

CLOSED

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

FILED

SEP 28 1992

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

BOBBY JACK BADLEY,)
)
 Plaintiff,)
)
 v.)
)
 LOUIS W. SULLIVAN,)
)
 Defendant.)

92-C-265-E

ON DOCKET

DATE SEP 30 1992

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed September 2, 1992 in which the Magistrate Judge recommended that the Motion to Remand 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.

SO ORDERED THIS 25th day of Sept, 1992.


JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

5

DATE 2 5 1992

CLOSED

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

FILED

SEP 23 1992

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

INTERNATIONAL SEARCHERS, INC., et al,)
)
Plaintiffs,)
)
v.)
)
KOCH OIL COMPANY,)
)
Defendant.)

92-C-296-B

ORDER

On April 9, 1992, Defendant Koch Oil Company ("Koch") filed a Petition For Removal. Koch asserts that the case should be removed pursuant to 28 U.S.C. §1441(a).¹ Plaintiffs did not file a Motion To Remand, but this Court raises the issue of whether Defendant can remove the case, *sua sponte*. *London v. United States Fire Insurance Co.*, 531 F.2d 257, 259-260 (5th Cir. 1976).

The issue is whether Defendant's Petition For Removal is timely under 28 U.S.C. §1446(b). Part of that statute reads:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon such action or proceeding is based, or within thirty days after the service of summons upon the defendant, if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter. (Emphasis added).

Defendant Koch admits it was served with the state court Petition on January 27, 1992. Petition For Removal, page 2 (docket #1). Koch then filed a Motion To Dismiss for

¹ The applicable part of 1441(a) states: "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant..."

lack of jurisdiction, which was denied by the state court on March 26, 1992. Koch then filed the instant Petition For Removal on April 9, 1992. As a result, Koch waited 73 days from the time it received the summons and Petition before filing for removal. This is beyond the 30-day time limit imposed by §1446. Writes one court:

The thirty day limitation mandated by § 1446(b) has a dual purpose. On the one hand, it forecloses a defendant from adopting a "wait and see" approach in the state court; specifically, it prevents a second bite at the jurisdictional apple if a defendant (belatedly) perceives that the case is proceeding other than to his liking...On the second hand, the statutory requirement minimizes the delay and waste of resources involved in starting a case over in federal court after substantial proceedings have taken place in state court. *Gorman v. Abbott Laboratories*, 629 F.Supp. 1196, 1199 (D.R.I. 1986).

In its removal petition, Koch cites no case law and does not even address the 30-day time limitation of §1446. Koch apparently believes the 30-day time limit is tolled by the filing of the Motion To Dismiss in state court. No such exception to the 30-day period of §1446(b) was found by this Court.² In addition, case law holds that the removal statute is to be strictly interpreted. *McCurtain City Production Corp. v. Cowett*, 482 F.Supp. 809, 812 (W.D. Okla. 1978). And, when the basis for jurisdiction is doubtful, the Court should resolve such doubt in favor of remand. *Id.*, quoting *Greenshields v. Warren Petroleum Co.*, 248 F.2d 61, 64-65 (10th Cir. 1957).

In summary, Koch admits knowing of the state Petition and summons on January 27, 1992. However, instead of removing the case in the next 30 days, it chose to file a Motion To Dismiss in state court. That motion was denied. Koch then filed the removal petition on April 9, 1992 -- 73 days after the case was removable. Koch's Petition is

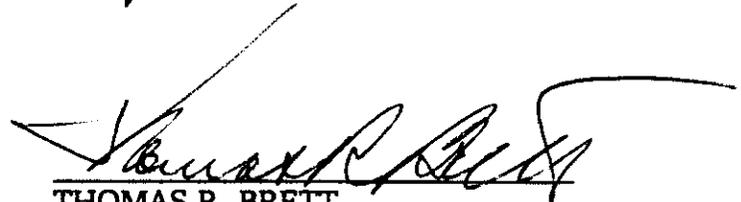
² *The court in Gorman, supra, stated that noncompliance with the time restraints does not, in itself, oust the federal court of jurisdiction. However, it also noted that § 1446 was not "a toothless dragon". The great weight of authority holds that, even if the statute is seen as modal rather than jurisdictional, the time limitation is mandatory and must be strictly applied. (Emphasis added.)*

beyond the 30-day time period.

It also should be noted that Koch has also filed a Motion To Dismiss in this Court, again raising the assertion of lack of personal jurisdiction. Such a motion further suggests that Koch is attempting to get a second bite at the jurisdictional apple.

In this case, Koch's Petition For Removal took place beyond the 30-day time limit imposed by §1446(b). Therefore, the case should be and hereby is remanded to state court, in accordance with the foregoing analysis.

SO ORDERED THIS 23rd day of Sept., 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 9/30/92

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

IN RE:) M-1417
)
ASBESTOS LITIGATION) ASB(TW) No. _____

JAY WILLIAM BLAIR and MILDRED L. BLAIR,) Case No. 88-C-720-B ✓
)

Plaintiffs,)

vs.)

EAGLE-PICHER INDUSTRIES, INC. and)
OWENS-CORNING FIBERGLAS CORPORATION,)

Defendants.)

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

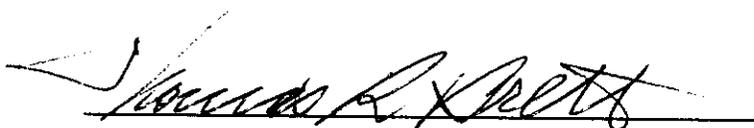
**ORDER FOR DISMISSAL WITH PREJUDICE AND
RELEASE OF SUPERSEDEAS BOND**

Comes now the Court, having considered Plaintiffs JAY BLAIR and MILDRED BLAIR' and Defendant OWENS-CORNING FIBERGLAS's Joint Stipulation and Motion, and herewith orders that the supersedeas bond filed in the within matter by Owens-Corning Fiberglas, shall hereby be released and returned to Owens-Corning Fiberglas.

The Court further orders that all claims asserted by plaintiffs against Owens-Corning Fiberglas in the within matter, are hereby dismissed with prejudice, with each party to pay their own costs and attorneys' fees.

DATED the 29 day of Sept., 1992

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Thomas R. [unclear]", is written over a horizontal line.

CLOSED

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

FILED

SEP 28 1992

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

AMERICAN MADE MACHINE, an)
Oklahoma general partnership,)

Plaintiff,)

vs.)

Case No. 92-C-681-E

OKUMA MACHINERY, INC., a)
New York corporation,)

Defendant.)

**FILED ON DOCKET
DATE SEP 30 1992**

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 25 day of Sept, 1992, this matter coming on before me the undersigned United States District Judge and having received the Joint Motion for Dismissal, finds as follows:

That each of the parties to this matter have entered into a settlement agreement. Pursuant to the terms of the settlement agreement, this action is now herein **DISMISSED WITH PREJUDICE**. Each party shall bear its own attorneys' fees and costs incurred in this action.

S/ JAMES O. ELLISON
United States District Judge

APPROVED AS TO FORM AND CONTENT:

ZARBANO, LEONARD & SCOTT



Marcia A. Scott, OBA #6858
5051 South Lewis, Suite 200
Tulsa, Oklahoma 74105-6061
Attorney for Plaintiffs,
American Made Machine

MOCK, SCHWABE, WALDO, ELDER,
REEVES & BRYANT



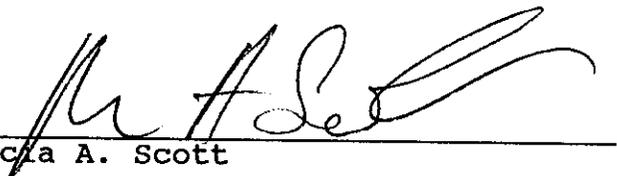
Jack C. Moore, OBA #14283
Fifteenth Floor
One Leadership Square
211 North Robinson
Oklahoma City, Oklahoma 73102
Attorney for Defendant,
Okuma Machinery, Inc.

CERTIFICATE OF MAILING

I hereby certify that on this 21st day of September, 1992, I mailed, postage prepaid, a true and correct copy of the above and foregoing instrument to the following:

Jack C. Moore
Mock, Schwabe, Waldo, Elder,
Reeves & Bryant
Fifteenth Floor
One Leadership Square
211 North Robinson
Oklahoma City, OK 73102

Allain C. Andry, IV
Robinson, Bradshaw & Hinson, P.A.
1900 Independence Center
101 N. Tryon Street
Charlotte, NC 26246



Marcia A. Scott

CLOSED

FILED

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

SEP 28 1992

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

NELLIE BARBEE,

Plaintiff,

v.

LOUIS W. SULLIVAN, M.D.,

Defendant.

91-C-567-E

ENTERED ON DOCKET
SEP 29 1992

ORDER

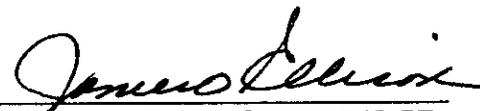
The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed September 2, 1992 in which the Magistrate Judge recommended that the Motion to Remand should be granted.

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.

SO ORDERED THIS 25th day of Sept., 1992.


JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

CLOSED

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

BRENT CARROLL,)
)
 Plaintiff,)
)
 vs.)
)
 HOWARD & WIDDOWS, P.C., an)
 Oklahoma Professional Corporation,)
 and JOHN W. HUNT,)
)
 Defendants.)

Case No. 91-C-132-B ✓

FILED

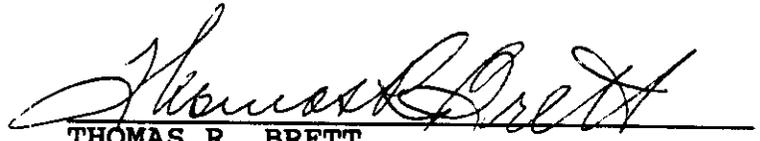
SEP 24 1992

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

J U D G M E N T

In accordance with the jury verdict rendered September 23, 1992, Judgment is hereby entered in favor of Plaintiff, Brent Carroll, and against the Defendants, Howard & Widdows, P.C., an Oklahoma Professional Corporation, and John W. Hunt, in the amount of One Dollar (\$1.00) for actual damages and Seven Thousand Five Hundred Dollars (\$7,500.00) for punitive damages, plus post-judgment interest on both such sums from the date hereof until paid at the rate of 3.13% per annum. Costs and reasonable attorneys fees are assessed against Defendants if timely applied for under Local Rule 6.

DATED this 24 day of September, 1992.


 THOMAS R. BRETT
 UNITED STATES DISTRICT JUDGE

72

FILED

SEP 24 1992

RICHARD M. LUTHERANCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

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

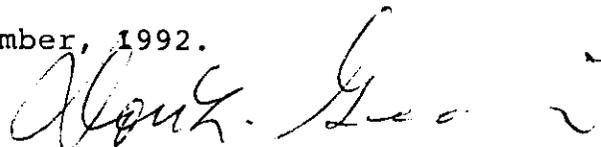
ROBERT DUNN and PATRICIA DUNN,)
)
 Plaintiff,)
)
 vs.)
)
 EMPIRE CONSTRUCTION & MATERIALS,)
 INC., an Oklahoma corporation)
 and LEGAL PROTECTIVE LIFE)
 INSURANCE COMPANY, a Texas)
 corporation,)
)
 Defendants.)

No. 92-C-555-B

STIPULATION OF DISMISSAL

IT is hereby stipulated that the above entitled action
may be dismissed without prejudice, each party to bear its
own costs.

Dated this the 24th day of September, 1992.


DON L. GILDER, OBA #3367
GILDER & GILDER
406 South Boulder, Suite 220
Tulsa, Oklahoma 74103
(918) 587-4436
Attorneys for Plaintiff


JAMES H. FERRIS, OBA #2883
MOYERS, MARTIN, SENTEE, IMEL
& TETRICK
320 South Boston, Suite 920
Tulsa, Oklahoma 74103
(918) 582-5281
Attorneys for Defendant,
Empire Construction & Materials, Inc.

DATE ~~SEP 25 1992~~
CLOSED

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

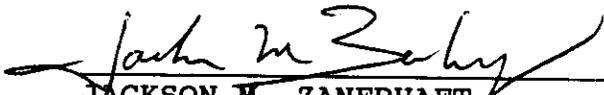
CHARLES E. REED,)
)
Plaintiff,)
)
vs.)
)
CITY OF TULSA, TULSA POLICE)
DEPARTMENT, FOUR ANONYMOUS)
POLICE OFFICERS OR SHERIFF'S)
DEPUTIES, TULSA COUNTY)
SHERIFF'S OFFICE, THE TULSA)
COUNTY COURT CLERK,)
)
Defendants.)

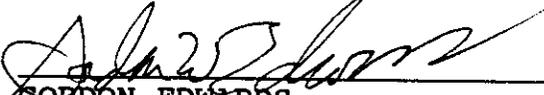
Case No. 92-C-597-B ✓

FILED
SEP 24 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COME NOW the Plaintiff, Charles E. Reed, and the Defendants, City of Tulsa, et al., and do hereby stipulate and agree that the above titled cause will be dismissed without prejudice.


 JACKSON M. ZANERHAFT
 Attorney for Plaintiff
 Charles E. Reed


 GORDON EDWARDS
 Attorney for Defendant
 Tulsa County


 MICHAEL C. ROMIG
 Attorney for Defendant
 City of Tulsa

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

23

ATLANTIC RICHFIELD COMPANY,)	
)	
Plaintiff,)	Consolidated Cases Nos.
)	
v.)	89-C-868-B
)	89-C-869-B
AMERICAN AIRLINES, INC., Et. Al.,)	90-C-859-B
)	
Defendants.)	

FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

Now on this 23rd day of Sept., 1992, this matter comes on for consideration of the Plaintiff Atlantic Richfield Company's (ARCO'S) NOTICE OF MOTION AND MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT¹ (docket no. 324). The Plaintiff ARCO appears by its attorney, Larry Gutteridge, the Defendants appear by their respective lead counsel, and William Anderson appears as liaison counsel. The Court having examined the files and records and proceedings herein, having reviewed and considered the terms and conditions of the settlements in question, having reviewed and considered the Magistrate's Report and Recommendation, and being fully advised and informed in the premises FINDS, ADJUDGES, ORDERS and DECREES:

1. The settlements encompassed by the Notice of Motion and Motion for Determination of Good Faith Settlement (docket no. 324) in the above captioned action between the Plaintiff ARCO

¹ On or about June 8, 1992, ARCO filed its Notice of Motion and Motion for Determination of Good Faith Settlement seeking determinations of good faith settlement and bar orders for settlements with 19 potentially responsible parties ("PRPs") of the Glenn Wynn Site.

and the following Defendants ("Settling Parties"):

1. Aircraft Accessories of Oklahoma, Inc.
2. American Airlines, Inc.
3. Andy Ewing Toyota, Inc.
4. Arrow Specialty Company
5. Carl Sutterfield
6. Cooper Tire & Rubber Company
7. Crow Brothers Toyota, Inc.
8. Danaher Tool, Inc.
9. FSCC Acquisition Company; Fort Smith Chair Company, d/b/a Ayers Furniture Industries
10. Garrison Furniture Company
11. Gerber Products Company
12. Harsco Corporation; Air X-Changers Div.
13. Milton R. Vanatta, III
14. Nestle Food Company; successor to Carnation Company
15. Pepsi Cola Bottling Company of Oklahoma City, Inc.; Beverage Products Corporation
16. Signal Delivery Service, Inc.
17. Thomas Engineering Company
18. W. R. Stubbs
19. Worthington Pump Corp. (USA), Inc.; Cooper Industries

are found to be in good faith, and a final judgment barring all claims against the Settling Parties for liabilities associated with the Site under state and federal law, except to the extent that such claims are preserved by the settlements, should be and is hereby entered.

2. Each and every claim asserted by the Plaintiff ARCO against the Settling Parties identified hereinabove is dismissed

in its entirety on the merits, with prejudice and without costs, except that the claim against Worthington Pump Corp. (USA), Inc.; Cooper Industries, is not and shall not be dismissed unless and until it makes payment in full of the amount of all litigation assessments and fees due and owing.

3. Each and every claim "deemed filed" by or against each of the Settling Parties identified hereinabove, pursuant to the terms of the First Amended Case Management Order, Section VII. B., filed March 6, 1992, is hereby dismissed in its entirety on the merits, with prejudice and without costs.

4. In accordance with the terms of the agreements with the Settling Parties identified herein above, hereinafter referred to as the Agreement, this Judgment shall be conditioned upon the Agreement being and remaining valid and in effect.

5. Entry into the Agreement by an ineligible entity renders the Agreement null and void. An eligible entity is a generator or transporter, or both, of material to the Site, with a volume of less than or equal to 100,000 gallons. The terms "Site" and "volume" are as defined in the Agreement and in ARCO's June 8, 1992 Motion.

6. Any breach, whether by omission or commission, whether intentional or non-intentional, of a Settling Party's representation and warranty that, it neither possesses, or has a right to possess, nor is aware of any information which indicates that it is responsible for additional or greater volume than is set forth in the Volume Report attached to the Agreement, which has not been included in the documentation provided to ARCO in support of

its offer to enter the Agreement, renders the Agreement null and void.

7. In the event that the Agreement is or becomes null and void, this Judgment along with all orders entered in conjunction with the Agreement shall be vacated nunc pro tunc, the settlement reflected in the Agreement shall be terminated pursuant to its terms and the parties to the vacated Agreement shall be deemed to have reverted to their respective status and position in the Action as of the date immediately prior to the execution of the Agreement.

8. Nothing contained in this Judgment and Order shall be construed to affect the rights of the Plaintiff ARCO or the Settling Parties with respect to claims which are preserved by the settlements.

9. There being no just reason to delay the entry of this Judgment, this Court hereby directs entry of this final Judgment and Order of Dismissal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: Sept. 23rd, 1992

SI THOMAS R. BRETT

Thomas R. Brett
United States District Court Judge

Presented by:

Gary A. Eaton
Gary A. Eaton, Attorney
for Plaintiff, Atlantic
Richfield Company

William Anderson
William Anderson,
Liaison Counsel

DATE SEP 24 1992

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

3

ATLANTIC RICHFIELD COMPANY,
Plaintiff,
v.
AMERICAN AIRLINES, INC., Et. Al.,
Defendants.

Consolidated Cases Nos.

- 89-C-868-B
- 89-C-869-B
- 90-C-859-B

FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

Now on this 23rd day of Sept, 1992, this matter comes on for consideration of the Plaintiff Atlantic Richfield Company's (ARCO'S) NOTICE OF MOTION AND MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT¹ (docket no. 259). The Plaintiff ARCO appears by its attorney, Larry Gutteridge, the Defendants appear by their respective lead counsel, and William Anderson appears as liaison counsel. The Court having examined the files and records and proceedings herein, having reviewed and considered the terms and conditions of the settlements in question, having reviewed and considered the Magistrate's Report and Recommendation, and being fully advised and informed in the premises FINDS, ADJUDGES, ORDERS and DECREES as follows:

¹ On or about April 30, 1992, ARCO filed its Notice of Motion and Motion for Determination of Good Faith Settlement seeking determinations of good faith settlement and bar orders for settlement with 174 potentially responsible parties ("PRPs") of the Glen Wynn Site. On May 8, 199, ARCO filed a Notice of Dismissal with Prejudice as to 91 of these 174 potentially responsible parties. Of the remaining potentially responsible parties for which good faith determination is sought, 6 are named as defendants, and the rest are not named as defendants.

1. The settlements encompassed by the Notice of Motion and Motion for Determination of Good Faith Settlement (docket no. 259) in the above captioned action between the Plaintiff ARCO and the following Defendants ("Settling Parties"):

1. City of Tulsa
2. Dowell, Inc.
3. Rheem Manufacturing Corporation
4. T.I.M.E. DC Inc.
5. Tulsa Airport Authority
6. Power Assist Company

are found to be in good faith, and a final judgment barring all claims against the Settling Parties for liabilities associated with the Site under state and federal law, except to the extent that such claims are preserved by the settlements, should be and is hereby entered.

2. Each and every claim asserted by the Plaintiff ARCO against the Settling Parties identified hereinabove is dismissed in its entirety on the merits, with prejudice and without costs, except that the claim against Power Assist Company is not and shall not be dismissed unless and until it makes payment in full of the amount of its settlement with the Plaintiff ARCO and payment in full of all litigation assessments and fees due and owing.

3. Each and every claim "deemed filed" by or against each of the Settling Parties identified hereinabove, pursuant to the

terms of the First Amended Case Management Order, Section VII. B., filed March 6, 1992, is hereby dismissed in its entirety on the merits, with prejudice and without costs.

4. In accordance with the terms of the agreements with the Settling Parties identified hereinabove, hereinafter referred to as the Agreement, this Judgment shall be conditioned upon the Agreement being and remaining valid and in effect.

5. Entry into the Agreement by an ineligible entity renders the Agreement null and void. An eligible entity is a generator or transporter, or both, of material to the Site, with a volume of less than or equal to 100,000 gallons. The terms "Site" and "volume" are as defined in the Agreement and in the Plaintiff ARCO's April 30, 1992 Motion.

