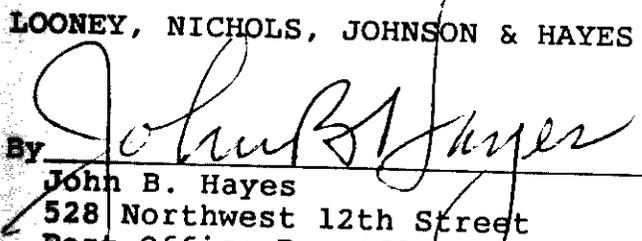
CROWE & DUNLEY, P.C.

By 

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ATTORNEYS FOR DEFENDANT,
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LOONEY, NICHOLS, JOHNSON & HAYES

By 

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Oklahoma City, Oklahoma 73101
(405) 235-7641
FAX: (405) 239-2050

ATTORNEYS FOR DEFENDANT,
SEWELL BROS., INC.

ENTERED ON DOCKET

DATE 7-20-92

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

FILED
16

Richard
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NANETTE D. LEES,
Plaintiff,

vs.

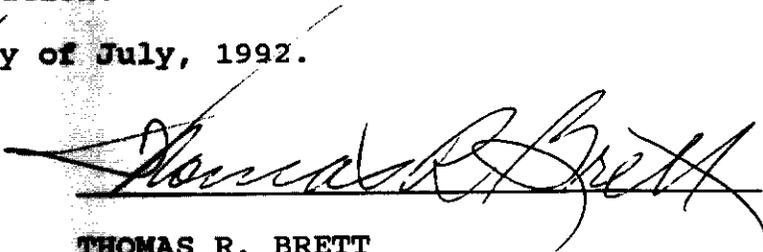
No. 91-C-451-B

STATE FARM FIRE AND CASUALTY
COMPANY, a corporation,
Defendant.

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

In accord with the Verdict entered on May 21, 1992, the Court hereby enters judgment in favor of the Plaintiff, Nanette D. Lees, and against the Defendant, State Farm Fire and Casualty Company, for the amount of \$223,189.50, plus prejudgment interest pursuant to Okla. Stat. tit. 36, §3629(B), accrued as of May 23, 1991, at the rate of 15% per annum until May 21, 1992, plus post-judgment interest from May 21, 1992 forward at the legal rate of 4.40% per annum, on the breach of contract claim; and for the amount of \$12,600.00, plus prejudgment interest pursuant to Okla. Stat. tit. 12, §727(A)(2), accrued as of May 30, 1991, until May 21, 1992 in the amount of 9.58% per annum, plus post-judgment interest from May 21, 1992 forward at the legal rate of 4.40% per annum, on the bad faith breach of contract claim. Costs and attorney fees may be awarded upon proper application.

DATED this 16th day of July, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

MONTA KUYKENDALL,

Plaintiff

vs.

LOUIS W. SULLIVAN, M.D.,
Secretary of Health and
Human Services,

Defendant.

Case No. 91-C-0307-B

FILED

JUL 16 1992

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

ORDER

This matter comes on for consideration of the objections of the Plaintiff, Monta Kuykendall, to the Report and Recommendation of the United States Magistrate Judge remanding the Administrative Law Judge's denial of disability insurance benefits.

Plaintiff filed the instant action pursuant to 42 U.S.C. § 405(g) seeking a review of the decision of the Secretary of Health and Human Services. The matter was referred to the United States Magistrate who entered his Report and Recommendation on April 7, 1992. The Magistrate Judge recommended to remand the Secretary's decision back to the administrative level to assess whether Plaintiff's past relevant work was substantial gainful employment, based on the type of work and the wages she earned. Report and Recommendation of the United States Magistrate Judge (hereinafter R & R) at 8-9.

The only issue before the Magistrate Judge was whether substantial evidence in the record supported the Secretary's

decision that the Plaintiff is not disabled within the meaning of the Social Security Act. The Social Security Act entitles every individual who "is under a disability" to disability insurance benefits. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id. § 423(d)(1)(A). An individual

"shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

Id. § 423(d)(2)(A).

Under the Social Security Act the claimant bears the burden of proving a disability, as defined by the Act, which prevents him from engaging in his prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the ability to do other work activity and that jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987). The Secretary meets this burden if the decision is supported by substantial evidence. See Campbell v.

Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Campbell v. Bowen, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

"is not merely a quantitative exercise. Evidence is not substantial 'if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.'"

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985) (quoting Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985)). Thus, if the claimant establishes a disability, the Secretary's denial of benefits must be supported by substantial evidence that the claimant could do other work activity in the national economy.

The Secretary has established a five-step process for evaluating a disability claim. See Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes v. Bowen, 845 F.2d at 243, proceed as follows:

- (1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).
- (2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).
- (3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled.

20 C.F.R. § 416.920(d).

- (4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).
- (5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

The inquiry proceeds beginning with step one, and if at any point the claimant is found to be disabled or not disabled, the inquiry ceases. Reyes, 845 F.2d at 242; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. §416.920 (1991). Further, with regard to the fourth section of the test there must be substantial evidence that the past work experience meets three additional requirements: it must have occurred within the last 15 years, been of sufficient duration to enable the worker to learn the skills associated with the job, and it must require significant and productive mental and physical duties which are remunerated within established earning guidelines. Jozefowicz v. Heckler, 811 F.2d 1352, 1355-56 (10th Cir. 1987); See 20 C.F.R. §§ 416.965(a), 404.1572, 404.1574 (2), (3), and (6) (1991).

Plaintiff here suffers from a variety of mental and physical ailments. This appeal focuses on her mental capabilities, and specifically whether her limited mental faculties permit her to hold substantial gainful employment. The record is replete with various and varied assessments of her condition, and the Administrative Law Judge (ALJ) who first evaluated Plaintiff's

claim considered testimony from two psychologists on her ability to work. See R & R at 2-4; Plaintiff's Concurrence With and Objections to the R & R (hereinafter Objections to R & R) at 2-5. The ALJ found that, based on all the evidence in the record, the Plaintiff failed to satisfy the fourth section of the test; her physical and mental condition allowed her to perform jobs which she held previously.

The Plaintiff objected to the ALJ's evaluation of the psychological evidence, and further disputed his failure to consider step five in the five-step test. Plaintiff felt that insufficient weight was given to the reports of the two psychologists under the "treating physician" rule, and that both doctors agreed that she was mentally unfit to work. The Magistrate Judge disagreed in part with the findings of the ALJ. The Magistrate found no error in the ALJ's evaluation of the psychological data or his use of the five-step test. The Magistrate Judge did however find error in the assumed conclusion (no actual finding was made) that Plaintiff's past relevant work was "substantial gainful employment" according to the Social Security Act. R & R at 8-9. Plaintiff disagrees with the Magistrate Judge's recommendations regarding the ALJ's treatment of the psychological evidence and the fifth step of the test, but agrees that the question of whether her previous employment was substantially gainful should be reconsidered. The Court agrees, with some slight clarifications, with the ruling of the Magistrate Judge.

TREATING PHYSICIAN RULE

The Tenth Circuit gives substantial credence to the opinions of treating physicians on the subject of medical disability. A treating physician's opinion is binding on the fact finder unless it is contradicted by "substantial evidence," and the opinion is entitled to extra weight due to the physician's greater familiarity with the claimant's medical situation. Kemp v. Bowen, 816 F.2d 1469, 1476 (10th Cir. 1987).

Plaintiff urges that the opinion of her psychologist, Dr. Joseph Schwartz, who examined her once on February 6, 1988, should be given extra weight due to the treating physician rule. Objections To R & R at 2-3. She further argues that the opinion of the psychologist hired by the Secretary, Dr. Warren Smith, is consistent with that of her own psychologist, and thus the ALJ did not have substantial evidence to contradict the opinion of her physician. Id. at 3. Plaintiff also notes that the ALJ's claim that her brother testified about the inaccuracy of her I.Q. tests was incorrect and is an additional error.

The treating physician rule is of limited use in a situation like the present one, where the two physicians each saw the plaintiff only once, both in anticipation of this litigation. The Magistrate Judge properly notes that the treating physician rule is intended to give a higher level of credibility to the reports of those doctors who have treated a patient for an extended period of time over those who are consulted once for the express purpose of litigation. See Broadbent v. Harris, 698 F.2d

407, 412 (10th Cir. 1983). Here there is no reason to give either of the two physicians any higher credibility than the other, and their respective opinions are not binding on the ALJ. Both were consulted for the express purpose of this litigation, neither spent extended periods of time with the Plaintiff, and there was no continuing treatment with either physician. Giving either doctor higher credibility under the treating physician rule flies in the face of the purposes behind the doctrine.

The claim that the two reports are consistent is also specious. Although both of the doctors found that the Plaintiff had similar difficulties, Dr. Schwartz "strongly" advocated that she receive social security insurance, while Dr. Smith wrote in part that she "can read, write, calculate, understand simple job instructions and carry them out. She can sustain work performance." R & R at 3. While Dr. Smith also conceded that the Plaintiff may have difficulties dealing with work pressures and co-workers, his evaluation clearly contemplates her holding a job of some type. The two doctors simply disagreed about the extent of the Plaintiff's impairment. The ALJ was required to weigh the credibility of all the evidence before him, both medical and non-medical, and assess Plaintiff's ability to work. The ALJ did not ignore the medical reports or "interpose his own medical expertise," and he felt that substantial evidence existed to show that the Plaintiff had the mental capability to hold gainful employment. The Court agrees with that assessment.

The question of whether the Plaintiff's brother testified as

to the accuracy of the I.Q. tests is irrelevant. Both tests had substantially similar results, and the accuracy of those results is not in question.¹ There is no evidence that the ALJ relied on the alleged statements to discredit either or both of the psychologists, and substantial evidence exists independent of the alleged statements to support the finding of the ALJ. Any error on the part of the ALJ in this regard is harmless.

FAILURE TO ANALYZE 85-15

Plaintiff claims that the Magistrate Judge's opinion concerning Social Security Ruling (SSR) 85-15 is incorrect.² The Magistrate Judge notes in his recommendation that SSR 85-15 is inapplicable since it relates only to whether the disability prevents the claimant from being employable in an unskilled capacity in the national economy. That statement is correct as far as it goes. However, Plaintiff is also correct in noting that, should the ALJ find on remand that her past relevant employment is not substantial or gainful, inquiry into the fifth

¹ Both psychologists tested Plaintiff using the Wechsler Adult Intelligence Scale; Schwartz found her full scale I.Q. to be 74 while Smith found it to be 72. See R & R at 2-3, id. at note 4.

² Social Security Ruling 85-15 states in part:
Where a person's only impairment is mental, is not of listing severity, but does prevent the person from meeting the mental demands of past relevant work and prevents the transferability of acquired work skills, the final consideration is whether the person can be expected to perform unskilled work.
SSR 85-15 at 94. This relates to the fifth step of the sequential inquiry and thus is only applicable if that final step is reached.

step is necessary. If such an examination is required, SSR 85-15 will certainly apply. The rest of Plaintiff's claims under heading II of her Concurrence and Objection to the R & R, insofar as they relate to the examinations and conclusions of Drs. Smith and Schwartz, were already resolved by the ALJ and are not open to further inquiry on remand. Should step five need to be considered, the remand is limited to a vocational inquiry to determine if Plaintiff is capable of other employment in the national economy. See 20 C.F.R. § 416.920(f)(1).