6. Any breach, whether by omission or commission, whether intentional or non-intentional, of a Settling Party's representation and warranty that, it neither possesses, or has a right to possess, nor is aware of any information which indicates that it is responsible for additional or greater volume than is set forth in the Volume Report attached to the Agreement, which has not been included in the documentation provided to ARCO in support of its offer to enter the Agreement, renders the Agreement null and void.

7. In the event that the Agreement is or becomes null and void, this Judgment along with all orders entered in conjunction with the Agreement shall be vacated nunc pro tunc, the settlement reflected in the Agreement shall be terminated pursuant to its terms and the parties to the vacated Agreement shall be deemed to

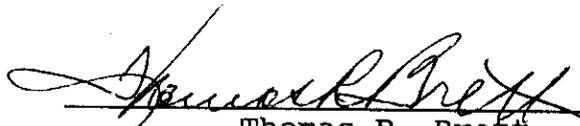
have reverted to their respective status and position in the Action as of the date immediately prior to the execution of the Agreement.

8. Nothing contained in this Judgment and Order shall be construed to affect the rights of the Plaintiff ARCO or the Settling Parties with respect to claims which are preserved by the settlements.

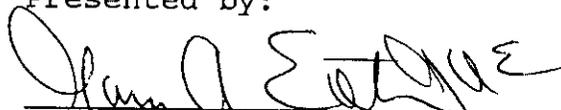
9. There being no just reason to delay the entry of this Judgment, this Court hereby directs entry of this final Judgment and Order of Dismissal as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

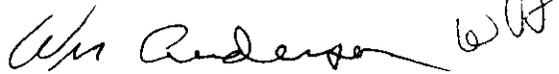
Dated:

Sept 23rd '92


Thomas R. Brett
United States District Court Judge

Presented by:


Gary A. Eaton, Attorney
for Plaintiff ARCO 743 8781


William Anderson,
Liaison Counsel

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

TURNER CORPORATION OF)
OKLAHOMA, INC.,)
)
Plaintiff,)
)
vs.)
)
VEREX ASSURANCE, INC.,)
)
Defendant.)

Case No. 92-C-591-E

FILED

SEP 24 1992

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

STIPULATION OF DISMISSAL WITH PREJUDICE

Turner Corporation of Oklahoma, Inc., by and through its counsel, Robert R. Edmiston of Noss, Monnet & Edmiston, and Verex Assurance, Inc., by and through its counsel, by James P. McCann of Doerner, Stuart, Saunders, Daniel & Anderson, pursuant to the provisions of Rule 41(a)(1), Fed. R. Civ. P., hereby stipulate to a dismissal with prejudice of the Plaintiff's Petition and the Defendant's Counterclaim filed in the above-referenced matter, such dismissals to be with prejudice to any subsequent refiling.

Robert R. Edmiston
 Robert R. Edmiston
 NOSS, MONNET & EDMISTON
 300 Grantson Bldg.
 111 West 5th Street
 Tulsa, OK 74103

James P. McCann
 James P. McCann
 DOERNER, STUART, SAUNDERS,
 DANIEL & ANDERSON
 320 S. Boston, Suite 500
 Tulsa, OK 74103

Attorneys for Plaintiff,
Turner Corporation of Oklahoma

Attorneys for Defendant,
Verex Assurance, Inc.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CLOSED

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	23
)	
FRED H. KATER; KEEVA J. KATER;)	
COUNTY TREASURER, Tulsa County,)	
Oklahoma; and BOARD OF COUNTY)	
COMMISSIONERS, Tulsa County,)	
Oklahoma,)	
)	
Defendants.)	CIVIL ACTION NO. 91-C-962-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 23rd day of Sept., 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; and the Defendants, Fred H. Kater and Keeva J. Kater, appear not, but make default.

The Court being fully advised and having examined the court file finds that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on December 18, 1991; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on December 17, 1991.

The Court further finds that the Defendants, Fred H. Kater and Keeva J. Kater, were served by publishing notice of

this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning June 1, 1992, and continuing through July 6, 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, Fred H. Kater and Keeva J. Kater, 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, Fred H. Kater and Keeva J. Kater. 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 Secretary of Veterans Affairs, 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 parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly

approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed its Answer on January 8, 1992; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on January 9, 1992; that the Defendants, Fred H. Kater and Keeva J. Kater, 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 Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

The South 210 feet of the West Half (W/2) of a tract of land more particularly described as follows: Beginning at a point 848.52 feet South and 1179.01 feet West of the Northeast Corner of Section 4, Township 19 North, Range 12 East; thence West 119.5 feet; thence North 418.4 feet; thence East 119.5 feet; thence South 418.4 feet to the point of beginning, all in the South Half (S/2) of Lot One (1), Section Four (4), Township Nineteen (19) North, Range Twelve (12) East of the Indian Base and Meridian in Tulsa County, State of Oklahoma, according to the United States Government Survey thereof.

The Court further finds that on August 10, 1990, the Defendants, Fred H. Kater and Keeva J. Kater, executed and delivered to the United States of America, acting on behalf of the Secretary of Veterans Affairs, their mortgage note in the

amount of \$26,508.00, payable in monthly installments, with interest thereon at the rate of 7.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Fred H. Kater and Keeva J. Kater, executed and delivered to the United States of America, acting on behalf of the Secretary of Veterans Affairs, a mortgage dated August 10, 1990, covering the above-described property. Said mortgage was recorded on August 13, 1990, in Book 5270, Page 1538, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Fred H. Kater and Keeva J. Kater, 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, Fred H. Kater and Keeva J. Kater, are indebted to the Plaintiff in the principal sum of \$26,388.09, plus interest at the rate of 7.5 percent per annum from November 1, 1990 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$329.20 for publication fees.

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 Defendants, Fred H. Kater and Keeva J. Kater, in the principal sum of \$26,388.09, plus interest at the rate of 7.5 percent per annum

from November 1, 1990 until judgment, plus interest thereafter at the current legal rate of 3.13 percent per annum until paid, plus the costs of this action in the amount of \$329.20 for publication fees, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, 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, Fred H. Kater and Keeva J. Kater, 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.

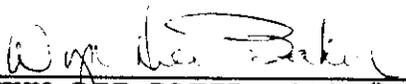
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney


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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 91-C-962-B

WDB/css

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

FILED
CLOSED
SEP 23 1992
Richard J. Anderson, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

SAM LEE HILL,)
)
Petitioner,)
)
v.)
)
R. MICHAEL CODY, et al,)
)
Respondents.)

92-C-0276-B

ORDER

Sam Lee Hill, who was convicted in 1990 of possession of amphetamine, methamphetamine and marijuana with intent to sell and possession of paraphernalia, asks this Court to grant him a Writ of Habeas Corpus for the following reasons: (1) he was not afforded a full and fair hearing at the State Court; (2) the evidence at trial was insufficient to convict him; and (3) prosecutorial misconduct violated his due process rights. Upon review, the Court of Criminal Appeals for the State of Oklahoma affirmed Hill's conviction.

After examining the record, this Court finds that: (1) Hill did, in fact, receive a full and fair hearing at his trial; (2) a rational jury could have found the evidence presented at trial sufficient to convict Hill of the charges brought against him; and (3) the prosecutorial conduct complained of was not sufficiently prejudicial to violate Hill's due process rights.

I. Summary of the Facts

Hill's conviction was affirmed by the Court of Criminal Appeals and his Application for Post-Conviction Relief was denied. *Hill v. State of Oklahoma*, No. F-90-1097 (Okla. Crim. filed Sept. 13, 1991) and Order Denying Application for Post-Conviction Relief, No.

CRF 89-9, filed Jan. 1, 1992., respectively. Hill filed a second Application for Post-Conviction Relief but later withdrew it. Hill has nonetheless, exhausted his state remedies.

Testimony at the trial showed that on December 26, 1988, Creek County deputies and Sapulpa police officers executed a search warrant at a mobile home in Creek County. Knocking on the door of the mobile home, officers announced themselves and their intent to search the premises. After hearing sounds of people running inside the mobile home, the officers broke through the locked front door. Co-defendant Linda Matthews was detained by a deputy in the bathroom of the mobile home as she unsuccessfully tried to flush a plastic bag down the toilet.¹ Meanwhile, Hill, who was dressed only in jeans, was apprehended by Sgt. Wall as he hurriedly exited the rear of the mobile home.²

Evidence produced at trial revealed that the search of the mobile home uncovered a video camera and tripod; a camera bag containing a baggie of what was later analyzed to be amphetamine; a baggie of marijuana in an envelope with \$815 in cash; a baggie of amphetamine next to \$58 in cash; a set of Nexus scales; a wooden engraved bottle containing a formula for making methamphetamine; a coffee can containing several items of drug paraphernalia, including empty baggies, black plastic Deering scales, another small set of scales, a spoon, a set of pill containers, a small brass pipe; a tan purse with a small metal pipe, small baggies, a small pair of scissors; a loaded pistol; a loaded .357 magnum revolver and a loaded .38 caliber Smith and Wesson revolver.³

¹ Tests later revealed the contents of the bag to be methamphetamine. Trial Transcript, May 8, 1990, page 142.

² Id. at 115 - 116.

³ Id. at 62, 66 - 67, 74 - 78.

II. Opportunity for a Full and Fair Hearing

The question for purposes of habeas corpus review is whether the State of Oklahoma provided Hill with an opportunity for a full and fair litigation of his Fourth Amendment claim. The rule in these cases is that

"[w]here the State has provided an opportunity for full and fair litigation on a Fourth Amendment claim, a state prisoner may not be granted habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial." *Stone v. Powell*, 428 U.S. 465, 494, 96 S.Ct. 3037, 3052, 49 L.Ed.2d 1067, 1088 (1976) [Footnotes omitted].

The Supreme Court in *Stone* explained that this rule was necessary because

"Fourth Amendment violations are different in kind from denials of Fifth or Sixth Amendment rights in that claims of illegal search and seizure do not impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable; rather, the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers." *Stone v. Powell*, 428 U.S. 465, 479, 96 S.Ct. 3037, 3045, 49 L.Ed.2d 1067, 1088 (1976) citing to *Kaufman v. United States*, 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed.2d 227 (1969).

Prior to his trial, Hill filed a Motion to Suppress all the evidence obtained against him In the December 26, 1988, search. Hill claims police officers used a "general search warrant" when they seized the evidence. This, Hill asserts, violated the United States Constitution and Oklahoma law.⁴ Hill also claims the warrant was deficient because it lacked sufficient details to establish the confidential informant's reliability.⁵

⁴ *Transverse to Respondents Response to Writ of Habeas Corpus, June 11, 1992, page 1; and Trial Transcript at 23 - 24, 110 - 113.*

⁵ *Id.* This claim is without merit since the task of the issuing magistrate is to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying the hearsay information, there is a fair probability that contraband or evidence of a crime will be found at a particular place. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Independent investigation by police and the subsequent corroboration of the informant's predictions suffices for the practical, common sense decision required by *Gates*. Probable cause does not require certainty of criminal activity, but only probability. *United States v. Rose*, 731 F.2d 1337, 1344 (8th Cir. 1984).

At the start of the trial, Hill asked the trial court to rule on his Motion to Suppress. The trial judge decided to hear the evidence before making his decision. At the conclusion of the State's evidence, Hill again asked for a ruling on the Motion to Suppress. After hearing arguments from Hill and the State, the trial judge ruled the warrant was not unconstitutionally general.⁶ As a result, the drug related evidence was admitted but the evidence of stolen property and firearms was suppressed because they were not listed on the search warrant.⁷

The Oklahoma Court of Criminal Appeals affirmed the trial court. The Appellate Court found that the weapons and the stolen property seized were outside the scope of the warrant and were properly excluded. They adduced that "the failure of the executing officers to obey the limits of the warrant does not render the warrant itself constitutionally insufficient. The jury was instructed to base their verdict on the properly admitted evidence only and there was no indication in the record that the jury was misled." *Hill v. State of Oklahoma*, No. F-90-1097 (Okla. Crim. filed Sept. 13, 1991).

Exactly what constitutes a full and fair opportunity to litigate has not been clearly defined. The Tenth Circuit has stated that an opportunity was full and fair "if the trial court considered the claims on a Motion to Suppress and a higher court considered the same on direct review." *Redford v. Smith*, 543 F.2d 726, 731 (10th Cir. 1976). Hill had the chance to argue his Motion to Suppress the evidence at trial as evidenced by the trial transcript. The Appellate Court then reviewed the Motion to Suppress and affirmed the

⁶ *Id.* at 113.

⁷ *Id.* at 113, 185.

trial court. Thus, Hill's Petition for a Writ of Habeas Corpus on the grounds of denial of a full and fair opportunity to litigate is without merit.

III. Insufficient Evidence

Hill's second claim is that the evidence produced by the State at trial was insufficient to convict him of possession of amphetamine, etc. In a habeas corpus proceeding, the question to be decided is,

"[W]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis added).

The issue then becomes whether under Oklahoma law, there was sufficient evidence to convict Hill of possession. To prove possession,

". . . [T]here must be other facts shown from which it can be fairly inferred that the defendant had dominion and control over the seized substance. Additional factors showing the accused's knowledge and control may consist of incriminating conduct by the defendant or any other circumstances from which possession may be fairly inferred." *Johnson v. State*, 764 P.2d 530, 532 (Okl.Cr. 1988).

At trial, the jury weighed several items of evidence. First, only Hill and Matthews were present in the mobile home when the police executed the search warrant. After police announced their intent to search the premises, Hill was caught trying to flee the mobile home through the rear door. Hill's desire to quickly escape is bolstered by the fact he did not take the extra time to put on any more clothes even though it was chilly December day.⁸ The police also had the mobile home under surveillance for the previous three

⁸ *Id.* at 116.

months and testified that Hill had been seen there several times before December 26, 1988.⁹

With the evidence presented, a reasonable jury could have found that Hill had dominion and control over the illegal substances. After examining all of the evidence presented in the light most favorable to the State, a rational jury could find that Hill had dominion and control of the illegal substances. This is particularly so given the volume of materials seized. Therefore, Hill's second claim for habeas relief based on insufficient evidence is without merit.

IV. Prosecutorial Misconduct

Hill's third habeas claim is that prosecutorial misconduct denied his right to a fair trial. When reviewing prosecutorial remarks, the relevant question for federal habeas review of a state court conviction

"[I]s whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) citing *Donnelly v. De Christoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

Hill cites five examples of misconduct:

- 1) By introducing "recipes" for manufacturing methamphetamine found in the mobile home, the prosecution improperly introduced character evidence and evidence of other crimes;
- 2) During closing arguments, the prosecutor made misleading statements concerning the outcome of the co-defendant Matthew's case;
- 3) The prosecution misstated the fact that the co-defendant Matthews was behind Hill when he was running out the rear door of the mobile home;

⁹ *Id.* at 40, 49 - 50.

4) The prosecution misstated that Hill lived in the mobile home when in fact Hill lived in Mounds, Oklahoma; and

5) The prosecution improperly commented on the dismissed charges of possession of firearms and stolen property during closing arguments.¹⁰

This Court will examine the first and fifth claims but finds no merit in claims two, three and four.¹¹

As regards the first contention of prosecutorial misconduct, the undersigned finds that the prosecution was not introducing evidence of prior crimes. A review of the record shows that no evidence was produced by either party indicating that Hill had ever been convicted of manufacturing illegal drugs. The prosecution was, in fact, introducing further evidence to support the possession of drug paraphernalia charge.¹² Furthermore, any inference that the jury could have made about the recipes being used for manufacturing was countered by the defense attorney's cross-examination of the chemist who examined the recipes.¹³ Consequently, the introduction of the recipes to support the possession of drug paraphernalia charge were not sufficiently prejudicial to violate Hill's due process rights.

¹⁰ Petition for a Writ of Habeas Corpus, No. 92-C-276-B, filed April 1, 1992, and Transverse to Respondent's Response to Writ of Habeas Corpus, filed June 11, 1992.

¹¹ *The second argument has no merit since any statements made about the co-defendant's case were not shown by Hill to have any bearing on the jury's decision in Hill's case. The third argument also has no merit since there is testimony in the trial transcript to the effect that Mathews was seen behind Hill as Hill exited the mobile home. Thus the prosecution was basing his closing argument on the evidence produced at trial. The fourth argument has no merit since there was nothing produced by Hill to establish his residence as being anything other than that of the mobile home. There is no reference in the record about Hill living in Mounds, Oklahoma. Thus, a reasonable inference could be made that Hill resided in the mobile home.*

¹² Trial Transcript at 58 - 59.

¹³ *Id.* at 148 - 152. *The chemist testified that there were no directions on the recipe on how to mix the chemicals or what to do in what order. Furthermore, the chemist testified that there were uses other than making methamphetamine for the chemicals described in the recipe.*

With regard to Hill's fifth contention of prosecutorial misconduct, the undersigned finds that the prosecution's comments about the dismissed possession of firearms and stolen property charges did not prejudice Hill's case.¹⁴ Though the comment was improperly made, the jurors were subsequently admonished by the court that they must rely on their own memory of the evidence admitted.¹⁵ Furthermore, before counsel began closing arguments, the trial court stated to the jury that they should rely on their memories as to the evidence presented and that closing arguments were not evidence.¹⁶ The firearms and stolen property were not admitted into evidence. Hill presents no evidence that the jury was either misled by the prosecutor's comment or based their decision on the excluded evidence. Thus, the prosecutor's comments were not prejudicial to Hill's due process rights.

Because Hill cannot show that any conduct on the behalf of the prosecutor so infected the trial with unfairness as to make his conviction a denial of due process, his third claim for habeas relief must also be denied.

V. Conclusion

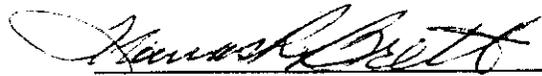
Upon examination of the facts in the case at bar, this Court finds that: (1) Hill did, in fact, receive a full and fair hearing at his trial; (2) a rational jury could have found the evidence presented sufficient to convict Hill of the charges brought against him; and (3) the prosecutorial conduct complained of was not sufficiently prejudicial to violate Hill's due process rights.

¹⁴ *The prosecutor's comment made during closing arguments was as follows: "[W]e had evidence put on concerning a video camera, some guns, two loaded guns and a gun found under a couch, which was reported stolen, and the video camera. I was disappointed that the judge threw those charges out because it was outside the scope of the narcotics search warrant."* *Id.* at 194.

¹⁵ *Id.* at 197, 213.

¹⁶ *Id.* at 191.

SO ORDERED THIS 21st day of Sept, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Anderson a/k/a Luella M. Anderson f/k/a Luella M. Walker f/k/a Luella Marie Walker, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, John W. Walker, acknowledged receipt of Summons and Complaint on June 21, 1991; that the Defendant, Luella Marie Anderson a/k/a Luella M. Anderson f/k/a Luella M. Walker f/k/a Luella Marie Walker, was served with Summons and Complaint on December 4, 1991; that the Defendant, Harry Shaia, Jr., as Trustee in Bankruptcy of Freedlander, Inc., The Mortgage People, acknowledged receipt of Summons and Complaint on July 10, 1991; that the Defendant, NCNB National Bank of North Carolina n/k/a Nations Bank of North Carolina, N.A., acknowledged receipt of Summons and Complaint on June 17, 1991; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on June 12, 1991; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on June 13, 1991.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on July 3, 1991, disclaiming any interest in the subject property; that the Defendant, Harry Shaia, Jr., as Trustee in Bankruptcy of Freedlander, Inc., The Mortgage People, filed his Answer of Trustee on July 15, 1991, disclaiming any interest in the subject property; that the Defendant, NCNB National Bank of North Carolina n/k/a Nations Bank of North Carolina, N.A., filed its

Disclaimer on August 12, 1992; and that the Defendants, John W. Walker and Luella Marie Anderson a/k/a Luella M. Anderson f/k/a Luella M. Walker f/k/a Luella Marie Walker, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, NCNB National Bank of North Carolina is now known as Nations Bank of North Carolina, N.A.

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-Four (24), Block Twelve (12), Suburban Hills Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on August 1, 1972, John W. Walker and Luella M. Walker 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 \$11,800.00, payable in monthly installments, with interest thereon at the rate of four and one-half percent (4.5%) per annum.

The Court further finds that as security for the payment of the above-described note, John W. Walker and Luella M. Walker 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 August 1, 1972, covering the above-described property. Said mortgage was recorded on August 2, 1972, in Book 4028, Page 504, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, John W. Walker and Luella Marie Anderson a/k/a Luella M. Anderson f/k/a Luella M. Walker f/k/a Luella Marie Walker, 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, John W. Walker and Luella Marie Anderson a/k/a Luella M. Anderson f/k/a Luella M. Walker f/k/a Luella Marie Walker, are indebted to the Plaintiff in the principal sum of \$6,950.98, plus interest at the rate of 4.5 percent per annum from November 1, 1989 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$24.92 (\$20.00 docket fees, \$4.92 fees for service of Summons and Complaint).

The Court further finds that the Defendant, NCNB National Bank of North Carolina n/k/a Nations Bank of North Carolina, N.A., disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, Harry Shaia, Jr., as Trustee in Bankruptcy of Freedlander, Inc., The Mortgage People and 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 Defendants, John W. Walker and Luella Marie Anderson a/k/a Luella M. Anderson f/k/a Luella M. Walker f/k/a Luella Marie Walker, in the principal sum of \$6,950.98, plus interest at the rate of 4.5 percent per annum from November 1, 1989 until judgment, plus interest thereafter at the current legal rate of 3.13 percent per annum until paid, plus the costs of this action in the amount of \$24.92 (\$20.00 docket fees, \$4.92 fees for service of Summons and Complaint), 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, Harry Shaia, Jr., as Trustee in Bankruptcy of Freedlander, Inc., The Mortgage People, NCNB National Bank of North Carolina n/k/a Nations Bank of North Carolina, N.A., 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, John W. Walker and Luella Marie Anderson a/k/a Luella M. Anderson f/k/a Luella M. Walker f/k/a Luella Marie Walker, 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 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/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

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Harry Shaia, Jr., as Trustee in
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J. Dennis Semler

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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 91-C-393-B

PB/css

CLOSED

PRINTED ON BOCKET

DATE 9-23-92

FILED

SEP 23 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

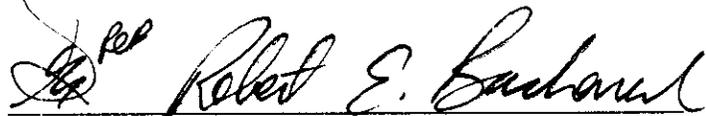
STEVEN QUENTIN DYER,)
)
 Plaintiff,)
)
 v.)
)
 OKLAHOMA BOARD OF CORRECTIONS,)
 et al.,)
 Defendants.)

Case No. 91-C-660-E

STIPULATION OF MUTUAL DISMISSALS WITH PREJUDICE

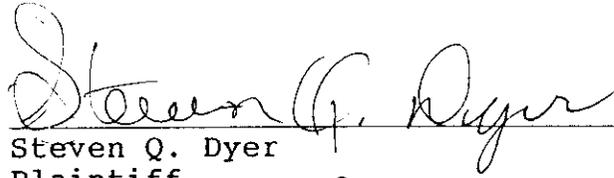
Plaintiff and Defendants hereby stipulate to dismiss all claims, counterclaims and causes of action therein with prejudice. Plaintiff and Defendants enter into such stipulation pursuant to a verbal settlement agreement calling for the discharge of Steven Q. Dyer from prison on September 18, 1992. Plaintiff and Defendants hereby stipulate that each party shall bear its own costs and attorney fees in this action.

Respectfully submitted,



Robert E. Bacharach
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, OK 73102
Telephone: (405) 235-7700

Attorney for Plaintiff



Steven Q. Dyer
Plaintiff



Wellon Poe
Assistant General Counsel
Department of Corrections
420 West Main - Suite 550
Oklahoma City, OK 73102

Attorneys for Defendants

259.92B.REB

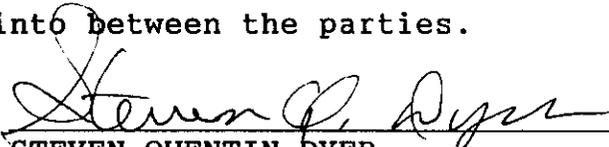
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

STEVEN QUENTIN DYER,)
)
 Plaintiff,)
)
 v.) Case No. CIV-89-257-W
)
 DAN MERRITT, et al.,)
)
 Defendants.)

LIMITED POWER OF ATTORNEY

STATE OF OKLAHOMA)
) ss.
 COUNTY OF OKLAHOMA)

I, Steven Quentin Dyer, being of lawful age, do hereby grant this limited power of attorney and authorize Robert E. Bacharach, my attorney in the above-referenced action, to sign on my behalf the papers necessary to effect the dismissal with prejudice of the case pending before the United States District Court for the Northern District of Oklahoma, styled: Dyer v. Oklahoma Board of Corrections, et al., Case No. 91-C-660-E, such dismissal being part of the Settlement Agreement entered into between the parties.


STEVEN QUENTIN DYER

Subscribed and sworn to before me this 21st day of September, 1992.


NOTARY PUBLIC

My Commission Expires:

April 4, 1994
(SEAL)

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

ENTERED

SAM LEE HILL,)
)
 Petitioner,)
)
 v.)
)
 R. MICHAEL CODY, et al,)
)
 Respondents.)

92-C-0276-B ✓

Richards
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
SEP 23 1992

ORDER

Sam Lee Hill, who was convicted in 1990 of possession of amphetamine, methamphetamine and marijuana with intent to sell and possession of paraphernalia, asks this Court to grant him a Writ of Habeas Corpus for the following reasons: (1) he was not afforded a full and fair hearing at the State Court; (2) the evidence at trial was insufficient to convict him; and (3) prosecutorial misconduct violated his due process rights. Upon review, the Court of Criminal Appeals for the State of Oklahoma affirmed Hill's conviction.

After examining the record, this Court finds that: (1) Hill did, in fact, receive a full and fair hearing at his trial; (2) a rational jury could have found the evidence presented at trial sufficient to convict Hill of the charges brought against him; and (3) the prosecutorial conduct complained of was not sufficiently prejudicial to violate Hill's due process rights.

I. Summary of the Facts

Hill's conviction was affirmed by the Court of Criminal Appeals and his Application for Post-Conviction Relief was denied. *Hill v. State of Oklahoma*, No. F-90-1097 (Okla. Crim. filed Sept. 13, 1991) and Order Denying Application for Post-Conviction Relief, No.

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CRF 89-9, filed Jan. 1, 1992., respectively. Hill filed a second Application for Post-Conviction Relief but later withdrew it. Hill has nonetheless, exhausted his state remedies.

Testimony at the trial showed that on December 26, 1988, Creek County deputies and Sapulpa police officers executed a search warrant at a mobile home in Creek County. Knocking on the door of the mobile home, officers announced themselves and their intent to search the premises. After hearing sounds of people running inside the mobile home, the officers broke through the locked front door. Co-defendant Linda Matthews was detained by a deputy in the bathroom of the mobile home as she unsuccessfully tried to flush a plastic bag down the toilet.¹ Meanwhile, Hill, who was dressed only in jeans, was apprehended by Sgt. Wall as he hurriedly exited the rear of the mobile home.²

Evidence produced at trial revealed that the search of the mobile home uncovered a video camera and tripod; a camera bag containing a baggie of what was later analyzed to be amphetamine; a baggie of marijuana in an envelope with \$815 in cash; a baggie of amphetamine next to \$58 in cash; a set of Nexus scales; a wooden engraved bottle containing a formula for making methamphetamine; a coffee can containing several items of drug paraphernalia, including empty baggies, black plastic Deering scales, another small set of scales, a spoon, a set of pill containers, a small brass pipe; a tan purse with a small metal pipe, small baggies, a small pair of scissors; a loaded pistol; a loaded .357 magnum revolver and a loaded .38 caliber Smith and Wesson revolver.³

¹ Tests later revealed the contents of the bag to be methamphetamine. Trial Transcript, May 8, 1990, page 142.

² Id. at 115 - 116.

³ Id. at 62, 66 - 67, 74 - 78.

II. Opportunity for a Full and Fair Hearing

The question for purposes of habeas corpus review is whether the State of Oklahoma provided Hill with an opportunity for a full and fair litigation of his Fourth Amendment claim. The rule in these cases is that

"[w]here the State has provided an opportunity for full and fair litigation on a Fourth Amendment claim, a state prisoner may not be granted habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial." *Stone v. Powell*, 428 U.S. 465, 494, 96 S.Ct. 3037, 3052, 49 L.Ed.2d 1067, 1088 (1976) [Footnotes omitted].

The Supreme Court in *Stone* explained that this rule was necessary because

"Fourth Amendment violations are different in kind from denials of Fifth or Sixth Amendment rights in that claims of illegal search and seizure do not impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable; rather, the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers." *Stone v. Powell*, 428 U.S. 465, 479, 96 S.Ct. 3037, 3045, 49 L.Ed.2d 1067, 1088 (1976) citing to *Kaufman v. United States*, 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed.2d 227 (1969).

Prior to his trial, Hill filed a Motion to Suppress all the evidence obtained against him in the December 26, 1988, search. Hill claims police officers used a "general search warrant" when they seized the evidence. This, Hill asserts, violated the United States Constitution and Oklahoma law.⁴ Hill also claims the warrant was deficient because it lacked sufficient details to establish the confidential informant's reliability.⁵

⁴ *Transverse to Respondent's Response to Writ of Habeas Corpus, June 11, 1992, page 1; and Trial Transcript at 23 - 24, 110 - 113.*

⁵ *Id.* This claim is without merit since the task of the issuing magistrate is to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying the hearsay information, there is a fair probability that contraband or evidence of a crime will be found at a particular place. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Independent investigation by police and the subsequent corroboration of the informant's predictions suffices for the practical, common sense decision required by *Gates*. Probable cause does not require certainty of criminal activity, but only probability. *United States v. Rose*, 731 F.2d 1337, 1344 (8th Cir. 1984).

At the start of the trial, Hill asked the trial court to rule on his Motion to Suppress. The trial judge decided to hear the evidence before making his decision. At the conclusion of the State's evidence, Hill again asked for a ruling on the Motion to Suppress. After hearing arguments from Hill and the State, the trial judge ruled the warrant was not unconstitutionally general.⁶ As a result, the drug related evidence was admitted but the evidence of stolen property and firearms was suppressed because they were not listed on the search warrant.⁷

The Oklahoma Court of Criminal Appeals affirmed the trial court. The Appellate Court found that the weapons and the stolen property seized were outside the scope of the warrant and were properly excluded. They adduced that "the failure of the executing officers to obey the limits of the warrant does not render the warrant itself constitutionally insufficient. The jury was instructed to base their verdict on the properly admitted evidence only and there was no indication in the record that the jury was misled." *Hill v. State of Oklahoma*, No. F-90-1097 (Okla. Crim. filed Sept. 13, 1991).

Exactly what constitutes a full and fair opportunity to litigate has not been clearly defined. The Tenth Circuit has stated that an opportunity was full and fair "if the trial court considered the claims on a Motion to Suppress and a higher court considered the same on direct review." *Redford v. Smith*, 543 F.2d 726, 731 (10th Cir. 1976). Hill had the chance to argue his Motion to Suppress the evidence at trial as evidenced by the trial transcript. The Appellate Court then reviewed the Motion to Suppress and affirmed the

⁶ *Id.* at 113.

⁷ *Id.* at 113, 185.

trial court. Thus, Hill's Petition for a Writ of Habeas Corpus on the grounds of denial of a full and fair opportunity to litigate is without merit.

III. Insufficient Evidence

Hill's second claim is that the evidence produced by the State at trial was insufficient to convict him of possession of amphetamine, etc. In a habeas corpus proceeding, the question to be decided is,

"[W]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis added).

The issue then becomes whether under Oklahoma law, there was sufficient evidence to convict Hill of possession. To prove possession,

". . . [T]here must be other facts shown from which it can be fairly inferred that the defendant had dominion and control over the seized substance. Additional factors showing the accused's knowledge and control may consist of incriminating conduct by the defendant or any other circumstances from which possession may be fairly inferred." *Johnson v. State*, 764 P.2d 530, 532 (Okl.Cr. 1988).

At trial, the jury weighed several items of evidence. First, only Hill and Matthews were present in the mobile home when the police executed the search warrant. After police announced their intent to search the premises, Hill was caught trying to flee the mobile home through the rear door. Hill's desire to quickly escape is bolstered by the fact he did not take the extra time to put on any more clothes even though it was chilly December day.⁸ The police also had the mobile home under surveillance for the previous three

⁸ *Id.* at 116.

months and testified that Hill had been seen there several times before December 26, 1988.⁹

With the evidence presented, a reasonable jury could have found that Hill had dominion and control over the illegal substances. After examining all of the evidence presented in the light most favorable to the State, a rational jury could find that Hill had dominion and control of the illegal substances. This is particularly so given the volume of materials seized. Therefore, Hill's second claim for habeas relief based on insufficient evidence is without merit.

IV. Prosecutorial Misconduct

Hill's third habeas claim is that prosecutorial misconduct denied his right to a fair trial. When reviewing prosecutorial remarks, the relevant question for federal habeas review of a state court conviction

"[I]s whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) citing *Donnelly v. De Christoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

Hill cites five examples of misconduct:

- 1) **By introducing "recipes" for manufacturing methamphetamine found in the mobile home, the prosecution improperly introduced character evidence and evidence of other crimes;**
- 2) **During closing arguments, the prosecutor made misleading statements concerning the outcome of the co-defendant Matthew's case;**
- 3) **The prosecution misstated the fact that the co-defendant Matthews was behind Hill when he was running out the rear door of the mobile home;**

⁹ *Id.* at 40, 49 - 50.

4) The prosecution misstated that Hill lived in the mobile home when in fact Hill lived in Mounds, Oklahoma; and

5) The prosecution improperly commented on the dismissed charges of possession of firearms and stolen property during closing arguments.¹⁰

This Court will examine the first and fifth claims but finds no merit in claims two, three and four.¹¹

As regards the first contention of prosecutorial misconduct, the undersigned finds that the prosecution was not introducing evidence of prior crimes. A review of the record shows that no evidence was produced by either party indicating that Hill had ever been convicted of manufacturing illegal drugs. The prosecution was, in fact, introducing further evidence to support the possession of drug paraphernalia charge.¹² Furthermore, any inference that the jury could have made about the recipes being used for manufacturing was countered by the defense attorney's cross-examination of the chemist who examined the recipes.¹³ Consequently, the introduction of the recipes to support the possession of drug paraphernalia charge were not sufficiently prejudicial to violate Hill's due process rights.

¹⁰ Petition for a Writ of Habeas Corpus, No. 92-C-276-B, filed April 1, 1992, and Transverse to Respondent's Response to Writ of Habeas Corpus, filed June 11, 1992.

¹¹ *The second argument has no merit since any statements made about the co-defendant's case were not shown by Hill to have any bearing on the jury's decision in Hill's case. The third argument also has no merit since there is testimony in the trial transcript to the effect that Matthews was seen behind Hill as Hill exited the mobile home. Thus the prosecution was basing his closing argument on the evidence produced at trial. The fourth argument has no merit since there was nothing produced by Hill to establish his residence as being anything other than that of the mobile home. There is no reference in the record about Hill living in Mounds, Oklahoma. Thus, a reasonable inference could be made that Hill resided in the mobile home.*

¹² Trial Transcript at 58 - 59.

¹³ Id. at 148 - 152. *The chemist testified that there were no directions on the recipe on how to mix the chemicals or what to do in what order. Furthermore, the chemist testified that there were uses other than making methamphetamine for the chemicals described in the recipe.*

With regard to Hill's fifth contention of prosecutorial misconduct, the undersigned finds that the prosecution's comments about the dismissed possession of firearms and stolen property charges did not prejudice Hill's case.¹⁴ Though the comment was improperly made, the jurors were subsequently admonished by the court that they must rely on their own memory of the evidence admitted.¹⁵ Furthermore, before counsel began closing arguments, the trial court stated to the jury that they should rely on their memories as to the evidence presented and that closing arguments were not evidence.¹⁶ The firearms and stolen property were not admitted into evidence. Hill presents no evidence that the jury was either misled by the prosecutor's comment or based their decision on the excluded evidence. Thus, the prosecutor's comments were not prejudicial to Hill's due process rights.

Because Hill cannot show that any conduct on the behalf of the prosecutor so infected the trial with unfairness as to make his conviction a denial of due process, his third claim for habeas relief must also be denied.

V. Conclusion

Upon examination of the facts in the case at bar, this Court finds that: (1) Hill did, in fact, receive a full and fair hearing at his trial; (2) a rational jury could have found the evidence presented sufficient to convict Hill of the charges brought against him; and (3) the prosecutorial conduct complained of was not sufficiently prejudicial to violate Hill's due process rights.

¹⁴ *The prosecutor's comment made during closing arguments was as follows: "[W]e had evidence put on concerning a video camera, some guns, two loaded guns and a gun found under a couch, which was reported stolen, and the video camera. I was disappointed that the judge threw those charges out because it was outside the scope of the narcotics search warrant."* *Id.* at 194.

¹⁵ *Id.* at 197, 213.

¹⁶ *Id.* at 191.

SO ORDERED THIS 21st day of Sept., 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 9-23-92

Entered

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

FILED

SEP 22 1992

JIMMIE DEAN STOHLER,
Petitioner/Appellant,

vs.

STEVE HARGETT, Warden,
Respondent/Appellee.

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No. 90-C-600-E Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ORDER

The Court has for consideration the Motion for Reconsideration and Rehearing (docket #60) and the Motion for Reconsideration F.R.C.P. Rule 60(b)(2)(6) (docket #61) filed by the Petitioner herein. Because a timely resolution of the issues raised is essential for purposes of Petitioner's appeal to the Tenth Circuit, the Court will not elicit a response from the State on the motions. The Court has reviewed the motions and finds that of the evidence submitted and proffered only the Matlock affidavit qualifies for Rule 60(b)(2) consideration as newly discovered evidence which by due diligence could not have been discovered. The Matlock affidavit goes to the weight of the evidence and is insufficient to compel a finding that Petitioner's motions should be granted. The motions will be, accordingly, denied.

So ORDERED this 22^o day of September, 1992.


JAMES G. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

CLOSED

ENTERED ON DOCKET

DATE 9-23-92

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 LLOYD A. RICHARDS; BARBARA E.)
 RICHARDS; JOHN DOE, Tenant;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; and BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

SEP 22 1992

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

CIVIL ACTION NO. 92-C-262-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22nd day
of Sept, 1992. The Plaintiff appears by Tony M.
Graham, United States Attorney for the Northern District of
Oklahoma, through Peter Bernhardt, Assistant United States
Attorney; the Defendants, County Treasurer, Tulsa County,
Oklahoma, and Board of County Commissioners, Tulsa County,
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, John Doe,
Tenant, appears not, and should be dismissed from this action;
and the Defendants, Lloyd A. Richards and Barbara E. Richards,
appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendants, Lloyd A. Richards and
Barbara E. Richards, were served with Summons and Complaint on
June 22, 1992; that Defendant, County Treasurer, Tulsa County,
Oklahoma, acknowledged receipt of Summons and Complaint on April
1, 1992; and that Defendant, Board of County Commissioners, Tulsa

County, Oklahoma, acknowledged receipt of Summons and Complaint on April 1, 1992.

The Court further finds that Defendant, John Doe, Tenant, has not been served herein as such person does not exist, and should therefore be dismissed as a Defendant herein.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on April 21, 1992, disclaiming any right, title or interest in the subject real property; that the Defendants, Lloyd A. Richards and Barbara E. Richards, 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 Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Five (5), Block Four (4), HARVARD HILLS ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on March 3, 1989, the Defendants, Lloyd A. Richards and Barbara E. Richards, 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 \$20,700.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Lloyd A. Richards and Barbara E. Richards, 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 March 3, 1989, covering the above-described property. Said mortgage was recorded on March 9, 1989, in Book 5170, Page 2080, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Lloyd A. Richards and Barbara E. Richards, 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, Lloyd A. Richards and Barbara E. Richards, are indebted to the Plaintiff in the principal sum of \$20,468.84, plus interest at the rate of 10 percent per annum from March 1, 1991 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

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 Defendants, Lloyd A. Richards and Barbara E. Richards, in the principal sum of \$20,468.84, plus interest at the rate of 10 percent per annum from March 1, 1991 until judgment, plus interest thereafter at the current legal rate of 3.13% 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, John Doe, Tenant, and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title or interest in the subject real property, and the Defendant, John Doe, Tenant, is hereby dismissed as a Defendant herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Lloyd A. Richards and Barbara E. Richards, 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 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.