SUBSTANTIAL GAINFUL EMPLOYMENT

In order to meet the fourth section of the test, the Secretary may use work that the claimant has done during the period which he or she claims to be disabled as proof of ability to work at the "substantial gainful activity level." 20 C.F.R. § 404.1571 (1991). A past vocation can be used so long as the employment occurred within the last 15 years, lasted long enough to enable the worker to learn the skills associated with that employment, and was substantial and gainful. Jozefowicz v. Heckler, 811 F.2d 1352, 1355 (10th Cir. 1987); 20 C.F.R. § 416.965(a) (1991). Substantial activity, according to Social Security Insurance regulations, is that which requires significant physical or mental activity, and gainful activity is that which is done for pay or profit. 20 C.F.R. § 404.1572(a) and (b) (1991). Furthermore, the earnings must meet specific pay

levels to be considered "gainful."³

The Tenth Circuit faced a situation similar to the present case in Jozefowicz. There the claimant's physical condition was deteriorating due to problems with her blood circulation, and she appealed a lower court ruling denying benefits due to her previous employment as a "telephone verifier" during the time she had the disability. The ALJ had not made a specific finding that this was gainful employment, and the Court of Appeals reversed the lower court decision since the claimant only earned \$50 per week at the job, or an average of \$1.43 an hour. 811 F.2d at 1357. The court considered the type of work, the amount of time spent working, and her earnings in holding that the claimant's employment was not gainful.

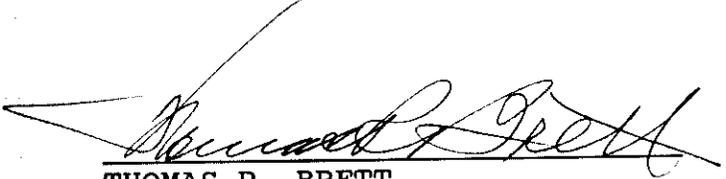
In the present case, the ALJ also failed to make a finding that the past employment was gainful. Thus the Magistrate Judge rightfully questions whether Plaintiff's job as a salad preparer at Shoney's can be considered profitable enough to preclude her receiving social security benefits. R & R at 8. However, Plaintiff held two other jobs which could also be used as previous employment experience: the nursing home kitchen job and

³ During the years concerned in the present case (1980-1987), gainful employment is assumed with a monthly income over \$300, non-gainful activity is presumed with a monthly income under \$190. 20 C.F.R. §§ 404.1574(b)(2)(vi), (b)(3)(vi) (1991). Employment which draws a monthly income between \$190 and \$300 triggers a further inquiry. If the job is comparable to that done by other unimpaired persons in the community, or is clearly worth \$300 per month even though the claimant received less than that, then the person is considered unimpaired for purposes of the Act. 20 C.F.R. §§ 404.1574 (6)(i)-(ii) (1991).

the school crossing guard position. According to the salary amounts listed in the Plaintiff's Vocational Report, the school crossing guard job clearly falls below the \$190 cutoff point listed in § .404.1574.⁴ See supra note 3. The nursing home salary almost breaks the \$300 barrier. According to the same Vocational Report, Plaintiff received \$3.45 an hour six days a week from November 1984 to November 1987. R & R at 3. The Magistrate Judge does not state whether this employment was full time. If it was full time work the Plaintiff would have earned almost \$280 a month while at the nursing home. This amount is very close to the \$300 mark, and could meet the requirements of § 404.1574(6)(i) or (ii). This possibility should be examined closely on remand.

Therefore the court agrees with the Magistrate Judge's Report and Recommendation, and orders that this cause be REMANDED to the Secretary for further proceedings consistent with this opinion. Plaintiff's objections to the Report and Recommendation of the Magistrate, insofar as they are inconsistent with this opinion, are hereby DENIED.

IT IS SO ORDERED this 16th day of July, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

⁴ According to R & R at note 5 and accompanying text, the Plaintiff received \$7.25 a day for five days a week as a school crossing guard, for a total monthly salary of \$145.00.

The Court being fully advised and having examined the court file finds that the Defendant, Stephen H. Perkins a/k/a Steve Perkins a/k/a Stephen Holmes Perkins, acknowledged receipt of Summons and Complaint on February 11, 1992; that the Defendant, Barbara Courtney a/k/a Barbara Courtney-Perkins a/k/a Barbara Perkins, acknowledged receipt of Summons and Complaint on May 18, 1992; that the Defendant, Jean Marie Seres, acknowledged receipt of Summons and Complaint on January 30, 1992; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 28, 1992; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 24, 1992.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on February 11, 1992; that the Defendant, Barbara Courtney a/k/a Barbara Courtney-Perkins a/k/a Barbara Perkins, filed her Disclaimer on May 22, 1992; that the Defendant, Jean Marie Seres, filed her Disclaimer of Interest on February 14, 1992; that Bright Mortgage Company successor in interest to the Defendant, TSL Service Corporation, filed its Answer on June 10, 1992; and that the Defendant, Stephen H. Perkins a/k/a Steve Perkins a/k/a Stephen Holmes Perkins, has failed to answer and his default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage

securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty-five (25), Block Two (2), SPRING VALLEY SECOND, A Subdivision of the SW/4 of the NE/4 of the SW/4 of Section 23, Township 18 North, Range 13 East to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on June 25, 1986, Maynard Macelin Harrison and Neva L. Harrison executed and delivered to Oklahoma Mortgage Company, Inc. a mortgage note in the amount of \$85,500.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Maynard Macelin Harrison and Neva L. Harrison executed and delivered to Oklahoma Mortgage Company, Inc. a real estate mortgage dated June 25, 1986, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on July 1, 1986, in Book 4952, Page 1481, in the records of Tulsa County, Oklahoma.

The Court further finds that the on July 12, 1986, Oklahoma Mortgage Company, Inc. assigned the above-described mortgage to Associates National Mortgage Corporation. This Assignment of Mortgage of Real Estate was recorded on August 27, 1986, in Book 4965, Page 1897, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 29, 1987, Maynard Macelin Harrison and Neva L. Harrison executed a General Warranty Deed conveying their interest in the above-described property to Stephen H. Perkins, a single person. This General Warranty Deed was recorded on April 30, 1987, in Book 5019, Page 2603, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 30, 1990, Associates National Mortgage Corporation assigned the above-described mortgage to the Secretary of Veterans Affairs. This Assignment of Real Estate Mortgage was recorded on June 15, 1990, in Book 5259, Page 1003, in the records of Tulsa County, Oklahoma.

The Court further finds that Stephen H. Perkins executed and delivered to the United States of America on behalf of the Secretary of Veterans Affairs an Assumption Agreement Creating Liability to Lender and United States Without Release.

The Court further finds that on July 17, 1990, Stephen H. Perkins executed and delivered to the United States of America on behalf of the Secretary of Veterans Affairs a Modification and Reamortization Agreement pursuant to which the entire debt due on that date was made principal and the interest rate was reduced from 9.5 percent to 7.5 percent.

The Court further finds that the Defendant, Stephen H. Perkins a/k/a Steve Perkins a/k/a Stephen Holmes Perkins, made default under the terms of the aforesaid note, mortgage, and the

modification and reamortization agreement by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Stephen H. Perkins a/k/a Steve Perkins a/k/a Stephen Holmes Perkins, is indebted to the Plaintiff in the principal sum of \$100,323.80, plus interest at the rate of 7.5 percent per annum from September 1, 1990 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendants, Barbara Courtney a/k/a Barbara Courtney-Perkins a/k/a Barbara Perkins and Jean Marie Seres, disclaim any right, title, or interest in the subject real property.

The Court further finds that Bright Mortgage Company successor in interest to the Defendant, TSL Service Corporation, has a lien on the property which is the subject matter of this action in the amount of \$69,196.64, with interest accruing at the rate of 12.875 percent per annum from June 1, 1984, until paid, plus costs and attorney fees, by virtue of a Journal Entry of Judgment, Case No. CJ-85-07766, District Court, Tulsa County, State of Oklahoma, dated November 24, 1986, and recorded on November 24, 1986, in Book 4984, Page 2759 in the records of Tulsa County, Oklahoma. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Stephen H. Perkins a/k/a Steve Perkins a/k/a Stephen Holmes Perkins, in the principal sum of \$100,323.80, plus interest at the rate of 7.5 percent per annum from September 1, 1990 until judgment, plus interest thereafter at the current legal rate of 4.11 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Bright Mortgage Company successor in interest to the Defendant, TSL Service Corporation, have and recover judgment in the amount of \$69,196.64, with interest accruing at the rate of 12.875 percent per annum from June 1, 1984, until paid, plus costs and attorney fees, by virtue of a Journal Entry of Judgment, Case No. CJ-85-07766, District Court, Tulsa County, State of Oklahoma, dated November 24, 1986, and recorded on November 24, 1986, in Book 4984, Page 2759 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Barbara Courtney a/k/a Barbara Courtney-Perkins a/k/a Barbara Perkins, Jean Marie Seres, and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Stephen H. Perkins a/k/a Steve Perkins a/k/a Stephen Holmes Perkins, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

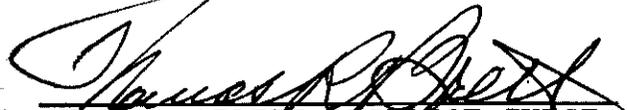
Third:

In payment of the judgment rendered herein in favor of Bright Mortgage Company successor in interest to the Defendant, TSL Service Corporation.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants

and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.


UNITED STATES DISTRICT JUDGE

APPROVED:

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United States Attorney


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Attorney for Bright Mortgage Company
successor in interest to the
Defendant, TSL Service Corporation

Judgment of Foreclosure
Civil Action No. 92-C-48-B

PP/css

DATE 7/20/92

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA)	
)	
Plaintiff)	
)	
vs.)	CIVIL ACTION NO. 92-C-496-B
)	
Sally J. Berger,)	
Defendant.)	

AGREED JUDGMENT

This matter comes on for consideration this 9th day of June, 1992, 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, Sally J. Berger, M.D., appearing pro se.

The Court, being fully advised and having examined the court file, finds that the Defendant, Sally J. Berger, M.D., acknowledged receipt of Summons and Complaint on June 8, 1992. The Defendant has not filed an Answer but in lieu thereof has agreed that she is indebted to the Plaintiff in the amount alleged in the Complaint and that judgment may accordingly be entered against Sally J. Berger, M.D. in the principal amount of \$111,102.36, plus accrued interest in the amount of \$6,750.46 as of December 31, 1991, plus interest thereafter at the rate of 6.620% per annum until judgment, plus interest thereafter at the legal rate until paid, plus a surcharge of 10% of the total debt, plus the costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of \$111,102.36, plus accrued interest in the

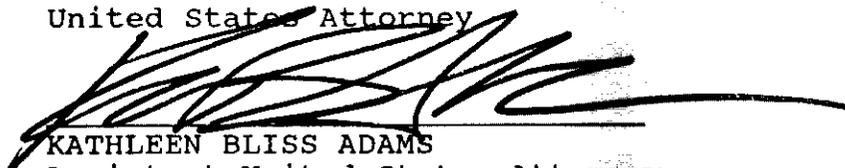
amount of \$6,750.46 as of December 31, 1991, plus interest thereafter at the rate of 6.620% per annum until judgment, plus interest thereafter at the current legal rate until paid, plus a surcharge of 10% of the total debt, plus the costs of this action.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

TONY M. GRAHAM
United States Attorney



KATHLEEN BLISS ADAMS
Assistant United States Attorney



SALLY J. BERGER

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

FILED
5
92-C-563-B ✓

MARVIN R. WASHINGTON,
Petitioner,
v.
RON CHAMPION,
Respondents.

ORDER

Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now before the court for initial consideration. Petitioner was convicted in Osage County District Court, Case No. CRF-90-209 and sentenced to fifty (50) years imprisonment. The conviction has been appealed to the Oklahoma Court of Criminal Appeals.

Petitioner now seeks federal habeas relief on the alleged grounds that he has been denied an appeal bond and the trial court erred in denying him a new trial.

Title 28 U.S.C. § 2254 provides in part:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

A federal habeas petitioner must have fairly presented to the state courts the substance of his federal claim. In Anderson v. Harless, 459 U.S. 4, 8 (1982), the Supreme

Court stated:

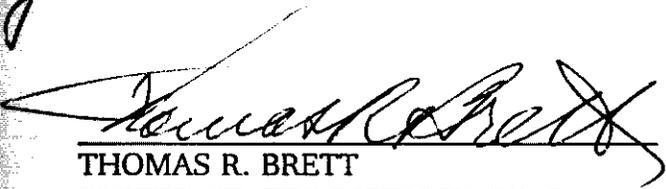
... 28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim. It is not enough that all the facts necessary to support the federal claim were before the state courts ... or that a somewhat similar state-law claim was made. In addition, the habeas petitioner must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim. (citations omitted).

The Tenth Circuit has noted that a "rigorously enforced" exhaustion policy is necessary to serve the end of protecting and promoting the State's role in resolving the constitutional issues raised in federal habeas petitions. Naranjo v. Ricketts, 696 F.2d 83, 87 (10th Cir. 1982).

Petitioner claims his motions for bail and a new trial were denied. Under Oklahoma law, the denial of bail can be raised in a petition for writ of habeas corpus to the Oklahoma Court of Appeals. 22 Okla.Stat. § 1079. Petitioner claims this was done, but offers no proof to the court. He admits his case is on appeal to the Oklahoma Court of Criminal Appeals.

Until his appeal is heard, petitioner is prevented from raising these issues to the federal court. Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied.

Dated this 15TH day of July, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED ON DOCKET
DATE 7/20/92

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

FILED
JUL 21 1992
Richard H. Thompson, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

PARK FRIENDS, INC.,)
)
Plaintiff,)
)
v.)
)
INVESTORS FINANCIAL LIMITED)
PARTNERSHIP et al,)
)
Defendants.)

91-C-719-B

ORDER

Park Friends, Inc. ("Park") now **appeals** a decision of the United States Bankruptcy Court for the Northern District Of Oklahoma. Two issues are raised: 1) Did the Bankruptcy Court err by permissively abstaining pursuant to 28 U.S.C. §1331(c)(1); and 2) Did the Bankruptcy Court err by holding that a **joint stipulation** did not bind the parties concerning the validity of a note and mortgage? **For the reasons** discussed below, this Court **AFFIRMS** the Bankruptcy Court's decision.

I. Summary Of Facts And Procedural History

Investors Financial Limited Partnership ("The Partnership") borrowed money from Fourth National Bank to buy land. **The Partnership** signed a promissory note and a mortgage to secure the loan, but **failed to meet** its obligations. Fourth National sued in state court to foreclose its mortgage lien.

However, before the state court **rendered** a decision, the Partnership filed Chapter 11 Bankruptcy. Park later took **Fourth National's** interest in the note and mortgage, and

continued to pursue the judgment in both state and the bankruptcy courts.

Park, attempting to proceed in state court, filed a Motion For Relief From The Automatic Stay. A key fact in this appeal is, prior to the hearing on the stay relief, the parties signed a Joint Stipulation on May 6, 1991 ("Stipulation"). The Stipulation's opening paragraph reads:

Park Friends, Inc., a non-profit corporation...and Investors Financial Limited Partnership...submit the following Joint Stipulations for the hearing of Park Friends' pending Motions For Stay Relief and Abandonment.

The other pertinent part of the three-page stipulation stated: "**The amount of the debt claimed in the Proof of Claim is accurate, and the lien of the Mortgage is a valid, first and prior perfected lien against the Mortgaged Property.**" The stipulation also stated that the note was properly secured by the mortgage. The Bankruptcy Court later granted Park relief from the automatic stay ("Order"), **finding** that the Debtor granted a first mortgage lien to United Bank (which later became Fourth National) to secure the Debtor's promissory note [for] \$375,000. *Order Granting Relief From Automatic Stay, page 2.* Following the Bankruptcy Court's order, Park filed a Motion For Summary Judgment in state court. The state court granted Park's summary judgment motion, apparently affirming the validity of the note and mortgage.¹

After the summary judgment decision, the Partnership obtained new counsel. A Trustee -- Patrick Malloy III -- also was appointed on behalf of the Partnership. Both new counsel and Malloy then filed a Motion For A Rehearing in state court; meanwhile, Park Friends filed a Complaint For A Declaratory Judgment in Bankruptcy Court.

¹ *The order granting the summary judgment was not found in the record.*

Once Park filed its Complaint, the state court stayed its proceedings. The Partnership then filed a Motion To Abstain with the Bankruptcy Court, arguing that the Motion for Rehearing should be decided by the state court.

On September 5, 1991, the Bankruptcy Court granted the Partnership's Motion To Abstain. It held that permissive abstention under 28 U.S.C. §1334(c)(1) was proper, given the fact that Park's Complaint involved state law issues concerning partnership, agency and real property law.

The Bankruptcy Court found that the Stipulation was binding only for purposes of the Motion for Relief from the Automatic Stay. It concluded that neither the Stipulation nor the May 10, 1991 Order granting the stay was binding for any other proceeding.

Park subsequently filed this appeal, claiming that the Bankruptcy Court, as a matter of law, should have not abstained and **should** have found that the Stipulation bound the parties concerning the question of the mortgage and note's validity.

II. Legal Analysis

This appeal raises two issues: 1) Did the Bankruptcy Court erred in granting the Motion To Abstain, and 2) Should the parties, including the Trustee, be bound by the Stipulation? The issues, which are questions of law, will be reviewed *de novo*.

A. Did The Bankruptcy Court Err by Permissively Abstaining Pursuant To 28 U.S.C. §1334(c)(1)?

Two types of abstention exist under 28 U.S.C. §1334: mandatory and permissive. Mandatory abstention is not at issue here. The Bankruptcy Court *permissively* abstained under 28 U.S.C. §1334(c)(1). That statute allows a district court to abstain from "a particular proceeding arising under title 11 or arising in or related to a case under title 11"

in the interest of justice or comity.²

At first blush, the statute appears to offer great leeway to federal courts. But case law suggests otherwise: "Abstention from the exercise of the federal jurisdiction is the exception, not the rule." *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 47 L.Ed.2d. 483 (1976). A further guideline offered by the Supreme Court is that federal courts have "virtually unflagging obligation" to exercise their jurisdiction. *Id.*, citing *England v. Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

Despite the "unflagging obligation", exceptions to the rule obviously exist. Two such exceptions, discussed in *Colorado River* will not be addressed here because they do not apply.³ A third exception is when a "resolution of state law question will involve the bankruptcy court in matters of substantial public import...and only if there exists no state precedent that either answers the precise question presented or enables the bankruptcy court to predict with reasonable certainty the conclusion the [state] courts will reach." *In Re Earle Industries, Inc.*, 72 B.R. 131, 133 (Bkrcty. E.D. Pa. 1987).

The Partnership suggests -- albeit unconvincingly -- that the issues in this case fall into this third exception. The issues here focus on the circumstances involving a mortgage and promissory note under Oklahoma law. While partnership and agency questions may

² The Partnership's argument that this Court may not review the Bankruptcy Court's decision is without merit. See *In Re Corporation de Services Medicos Hosp.*, 805 F.2d 440, 443 (1st Cir. 1986). Also, see *In Re Ben Cooper*, 924 F.2d 36, 38 (2d Cir. 1991)(nothing prevents appellate review of permissive abstention); *In Re GF Corp.*, 127 B.R. 384, 385 (Bkrcty. N.D. Ohio 1991)(§309 of the Judicial Improvement Act permits the appeal of abstention), and *In Re Holtzclaw*, 131 B.R. 162, 164 (E.D. Cal. 1991)(appeal on decision to abstain is proper).

³ The first is when a federal constitutional issue exists that might be presented in a different posture or mooted by a state court proceeding. Also, abstention is appropriate where, absent bad faith or harassment, or a patently invalid state statute, federal jurisdiction has been involved for the purpose of restraining state criminal proceedings. *Colorado River*, 424 U.S. at 814-816.

exist, nothing in the record indicates that **these** issues are novel or that no state precedent exists. Therefore, the third exception **does** not apply.

Typically, when no novel state law **issues** exist, general considerations of comity and respect for state court processes are **insufficient** to warrant §1334(c)(1) abstention. *J.D. Marshall Intern. Inc. v. Redstart, Inc.*, 74 B.R. 651, 656 (N.D.Ill. 1987). Yet, courts may still permissively abstain if such constitutes "wise judicial administration, giving regard to conservation of judicial resources and **comprehensive** disposition of litigation." *Colorado River Water Cons. Dist.*, 424 U.S. 800 at 817 (1976). This is why the Bankruptcy Court apparently chose to abstain.

Courts do not specifically define "**wise** judicial administration." For the most part, it appears to be a common sense judgment, based on the circumstances of a particular case. The language in §1334(c)(1) "interest of **justice** or comity" also seems to incorporate such logic.

Some courts have used the following elements of mandatory abstention to guide them on whether they should permissively abstain: 1) The party files a timely motion; 2) the proceeding is based on a state law **claim**; 3) the proceeding is a "related to" proceeding; 4) there is no basis for federal jurisdiction other than section 1334; 5) an action is pending in state court; and 6) the state court **action** can be timely adjudicated. *In Re Rarick*, 132 B.R. 47, 50 (D.Colo. 1991).

In this case, five of the six elements exist.⁴ First, the Partnership filed a timely motion. Second, the proceeding deals with state law claims. Third, had the Partnership not filed bankruptcy, no jurisdiction would exist in the Bankruptcy Court. Fourth, an action is not only pending in state court -- the claim has already been ruled upon, and only a Motion for a New Hearing is pending. Lastly, no evidence exists that the state court action will not be timely adjudicated.