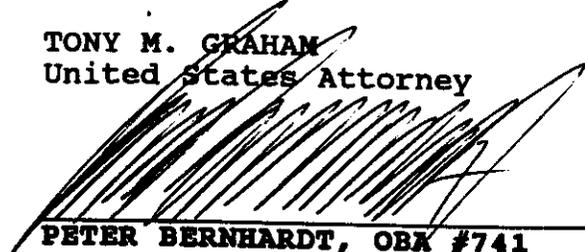
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

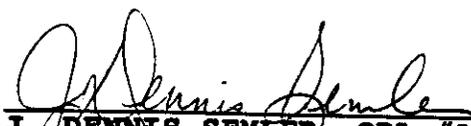
APPROVED:

TONY M. GRAHAM
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

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



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

Judgment of Foreclosure
Civil Action No. 92-C-262-E

PB/css

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

MUSEUM STEPS MUSIC, AGE TO AGE)
MUSIC, INC., EDWARD GRANT, INC.,)
YELLOW ELEPHANT MUSIC, REALSONGS,)
LEOSUN MUSIC, EMI APRIL MUSIC, INC.)
THRILLER MILLER MUSIC, UNCLE)
RONNIE'S MUSIC COMPANY, INC., MCA,)
INC., JOBETE MUSIC CO., INC.,)
BILLY STEINBERG MUSIC, DENISE BARRY)
MUSIC, ZAPPO MUSIC, BASICALLY GASP)
MUSIC, HIDEOUT RECORDS AND)
DISTRIBUTORS, INC., NEBRASKA MUSIC,)
CASS COUNTY MUSIC COMPANY, RED)
CLOUD MUSIC COMPANY, SHAPIRO,)
BERNSTEIN & CO., INC., MEADOWGREEN)
MUSIC COMPANY, BUG AND BEAR MUSIC,)
GRAND ILLUSION MUSIC AND HICKORY)
GROVE MUSIC,)

Plaintiffs,)

vs.)

LEEMAY BROADCASTING SERVICES, INC.,)
JACK D. LEE and ROBERT L. MAY,)

Defendants.)

NO. 92-C-610-B

FILED

SEP 23 1992
Richard M. Livingston, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

**ORDER OF DISMISSAL WITHOUT PREJUDICE
OF DEFENDANT ROBERT MAY ONLY**

The above-styled and numbered cause comes before the Court pursuant to the plaintiffs' Application for an Order dismissing defendant Robert L. May only without prejudice. Based upon the plaintiffs' Application, and for good cause shown, the Court finds that defendant Robert L. May should be, and hereby is, dismissed from this action without prejudice to the refiling of the same claims against him.

Further, this Dismissal Without Prejudice shall pertain to defendant Robert L. May only, and shall in no way prohibit plaintiffs from further pursuing this action against the remaining defendants, Leemay Broadcasting Services, Inc. and Jack D. Lee.

IT IS SO ORDERED this 21st day of September, 1992.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE SEP 23 1992

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

FILED
SEP 23 1992
Richard W. [unclear], Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DANNY L. WOLFE,

Plaintiff,

vs.

THE CITY OF TULSA, Officers
PERRY LEWIS, and ROBERT BISKUP,

Defendants.

Case No. 91-C-982-B

O R D E R

Before the Court for consideration is a Motion for Partial Dismissal filed on behalf of Defendants, Perry Lewis (hereinafter "Lewis"), Robert Biskup (hereinafter "Biskup") and the City of Tulsa (hereinafter "the City") pursuant to Fed.R.Civ.P.12 (b)(6).

Plaintiff, Danny L. Wolfe, filed this Title 42 U.S.C.A. §1983 action on December 23, 1991, along with pendant state claims, alleging that police officers, Lewis and Biskup, used unreasonable and excessive force in arresting Plaintiff; and that the defendant City failed to adequately discipline or train the involved police officers in addition to other alleged systemic deficiencies of the City. Plaintiff contends that such actions by the Defendants deprived him of his rights under the First, Fourth, Fifth and Fourteenth Amendments to the Constitution. Defendants now move to dismiss Plaintiff's claim under the First and Fifth Amendments as to all Defendants and to dismiss the claim under the Fourteenth Amendment as to Lewis and Biskup. Plaintiff has not responded to

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the Defendants' motion.¹

To dismiss a complaint and action for failure to state a claim upon which relief can be granted it must appear beyond doubt that 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).

Police Officers

The claims against Lewis and Biskup are based on the alleged use of unreasonable force during the arrest of Plaintiff. The Supreme Court has held that where there is a claim that law enforcement officials used unreasonable and excessive force in the

¹ Local Rule 15(A) provides:

Each motion ... shall set out the specific point or points upon which the motion is brought and shall be accompanied by a concise brief. Memoranda in opposition to such motion ... shall be filed within fifteen (15) days ... after the filing of the motion or objection. Failure to comply with this paragraph will constitute waiver of objection by the party not complying, and such failure to comply will constitute a confession of the matters raised by such pleadings.

Therefore, the Plaintiff has admitted all the matters raised by the Defendants in their motion to dismiss. The Court's ruling is based on this admission as well as on the merits of Defendants' argument.

course of an arrest, the claim is properly analyzed under the Fourth Amendment's "objective reasonableness" standard rather than under a general substantive due process standard. Graham v. Connor, 490 U.S. 386 (1989); Culver v. Town of Torrington, 930 F.2d 1456, 1460 (10th Cir. 1991). In Graham, the plaintiff filed a §1983 claim alleging unreasonable and excessive force in his arrest under the Fourth and Fourteenth Amendments. The Court found that he must utilize the Fourth Amendment in vindicating this alleged violation. Graham, 490 U.S. at 394. Applying this principle of law, it has also been recognized that the Fifth Amendment is inappropriate in this situation. Weimer v. Schraeder, 952 F.2d 336 (10th Cir. 1991).

Plaintiff also asserts a First Amendment violation against the police officers. The First Amendment provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for a redress of grievances.

The Court finds that Plaintiff has pled no facts which would state a claim for violation of his First Amendment rights.

The Court, therefore, concludes that Plaintiff has failed to state a claim upon which relief can be granted under the First, Fifth and Fourteenth Amendments as against Lewis and Biskup.

City of Tulsa

The claims against the City are based on an assortment of alleged deficiencies as to how the City handled the police

officers' alleged use of excessive and unreasonable force. Plaintiff bases his claims against the City, in part, on a violation of the First and Fifth Amendments.

The Court finds that Plaintiff has failed to allege facts sufficient to state a cause of action under the First Amendment as against the defendant City.

The Fifth Amendment forbids only the federal government from depriving any person of life, liberty or property without due process or law. Bloom v. Illinois, 391 U.S. 194 (1968). The Court finds that all Defendants to this lawsuit are part of state government, not federal government.

The Court, therefore, concludes that Plaintiff has failed to state facts sufficient to support a cause of action under the Fifth Amendment as against the defendant City.

For all of the reasons stated above, the Court concludes that the Plaintiff's claims based on the First, Fifth, and Fourteenth Amendments against Defendants, Lewis and Biskup, should be dismissed and the same is hereby GRANTED. The Court further concludes that Plaintiff's claims based on the First and Fifth Amendments against the Defendant, City of Tulsa, should be dismissed and the same is hereby GRANTED.

Therefore, the Plaintiff's only remaining §1983 claims are for violation of his fourth amendment rights (against all Defendants) and for violation of his fourteenth amendment rights (against the City). The Plaintiff's pendant state claim for assault and battery was not addressed or affected by the Defendants' motion.

IT IS SO ORDERED THIS 22nd DAY OF September, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

CLOSED

FILED

SEP 21 1992

RICHARD L. BRYANT
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

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

A. H. SLEMP and ALICE SLEMP,)
husband and wife,)
)
)
 Plaintiffs,)
)
)
 v.)
)
)
 ROBERT JOLLEY, d/b/a)
 F.C.S. FINANCIAL SERVICES,)
 LTD.)
)
 Defendant.)

No. 92-C-638-E

STIPULATION OF DISMISSAL

Plaintiffs, A. H. Slemp and Alice Slemp, and the Defendant, Robert Jolley, d/b/a F.C.S. Financial Services, Ltd., being all the parties to this action, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure hereby stipulate and agree to the dismissal of this action and all claims asserted herein, with prejudice to the refiling thereof.

Dated this 21st of September, 1992.

Respectfully submitted,

David L. Bryant

David L. Bryant, Esq. OBA #1262
GABLE & GOTWALS
2000 Fourth National Bank Bldg.
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Attorneys for Plaintiffs,
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Attorneys for Defendant,
Robert Jolley, d/b/a
F.C.S. Financial Services, Ltd.

ENTERED ON DOCKET

CLOSED

DATE 9-22-92

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

UNITED STATES OF AMERICA,)
)
 Plaintiff,)

SEP 21 1992

vs.)

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

CHARLES A. CORLETT; CYNTHIA)
 M. CORLETT; COUNTY TREASURER,)
 Washington County, Oklahoma;)
 and BOARD OF COUNTY)
 COMMISSIONERS, Washington)
 County, Oklahoma,)

Defendants.)

CIVIL ACTION NO. 92-C-677-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 21st day
of Sept., 1992. The Plaintiff appears by Tony M.
Graham, United States Attorney for the Northern District of
Oklahoma, through Kathleen Bliss Adams, Assistant United States
Attorney; and the Defendants, Charles A. Corlett, Cynthia M.
Corlett, and County Treasurer and Board of County Commissioners,
Washington County, Oklahoma, appear not, but make default.

The Court, being fully advised and having examined the
court file, finds that the Defendant, Charles A. Corlett,
acknowledged receipt of Summons and Complaint on August 3, 1992;
the Defendant, Cynthia M. Corlett acknowledged receipt of Summons
and Complaint on August 3, 1992; the Defendant, County Treasurer,
Washington County, Oklahoma, acknowledged receipt of Summons and
Complaint on August 6, 1992; and the Defendant, Board of County
Commissioners, Washington County, Oklahoma, acknowledged receipt
of Summons and Complaint on August 3, 1992.

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 Washington County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Six (6), Block Eleven (11), Madison Heights Fourth Addition, Washington County.

The Court further finds that on December 19, 1984, the Defendants, Charles A. Corlett and Cynthia M. Corlett, 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 \$68,500.00, payable in monthly installments, with interest thereon at the rate of 12.5 percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Charles A. Corlett and Cynthia M. Corlett, 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 December 19, 1984, covering the above-described property. Said mortgage was recorded on December 19, 1984, in Book 827, Page 220, in the records of Washington County, Oklahoma.

The Court further finds that the Defendants, Charles A. Corlett and Cynthia M. Corlett, 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, Charles A. Corlett and Cynthia M. Corlett, are indebted to the Plaintiff in the principal sum of \$64,560.42, plus interest at the rate of 12.50 percent per annum from October 1, 1991 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$8.00 for recording the Notice of Lis Pendens.

The Court further finds that the Defendants, Charles A. Corlett, Cynthia M. Corlett, and County Treasurer and Board of County Commissioners, Washington 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, Charles A. Corlett and Cynthia M. Corlett, in the principal sum of \$64,560.42, plus interest at the rate of 12.50 percent per annum from October 1, 1991 until judgment, plus interest thereafter at the current legal rate of 3.43 percent per annum until paid, plus the costs of this action in the amount of \$8.00 for recording the 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, Charles A. Corlett, Cynthia M. Corlett, and County Treasurer and Board of County Commissioners, Washington 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, Charles A. Corlett and Cynthia M. Corlett, 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 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



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

Judgment of Foreclosure
Civil Action No. 92-C-677-E

KBA/esr

FILED ON DOCKET

DATE 9-22-92

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

FILED

SEP 21 1992

Richard [unclear] Clerk
U.S. DISTRICT COURT

VARRY WHITE MUSIC, HOWLIN' HITS)
MUSIC, INC., MAJOR BOB MUSIC, BAIT)
AND BEER MUSIC, FORERUNNER MUSIC,)
INC., and KAL MANN,)

Plaintiffs,)

vs.)

NO. 92-C-31-E

BRIAN K. MARTINDALE and)
JUNIOR F. MARTINDALE,)

Defendants.)

J U D G M E N T

This matter comes before the Court pursuant to the plaintiffs' Application for Entry of Judgment by Default Against Defendant, Junior F. Martindale. The files and records in this case show that the First Amended Complaint was filed on February 6, 1992; that the Summons and First Amended Complaint were duly served upon defendant Junior F. Martindale by personal service on March 12, 1992, as shown by the Return of Service now on file in the office of the Clerk; that no answer or other responsive pleading or appearance has ever been filed by this defendant; that the time for filing an answer has elapsed and has not been further extended; and that the defendant is not an infant or incompetent person. The Court therefore finds that the plaintiffs are entitled to judgment by default against defendant Junior F. Martindale as requested.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. Judgment is hereby rendered in favor of the plaintiffs Varry White Music, et al., and against the defendant, Junior F. Martindale; and

2. The defendant and all persons, companies and corporations acting under his direction, control, permission or license, are hereby permanently enjoined from publicly performing any and all of the plaintiffs' copyrighted musical compositions and all such copyrighted music in the repertory of the American Society of Composers, Authors and Publishers (ASCAP) and from causing or permitting these compositions to be publicly performed in the defendant's premises or in any place owned, controlled or conducted by defendant, and from aiding or abetting the public performance of any such compositions from any location; and

3. The defendant shall pay to plaintiffs damages of Two Thousand Five Hundred and No/100 Dollars (\$2,500.00) for each of the four (4) causes of action and for investigation costs in the sum of Three Hundred Fifty-two and 08/100 Dollars (\$352.08), for a total judgment of Ten Thousand Three Hundred Fifty-two and 08/100 Dollars (\$10,352.08); and

4. Pursuant to 17 U.S.C. §505, the Court further finds that the plaintiffs are entitled to recover their costs, including a reasonable attorney's fee, in addition to those amounts set forth above. Plaintiffs' counsel are directed to submit a Bill of Costs and an Application for Attorney's Fees within fifteen (15) days after the entry of this judgment in compliance with Local Court Rules 6(E) and (G).

IT IS SO ORDERED this 21st day of September, 1992.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

DATE SEP 21 1992
CLOSED

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

FILED
SEP 14 1992

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

SAM RAMSEY and JERRY RAMSEY,
Plaintiffs,
v.
GUARDSMARK, INC.,
Defendant.

No. 92-C-085-B

J U D G M E N T

In keeping with the Order Sustaining Defendant Guardsmark, Inc.'s Motion for Summary Judgment this date, Judgment is hereby entered in favor of Guardsmark, Inc. and against the Plaintiffs, Sam Ramsey and Jerry Ramsey, and their action is hereby dismissed. Costs are assessed against the Plaintiffs if timely applied for pursuant to Local Rule 6. Each party is to pay their own respective attorney fees.

DATED this 18th day of September, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Entered
DATE ~~SEP 21 1992~~

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

CRAWFORD ENTERPRISES)
MANUFACTURING, INC.,)
)
Plaintiff,)
)
vs.)
)
RYDER/P-I-E NATIONWIDE,)
INC.,)
)
Defendant.)
)
and)
)
GRANITE STATE INSURANCE)
COMPANY (6182 3551) and)
CHICAGO INSURANCE COMPANY)
(283 155531))
)
Garnishees.)

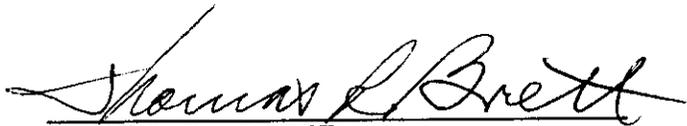
No. 84-C-395-B ✓

FILED
SEP 18 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

J U D G M E N T

In accord with the Order entered September 18th, 1992, directing that Judgment should be entered in favor of Granite State Insurance Company, Garnishee, and against Crawford Enterprises Manufacturing, Inc., Plaintiff, Judgment is hereby entered in favor of Granite State Insurance Company, Garnishee, and against Crawford Enterprises Manufacturing, Inc., Plaintiff, on all claims. Costs are awarded to Granite State Insurance Company, Garnishee, if timely applied for under Local Rule 6. The parties are to pay their own respective attorneys fees.

DATED this 18th day of September, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

222

FILED
SEP 13 1992
Edward J. ...
U.S. ...
Tulsa, Oklahoma

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

PRUDENTIAL SECURITIES, Inc.,)
Plaintiff)
vs.)
DORIS L. SNOW,)
Defendant)

Case No. 92-C-663-E

NOTICE OF DISMISSAL

The Plaintiff, Prudent Securities, Inc., pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure hereby dismisses the action set forth in its Complaint filed herein.

Patrick O. Waddel

Patrick O. Waddel, OBA #9254
Patricia Ledvina Himes, OBA #5331
GABLE & GOTWALS, INC.
2000 Fourth National Bank Building
15 W. 6th Street
Tulsa, Oklahoma 74119
(918) 582-9201

ATTORNEYS FOR PLAINTIFF

Of Counsel:

William A. Healy, Esq.
Prudential Securities, Inc.
127 John Street
New York, New York 10292 35

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 1992, a true and correct copy of the above and foregoing instrument was mailed to William C. Chevallier, Esq., Mysock & Chevallier, 2021 S. Lewis, Station 700, Tulsa, Oklahoma 74101.

Patrick O. Waddel

Patrick O. Waddel

DATE SEP 21 1992

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

ATLANTIC RICHFIELD COMPANY,)
)
 Plaintiff,)
)
 v.)
)
 AMERICAN AIRLINES, INC., Et. Al.,)
)
 Defendants.)

Consolidated Cases Nos.
89-C-868-B
89-C-869-B
90-C-859-B

NOTICE OF DISMISSAL WITHOUT PREJUDICE

Now on this 17th day of September, 1992, all parties hereto please take notice that pursuant to Rule 41 (a) of the Federal Rules of Civil Procedure and Section V. of the Case Management Order the Plaintiff hereby dismisses without prejudice this action against the following Defendants only, and expressly reserves its causes of action against all other Defendants, not heretofore dismissed from this action:

- 1. Frank Davis
- 2. Charlene Ready
- 3. Samuel Ready
- 4. Doris Rudder
- 5. Dan Rudder Motor Company

Gary A. Eaton, OBA #2598
Attorney at Law
1717 East 15th St.
Tulsa, OK 74104
918 743 8781

CERTIFICATE OF MAILING

The undersigned certifies that on September 17, 1992, a true and correct copy of the above instrument / pleading was mailed with postage prepaid to the following persons:

Mr. Larry Gutteridge, Co-Counsel for Plaintiff, 633 West 5th Street, 35th Floor, Los Angeles, California 90071

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

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

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

Mr. Charles Shipley, Attorney at Law and Settlement Coordinator, 3600 First National Tower, Tulsa, OK 74103

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

Name

ENTERED ON DOCKET
DATE SEP 21 1992

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

FILED
SEP 21 1992
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY,)
)
Plaintiff,)
vs.)
AMERICAN AIRLINES, INC., et al.,)
)
Defendants.)

Case Nos. 89-C-868 B;
89-C-869 B;
90-C-859 B
(Consolidated)

AND CONSOLIDATED ACTIONS

AMERICAN AIRLINES, INC., et al.)
)
Third-Party Plaintiffs,)
vs.)
AMF; et al.)
)
Third-Party Defendants.)

NOTICE OF DISMISSAL

The Group I Defendants/Third-Party Plaintiffs American Airlines, Inc., et al., pursuant to and in accordance with Fed. R. Civ. P. 41(a)(1), hereby dismiss their Third-Party Complaint, without prejudice, against each of the Third-Party Defendants listed below:

1. Burgraff Service Tires, Inc.
2. Custom Airmotive, Inc.
3. Hood's Sunoco
4. Success Motor Company, Inc.
5. Western Oil and Gas Development, Inc.

45

CHARLES W. SHIPLEY, OBA No. 8182
DOUGLAS L. INHOFE, OBA No. 4550
MARK B. JENNINGS, OBA No. 10082
MARK A. WALLER, OBA No. 14831

SHIPLEY, INHOFE & STRECKER
3600 First National Tower
15 East Fifth Street
Tulsa, Oklahoma 74103
(918) 582-1720

By Mark Jennings
Mark B. Jennings

Attorneys for Third-Party
Plaintiffs (GROUP 1)

CERTIFICATE OF MAILING

I do hereby certify that on the 18 day of September, 1992, I deposited the above and foregoing instrument in the United States mail, first class, postage pre-paid to the following:

Professor Martin A. Frey
Tulsa University College of Law
3120 E. 4th Place
Tulsa, Oklahoma 74104

Larry G. Gutteridge, Esq.
Sidley & Austin
633 W. 5th Street, Suite 3500
Los Angeles, CA 90071

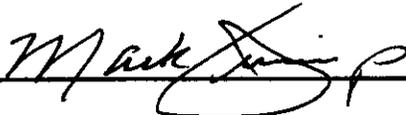
Michael D. Graves, Esq.
Hall, Estill, Hardwick, Gable, Golden & Nelson
4100 Bank of Oklahoma Tower
Tulsa, Oklahoma 74172

William C. Anderson, Esq.
Doerner, Stuart, Saunders, Daniel & Anderson
320 South Boston, Suite 500
Tulsa, Oklahoma 74103

Steve Harris, Esq.
Doyle & Harris
P. O. Box 1679
Tulsa, Oklahoma 74101

John H. Tucker, Esq.
Rhodes, Hieronymus, Jones, Tucker & Gable
2800 Fourth National Bank Building
Tulsa, Oklahoma 74119

Bradley Bridgewater, Esq.
U. S. DOJ-Environmental &
Natural Resources Division
999 18th Street, Suite 501
North Tower
Denver, Colorado 80202



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

FILED
SEP 21 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

SAM RAMSEY and JERRY RAMSEY,)
)
 Plaintiffs,)
)
 v.)
)
 GUARDSMARK, INC.,)
)
 Defendant.)