Other factors also favor abstention. The Bankruptcy Court, unlike the state court, has yet to gather all the evidence necessary to make a ruling. As a result, it would be forced to spend additional time and expense before rendering a decision. Such would be repetitive litigation. See, *In Re Counts*, 54 B.R. 730, 736 (Bkrcty.D.Col.1985) ("Clearly sound policy mandates conservation of judicial resources").

Furthermore, the Bankruptcy Court found that the Partnership filed its case in bad faith, suggesting that the issues discussed here should have stayed in state court from the outset. See, *Order Granting Relief From Automatic Stay, May 10, 1991, page 6*.⁵ Another factor is that neither party alleges that abstention will have an adverse effect on the efficient administration of the estate.

⁴ The action before the Bankruptcy Court is a core proceeding, which is the subject of element No. 3. This is why mandatory abstention would be inappropriate.

⁵ These factors are taken from *In Re Republic Reader's Service*, 81 B.R. 422, 429 (Bkrcty.S.D.Tex.1987). That case outlines 11 factors to consider under 28 U.S.C. §1334(c)(1): 1) the effect or lack thereof on efficient administration of the estate; 2) the extent to which state law issues predominate over bankruptcy issues; 3) the difficulty or unascertained nature of applicable state law; 4) the presence of a related proceeding commenced in state court or other nonbankruptcy court; 5) the jurisdictional basis, if any, other than 28 U.S.C. §1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; 7) the substance rather than the form of an asserted "core" proceeding; 8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; 9) the burden of the bankruptcy court's docket; 10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; and 11) the presence of nondebtor parties.

For the reasons listed above, the Bankruptcy Court did not err in permissively abstaining. It makes more sense to **allow** the state court to rule on the Partnership's Motion for a New Hearing than for the Bankruptcy Court to have to spend additional time and expense in re-litigating an issue **already** decided by the state court (and now on appeal). This finding is bolstered by the **fact** all issues are state law questions.

B. Did The May 6, 1991 Joint Stipulation Bind The Parties On The Issue Of Whether The Mortgage And Note Were Valid?

The second issue in this case is **whether** the Bankruptcy Court and/or the state court is bound by the Stipulation and the May 10, 1991 Order. Park's primary argument is that the Stipulation and subsequent Order gives *res judicata* effect to the finding that the mortgage and note were valid. This Court disagrees.

District courts have "broad discretion" in determining whether to hold a party to a stipulation. *Morrison v. Genuine Parts Co.*, 828 F.2d 708, 709 (11th Cir. 1987). And stipulations concerning questions of law are usually not considered binding. *Sinicropi v. Milone*, 915 F.2d 66,68 (2d Cir.1990).⁶ The Stipulation in this case focuses on a question of law -- a determination of the mortgage and note. Furthermore, when examining stipulations, courts should look at the **circumstances** underlying its formation:

where a stipulation is distinctly and formally made for the express purpose of relieving the opposing party from proving some fact or facts, or where a formal admission of facts is made by counsel and becomes a part of the record, such a stipulation or admission, provided it is not by its terms limited to a particular occasion or a temporary objection, can be introduced in evidence and is available as proof of the facts admitted upon a subsequent trial of the same action, unless the court permits its withdrawal upon proper

⁶ See, also, *In Re Lawson Square*, 816 F.2d 1236, 1241 (8th Cir. 1987)(As a general rule, stipulations are not considered binding to issues of law).

application. *See Wheeler v. John Deere Co.*, 935 F.2d 1090, 1098 (10th Cir. 1991)(citing 73 Am.Jur.2d. Stipulations § 10 at 545-546 (1974)).⁷

The underlined part of the foregoing excerpt lends support to the proposition that stipulations are interpreted by general contract principles. *In Re Cuascut*, 91 B.R. 13, 15 (Bkrcty.E.D.Pa. 1988). The language in the Stipulation in this case is clear and unambiguous: "Park Friends, Inc., a non-profit corporation...and Investors Financial Limited Partnership...submit the following Joint Stipulations for the hearing of Park Friends' pending Motions For Stay Relief and Abandonment." Consequently, by its own terms, the Stipulation is limited to the relief from stay.⁸

The May 10, 1991 Order also does not bind the parties. Bankruptcy courts -- as courts of equity -- have the power to reconsider, modify or vacate their previous orders so long as no intervening rights have been violated in reliance by the orders. *In Re Lenox*, 902 F.2d 737, 738 (9th Cir.1990).⁹ While the Bankruptcy Court did not reconsider, modify or vacate its order, its interpretation of the Order ought to be a factor in this analysis. And the Bankruptcy Court found that its Order did not intend to bind the parties on subsequent proceedings. *See, Order Granting Motion To Abstain, page 2.*

In addition, this Court's reading of the Order does not show that the Order binds the parties. Therefore, the Bankruptcy Court did not err in deciding that its Order did not bind the parties on a legal determination of the mortgage and note.

⁷ The facts in *Wheeler* differ from those in the instant case. However, the undersigned believes an analogy can be drawn between the two cases concerning whether a stipulation automatically binds the parties in subsequent proceedings.

⁸ See Am.Jur.2d. Stipulations §8 at 543 (In cases of doubt, appellate courts strongly inclined toward the construction adopted by the trial court.) This is not a case of "doubt"; however, the proposition does strengthen the finding that the stipulation is not binding.

⁹ This Court does not find that any intervening rights have been violated or that either party detrimentally relied on the Order.

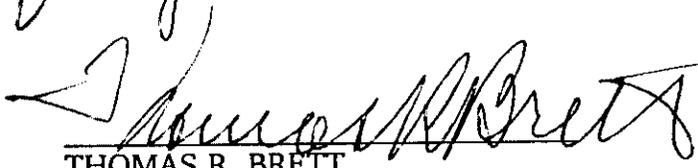
III. Conclusion

Federal courts do have an "unflagging obligation" to exercise their jurisdiction. But 28 U.S.C. §1331(c)(1) allows permissive abstention to take place in the interest of justice and comity. While courts should not abstain as a rule, the circumstances of a case, such as are present here, may give rise to good cause to do so. Therefore, for the reasons outlined above, this Court finds that the Bankruptcy Court did not err in abstaining.

The Bankruptcy Court also found that the Stipulation was binding only for the Motion for Relief -- not any other proceeding. The law does not mandate that courts blindly adhere to Stipulations. In fact, courts have wide discretion in this regard. Furthermore, the Stipulation involved a legal determination of the mortgage and its effect on the parties -- a legal question. Lastly, the language of the Stipulation limited it to the Motion for Relief from the Automatic Stay.

This Court finds similarly as regards the Order. Nothing in the Order shows that it was intended to bind the parties in all subsequent proceedings. In sum, after a *de novo* review of the issues, the Bankruptcy Court's decision is hereby AFFIRMED.

SO ORDERED THIS 17th day of July, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

benefits. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id. § 423(d)(1)(A). An individual

"shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

Id. § 423(d)(2)(A).

Under the Social Security Act the claimant bears the burden of proving a disability, as defined by the Act, which prevents him from engaging in his prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the ability to do other work activity and that jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987). The Secretary meets this burden if the decision is supported by substantial evidence. See Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is

satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Campbell v. Bowen, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

"is not merely a quantitative exercise. Evidence is not substantial 'if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.'"

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985) (quoting Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985)). Thus, if the claimant establishes a disability, the Secretary's denial of benefits must be supported by substantial evidence that the claimant could do other work activity in the national economy.

The Secretary has established a five-step process for evaluating a disability claim. See Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes v. Bowen, 845 F.2d at 243, proceed as follows:

- (1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).
- (2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).
- (3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).
- (4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).

- (5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

The inquiry proceeds beginning with step one, and if at any point the claimant is found to be disabled or not disabled, the inquiry ceases. Reyes, 845 F.2d at 242; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. §416.920 (1991).

Plaintiff here allegedly suffers from "severe depression" and "severe headaches." Plaintiff's Opening Brief at 2-3. This appeal focuses on the effects of these ailments, and specifically whether these problems permit him to hold substantial gainful employment. Several physicians examined Plaintiff over the period from July of 1980 through October of 1989 in order to understand the extent of his physical and emotional difficulties. See R & R at note 4. The ALJ found that, based on all the symptoms, the Plaintiff failed to satisfy the third section of the test since his mental or emotional impairment did not meet the strictures of 20 C.F.R. § 404, subpt. P, app. 1. R & R at 6. The ALJ further concluded that Mr. Wood's physical and mental condition allow him to perform jobs which are available in the national economy, thus failing to prove a disability. Id.

Plaintiff objects to the ALJ's evaluation of the medical evidence and the Magistrate Judge's recommendation to affirm that decision. Plaintiff argues that insufficient weight was given to evidence by his doctors concerning his medical condition under

the "treating physician rule." Plaintiff's Objections To The R & R (hereinafter Objections to R & R) at 1. Wood believes that the ALJ's evaluation of his pain was not in line with previous decisions in the Tenth Circuit, and that the ALJ failed to apply the correct concept of "stress" in this case, resulting in the improper conclusion that his daily activity proved an ability to work on a sustained and reasonably regular basis. Id. The Magistrate found no error in the ALJ's evaluation of the medical evidence or his application of the law. The Court agrees with the recommendation of the Magistrate Judge.

TREATING PHYSICIAN RULE

The Tenth Circuit gives substantial credence to the opinions of treating physicians on the subject of medical disability. A treating physician's opinion is binding on the fact finder unless it is contradicted by "substantial evidence," and the opinion is entitled to extra weight due to the physician's greater familiarity with the claimant's medical situation. Kemp v. Bowen, 816 F.2d 1469, 1476 (10th Cir. 1987); Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987).

Plaintiff urges that the opinion of his physicians, who treated him for severe headaches, should be given extra weight due to the treating physician rule. Objections To R & R at 2-3. He believes that the ALJ and the Magistrate failed to cite "specific, legitimate" reasons for their rejection of the Plaintiff's claim that these headaches were disabling impairments. Id. at 2. Plaintiff further objects to the

conclusions of Dr. Minor Gordon, who was present at the hearing, reviewed Wood's medical records, and presented expert testimony concerning his evaluation of the Plaintiff's ailments. Wood claims that Dr. Gordon has never treated him and therefore the testimony is of little value. Id.

The medical records of Plaintiff's treating physicians are not as conclusive as portrayed in his brief objecting to the Magistrate's recommendation. Although there was evidence that his headaches were the result of sinusitis and depression, the majority of Wood's treating physicians were unable to find any organic basis for the headaches.¹ R & R at note 4. In cases where the treating physicians are in conflict, the ALJ has the duty to consider all the evidence and resolve the dispute. Richardson v. Perales, 402 U.S. 389, 399. 91 S.Ct. 1420, 1426 (1971). None of the treating physicians felt that Wood was disabled. In fact, of the three doctors who considered the question specifically, two felt that the Plaintiff was able to work, and the third was unable to make a determination due to the fact that Wood did not have a follow-up visit.² R & R at 5, 7, and note 4(h). As the Magistrate Judge notes, "Nothing in the

¹ For example: Dr. Hastings conducted neurological tests and found Wood to be normal; Dr. Merifield, an ear, nose and throat specialist, found no explanation for the headaches; Doctors at Bartlett Memorial Hospital and St. Francis Hospital both conducted brain scans which showed up normal; Dr. Goodman, a psychiatrist, although concluding the headaches were caused by Plaintiff's depression, also felt that Wood was exaggerating their severity and could return to repetitive type work.

² Drs. Gordon and Goodman felt that Wood could work, and Dr. Friedenberger was unable to make a determination.

record indicates that the ALJ ignored the treating physicians' opinions as to Mr. Wood's severe headaches." Id. at 8. The ALJ properly considered all the medical and nonmedical evidence and the Magistrate Judge correctly found that there was substantial evidence to support the ALJ's ruling.

SUBJECTIVE PAIN

Plaintiff also contends that the ALJ and the Magistrate Judge failed to properly weigh subjective claims of the plaintiff regarding the pain he was suffering. The Tenth Circuit requires that, where a pain-causing impairment is isolated, the court must consider all evidence relating to the extent of the pain in this particular plaintiff. Luna v. Bowen, 834 F.2d 161, 164 (10th Cir. 1987). In the present case, the ALJ considered not only the evidence of the physicians, but also the testimony of Mr. Wood and his wife, evaluating all the symptoms and treatments. R & R at 4, note 7.

Plaintiff notes in his brief in opposition to the recommendation the pervasiveness of the headache among American households and the highly idiosyncratic nature of pain, particularly headache pain. Objections to R & R at 4. This is exactly the point. Nobody questions that Mr. Wood has headaches, or that the headaches are "severe" (although at least one of his physicians, Dr. Goodman, questions the veracity of the Plaintiff on the severity of the pain). The question is whether these headaches are disabling to the point that Wood cannot be expected to hold substantial gainful employment. The ALJ made the

determination, based on all the relevant facts and the credibility of all the testimony, that Wood's pain is not disabling under the Act. This judgment is binding on the district court if there is substantial probative evidence to support it. See Richardson v. Perales, 402 U.S. at 399; Broadbent v. Harris, 698 F.2d 407, 413 (10th Cir. 1983). The fact that Wood's "somatoform disorder" forces him to respond to pressure by a painful headache is truly unfortunate, and the Court does not question his motives as he seems to believe. See Objections to R & R at 5. However, given the record below, it is clear that there was substantial evidence on which to base the ALJ's decision.

DEFINITION OF STRESS

Plaintiff also claims that the ALJ misanalyzed the concept of stress, and that a proper application of the law in this regard would result in a finding of disability. The Court cannot agree. Wood argues that the ALJ and the Magistrate Judge rely on a definition of stress which is occupation oriented and not centered on the claimant's personal ability to deal with the stress of a particular job. Objections to R & R at 8. However, the vocational expert who testified at the administrative hearing observed the testimony of Wood, his wife, and the physician who evaluated the medical files. R & R at 10. Her testimony included not only a listing of jobs that Wood had the skill to handle, but also a determination that those occupations would not involve the types of stress which caused problems for the

Plaintiff in his previous jobs. Id. Her determination was based on her expert opinion of this particular claimant's ability to handle specific jobs available in the national economy, and is therefore substantial evidence that Wood is not disabled. See Ellison v. Sullivan, 929 F.2d 534, 537 (10th Cir. 1991).

DAILY ACTIVITY

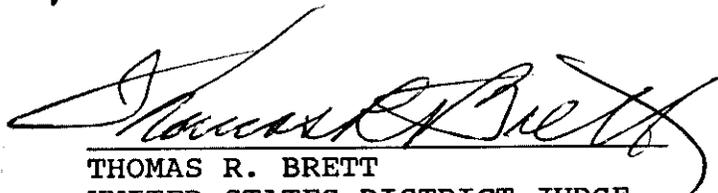
Wood finally claims that evidence concerning his daily activities was misanalyzed by the ALJ and the Magistrate Judge. Plaintiff is certainly correct in noting the Tenth Circuit's view that the ALJ is not allowed to consider only "isolated scraps of evidence which support his conclusion; the record as a whole must be considered." Dollar v. Bowen, 821 F.2d 530, 532 (10th Cir. 1987). Plaintiff is incorrect, however, in asserting that the ALJ or the Magistrate Judge relied only on the fact that Wood mows his yard or plays with his children as evidence that he is capable of handling the stress of working on a sustained, regular basis. It is clear from the record that the testimony concerning Wood's ability to work for sustained periods of time was conflicting. R & R at 10-11. Yet the ALJ did not isolate the testimony tending to deny Plaintiff's disability; he considered all the testimony and records presented, evaluated the credibility of each piece of evidence, and made a decision based on all the information presented.

The cases Plaintiff cites as persuasive authority on this point are inapposite. In Pettyjohn v. Sullivan, 776 F.Supp. 1482 (D.Colo. 1991), the claimant had severe muscular and spinal

disorders, was only capable of manual labor tasks due to her illiteracy, she was frequently bedridden, and the medical testimony agreed that she could not continue in manual work. In Anaya v. Sullivan, 779 F.Supp. 509 (D.Colo. 1991), the claimant's serious heart disease (which required extensive operations) resulted in dizzy spells, numbness in his extremities, and reduced mental acuity which prevented him from being employable in his former post as a printer. In the present case, the medical testimony is that the Plaintiff can continue work and is able to continue his daily activity, albeit with reduced vigor. The vocational expert feels that there are a variety of jobs which claimant could take without upsetting his health. The ALJ certainly had substantial evidence on which to base his conclusion that the Plaintiff was not disabled.

Therefore the court agrees with the Magistrate Judge's Report and Recommendation, and orders that the decision of the Secretary be AFFIRMED. Plaintiff's objections to the Report and Recommendation of the Magistrate are hereby DENIED.

IT IS SO ORDERED this July 17th day of July, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

considering whether retaliatory discharge claims arise under workers' compensation laws have held in the affirmative. Jones v. Roadway Express, 936 F.2d 789 (5th Cir. 1991) (§1445 shows that "Congress clearly intended that state courts should resolve workers' compensation suits."); Baldracchi v. Pratt & Whitney Aircraft, 814 F.2d 102 (2nd Cir. 1987) ("§1445 reveals a congressional intent not to interfere with state protection of workers' compensation rights."); Pope v. Bethesda Health Center, 813 F.2d 1306 (4th Cir. 1987) ("A suit in state court for wrongful discharge based on allegations that an employee was discharged in retaliation for filing a claim for workers' compensation benefits was not removable to a district court" due to §1445); and Kemp v. Dayton Tire and Rubber Co., 435 F.Supp. 1062 (W.D.Okla. 1977).¹

The Kemp court held that 85 O.S. §5, the Oklahoma statute that deals with retaliatory discharge, must be considered part of the state's workers' compensation laws for the purpose of removability set forth in 28 U.S.C. §1445(c). The court held that §1445(c) "does not purport to preclude removal of only those actions arising under workmen's compensation laws which seek to recover for a job-related injury" as the defendant claimed in Kemp and as American claims here. Id. at 1063. Such construction of the statute, the Kemp court held, is consistent with the rule that removal statutes should be strictly construed and all doubts should be resolved in favor of

¹See also Rodkey v. W.R. Grace & Co., 764 F.Supp. 1313 (N.D.Ill. 1991); Kilpatrick v. Martin K. Eby Construction Co., 708 F.Supp. 1241 (N.D.Ala. 1989); and Thomas v. Kroger Co., 583 F.Supp. 1031 (S.D.W.Va. 1984).

remand. Id. at 1063 (citations omitted).

Therefore, the Court holds that Carter's retaliatory discharge claim arises under Oklahoma workers' compensation laws and is non-removable under 28 U.S.C. §1445(c).

The Court now turns to American's amended petition for removal, in which it alleges a separate basis for removal. In the amended petition, American asserts federal question jurisdiction, alleging Carter's state law claim is superseded by federal law. American, however, neither sought nor received permission to file the amended petition. American filed the amended petition on May 22, 1992, more than two months after the original petition for removal was filed.

A significant number of courts prohibit amended removal petitions if the 30-day time limit for removal established by 28 U.S.C. §1446(b) has expired. Barnhill v. Insurance Co. of North America, 130 F.R.D. 46 (D.S.C. 1990). Nevertheless, the Tenth Circuit, along with most other courts, allows amendment beyond the 30-day limit when the petitioner is clarifying grounds for removal that had been stated imperfectly in the original petition. Hendrix v. New Amsterdam Casualty Co., 390 F.2d 299 (10th Cir. 1968). This allowance is pursuant to 28 U.S.C. §1653, which states that "defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

However, the Hendrix Court does not address the question of amendment beyond the 30-day limit to add new bases for federal jurisdiction. Most courts that have addressed the question refuse

to allow amendment in order for the defendant to supply missing or new allegations. Barnhill, 130 F.R.D. at 51.

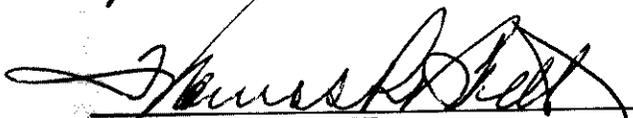
The court in Van Horn v. Western Electric Co., 424 F.Supp. 920 (E.D.Mich. 1977), stated that "[t]he amendment must do no more than set forth in proper form what has been before imperfectly stated in the petition for removal.... An amendment cannot be made to ... set up entirely new and different grounds for removal." Id. at 925. In addition, the court in Woodlands II On the Creek Homeowners Association v. City Savings and Loan of San Angelo, 703 F.Supp. 604 (N.D.Tex. 1989), stated that "[a]fter the 30-day period for removal ... has lapsed, the only amendments which should be permitted are those to remedy a defective allegation of jurisdiction." See also William Kalivas Construction v. Vent Control of Kansas City, 325 F.Supp. 1008 (W.D.Mo. 1970); Richmond, Fredericksburg & Potomac R. Co. v. Intermodal Services, Inc., 508 F.Supp. 804 (E.D.Va. 1981); and Wright & Miller §3733 at 537-38 ("[N]ew grounds may not be added and missing allegations may not be furnished" when amending a petition for removal).

American's original petition for removal does not mention federal question jurisdiction; there is no imperfect allegation of jurisdiction that could be clarified by amendment pursuant to Hendrix and 28 U.S.C. §1653. Therefore, the Court will not consider American's amended petition.² The plaintiff's Motion to Remand is

²Cursory examination indicates that the Court would have no federal question jurisdiction due to the recent holding in Davies v. American Airlines, --- F.2d ---, 1992 WL 158726, (10th Cir. July 13, 1992).

hereby GRANTED on the grounds that cases arising under state workers' compensation laws are not removable. The Court does not have jurisdiction to consider American's Motion for Summary Judgment.

IT IS SO ORDERED, this 17th day of July, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
ONE 1990 WHITE FORD)
TAURUS GL, VIN)
1FACP52U1LA165498,)
NEVADA LICENSE NO.)
079-DOB,)
)
Defendant.)