No. 92-C-085-B

ORDER SUSTAINING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court for decision and at issue in this diversity action is Defendant's motion for summary judgment pursuant to Fed.R.Civ.P. 56. The Court concludes that no issue of material fact remains and Defendant, Guardsmark, Inc. ("Guardsmark"), is entitled to summary judgment for the reasons hereafter stated.

The Plaintiffs have commenced this action for alleged malicious interference with contract relations under Oklahoma law. The undisputed material facts are as follows:

The Plaintiffs became employed by Guardsmark following background checks, selection and training and were assigned to work as security officers at the Amoco Production Company ("Amoco") facility in Tulsa, Oklahoma. The Plaintiffs signed written agreements in which they agreed not to work in security at the specific Amoco facility for a period of twelve months following their termination of employment with Guardsmark. (Defendant's Exhibits 1 and 2).¹

¹Plaintiff, Jerry Ramsey, signed Defendant's Exhibit No. 2 upon application and commencement of his employment on September 13, 1989. Plaintiff, Sam Ramsey, commenced work in 1986, and was requested to sign such an agreement but refused at that time and

The relevant noncompete provision of Defendant's Exhibits 1 and 2 is found in paragraph 7(a) and states as follows:

"7. (a) Employee hereby agrees that following the termination of employment with GUARDSMARK, whether voluntarily or involuntarily, for a period of one year thereafter he or she will not perform or hire others to perform any security services at the site, place or location where he or she performed security services within the immediate preceding twelve (12) months of his or her employment with GUARDSMARK."²

In February 1990, Guardsmark lost its independent contract to provide security services to the Amoco facility in Tulsa, Oklahoma, and another company, Burns International Security Services, Inc. ("Burns"), was awarded the contract with Amoco to provide such security service, effective February 15, 1990. Previous to the February 15, 1990 transition, Guardsmark notified Burns of the covenants signed by Guardsmark security officers, including the

then three years later was advised if he desired to continue employment with Guardsmark, Inc., at the Amoco facility he would have to sign Defendant's Exhibit 1, and did so on April 5, 1989, to continue his employment. (Defendant's Exhibit C, pp. 15-16).

²Paragraph 7.(b) states the following:

"(b) Employee hereby agrees that following the termination of employment with GUARDSMARK, whether voluntarily or involuntarily, for a period of one year thereafter he or she will not accept employment with or become employed by, or perform any service as an independent contractor for, a client of GUARDSMARK for whom the employee has provided his or her service as an employee of GUARDSMARK."

Herein, the operative provision is 7. (a) because the only security employment of Plaintiffs, through their employment with Guardsmark, was at the Amoco Tulsa, Oklahoma facility.

Plaintiffs, and asked for assurances that the covenants would be honored. (Defendant's Exhibit 3).

In its letter contract with Guardsmark, Amoco agreed as follows:

"Client acknowledges the costs incurred by GUARDSMARK in selection and training of security personnel, and agrees that during the term of this Agreement, and for the period of one full year thereafter: (a) it will not hire for its own employment any persons employed by GUARDSMARK in the performance of this contract; and (b) it will prohibit the use of any such persons by any other guard company at any of Client's locations serviced by GUARDSMARK in the performance of this contract. It is further agreed that Client shall pay to GUARDSMARK, as liquidated damages, the sum of \$750 for each person so employed in violation of the provisions of this paragraph." (Defendant's Exhibit 4).

Previous to February 15, 1990, Guardsmark notified Amoco of the restrictive covenant signed by each security officer, including Plaintiffs, and also reminded Amoco of the contractual provision prohibiting the utilization of former Guardsmark security officers at the Tulsa facility. (Defendant's Exhibit 5).

Amoco agreed to abide by its contract and informed Burns not to place former Guardsmark security officers, including Plaintiffs, at the Tulsa facility. (Defendant's Exhibit 6). Initially, Burns considered hiring Plaintiffs in spite of Guardsmark's contract and warnings but then concluded to the contrary after internal discussions and discussions with Amoco, concluding that litigation might result. (Plaintiff's Exhibits C and E).

Plaintiff, Sam Ramsey, asked Guardsmark if there were any other positions with Guardsmark to which he could be transferred.

Sam Ramsey was told that there were no other positions available with Guardsmark at the time and Guardsmark refused to release Sam Ramsey from the restrictive covenant. (Plaintiff's Exhibit C, Ramsey Deposition, p. 9).

John Sharp, an official of Burns, at relevant times herein, testified there is considerable competition between security companies and large accounts such as Amoco frequently move from one contract security company to another. (Plaintiffs' Exhibit B at 7). He also testified in acquiring independent contract security services such as this major account with Amoco, low bid price is not the only consideration, that quality of service is also a significant factor. He further testified that in a job this size there is substantial expense in recruitment, background investigations, training, both in-house and forty hours of unreimbursed on-the-job training. (Plaintiffs' Exhibit B, p. 38). It would have been in Burns' best interest to hire the Guardsmark incumbent security personnel. (Plaintiffs' Exhibit B at 31). Had Burns been permitted to employ Guardsmark personnel who had been on the job previously at Amoco, Burns ". . . would have been able to avoid the massive cost and expense associated with the extensive training." Both Amoco and Burns were interested in retaining most of the Guardsmark security employees that had worked at Amoco in Tulsa because they were quality employees. (Plaintiffs' Exhibit B at 9).

The Plaintiffs were free to go to work during the first year after their employment with Guardsmark with any security company or

on their own as a security officer any place other than at Amoco. Plaintiffs were free to work for Burns as security employees at any place other than at Amoco.

Plaintiffs' employment with Guardsmark terminated on February 15, 1990, and they did not become employed by Burns at the Amoco facility in Tulsa.

The Standard of Fed.R.Civ.P. 56
Motion for Summary Judgment

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, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 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 evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can

demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

A recent Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

"Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . . .

"A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

Legal Authority and Analysis:

Three elements are necessary to support a cause of action for the tort of malicious interference with a contract relation, which are: (1) the Plaintiffs had a business or contractual right that was interfered with; (2) the interference was malicious and wrongful, and not justified, privileged or excusable; and (3) the Plaintiffs sustained damage proximately caused by the interference. Mac Adjustment, Inc. v. Property Loss Research Bureau, 595 P.2d

427, 428 (Okla. 1979).

Clearly, the undisputed material facts establish that the Plaintiffs had a contractual right with which the Defendant interfered. The issue here is whether the interference was malicious and wrongful or whether the interference was justified, privileged or excusable. As was stated in Overbeck v. Quaker Life Insurance Company, 757 P.2d 846, 848 (Okla. Ct. App. 1984), quoting National Life and Accident Insurance Co. v. Wallace, 162 Okla. 174, 21 P.2d 492, 494 (1933), and Schonwald v. Ragains, 32 Okla. 223, 122 P. 203 (1912):

"It is not unlawful for one, by fair means and lawful argument or persuasion to interfere with the contractual relations of another, and without doubt one person has the legal right to persuade another . . . to quit trading with another, provided always such persuasion and argument is fair, . . . and is made with the honest intent and purpose of fairly bettering one's own business, trade, or employment, and not for the primary object of wrongfully destroying honest competition, or wrongfully injuring one's competitor."

Both Plaintiffs and Defendant recognize that under Oklahoma law reasonable restraints on the exercise of a lawful profession, trade or business do not violate Okla. Stat. tit. 15, § 217. Crown Paint Co. v. Bankston, 640 P.2d 948, 952 (Okla. 1981), *cert. denied*, 455 U.S. 946, 102 S.Ct. 1444, 71 L.Ed.2d 659 (1982), and Board of Regents v. Nat'l Collegiate Athletic Ass'n (NCAA), 561 P.2d 499, 508, 85 A.L.R.3d 953, 967 (Okla. 1977). A restraint of trade may be characterized as lawful under Okla. Stat. tit. 15, § 217 if there are reasonable limitations concerning the activities as to

time and geographical limitations. Bayly, Martin & Fay, Inc. v. Pickard, 780 P.2d 1168, 1173 (Okla. 1989).³

The record reveals there is considerable competition between independent security firms for major accounts, such as Amoco, and that an employer incurs considerable expense in staffing due to employee background checks, orientation and training. Guardsmark furnished top quality people a competitor would be interested in retaining for good will purposes and to forego the expense of background checks and training. (Plaintiffs' Exhibit B, pp. 9, 10 and 31; Plaintiffs' Exhibit C, p. 18).

A restraint is deemed reasonable only if it (1) is not greater than required for the employer's protection, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public. Bayly, Martin & Fay, Inc. v. Pickard, *supra* (Hodges, J., dissenting, p. 1176), Central Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 37 (Tenn. 1984), Ehlers v. Iowa Warehouse Company, 188 N.W.2d 368, 370-374 (Iowa 1971), *opinion modified by* 190 N.W.2d 413 (Iowa 1971). A court must balance these competing interests to determine the reasonableness of the noncompete restraint. The inquiry for analyzing the restraint's reasonableness generally

³An overly broad restrictive covenant is subject to judicial modification and enforcement, if the court would not have to rewrite the contract and provide essential elements of the agreement. Bayly, Martin & Fay, Inc. v. Pickard, *supra*, and 14 Williston on Contracts, § 1647B, n. 4 at 285, Solari Industries, Inc. v. Malady, 55 N.J. 571, 264 A.2d 53, 56 (1970), Smith, Batchelder & Rugg v. Foster, 119 N.H. 679, 406 A.2d 1310, 1313 (1979), and Fullerton Lumber Co. v. Torborg, 270 Wis. 133, 70 N.W.2d 585, 592 (1955).

focuses on three factors: the types of activities embraced, the geographical area and the span of time. Bayly, Martin & Fay, Inc. v. Pickard, *supra* (Hodges, J., dissenting, p. 1176), Piercing Pagoda, Inc. v. Hoffner, 465 Pa. 500, 351 A.2d 207, 212 (1976), Raimonde v. Van Vlerah, 42 Ohio St.2d 21, 325 N.E.2d 544, 546-547 (1975), Westec Sec. Services, Inc. v. Westinghouse Elec. Corp., 538 F.Supp. 108, 122-123 (E.D.Penn. 1982), 14 Williston, Contracts, § 1647B at 286-288 (1972), and Restatement (Second) of Contracts § 188, Comment b.

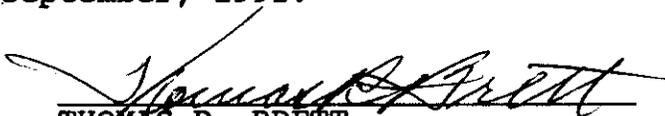
The subject paragraph 7.(a) restrains the Plaintiffs from working at the Tulsa, Oklahoma Amoco facility for a period of one year. Guardsmark has a legitimate business interest in preventing competing firms from acquiring its employees to continue at a particular location, thus avoiding the expenditure required in background checks, orientation and training. Thus, the restraint is no greater than is required for Guardsmark's protection. While the restraint imposes a hardship on the employee in continuing to work at the Amoco Tulsa, Oklahoma facility, the employee is free to work for any other security company or at any other place in security work at any other location. Such should not be considered an undue hardship as a matter of law. For the same reasons, the restraint would not be considered in violation of public policy because of its narrow limits applying for one year only at the Amoco Tulsa, Oklahoma facility.

It is thus concluded as a matter of law that Defendant's good faith interference with the Plaintiffs' rights of employment could

be characterized as justified and excusable and was not malicious and wrongful. The undisputed material facts herein reveal that Plaintiffs are unable to create an issue of fact regarding the alleged tort of malicious interference with contractual relationships.

IT IS THEREFORE ORDERED Defendant's Motion for Summary Judgment Pursuant to Fed.R.Civ.P. 56 is hereby SUSTAINED.

DATED this 18th day of September, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE ~~SEP 21 1992~~

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

FILED

SEP 18 1992

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

MARION PARKER,)
)
 Plaintiff,)
)
 vs.)
)
 BANCOKLAHOMA MORTG. CO.,)
 et al.,)
)
 Defendant.)

Case No. 92-C-664-B

**DISMISSAL OF COMPLAINT AS AGAINST
DEFENDANT, FIRST MORTGAGE CO.**

On this 18th day of September, 1992, pursuant to the joint application of Plaintiff and Defendant, First Mortgage Co., and for good cause shown, this Court grants the Plaintiff's application to dismiss as to Defendant, First Mortgage Co.

8/ THOMAS R. BRETT

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
SEP 18 1992
DATE _____

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

CLOSED

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

Plaintiff,

vs.

BILL'S RENT-A-CAR, INC.
a Kentucky corporation, and
WILLIAM W. MINGEY,
an individual

Defendants.

No. 91-C-845-B

FILED

SEP 18 1992

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

J U D G M E N T

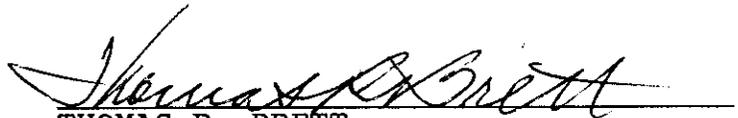
In accordance with the Order filed herein on September 15, *ML* 1992, granting Plaintiff's Motion for Summary Judgment, judgment is hereby entered in favor of Plaintiff, Thrifty Rent-a-Car System, Inc. and against Defendant, William W. Mingey in the amount of \$61,980.77, as due and owing under the License Agreement, and in the amount of \$200,651.79, as due under the Lease Agreement. Of that amount, Plaintiff, Thrifty Rent-a-Car System, Inc., is entitled to judgment as a matter of law against the Defendant, Bill's Rent-a-Car, Inc., in the amount of \$200,651.79. The Court also awards pre-judgment interest on all amounts at the rate of 6% per annum from May 15, 1991, plus post-judgment interest calculated upon all amounts, which includes the amount of verdict and the pre-judgment interest, at the rate of 3.41% per annum.

23-1

Judgment is also hereby entered in favor of Plaintiff, Thrifty Rent-a-Car System, Inc., and against Defendants, Bill's Rent-a-Car, Inc. and William Mingey, on Defendants' counterclaim.

Costs and attorney fees are awarded Plaintiff if timely applied for under Local Rule 6.

DATED this 15th day of September, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE **SEP 18 1992**

FILED
CLOSED
SEP 17 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

IN RE: BENJAMIN FRANKLIN STEGALL,)
)
 Plaintiff,)
)
 v.)
)
 JOSEPH Q. ADAMS, TRUSTEE,)
)
 Defendant.)

Case No. 92-C-246-B

ORDER

Now before this Court is Debtor Benjamin Stegall's appeal of a bankruptcy court decision. The Bankruptcy Court denied Stegall's motion to convert from a Chapter 7 proceeding to a Chapter 11 bankruptcy. The only issue on appeal is whether a debtor such as Stegall has an absolute right to convert to Chapter 11 under 11 U.S.C. §706(a). For the reasons discussed below, this Court finds the debtor has that right.

I. Summary of Facts

On April 3, 1990, Stegall filed bankruptcy under Chapter 7. For the next 20 months, the record shows -- and the Bankruptcy Court explained in a 20-page summary of the facts -- that Stegall's conduct hampered the Trustee's administration of the bankruptcy estate. *Order Denying Debtor's Motion For New Trial, March 13, 1992 (Bankruptcy docket #217).*

Stegall's answer and deposition reflect that he transferred substantial real property to family members without receiving anything reasonably equivalent in return. These

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Cl Bky & Trustee

transfers were further complicated because the facts concerning the transfers did not surface until after an investigation by the Trustee. *Id.* The Bankruptcy Court did not find Stegall's conduct to be in bad faith, but it did list several examples of how Stegall and/or his attorney delayed and/or hampered the process. *Id.*¹

Subsequently, on December 9, 1991, Stegall filed a Notice of Conversion to Chapter 13. That was later changed to a Notice of Conversion to Chapter 11. After a hearing, the Bankruptcy Court denied the Motion To Convert on January 7, 1992. Stegall filed a Motion For A New Trial. The Bankruptcy Court denied that on March 13, 1992 in a 26-page Order setting forth numerous findings of fact and conclusions of law.

II. Does Stegall Have An Absolute Right To Convert Under 11 U.S.C. §706(a)?

Stegall's argues that §706(a) gives him the absolute right to convert to a Chapter 11. §706(a) states:

The debtor may convert a case under this chapter to a case under Chapter 11,12, or 13 of this title at any time, if the case has not been converted under section 1112, 1307, or 1208 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.² (Emphasis supplied.)

Stegall's case has not been converted before, and, therefore, the only question is whether the Bankruptcy Court could prevent him from converting his case. The Bankruptcy Court denied the motion to convert because it felt such a conversion would be "useless at best and harmful at worst." *Order at 25*. Part of its reasoning is below:

Debtor's attorney urges the Court to "Give the man a chance." Debtor has already had any number of chances. He had a chance to file under Ch. 11

¹ *The Bankruptcy Court also noted that some 200 entries had been made on the docket sheet in this case.*

² *§§1112, 1208 and 1307 explain the circumstances where a case can be converted to Chapter 7.*

in the first place, before leading his creditors and the Chapter 7 Trustee through more than a year and a half of litigation, effort and expense. He had a chance to refrain from making fraudulent transfers. He had a chance to help, or at least not hinder, the Trustee's efforts to undo these transfers; but instead he and his attorney have acted the part of allies of the fraudulent transferee. He had a chance to assist the Trustee's management of estate property; instead he antagonized a creditor's attorney. He tried to dismiss his own case, failed, then tried to convert to a Chapter for which was not even eligible, failed, and now turns to Chapter 11 merely as the very last resort for himself. Under such circumstances, debtor's plea for "a chance" rings false. *Order at 21-22.*³

In making its decision, the Bankruptcy Court used one of its earlier decisions as precedent. In *Re Spencer*, 137 B.R. 506, 513 (Bankr. N.D. Okla. 1992). The rule crafted in *In Re Spencer* was that "706(a) permits debtor to convert...only if the case has not previously been converted from another chapter, and in the absence of extreme circumstances, amounting to bad faith, imposition on the Court's jurisdiction, abuse of process, or other gross inequity."

In the instant case, the Bankruptcy Court discussed how Stegall had abused the process. But, as mentioned, the Court made no specific finding of "bad faith" or "extreme circumstances." In addition, a recent Tenth Circuit decision does not appear to support the Bankruptcy Court's conclusions that it has discretion to prevent a debtor from converting a Chapter 7 to Chapter 11. *See In Re Calder*, 1992 WL 202639 (10th Cir. August 25, 1992).

In Re Calder involves different issues and facts. However, the Court clearly stated: "We agree with Calder's [debtor's] statement that the Bankruptcy Rules cannot override the

³ The Bankruptcy Court wrote that the question is "whether this Court should allow a debtor, who cannot be left as debtor-in-possession, to convert to Ch[apter] 11 anyway, in order to make a futile attempt at a 'reorganization' whose infeasibility is shown by debtor's own statements and schedules and whose only feasible elements have already been accomplished in this Ch[apter] 7. The question answers itself." *Order at 25.*

statement may be dicta. However, this Court places significance on the fact that the underlying bankruptcy case expressly dealt with the issue of whether §706(A) gives a debtor an absolute right to convert. *See In Re Calder*, 93 B.R. 739 (Bankr. D. Utah 1988), rev'd *Calder v. Segal*, Civ. No. C-89-59-W (D. Utah Nov.14, 1989).⁴ It also should be noted that the Tenth Circuit decision mentions no exceptions or circumstance that would prevent a debtor from converting to Chapter 11.

This Court also finds a Fifth Circuit case as persuasive. Matter of Martín, 880 F.2d 857, 859 (5th Cir. 1989).

In that case, the appellate court concluded that a debtor's right to convert from Chapter 7 to Chapter 13 was absolute. The Fifth Circuit pointed to the legislative history of §706(a):

Subsection (a) of this section gives the debtor one absolute right of conversion of liquidation to a reorganization or individual repayment plan case. If the case has already once been converted from chapter 11 to chapter 13 to chapter 7, then the debtor does not have that right. The policy of the provision is that the debtor should always be given the opportunity to repay his debts. *Id.*, quoting S.Rep. No. 989, 95th Cong., 2d Sess. 380, reprinted in 1978 U.S. Code Cong. & Admin.News 5787, 5880.

It then concluded:

The legislative history of this section makes clear that Congress intended to encourage such conversions and to give the debtor an absolute one-time right to convert...Further, the legislative history contains no contrary language indicating that Congress sought to restrict a debtor's right to convert or to discourage conversion.*Id.* at 859.

⁴ *The Bankruptcy Court interpreted 11 U.S.C. §105(a) as giving it the power to deny a motion to convert. In Re Calder*, 93 B.R. at 740. Such is the argument advanced here; and, as in *Calder*, the argument is without merit, especially in light of the Tenth Circuit decision discussed above.