CIVIL ACTION NO. 92-C-357-B

FILED
JUL 27 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORFEITURE

This cause having come before this Court upon Plaintiff's Application filed herein, and being otherwise fully apprised in the premises, the Court finds as follows:

That the verified Complaint for Forfeiture In Rem was filed in this action on the 30th day of April 1992; the Complaint alleges that the defendant vehicle is subject to forfeiture pursuant to Title 18 U.S.C. § 981 because it was derived from the proceeds of a specified unlawful activity, an illegal gambling operation, Title 18, United States Code, Section 1955, and because this transaction was knowingly designed to avoid the reporting requirements of Title 26, United States Code, Section 6050I(a), as set forth in Title 18, United States Code, Section 1956(a)(1)(B)(ii), and Meyer knowingly conducted a monetary transaction in criminally derived property with a value greater than \$10,000, which was derived from a specified unlawful

activity, illegal gambling, pursuant to Title 18, United States Code, Section 1957.

That a Warrant of Arrest and Notice In Rem was issued on the 30th day of April 1992, by the Clerk of this Court as to the defendant vehicle.

That the United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on the defendant vehicle on the 8th day of May 1992.

That the United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem upon Mary Meyer, the owner of and the person from whom the vehicle was seized on January 3, 1992, a potential claimant herein, on the 7th day of May, 1992.

That USMS Forms 285 reflecting service on the above-described defendant vehicle and upon Mary Meyer are on file herein.

That all persons interested in the defendant vehicle, hereinafter described, if any, were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the

Complaint within twenty (20) days after filing their respective claims.

That the defendant vehicle upon which personal service was effectuated more than twenty (20) days ago has failed to file a claim or answer, as directed in the Warrant of Arrest and Notice In Rem on file herein.

That the United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, on June 11, 18, and 25, 1991, and in the Las Vegas Review Journal, Las Vegas, Nevada, on June 12, 19, and 26, 1992; and that Proof of Publication was filed of record on the 15th day of July 1992.

That no other claims, papers, pleadings, or other defenses have been filed by the defendant vehicle or any persons or entities having an interest therein.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Judgment be entered against the following-described defendant vehicle:

One 1990 White Ford Taurus GL, VIN
1FACP52U1LA165498, Nevada License
079-DOB,

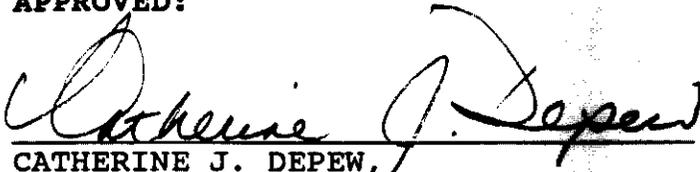
and against all persons and/or entities, if any, having an interest in such vehicle, and that said defendant vehicle be, and the same is, hereby forfeited to the United States of America for

disposition by the United States Marshal according to law, and that no right, title, or interest shall exist in any other party.

SECRET

THOMAS R. BRETT,
Judge of the United States District
Court for the Northern District of
Oklahoma

APPROVED:


CATHERINE J. DEPEW,
Assistant United States Attorney

CJD/ch

IRS SEIZURE NO. 873920005

N:\UDD\CHOOK\FC\MEYER2\02249

FILED
DATE 7/20/92

IN THE U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LINDA SUE FOSTER and
CHARLES R. FOSTER,

Plaintiffs,

vs.

PRUDENTIAL PROPERTY AND
CASUALTY INSURANCE COMPANY,
an Indiana Corporation,

Defendant.

Case No. 92 C 333 B

FILED

JUL 17 1992

Richard H. Le... Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER DISMISSING ACTION WITH PREJUDICE

NOW come the Plaintiffs by Jerry Williams, their attorney, and
dismiss their action herein, the same having been compromised for
\$18,650.00, and this sum having been paid by Defendant.

It is therefore ordered by the Court that the above-entitled
action be, and it is hereby, dismissed with prejudice.

Dated July 17th, 1992.

S/ THOMAS R. BRETT

JUDGE OF THE DISTRICT COURT

DATE 7/17/92

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

LEROY IMBEAU,)
)
 Plaintiff,)
)
 vs.)
)
 LOUIS W. SULLIVAN, M.D., SECRETARY)
 OF HEALTH AND HUMAN SERVICES.)
)
 Defendant.)

FILED
 JUL 17 1992
 U.S. DISTRICT COURT
 NORTHERN DISTRICT OF OKLAHOMA

CASE NO. 91-C-484-*CB*

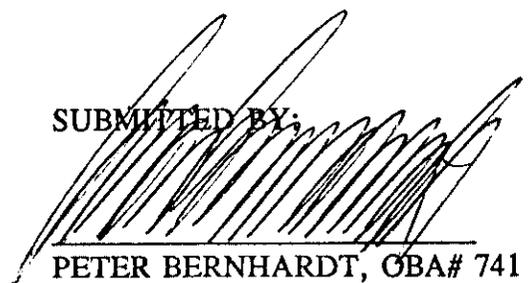
ORDER

Upon the Motion of Louis W. Sullivan, Secretary of the Department of Health and Human Services, by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that the above-styled case be remanded to the Defendant to issue an administrative decision fully favorable to plaintiff and for payment of benefits.

Dated this 15th day of July, 1992.

S/ THOMAS B. BERRY

UNITED STATES DISTRICT JUDGE

SUBMITTED BY:


PETER BERNHARDT, OBA# 741
 Assistant United States Attorney
 3900 U.S. Courthouse
 Tulsa, Oklahoma 74103
 (918) 581-7463

7/17/92

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

RESOLUTION TRUST CORPORATION AS)
RECEIVER OF FIRST FEDERAL SAVINGS)
& LOAN ASSOCIATION OF COFFEYVILLE,)
COFFEYVILLE, KANSAS,)

Plaintiff,)

v.)

Case No. 91-C-972-B

HOWARD L. GULLICKSON,)
individually, and PATSY R.)
GULLICKSON, individually, BOARD OF)
COUNTY COMMISSIONERS OF TULSA)
COUNTY, OKLAHOMA and JOHN F.)
CANTRELL, County Treasurer of)
Tulsa County, Oklahoma,)

Defendants.)

FILED
JUL 17 1992
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
TULSA, OKLAHOMA

JUDGMENT

This matter comes on for consideration this 15th day of July, 1992, before the undersigned Judge of the United States District Court. The Resolution Trust Corporation, as Receiver of First Federal Savings and Loan Association of Coffeyville (the "RTC"), appears by and through its attorneys of record, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C. by R. Mark Petrich. The Defendants Howard L. Gullickson and Patsy R. Gullickson (the "Gullicksons") appear by and through their attorney of record, H. I. Aston. The Defendants John F. Cantrell, County Treasurer of Tulsa County, Oklahoma, and the Board of County Commissioners of Tulsa County, Oklahoma appear by and through their attorney of record J. Dennis Semler. This Court, being fully advised in the premises and noting the consent of all parties herein, finds as follows:

1. On or about October 28, 1981, J. Ernest Talley executed and delivered a promissory note to First Federal Savings and Loan Association of Coffeyville ("First Federal") in the principal sum of \$450,000 (the "Note").

2. The Note is secured by a certain real estate mortgage (the "Mortgage") in and to the following described real property located in Tulsa County, Oklahoma, to-wit:

Lot 2, Block 3, TOWNE PARK SECOND ADDITION, a resubdivision of the West 330 feet of Block 3, TOWNE PARK ADDITION, a subdivision in Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof; also known as: 6307 South Newport Avenue, Tulsa, Oklahoma.

3. On or about April 27, 1984, the Gullicksons assumed all liability under the Note.

4. The Gullicksons are in default under the terms and conditions of the Note and Mortgage and there remains a principal amount outstanding of \$97,432.11, plus accrued interest through November 4, 1991, in the sum of \$7,731.20, plus continuing interest from November 4, 1991, until paid, at the rate of \$26.25 per day.

5. The RTC should be granted judgment in personam and in rem against the Gullicksons for the amounts set forth above, together with all costs of this action, accrued and accruing, including a reasonable attorneys' fee in a sum of \$3,500.00.

6. The Gullicksons have filed herein a counterclaim against the RTC and this Court reserves its determination of said counterclaim until after the real property is sold herein. Notwithstanding said reservation, pursuant to Fed. R. Civ. P. 54(b), the Judgment against the Gullicksons herein should be

entered as a final Judgment since there is no just reason for delay with respect to the entry of said Judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that the RTC have and recover judgment, in personam and in rem, against Defendants Howard L. Gullickson and Patsy R. Gullickson, for the principal sum of \$97,432.11, plus accrued interest through November 4, 1991, in the sum of \$7,731.20, plus continuing interest from November 4, 1991, until paid, at the rate of \$26.25 per day, together with all costs of this action including a reasonable attorneys' fee in the amount of \$3,500.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court hereby reserves its determination of the Defendants' Counterclaim, but hereby orders that the Judgment against the Defendants herein be entered as a final Judgment since there is no just reason for delay with respect to the entry of a final Judgment on the RTC's claims.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the RTC has a valid first lien on the real property described above, securing the judgment entered herein in the principal sum of \$97,432.11, plus interest, costs and attorneys' fee as set forth above, which is prior to all rights, titles, interests and liens of all Defendants herein and, therefore, the RTC is entitled to a judgment in rem against all Defendants herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the rights, titles, interests and liens of all parties herein be foreclosed upon the real property described above and that a Special Execution and Order of Sale be issued, directing the sale

of the above described real property after proper notice as provided by law. This Court hereby authorizes the Sheriff of Tulsa County, State of Oklahoma to conduct the sale of the above-described real property and hereby approves the use of said Sheriff for the sale of said real property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the order of priority of liens of the parties and the order of distribution of the proceeds from the sale are as follows:

1. First, to the payment of delinquent ad valorem taxes, penalties and interest due the County Treasurer of Tulsa County, Oklahoma;
2. Second, to the payment of all costs incurred herein by the RTC;
3. Third, to the payment of the judgment lien of the RTC in the sum of \$97,432.11, plus accrued and accruing interest; and
4. Fourth, the balance, if any, to be paid to the Clerk of this Court to await further order of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that, upon confirmation of the sale of the above described real property, each and every party herein shall be forever barred, foreclosed and enjoined from asserting or claiming any right, title, interest, estate or equity of redemption in and to said premises or any part thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that, upon confirmation of said sale, the United States Marshal of the Northern District of Oklahoma or the Sheriff of Tulsa County, State of Oklahoma, whichever is called upon to conduct said sale, shall execute and deliver a good and sufficient deed to the premises to the purchaser thereof, conveying all right, title,

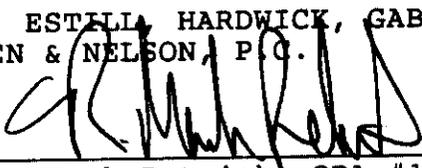
interest estate and equity of redemption of each of the parties herein and each and all parties claiming under them since the filing of the Complaint in this suit, and to the real estate described above, and that upon application of the purchaser, a writ of assistance shall be issued and directed to the United States Marshal or Sheriff of Tulsa County who shall thereupon and forthwith, place said premises in full and complete possession and enjoyment of said purchaser.