In *Matter of Kleber*, 81 B.R. 726, 727 (Bankr. N.D.Ga. 1987), similar circumstances existed. The Chapter 7 trustee argued that the debtor should not be able to convert to a Chapter 11 because the debtor had made fraudulent representations on his schedule and statements, and because Debtor had no business to reorganize. The court, however, found that it had no discretion in determining whether a debtor should be able to convert from a Chapter 7 to a Chapter 11. *Id.*

In this case, this Court understands the dilemma faced by the Bankruptcy Court in allowing Stegall to convert to Chapter 11. However, several factors support the proposition that Stegall should be allowed to convert: (1) the language of §706(a); (2) the authority cited above; and (3) In the absence of a finding by the Bankruptcy Court of bad faith on the part of Stegall, this Court concludes that extreme circumstances do not exist sufficient to deviate from §706(a). Therefore, for the above reasons, the Bankruptcy Court decision is **REVERSED and REMANDED**.

DATED this 17 day of Sept, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE SEP 18 1992

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

NATALIE JOHNSON, a minor who)
sues by and through Fred and)
Jennifer Johnson, her father)
and mother as next of friends,)

Plaintiff,)

vs.)

No. 92-C-238-E ✓

INDEPENDENT SCHOOL DISTRICT)
NO. 4 OF BIXBY, TULSA COUNTY,)
OKLAHOMA; OKLAHOMA STATE)
DEPARTMENT OF EDUCATION,)

Defendants.)

FILED

SEP 16 1992 *[Signature]*

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

ORDER AND JUDGMENT

Comes now before the Court for its consideration Defendant State Department of Education's ("Defendant") Motion to Dismiss Plaintiff's Complaint. After review of the pleadings and for good cause shown, the Court finds Defendant's motion should be granted.

The Court's ruling is based on the merits of the case and Plaintiff's failure to respond to said motion.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss Plaintiff's Complaint is hereby granted.

ORDERED this 15th day of September, 1992.

[Signature]
JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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Defendants' position regarding premium payment, policy lapse and exhaustion of administrative remedies. However, it is no defense to Defendants' argument that the injuries incurred are specifically excluded from coverage under the terms of the policy because she admitted that she was driving under the influence of alcohol when the accident occurred.

Wal-Mart Associates' Health Plan Document at page 25, ¶N states in pertinent part that benefits are not payable for "charges for any treatment or services resulting from ... injury ... while under the influence of ... alcohol ... or from participation in the commission ... of a criminal offense." (see Exhibit "A" attached). It is undisputed that Plaintiff was charged with and subsequently pled guilty to a charge of driving while under the influence of intoxicating liquor in connection with the accident. See, Defendants' Exhibits C and K attached to its Brief in Support of Motion for Summary Judgment. In the case of Boknecht v. Wal-Mart Stores, Inc., cause no. NA-91-164-C (U.S. District Court, Southern District of Indiana, New Albany Division, Aug. 10, 1992) the Court found ¶N of the exclusion section, cited above, to be "poorly drafted and ambiguous" but found the Plan's interpretation that the exclusion applied to medical services for injuries incurred while under the influence of alcohol to be reasonable (to be precise, the Court, applying the Seventh Circuit test, found the interpretation to be "not 'downright unreasonable.'") Id. at 12. The facts in that case were distinguishable from those in instant case. Therefore it will suffice to say that given the facts in the

instant case the exclusion set forth in ¶N appears to be patently and unambiguously applicable. Therefore, as to Plaintiff's claim under the Group Health Plan, Defendants' Motion for Summary Judgment will be granted.

Defendants' Motion for Summary Judgment as it pertains to the Short-Term Disability Plan should also be granted because Plaintiff has made no prima facie showing of her entitlement to coverage under the Plan.

Therefore Defendants' Motion for Summary Judgment will be granted in its entirety.

ORDERED this 15th day of September, 1992.



JAMES C. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IV - LIMITATIONS AND EXCLUSIONS

Under this PLAN shall not be payable for:

- A. Charges for any treatment or service not prescribed by a PHYSICIAN, including personal convenience items.
- B. Charges for any treatment or service which is covered, or which could be covered upon proper claim, under any Worker's Compensation law or act, or would have been covered but for settlement or the expiration of the time period for filing of such Worker's Compensation claim. Treatment or service received by the PARTICIPANT which is unauthorized by the PARTICIPANT'S employer and thus excluded under Worker's Compensation is likewise excluded under this PLAN.
- C. Charges for any treatment or service which is compensated for or furnished by the State, Local or United States Government or any Agency thereof.
- D. Charges for surgical correction, including initial office visit and diagnostic work-up, for the treatment of orofacial skeletal deformities, mandibular/maxillary fractures as a result of atrophy, including the temporomandibular joint or jaw-related neuromuscular conditions or alteration of the occlusal relationship of the teeth or jaws to eliminate pain or dysfunction of the temporomandibular joint and all adjacent muscles and nerves are limited to a lifetime maximum of \$5,000 per PLAN PARTICIPANT.
- E. Any INJURY sustained or ILLNESS contracted while on duty with any military, naval, or air force of any country or international organization, including temporary duty with the National Guard or reserves; or the

result of an act of declared or undeclared war (including resistance to armed aggression) occurring before or while a PARTICIPANT.

- F. Charges for any PRE-EXISTING CONDITIONS.
- G. Charges for any treatment or service furnished for which the PARTICIPANT is not obligated to pay.
- H. Charges for any treatment or service received in CUSTODIAL CARE or similar institutions or rest cures.
- I. Charges for any examinations related to insurance, occupation, employment or health checkups, including well child care, immunizations, and other preventive medical care.
- J. Charges for any lodging or travel for health purposes.
- K. Charges for any treatment or service for abortions, sex transformations, sterilization procedures or reversal of sterilization procedures, artificial inseminations, in vitro fertilizations or embryo transfers, keratotomy, etc., and any complications arising therefrom.
- L. Treatment or service that is EXPERIMENTAL/INVESTIGATIONAL.
- M. Charges for any treatment or service for COSMETIC SURGERY unless such treatment or service is due directly to an ACCIDENTAL INJURY sustained while the PARTICIPANT is covered under the PLAN.
- N. Charges for any treatment or service resulting from an intentional self-inflicted ILLNESS or INJURY while sane or insane, or while under the influence of drugs or alcohol, or from a fight instigated by the covered PARTICIPANT; or from participation in the commission or attempted commission of a criminal offense.
- O. Charges for any pregnancy of an eligible dependent child.
- P. Charges for premarital examinations and preventive screening.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CLOSED

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 RICHARD V. CHAMBERS a/k/a)
 RICHARD CHAMBERS; VICKIE L.)
 CHAMBERS a/k/a VICKI CHAMBERS;)
 COUNTY TREASURER, Mayes)
 County, Oklahoma; BOARD)
 OF COUNTY COMMISSIONERS,)
 Mayes County, Oklahoma,)
)
 Defendants.)

FILED
SEP 16 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 92-C-188-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 16th day of Sept., 1992. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney; and the Defendants, Richard V. Chambers a/k/a Richard Chambers, Vickie L. Chambers a/k/a Vicki Chambers, and the County Treasurer and Board of County Commissioners, Mayes County, Oklahoma, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendants, Richard V. Chambers a/k/a Richard Chambers and Vickie L. Chambers a/k/a Vicki Chambers, were served by publication as evidenced by the Proof of Publication filed August 18, 1992; that Defendant, County Treasurer, Mayes County, Oklahoma, acknowledged receipt of Summons and Complaint on March 5, 1992; and that Defendant, Board of County Commissioners, Mayes County, Oklahoma, acknowledged receipt of Summons and Complaint on March 5, 1992.

The Court further finds that the Defendants, Richard V. Chambers a/k/a Richard Chambers and Vickie L. Chambers a/k/a Vicki Chambers, were served by publishing notice of this action in the Pryor Daily Times, a newspaper of general circulation in Mayes County, Oklahoma, once a week for six (6) consecutive weeks

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

beginning July 10, 1992, and continuing to August 14, 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, Richard V. Chambers a/k/a Richard Chambers and Vickie L. Chambers a/k/a Vicki Chambers, 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, Richard V. Chambers a/k/a Richard Chambers and Vickie L. Chambers a/k/a Vicki Chambers. 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 Secretary of Veterans Affairs, and its attorneys, Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the 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 Defendants, Richard V. Chambers a/k/a Richard Chambers, Vickie L. Chambers a/k/a Vicki Chambers, and the County Treasurer and Board of County Commissioners, Mayes 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 Mayes County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Numbered Seven (7), in Block Numbered Five (5) of EASTMANOR SECOND, an Addition to the Incorporated City of PRYOR CREEK, Mayes County, State of Oklahoma, according to the Official, Recorded Plat and Survey thereof.

The Court further finds that on June 26, 1987, the Defendants, Richard V. Chambers and Vicki L. Chambers, executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of \$38,000.00, payable in monthly installments, with interest thereon at the rate of 8.5 percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Richard V. Chambers and Vicki L. Chambers, executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated June 26, 1987, covering the above-described property. Said mortgage was recorded on June 26, 1987, in Book 675, Page 362, in the records of Mayes County, Oklahoma.

The Court further finds that on June 26, 1987, the Defendants, Richard V. Chambers and Vicki L. Chambers, 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 26, 1987, the Farmers Home Administration cancelled the above-referenced Interest Credit Agreement because the borrowers received improper interest credit.

The Court further finds that on August 25, 1987, the Defendants, Richard V. Chambers and Vicki L. Chambers, 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 2, 1988, the Defendants, Richard Chambers and Vicki Chambers, 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 July 3, 1989, the Defendants, Richard Chambers and Vicki Chambers, 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, Richard V. Chambers a/k/a Richard Chambers and Vickie L. Chambers a/k/a Vicki Chambers, 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, Richard V. Chambers a/k/a Richard Chambers and Vickie L. Chambers a/k/a Vicki Chambers, are indebted to the Plaintiff in the principal sum of \$35,755.27, plus accrued interest in the amount of \$3,285.70 as of August 29, 1991, plus interest accruing thereafter at the rate of 8.5 percent per annum or \$8.7923 per day until judgment, plus interest thereafter at the legal rate until fully paid, plus the further sum due and owing under the interest credit agreements of \$3,370.38, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action in the amount of \$246.85 (\$238.85 publication fees, \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, Richard V. Chambers a/k/a Richard Chambers, Vickie L. Chambers a/k/a Vicki Chambers, and the County Treasurer and Board of County Commissioners, Mayes 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, Richard V. Chambers a/k/a Richard Chambers and Vickie L. Chambers a/k/a Vicki Chambers, in the principal sum of \$35,755.27, plus accrued interest in the amount of \$3,285.70 as of August 29, 1991, plus interest accruing thereafter at the rate of 8.5 percent per annum or \$8.7923 per day until judgment, plus interest thereafter at the current legal rate of 3.41 percent per annum until paid, plus the further sum due and owing under the interest credit agreements of \$3,370.38, plus interest on

that sum at 3.41 percent per annum from judgment until paid, plus the costs of this action in the amount of \$246.85 (\$238.85 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, Richard V. Chambers a/k/a Richard Chambers, Vickie L. Chambers a/k/a Vicki Chambers, and the County Treasurer and Board of County Commissioners, Mayes 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, Richard V. Chambers a/k/a Richard Chambers and Vickie L. Chambers a/k/a Vicki Chambers, 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 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;

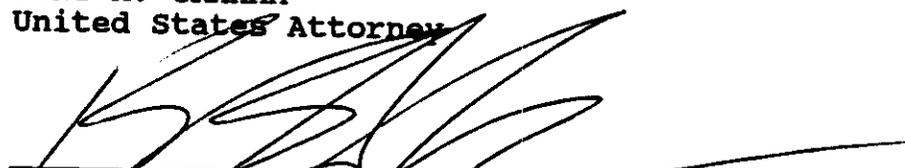
The surplus from said sale, if any, shall be deposited with the
Clerk of the Court to await further Order of the Court.

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.


UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney


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

Judgment of Foreclosure
Civil Action No. 92-C-188-B

KBA/esr

EMPOWERED... 1992
DATE

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

FILED
CLOSED

SEP 16 1992

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

ROBERT TURNER,)
)
 Plaintiff,)
)
 v.)
)
 NURSE RENI, et al.,)
)
 Defendants.)

92-C-223-B

ORDER

Plaintiff's Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 was filed March 16, 1992. Plaintiff has failed to serve Defendants. For good cause shown, Plaintiff's complaint is dismissed for failure to prosecute.

Dated this 16 day of Sept, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

CLOSED

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

SEP 15 1992

FILED

CHRISTINE DIXON,
Plaintiff,

vs.

WESTERN NATIONAL BANK OF TULSA,
Defendant,

Case No. 92-C-131-B

FILED

SEP 18 1992

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

STIPULATION OF
DISMISSAL WITH PREJUDICE

COMES NOW, the Plaintiff, J. Christine Dixon, by and through her attorney, and dismisses the above entitled action with prejudice against the above named Defendant, Western National Bank of Tulsa, from future filings.

Christine Dixon

Christine Dixon, Plaintiff

John Zarbano

John Zarbano by McQuerton per phone
Attorney for Defendant Authorization
9-17-92

Jeff Nix

Jeff Nix, OBA #6688
2120 South Columbia
Suite 710
Tulsa, OK 74114
(918) 742-4486

Attorney for Plaintiff,
Christine Dixon

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 15th day of September, 1992, a true and correct copy of the above and

foregoing instrument was mailed, first class and certified mail, by depositing in the United States Mail, with sufficient postage, thereon fully prepaid, to:

John S. Zarbano
5051 South Lewis, Suite 200
Tulsa, OK 74105-6061



Jeff Nix

MEMORANDUM OF CALL

TO: *AG*

Other options usable

YOU WERE CALLED BY - YOU WERE VISITED BY -

MAN

PLEASE PHONE FTS AUTOVON

792-2385

WILL CALL AGAIN IS WAITING TO SEE YOU
 RETURNED YOUR CALL WISHES AN APPOINTMENT

MESSAGE

DIXON

RECEIVED BY *AM* DATE TIME

63-110 NSN 7540-00-634-4018
STANDARD FORM 63 (Rev. 8-61)
Prescribed by 25A
FPMR (41 CFR) 101-11.6

★ GPO 1987-181-24860008

To _____
Date _____ Time _____ AM PM

WHILE YOU WERE OUT

M. *E. Dixon*

Phone () _____

Area Code	Number	Extension
TELEPHONED		PLEASE CALL
CALLED TO SEE YOU		WILL CALL AGAIN
WANTS TO SEE YOU		URGENT

RETURNED YOUR CALL

Message _____
Howard
Sign name
H. E. Dixon - Operator



REORDER #23-000

Kentucky.

3. Bill's is a Kentucky corporation of which Mingey is President.

4. On September 9, 1985, Thrifty, Bill's and Mingey entered into a Lease Agreement, for the purpose of leasing to Bill's vehicles to be used in the operation of Defendants' Thrifty Car Rental franchise in Kentucky. Incorporated into the terms of the Lease Agreement were the terms of Vehicle Lease Orders ("Lease Orders") executed from time to time thereafter, pursuant to which vehicles were delivered to the lessee.

5. The Lease Orders relevant to this action were executed by Thrifty and Bill's, and were personally guaranteed by Mingey.

6. Effective, May 15, 1991, the agreements relating to Defendants' Kentucky license location were terminated.

7. Since May 15, 1991, Defendants have not paid any monies to Thrifty.

8. There now remains due and owing to Thrifty the amount of \$259,341.56, [not]¹ including estimated May, 1991 license fees of totalling \$3,291.00.

9. The invoices listed in response to Interrogatories 1 and 2 of the Plaintiff's First Set of Interrogatories are the only invoices that Defendants question in their responses to

¹ Counsel apparently omitted the word "not". The Court recognized this omission when reviewing the account summary in the record.

In a proposed Order offered by counsel, counsel mistakenly added this amount to the Lease Agreement as a cost associated with vehicle repair costs and lease payments.

Interrogatories and Deposition.

10. On April 7, 1992, Thrifty credited Defendants' account in the amount of \$15,000, the amount of Defendants' 1991 Vehicle Lease Deposit with Thrifty. The Defendants' counterclaim has now been rendered moot.²

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, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 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, the nonmovant "must establish that there is a genuine issue of material facts...". Furthermore, the 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). Lastly, conclusory allegations of entitlement to credits or set-offs do not create a

² Licensor may deduct any and all sums remaining unpaid, from any monies or credit held by Licensor for Licensee. See License Agreement at 3.11. Defendants were given credit on March 31, 1991, for the \$15,000 deposit amount (invoice # I4010058). Such credit is reflected in the final Lease Agreement balance of \$200,651.79.

fact question. Bruce v. Martin-Marietta, 544 F.2d 442 (10th Cir.1976).

Thrifty's Motion for Summary Judgment is unopposed. In the deposition of Mingey and in the Response to Interrogatories 1 and 2, Defendants, Bill's and Mingey, aver that certain invoices are factually incorrect. The Court concludes that although there may be some metaphysical doubt as to the material facts, by failing to respond to Plaintiff's Motion for Summary Judgment, Defendants have not satisfied their burden of showing that there is a genuine issue of material fact. Matsushita, supra. Local Rule 15 B.

Based on the undisputed facts and the evidence submitted in support thereof, the Court concludes that as a matter of law Defendants, Bill's and Mingey, breached both the License Agreement and the Lease Agreement. The Court further concludes that Defendants' counterclaim, for deposit monies due under the Lease Agreement, is moot. Accordingly, Summary Judgment is appropriate as to all causes of action before the Court.

Summary Judgment is hereby GRANTED for Plaintiff, Thrifty, and against Defendants, Bill's and Mingey. A separate Judgment in accord with this Order shall be filed this date.

IT IS SO ORDERED, this 15th day of September, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON...
DATE 8

UNITED STATES OF AMERICA,
Plaintiff,
vs.
PEDRO VALENTIN; MIGDALIA
VALENTIN; SCHELL SECURITY OF
TULSA, INC.; CITIZENS SECURITY
BANK & TRUST; COUNTY TREASURER,
Tulsa County, Oklahoma; and
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,
Defendants.

FILED

SEP 17 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 92-C-070-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 16th day
of Sept., 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 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, Citizens Security Bank & Trust, appears
by Mike Mease, Vice President; and Defendants, Pedro Valentin,
Migdalia Valentin, and Schell Security of Tulsa, Inc., appear
not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, Pedro Valentin, acknowledged
receipt of Summons and Complaint on February 11, 1992; that the
Defendant, Migdalia Valentin, acknowledged receipt of Summons and
Complaint on February 12, 1992; that the Defendant, Citizens

Security Bank & Trust, acknowledged receipt of Summons and Complaint on January 28, 1992; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 29, 1992; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 30, 1992.

The Court further finds that the Defendant, Schell Security of Tulsa, Inc., was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning May 15, 1992, and continuing through June 19, 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, Schell Security of Tulsa, Inc., and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, Schell Security of Tulsa, Inc.. 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 Secretary of Veterans Affairs, 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 party served by publication with respect to its present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on February 13, 1992; that the Defendants, Pedro Valentin, Migdalia Valentin, and Schell Security of Tulsa, Inc., 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 Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Sixteen (16), Block Five (5), SUMMERFIELD, an Addition in the City and County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on December 20, 1979, the Defendants, Pedro Valentin and Migdalia Valentin, executed and delivered to Western Pacific Financial Corporation their mortgage note in the amount of \$56,800.00, payable in monthly installments, with interest thereon at the rate of 11.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Pedro Valentin and Migdalia Valentin, executed and delivered to Western Pacific Financial Corporation a real estate mortgage dated December 20, 1979. This mortgage was recorded on January 3, 1980, in Book 4450, Page 584, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 29, 1980, Western Pacific Financial Corporation assigned the above-described mortgage to Security Pacific Mortgage Corporation. This Assignment of Mortgage was recorded on October 20, 1980, in Book 4505, Page 155, in the records of Tulsa County, Oklahoma. On September 9, 1986, Western Pacific Financial Corporation executed a Corrective Assignment of Mortgage to Security Pacific Mortgage Corporation. This Assignment was recorded on September 23, 1986, in Book 4971, Page 1590, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 10, 1987, Security Pacific Mortgage Corporation assigned the above-

described mortgage to Fleet Real Estate Funding Corp. This Corporation Assignment of Mortgage was recorded on January 14, 1988, in Book 5074, Page 2554, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 27, 1989, Fleet Real Estate Funding Corp. assigned the above-described mortgage to the Secretary of Veterans Affairs. This Assignment of Real Estate Mortgage was recorded on April 17, 1990, in Book 5247, Page 1327, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Pedro Valentin and Migdalia Valentin, 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, Pedro Valentin and Migdalia Valentin, are indebted to the Plaintiff in the principal sum of \$57,395.63, plus interest at the rate of 10 percent per annum from August 1, 1990 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$279.85 for publication fees.