S/ THOMAS R. BRETT,

United States District Court Judge

APPROVED AS TO CONTENT AND FORM:

HALL, ESTELLA HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

By: 

R. Mark Petrich, OBA #11956
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-4161

ATTORNEYS FOR THE PLAINTIFF THE
RESOLUTION TRUST CORPORATION AS
RECEIVER OF FIRST FEDERAL SAVINGS
& LOAN ASSOCIATION OF COFFEYVILLE,
COFFEYVILLE, KANSAS


H. I. Aston
3242 East 30th Place
Tulsa, OK 74114-5831

ATTORNEY FOR HOWARD L. GULLICKSON
AND PATSY R. GULLICKSON

Signature Page for
Judgment
Case No. 91-C-972-B

By:



J. Dennis Semler
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103

ATTORNEYS FOR DEFENDANTS BOARD OF
COUNTY COMMISSIONERS OF TULSA
COUNTY, OKLAHOMA AND JOHN F.
CANTRELL, COUNTY TREASURER OF
TULSA COUNTY, OKLAHOMA

ENTERED ON DOCKET

DATE 7/17/92

FILED

JUL 15 1992

OK

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

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

MICHAEL J. CUTRIGHT,)
)
 Appellant,)
)
 v.)
)
 UNITED STATES TRUSTEE FOR)
 REGION 20,)
)
 Appellee.)

92-C-26-B ✓

ORDER

Now before this Court is a bankruptcy appeal by Debtor Michael J. Cutright. The issue is whether the Bankruptcy Court abused its discretion in reducing the attorney fees sought by Cutright's attorney. Attorney Cliff A. Stark, who represented Cutright in the bankruptcy, asked the Bankruptcy Court to award him \$8,950 in fees and an additional \$715.74 in costs.

The Bankruptcy Court granted the \$715.74 in costs, but awarded Stark \$3,500 as attorney fees. Stark appeals, arguing that the Bankruptcy Court erred in its decision to reduce his claim for fees. However, for the reasons listed below, this Court finds that the Bankruptcy Court did not abuse its discretion in reducing Stark's fees, and that the decision of the Bankruptcy Court should be and hereby is affirmed.

I. Summary Of Facts/Procedural History

Michael J. Cutright filed for Chapter 11 Bankruptcy protection on July 16, 1991. Cutright, who was represented by Stark, operated as a debtor-in-possession until a Trustee

was appointed by the Bankruptcy Court on November 22, 1991.

On December 10, 1991, Stark filed an Application for \$8,590 in attorney fees and an additional \$715.74 in costs and expenses. In the Application, Stark stated that his hourly fee was \$100 per hour, and that he worked 85.9 hours representing Cutright in the bankruptcy. The Application included a list of tasks performed, together with a breakdown of costs and expenses. See, *Application For Interim Allowance Of Attorneys Fee And Reimbursement Of Out Of Pocket Expenses*.

The Bankruptcy Court examined the Application during a January 2, 1992 hearing. At the hearing no evidence regarding the reasonableness of the fees or the reasonableness of the hours billed was submitted by Stark. In addition, the Court listened to comments from attorneys Scott Kirtley, Paul Thomas and Stark but considered no evidence other than what was already in the record prior to the hearing.

At one point in the hearing, the Bankruptcy Court asked Stark to "help him" determine why the Application should be granted. The Court, concerned about the debtor's course of conduct through the bankruptcy, inquired about Stark's influence over his client. In part, the Court observed:

THE COURT: Could you control your client? Apparently you couldn't because he violated about every law that I know of.

STARK: I understand.

THE COURT: That's what I need to know. Did you tell him the right thing to do, and when he did something else, that's kind of what I'm probing for.

STARK: In several ways, that's what happened, Your Honor. I think the U.S. Trustee's office knows that I have another case pending, not before this Court, but I don't necessarily myself have this kind of problem every time I'm before the Court, or it would be indicative of something wrong. *Transcript Of*

Hearing On Fee Application And Reimbursement Of Expenses, pages 11-12.

After listening to Stark, Kirtley and Thomas, the Court found that Stark should receive \$3,500 in attorney fees and \$715.74 in costs and expenses. *Id. at 13.* No specific findings were made as to whether the \$100 hourly rate was unreasonable or whether the 89.5 hours spent on the case were proper. But the Bankruptcy Court clearly explained why it believed Stark should not receive all of his requested fees:

Upon consideration of the status of the case and the operation of the Debtor-in - possession which effectively has caused substantial post-petition expenses being incurred with insufficient sums of money to pay the same, and the Court, upon consideration of the Court's knowledge of the acts and activities of this case...and the revelation of the Debtor-in-possession being unable to comply with applicable statutes and orders of the Court concerning its administration and unable to formulate a Plan and upon the totality of the circumstances, finds that applicant Cliff Stark should be allowed fees...[for] \$3,500. *Order Granting In Part Application For Allowance Of Fees and Expenses, January 3, 1992, pages 1-2.*

Stark, unsatisfied with the decision, asked the court to reconsider. *Motion To Reconsider And Request For Hearing, filed January 6, 1992.* Stark said he "did not understand how the violations of the Debtor relate to the fee application." *Id. at page 2.* He also maintained that he was placed in an "improper and awkward position of making statements against his client's interest."¹ Furthermore, Stark, who described himself as "bewildered" over the decision, insisted that he helped -- not hindered -- the estate. *Id. at 3.*

The Bankruptcy Court denied Stark's Motion to Reconsider. The reason Stark's fees were reduced, the Court wrote, was the result obtained. *Order Denying Motion To Reconsider and Request For Hearing, January 13, 1992, page 2.* Explained the Court:

¹ Stark said that he believed that he should not have to answer questions about his client due to ethical and confidentiality concerns.

These generalities [case law] must yield to the hard facts of this case. ..the Court has been forced to appoint a Trustee to take the administration of the case out of the hands of the debtor and his attorney. [At the January 2, 1992 hearing], the Court was presented with evidence that debtor had incurred up to \$150,000 in unpaid post-petition debts, not counting fees of officers and employees of the estate and (according to debtor's schedules) \$871,047.18 in pre-petition debts; and that sale of debtor's assets...is expected to generate no more than \$160,000 . *Id. at 4.*

The Court wrote that bankruptcy cannot be a "free ride" for anyone, explaining that Stark's client was the estate. The reduction of Stark's attorney fees, the Court held, was due primarily "to the fact [that] debtor's attorney's time went largely to presiding over the creation of a double insolvent estate, and secondarily to an unreasonable amount of time being spent on certain activities." *Id. at 7.*

Once Stark's Motion to Reconsider was denied, he filed an appeal in this Court on January 13, 1992. Stark raises two issues on appeal; however, the only pertinent one is whether the Bankruptcy Court abused its discretion in reducing Stark's fee.²

I. Legal Analysis: Did The Bankruptcy Court Err In Reducing Attorney Fees?

One who seeks attorney fees bears the burden in establishing the reasonableness of the amount requested. *Duran v. Carruthers*, 885 F.2d 1492, 1495 (10th Cir. 1989) And when a trial court awards attorney fees, the standard of review for an appellate court is whether the decision constituted an abuse of discretion. *Id.*³ An abuse of discretion can be measured by answering the question whether the decision was "arbitrary, capricious or

² Stark's argument about the attorney-client privilege somehow being violated by the Bankruptcy Court's inquiry over fee applications does not merit discussion. Stark, who had the burden of proving his fees were proper, was not forced by the Bankruptcy Court to disclose any information. The task of the Bankruptcy Court simply was to evaluate his fee application. Also, the record does not indicate that Starks' fees were reduced because he failed to disclose privileged information.

³ The appellate court plays a "limited role" in reviewing a trial court's award of attorney fees and costs, and deference is given to the trial court's judgment on the matter. This is because the trial court is in a better position to assess the course of litigation and quality of work. See *Duran*, 885 F.2d at 1494.

whimsical." *United States v. Wright*, 826 F.2d 938, 943 (10th Cir. 1987).

Courts examine many variables when deciding attorney fee applications. See, *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974).⁴ The Tenth Circuit, however, emphasizes the following factors:

1. How many hours were reasonably expended by the attorney on the case?
2. Did the attorney charge a reasonable hourly rate?
3. Was the attorney's performance exceptional enough to merit enhancement of the fee?
4. Was the case undesirable?
5. Did the attorney take the case on contingency?
6. The degree of success in the case by the attorney. *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983).

The oversight in this case, which appears to be Stark's major complaint, is that the Bankruptcy Court did not adequately explain its reasoning for all of the above factors on why his Application for fees were reduced. Part of his argument has merit: The Court did not calculate how many hours Starks reasonably expended or whether he charged a reasonable rate. In addition, the Court did not discuss the undesirability of the case.⁵

However, the Bankruptcy Court did elucidate on the "degree of success" factor. In *Ramos*, the Tenth Circuit described this factor as "critical" in an analysis whether attorney fees should be reduced. It explained how a court should approach the issue:

⁴ Some of the factors listed in *Johnson* include: time and labor expended, novelty and difficulty of the questions, attorney skills required, the customary fee, contingency factors, undesirability of the case and experience and ability of the attorney. These factors, coupled with what is discussed below in *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983), are what this Court is examining in deciding this appeal.

⁵ The contingency factor does not apply. In addition, the tenor of the Bankruptcy Court's words indicate that it did not believe Stark's fees ought to be enhanced for excellent performance.

There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified. *Id.* at 556.

In this case, the tenor of the Bankruptcy Court's opinion was blunt: Cutright's bankruptcy case was a "debacle". Finding that Cutright had "violated about every law", the Bankruptcy Court indicated that the estate was grossly mishandled as evidenced by the \$150,000 in post-petition debt and another \$871,047.18 in pre-petition debt.

The Bankruptcy Court did not directly blame Stark for the debtor's misconduct, but it concluded that Stark -- as the estate's attorney -- should be held at least partially accountable. In addition, it found that Stark devoted an "unreasonable amount of time" on certain activities.⁶ Second, it found that much of Stark's time went to "presiding over the creation of a doubly insolvent estate." *Id.* These comments refute Stark's argument that the Court found that the time he spent on the case was reasonable.

Another issue considered by this Court is that Stark bore the burden of establishing the reasonableness of his fees. He did submit time records and an affidavit, but he offered no additional evidence at the hearing. In addition, his arguments at the hearing -- and during this appeal -- were ineffective. While Stark declined to tell the Bankruptcy Court what he told his client, he still had the opportunity to make his case; he chose not to.

The real issue here is whether the Bankruptcy Court must specifically calculate how many hours Stark was entitled to and then make an explicit finding as to the

⁶ The Court offered little explanation for this conclusion.

reasonableness of his hourly rate.⁷

Such findings by a trial court would certainly ease the task of a reviewing court on attorney fee matters. But the undersigned does not read *Ramos* or any other case as mandating such a formula. The Supreme Court appears to support such a proposition:

We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters. It remains important, however, for the district court to provide a concise explanation of its reasons for the fee award. When an adjustment is requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, the district court should make it clear that it has considered the relationship between the amount of the fee awarded and the results obtained. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941 (1983).