The Court further finds that the Defendants, Citizens Security Bank & Trust and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendant, Schell Security of Tulsa, Inc., is in default and has 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, Pedro Valentin and Migdalia Valentin, in the principal sum of \$57,395.63, plus interest at the rate of 10 percent per annum from August 1, 1990 until judgment, plus interest thereafter at the current legal rate of 3.41 percent per annum until paid, plus the costs of this action in the amount of \$279.85 for publication fees, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Schell Security of Tulsa, Inc., Citizens Security Bank & Trust, 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, Pedro Valentin and Migdalia Valentin, 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

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



PHIL PINNELL, OBA #7169
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



MIKE MEASE, Vice President
Citizens Security Bank & Trust
P.O. Box 130
Bixby, Oklahoma 74008
(918) 366-8264



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 584-0440
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 92-C-070-B

PP/css

ENTERED ON DOCKET

DATE 9-17-92

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

FILED

SEP 17 1992 *mm*

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

TYRONE G. FARLEY,)
)
Plaintiff,)
)
v.)
)
AMERICAN AIRLINES, INC.,)
)
Defendant.)

Case No. 91-C-775-C ✓

O R D E R

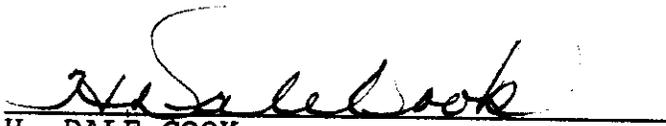
Before the Court is the motion of plaintiff to reconsider pursuant to Rule 60(b) F.R.Cv.P. This is an action for wrongful discharge. By Order and Judgment entered on July 8, 1992, the Court granted the motion of the defendant for summary judgment. On August 5, 1992, plaintiff filed his notice of appeal. On August 6, 1992, the Court invited the present motion, in view of the Tenth Circuit decision in Davies v. American Airlines, Inc., ___ F.2d ___ (10th Cir.) (July 13, 1992). Defendant has responded to the motion, and it is ripe for decision.

This Court's ruling rested on three bases: (1) Burk v. K-Mart, 770 P.2d 24 (Okla. 1989) is limited to at-will employees; (2) a dispute such as this is a "minor" dispute under the Railway Labor Act and thus preempted; (3) collateral estoppel based upon the arbitration board ruling against plaintiff. The first two bases are no longer viable after Davies. As to collateral estoppel, this Court ruled that, since the arbitration board had found that plaintiff had been discharged for just cause, he was precluded from litigating that he had been discharged in violation of public

policy. The Davies opinion contains the following statement: "In arbitration, it was found that Davies had violated American's rules and that, therefore, American had 'just cause' to discharge him. However, the arbitrator did not address the issue of whether the discharge violated clearly established public policy and therefore was actionable under Burk." (slip op. at 3-4). So far as the Court is aware, the arbitrator in this case likewise made no finding as to public policy. It seems possible that the Tenth Circuit does not view the issues involved in arbitration as having the requisite identity for collateral estoppel purposes. However, since the notice of appeal has been filed, the matter is best left to the appellate court. This Court affirms its previous ruling.

It is the Order of the Court that the motion of the plaintiff to reconsider is hereby denied.

IT IS SO ORDERED this 17th day of September, 1992.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

CLOSED

ENTERED ON DOCKET

DATE 9-17-92

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

F I L E D

SEP 17 1992

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 CARMILLE CHONG HUAN SULVETTA,)
)
 Defendant.)

No. 91-CR-119-C
92-C-266-C ✓

ORDER

Before the Court is the motion of the defendant Carmille Sulvetta for the Court to vacate, set aside or correct her sentence and to withdraw her plea of guilty filed pursuant to 28 U.S.C. §2255.

On November 25, 1991 Sulvetta entered a plea of guilty to Count 5 of the indictment charging her with a violation of 42 U.S.C. §408(a)(7)(B), fraudulent use of a social security number. Subsequently she was sentenced to a term of imprisonment for a period of nine months followed by a two year term of supervised release.

Sulvetta now petitions the Court to set aside her plea and conviction asserting that her plea of guilty was not knowingly and voluntarily entered into because (1) her pregnancy and subsequent birth of her child during this time frame caused her to be confused and in a state of emotional turmoil and (2) that she had been assured if she entered a plea of guilty to one count of the indictment she would receive probation and she relied upon those

assurances.

The Court has carefully reviewed the record in this case and finds that the sentence imposed was just and reasonable under the circumstances. The Court finds untenable Sulvetta's assertion that her plea was not knowingly and voluntarily entered.

At the change of plea hearing the Court advised Ms. Sulvetta of her rights to a trial by jury, her right to confront and cross examine witnesses and her right not to incriminate herself. Further the Court propounded several inquiries into the voluntariness of her decision to plead guilty. Among other questions the Court asked if her guilty plea was freely and voluntarily entered into, whether her decision was a result of her own free will, whether she had been coerced or threatened to plead guilty, and specifically the Court inquired whether Sulvetta was relying upon any representations or promises either expressed or implied which were not clearly set forth in the written plea agreement. As to each of these inquiries Sulvetta's response indicated her decision was knowingly and voluntarily and that she was not relying on any outside representations.

The defendant is now coming before the Court seeking postconviction relief advising, in essence, that her prior comments to the Court were perjured. She asserts that her attorney assured her she would receive protection if she pleaded guilty.

At this juncture, the Court is faced with evaluating which statements of the defendant are perjured, since they are contradictory. At the change of plea hearing the Court thoroughly

inquired into the bases of Sulvetta's decision to change her plea to guilty. At the sentencing hearing the Court provided Sulvetta an opportunity to state any information the Court should consider in imposing sentencing. If the defendant did not voice her reliance at that time regarding her assurance that she would receive probation, the Court will not permit her to use post judgment relief to assert the same. The Court must be able to rely on the responses given by defendants to specific inquiries of the Court in order for the Court to properly conduct the proceedings, make informed determinations and enter a final judgment. Absent extraordinary circumstances, not shown in this case, the Court will not inquire into matters involving private communications between criminal defendants and their attorneys which are inconsistent with statements by the defendant in open court.

Accordingly, defendant's motion pursuant to 28 U.S.C. §2255 is hereby denied.

IT IS SO ORDERED this 15th day of September, 1992.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

CLOSED
FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA **SEP 15 1992**

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

DAN R. MASSEY, et al.,

Plaintiffs,

vs.

ROBERT LEWIS JACKSON,

Defendant.

No. 92-C-282-E

ENTERED ON DOCKET
DATE **SEP 17 1992**

ORDER

It appearing to the Court that the instant case is a companion case to 92-C-281-E wherein the Court ordered remand, the Court now finds this matter should be remanded as well for the reasons set forth in 92-C-281-E.

ORDERED this 14th day of September, 1992.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

121

DATE SEP 15 1992

CLOSED

FILED

SEP 15 1992

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

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

MAJOR BOB MUSIC, TEN TEN TUNES,
MATTIE RUTH MUSICK, SEVENTH SON
MUSIC, INC. AND POLYGRAM
INTERNATIONAL PUBLISHING, INC.,

Plaintiffs,

vs.

LARRY AKIN AND PATRICIA F. JOHNSON,

Defendants.

NO. 92-C-237-E

J U D G M E N T

This matter comes before the Court pursuant to the plaintiffs' Application for Entry of Judgment by Default against defendants Larry Akin and Patricia F. Johnson. The files and records in this case show that the Complaint was filed on March 19, 1992; that the Summons and Complaint were personally served upon both defendants, Larry Akin and Patricia F. Johnson, on March 31, 1992, as shown by the Return of Service now on file in the office of the Clerk; that no answer or other responsive pleading or appearance has ever been filed by the defendants; that the time for filing an answer has elapsed and has not been further extended; and neither of the defendants are infants or incompetent persons. The Court therefore finds that plaintiffs are entitled to Judgment by default against the defendants as requested.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. Judgment is hereby rendered in favor of the plaintiffs Major Bob Music, et al., and against the defendants, Larry Akin and Patricia F. Johnson, jointly and severally; and

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2. The defendants and all persons, companies and corporations acting under their direction, control, permission or license, are hereby permanently enjoined from publicly performing any and all of the plaintiffs' copyrighted musical compositions and all such copyrighted music in the repertory of the American Society of Composers, Authors and Publishers (ASCAP) and from causing or permitting these compositions to be publicly performed in the defendants' premises or in any place owned, controlled or conducted by defendants, and from aiding or abetting the public performance of any such compositions from any location; and

3. The defendants shall pay to plaintiffs damages of Two Thousand Five Hundred and No/100 Dollars (\$2,500.00) for each of the four (4) causes of action and for investigation costs in the sum of Three Hundred Thirty-eight and 78/100 Dollars (\$338.78), for a total judgment of Ten Thousand Three Hundred Thirty-eight and 78/100 Dollars (\$10,338.78); and

4. Pursuant to 17 U.S.C. §505, the Court further finds that the plaintiffs are entitled to recover their costs, including a reasonable attorney's fee, in addition to those amounts set forth above. Plaintiffs' counsel are directed to submit a Bill of Costs and an Application for Attorney's Fees within fifteen (15) days after the entry of this judgment in compliance with Local Court Rules 6(E) and (G).

IT IS SO ORDERED this 14th day of September, 1992.


UNITED STATES DISTRICT JUDGE

**CLOSED
FILED**

IN THE UNITED STATES DISTRICT COURT SEP 15 1992
FOR THE NORTHERN DISTRICT OF OKLAHOMA

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

JO DELL GLANCY,
Plaintiff,

vs.

STATE FARM FIRE AND
CASUALTY COMPANY,
Defendant.

}
}
}
}
}
}
}
}
}

Case No. 92-C-631-E

ENTERED ON DOCKET

DATE SEP 17 1992

ORDER

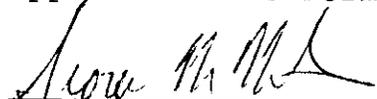
NOW on this 14 day of Sept, 1992, the Court after review of the parties Joint Stipulation of Dismissal With Prejudice, does hereby find that this matter should be dismissed with prejudice.

IT IS THEREFORE ORDERED that this matter be dismissed with prejudice.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

Approved as to Form:


George M. Miles,
Attorney for Plaintiff


Neal E. Stauffer,
Attorney for Defendant

Entered

GLH/dc
09/17/92

1117

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

FLORA L. POWELL, Individually, and as)
 Surviving Wife of HUBERT C. POWELL,)
 Deceased,)
)
 Plaintiff,)
)
 vs.)
)
 EAGLE-PICHER INDUSTRIES, INC., and)
 OWENS-CORNING FIBERGLAS CORPORATION,)
)
 Defendants.)

No. 88-C-555-E

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Flora L. Powell, and hereby dismisses all claims listed in the above-referenced suit as to the Defendant Eagle-Picher Industries (hereinafter EP). Said Dismissal is with prejudice and each party is to bear her/its own cost.

NORMAN & EDEM, P.C.
Attorneys for Plaintiff

By: 

GINA L. HENDRYX - OBA #10330
Renaissance Centre East
127 N.W. 10th Street
Oklahoma City, OK 73103-4927
405-272-0200 (O)
405-235-2949 (F)

DATE SEP 16 1992

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

FILED
SEP 15 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ANNA M. ROBERTS,)
)
 Plaintiff,)
)
 vs.)
)
 LOUIS W. SULLIVAN, M.D.,)
 SECRETARY OF HEALTH AND)
 HUMAN SERVICES,)
)
 Defendant.)

No. 89-C-522-B

ORDER AND JUDGMENT

Before the Court for decision is Plaintiff's attorney's application for attorney's fee herein, pursuant to 42 U.S.C. §406(B)(1). Based upon the recovery as prevailing party, and the time expended, the Court concludes the requested sum of \$8,000.00 is a reasonable attorney's fee. Harris v. Secretary of Health and Human Services, 836 F.2d 496 (10th Cir. 1987), and Martin v. Secretary of Health, Education and Welfare, 492 F.Supp. 459 (D. Wyo. 1980). The Government concedes by its filing of August 3, 1992, said attorney's fee sum requested is reasonable.

IT IS THEREFORE ORDERED AND ADJUDGED that Plaintiff's counsel, Mark E. Buchner, is granted an attorney's fee herein of Eight Thousand Dollars (\$8,000.00), to be paid from benefits withheld to pay said attorney's fee. *tlh*

DATED this 15th day of September, 1992.

Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

SEP 16 1992

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

JOHN E. DEAS,

Plaintiff,

v.

ALCOHOL BEVERAGE LAWS
ENFORCEMENT COMMISSION,
a State Agency, PETE HEIST
and ROGER DAVIS,

Defendants.

FILED

SEP 14 1992

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

92-C-400-B

ORDER

This order pertains to the Motion to Dismiss of Defendant, the Oklahoma Alcoholic Beverage Laws Enforcement Commission (Docket #2)¹, the Motion to Dismiss of Defendants Heist and Davis (#10), and Plaintiff's Response to Motion to Dismiss of Defendants Heist and Davis (#11).

Plaintiff claims that his civil rights under 42 U.S.C. § 1983 were violated when he was arrested on September 7, 1991 by two agents of the Oklahoma Alcoholic Beverage Laws Enforcement Commission ("ABLE") for selling alcoholic beverages to an intoxicated person. ABLE seeks dismissal, saying it is a state agency and is immune from suit under the Eleventh Amendment to the United States Constitution. Plaintiff has not responded to this motion and, under Rule 15(A) of the Local Rules of this court, failure to respond constitutes a confession of the matters raised by the motion. The Eleventh Amendment to the United States Constitution bars suit against a state, as well as its agencies, unless the

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

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state consents to the suit. Alabama v. Pugh, 438 U.S. 781, 782 (1978). Oklahoma has not consented to this suit. ABLE's Motion to Dismiss (#2) is granted.

Defendants Heist and Davis seek dismissal, claiming immunity in their official capacity under the Eleventh Amendment and arguing that they are not "persons" within the meaning of § 1983. Plaintiff's First Amended Complaint (#7) states that these Defendants are sued only in their individual capacities. There is therefore no merit to Defendants' first and second bases for dismissal. Defendants also ask the court to dismiss Plaintiff's claims against them pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, arguing that Plaintiff's conclusory allegations are insufficient to plead a cause of action under § 1983.

The rule for reviewing the sufficiency of any complaint is that the "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). A court may dismiss an action for failure to state a cause of action "only if it is clear that no relief could be granted under any set of facts which could be proved". Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

Plaintiff's complaint states that Defendants Heist and Davis conducted a surveillance at the 15th Street Wine and Liquor Store in Tulsa, Oklahoma on September 7, 1991 and unlawfully arrested him and subjected him to illegal incarceration, assault and battery, humiliation and damage to his reputation. Two elements are necessary for recovery under 42 U.S.C. § 1983. First, the plaintiff must prove that the defendant has deprived him of

a right secured by the Constitution and laws of the United States. Second, the plaintiff must show that the defendant acted "under color of law." Gunkel v. City of Emporia, Kan., 835 F.2d 1302, 1303 (10th Cir. 1987).

The thrust of § 1983 is to protect against the misuse of power by officials such as those here. Monroe v. Pape, 365 U.S. 167, 184 (1961). The concept of "liberty" guaranteed by the Fourteenth Amendment denotes freedom from bodily restraint. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). In numerous instances the courts have held that false arrest and false imprisonment give rise to claims under § 1983. In most of these cases, there were aggravated circumstances such as assaults, harassment or unlawful searches. See Monroe v. Pape, 365 U.S. at 183-184; Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963); Marland v. Heyse, 315 F.2d 312 (10th Cir. 1963). Plaintiff's complaint states a claim for false arrest and false imprisonment by persons acting under color of state law.

The Motion to Dismiss of Defendants Heist and Davis (#10) is denied.

To summarize, ABLE's Motion to Dismiss (#2) is granted and the Motion to Dismiss of Defendants Heist and Davis (#10) is denied.

Dated this 14 day of Sept., 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE SEP 16 1992

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

FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver for First National Bank and Trust Company of Cushing, Cushing, Oklahoma,
 Plaintiff,
 vs.
 JERRY CONREY and JOSEPH E. MOUNTFORD,
 Defendants.

FILED

SEP 15 1992

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

Case No. 90-C-341-E

DEFICIENCY JUDGMENT

The Motion for Deficiency Judgment of the Plaintiff came on for hearing before the Court, the Honorable James O. Ellison, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered, all as set forth in the Court's Order, filed on August 25, 1992, granting the Motion for Deficiency Judgment, and incorporated herein by reference,

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff Federal Deposit Insurance Corporation, in its capacity as Receiver for First National Bank and Trust Company of Cushing, Oklahoma, recover of the Defendant Jerry Conrey, the sum of \$262,219.48, with interest thereon at the rate of 3.41 percent per annum as provided by law, less amounts to be credited as reflected in the Receiver's Final Accounting and Report, as approved, when approved.

DATED this 14th day of Sept, 1992.

James O. Ellison
The Honorable James O. Ellison
United States District Judge

94

ENTERED ON DOCKET
DATE SEP 16 1992

CLOSED

FILED

SEP 15 1992

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

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

INTERNATIONAL UNION, UNITED)
 AUTOMOBILE, AEROSPACE, AND)
 AGRICULTURAL IMPLEMENT)
 WORKERS OF AMERICA AND ITS)
 AMALGAMATED LOCAL 73,)
)
 Plaintiffs,)
)
 vs.)
)
 FACET QUANTEK, INC., a)
 subsidiary of Purolator)
 Products, Inc.,)
)
 Defendant.)

No. 90-C-734-E

ORDER AND JUDGMENT

This matter is before the Court on the parties' cross-motions for summary judgment relative to Plaintiffs' Complaint and Defendant's Counterclaim for Declaratory Judgment. Under Celotex v. Catrett, 447 U.S. 317 (1986), and its progeny the Court will consider whether the parties dispute facts material to the following pivotal inquiry: is the alleged prior oral agreement admissible to modify the terms of the subsequently ratified Collective Bargaining Agreement and Effects Agreement.¹

A collective bargaining agreement (CBA) is not an ordinary common law contract; rather, it is "the charter instrument of a system of industrial self-government." United Steelworkers of

¹There is some dispute as to the content and import of the statement made by management's representative, Brad Johnson, in that regard. See, Brief in Support of Plaintiff's cross-motion for summary judgment, docket #61, p. 5; Facet Quantek's Brief in support of motion for summary judgment, docket #36, p. 3.

X

21

America v. American Mfg. Co., 80 S.Ct. 1343 (1960) (Brennan, J. concurring). It is settled that a CBA should be construed pursuant to federal statutory and common law principles designed to give effect to the national labor policies which underlie them. Textile Workers Union v. Lincoln Mills, 77 S.Ct. 912 (1957). At the outset, it must be noted that federal law does not require that a CBA be reduced to a writing in order that it be enforceable. Indeed, Section (d) of the National Labor Relations Act expressly permits oral agreements unless one party requests a written agreement. The fact that an agreement is oral will, therefore, not render it unenforceable. Federal courts have generally applied a variation of the parol evidence rule, §215, Restatement (Second) of Contracts, to the issue: evidence of prior or contemporaneous agreements is inadmissible to modify or contradict the terms of a written agreement, but may be considered to divine the intent of the parties. Indeed, interpretation of a CBA requires consideration of "other related collective bargaining agreements, as well as practice, usage and custom pertaining to all such agreements." S.E. Pa. Transp. Auth. v. Broth. of R.R. Synalmen, 882 F.2d 778, 784 (3rd Cir. 1989), citing Transportation-Communication Employees Union v. Union Pacific R.R., 87 S.Ct. 369, 371 (1966); also citing, R. Gorman, Basic Text in Labor Law, Unionization and Collective Bargaining (1976).

The following facts are not disputed:

1. Plaintiff Union is a labor organization within the meaning of 29 U.S.C. §152(5) and is the exclusive

bargaining representative for the production and maintenance employees at Facet's plant in Tulsa, Oklahoma.

2. Defendant Facet is an employer within the meaning of 29 U.S.C. §152(2) and operates a plant in Tulsa, Oklahoma.
3. On June 6, 1964, the National Labor Relations Board certified the Union as the exclusive bargaining representative for designated employees at the company. The parties have negotiated eight Collective Bargaining Agreements over the bargaining year history.
4. In July 1988 the parties met to renegotiate the Collective Bargaining Agreement set to expire on August 8, 1988. Upon the Agreement's expiration, Facet notified Union that it would only continue the terms and conditions of employment contained therein to the extent required by law.
5. On January 12, 1989, Facet declared an impasse in negotiations and implemented certain terms and conditions of employment.
6. At a negotiating session on October 23, 1989, Facet's lead negotiator, Brad Johnson, advised Union there would be a mass layoff in December 1989 and January 1990 due to Facet's decision to eliminate the MicroBon, Super-Spun and Fabrication lines. Brad Johnson had authority to speak on behalf of Facet during all pertinent negotiating session with the Union in late 1989.