In this case, the Bankruptcy Court explained the fee reduction: the estate was handled improperly. And, given the limited -- or, in this case, the almost non-existent -- nature of relief to the creditors of the estate, the Bankruptcy Court made it quite clear that the lack of success in the case is why Stark's fees were reduced.

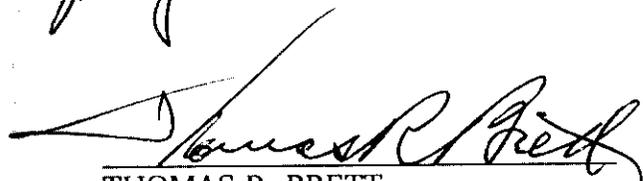
III. Conclusion

The bottom line here is that the Bankruptcy Court concluded that the debtor had plummeted the estate. The estate had more than \$1 million in unpaid post-petition and pre-petition debts, compared to assets estimated at some \$160,000. The Court found the debtor had violated laws, and did so even through the course of bankruptcy. The Court also found that Stark devoted time to "unreasonable" activities.

⁷ "The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of "results obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 1940 (1983).

It makes little sense to make such findings, and then to award the attorney -- who must take some responsibility for the estate and the debtor's actions - his entire fee request. Instead, the Bankruptcy Court considered factors discussed in *Ramos* before deciding that Stark's fees should be reduced. A review of the record shows that such a decision is not arbitrary, whimsical or capricious. Therefore, this Court finds that the Bankruptcy Court did not abuse its discretion, and the decision is AFFIRMED.

SO ORDERED THIS 15th day of July, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE 7/17/92

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 CHESTER NORRIS; GERALDINE NORRIS)
 a/k/a BRENDA GERALDINE NORRIS)
 a/k/a DEANIE NORRIS; COMMUNITY)
 BANK AND TRUST COMPANY; COUNTY)
 TREASURER, Tulsa County,)
 Oklahoma; and BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

JUL 1 1992

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

CIVIL ACTION NO. 92-C-412-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15th day
of July, 1992. The Plaintiff appears by Tony M.
Graham, United States Attorney for the Northern District of
Oklahoma, through Wyn Dee Baker, Assistant United States
Attorney; the Defendants, County Treasurer, Tulsa County,
Oklahoma, and Board of County Commissioners, Tulsa County,
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, Community Bank
and Trust Company, appears not, having previously filed its
Disclaimer; and the Defendants, Chester Norris and Geraldine
Norris a/k/a Brenda Geraldine Norris a/k/a Deanie Norris, appear
not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, Chester Norris and Geraldine
Norris a/k/a Brenda Geraldine Norris a/k/a Deanie Norris,
acknowledged receipt of Summons and Complaint on May 15, 1992;

property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

The North Half of Lot Sixteen (16) in Walker Heights, an addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on November 9, 1984, Chester Norris and Geraldine Norris executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$46,000.00, payable in monthly installments, with interest thereon at the rate of thirteen percent (13.0%) per annum.

The Court further finds that as security for the payment of the above-described note, Chester Norris and Geraldine Norris executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated November 9, 1984, covering the above-described property. Said mortgage was recorded on November 13, 1984, in Book 4828, Page 563, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Chester Norris and Geraldine Norris a/k/a Brenda Geraldine Norris a/k/a Deanie Norris, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Chester Norris and Geraldine

Norris a/k/a Brenda Geraldine Norris a/k/a Deanie Norris, are indebted to the Plaintiff in the principal sum of \$44,839.01, plus interest at the rate of 13 percent per annum from December 1, 1990 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, Community Bank and Trust Company, disclaims all right, title or interest in the subject real property.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendants, Chester Norris and Geraldine Norris a/k/a Brenda Geraldine Norris a/k/a Deanie Norris, in the principal sum of \$44,839.01, plus interest at the rate of 13 percent per annum from December 1, 1990 until judgment, plus interest thereafter at the current legal rate of 4.11 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Chester Norris and Geraldine Norris a/k/a Brenda Geraldine Norris a/k/a Deanie Norris, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under

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

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

Wyn Dee Baker
WYN DEE BAKER, OBA #465
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

J. Dennis Semler
J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 92-C-412-B

WDB/css

FILED

JUL 16 1992

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

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

THE TIMBERS HOMEOWNERS)
ASSOCIATION,)

Plaintiff,)

v.)

RESOLUTION TRUST CORPORATION,)
as successor-in-interest to)
SOONER FEDERAL SAVINGS AND)
LOAN ASSOCIATION,)

Defendant.)

Case No. 91-C-946-E

ENTERED ON DOCKET
DATE JUL 16 1992

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed June 29, 1992, in which the Magistrate Judge recommended that Defendant's Motion to Dismiss Plaintiff's Complaint as to the Receiver be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

It is therefore Ordered that Defendant's Motion to Dismiss Plaintiff's Complaint as to the Receiver is granted.

Dated this 16th day of July, 1992.



JAMES O. ELLISON, CHIEF
UNITED STATES DISTRICT JUDGE

8

ENTERED ON DOCKET
DATE JUL 16 1992

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

FILED

JUL 16 1992

Handwritten mark

MICHAEL ROBINSON,)
)
 Plaintiff,)
)
 v.)
)
 STANLEY GLANZ, et al,)
)
 Defendants.)

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

91-C-832-E

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed June 16, 1992 in which the Magistrate Judge recommended that the Defendant's Motion to Dismiss be granted.

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

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

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

Dated this 16th day of July, 1992.

James O. Ellison
JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

16

ENTERED ON DOCKET
DATE JUL 16 1992 1

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

FILED

JUL 15 1992 *[Signature]*

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

FRANK R. PANZER,)
)
 Plaintiff,)
)
 vs.)
)
 THE PERMIAN CORPORATION,)
)
 Defendant.)

Case No. 91-C-149-B ✓

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, by 10-16-92, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 15th day of JULY, 19 92

[Signature]
UNITED STATES DISTRICT JUDGE
THOMAS R. BRETT

44

ENTERED ON DOCKET

DATE 7-16-92

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

FILED

FILED
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
MUSKOGEE COUNTY

JIM T. SPEARS,

Plaintiff,

v.

UNITED STATES OF AMERICA,

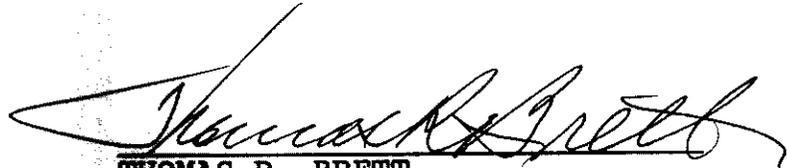
Defendant.

Case No. 91-C-007-B

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

In conformance with the Court's Order sustaining Plaintiff, Jim Spears' Motion for Summary Judgment and denying Defendant, United States of America's Motion for Partial Summary Judgment, Judgment is hereby entered in favor of Plaintiff and against the Defendant in the amount of \$8,500.22, plus interest from March 3, 1992, as provided in 28 U.S.C. §2411 and 26 U.S.C. §6621 until paid. Costs are hereby assessed against Defendant if timely applied for pursuant to Local Rule 6.¹ Attorneys fees are awarded Plaintiff if timely applied for pursuant to Local Rule 6.

DATED this 16th day of July, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹ Costs in the amount of \$125.04 were taxed against Defendant by the Clerk of the Court on April 16, 1992.

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

FILED

JUL 16 1992

J & H INDUSTRIES, INC.,)
)
 Plaintiff,)
)
 v.)
)
 EL PASO REFINERY, L.P.,)
)
 Defendant.)

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

No. 91-C-793-E

ENTERED ON DOCKET
DATE JUL 16 1992

AGREED ORDER OF DISMISSAL WITH PREJUDICE

On this day came on to be heard the Joint Motion for Dismissal with Prejudice of the above lawsuit. The parties have agreed to dismissal because this matter has been settled. The Court is of the opinion that the Order should be granted.

IT IS, THEREFORE, ORDERED that all claims of all parties that were or could have been raised be and are hereby dismissed with prejudice to the refiling of same.

IT IS FURTHER ORDERED that each party is to bear its own costs.

SIGNED this 16th day of July, 1992.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND SUBSTANCE:

JONES, GIVENS, GOTCHER & BOGAN,
a professional corporation



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

FILED

JUL 16 1992

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

OKLAHOMA FIXTURE COMPANY,)
an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
ASK COMPUTER SYSTEMS, INC.,)
a California corporation,)
)
Defendant.)

Case No. 90-C-747-E

ORDER

Plaintiff has filed a Motion for Partial Summary Judgment on its breach of contract and breach of warranty claims in this case, and Defendant has filed a Motion for Summary Judgment on all claims asserted by Plaintiff. Upon consideration of the briefs and evidentiary materials submitted by the parties, **THE COURT HEREBY ORDERS AS FOLLOWS:**

1. Plaintiff's Motion for Partial Summary Judgment is denied.

2. Defendant's Motion for Summary Judgment is granted in part and denied in part, as follows: Defendant's Motion is granted as to Plaintiff's Third Claim for Relief, for fraud, actual, constructive and fraud in the inducement, and on Plaintiff's Fourth Claim for Relief, for negligence. As to Plaintiff's First Claim for Relief, for breach of contract, and Plaintiff's Second Claim for Relief, for breach of warranty, the Court finds that as a matter of law the only warranty provided by Defendant to Plaintiff was the warranty in the ASK Terms and

Conditions that the ASK software sold to Plaintiff would function in accordance with ASK published specifications and that Defendant validly disclaimed all other express or implied warranties; however, the Court also finds that an issue of fact remains for trial as to whether the ASK software sold by Defendant to Plaintiff did function in accordance with the published specifications in the ASK user manuals furnished to Plaintiff after the sale of the software.

The Court reserves ruling on Defendant's Motion in Limine on consequential damages and on the issue of whether parol evidence of oral or written communications between Plaintiff and Defendant prior to the execution of the purchase agreement will be admissible at trial on the issue of what are the "ASK published specifications". Those issues will be addressed by a subsequent Order of the Court. The parties may submit supplemental authorities on the consequential damages issue by July 15, 1992.

Following the Court's ruling on the consequential damages and parol evidence issues, the parties are to submit an amended pretrial order for the trial of this case. The Court will set the date for submission of the amended pretrial order in its ruling on the consequential damages and parol evidence issues.

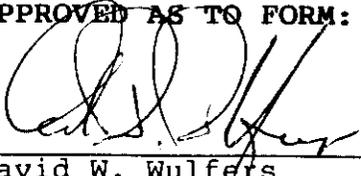
This case is set for trial on September 8, 1992.

DATED this 16th day of July, 1992.

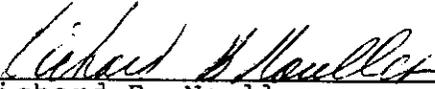
S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:



David W. Wulfers
Attorney for Plaintiff



Richard B. Noulles
Attorney for Defendant