7. The National Labor Relations Act requires an employer to negotiate over the effects a mass layoff will have on displaced workers. 29 U.S.C. §158(d).
8. Pursuant to the National Labor Relations Act, the parties negotiated on November 7 and 8, 1989, over the effects of the layoff on those employees who were scheduled to lose their jobs. Among other things, negotiations during the October 23, October 24, November 7 and November 8, 1989 sessions addressed what job categories and the number of employees who were going to be affected by the removal of the MicroBon, Super-Spun and Fabrication lines. The negotiations on these dates also addressed several pending unfair labor practice charges against Facet and approximately eighty pending grievances. These negotiations also identified six written changes to be made to the proposed Collective Bargaining Agreement. These six written changes were incorporated in a written agreement that is memorialized in a document entitled "Agreement between Facet Quantek, Inc. and UAW, Local 73" (the "Effects Agreement"). This Effects Agreement was later submitted to the Union's members for ratification. None of these six written changes of the terms or conditions of employment related to or affected the management rights clause in the Collective Bargaining Agreement.
9. Negotiations for both the proposed Collective Bargaining

Agreement and Effects Agreement were completed on November 8, 1989.

10. At the time the proposed Collective Bargaining Agreement and Effects Agreement were ratified, the only unresolved issue was Facet's drug testing policy. This issue was to be negotiated locally between Facet and Union's local representative, Loyd Cox.
11. Any oral statements made by Brad Johnson with regard to future reductions in force at the Tulsa plant were made prior to the agreements being submitted to the Union members for ratification.
12. Representatives for Union and Facet signed the ratified Collective Bargaining Agreement and Effects Agreement on December 7, 1989.
13. Subsequent to the conclusion of the pertinent negotiating sessions on November 8, 1989, there have been no negotiations or representations made limiting any legal rights Facet may have to either remove, transfer, relocate, or discontinue certain bargaining unit work (i.e. bargaining unit work other than MicroBon, Super-Spun and Fabrication) from its Tulsa plant, or any legal right it may have to use outside contractors or subcontractors to perform such work.
14. Article VIII of the ratified Collective Bargaining Agreement specifically provides the method for determining the manner of reducing the work force when

additional layoffs become necessary.

15. Subsequent to ratification of the Collective Bargaining Agreement and Effects Agreement, Facet discontinued the micro-edge line; transferred the suitcase line to its Stillwell, Oklahoma facility; occasionally engaged in systems assembling, performed by non-bargaining unit personnel, off the premises; and subcontracted janitorial services to non-bargaining unit personnel.
16. Subsequent to ratification of the Collective Bargaining Agreement and Effects Agreement, some painting and sandblasting work continues to be performed at the Tulsa plant by bargaining unit personnel.

It is also undisputed that Brad Johnson had some discussions with Plaintiff's representatives regarding a subsequent lay-off policy during the negotiations which culminated in ratification of the two Agreements. Plaintiffs contend that Facet

"orally agreed not to remove, transfer, relocate or discontinue certain bargaining unit work (other than MicroBon, Super-Spun and Fabrication) from its Tulsa plant, or to use outside contractors or subcontractors to perform such work at or away from the Tulsa plant.

The Defendant has submitted the case of Merk v. Jewell Food Stores, 945 F.2d 889 (7th Cir. 1991) rehearing denied, Dec. 20, 1991, in support of its position. There, the Seventh Circuit held that a nonratified secret oral "reopener" agreement between Jewel and the union representatives was not admissible to modify the written contract. The reopener agreement would have permitted

Jewel to "reopen all economic terms of the CBA" ... if competitors entered the market with a lower wage scale than Jewel. The effect of enforcing this secret side deal, as the majority suggests, would be to permit the officials of labor and management to quietly "barter away basic guarantees contained in the collective bargaining agreement and relied upon by all union members." Id. at 894. A significant factual distinction between Merk and the instant case is obvious: in Merk the side deal would work to dilute the employees rights and benefits (principally, wages) under the ratified written agreement. In the instant case the side deal would serve to enhance the employee's rights and benefits (job security).² The Court finds, however, that the factual distinction does not render Merk inapplicable to the case at bar. Indeed, it is the very danger - made manifest in Merk - of creating "manifold opportunities for manipulation by crafty operators" to the detriment of employees that compels this Court to find that the better rule is to preclude all secret oral side deals which alter or undermine the terms of a CBA. The Court therefore adopts the rule as stated in Merk: "National labor policy forbids introduction of prior or contemporaneous secret agreements to contradict fundamental terms of a ratified collective bargaining contract." Id. at 894. That said, there remain for resolution three issues:

- 1) The Court finds from the record herein that the side deal

²The Seventh Circuit found the secrecy element crucial in Merk as, given the material facts, it surely must.

was secret; i.e.: that an oral agreement was reached between the officials of the union and the management - there being no evidence or averments that the rank and file was apprised of the deal;

- 2) The Court finds that there is neither evidence nor averment on the record that this type of side deal was acceptable given the past practices of the parties; therefore the "entire agreement" provision must work to preclude it;
- 3) The fact that the parties dispute the precise content of the oral agreement herein is not material. Assuming arguendo that the deal was reached under the terms urged by Plaintiff, the court must find, ultimately, against Plaintiff's position for the reasons set forth above.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment is granted; Plaintiff's Motion for Summary Judgment is denied. This case is dismissed; parties to bear their own costs herein.

ORDERED this 14th day of September, 1992.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

CLOSED

ENTERED ON DOCKET
DATE SEP 16 1992

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

KYLE B. HONEA, an individual,

Plaintiff,

vs.

Case No. 91-C-329 E

**AMOCO PRODUCTION COMPANY a/k/a
AMOCO PRODUCTION COMPANY RESEARCH,
a Delaware Corporation,**

**Defendant and
Third-Party Plaintiff,**

vs.

ZURICH-AMERICAN INSURANCE COMPANY,

Intervenor,

**LONGYEAR COMPANY,
a Minnesota corporation,**

Third-Party Defendant.

**JOINT STIPULATION OF
DISMISSAL WITH PREJUDICE**

COMES NOW the Plaintiff, KYLE B. HONEA, and the Defendant, AMOCO PRODUCTION COMPANY a/k/a AMOCO PRODUCTION COMPANY RESEARCH, a Delaware Corporation, and the Intervenor, ZURICH-AMERICAN INSURANCE COMPANY, and the Third-Party Defendant, LONGYEAR COMPANY, a Minnesota corporation, and stipulate pursuant to Federal Rules of Civil Procedure, Rule 41, that this action, including all claims of all the parties made herein, be dismissed with prejudice.

Dated this 14 day of ~~August~~^{September}, 1992.

PLAINTIFF, KYLE B. HONEA

BY: 
Darrell E. Williams, OBA #9640
5416 S. Yale Avenue, Suite 600
Tulsa, OK 74135
(918)496-9200
Attorney for Plaintiff

**DEFENDANT: AMOCO PRODUCTION
COMPANY,**
a/k/a **AMOCO PRODUCTION COMPANY
RESEARCH, a Delaware Corporation,**

BY: 
G. Steven Stidham, OBA #8633
SNEED, LANG, ADAMS & BARNETT
2300 Williams Center Tower II
Tulsa, OK 74103
(918) 583-3145
Attorneys for Defendant

**INTERVENOR: ZURICH-AMERICAN
INSURANCE COMPANY,**

and

**THIRD-PARTY DEFENDANT, LONGYEAR
COMPANY, a Minnesota Corporation,**

BY: 
RICHARD M. ELDRIDGE, OBA #2665
RHODES, HIERONYMUS, JONES,
TUCKER & GABLE
2800 Fourth National Bank Bldg.
Tulsa, Oklahoma 74119
(918) 582-1173
**Attorneys for Intervenor and Third-Party
Defendant**

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

~~FILED~~

SEP 08 1992

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

91-C-798-E

FILED

SEP 15 1992

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

WALTER LEON WILSON,)
)
 Plaintiff,)
)
 v.)
)
 STANLEY GLANZ, et al.,)
)
 Defendants.)

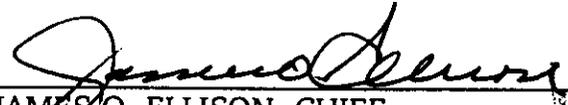
ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed August 3, 1992, in which the Magistrate Judge recommended that Defendants' Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted 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 Defendants' Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted is granted and Plaintiff's Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 is dismissed.

Dated this 14 day of September, 1992.


JAMES O. ELLISON, CHIEF
UNITED STATES DISTRICT JUDGE

The Court being fully advised and having examined the court file finds that the Defendant, Eugene L. Johnson, acknowledged receipt of Summons and Complaint on February 3, 1992; that the Defendant, Peggy N. Johnson a/k/a Peggy Nell Johnson, acknowledged receipt of Summons and Complaint on March 2, 1992; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, acknowledged receipt of Summons and Complaint on January 27, 1992; and that the Defendant, State of Oklahoma ex rel. Oklahoma Employment Security Commission, acknowledged receipt of Summons and Amended Complaint on May 28, 1992.

It appears that the Defendants, County Treasurer, Ottawa County, Oklahoma, and Board of County Commissioners, Ottawa County, Oklahoma, filed their Answer on January 31, 1992; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer and Counterclaim February 7, 1992 and its Response to Plaintiff's Amended Complaint on May 13, 1992; that the Defendant, State of Oklahoma ex rel. Oklahoma Employment Security Commission, filed its Answer and Cross-Petition on June 4, 1992; and that the Defendants, Eugene L. Johnson and Peggy N. Johnson a/k/a Peggy Nell Johnson, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on April 10, 1987, Eugene L. Johnson d/b/a Gene Johnson Trucking filed his voluntary

petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 86-00775. On July 7, 1987, a Discharge of Debtor was entered releasing the debtor from all dischargeable debts. On July 18, 1988, this bankruptcy case was closed.

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

The West Half of the Southwest Quarter of the Southeast Quarter less 2.98 acres for the railroad right-of-way and the Northeast Quarter of the Southwest Quarter of the Southeast Quarter less .66 acres for railroad right-of-way of Section 28, Township 26 North, Range 22 East less 3.89 acres for St. Louis and San Francisco Railway Company's wye, containing 22.47 acres more or less, Ottawa County, Oklahoma.

AND

The South 1/2 of the Southwest 1/4 of the Southwest 1/4 of Section 29, Township 27 North, Range 22 East of the Indian Meridian, Ottawa County, Oklahoma.

The Court further finds that Eugene L. Johnson and Peggy N. Johnson executed and delivered to the United States of America, acting through the Farmers Home Administration, the following promissory notes, payable in yearly installments.

<u>Loan Number</u>	<u>Original Amount</u>	<u>Date</u>	<u>Interest Rate</u>
43-02	\$282,170.00	05/14/79	8.50%
	\$ 64,630.00	05/14/79	3.00%

43-03	\$ 29,560.00	09/28/79	9.00%
43-04	\$ 61,358.74	11/03/83	3.00%
(43-04 was rescheduled from note dated 05/14/79 in the amount of \$64,630.00)			
43-05	\$ 85,070.00	05/25/84	5.00%

The Court further finds that as security for the payment of the above-described notes, Eugene L. Johnson and Peggy N. Johnson executed and delivered to the United States of America, acting through the Farmers Home Administration, the following real estate mortgages.

<u>Instrument</u>	<u>Dated</u>	<u>Filed</u>	<u>County</u>	<u>Book/Page</u>
Mortgage	05/14/79	05/14/79	Ottawa	389/342
Mortgage	09/28/79	09/28/79	Ottawa	393/681
Mortgage	05/25/84	05/25/84	Ottawa	433/33

The Court further finds that the mortgage dated May 25, 1984, and recorded in Book 433, Page 33, in the records of Ottawa County, Oklahoma, incorrectly shows the property located in Township 27 due to a scrivener's error. The correct legal description should reflect Township 26. The Court further finds that this mortgage should be reformed to conform with the intent of the parties as indicated by the two prior mortgages.

The Court further finds that the Defendants, Eugene L. Johnson and Peggy N. Johnson a/k/a Peggy Nell Johnson, made default under the terms of the aforesaid notes and mortgages by reason of their failure to make the yearly installments due thereon, which default has continued, and that by reason thereof the Defendants, Eugene L. Johnson and Peggy N. Johnson a/k/a Peggy Nell Johnson, are indebted to the Plaintiff in the principal sum of \$444,851.55,

plus accrued interest in the amount of \$199,559.45 as of August 28, 1990, plus interest accruing thereafter at the rate of \$86.5871 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$10.00 (\$10.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Ottawa County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$217.90, plus penalties and interest, for the year 1991-1992. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action in the amount of \$17,427.47 together with interest and penalty according to law, by virtue of Motor Fuel Tax Lien MFF0004647400. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Employment Security Commission, has liens on the property which is the subject matter of this action in the amount of \$19,690.97 plus interest at the rate of 1 percent per month from May 1, 1992 until paid, by virtue of unemployment compensation tax warrants numbered 1) 002850-90; 2) 001977-91;

3) 004300-91; 4) 005983-91; 5) 001031-92 filed of record in the Ottawa County Clerk's Office on 1) December 26, 1990; 2) March 5, 1991; 3) August 9, 1991; 4) September 30, 1991; 5) March 11, 1992. These liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Peggy N. Johnson a/k/a Peggy Nell Johnson, is in default and has no right, title, or interest in the subject real property by virtue of a judgment lien in Case No. JFD-84-112, District Court, Ottawa County, State of Oklahoma.

The Court further finds that the Internal Revenue Service has liens upon the property by virtue of the following Notices of Federal Tax Liens:

<u>Case No.</u>	<u>Dated</u>	<u>Serial No.</u>	<u>Amount</u>
89-86	12/04/89	738917258	\$ 5,299.84
89-74	11/16/89	738916047	\$18,475.60
89-68	10/11/89	738912640	\$31,242.22

Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Internal Revenue Service is not made a party hereto; however, by agreement of the agencies the liens will be released at the time of sale should the property fail to yield an amount in excess of the debt to the Farmers Home Administration.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendants, Eugene L. Johnson and Peggy N. Johnson a/k/a Peggy Nell Johnson, in the principal sum of \$444,851.55, plus accrued interest in the

amount of \$199,559.45 as of August 28, 1990, plus interest accruing thereafter at the rate of \$86.5871 per day until judgment, plus interest thereafter at the current legal rate of 3.41 percent per annum until paid, plus the costs of this action in the amount of \$10.00 (\$10.00 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, County Treasurer and Board of County Commissioners, Ottawa County, Oklahoma, have and recover judgment in the amount of \$217.90, plus penalties and interest, for ad valorem taxes for the year 1991-1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, have and recover judgment in the amount of \$17,427.47 together with interest and penalty according to law, by virtue of Motor Fuel Tax Lien MFF0004647400.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Employment Security Commission, have and recover judgment in the amount of \$19,690.97 plus interest at the rate of 1 percent from May 1, 1992 until paid, by virtue of unemployment compensation tax warrants numbered
1) 002850-90; 2) 001977-91; 3) 004300-91; 4) 005983-91;
5) 001031-92 filed of record in the Ottawa County Clerk's Office

on 1) December 26, 1990; 2) March 5, 1991; 3) August 9, 1991;
4) September 30, 1991; 5) March 11, 1992.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Peggy N. Johnson a/k/a Peggy Nell Johnson, has no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the mortgage dated May 25, 1984, and recorded in Book 433, Page 33, in the records of Ottawa County, Oklahoma, showing the property located in Township 27 due to a scrivener's error, is corrected to reflect Township 26. This mortgage is reformed to conform with the intent of the parties as indicated by the two prior mortgages.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Eugene L. Johnson and Peggy N. Johnson a/k/a Peggy Nell Johnson, 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 Defendants, County Treasurer and Board of County Commissioners, Ottawa County, Oklahoma, in the amount of \$217.90, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

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

Fourth:

In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission;

Fifth:

In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Oklahoma Employment Security Commission.

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,

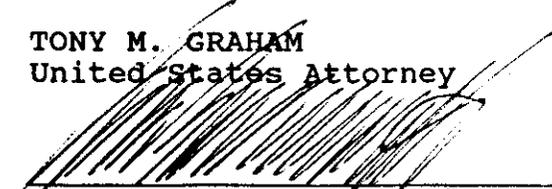
be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

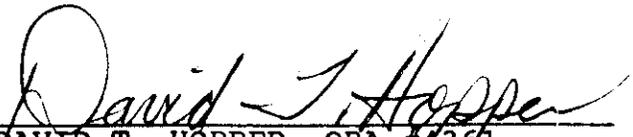
APPROVED:

TONY M. GRAHAM
United States Attorney


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Attorney for Defendants,
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Board of County Commissioners,
Ottawa County, Oklahoma


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Oklahoma Tax Commission


DAVID T. HOPPER, OBA #4361
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2401 North Lincoln Boulevard
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(405) 557-7146

Attorney for Defendant,
State of Oklahoma ex rel.
Oklahoma Employment Security Commission

Judgment of Foreclosure
Civil Action No. 92-C-63-E

CLOSED

JKS/dkc tyson.2

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

FILED

SEP 15 1992

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

JEFFREY W. TYSON,

Plaintiff,

vs.

Case No. 92-C-503-E

CMNI INSURANCE COMPANY,

Defendant.

ENTERED ON DOCKET

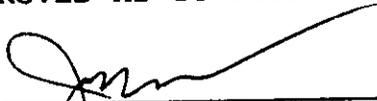
DATE SEP 17 1992

**ORDER OF DISMISSAL
WITH PREJUDICE**

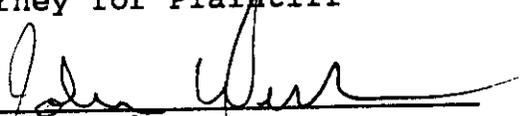
NOW on this 11 day of Sept, 1992, for
good cause shown, the above-entitled action is hereby ordered
dismissed, with prejudice.

S/ JAMES O. ELISON
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF OKLAHOMA

APPROVED AS TO FORM:


James K. Secrest, II
Attorney for Defendant


William F. Smith
Attorney for Plaintiff


John R. Decker
Attorney for Plaintiff

Plaintiff filed his action pursuant to the Fourth and Fourteenth Amendments of the United States Constitution alleging that on July 11, 1988, he was arrested without probable cause and that money in the amount of \$4,319.00 was unreasonably seized from him.

To dismiss a complaint and action for failure to state a claim upon which relief can be granted it must appear beyond doubt that 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).

In order to state a claim under 42 U.S.C.A. §1983, a Plaintiff must file his or her complaint in a court with proper venue, and must file such complaint within the applicable statute of limitations.

VENUE

In determining venue, Title 28 U.S.C.A. §1391(b) provides that

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only if (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.

In the present case, Defendants, Ring and Bomgaars, reside in the Western District of Oklahoma. Furthermore, the alleged claim stems from an event at Will Rogers World Airport, which is located in the Western District of Oklahoma. In the "R & R", the Magistrate Judge found that venue was proper in the Western District of Oklahoma, not the Northern District of Oklahoma. The Court agrees with the finding of the Magistrate Judge.

Title 28 U.S.C.A. §1404(a) provides that the Court may dismiss the case, or if it is in the interest of justice to do so, transfer it to a court of proper venue. Therefore, it is necessary to determine whether Plaintiff has stated a cause of action upon which relief can be granted in light of the statute of limitations defense raised by the Defendants.¹

STATUTE OF LIMITATIONS

Title 42 U.S.C.A. §1983 incorporates no statute of limitation. Nevertheless, §1988 provides that where federal law is deficient, courts should refer to applicable statutes from the forum state. The United States Supreme Court has held "that where state law provides multiple statutes of limitations for personal injury

¹ Affirmative pleading of statute of limitation defense may serve as a proper ground in a motion to dismiss for failure to state a claim upon which relief can be granted. Watts v. Graves, 720 F.2d 1416 (C.A.La. 1983); Rauch v. Day & Night Mfg. Corp., 576 F.2d 697 (C.A.Mich. 1978); Murphy v. Dyer, 260 F.Supp. 822 (D.C.Colo. 1966).

actions, courts considering §1983 claims should borrow the general or residual statute for personal injury actions". Owens v. Okure, 488 U.S.235, 249-50 (1989).

The applicable Oklahoma statute for detaining or injuring personal property is set forth in Title 12 O.S. §95(3), providing for a two-year statute of limitations. Meade v. Grubbs, 841 F.2d 1512, 1522 (10th Cir. 1988).

In the present case, the Magistrate Judge found that Plaintiff was arrested and his money was seized on July 11, 1988; however, Plaintiff did not file this lawsuit until February 14, 1992. Thus, if any valid 1983 claim existed, it expired on July 11, 1990. The Court agrees with the Magistrate Judge and accordingly, finds that the statute of limitations will bar any alleged claim that Plaintiff may have had.

Pursuant to 28 U.S.C.A. §1404, the Court finds that it is not in the interest of justice to transfer this case. The Court concludes Plaintiff's action should be and the same is hereby DISMISSED with prejudice. A Judgment in accord with this Order will be entered simultaneously herein.

IT IS SO ORDERED THIS 14th DAY OF SEPTEMBER, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE