

ENTERED ON DOCKET
DATE NOV 20 1992

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

FILED

NOV 13 1992

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

F. ROZIER SHARP, Regional Director
for Region 17 of the National
Labor Relations Board, for and
on behalf of the NATIONAL LABOR
RELATIONS BOARD,

Petitioner,

v.

OKLAHOMA FIXTURE COMPANY,

Respondent.

Case No. 92-C-995-B

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The petition of the Regional Director seeking a preliminary injunction against the Defendant, Oklahoma Fixture Company ("OFC"), pursuant to Section 10(j) of the National Labor Relations Act, as amended, (61 Stat. 149; 73 Stat. 544; 29 U.S.C. § 160(j)), came on for evidentiary hearing on Thursday, November 5, 1992, and Monday, November 9, 1992.

The Regional Director states that the requested preliminary injunction is not to protect the interest of the employees allegedly unlawfully discharged, but rather in the public interest to preserve and protect the integrity of the collective bargaining process. The petitioner asserts a final Board order will be ineffectual because a return to status quo cannot be accomplished, thus making essential the granting of this interim injunctive relief.

After considering the evidence in conjunction with the issues, the legal authorities presented, and arguments of counsel, the Court enters the following findings of fact and conclusions of law:

NOV 18 1992

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FINDINGS OF FACT

1. Petitioner is the Regional Director for Region 17 of the National Labor Relations Board ("Board"), an agency of the United States, and files the petition for and on behalf of the Board.
2. The Defendant, OFC, is a company located in Tulsa, Oklahoma, having approximately eight hundred total employees and has been in the business of building and selling store fixtures for in excess of fifty years.
3. OFC's work has been performed principally by carpenters, painters, and teamsters who, for many years have been represented by their respective certified unions. Currently, there are more than five hundred OFC employees who are so represented.
4. OFC has had a long history of collective bargaining with the carpenters, painters, and the teamsters' unions, and is currently a signatory to collective bargaining agreements with said unions representing each of the bargaining units. Negotiations for new collective bargaining agreements are currently taking place as they are to expire before year-end.
5. Historically, OFC has not been in the business of providing electrical services in reference to the store fixtures it constructs. However, often it is necessary for OFC to pre-wire various fixtures for lights and electrical outlets. Rather than provide this service itself, OFC has historically used electrical independent subcontractors to do this specialized work. In early 1991, OFC made the decision to try to have this electrical work done in-house by its own employees with an aim of saving this subcontracting expense and perhaps making additional profit.

6. In March 1991, OFC hired approximately fifteen electricians, some journeymen, some apprentices, and some of whom were members of the International Brotherhood of Electrical Workers ("IBEW").

7. On September 19, 1991, a petition was filed with the NLRB by the IBEW, Local No. 584, AFL-CIO ("Union") to have it certified as the exclusive bargaining agent for OFC's electricians and electricians' helpers.

8. An election was held on November 6, 1991, and of the thirteen eligible electrician voters, ten voted in favor of the Union and three voted against the Union. As a result, the Union was certified on November 20, 1991, as the exclusive collective bargaining representative of the unit under Section 9A of the Act with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

9. At all material times, OFC as a manufacturer and seller of non-retail store fixtures in Tulsa, Oklahoma, has been engaged in commerce within the meaning of Sections (2), (6), and (7) of the NLRA.

10. At all material times, the IBEW has been a labor organization within the meaning of Section 2(5) of the NLRA.

11. After November 20, 1991, and into 1992, negotiations began between OFC and the Union relative to a collective bargaining agreement.

12. The evidence has established that OFC through its manager, Mark Cavens, and supervisory personnel, both before and after November 19, 1991, communicated to the electrical employees that if they favored and supported the creation of the collective bargaining unit they would be terminated. Further, OFC management made it known that

they would not enter into collective bargaining in good faith and would endeavor to bargain to impasse. Such conduct was in violation of Section 8(a)(1), (3), and (5) of the NLRA.

13. At a bargaining session on or about May 14, 1992, OFC informed the Union that it no longer desired to be in the electrical business and that it planned to return to its previous practice of having the electrical work done by an independent subcontractor. OFC informed that this was an entrepreneurial decision because of OFC's lack of familiarity with the electrical work, and because of the potential product liability exposure, it would be more desirable from a business standpoint if an insured independent contractor did the electrical wiring. Because of the stated reasons, OFC expressed skepticism that the Union could offer anything in negotiations to change the company's decision to return to subbing out such work. The Union understood the OFC's decision in this regard to be final and made no offers addressing the concerns of OFC and made no demands to bargain over the effects of OFC's decision.

14. On June 9, 1992, OFC laid off and terminated the employment of all of the members of the bargaining unit who are:

Richard W. Gill
Augustine A. Ruiz, Jr.
William C. Adams
Steven G. Laird

Ray G. Creel
Charles Dale Haines
Jess I. Prigden
Milton Dale Carter

15. On or about June 9, 1992, the IBEW, pursuant to the provisions of the NLRA, filed a Charge with the Board in Case 17-CA-16206 alleging that respondent violated Section 8(a)(1), (3), and (5) of the Act. On or about July 17, 1992, the Union,

pursuant to the provisions of the Act, filed an Amended Charge with the Board in Case 17-CA-16206, again alleging that respondent violated said section of the Act.

16. The above charges were referred to Petitioner as Regional Director of Region 17 of the Board for appropriate investigation.

17. Following an investigation of said charges, the Petitioner concluded it had reasonable cause to believe that the charges were true, so the general counsel of the Board of behalf of the Board, by Petitioner, on July 17, 1992, issued a Complaint and Notice of Hearing pursuant to Section 10(b) of the Act, alleging that respondent has engaged in, and is engaging in, unfair labor practices as charged within the meaning of Section 8(a)(1), (3), and (5) of the Act. Trial of the matter concerning said complaint is presently set for November 30, 1992, before an Administrative Law Judge of the National Labor Relations Board.

18. In its complaint, it is asserted that OFC engaged in the unfair labor practices to discourage employees from engaging in the Union activities and did not afford the Union an opportunity to bargain with OFC in good faith concerning OFC's conduct and the effects thereof. The complainant asserts that the unfair labor practices of OFC have a close, intimate and substantial relation to trade, traffic and commerce among the several states that tend to lead to, and do lead to, the burdening and obstructing of commerce and the free flow of commerce.

19. The Regional Director represents to the Court that six of the eight members of the unit stand ready to be reinstated with back pay.

20. While the OFC denies any wrongdoing as set forth in the complaint, OFC offered no evidence joining issue at the preliminary injunction hearing concerning the unfair labor practices, stating that this Court has no authority to judge credibility of the witnesses or decide issue on the merits. Thus, for the purposes of the preliminary injunction hearing, the fact of the asserted unfair labor practices has been established.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter under Section 10(j) of the National Labor Relations Act and is empowered thereunder to grant injunctive relief.

2. Any finding of fact above which might be properly characterized a conclusion of law is included herein.

3. Section 10(j) of the National Labor Relations Act provides as follows:

The Board shall have power, upon issuance of a Complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

4. The Tenth Circuit Court of Appeals as well as other circuits has concluded that before a preliminary injunction can be granted the evidence presented must establish two elements: (1) reasonable cause to believe that an unfair labor practice has occurred;

and (2) probability that the remedial purposes of the National Labor Relations Act will be frustrated unless preliminary injunction relief is granted. Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967); NLRB v. Acker Industries, 460 F.2d 649, 652 (10th Cir. 1972); Pascarella v. Vibra Screw, 904 F.2d 874, 134 L.R.R.M.2458 (3rd Cir. 1990) and Kobell v. Suburban Lines, 731 F.2d 1076, 115 L.R.R.M.3297 (3rd Cir. 1984). See also, Szabo v. P*I*E Nationwide, 878 F.2d 207, 209 (7th Cir. 1989); Eisenberg v. Lenape Products Inc., 781 F.2d 999, 1005 (3rd Cir. 1986); NLRB v. Townhouse T.V., 531 F.2d 826, 830; 91 L.R.R.M.2636 (7th Cir. 1976); Wilson v. Liberty Homes, Inc., 500 F.Supp. 1120, 1125; 108 L.R.R.M.2688 (W.D. Wis. 1980); vacated in part Wilson v. Liberty Homes, Inc., 673 F.2d 1333 (7th Cir. 1981); Kaynard v. Palby Lingerie, Inc., 625 F.2d 1047, 1053; 104 L.R.R.M.2897 (2d Cir. 1980); Brown v. Pacific Telephone and Telegraph Co., 218 F.2d 542, 544 (9th Cir. 1954); Reynolds v. Curley Printing Co. Inc., 247 F.Supp. 317, 320; 60 L.R.R.M.2413 (M.D. Tenn. 1965); Maram, Etc. v. Universidad Interamericana De Puerto Rico, Inc., 722 F.2d 953, 115 L.R.R.M.2118 (1st Cir. 1983), rev'd, 722 F.2d 953 (1st Cir. P.R. 1983).

5. The first element regarding unfair labor practice has been established by the evidence presented herein. The remaining issue to be decided from the evidence presented concerns the probability that the remedial purposes of the National Labor Relations Act will be frustrated absent the issuance of the requested preliminary injunction relief.

6. Section 10(j) relief of preliminary injunction exists to protect the Board's ability to carry out its responsibility of remedying unfair labor practices. Section 10(j) does not exist to remedy the private harm experienced by employee as a result of unfair labor

practices because private harm remains the exclusive province of the Board which may be corrected by way of orders of reinstatement and/or back pay awards. (See authority cited ¶4.)

7. The District Court is not to resolve contested factual issues or issues involving the credibility of witnesses. See Scott v. El Farra Enterprises, Inc., d/b/a Bi-Fair Market, 863 F.2d 670, 673 n.6 (9th Cir. 1988), (citing Fuchs v. Hood Industries, Inc., 590 F.2d 395, 397 (1st Cir. 1979); Kaynard v. Mego Corp., 633 F.2d 1026, 1031 (2d Cir. 1980); Gottfried v. Frankel, 818 F.2d 485, 493, 494 (6th Cir. 1987) and Fuchs v. Jet Spray Corp., 560 F.Supp. 1147, 1150-51 n.2 (D. Mass. 1983), aff'd per curiam, 725 F.2d 664 (1st Cir. 1983). Angle v. Sacks, 382 F.2d 655, 658 (10th Cir. 1967) states that concerning a requested preliminary injunction the district court needs to determine whether the evidence presented by the Regional Director supporting a finding of "reasonable cause" is "substantial."

8. The parties herein, the Regional Director and OFC, agree that the issue concerning whether issuance of a Section 10(j) injunction is just and proper centers in whether the evidence herein demonstrates "a reasonable apprehension that the efficacy of the Board's final order may be nullified or the administrative procedures will be rendered meaningless", in the absence of an injunction. Angle v. Sacks, supra.

9. A subcontracting of bargaining unit work to an independent contractor that results in layoffs of bargaining unit members violates the Act only if such decision and conduct is motivated by anti-union animus. Textile Workers v. Darlington Manufacturing Company, 380 U.S. 263 (1965); Monongahela Steel Company, 265 NLRB 262 (1982); and

Woodline Motor Freight, 278 NLRB 1141, 1222 (1986).

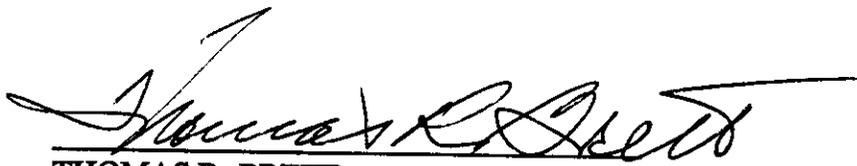
10. Section 10(j) relief is an extraordinary remedy which should be granted in those situations in which the effective enforcement of the NLRA will be frustrated. As stated in Angle v. Sacks, *supra*:

We do think, however, that the legislative history [of Section 10(j)] indicates a standard in addition to the "probable cause" finding that must be satisfied before a district court grants relief. The circumstances of the case must demonstrate that there exists a probability that the purposes of the Act will be frustrated unless temporary relief is granted.

11. The evidence has established that the respondent (OFC) has a long history of collective bargaining with established certified painters, carpenters, and teamsters' bargaining units. No evidence has been presented that the unfair labor practices regarding the IBEW will affect or is affecting the ongoing negotiation with these other bargaining units.

12. From the evidence presented the Court cannot conclude that there is a reasonable probability the Board's effectiveness, purpose, or remedial authority or procedures may be nullified or rendered meaningless. The matter is presently set before the Board for hearing on the merits on November 30, 1992, less than three weeks from this date. Six of the eight employees stand ready to return to work should the Board conclude a reinstatement and/or back pay order is "just and proper", following a full hearing. The Court thus concludes that the Board's remedial powers are adequate to protect the rights of the individual workers, some of whom were previously IBEW members, as well as the interest of the public so the petitioner's application for a preliminary injunction is hereby denied.

Dated this 13th day of November, 1992.

A handwritten signature in black ink, appearing to read "Thomas R. Brett", written in a cursive style with a long horizontal flourish extending to the right.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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CONCLUSIONS OF LAW

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4. The Tenth Circuit Court of Appeals as well as other circuits has concluded that before a preliminary injunction can be granted the evidence presented must establish two elements: (1) reasonable cause to believe that an unfair labor practice has occurred;

and (2) probability that the remedial purposes of the National Labor Relations Act will be frustrated unless preliminary injunction relief is granted. Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967); NLRB v. Acker Industries, 460 F.2d 649, 652 (10th Cir. 1972); Pascarella v. Vibra Screw, 904 F.2d 874, 134 L.R.R.M.2458 (3rd Cir. 1990) and Kobell v. Suburban Lines, 731 F.2d 1076, 115 L.R.R.M.3297 (3rd Cir. 1984). See also, Szabo v. P*I*E Nationwide, 878 F.2d 207, 209 (7th Cir. 1989); Eisenberg v. Lenape Products Inc., 781 F.2d 999, 1005 (3rd Cir. 1986); NLRB v. Townhouse T.V., 531 F.2d 826, 830; 91 L.R.R.M.2636 (7th Cir. 1976); Wilson v. Liberty Homes, Inc., 500 F.Supp. 1120, 1125; 108 L.R.R.M.2688 (W.D. Wis. 1980); vacated in part Wilson v. Liberty Homes, Inc., 673 F.2d 1333 (7th Cir. 1981); Kaynard v. Palby Lingerie, Inc., 625 F.2d 1047, 1053; 104 L.R.R.M.2897 (2d Cir. 1980); Brown v. Pacific Telephone and Telegraph Co., 218 F.2d 542, 544 (9th Cir. 1954); Reynolds v. Curley Printing Co. Inc., 247 F.Supp. 317, 320; 60 L.R.R.M.2413 (M.D. Tenn. 1965); Maram, Etc. v. Universidad Interamericana De Puerto Rico, Inc., 722 F.2d 953, 115 L.R.R.M.2118 (1st Cir. 1983), rev'd, 722 F.2d 953 (1st Cir. P.R. 1983).

5. The first element regarding unfair labor practice has been established by the evidence presented herein. The remaining issue to be decided from the evidence presented concerns the probability that the remedial purposes of the National Labor Relations Act will be frustrated absent the issuance of the requested preliminary injunction relief.

6. Section 10(j) relief of preliminary injunction exists to protect the Board's ability to carry out its responsibility of remedying unfair labor practices. Section 10(j) does not exist to remedy the private harm experienced by employee as a result of unfair labor

practices because private harm remains the exclusive province of the Board which may be corrected by way of orders of reinstatement and/or back pay awards. (See authority cited ¶4.)

7. The District Court is not to resolve contested factual issues or issues involving the credibility of witnesses. See Scott v. El Farra Enterprises, Inc., d/b/a Bi-Fair Market, 863 F.2d 670, 673 n.6 (9th Cir. 1988), (citing Fuchs v. Hood Industries, Inc., 590 F.2d 395, 397 (1st Cir. 1979); Kaynard v. Mego Corp., 633 F.2d 1026, 1031 (2d Cir. 1980); Gottfried v. Frankel, 818 F.2d 485, 493, 494 (6th Cir. 1987) and Fuchs v. Jet Spray Corp., 560 F.Supp. 1147, 1150-51 n.2 (D. Mass. 1983), aff'd per curiam, 725 F.2d 664 (1st Cir. 1983). Angle v. Sacks, 382 F.2d 655, 658 (10th Cir. 1967) states that concerning a requested preliminary injunction the district court needs to determine whether the evidence presented by the Regional Director supporting a finding of "reasonable cause" is "substantial."

8. The parties herein, the Regional Director and OFC, agree that the issue concerning whether issuance of a Section 10(j) injunction is just and proper centers in whether the evidence herein demonstrates "a reasonable apprehension that the efficacy of the Board's final order may be nullified or the administrative procedures will be rendered meaningless", in the absence of an injunction. Angle v. Sacks, supra.

9. A subcontracting of bargaining unit work to an independent contractor that results in layoffs of bargaining unit members violates the Act only if such decision and conduct is motivated by anti-union animus. Textile Workers v. Darlington Manufacturing Company, 380 U.S. 263 (1965); Monongahela Steel Company, 265 NLRB 262 (1982); and

Woodline Motor Freight, 278 NLRB 1141, 1222 (1986).

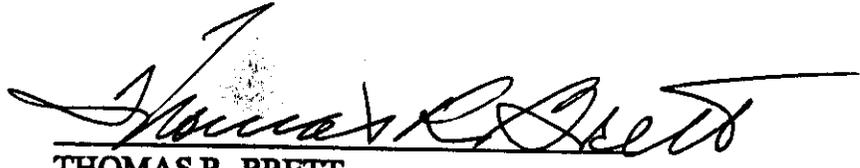
10. Section 10(j) relief is an extraordinary remedy which should be granted in those situations in which the effective enforcement of the NLRA will be frustrated. As stated in Angle v. Sacks, *supra*:

We do think, however, that the legislative history [of Section 10(j)] indicates a standard in addition to the "probable cause" finding that must be satisfied before a district court grants relief. The circumstances of the case must demonstrate that there exists a probability that the purposes of the Act will be frustrated unless temporary relief is granted.

11. The evidence has established that the respondent (OFC) has a long history of collective bargaining with established certified painters, carpenters, and teamsters' bargaining units. No evidence has been presented that the unfair labor practices regarding the IBEW will affect or is affecting the ongoing negotiation with these other bargaining units.

12. From the evidence presented the Court cannot conclude that there is a reasonable probability the Board's effectiveness, purpose, or remedial authority or procedures may be nullified or rendered meaningless. The matter is presently set before the Board for hearing on the merits on November 30, 1992, less than three weeks from this date. Six of the eight employees stand ready to return to work should the Board conclude a reinstatement and/or back pay order is "just and proper", following a full hearing. The Court thus concludes that the Board's remedial powers are adequate to protect the rights of the individual workers, some of whom were previously IBEW members, as well as the interest of the public so the petitioner's application for a preliminary injunction is hereby denied.

Dated this 13th day of November, 1992.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

CLOSED

ENVIRONMENTAL RECORDS

DATE NOV 20 1992

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

FILED

ROBERT J. PHILLIPS and
WANDA N. PHILLIPS,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

NOV 16 1992

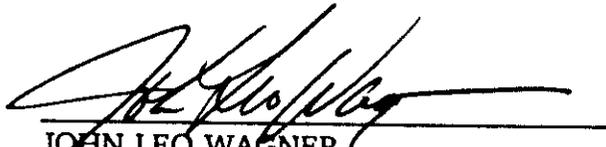
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

91-C-543-B

JUDGMENT

Judgment is hereby entered in favor of the defendant, United States of America, and against the plaintiffs, Robert J. Phillips and Wanda N. Phillips, in accordance with the court's Order of November 5, 1992.

Dated this 16th day of November, 1992.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET
DATE NOV 20 1992

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

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

VOICE SYSTEMS AND SERVICES, INC.,
Debtor.

VMX, INC.,
Movant,
vs.
VOICE SYSTEMS AND SERVICES, INC.,
Respondent.

BANKR. CASE NO. 92-923-W

91
Civil No. ~~92~~-C-088-B

ORDER

On the 10th day of November, 1992, the Court heard the motion of Voice Systems and Services, Inc. (VSSI) to reconsider this Court's September 8, 1992 Order granting the motion of VMX, Inc. (VMX) to withdraw the reference of Bankruptcy Case No. 92-923-W, In re Voice Systems and Services, Inc. (the VSSI Bankruptcy), to the Bankruptcy Court for the Northern District of Oklahoma. Counsel for VSSI, VMX and Valley National Bank appeared at the hearing. The Court, having considered the motion and other papers on file in this case, and having heard the arguments of counsel, hereby ORDERS, ADJUDGES AND DECREES the following:

1. All bankruptcy matters should be and are referred back to the United States Bankruptcy Court.

163

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E/BK4

2. This Court retains jurisdiction over all patent matters in the Bankruptcy of Voice Systems and Services, Inc., that involve construction or application of Federal Patent Law.

3. This Court on its own motion will hereafter consider whether this case should be consolidated with 91 C-88 B.

4. United Bankruptcy Court is directed to devise a format for any patent matters arising in such bankruptcy so that the same will be early addressed by the Bankruptcy Court and noticed to this Court as an emergency matter.

Signed this 16 day of November, 1992.


UNITED STATES DISTRICT JUDGE

CERTIFICATE OF MAILING

The undersigned of Freese & March, P. A. hereby certifies that on the _____ day of November, 1992, he/she faxed and mailed a true and correct copy of the within and foregoing writing with proper postage thereon fully prepaid to:

Boone, Smith, Davis,
Hurst & Dickman
500 OneOK Plaza
100 W. Fifth Street
Tulsa, OK 74103

Attention: Paul J. Cleary, Esq.

Honigman, Miller, Schwartz
& Cohn
3100 First Interstate Bank Plaza
1000 Louisiana Street
Houston, TX 77002-5011

Attention: Sydney Leach, Esq.
Louis Bonham, Esq.

Doerner, Stuart, Saunders,
Daniel & Anderson
320 S. Boston, Suite 500
Tulsa, OK 74103-3725

Attention: Gary McDonald, Esq.

Office of the U.S. Trustee
111 W. 5th St., Suite 900
Tulsa, OK 74103

Attention: Paul Thomas, Esq.

FREESE & MARCH, P. A.

By: _____

ENTERED ON DOCKET
DATE NOV 20 1992

FILED

NOV 16 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

JANET SISCO,
Plaintiff,

vs.

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

Case No. 91-C-430-B

O R D E R

The Court has for its consideration the objections of Plaintiff, Janet Sisco, to the Report and Recommendation (hereinafter "R&R") of the United States Magistrate Judge affirming the Administrative Law Judge's (hereinafter "ALJ") denial of disability insurance benefits under 42 U.S.C. §§ 216(i) and 223 of the Social Security Act, as amended.

Plaintiff filed the instant action pursuant to 42 U.S.C. § 405(g) seeking review of the decision of the Secretary of Health and Human Services. The matter was referred to the Magistrate Judge who entered his R&R on September 21, 1992. The Magistrate Judge recommended to affirm the Secretary's decision.

The Social Security Act entitles every individual who "is under a disability" to disability insurance benefits. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." *Id.* § 423(d)(1)(A). An individual

NOV 16 1992 *clm*

26

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

Id. §423(d) (2)(A).

Under the Social Security Act, the claimant bears the burden of proving a disability, as defined by the Act, which prevents him from engaging in his prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once a disability is established, the burden shifts to the Secretary who must show that the claimant retains the ability to do other work activity and that jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. See Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971); Campbell, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the

Secretary's decision, however,

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

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

The Secretary has established a five-step process for evaluating a disability claim. The five steps, as set forth in Reyes v. Bowen, 845 F.2d at 243, are as follows:

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

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

Plaintiff has been diagnosed as having insulin dependent diabetes mellitus and essential hypertension, which are both controlled by medication, and as suffering from severe pain. The present appeal focuses on (1) whether substantial evidence supports the finding of the ALJ; (2) whether the ALJ erred in failing to give substantial weight to the opinion of claimant's treating physician; and (3) whether the ALJ erred in finding that claimant's allegations of pain were not credible to the extent that she was prevented from engaging in substantial gainful activity.

Substantial Evidence

Based on the testimony of the Plaintiff and the medical reports, the ALJ found that Plaintiff's impairments did not meet the strictures of 20 C.F.R. § 404.1520 (1983) as she failed to satisfy the second step of the sequential test used in considering a claim for benefits under the Social Security Act. The ALJ found that Plaintiff did not have an impairment or combination of impairments which significantly limited Plaintiff's ability to perform basic work-related functions. He concluded that Plaintiff did not have such an impairment at any time through the date of decision.

Plaintiff objects that there is not substantial evidence to support this finding. The Court adopts the facts as set forth in the R&R of the Magistrate finding that substantial evidence in the

record supports the ALJ findings as to disability.¹

Based on the foregoing, the record and his own observations, the ALJ concluded that Plaintiff was not disabled under the Social Security Act. After a thorough review of the record, the Court agrees with and adopts the R&R of the Magistrate Judge finding that substantial evidence supported the ALJ's ruling.

Treating Physician

Plaintiff argues that the ALJ failed to give substantial weight to the opinion of her treating physician. Plaintiff's treating physician concluded that she had medical problems which rendered her unemployable for any type of productive or monetary employment.

The Tenth Circuit requires that the ALJ give substantial credence to the opinions of treating physicians on the subject of medical disability. Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). A treating physician's opinion is binding on the fact finder unless it is contradicted by "substantial evidence," and the opinion is entitled to extra weight due to the physician's greater familiarity with the claimant's medical situation. Kemp v. Bowen,

¹ In part, the ALJ relied on the testimony of Dr. Cooper, who stated that Plaintiff's feet were warm and had normal color, that she had full range of motion in her cervical spine, fingers, wrists, elbows, hips, knees, shoulders, and ankles, and that she had lumbar spine flexion to 80 degrees and a full range of right and left side bending and extension. Plaintiff could walk on her heels and toes and perform straight leg raises with no difficulty. Her finger dexterity was good and she was neurologically intact. Her eye examination was basically good and Dr. Cooper reported that there were no medical findings to support her complaints of pain. He did, however, confirm her diagnosis of diabetes. Additionally, Plaintiff testified that she is capable of sitting, standing, and walking although for limited periods of time.

816 F.2d 1469, 1476 (10th Cir. 1987); Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987).

As set forth in the R&R of the Magistrate, the ALJ stated his reasons for disregarding the opinion of Plaintiff's treating physician. The ALJ stated that the doctor's opinion appeared to be submitted in respect to Plaintiff's eligibility for medical assistance and food stamps and did not appear to be based upon a knowledge and consideration of all the factors involved in determining disability under the Social Security Act.

The trier of fact, the ALJ here, has the duty to weigh the evidence. Furthermore, "[i]t is an accepted principle that the opinion of a treating physician is not binding if it is contradicted by substantial evidence." Mongeur v. Heckler, 722 F.2d 1033, 1039 (2nd Cir. 1983).

After a thorough review of the record, the Court agrees with and adopts the R&R of the Magistrate finding that the ALJ did not err as to the weight given the treating physician's opinion.

SUBJECTIVE PAIN

Plaintiff also contends that the ALJ failed to properly weigh Plaintiff's subjective claims of pain. Courts have found that both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). Nevertheless, "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical finding." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987).

The Tenth Circuit requires that, where a pain-causing

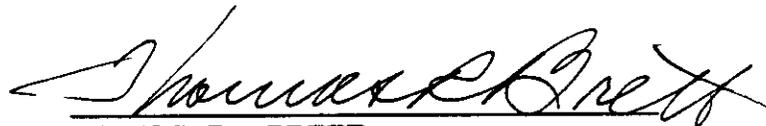
impairment is isolated, the court must consider all evidence relating to the extent of the pain in this particular plaintiff. Luna v. Bowen, 834 F.2d 161, 164 (10th Cir. 1987). In the present case, the ALJ considered Plaintiff's testimony and the medical records regarding all the symptoms and treatments.

The ALJ made the determination, based on all the relevant facts and the medical report, that Plaintiff's alleged extent of pain is not credible nor is it disabling under the Act. This judgment is binding on the district court if there is substantial probative evidence to support it. See Richardson v. Perales, 402 U.S. at 399; Broadbent v. Harris, 698 F.2d 407, 413 (10th Cir. 1983).

In finding that substantial evidence supports the finding of the ALJ, the R&R of the Magistrate sets forth the specific facts relied upon. After a thorough review of the record, the Court agrees with and adopts the R&R of the Magistrate finding that Plaintiff's allegations of pain were not sufficient to support a disability claim.

The ALJ's denial of Social Security Disability Benefits is hereby AFFIRMED.

IT IS SO ORDERED this 16th day of November, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED
DATE NOV 20 1992

FILED

NOV 16 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

MITCHELL PRICE, III,)
)
Plaintiff,)
)
v.)
)
STEPHENS RACING, INC.,)
)
Defendant.)

Case No. 92-C-106-B

O R D E R

Before the Court for its consideration is Defendant Stephens Racing, Inc's. ("Stephens") Motion to Alter or Amend Judgment by the imposition of sanctions pursuant to Rule 11, Federal Rules of Civil Procedure.

This action was initially filed January 27, 1992, in Tulsa County District Court on behalf of Plaintiff Mitchell Price, III ("Price"), seeking alleged unpaid overtime compensation, liquidated damages, attorneys' fees and costs under the provisions of Section 16(b) of the Fair Labor and Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201, et seq. The case was removed to this Court on February 5, 1992, by Stephens, pursuant to 28 U.S.C. §§ 1331, 1441 and 1446. Stephens argued that it was exempt from the FLSA per 29 U.S.C. § 213(a)(3)(B) and this Court, finding no triable dispute as to the exemption issue, granted summary judgment for Stephens on August 26, 1992.

Stephens now petitions the Court to also award it reasonable attorneys' fees, pursuant to FED. R. CIV. P. 11, as a sanction against Price. Stephens argues that attorneys' fees are warranted because Price did not conduct a reasonable inquiry prior to

23

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c/m

initiating litigation, which inquiry would have shown that litigation was not justified.

The federal courts are given the authority to impose sanctions against attorneys and parties in FED. R. CIV. P. 11 which provides:

Every pleading, motion or other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The United States Supreme Court recently addressed the standard of review for Rule 11 sanctions and concluded that Rule 11 imposes on the signer "an affirmative duty to conduct a reasonable inquiry into the facts and the law before filing, and the applicable standard is one of reasonableness under the circumstances." Business Guides v. Chromatic Communications Enters., Inc., 111 S.Ct. 922, 933 (1991); Coffey v. Healthtrust, Inc., 955 F.2d 1388, 1393 (10th Cir.1992) (the signer of a pleading certifies that he has conducted a reasonable inquiry into the factual and legal basis for the filing, and that the substance of the pleading is well grounded in fact and law); Dodd Ins. Servs., Inc. v. Royal Ins. Co. of Am., 935 F.2d 1152, 1155 (10th

Cir.1991) (applying an objective standard in making Rule 11 determinations in considering whether a reasonable and competent attorney would believe in the merits of the argument); Adamson v. Bowen, 855 F.2d 668, 673 (10th Cir.1988) (an attorney's actions must be objectively reasonable in order to avoid Rule 11 sanctions).

Price's claims had a factual and legal basis as long as Stephens was not exempt from the FSLA. A reasonable, objective and competent attorney could very well believe Price's claims were meritorious as long as he reasonably determined that Stephens had no exemption. From the record, the Court finds that Price's counsel's actions satisfied the reasonable inquiry requirement even though the inquiries, through no fault of his own, were unsuccessful.

The record indicates that from September 5, 1991 until January 27, 1992, Price sought to determine if Stephens was exempt from the FSLA. Under 29 U.S.C. § 213, Stephens had two possible avenues for exemption. It was readily apparent from Stephens' track schedule that it did not qualify for an exemption under the operations provision of 29 U.S.C. § 213(a)(3)(A); therefore the only available means of exemption available to Stephens was the receipts provision of 29 U.S.C. § 213(a)(3)(B). Determining qualification for the receipts exemption requires the examination of specific financial reports containing gross income figures.

In the Court's judgment Price conducted a reasonable investigation into Stephens exemption status prior to filing this suit. On September 5, 1991, Price's counsel asked Stephens to

furnish certain financial information, if it existed, which would support Stephens' claim of exemption. However, Price's counsel received no reply. On September 24, 1991, Stephens' counsel agreed to forward financial summaries to Price but Price's counsel received only a State Insurance Fund payroll report covering a one month time period and an irrelevant excerpt from Enrolled House Bill No. 1241. On December 11, 1991, Price's counsel again asked Stephens' to supply its gross receipts information, but again received no reply from Stephens.

It was only after this lawsuit was filed and discovery was underway that Stephens furnished the specific gross receipts information to Price. While Stephens was, in fact, exempt from the FSLA all along, Price had no way of ascertaining this fact without access to Stephens' gross receipts information. In the Court's opinion, Price's lack of success in obtaining the needed financial information was not due to his failure to make reasonable inquiries, but due to Stephens' lack of cooperation. It is evident that Stephens encouraged the filing of this suit by not resolving the exemption matter when resolution was solely within its power. Therefore, because Stephens could have easily prevented incurring these fees initially by simply producing the documents in its possession, it is not now entitled to an award of attorneys' fees. This Court will not encourage parties to engage in cat and mouse games by delaying resolution of a dispute where no legal claim exists in order to recover their attorneys' fees when the meritless suit is resolved in their favor.

The Court therefore finds no merit in Stephens' motion and the same is hereby DENIED.

IT IS SO ORDERED THIS 16th DAY OF NOVEMBER, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE NOV 20 1992

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

FILED

NOV 17 1992

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

OKLAHOMA FEDERATED GOLD
AND NUMISMATICS, INC.

Plaintiff,

V.

MICHAEL W. BLODGETT,

Defendant.

CASE NO. 91-C-707-B

O R D E R

This matter comes on for consideration of Defendant Michael W. Blodgett's (Blodgett) Motion For Certification pursuant to Fed.R.Civ.P. 54(b).

A Judgment for \$1,125,000 was entered against Blodgett on August 21, 1992, after a jury trial. T.G. Morgan, Inc., a Minnesota corporation (Morgan), a co-defendant in this action, filed for bankruptcy under Chapter 11 of the Bankruptcy Code prior to the Judgment against Blodgett, and on September 24, 1992, an Administrative Closing Order was entered as to the claim against Morgan.

Blodgett served a Notice of Appeal on September 17, 1992. By letter dated October 26, 1992, the Tenth Circuit Court of Appeals advised all counsel that it was considering summary dismissal of the appeal for lack of appellate jurisdiction because the District Court's Judgment was interlocutory and not immediately appealable.¹

¹ This is because of the remaining claims against Morgan.

38

NOV 18 1992 *clm*

The decision to grant a Rule 54(b) certification rests within the sound discretion of the Court. Such decision will be given substantial deference on review. Curtiss-Wright Corporation v. General Electric Company, 446 U.S. 1, (1980); Federal Deposit Insurance Corporation v. Bernstein, 944 F.2d 101 (2nd Cir.1991). Only an abuse of discretion justifies disturbance of a district court's decision regarding certification. Id. at 108. Courts making Rule 54(b) certification decisions should exercise their discretion "in the interest of sound judicial administration." Curtiss-Wright, at 8.

Rule 54(b) certification may only be granted for "final judgments." Curtiss-Wright, at 7. The judgment must be "final" in the sense that its an ultimate decision of a single claim entered in the course of a multiple claim litigation and any appeal must involve a "judgment", i.e. a decision upon a cognizable claim for relief. Id. A judicial ruling is "final" when it terminates all remaining litigation against an individual. Robison v. Canterbury Village, Inc., 848 F.2d 424 (3rd.1988).

The Court concludes the claims against Blodgett are legally separable and independent from those against Morgan. The Court further concludes there is no just reason for delaying the resolution of Blodgett's appeal of the Judgment against him individually pending the resolution of Morgan's bankruptcy proceeding and the remaining claims against it herein.

There is no just reason for delay, the Court concludes that Defendant Blodgett should be and he is granted Rule 54(b)

Certification of the Judgment entered against him on August 20,
1992.

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


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE NOV 20 1992

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

FILED

NOV 18 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ROBERT L. GILL,

Plaintiff,

vs.

WARREN PETROLEUM CO., a division
of Chevron U.S.A. Inc.,

Defendant.

No. 91-C-792-B

ORDER OF DISMISSAL

Before the Court is the parties' Stipulation of Dismissal.
The Court orders that Plaintiff's claims against the Defendant
in the above-entitled cause are dismissed with prejudice.
DATED this 18th day of November, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE NOV 20 1992

MAW/cv

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

FILED
NOV 19 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JEAN DAVIS, Guardian of the person)
and property of NELL LOUX, an)
incapacitated person on behalf)
of NELL LOUX,)

Plaintiff,)

vs.)

Case No.: 91-C-959 B

HEA MANAGEMENT GROUP, INC.,)

Defendant.)

STIPULATION OF DISMISSAL

COMES NOW the Plaintiff, JEAN DAVIS, Guardian of the person and property of NELL LOUX, an incapacitated person on behalf of NELL LOUX, and Defendant HEA MANAGEMENT GROUP, INC., by and through their undersigned counsel, and, pursuant to Rule 41 of the Federal Rules of Civil Procedure, hereby files their stipulation of Dismissal, dismissing with prejudice all claims raised by said parties in the entitled action for the reason that the parties have settled all matters in controversy.

JEAN DAVIS, Guardian of the person and property of NELL LOUX, an incapacitated person on behalf of NELL LOUX,

Jean Davis
Plaintiff

Nelson,
THOMAS SHERWOOD & BROWN

Fred Sherman
Attorney for Plaintiff

MARK A WARMAN

Mark A. Warman
Attorney for Defendant

12

STATE OF OKLAHOMA)
)SS
COUNTY OF TULSA)

Before me, the undersigned, a Notary public in and for said County and State, on this 17th day of November, 1992, personally appeared JEAN DAVIS, Guardian of the person and property of NELL LOUX, an incapacitated person on behalf of NELL LOUX, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that she executed the same as hr free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and seal of office the day and year above written.

Dawn B. Stouck
NOTARY PUBLIC

MY COMMISSION EXPIRES:

3-6-95

ENTERED ON DOCKET
DATE NOV 20 1992

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

FILED
NOV 18 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RESOLUTION TRUST CORPORATION, as)
Receiver for San Antonio Savings)
Association, a Texas-chartered)
mutual savings and loan)
association,)

Plaintiff,)

vs.)

Case No. 90-C-1016 B /

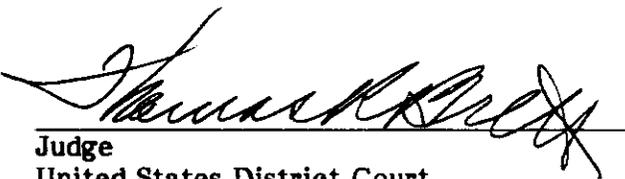
SQUARE ONE, LTD., an Oklahoma)
limited partnership; RKR, INC.,)
an Oklahoma corporation; HOWARD)
L. RASKIN, an individual;)
CLARENCE E. KINGHAM, an)
individual; and PHILLIP H. RYAN,)
an individual,)

Defendants.)

ORDER OF DISMISSAL WITH PREJUDICE

On Motion of the Plaintiff, the Resolution Trust Corporation as Receiver for San Antonio Savings Association, this action is hereby dismissed with prejudice to refiling.

Dated this 18 day of Nov, 1992.



Judge
United States District Court

ENTERED ON DOCKET
DATE NOV 20 1992

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

FILED

NOV 17 1992

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

OKLAHOMA FEDERATED GOLD
AND NUMISMATICS, INC.

Plaintiff,

V.

MICHAEL W. BLODGETT,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

CASE NO. 91-C-707-B

ORDER

This matter comes on for consideration of Defendant Michael W. Blodgett's (Blodgett) Motion For Certification pursuant to Fed.R.Civ.P. 54(b).

A Judgment for \$1,125,000 was entered against Blodgett on August 21, 1992, after a jury trial. T.G. Morgan, Inc., a Minnesota corporation (Morgan), a co-defendant in this action, filed for bankruptcy under Chapter 11 of the Bankruptcy Code prior to the Judgment against Blodgett, and on September 24, 1992, an Administrative Closing Order was entered as to the claim against Morgan.

Blodgett served a Notice of Appeal on September 17, 1992. By letter dated October 26, 1992, the Tenth Circuit Court of Appeals advised all counsel that it was considering summary dismissal of the appeal for lack of appellate jurisdiction because the District Court's Judgment was interlocutory and not immediately appealable.¹

¹ This is because of the remaining claims against Morgan.

38

NOV 18 1992 *clm*

The decision to grant a Rule 54(b) certification rests within the sound discretion of the Court. Such decision will be given substantial deference on review. Curtiss-Wright Corporation v. General Electric Company, 446 U.S. 1, (1980); Federal Deposit Insurance Corporation v. Bernstein, 944 F.2d 101 (2nd Cir.1991). Only an abuse of discretion justifies disturbance of a district court's decision regarding certification. Id. at 108. Courts making Rule 54(b) certification decisions should exercise their discretion "in the interest of sound judicial administration." Curtiss-Wright, at 8.

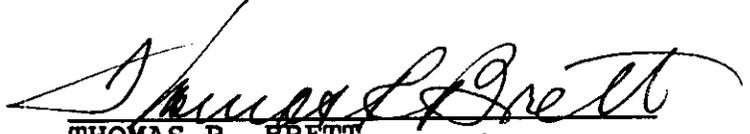
Rule 54(b) certification may only be granted for "final judgments." Curtiss-Wright, at 7. The judgment must be "final" in the sense that its an ultimate decision of a single claim entered in the course of a multiple claim litigation and any appeal must involve a "judgment", i.e. a decision upon a cognizable claim for relief. Id. A judicial ruling is "final" when it terminates all remaining litigation against an individual. Robison v. Canterbury Village, Inc., 848 F.2d 424 (3rd.1988).

The Court concludes the claims against Blodgett are legally separable and independent from those against Morgan. The Court further concludes there is no just reason for delaying the resolution of Blodgett's appeal of the Judgment against him individually pending the resolution of Morgan's bankruptcy proceeding and the remaining claims against it herein.

There is no just reason for delay, the Court concludes that Defendant Blodgett should be and he is granted Rule 54(b)

Certification of the Judgment entered against him on August 20,
1992.

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



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE NOV 20 1992

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

ABDUL-RAHMAN CHOUBAN-ALJAZAIRI)
)
 Plaintiff,)
)
 vs.)
)
 CONSOLIDATED CAPITAL EQUITIES)
 CORPORATION, a Colorado corpora-)
 tion; CONSOLIDATED CAPITAL)
 PROPERTIES, a California limited)
 partnership, d/b/a Villa Fontana)
 Apartments; and HORN-BARLOW)
 COMPANIES, a Texas limited)
 partnership,)
)
 Defendants.)

Case No. 92-C-215-B

FILED

NOV 17 1992

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

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Abdul-Rahman Chouban-Aljazairi, and hereby dismisses the above styled cause of action with prejudice in its entirety, with each party bearing their own costs, attorney fees and expenses.

ABDUL CHOUBAN

ABDUL-RAHMAN CHOUBAN-ALJAZAIRI
Plaintiff

RONALD W. HORGAN
Attorney for Plaintiff

CLOSED

ENTERED ON DOCKET

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA DATE NOV 17 1992

IN RE:)
)
 REPUBLIC FINANCIAL)
 CORPORATION, an Oklahoma)
 corporation,)
)
 Debtor.)
)
 R. DOBIE LANGENKAMP,)
 Successor Trustee,)
)
 Plaintiff-Appellee,)
)
 vs.)
)
 RONALD V. and GRACE WILKINSON)
 and STEVE V. WILKINSON,)
)
 Defendant-)
 Appellants.)

Case No. 84-01460-W
(Chapter 11)

FILED

NOV 16 1992

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

Adversary No. 86-382-C

Dist. Ct. No. 92-C-626-E

ORDER

Comes now before the Court for its consideration, pursuant to Rule 41(a)(1)(ii) Fed.R.Civ.Proc., a Stipulation of Dismissal of the above appeal. After review of the record, the Court finds that said stipulation of dismissal should be granted.

IT IS THEREFORE ORDERED that said Stipulation of Dismissal is hereby GRANTED.

ORDERED this 13th day of November, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

151

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON FILE
DATE NOV 16 1992

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JOHN ERVIN FINNEY a/k/a)
 JOHN E. FINNEY; PATRICIA)
 FINNEY a/k/a PATRICIA V.)
 FINNEY; WILLIAM R. PITCOCK;)
 COUNTY TREASURER, Tulsa)
 County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
 Defendants.)

FILED

NOV 16 1992

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

CIVIL ACTION NO. 91-C-0104-C

DEFICIENCY JUDGMENT

This matter comes on for consideration this 13th day of Nov, 1992, upon the Motion of the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, for leave to enter a Deficiency Judgment. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendants, John Ervin Finney a/k/a John E. Finney and Patricia Finney a/k/a Patricia V. Finney, appear neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that a copy of Plaintiff's Motion was mailed by certified return receipt addressee restricted mail to John Ervin Finney a/k/a John E. Finney and Patricia Finney a/k/a Patricia V. Finney, 922 North Harvard Avenue, Tulsa, Oklahoma 74115, and by first-class mail to all answering parties and/or counsel of record.

The Court further finds that the amount of the Judgment rendered on March 23, 1992, in favor of the Plaintiff United States of America, and against the Defendants, John Ervin Finney a/k/a John E. Finney and Patricia Finney a/k/a Patricia V. Finney, with interest and costs to date of sale is \$30,876.50.

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

The Court further finds that the appraised value of the real property at the time of sale was \$3,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered March 23, 1992, for the sum of \$3,305.00 which is more than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on November 2, 1992.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendants, John Ervin Finney a/k/a John E. Finney and Patricia Finney a/k/a Patricia V. Finney, as follows:

Principal Balance plus pre-Judgment Interest as of March 23, 1992	\$29,175.95
Interest From Date of Judgment to Sale	408.91
Late Charges to Date of Judgment	304.29
Appraisal by Agency	250.00
Abstracting	145.00
Publication Fees of Notice of Sale	367.35
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$30,876.50
Less Credit of Sales Proceeds	- <u>3,305.00</u>
DEFICIENCY	\$27,571.50

plus interest on said deficiency judgment at the legal rate of 3.24 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the sale proceeds of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendants, John Ervin Finney a/k/a John E. Finney and Patricia Finney a/k/a Patricia V. Finney, a deficiency judgment in the amount of \$27,571.50, plus interest at the legal rate of 3.24 percent per annum on said deficiency judgment from date of judgment until paid.

~~(Signed)~~ H. Dale Cook

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney


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

PB/esr

CLOSED

FILED

NOV 16 1992

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

UNITED VAN LINES, INC., a)
corporation,)
)
Plaintiff)
)
vs.)
)
NEW ANTIQUES, INC., an)
Oklahoma Corporation, and)
OAK MART, INC., an)
Oklahoma Corporation)
)
Defendants)

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

Case No. 92-C-805-E

ENTERED ON DOCKET

DATE NOV 17 1992

NOTICE OF DISMISSAL

COMES NOW, United Van Lines, Inc. Plaintiff, pursuant to Rule 41 (a)(1) of the Federal Rules of Civil Procedure and dismisses its Complaint in the above styled cause.

No answer or entry of appearance has been filed by any Defendant herein.

Respectfully submitted,



DAVID B. SCHNEIDER, OBA #7969
210 West Park Avenue, Suite 1120
Oklahoma City, Oklahoma 73102
(405) 232-9990

Attorney United Van Lines, Inc.

DATE ~~NOV 17 1992~~

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

FILED

NOV 9 1992

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

JEANNE SHERRILL and)
 C.D. SHERRILL,)
)
 Plaintiffs,)
)
 vs.)
)
 MARINE RECREATIONAL)
 OPPORTUNITIES, INC.,)
 a foreign corporation,)
)
 Defendant.)

Case No. 91-C-420 -B ✓

O R D E R

Before the Court for consideration is the Defendant's Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(7) and Alternatively Motion to Join pursuant to Fed.R.Civ.P 19(a) and Motion to Dismiss pursuant to Fed.R.Civ.P. 19(b).

Plaintiffs, Jeanne Sherrill ("Jeanne") and C.D. Sherrill, filed this action June 17, 1991, alleging that Defendant's negligent operation and maintenance of property held open to the public caused Jeanne Sherrill to fall from a mobile home porch and suffer severe injuries (count 1) which consequently deprived C.D. Sherrill of Jeanne's services of society and companionship (count 2).

An initial status conference was held September 1, 1992, by the Magistrate. He ordered the Defendant to file any dispositive motions by October 1, 1992, and the Plaintiff to respond by October 16, 1992. Defendant, Marine Recreational Opportunities, Inc., filed its motion to dismiss September 9, 1992. The Plaintiffs have failed to respond. According to Local Rule 15(A), Plaintiff's failure to

clm

file a response constitutes a confession of the matters raised in the Defendant's motion.

Defendant's motion argues that Jeanne was allegedly injured due to a premises defect at Marineland, located in Delaware County, Oklahoma. Defendant contends that it did not own the property or the business where the alleged injury occurred but rather it managed the business for Grand Lake Properties, Inc. ("Grand Lake"), which owned the property and business.

Defendant argues that Grand Lake is an indispensable party to this action because any determination by this Court of the existence of a property defect would necessarily affect the rights of Grand Lake. Defendant contends that Plaintiffs' failure to join Grand Lake is fatal to their cause of action and the Court should dismiss the action pursuant to Rule 12(b)(7).

Alternatively, Defendant argues that if Grand Lake is joined as a Defendant pursuant to Rule 19(a), diversity of citizenship would be destroyed¹ and the Court should dismiss the matter pursuant to Rule 19(b).

Based on Defendant's allegations, and the Plaintiffs' confession of the same, the Court concludes that Grand Lake could be prejudiced by an adverse ruling in this case and thus Grand Lake should be joined as a party, that neither the Plaintiffs nor the Defendant would be prejudiced by dismissing this action at this stage of the proceeding and that joining Grand Lake as a Defendant

¹ Defendant states that Grand lake Properties, Inc., is an Oklahoma corporation and the Plaintiff's are Oklahoma residents.

would destroy diversity. Dismissing this action will not deprive the Plaintiffs of a forum for their claim as they can still bring this action in state court and join all the necessary parties.

For these reasons, Defendant's Motion to Dismiss for failure to join an indispensable party is GRANTED.

IT IS SO ORDERED THIS 9th DAY OF NOVEMBER, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

FEDERAL DEPOSIT INSURANCE CORPORATION,)
as Manager of the Federal Savings)
and Loan Insurance Corporation)
Resolution Fund,)

Plaintiff,)

v.)

JAMES P. FAWCETT, VIRGIL S.)
TILLY, JR., ROBERT S. COPE,)
R. KENNETH DOSE, and CHARLIE MITCHELL,)
Individuals,)

Defendants.)

Richard M. Ellison
1105 W. 17th St.
Oklahoma City, Oklahoma 73101

CASE NO. 91-C-677-E

ENTERED ON DOCKET
DATE NOV 17 1992

ORDER OF DISMISSAL WITH PREJUDICE

Upon motion of the parties,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion for Dismissal With Prejudice of plaintiff, Federal Deposit Insurance Corporation, as Manager of the Federal Savings and Loan Insurance Corporation Resolution Fund acting in its corporate capacity, and defendant, R. Kenneth Dose, be granted and that this action, including all claims, counterclaims and demands which have been asserted or could have been asserted in this cause are dismissed as to R. Kenneth Dose only, with prejudice to any further action, each party to bear its own attorneys' fees and costs.

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

S/ JAMES O. ELLISON

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

CLOSED

FILED

NOV 13 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

MICHAEL B. SNEDDEN and
JANE O. SNEDDEN,

Plaintiffs,

v.

PEABODY COAL COMPANY,

Defendant.

Cause No. 92-C-112 B

EOD 11/16/92

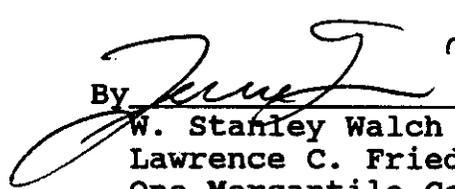
STIPULATION FOR DISMISSAL WITH PREJUDICE

Come now Plaintiffs Michael B. Snedden and Jane O. Snedden, by and through counsel, pursuant to Fed. R. Civ. P. 41(a)(1)(ii) and hereby dismiss their action with prejudice, each party to bear its own costs.

HALL, ESTILL, HARDWICK,
GABLE, GOLDEN & NELSON, P.C.

THOMPSON & MITCHELL

Claire V. Eagan, OBA #554
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2735

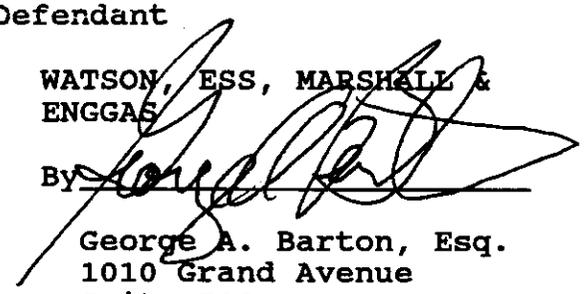
By 
W. Stanley Walch
Lawrence C. Friedman
One Mercantile Center
Suite 3400
St. Louis, MO 63101
(314) 231-7676

Attorneys for Defendant

CROWE & DUNLEVY, P.C.

WATSON, ESS, MARSHALL &
ENGGAS

Madalene Witterholt, Esq.
321 South Boston
Suite 500
Tulsa, OK 74103-3313

By 
George A. Barton, Esq.
1010 Grand Avenue
Suite 500
Kansas City, MO 64106

Attorneys for Plaintiffs

ENTERED ON DOCKET

DATE NOV 16 1992

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 16 1992

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

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PAMELA M. ST. LOUIS f/k/a
PAMELA M. SHANNON; COUNTY
TREASURER, Tulsa County,
Oklahoma; and BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

CIVIL ACTION NO. 92-C-229-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 10th day
of Nov., 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 Defendant, Pamela M.
St. Louis f/k/a Pamela M. Shannon, appears not, but makes
default.

The Court being fully advised and having examined the
court file finds that the Defendant, County Treasurer, Tulsa
County, Oklahoma, acknowledged receipt of Summons and Complaint
on March 19, 1992; and that Defendant, Board of County
Commissioners, Tulsa County, Oklahoma, acknowledged receipt of
Summons and Complaint on March 18, 1992.

THIS CASE IS TO BE MAILED
BY MAIL TO ALL CREDITORS AND
PROSECUTORS WITHIN 30 DAYS
OF THE DATE OF THIS JUDGMENT.

The Court further finds that the Defendant, Pamela M. St. Louis f/k/a Pamela M. Shannon, 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 July 2, 1992, and continuing through August 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 Defendant, Pamela M. St. Louis f/k/a Pamela M. Shannon, 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, Pamela M. St. Louis f/k/a Pamela M. Shannon. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Farmers Home Administration, and its attorneys, Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Wyn Dee

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

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on April 6, 1992; that the Defendant, Pamela M. St. Louis f/k/a Pamela M. Shannon, has failed to answer and her 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 Ten (10), Block Two (2), of ROLLING MEADOWS, a subdivision to the Town of Glenpool, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on June 15, 1981, Pamela M. Shannon executed and delivered to the United States of America, acting through the Farmers Home Administration, her mortgage note in the amount of \$36,500.00, payable in monthly

installments, with interest thereon at the rate of thirteen percent (13%) per annum.

The Court further finds that as security for the payment of the above-described note, Pamela M. Shannon, executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated June 15, 1981, covering the above-described property. Said mortgage was recorded on June 15, 1981, in Book 4550, Page 2240, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 21, 1981, Pamela M. Shannon 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 August 4, 1983, Pamela M. Shannon 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 October 3, 1984, Pamela M. Shannon executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on September 13, 1985, Pamela M. St. Louis 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 October 2, 1986, Pamela M. St. Louis 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 August 10, 1987, Pamela M. St. Louis 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 Defendant, Pamela M. St. Louis f/k/a Pamela M. Shannon, made default under the terms of the aforesaid note, mortgage, and interest credit agreements by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Pamela M. St. Louis f/k/a Pamela M. Shannon, is indebted to the Plaintiff in the principal sum of \$33,238.53, plus accrued interest in the amount of \$7,351.95 as of July 11, 1990, plus interest accruing thereafter at the rate of 13 percent per annum or \$11.8383 per day until judgment, plus interest

thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of \$27,480.35, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action in the amount of \$305.90 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 the Defendant, Pamela M. St. Louis f/k/a Pamela M. Shannon, in the principal sum of \$33,238.53, plus accrued interest in the amount of \$7,351.95 as of July 11, 1990, plus interest accruing thereafter at the rate of 13 percent per annum or \$11.8383 per day until judgment, plus interest thereafter at the current legal rate of 3.24 percent per annum until fully paid, and the further sum due and owing under the interest credit agreements of \$27,480.35, plus interest on that sum at the current legal rate of 3.24 percent per annum from judgment until paid, plus the costs of this action in the amount of \$305.90 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 Defendant, Pamela M. St. Louis f/k/a Pamela M. Shannon, 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 appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

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

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

CLOSED
FILED
NOV 15 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:)
)
REPUBLIC FINANCIAL)
CORPORATION, an Oklahoma)
corporation,)
)
Debtor.)
)
R. DOBIE LANGENKAMP,)
Successor Trustee,)
)
Plaintiff-Appellee,)
)
vs.)
)
CLEO M. and GARY A. WELCH,)
)
Defendant-)
Appellants.)

Case No. 84-01460-W
(Chapter 11)

ENTERED ON DOCKET
DATE NOV 16 1992

Adversary No. 86-630-C

Dist. Ct. No. 92-C-618-E

ORDER

Comes now before the Court for its consideration, pursuant to Rule 41(a)(1)(ii) Fed.R.Civ.Proc., a Stipulation of Dismissal of the above appeal. After review of the record, the Court finds that said stipulation of dismissal should be granted.

IT IS THEREFORE ORDERED that said Stipulation of Dismissal is hereby GRANTED.

ORDERED this 12th day of November, 1992.


JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

15

CLOSED

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

FILED

NOV 13 1992

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

MARCEL L. JACKSON,
Plaintiff,

vs.

STANLEY GLANZ, ET AL.,
Defendants.

No. 92-C-723-E

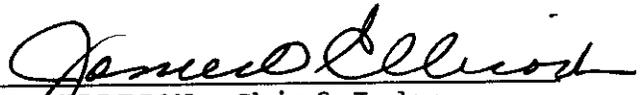
ENTERED ON DOCKET
DATE NOV 16 1992

ORDER

In the court's last order, Plaintiff's motion for an enlargement of time in which to respond to Defendants' motion to dismiss was granted, and Plaintiff was given twenty more days within which to oppose Defendants' motion. The court advised Plaintiff that failure to comply with the court's order could result in the dismissal of his complaint.

The court's deadline has long since past, and Plaintiff has not filed a response to Defendants' motion to dismiss. Accordingly, Plaintiff's complaint is hereby dismissed without prejudice for failure to comply with the court's order. See also Local Rule 15(A); Green v. Dorrell, 969 F.2d 915 (10th Cir. 1992).

SO ORDERED THIS 13th day of November, 1992.


JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

8

CLOSED

ENTERED ON DOCKET

DATE NOV 16 1992

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

FILED

NOV 13 1992

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

KEVIN CHRISTOPHER REPTKE,

Plaintiff,

vs.

STANLEY GLANCE, ET AL.,

Defendants.

No. 92-C-809-E

ORDER

Plaintiff filed a civil rights complaint, but did not submit a filing fee or motion for leave to proceed in forma pauperis with his complaint. In the court's last order, the Clerk was directed to send Plaintiff a motion for leave to proceed in forma pauperis form, and Plaintiff was granted twenty days within which to file a completed motion with the court. Plaintiff was advised that the failure to comply with the order could result in the dismissal of his complaint.

Plaintiff has not complied with the court's order; it appears that Plaintiff has moved without leaving a forwarding address with the court. Accordingly, the court has no choice but to dismiss Plaintiff's complaint at this time.

SO ORDERED THIS 13th day of November, 1992.

James O. Ellison
JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

3

NOV 19 1992

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 RONALD JOE ANDERSON;)
 COUNTY TREASURER, Tulsa)
 County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED

NOV 19 1992

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

CIVIL ACTION NO. 92-C-038-B

DEFICIENCY JUDGMENT

This matter comes on for consideration this 10 day of Nov., 1992, upon the Motion of the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, for leave to enter a Deficiency Judgment. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendant, Ronald Joe Anderson, appears neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that a copy of Plaintiff's Motion was mailed by certified return receipt addressee restricted mail to Ronald Joe Anderson, 11407 North 96th East Ave., Owasso, Oklahoma 74150, and by first-class mail to all answering parties and/or counsel of record.

The Court further finds that the amount of the Judgment rendered on March 27, 1992, in favor of the Plaintiff, United

RECEIVED BY OFFICE OF THE CLERK
U. S. DISTRICT COURT AND
RETURNED TO THE MAIL ROOM
UPON RECEIPT.

States of America, and against the Defendant, Ronald Joe Anderson, with interest and costs to date of sale is \$65,971.24.

The Court further finds that the appraised value of the real property at the time of sale was \$52,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered March 27, 1992, for the sum of \$46,312.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on October 14, 1992.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendant, Ronald Joe Anderson, as follows:

Principal Balance plus pre-Judgment Interest as of March 27, 1992	\$64,063.84
Interest From Date of Judgment to Sale	921.92
Late Charges to Date of Judgment	457.40
Appraisal by Agency	50.00
Abstracting	120.00
Publication Fees of Notice of Sale	133.08
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$65,971.24
Less Credit of Appraised Value	- <u>52,000.00</u>
DEFICIENCY	\$13,971.24

plus interest on said deficiency judgment at the legal rate of 3.24 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendant, Ronald Joe Anderson, a deficiency judgment in the amount of \$13,971.24, plus interest at the legal rate of 3.24 percent per annum on said deficiency judgment from date of judgment until paid.

S/ THOMAS H. ORT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney

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

PB/esr

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

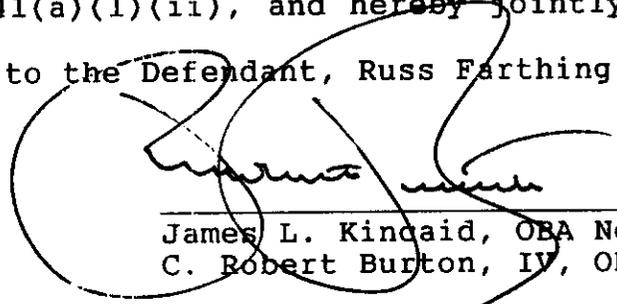
THE FIRST NATIONAL BANK &
TRUST COMPANY OF TULSA)
)
)
 Plaintiff,)
)
 v.)
)
 DUKE MANUFACTURING, INC.,)
 PROCHEM, INC., JERRY N.)
 DUKE, PATRICIA MAGEE, and)
 RUSS FARTHING)
)
 Defendants.)

Case No. 91-C-675-B

FILED
NOV 12 1992
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

STIPULATION OF DISMISSAL

COMES NOW the parties, Plaintiff, The First National Bank & Trust Company of Tulsa, and the Defendant, Russ Farthing, by and through their attorneys of record, pursuant to Fed.R.Civ.P. 41(a)(1)(ii), and hereby jointly dismiss the within action as to the Defendant, Russ Farthing.

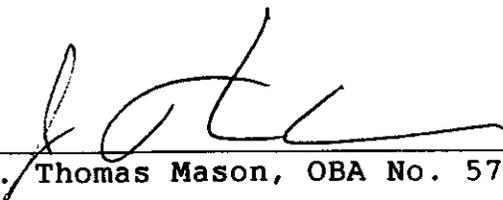


James L. Kincaid, OBA No. 5021
C. Robert Burton, IV, OBA No. 14195

- Of the Firm -

CROWE & DUNLEVY
A Professional Corporation
Suite 500
321 South Boston
Tulsa, Oklahoma 74103-3313
(918) 592-9800

ATTORNEYS FOR PLAINTIFF THE
FIRST NATIONAL BANK & TRUST
COMPANY OF TULSA



J. Thomas Mason, OBA No. 5758

- Of the Firm -

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

ATTORNEYS FOR DEFENDANTS' DUKE
MANUFACTURING, INC., PROCHEM,
INC., JERRY N. DUKE, PATRICIA
MAGEE, and RUSS FARTHING

219.92BCRB

NOV 18 1992

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

FILED

NOV 12 1992

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

92-C-285-B

CHARLES DAY,)
)
Petitioner,)
)
v.)
)
RON CHAMPION,)
)
Respondent.)

ORDER

Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now before the court for consideration. Petitioner was convicted in Oklahoma County District Court, Case No. CRF-85-3230, of fraud, and sentenced to sixty (60) years imprisonment. The conviction was affirmed on appeal to the Oklahoma Court of Criminal Appeals.

Petitioner filed three applications for relief under the Oklahoma Post-Conviction Procedure Act, 22 O.S. § 1080 et seq. The first was denied on April 3, 1989 and the denial was affirmed by the Oklahoma Court of Criminal Appeals in Case No. PC-89-419. The second was denied in 1990 and the denial was affirmed by the Oklahoma Court of Criminal Appeals in Case No. PC-90-396. The third was denied on December 6, 1991 and the denial was affirmed by the Oklahoma Court of Criminal Appeals

Petitioner now seeks federal habeas relief on the alleged grounds that: 1) the State of Oklahoma denied his due process rights by failing to provide an adequate post-conviction judicial procedure to remedy defects in his prosecution; 2) his present sentence was improperly enhanced by 1967 prior convictions obtained by involuntary and uninformed guilty pleas; 3) he was denied his due process right to an evidentiary hearing

by the state trial court on his application for post-conviction relief; and 4) the judge hearing his application for post-conviction relief erred in barring review of his claim based on the collateral attack standard.

Respondent moves for dismissal under 28 U.S.C. § 2244(b), claiming the petition is successive and constitutes an abuse of the writ of habeas corpus.

This is petitioner's second attempt to obtain federal habeas relief from this conviction. On August 15, 1990, he filed an application for a writ of habeas corpus in the United States District Court for the Western District of Oklahoma in Case No. CIV-90-1305-R, attacking the same conviction he is attacking in the present case. He raised fifteen allegations of error, but on January 18, 1991, the District Court denied his requested relief and dismissed the petition. The petitioner appealed the denial to the Tenth Circuit Court of Appeals in Case No. 91-6045, and the denial was affirmed on November 12, 1991.

In McCleskey v. Zant, 499 U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), the Supreme Court addressed the doctrine of abuse of a petition for writ of habeas corpus under 28 U.S.C. § 2244(b). In McCleskey, the Court stated that, after an abuse of the writ is pled by the government, a petitioner must show that the writ has not been abused. 111 S.Ct at 1470. To excuse his failure to raise a claim earlier, he must show cause for the failure to raise the issue and must then show any prejudice therefrom. Id.

In Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir. 1991), the Tenth Circuit held that, in abuse of the writ cases, the cause and prejudice standard applies to pro se petitioners just as it applies to petitioners represented by counsel. When a pro se petitioner presents a new claim in a second or subsequent federal habeas petition, he must show

cause and prejudice, as those terms have been defined in procedural default cases. "We have noted that 'cause requires a showing of some external impediment' that prevents the petitioner or counsel from constructing or raising the claim. In order to satisfy the cause standard in procedural default cases, 'the petitioner must show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court.'" Id. (citations omitted). A pro se prisoner's status and corresponding lack of awareness and training on legal issues do not constitute adequate cause for failure to raise new claims in a previous petition. Id. at 688.

In the present case, it is clear that the issues raised in this petition were available to the petitioner when he filed his first petition in August of 1990. Petitioner attempts to blame the failure to raise the issues on "new developments in the law", citing the case of Gamble v. Parsons, 898 F.2d 117 (10th Cir. 1990). However, the Gamble case was decided five months before his first petition was filed and the decision is only tangentially related to one of the four claims raised, that of improper enhancement by prior invalid convictions. The Gamble court concluded that a defendant can challenge a fully-expired conviction used to enhance a subsequent conviction by filing a habeas corpus action directed toward the enhanced sentence being served. However, the decision did not discuss the standards for determining the validity of a guilty plea, which were set out in King v. State, 553 P.2d 530 (Okla.Crim.App. 1976). The law in King that is the basis of petitioner's claim that his prior convictions were obtained by involuntary and uninformed guilty pleas was available to petitioner at the time he appealed his present conviction, filed

his post-conviction applications, and filed his first habeas corpus petition, and was never raised.

Petitioner has shown absolutely no reason why his claims were not or could not have been asserted in his petition filed in 1990. The issues were clear and undoubtedly could have been raised at that time. Because all of the claims could have been asserted in the prior petition filed in federal court, petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is dismissed as successive and an abuse of the writ in accordance with Rule 9(b), Rules Governing Section 2254 Cases.

Dated this 12th day of Nov., 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

NOV 12 1992

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

92-C-501-B

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

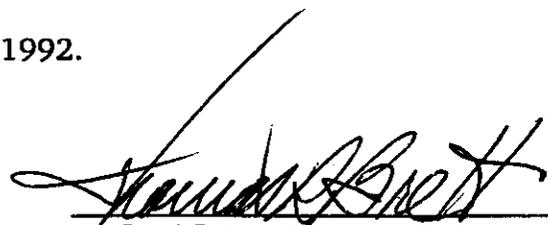
ROBERT EARL GLASPER,)
)
Petitioner,)
)
v.)
)
RON CHAMPION, et al.,)
)
Respondents.)

ORDER

This order pertains to petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1)¹, respondents' Motion to Dismiss for Failure to Exhaust State Remedies (#3), and petitioner's Traverse (#6). In his traverse, petitioner agrees with respondents that he has not exhausted his state remedies by raising the issues contained in his petition on appeal or through post-conviction relief proceedings. Petitioner asks the court to dismiss his petition without prejudice to give the state courts an opportunity to address his claims.

Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 is dismissed without prejudice.

Dated this 12th day of November, 1992.



 THOMAS R. BRETT
 UNITED STATES DISTRICT JUDGE

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

NOV 16 1992

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 MARIE A. MILLER; COUNTY)
 TREASURER, Tulsa County,)
 Oklahoma; and BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

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

CIVIL ACTION NO. 91-C-856-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 10th day
of Nov., 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 Defendant, Marie A.
Miller, appears not, but makes default.

The Court being fully advised and having examined the
court file finds that the Defendant, County Treasurer, Tulsa
County, Oklahoma, acknowledged receipt of Summons and Complaint
on November 5, 1991; and that the Defendant, Board of County
Commissioners, Tulsa County, Oklahoma, acknowledged receipt of
Summons and Complaint on November 5, 1991.

The Court further finds that the Defendant, Marie A. Miller, 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 July 23, 1992, and continuing through August 27, 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, Marie A. Miller, 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, Marie A. Miller. 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 party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on November 25, 1991; that the Defendant, Marie A. Miller, has failed to answer and her 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 Twelve (12), Block Forty-Nine (49), VALLEY VIEW ACRES THIRD ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of Cleveland Miller and of judicially terminating the joint tenancy of Cleveland Miller and Marie A. Miller.

The Court further finds that Cleveland Miller and Marie A. Miller became the record owners of the real property

involved in this action by virtue of that certain Warranty Deed dated May 3, 1973, from Donald E. Johnson as Administrator of Veterans Affairs to Cleveland Miller and Marie A. Miller, husband and wife, as joint tenants, and not as tenants in common, with full right of survivorship, the whole estate to vest in the survivor in the event of the death of either, which Warranty Deed was filed of record on May 7, 1973, in Book 4067, Page 1738, in the records of the County Clerk of Tulsa County, Oklahoma.

The Court further finds that on May 4, 1973, Cleveland Miller and Marie A. Miller 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 \$11,000.00, 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, Cleveland Miller and Marie A. Miller 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 real estate mortgage dated May 4, 1973, covering the above-described property. Said mortgage was recorded on May 7, 1973, in Book 4067, Page 1756, in the records of Tulsa County, Oklahoma.

The Court further finds that Cleveland Miller died on May 21, 1978, in the City of Tulsa, Tulsa County, Oklahoma. Upon

the death of Cleveland Miller, the subject property vested in his surviving joint tenant, Marie A. Miller, by operation of law.

The Court further finds that the Defendant, Marie A. Miller, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Marie A. Miller, is indebted to the Plaintiff in the principal sum of \$8,531.01, plus interest at the rate of 4.5 percent per annum from May 1, 1984 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$289.55 (\$281.55 publication fees, \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$352.00, plus penalties and interest, for the year 1991. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$3.00 which became a lien on the property as of 1990. Said lien is inferior to the interest of the Plaintiff, United States of America.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the death of Cleveland Miller be and the same hereby is judicially determined to have occurred on May 21, 1978, in the City of Tulsa, Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the joint tenancy of Cleveland Miller and Marie A. Miller in the above-described real property be and the same hereby is judicially terminated as of the date of the death of Cleveland Miller on May 21, 1978.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against Defendant, Marie A. Miller, in the principal sum of \$8,531.01, plus interest at the rate of 4.5 percent per annum from May 1, 1984 until judgment, plus interest thereafter at the current legal rate of 3.24 percent per annum until paid, plus the costs of this action in the amount of \$289.55 (\$281.55 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 Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$352.00, plus penalties and interest, for ad valorem taxes for the year 1991, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$3.00 for personal property taxes for the year 1990, plus the costs of this action.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Marie A. Miller, 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 appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$352.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

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

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$3.00, personal property taxes which are currently due and owing.

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

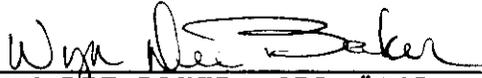
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. DEWITT

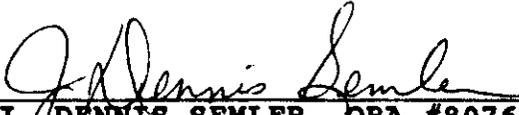
UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney



WYN DEE BAKER, OBA #465
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



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. 91-C-856-B

WDB/css

States of America, and against the Defendant, Charles V. Coleman, with interest and costs to date of sale is \$12,752.83.

The Court further finds that the appraised value of the real property at the time of sale was \$3,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered November 1, 1991, for the sum of \$3,334.00 which is more than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on September 25, 1992.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendant, Charles V. Coleman, as follows:

Principal Balance plus pre-Judgment Interest as of November 1, 1991	\$11,140.06
Interest From Date of Judgment to Sale	421.83
Late Charges to Date of Judgment	224.40
Appraisal by Agency	350.00
Abstracting	243.00
Publication Fees of Notice of Sale	148.54
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$12,752.83
Less Credit of Sale Proceeds	- <u>3,334.00</u>
DEFICIENCY	\$ 9,418.83

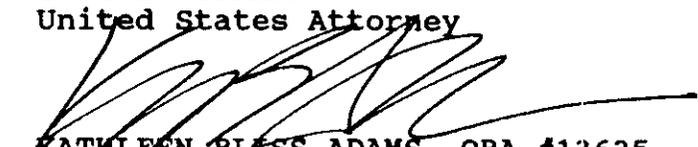
plus interest on said deficiency judgment at the legal rate of 3.24 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the sale proceeds of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendant, Charles V. Coleman, a deficiency judgment in the amount of \$9,418.83, plus interest at the legal rate of 3.24 percent per annum on said deficiency judgment from date of judgment until paid.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney



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

KBA/esr

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

FILED

NOV 15 1992

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

BERNARD OLCOTT,
Plaintiff,
vs.
DELAWARE FLOOD COMPANY,
a limited partnership under
the laws of Oklahoma, et al.,
Defendants.

No. 83-C-179-E

ENTERED ON DOCKET
NOV 15 1992

ORDER

The Court has for consideration the viability of Plaintiff's claim in light of recent changes in the relevant law. The parties have adequately briefed the issues that pertain and the matter is in a posture for resolution.

By way of review, Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gibertson, ___ U.S. ___, 111 S.Ct. 2773 (1991) held that the statute of limitations applicable to Section 10(b) claims under the Securities Exchange Act of 1934 as amended - 15 U.S.C. §78j(b) - is to be found in Section 9(e) of the Act which provides that:

No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

15 U.S.C. §78i(e). Because the three year limit amounts to a period of repose which extinguishes the claim, the federal equitable tolling doctrine could not apply beyond its reach. Gilbertson at 2782. Under the rule announced in James B. Beam Distilling Co. v Georgia, ___ U.S. ___, 111 S.Ct. 2439, 2447-48 (1991), it was clear that Gilbertson should be applied

832

retroactively. In sum, Gilbertson effected an absolute bar on pending claims brought more than three years after a §10(b) violation.

Shortly after Gilbertson was decided, Congress amended the Securities and Exchange Act of 1934, 15 U.S.C. §78aa-1 (Supp. III 1991) to provide, in pertinent part, that

Sec. 27A(a) ... The limitation period for any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991; [and]

(b) ... Any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991 ...

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

The instant case was dismissed on September 25, 1991 (docket #780) pursuant to Gilbertson. Plaintiff appealed from the dismissal but, subsequently, moved the Tenth Circuit to remand on the basis of Section 27A. Plaintiff also filed a timely Motion to Reinstate (docket #798) under Section 27A(b) of the Act. The Circuit granted Plaintiff's Motion to Remand and this Court then stayed proceedings on reinstatement pending resolution of the issue

raised in Anixter v. Homestake Production Co., 939 F.2d 1420 (10th Cir. 1991) challenging the constitutionality of Section 27A. In Homestake the Circuit had dismissed Plaintiffs' §10(b) claims pursuant to Gilbertson but revisited the claims upon Plaintiffs' §27A(b) Motion to Reinstate following passage of the amendment. In Anixter v. Homestake Production Co., Nos. 90-5040-5049; 90-5051; 90-5053; 90-5055-5059; 90-5062-5067, slip op. at 31 (10th Cir. Aug. 24, 1992) the Court held, inter alia, that §27A was constitutional; therefore the verdict should be reinstated. And in Anixter v. Homestake Production Co., Nos. 90-5040-5049; 90-5051; 90-5053; 90-5055-5059; 90-5062-5067, slip op. at 4 (10th Cir. Oct. 23, 1992) the Circuit amplified its prior decision by finding in part that because Oklahoma law (Okla.Stat.Ann.tit. 12 Section 95) governed the applicable limitations period for the claims and as of June 19, 1991, Oklahoma limitations law included principles of equitable tolling, the case would be remanded for a factual determination of whether Plaintiffs' claims were timely filed.

What remains for this Court to determine in the case at bar is 1) which jurisdiction states the applicable limitations period; and 2) whether Plaintiff's claims were timely under the applicable statute of limitations as of June 19, 1991. The parties will recall that these issues were previously briefed pursuant to the Court's directive at docket #756. The Court has reviewed the arguments of the parties on these issues and now finds as follows:

1. This case was initially filed in New Jersey on July 7, 1982;

2. On the grounds of forum non conveniens, it was subsequently transferred to this Court pursuant to 28 U.S.C. §1404(a);
3. Pursuant to the authority of Van Dusen v. Barrack, 84 S.Ct. 805 (1964) and Ferens v. John Deere Co., 110 S.Ct. 1274 (1990), this Court must apply the law of the transferor court;
4. Section 27A(b) requires this court to look to "the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991";
5. As of June 19, 1991, the applicable limitations period for §10(b) and Rule 10b-5 claims had been enunciated in In re Data Access Systems Securities Litigation, 843 F.2d 1537 (3rd Cir. 1988). There, the Third Circuit adopted the one and three year approach found in the limitations provisions of the Securities and Exchange Act of 1934. Id. at 1550. Thus we ironically come full circle and return to the same rule announced in Gilbertson, Section 27A notwithstanding;
6. The Court must next address the conundrum of retroactivity: should Data Access be applied to the present case pursuant to Third Circuit law governing retroactivity as of June 19, 1991? In resolving the issue the Court has applied the three-pronged test mandated by Chevron Oil Co. v. Henson, 92 S.Ct. 349

(1971) and finds that

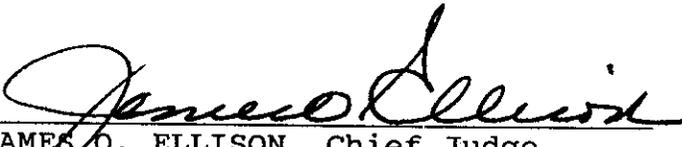
- a. Data Access did not overrule clear precedent on which the plaintiff might reasonably have relied nor did it decide an issue of first impression. The issue had been addressed on previous occasions by a notably divided court. See e.g. Roberts v. Magnetic Metals Co., 611 F.2d 450 (3rd Cir. 1979) followed by Biggans v. Bache Halsey Stuart Shields, 638 F.2d 605 (3rd Cir. 1980). Indeed, of the four Third Circuit cases which have considered this first prong of the Chevron test as it applies to Data Access, three have found that there was no clear precedent, pre-Data Access, upon which plaintiff could justifiably rely.¹
- b. These same Third Circuit opinions each found that retroactive application of Data Access would neither assist nor hamper the rule's function. See, e.g. Hill at 698, Gatto at 843. The Court finds that under the facts of this case the second Chevron criterion is rendered neutral as well.
- c. Finally, because Plaintiff's claim would have been time barred under New Jersey's two-year Blue Sky limitation of actions law for Section 10(b) claims, the Court finds that retroactive application of

¹Hill v. Equitable Trust Co., 851 F.2d 691 (3rd Cir. 1988); McCarlett v. Mitcham, 883 F.2d 196 (3rd Cir. 1989); and Gatto v. Meridan Medical Associates, Inc., 882 F.2d 840 (3rd Cir. 1989).

Data Access will not work a substantial inequity upon Plaintiff.

The Court must conclude that under the applicable law, Plaintiff's claims are time-barred, thus this Court lacks subject-matter jurisdiction over them and the case should be dismissed.

It is so ORDERED this 17th day of November, 1992.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
NOV 13 1992
DATE

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

Gilbert M. Milford,

Plaintiff,

vs.

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

Defendant.

Case No. 91-C-256-B ✓

FILED

NOV - 6 1992

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

ORDER

The Court has for its consideration the objections of Plaintiff, Gilbert M. Milford, to the Report and Recommendation (hereinafter "R&R") of the United States Magistrate Judge affirming the Administrative Law Judge's (hereinafter "ALJ") denial of disability insurance benefits under 42 U.S.C. §§ 216(i) and 223 of the Social Security Act, as amended.

Plaintiff filed the instant action pursuant to 42 U.S.C. § 405(g) seeking review of the decision of the Secretary of Health and Human Services. The matter was referred to the Magistrate Judge who entered his R&R on July 30, 1992. The Magistrate Judge recommended to affirm the Secretary's decision.

The Social Security Act entitles every individual who "is under a disability" to disability insurance benefits. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." *Id.* § 423(d)(1)(A). An individual

"shall be determined to be under disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but

11

cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

Id. §423(d) (2)(A).

Under the Social Security Act, the claimant bears the burden of proving a disability, as defined by the Act, which prevents him from engaging in his prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once a disability is established, the burden shifts to the Secretary who must show that the claimant retains the ability to do other work activity and that jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. See Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971); Campbell, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

"is not merely a quantitative exercise.

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

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

The Secretary has established a five-step process for evaluating a disability claim. The five steps, as set forth in Reyes v. Bowen, 845 F.2d at 243, are as follows:

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

The inquiry begins with step one, and if at any point the claimant is found to be disabled or not disabled, the inquiry

ceases. Reyes, 845 F.2d at 242; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. §416.920 (1991).

Plaintiff here allegedly suffers from degenerative joint disease in both knees. The present appeal focuses on whether the ALJ properly found that the Plaintiff's right to Social Security Disability Benefits commenced on January 7, 1989, when Plaintiff became 50 years of age, as opposed to June 16, 1986, Plaintiff's alleged date of disability. Plaintiff argues that the ALJ's application of the Medical-Vocational Guidelines (Grids) was improper in a case involving nonexertional impairments, and thus, his decision was not supported by substantial evidence.

Substantial Evidence

Based on the testimony of the Plaintiff and the medical reports, the ALJ found that Plaintiff's impairments did not meet the strictures of 20 C.F.R. § 404.1520 (1983) as he failed to satisfy the fifth section of the test used in considering a claim for benefits under the Social Security Act. The ALJ concluded that Plaintiff did not have an impairment or combination of impairments of such severity as to prevent him from engaging in all substantial gainful work activity prior to January 7, 1989; however, disability existed after such time.

In reaching his conclusion, the ALJ found that Plaintiff had the residual functional capacity to perform the physical exertional requirements of work except for lifting and carrying more than 20 pounds and standing and/or walking for prolonged periods, with no nonexertional limitations. The ALJ further found that while Plaintiff was unable to perform his past relevant work as a

computer output technician, he had the residual functional capacity to perform the full range of sedentary work.

After concluding that Plaintiff's impairments were of sufficient severity to preclude the performance of past work, the ALJ determined whether or not Plaintiff could perform other work in the national economy, requiring consideration of other factors, including age, education, past work experience, and residual functional capacity. Additionally, the ALJ considered the vocational expert's testimony that Plaintiff's work was a semi-skilled occupation with no transferable skills to sedentary or light work (TR.49).

Plaintiff was 47 years of age at the alleged onset of disability, June 15, 1986. The grids, as set forth in 20 C.F.R.§404, subpt.P, app.2, direct that special consideration be given to age in determining an individual's ability to make a vocational adjustment to sedentary work. Specifically, those guidelines direct that a younger individual between the ages of 18 and 49, who is a high school graduate,¹ can be expected to make an adjustment to sedentary work regardless of whether they have transferable skills or not. 20 C.F.R.§404, subpt.P, app.2, 201.00(h). The Grids further direct that individuals approaching advanced age, between 50 and 54, may be significantly limited in vocational adaptability if they are restricted to sedentary work. 20 C.F.R.§404, subpt.P, app.2,201.00(g). Thus, the ALJ concluded that although the Plaintiff still had the ability to engage in

¹ Plaintiff completed high school. (Record on Appeal pp. 15-16).

sedentary work, his adaptability to such work, considering his lack of transferable skills, was too remote at the age of 50, and thus the ALJ found that the Plaintiff was disabled at that point.

Such use of the Grids is appropriate in determining disability. See, Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984); Heckler v. Campbell, 461 U.S. 458,467 (1983). Furthermore, the appendix to the Grids, states that the rules "reflect the analysis of the various vocational factors (i.e., age, education, and work experience) in combination with the individual's residual functional capacity... in evaluating the individuals's ability to engage in substantial gainful activity in other than his or her vocational relevant past work."

Plaintiff argues that application of the Grids is not appropriate where nonexertional impairments exist.² However, the presence of a nonexertional impairment such as pain does not preclude the use of the grids. Eggleston v. Bowen, 851 F.2d 1244, 1247 (10th Cir. 1988). The use of grids is precluded only to the extent that the nonexertional impairment further limits the claimant's ability to perform work at the applicable exertional level. Eggleston, 851 F.2d at 1247; Teter v. Heckler, 775 F.2d 1104,1105 (10th Cir. 1985).

Courts have found that both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). Nevertheless, "subjective complaints of pain must be accompanied by medical evidence and may

² The record reveals that Plaintiff's only alleged nonexertional impairment is pain.

be disregarded if unsupported by any clinical finding." Frey v. Bowen, 816 F.2d 508,515 (10th Cir. 1987). In this case, the ALJ addressed Plaintiff's alleged pain and found that such subjective complaints of pain were not of sufficient frequency or severity to affect Plaintiff's ability to engage in a full range of sedentary work.

The ALJ questioned the credibility of Plaintiff's subjective complaints of pain as they were not supported by the medical evidence or Plaintiff's daily activities. Nevertheless, he gave Plaintiff every benefit of the doubt and found that certain physical exertions did in fact result in severe discomfort or pain, in Plaintiff's knees, although not precluding him from performing a full range of sedentary work.

The Court agrees with and adopts the R&R of the Magistrate finding that substantial evidence in the record supports the ALJ findings as to disability.³ The record indicates that Plaintiff's treating physicians only placed very slight functional restrictions on Plaintiff's activities, such as deep knee squats, climbing

³ As hereby adopted and set forth in the R&R of the Magistrate, the ALJ relied on the testimony of Dr. George Mauerman, Dr. Rodney Plaster and Dr. Lance King. Specifically, in December 1986, Dr. Plaster gave Plaintiff a release to return to work in 3 weeks "although it sounds as though because of his compensation he will probably not return to work".

Additionally, he relied on Plaintiff's testimony that he could walk short distances, (TR. 32); he has a "discomfort" in his knees after sitting over an hour and a half and has to "get up and move around sometimes" and sometimes take medicine (TR.34); he spent the day doing small jobs around the house, ran the dishwasher, and cooked (TR.35); he has no difficulty caring for personal needs (TR.35); that walking does not cause any problems unless he does excessive walking for one to two hours at a time (TR.43); he mows the lawn with a rider mower and takes short drives when necessary (TR.43).

ladders and kneeling. The record also indicates that on March 14, 1989, Plaintiff stated that he cooked one meal each day, drove his car to the post office and bank, took his daughter for a piano lesson once a week, did laundry, dishes and swept a small kitchen three times a week. On January 22, 1990, he testified that he reads, watches television, does dishes and cooks the evening meal for the family. The ALJ concluded that such daily activities were more physically demanding than sedentary work.

The Court also concludes that the ALJ did not erroneously apply the Grid. The ALJ only applied the Grid after considering the extent of Plaintiff's nonexertional impairment. He concluded that although claimant graduated from high school, he had no additional education enabling direct entry into sedentary work, and therefore, claimant should be classified as disabled upon attaining the age of 50, on January 7, 1989.

After a thorough review of the record, the Court hereby agrees with and adopts the R&R of the Magistrate finding that substantial evidence supports the decision of the ALJ. The ALJ's denial of Social Security Disability Benefits and Supplemental Security Income Disability prior to January 7, 1989 is hereby AFFIRMED.

IT IS SO ORDERED this 6th day of November, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

CLOSED

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

FILED

NOV 12 1992

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

JAMES JACKSON,)
)
 Plaintiff,)
)
 vs.)
)
 GENERAL MOTORS,)
 CPC, DOUG HILL,)
 JACK WEBBER, et al.,)
)
 Defendants.)

Case No. 92-C-0323-E

NOV 13 1992

ORDER AND JUDGMENT

COMES NOW BEFORE THE COURT FOR CONSIDERATION the Plaintiff's Motion for Summary Judgment, or in the alternative, for Partial Summary Judgment, and the Defendant's Motion for Summary Judgment.

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

For the reasons stated herein, Plaintiff's Motion for Summary Judgment is denied and Defendant's Motion for Summary Judgment is granted.

I. Issues Presented

A. Whether, and if so in favor of whom, summary judgment should be granted with respect to Plaintiff's Title VII claims?

1) Whether Title VII of the Civil Rights Act of 1991 applies retroactively to a case pending at the time of its passage?

27

- 2) Whether Plaintiff's Title VII claims are barred by the 90-day filing requirement set forth in the right-to-sue notice sent to Plaintiff by the EEOC?
- B. Whether, and if so in favor of whom, summary judgment should be granted with respect to Plaintiff's 42 U.S.C. §1981 claims?
- 1) Whether Plaintiff's §1981 claims are time-barred by the two- year limitation on filing?
 - 2) Whether Plaintiff's claims of discriminatory harassment in the workplace and/or discriminatory discharge are actionable under §1981?
 - 3) Whether any genuine issue of material fact remains with respect to Plaintiff's §1981 claims?

II. Discussion

A. **TITLE VII CLAIMS**

- 1) **The 1991 Civil Rights Act does not retroactively apply to Jackson's claims**

Jackson's complaint seeks recovery under the "Civil Rights Act of 1991 or 1992". However, the alleged discrimination for which Jackson seeks recovery occurred in April of 1990. The issue raised is whether the 1991 amendments to Title VII of the Civil Rights Act of 1964, as amended in 1972, retroactively apply to a claim which arose prior to their passage.

The United States Supreme Court charged lower federal courts to determine whether the 1991 amendments were intended to be applied retroactively. See Gersman v. Group Health Association, Inc., 112 S.Ct. 960 (1992) (case remanded to the D.C. Appellate

Court for further consideration in light of the 1991 Civil Rights Act); Holland v. First Virginia Banks, Inc., 112 S.Ct. 1152 (1992) (case remanded to Fourth Circuit for further consideration in light of the 1991 Civil Rights Act). This Court has declined to retroactively apply the provisions of the 1991 Civil Rights Act in the case of Barkan v. Hilti, Inc., No. 89-C-318-E (D.Okl. filed May 4, 1992).

The 1991 Amendments are not applicable to this cause. Plaintiff's may only pursue a claim under the Title VII of the Civil Rights Act of 1964, as amended in 1972.

2) **The Title VII claims are time-barred**

In October of 1990, Jackson filed a Charge of Discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC") and signed a Failure to Cooperate notice, which stated, in pertinent part:

You are now required to inform the EEOC of any changes in your address or phone numbers as long as you have a charge in process. If you fail to do so and contact with you is necessary, your charge will be dismissed for Failure to Cooperate, and no other action will be taken on your charge. [Citation omitted].

If you change your address, write down your charge number and take or mail your new address to: [EEOC address].

By signing this Failure to Cooperate notice, Jackson was placed under a continuing obligation to notify the EEOC of any change in his address.

On December 28, 1990, the EEOC issued Jackson a right-to-sue notice, which was mailed to the address provided by Jackson upon his Charge of Discrimination, and which was never returned by the United States Post Office. That notice advised Jackson that his

right to file suit would be lost if action was not taken by April 12, 1991 (e.g. within 90 days). GM asserts that because Jackson did not file suit until April 23, 1992, Jackson lost the right to sue under Title VII.

Jackson contends that he did not receive the right-to-sue notice until February 26, 1992, and wrote a letter to the EEOC to that effect on February 17, 1992.

A similar situation was addressed in Felton v. New York Post, 54 EPD ¶40, 241 (D.N.Y. 1990). The EEOC mailed Felton a right-to-sue letter on November 13, 1989, but Felton claimed to have not received the letter until February of 1990. Felton filed his claim on April 2, 1990. In addressing the issue of whether the claim was time barred by the statute of limitations, the court stated:

The statute of limitations starts to run when the plaintiff would be expected to receive the right-to-sue letter, and there is "a presumption that a [right-to-sue] letter properly mailed is not only received by the addressee, but also that it is received in the due course of the mails..." Battaglia v. Heckler, 643 F.Supp 558, 559-60 (S.D.N.Y. 1986) (Weinfeld, J.) As a general matter, a plaintiff does not "lose the right-to-sue because of fortuitous circumstances or events beyond his or her control which delay receipt of the EEOC's notice." St. Louis v. Alverno College, [35 EPD ¶34, 693] 744 F.2d 1314, 1316 (7th Cir. 1984). At the same time, however, it is well established that non-receipt of a right-to-sue letter because of a change of address about which the EEOC was not informed is not an event beyond plaintiff's control. [citations omitted].

Courts have clearly placed the burden on the claimants to notify the EEOC of any changes in their address. See also, Griffin v. Prince William Hosp. Corp., 716 F.Supp 919 (E.D.Va. 1989); Hunter v. Stephenson Roofing, 790 F.2d 472 (6th Cir. 1986).

Jackson utterly failed to inform the EEOC of his change of

address pursuant to the "Failure to Cooperate" notice he signed. The ninety day period began to run on Jackson's claims, five days after the EEOC issued the Determination and Right-to-Sue notice to Jackson's address of record. Jackson's claims under Title VII are time barred, and any issues regarding the extent of Jackson's remedies under Title VII are rendered moot.

B. 42 U.S.C. §1981 CLAIMS

1) The §1981 claims are not time-barred

Section 1981 claims are subject to a two year statute of limitations which begins to run on the date of the alleged discrimination. See E.E.O.C. v. Gaddis, 733 F.2d 1373 at 1376-77 (10th Cir. 1984); Scheerer v. Rose State College, 774 F.Supp. 620 (W.D. Okla. 1991). The limitations period in this case began to run in this case on April 19, 1990, the date of the alleged constructive discharge.

GM asserts that because Jackson's complaint was not filed until April 23, 1992, it is time barred. Jackson, however, would assert that the filing of his Affidavit of Financial Status on April 19, 1992 tolled the statute. The issue raised is whether the filing of the Affidavit of Financial Status and request for leave to file in forma pauperis was sufficient to toll the statute of limitations.

The District Court of Oklahoma has addressed a similar issue in Wright v. St.John's Hospital, 414 F.Supp. 1202 (D.C.Okla. 1976), wherein this Court held that the filing of an application for appointment of counsel within the limitations period was sufficient to meet the requirements of filing. The District Court of Pennsylvania has specifically held that filing a motion to proceed in forma pauperis within the limitations period is a sufficient "filing" to toll the statute of limitations, even though the motion is not granted, and therefore the complaint not docketed, until after expiration of the limitations period. See Krajci v. Provident

Consumer Discount Co., 525 F.Supp. 145, aff'd 688 F.2d 822 (D.C.Pa.1981).

Jackson's Affidavit of Financial Status and request for leave to file in forma pauperis, which was filed within the limitations period, was sufficient to meet the requirement of filing. Jackson's §1981 claims are therefore not time-barred by the applicable two-year statute of limitations.

2) The claims of Discriminatory discharge/harassment are not actionable under §1981

Plaintiff asserts a claim for discriminatory discharge, racial harassment in the workplace, and constructive discharge, pursuant to 42 U.S.C. §1981. Plaintiff's claims of racial harassment and discriminatory discharge are not actionable under 42 U.S.C. §1981. See Hill v. Goodyear Tire & Rubber, Inc.; 918 F.2d 877 at 880 (10th Cir. 1990); Trujillo v. Grand Junction Regional Center, 928 F.2d 973, 975 (10th Cir. 1991).

3) No genuine issue of material fact remains with respect to Plaintiff's constructive discharge claim

Jackson's only remaining, viable claim is that of constructive discharge. The Tenth Circuit established the standard for constructive discharge claims as "whether a reasonable person would view the working conditions as intolerable." Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572, 580 (10th Cir. 1990).

Jackson has failed to put forth any evidence of constructive discharge. Plaintiff applied for the Voluntary Termination of Employment Program, plaintiff's application was granted, and about three weeks later Plaintiff was granted his lump sum payment which terminated his employment. The only factual dispute on the issue of constructive discharge concerns whether Jackson was reprimanded for taking two breaks prior to the grant of his lump sum payment. Even if such "disciplinary" issue was raised, it is not evidence of

constructive discharge.

Although summary judgment relief contemplated by Federal Rule of Civil Procedure 56 is drastic and should be applied with caution so that litigants will have an opportunity for trial on bona fide factual disputes, summary judgment shall be rendered if the pleadings and other documents on file with the Court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In a case such as this, where Plaintiff has utterly failed to submit evidence on the central issue of a claim, the last two sentences of subsection (e) of Fed.R.Civ.Proc. 56 must be considered:

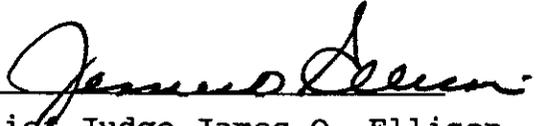
When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise, as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The record establishes in this case that Jackson has submitted no evidence beyond the pleadings on the issue of constructive discharge, and Defendants have demonstrated beyond a reasonable doubt that no genuine issue as to any material fact remains.

III. Conclusion

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Summary Judgment is denied, and that Defendant's Motion for Summary Judgment is granted.

It is so ORDERED this 12th day of November, 1992.


Chief Judge James O. Ellison
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA NOV -5 1992

RICHARD J. LAWRENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

EVERETT B. HOLLAN,)
)
 Plaintiff,)
)
 v.)
)
 STEVE HARGETT, et al,)
)
 Defendants.)

92-C-668-B

ORDER

Now before this Court is Respondent's Motion To Dismiss For Failure To Exhaust State Remedies (docket #3). Petitioner Everett B. Hollan filed a habeas petition alleging ineffective assistance of appellate counsel. Respondent contends that Hollan did not raise the claim to the state court, and, as result, he has failed to exhaust his state remedies. This Court agrees.

Title 28 U.S.C. § 2254(b) states that a habeas petition by a state prisoner shall not be granted unless it appears the applicant has exhausted his state remedies available in the courts of the state or that there is either an absence of available state corrective process or the circumstances rendering such a process ineffective. Section (c) of that statute reads:

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.¹

¹ See, also, Picard v. Connor, 404 U.S. 267, 270 (1971) ("Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts.")

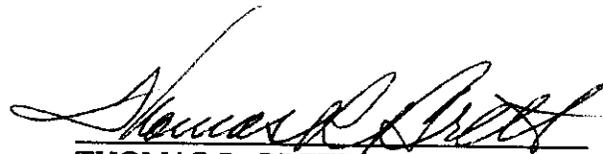
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In this case, Petitioner was convicted of two counts of second-degree murder and three counts of shooting-with-intent-to-kill. He received two life sentences on the second-degree murder counts and was sentenced to 35 years for the shooting-with-intent-to-kill conviction.

Petitioner appealed the convictions to the Oklahoma Court of Criminal Appeal. That court affirmed the direct appeal in Case No. F-81-282 on January 27, 1984. Petitioner subsequently filed an Application For Post-Conviction Relief, which was denied in February of 1985. He did not appeal the denial of the Application to the Oklahoma Court of Criminal Appeals.

Petitioner did not raise the ineffective assistance of counsel claim on his direct appeal or in his Application For Post-Conviction Relief. Instead, he raises the issue for the first time in the instant habeas petition. As stated in 28 U.S.C. §2254 and in the teachings of *Picard*, Petitioner must first raise the ineffective assistance of counsel claim to the state court before bringing seeking federal habeas relief in this Court. He has not done so.² Therefore, the Respondent's Motion To Dismiss is GRANTED. Once the state remedies are exhausted, the Petitioner may re-file his Petition for Writ of Habeas Corpus.

SO ORDERED THIS 5th day of NOV., 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

² Nothing in the record indicates that the available state corrective process is either absent or ineffective.

NOV 13 1992

FILED

NOV 9 1992

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

FIRST NATIONAL BANK AND TRUST)
COMPANY OF TULSA, Trustee,)
)
Plaintiff,)
)
v.)
)
COMMONWEALTH MORTGAGE COMPANY)
OF AMERICA, L.P.; and)
COMMONWEALTH MORTGAGE)
CORPORATION OF AMERICA,)
)
Defendants.)

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

Case No. 92-C-44-B

STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

Plaintiff, Liberty Bank & Trust Company of Tulsa, Trustee, N.A.,
formerly known as First National Bank and Trust Company of Tulsa, Trustee and
Defendants, Commonwealth Mortgage Company of America, L.P. and
Commonwealth Mortgage Corporation of America, being all the parties who made
an appearance in this action, herewith jointly stipulate that the captioned matter
should be and is hereby dismissed without prejudice to the filing of a new
action.

JAMES R. RYAN, OBA No. 7861
G. W. TURNER, III, OBA No. 11182

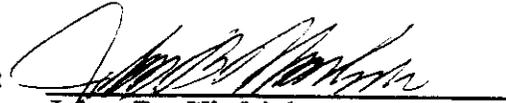
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G. W. Turner, III

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Company of Tulsa, Trustee

RIDDLE, WIMBISH & CRAIN

By:



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Attorneys for Defendants
Commonwealth Mortgage Company
of America, L.P. and Commonwealth
Mortgage Corporation of America

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

CLOSED

IN RE:)
)
 VOGUE COACH COMPANY,)
 an Oklahoma corporation,)
)
 Debtor.)
)
 JUDI E. BEAUMONT, TRUSTEE,)
)
 Plaintiff,)
)
 v.)
)
 FOURTH NATIONAL BANK OF TULSA,)
 FIRST NATIONAL BANK OF PRYOR)
 CREEK, GENERAL ELECTRIC CAPITAL)
 CORPORATION, VOGUE R.V. SALES OF)
 CALIFORNIA and JOSEPH Q. ADAMS)
 AS TRUSTEE FOR VOGUE R.V. SALES)
 OF CALIFORNIA,)
)
 Defendants.)
)
 FOURTH NATIONAL BANK OF TULSA,)
)
 Third Party Plaintiff,)
)
 v.)
)
 TRANSAMERICA COMMERCIAL FINANCE)
 CORPORATION,)
)
 Third Party Defendant.)

Bankruptcy No. 90-03427-C
(Chapter 7)

Adversary No. 91-0345-C

Case No. 92-C-084-B

FILED

NOV 6 1992

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

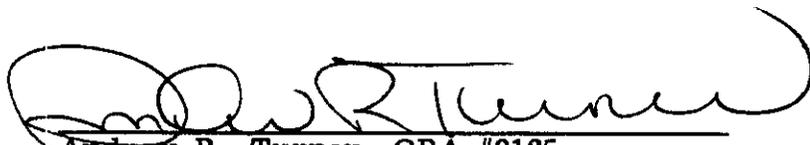
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff Judi E. Beaumont, Trustee, Defendants Vogue R.V. Sales of California, Inc., First National Bank of Pryor Creek, General Electric Capital Corporation, Joseph Q. Adams as Trustee for Vogue R.V. Sales of California, Defendants and Third Party Plaintiff Fourth National Bank of Tulsa, and Third Party Defendant Transamerica Commercial Finance Corporation, by and through their attorneys of record, and pursuant to Bankruptcy Rule 7041, stipulate to the dismissal of, and do hereby dismiss

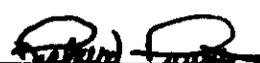
the above-captioned adversary proceeding with prejudice, each party to bear its own costs and attorneys' fees.


Judi E. Beaumont
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Tulsa, Oklahoma 74114
(918) 744-5111

JUDI E. BEAUMONT, VOGUE COACH
TRUSTEE


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Joint Stipulation for Dismissal
With Prejudice
Case No. 92-C-084-B

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INC.

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Joint Stipulation for Dismissal
With Prejudice
Case No. 92-C-084-B

ENTERED ON DOCKET
DATE NOV 13 1992

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

F I L E D
NOV 6 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TACONIC PETROLEUM CORPORATION,)
a Delaware corporation,)
)
Plaintiff,)
)
vs.)
)
PITTENCRIEFF plc, a foreign)
corporation formed under the)
laws of Scotland,)
)
Defendant.)

Case No. 92-C-550-B /

ORDER

Before the Court for consideration is the Defendant's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2) or in the alternative Motion for Change of Venue pursuant to 28 U.S.C. §1404.

Plaintiff, Taconic Petroleum Corporation ("Taconic"), filed this action June 25, 1992, stating three claims for relief arising from the alleged breach of a promissory note and pledge agreement executed in conjunction with a stock purchase agreement. Defendant, Pittencrieff plc ("Pittencrieff"), now contends that this Court lacks personal jurisdiction over it and alternatively that this action should be transferred to the Northern District of Texas.

Factual Background

Taconic, a Delaware corporation with its current¹ principal place of business in New York City, New York, entered into a stock

¹ Taconic contends that at all times relevant to this suit, its principal place of business was in Tulsa, Oklahoma.

13

purchase agreement in January, 1992, with Pittencrieff, a foreign corporation with its principal place of business in Edinburgh, Scotland. The stock purchase agreement, dated January 15, 1992, provided that Pittencrieff would purchase all of Taconic's interest in two oil and gas properties known as the Wood River and Arapahoe Properties (collectively "the Properties") and Taconic's 259 shares of stock in Southport Exploration Associates, Inc. ("the Southport stock"),² which also owned interests in the Properties, for \$275,000 in cash and a promissory note in the amount of \$125,000.³

The promissory note provided that it would become due and payable upon the occurrence of either of two events.⁴ If neither event occurred before July 1, 1994, the note would become due and Pittencrieff could either pay the entire unpaid amount of the note or return the 259 shares of Southport stock to Taconic.

Along with the stock purchase agreement and the promissory note, the parties executed a pledge agreement in which Pittencrieff pledged the Southport stock it was acquiring from Taconic to Taconic as security for the payment of the promissory note.

² Southport Exploration Associates, Inc., is a closely held Oklahoma corporation.

³ Taconic contends that Pittencrieff's acquisition of the 259 shares of Southport stock increased Pittencrieff's ownership of Southport to 52% of the outstanding shares. Taconic contends that Pittencrieff hoped that the increased ownership interest in Southport would force Southport to distribute its interest in the Properties to Pittencrieff in exchange for Pittencrieff's Southport shares.

⁴ The note would become due upon (1) the liquidation and dissolution of Southport or upon (2) the receipt by Pittencrieff of any assets of Southport, in exchange for or redemption of the 259 shares of Southport stock.

Taconic alleges that Pittencrieff manipulated Southport in such a way that Pittencrieff obtained a large portion of Southport's assets without triggering the provisions of the promissory note. However, Taconic contends that Pittencrieff "accomplished precisely what the parties expected and intended would trigger the payment obligation under the Promissory Note" and yet Pittencrieff has refused to make such payment.

Taconic argues that the promissory note is in default as a result of Pittencrieff's waiver of the conditions precedent (first claim for relief) and breach of the covenant of good faith and fair dealing (second claim for relief). Taconic also contends that as a result of the default, it should be allowed to enforce its rights under the pledge agreement (third claim for relief).

Standard for Establishing Personal Jurisdiction

"Whether a federal court has personal jurisdiction over a nonresident defendant in a diversity action is determined by the law of the forum state." Yarbrough v. Elmer Bunker and Associates, 669 F.2d 614 (10th Cir. 1982). Oklahoma's law, 12 O.S. §2004(f) provides:

"A court of this state may exercise jurisdiction on any basis consistent with the Constitution of the United States."

The United States Supreme Court held that before jurisdiction can be exercised, the Due Process Clause of the Fourteenth Amendment requires minimum contacts between the state exercising personal jurisdiction and the defendant. International Shoe Co. v. State of Washington, et al., 326 U.S. 310, 90 L.Ed.2d 95 (1945).

It is critical to due process that "defendant's conduct and connection with the forum state are such that he would reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559 (1980); Burger King v. Rudzewicz, 471 U.S. 462 (1985).

A minimum contacts inquiry must focus on the totality of the relationship between the Defendant and the forum state. Colwell Realty Investments v. Triple T Inns of Arizona, 785 F.2d 1330 (5th Cir. 1986); All American Car Wash v. National Pride Equipment, 550 F.Supp. 166 (W.D.Okla. 1981). The Plaintiff has the burden of establishing that the nonresident defendant has the necessary minimum contacts with the forum that maintenance of the suit "does not offend traditional notions of fair play and substantial justice." Ten Mile Indus. Park v. Western Plains Service Corp., 810 F.2d 1518, 1524 (10th Cir. 1987); Hanson v. Denckla, 357 U.S. 235 (1958); International Shoe, 326 U.S. 310.

The Defendant in this case is a foreign corporation. Jurisdiction over corporations may be either general or specific. Rambo v. American Southern Ins., 839 F.2d 1415, 1418 (10th Cir. 1988). Jurisdiction over a defendant in a case arising out of or related to the defendant's contacts with the forum state is "specific jurisdiction." When the case does not arise from or relate to the defendant's contacts with the forum and jurisdiction is based on the defendant's presence or accumulated contacts with the forum, the court exercises "general jurisdiction."

"Where a forum seeks to assert specific jurisdiction over an out-of-state defendant

who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984), and the litigation results from alleged injuries that 'arise out of or relate to' those activities, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

* * *

And with respect to interstate contractual obligations, we have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities. Travelers Health Assn. v. Virginia, 339 U.S. 643, 647 (1950). *See also*, McGee v. International Life Insurance Co., 355 U.S. 220, 223-224 (1957)."

Burger King, 471 U.S. at 472-473. The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, Keeton v. Hustler Magazine, Inc., 465 U.S. at 774.

Paragraph 2 of the Plaintiff's complaint states "Pittencrieff is a corporation formed under the laws of Scotland with its principal place of business in Edinburgh, Scotland." No other allegations appear in the complaint concerning jurisdiction over Pittencrieff, or its contacts with the state of Oklahoma.

Based on this lack of allegations concerning personal jurisdiction, Pittencrieff filed its Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(2) along with the affidavit of Robert J. Wolsey,

its executive director. Pittencrieff contends that it lacks the minimum contacts necessary to subject it to this Court's jurisdiction.

First, Pittencrieff contends that it does not have the continuous and systematic contacts with Oklahoma necessary for this Court to exercise general jurisdiction:

Pittencrieff is not authorized or licensed to do business in the state of Oklahoma. Pittencrieff does not have a registered agent for service of process in Oklahoma. Pittencrieff has no employees, offices, real or personal property, bank accounts, or a mailing address in Oklahoma. Pittencrieff does not advertise or otherwise solicit business from the state of Oklahoma.

Pittencrieff also argues that this lawsuit does not arise out of or relate to specific acts which Pittencrieff purposely directed to the state of Oklahoma and thus the Court does not have specific jurisdiction:

The parties to the contract are not Oklahoma corporations and do not maintain their principal place of business in the state of Oklahoma; The contract was not executed by either party in the state of Oklahoma; and the contract is not governed by Oklahoma law.

Once a 12(b)(2) motion has been filed with supporting affidavits, a plaintiff must respond with counter-affidavits or appropriate proofs to establish the necessary contact with the forum to support *in personam* jurisdiction. Stranahan Gear Co. v. NL Industries, Inc., 800 F.2d 53, 58 (3rd Cir. 1986). Taconic responded to Pittencrieff's motion to dismiss and attached the affidavit of Lynnwood R. Moore, Jr., Taconic's legal counsel, and Cameron O. Smith, president of Taconic.

Taconic contends that this lawsuit arises from Pittencrieff's

contacts with the state of Oklahoma and therefore, this Court has specific jurisdiction over the Defendant. Taconic argues that the following "contacts" with Oklahoma satisfy the jurisdictional "minimum contacts" requirement:

- 1) The promissory note signed by Pittencrieff was partial payment for the purchase of shares of stock in Southport, a closely held Oklahoma corporation;
- 2) Taconic, the seller, had its principal place of business in Tulsa, Oklahoma, at the time Pittencrieff purchased the Southport stock from Taconic;
- 3) Pittencrieff negotiated the purchase of the Southport stock with Taconic's President, Cameron O. Smith ("Smith"), who spent significant amounts of time in Tulsa, Oklahoma.
- 4) On three occasions, Smith discussed the sale of Taconic assets with Pittencrieff representatives in Taconic's offices in Tulsa, Oklahoma.
- 5) Four telephone conferences were held concerning the sale of Taconic assets to Pittencrieff; Smith was in the Tulsa, Oklahoma, office during three of the conferences and documents were sent via facsimile from the Tulsa office on the other occasion.
- 6) Lynwood R. Moore, Jr. ("Moore"), a member of the Oklahoma bar and resident of Oklahoma served as counsel to Taconic in connection with the review of the final documentation. Pittencrieff's counsel, Larry Bridgefarmer ("Bridgefarmer"), sent numerous drafts of the purchase documents to Moore's office in Tulsa, Oklahoma.
- 7) The pledge agreement securing the promissory note provides that it "shall in all respects be construed and interpreted in accordance with and governed by the laws of the State of Oklahoma."
- 8) Pittencrieff delivered the stock purchase agreement, the promissory note and the pledge agreement by mail to Mr. Moore in Tulsa, Oklahoma. The certificates for the Southport stock, which Pittencrieff pledged as security, were delivered to Taconic in Tulsa, Oklahoma.
- 9) On March 17, 1992, Pittencrieff caused its agent and wholly owned subsidiary, Owl Creek Investments plc, to commence a lawsuit in this court. The goal of the action

was to invalidate first right of refusal claims of Southport's other stockholders to the stock Pittencrieff had acquired from Taconic. This suit was eventually settled at Pittencrieff's insistence by reorganizing Southport in such way as to avoid paying the Promissory Note.

In Behagen v. Amateur Basketball Ass'n of the United States, 744 F.2d 731, 733 (10th Cir. 1984), *cert. denied*, 471 U.S. 1010 (1985), the Court stated:

"The plaintiff bears the burden of establishing personal jurisdiction over the defendant. Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a *prima facie* showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in plaintiff's favor, and the plaintiff's *prima facie* showing is sufficient notwithstanding the contrary presentation of the moving party."

Contracting with an out-of-state party alone cannot automatically "establish sufficient minimum contacts in the other party's home forum." Burger King, at 479; Fidelity Bank, N.A. v. Standard Industries, Inc., 515 P.2d 219 (Okla. 1973) (court should consider the totality of contacts with the forum state). The Burger King court set forth factors for determining when a contracting out-of-state party has minimum contacts with the forum state.

Instead, we have emphasized the need for a 'highly realistic' approach that recognizes that a 'contract' is 'ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.' (cite omitted). It is these factors -- prior negotiations and

contemplated future consequences, along with the terms of the contract and the parties actual course of dealing -- that must be evaluated in determining whether the defendant purposefully established minimum contacts with the forum.

Burger King, 471 U.S. at 479 (citing Hoopston Canning Co. v. Cullen, 318 U.S. 313,316 (1943)).

Construing the conflicting affidavits in Plaintiff's favor, the Court finds that 1) Taconic was based in Oklahoma; 2) Pittencrieff was purchasing stock of an Oklahoma corporation; 3) the promissory note was payable to Taconic at any place it should designate; Alameda National Bank v. Kanchanapoom, 752 F.Supp. 367,369-70 (D.Colo. 1990) (minimum contacts found where promissory note concerned dealings in Colorado real estate, was made payable to Colorado partnership and payee retained absolute discretion to direct where payment was to be made); 4) negotiations were held in Oklahoma; and 5) phone conferences and letters were directed to and from Oklahoma; Northwest Animal Hospital, Inc. v. Earnhardt, 444 F.Supp. 10 (W.D.Okla. 1977) (contacts to be considered include telephone conversations and letters); Hoster v. Monongahela Steel Corp., 492 F.Supp. 1249,1253 (W.D.Okla. 1980) (contacts the court may consider include such things as phone conversations or letters to parties in Oklahoma from nonresident defendant); Gregory v. Grove, 547 P.2d 381,382 (Okla. 1976) (minimum contacts found where out-of-state party had a yellow pages listing in the Tulsa telephone book and had communicated with the in-state party by letter and telephone call) but see, Lynch v. New Jersey Auto. Full Ins. Underwriting Ass'n, 762 F.Supp. 101,104 (E.D.Pa. 1991) (the

placing of telephone calls or the sending of letters into the forum by a party to a contract is not sufficient).

Considering the totality of contacts Pittencrieff has with Oklahoma, the Court concludes that sufficient minimum contacts with Oklahoma exist for this Court to exercise *in personam* jurisdiction over Pittencrieff. McGee v. International Life Ins. Co., 355 U.S. 220 (1957). The Court also concludes that maintaining the suit in Oklahoma would comport with the notion of "fair play and substantial justice" and that Defendant's connection with Oklahoma is such that it would reasonably anticipate being haled into court in Oklahoma. International Shoe, at 320; Burger King, at 477.

Motion to Change Venue

Defendant moves in the alternative for a transfer of this case to the Northern District of Texas, Abilene Division, pursuant to 28 U.S.C. §1404 which provides in pertinent part:

(a) For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought originally.

The decision to transfer a case under §1404(a) rests within the sound discretion of the District Court. Wm. A. Smith Contracting Co. v. Travelers Indem. Co., 467 F.2d 662 (10th Cir. 1972); Jacobs v. Lancaster, 526 F.Supp. 767, 769 (W.D.Okla. 1981). In deciding whether to transfer the case, the court is to consider: 1) the convenience of the parties, 2) the convenience of the witnesses, and 3) the interests of justice. Natl. Surety Corp. v. Robert M. Barton Corp., 484 F.Supp. 222,224 (W.D.Okla. 1979). The

burden of establishing that a case should be transferred is on the movant, and unless evidence and circumstances of case are strongly in favor of transfer, plaintiff's choice of forum should rarely be disturbed. Hoster, 492 F.Supp. at 1254.

Pittencrieff argues the case should be transferred to the Northern District of Texas because Oklahoma has no significant contact to the underlying cause of action, the contract in question was executed by Pittencrieff in Texas and a Texas court would be better able to apply Texas law in determining the rights and liabilities between the parties.

Taconic argues that Tulsa, Oklahoma, is the locus of all the operative facts underlying Taconic's breach of contract claims. Taconic also points out that Oklahoma law governs the parties' obligations under the pledge agreement. Further, Taconic points out that it has an office in Tulsa, Oklahoma, but has no ties in Abilene, Texas. Taconic also contends that the key non-party witnesses reside in Tulsa.

The Court concludes the convenience of the parties and the witnesses and the interests of justice would not be best served by transferring the case to Texas. The Plaintiff's choice of forum will not be disregarded simply because the Defendant executed the contract in Texas and Texas law may be applicable to portions of the case.

For the above stated reasons, Pittencrieff's Motion to Dismiss is DENIED and Pittencrieff's alternative Motion to Change Venue is also DENIED.

IT IS SO ORDERED, this 6th day of November, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE NOV 13 1992

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

CLOSED
FILED

NOV 6 1992

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

GENERAL ELECTRIC CAPITAL CORPORATION, a New York corporation,

Plaintiff,

v.

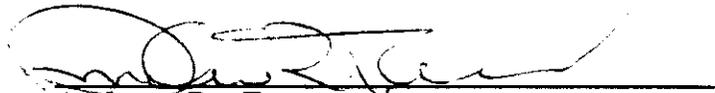
No. 90-C-962-B

VOGUE R.V. SALES OF CALIFORNIA, INC., an Oklahoma corporation;
ITT COMMERCIAL FINANCE CORPORATION, a Nevada corporation;
and TRANSAMERICA COMMERCIAL FINANCE CORPORATION, a Delaware corporation,

Defendants.

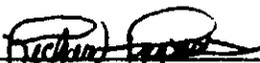
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff General Electric Capital Corporation and Defendants Vogue R.V. Sales of California, Inc., and Transamerica Commercial Finance Corporation (the only parties remaining in this action), by and through their attorneys of record, and pursuant to Fed.R.Civ.P. 41(a)(1), stipulate to the dismissal of, and do hereby dismiss the above-captioned action with prejudice, each party to bear its own costs and attorneys' fees.



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OF VOGUE R.V. SALES OF CALIFORNIA,
INC.

CLOSED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JACKIE R. MEDEARIS a/k/a JACKIE)
 RAY MEDEARIS; CAROL J. MEDEARIS;)
 BOATMEN'S FIRST NATIONAL BANK OF)
 KANSAS CITY, MISSOURI, f/k/a The)
 First National Bank of Kansas)
 City, Missouri; COUNTY TREASURER,)
 Craig County, Oklahoma; and BOARD)
 OF COUNTY COMMISSIONERS, Craig)
 County, Oklahoma,)
)
 Defendants.)

NOV 18 1992

FILED

NOV 17 1992

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

CIVIL ACTION NO. 92-C-313-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12 day
of November, 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; the Defendants, County Treasurer, Craig County,
Oklahoma, and Board of County Commissioners, Craig County,
Oklahoma, appear by Clint Ward, Assistant District
Attorney, Craig County, Oklahoma; the Defendant, Boatmen's First
National Bank of Kansas City, Missouri, f/k/a The First National
Bank of Kansas City, Missouri, appears by its General Counsel and
Senior Vice President M. Elizabeth Fast; and the Defendants,
Jackie R. Medearis a/k/a Jackie Ray Medearis and Carol J.
Medearis, appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, Jackie R. Medearis a/k/a
Jackie Ray Medearis, acknowledged receipt of Summons and

Complaint on or about April 27, 1992; that the Defendant, Carol J. Medearis, acknowledged receipt of Summons and Complaint on April 17, 1992; that the Defendant, Boatmen's First National Bank of Kansas City, Missouri, f/k/a The First National Bank of Kansas City, Missouri, acknowledged receipt of Summons and Complaint on June 23, 1992; that Defendant, County Treasurer, Craig County, Oklahoma, acknowledged receipt of Summons and Complaint on April 22, 1992; and that Defendant, Board of County Commissioners, Craig County, Oklahoma, acknowledged receipt of Summons and Complaint on April 20, 1992.

It appears that the Defendants, County Treasurer, Craig County, Oklahoma, and Board of County Commissioners, Craig County, Oklahoma, filed their Answer and Cross-Petition on April 28, 1992; that the Plaintiff submitted to the Court the Affidavit of the Defendant, Boatmen's First National Bank of Kansas City, Missouri, f/k/a The First National Bank of Kansas City, Missouri, on July 23, 1992; that the Plaintiff submitted to the Court the Secretary's Certificate of Defendant, Boatmen's First National Bank of Kansas City, Missouri, f/k/a The First National Bank of Kansas City, Missouri, on September 2, 1992; and that the Defendants, Jackie R. Medearis a/k/a Jackie Ray Medearis and Carol J. Medearis, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on January 12, 1990, Jackie Ray Medearis and Carol J. Medearis filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 90-00064-C. On March 27, 1992, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order

modifying the automatic stay afforded the debtors by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

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

The Southerly 50 feet of Lot 17, in Block 21, in the City of Vinita, Oklahoma, according to the United States Government Survey and approved plat thereof.

The Court further finds that on December 27, 1976, Jackie R. Medearis and Carol J. Medearis executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of \$14,800.00, payable in monthly installments, with interest thereon at the rate of eight percent (8%) per annum.

The Court further finds that as security for the payment of the above-described note, Jackie R. Medearis and Carol J. Medearis executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated December 27, 1976, covering the above-described property. Said mortgage was recorded on December 27, 1976, in Book 295, Page 279, in the records of Craig County, Oklahoma.

The Court further finds that on March 15, 1980, Jackie R. Medearis and Carol J. Medearis executed and delivered to the United States of America, acting through the Farmers Home Administration, a Reamortization and/or Deferral Agreement

pursuant to which the entire debt due on that date was made principal.

The Court further finds that the Defendants, Jackie R. Medearis a/k/a Jackie Ray Medearis and Carol J. Medearis, made default under the terms of the aforesaid note, mortgage, and reamortization and/or deferral agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Jackie R. Medearis a/k/a Jackie Ray Medearis and Carol J. Medearis, are indebted to the Plaintiff in the principal sum of \$14,545.37, plus accrued interest in the amount of \$1,853.94 as of August 12, 1991, plus interest accruing thereafter at the rate of 8 percent per annum or \$3.1881 per day 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 Notice of Lis Pendens.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Craig 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 \$176.52, plus penalties and interest, for the year 1991. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Boatmen's First National Bank of Kansas City, Missouri, f/k/a The First National Bank of Kansas City, Missouri, claims no right, title or interest in the subject real property.

The Court further finds that the Department of Housing and Urban Development has a lien upon the property by virtue of

an Assignment dated April 26, 1990, and recorded in Book 376, Page 57 in the records of the Craig County Clerk, Craig County, Oklahoma. Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Department of Housing and Urban Development is not made a party hereto; however, by agreement of the agencies the lien 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 Defendants, Jackie R. Medearis a/k/a Jackie Ray Medearis and Carol J. Medearis, in the principal sum of \$14,545.37, plus accrued interest in the amount of \$1,853.94 as of August 12, 1991, plus interest accruing thereafter at the rate of 8 percent per annum or \$3.1881 per day until judgment, plus interest thereafter at the current legal rate of 3.24 percent per annum until paid, plus the costs of this action in the amount of \$8.00 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, Craig County, Oklahoma, have and recover judgment in the amount of \$176.52, plus penalties and interest, for ad valorem taxes for the year 1991, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Boatmen's First National Bank of Kansas City,

Missouri, f/k/a The First National Bank of Kansas City, Missouri, has no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Jackie R. Medearis a/k/a Jackie Ray Medearis and Carol J. Medearis, 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, Craig County, Oklahoma, in the amount of \$176.52, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

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

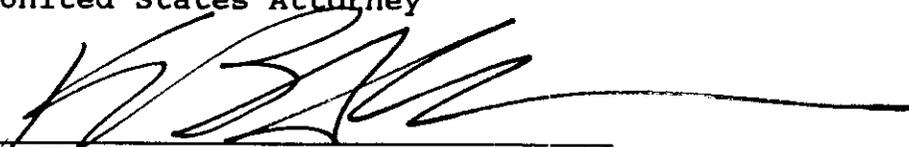
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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

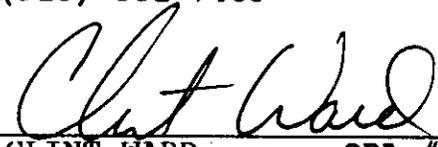
S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED:

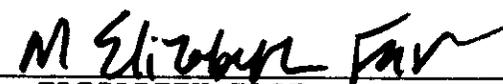
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Board of County Commissioners,
Craig County, Oklahoma



M. ELIZABETH FAST
General Counsel and Senior Vice President,
Boatmen's First National Bank of Kansas City, Missouri,
f/k/a The First National Bank of Kansas City, Missouri

Judgment of Foreclosure
Civil Action No. 92-C-313-E

ENTERED

ENTERED ON DOCKET

DATE NOV 12 1992

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

FILED

NOV 5 1992

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

MARJORIE REED and)
TY LANE PETERSON,)
)
Plaintiffs,)
)
vs.)
)
CITY OF BROKEN ARROW)
and DANNY DAVID,)
)
Defendants.)

No. 92-C-034-B

ORDER

Before the Court for decision is the Motion for Summary Judgment of Defendant, Danny David ("David"), regarding qualified immunity, the Motion for Summary Judgment of the Defendant, City of Broken Arrow ("City"), and the Motion for Partial Summary Judgment of Plaintiff, Ty Lane Peterson ("Peterson"). Each is filed pursuant to Fed.R.Civ.P. 56.

After considering the issues presented by the record, the legal authorities, and arguments at the hearing on October 15, 1992, the Court concludes the Defendants' Motions for Summary Judgment should be SUSTAINED and Plaintiff's Motion for Partial Summary Judgment should be OVERRULED.

The undisputed material facts are as follows:

1. Danny Allen David is a police officer with the City of Broken Arrow Police Department and has almost ten (10) years law enforcement experience. (Ex. A to Deft. David's Brief in Support of Motion for Summary Judgment filed June 1, 1992.)

2. On the evening of February 2, 1991, and the early morning of February 3, 1991, at all times relevant to this litigation,

65

Danny David was on duty as a uniformed police officer for the City of Broken Arrow Police Department. (Ex. A and B to Deft. David's Brief filed June 1, 1992.)

3. On February 3, 1991, at approximately 1:15 o'clock a.m., Officer David was east bound on Mason Drive in Broken Arrow, Oklahoma, when he observed a Ford automobile traveling west bound on Mason Drive at a high rate of speed. David's radar showed the Ford to be traveling at 54 miles per hour ("m.p.h.") in a 30 m.p.h. zoned area. Officer David turned his vehicle in the direction of the Ford. The Ford then turned into a parking lot in the 100 block of East Mason. (Ex. C to Deft. David's Brief filed 6-1-92.)

4. At the time Peterson stopped and parked his car, Officer David believed Peterson had committed four misdemeanors: speeding, reckless driving, improper left turn and improper parking. (Ex. 1 to Plff's Brief in Support of Motion for Partial Summary Judgment filed 9-11-92, David Depo., pp. 46-47.)

5. After stopping his vehicle, the driver of the Ford (who was later identified as Ty Lane Peterson, and will be referred to herein as "Peterson" or "the suspect") quickly exited his vehicle, leaving the door partially open and unsecured, and ran toward the apartment complex in an attempt to avoid confrontation with the police. (Ex. C and D to Deft. David's Brief filed 6-1-92.)

6. Officer David ordered the suspect to stop running. The suspect knew that the person behind him was a police officer, yet he ran from Officer David and entered an apartment. (Ex. C and D to Deft. David's Brief filed 6-1-92.)

7. The suspect entered the apartment, apparently not using a key, closed the door in Officer David's face and bolted the door, knowing that it was a police officer who was behind him and knocking on the door. (Ex. C and D to Deft. David's Brief filed 6-1-92; Ex. 1 to Plff.'s Brief filed 9-11-92, pp. 53-54.)

8. After the suspect had bolted the apartment door shut, Officer David heard a female screaming within the apartment. The female was screaming "Stop. What are you doing? Don't." Officer David thought he had observed a breaking and entering. (Ex. C, D and E to Deft. David's Brief filed 6-1-92; Ex. 1 to Plff.'s Brief in Support of Partial Summary Judgment filed 9-11-92, p. 46.)

9. While Officer David was pounding at the door and ordering the suspect to open the door, and while Marjorie Reed was screaming, Plaintiff Ty Peterson was attempting to hide from the police officer within the apartment. (Ex. D to Deft. David's Brief filed 6-1-92.)

10. Officer Danny David did not know Ty Peterson's identity prior to arresting him; he did not know Marjorie Reed's identity; he did not know that Peterson and Reed were related; he did not know that Peterson had entered his mother's apartment at which he was then living. (Ex. A and C to Deft. David's Brief filed 6-1-92.)

11. Concerned for the safety and well being of the occupants of the apartment as potential victims, and fearing possible personal injury, Officer David radioed a report and requested backup assistance, and then forced open the door of the apartment

after not being allowed entrance or getting what he thought was an appropriate response from the occupant. (Ex. A, B, C, E and F to Deft. David's Brief filed 6-1-92.)

12. Upon entering the apartment, Officer David saw a frightened female and observed Peterson attempting to conceal himself at the back of the apartment, at which time Officer David pursued Peterson into the bedroom of the apartment. (Ex. A, C, D and E to Deft. David's Brief filed 6-1-92).

13. In the bedroom of the apartment, Peterson physically resisted Officer David, attempted to escape, and at one point screamed that he would not go with the officer. Officer David used an arm bar technique to subdue Peterson. The arm bar is a technique which David had been trained to use, and it is designed to force one arm of the suspect behind his back and upward, thereby allowing the officer to gain control of him. (Ex. A, C, D and E to Deft. David's Brief filed 6-1-92.)

14. Once Peterson was subdued and handcuffed, Officer David detected an odor of alcoholic beverage on Peterson's breath. Peterson had in fact been consuming alcoholic beverages while at the Caravan bar for three or four hours prior to the encounter with Officer David. (Ex. C and D to Deft. David's Brief filed 6-1-92.)

15. Peterson was arrested for misdemeanors of driving under the influence and resisting arrest. (Ex. 1 to Plaintiff's Brief filed 9-11-92.) The charges were later dismissed by the Tulsa District Attorney's office.

15. After subduing Peterson and placing him under arrest,

Officer David learned Peterson was residing at his mother's apartment and the woman present, Mrs. Reed, was Peterson's mother. (Ex. A to Deft. David's Brief filed 6-1-92.)

16. The backup officers who arrived on the scene as Peterson was being escorted from the apartment and placed into the back of the police unit did not notice anything to indicate, and Peterson did not indicate, to them that he was injured or in pain. The jailer conducting the "book-in" paid special attention to Peterson, as he does to all arrestees, watching for signs of injury or illness. Peterson used his right hand to sign the book-in documents; he held the booking photo information board with his right hand; he extended his right arm to allow a pat-down search and finger printing. At no time did Peterson indicate that he was injured or in pain. In fact, when specifically questioned as to the existence of any injury or illness, Peterson stated that he was not injured and was not in need of any medical assistance. (Ex. B, C, F and G to Deft. David's Brief filed 6-1-92.)

17. Peterson has sought no medical attention for the alleged injured shoulder other than a single visit to a chiropractor, Gene Mills, D.C., on February 4, 1991, the Monday following the arrest incident. (Ex. D to Deft. David's Brief filed 6-1-92.)

18. The single visit to Mills' office on February 4th had been scheduled prior to the February 3, 1991 arrest. For several weeks prior to and after the incident which is the subject of this litigation, Peterson was seeing his chiropractor, Gene Mills, D.C., on a routine and almost daily basis for treatment for a previous

automobile accident injury. (Ex. H to Deft. David's Brief filed 6-1-92.)

19. Peterson, who is right-handed and alleges that his right shoulder was seriously injured by Officer David, used a hammer the afternoon of his arrest in an effort to repair his mother's door. On the Monday following the arrest Peterson returned to work driving a truck and providing lawn services for Chemlawn, Inc., and in fact, Peterson states that he did not lose any work time as a result of the alleged injury. (Ex. D to Deft. David's Brief filed 6-1-92.)

20. There are no facts establishing a policy or custom on the part of the City of Broken Arrow causing a violation of Plaintiff's federally protected rights. (Ex. D, p. 82, lines 1-9; Ex. C, p. 63, line 24 through p. 64, line 6; and Ex. F to Deft. City of Broken Arrow's Brief in Support of Motion for Summary Judgment filed 9-22-92.)

21. Plaintiff's attorney stipulated at deposition that Plaintiff Peterson cannot articulate any facts that would establish a policy or custom of the City of Broken Arrow. (Ex. D, p. 82, lines 1-9; Ex. C, p. 63, line 24 through p. 64, line 6 to Deft. City of Broken Arrow's Brief filed 9-22-92.)

22. Plaintiff cannot articulate any facts supporting his allegation of policy and custom on the part of the City of Broken Arrow other than one other isolated incident where he alleges that the City of Broken Arrow used force to unlawfully enter his residence and make an arrest. (Ex. F to Deft. City of Broken

Arrow's Brief filed 9-22-92.)

The Plaintiff seeks the following relief in his Complaint:¹

1. First Claim - Peterson seeks judgment that David's actions constitute an unlawful entry to the apartment and unlawful arrest, both of which violated his Fourth Amendment rights under the United States Constitution. Peterson also seeks actual damages against the City and David, as well as punitive damages against David.

2. Second Claim - Peterson seeks judgment that David used excessive force in accomplishing the arrest, and thereby violated Peterson's Fourth Amendment protection against unreasonable search and seizure. Peterson seeks actual damages against the City and David as well as punitive damages against David.

3. Third Claim - Peterson seeks judgment that David's actions constitute the intentional tort of malicious prosecution, and seeks actual and punitive damages against David.

4. Fourth Claim - Peterson seeks judgment that the City's action constitute malicious prosecution, and seeks actual damages against the City.

5. Fifth Claim - Peterson seeks judgment that the actions of David constitute the intentional torts of malicious injury to property and trespass, and seeks actual and punitive damages against David.

¹The Plaintiff, Marjorie Reed, has dismissed her claim herein and is no longer a party.

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."

The Court will first address the Motion for Summary Judgment on behalf of David urging the defense of qualified immunity.

The Supreme Court has "emphasized the qualified immunity questions should be resolved at the earliest possible stage of a litigation." Anderson v. Creighton, 107 S.Ct. 3034, 3042 n. 6 (1987). The Supreme Court has also stated that, "insubstantial claims against government officials [should] be resolved prior to discovery and on summary judgment if possible." Anderson, supra, at 3039, n. 2, citing Harlow v. Fitzgerald, 102 S.Ct. 2727, 2738 (1982). "One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." Seigert v. Gilley, 111 S.Ct. 1789, 1793 (1991).

Whether the conduct of David in arresting Peterson was objectively reasonable is a question of law for this court to determine. Hunter v. Bryant, 112 S.Ct. 534, 537 (1991). Officer David was acting within the scope of his employment as a City of Broken Arrow police officer on February 3, 1991. Qualified immunity is a valid affirmative defense that shields government officials from liability if a reasonable officer could have believed his actions to be lawful, in light of clearly established law and the information the officer possessed. Hunter, supra, 536, citing Anderson, supra, 3034. Thus, the issue before the Court is whether "a reasonable officer could have believed that the conduct in question did not violate clearly established law. Dixon v. Richer, 922 F.2d 1456, 1463 (10th Cir. 1991). In determining whether there is qualified immunity, one need not employ 20/20 hindsight, but the issue is one of objective reasonableness concerning the facts with which the officer is confronted at the time. Anderson, supra; U.S. v. Lai, 944 F.2d 1434 (9th Cir. 1991); and Powell v. Mikulecky, et al., 891 F.2d 1454 (10th Cir. 1989).

The Fourth Amendment strongly disfavors warrantless searches and seizures, particularly in a private home. However, an exception to the rule exists under circumstances in which an officer has probable cause which would justify obtaining a warrant, but exigent circumstances make the delay in obtaining a warrant imprudent. U. S. v. Smith, 797 F.2d 836 (10th Cir. 1986).

U. S. v. Smith, 797 F.2d 836, 840 (10th Cir. 1986), states:

"The basic aspects of the 'exigent circumstances' exception are that

1. The law enforcement officers must have reasonable grounds to believe that there is immediate need to protect their lives or others or their property or that of others,
2. The search must not be motivated by an attempt to arrest and seize evidence, and
3. There must be some reasonable basis approaching probable cause to associate an emergency with the area or place to be searched."

Confronted with a fleeing suspect entering an apartment, followed by screams within the apartment that indicated a hostile encounter, it was reasonable for Officer David to suspect serious criminal activity by Peterson and to have genuine concern for the safety of the occupants of the apartment. One reasonable conclusion would be to consider it irresponsible for Officer David not to have entered the apartment to take control of what appeared to be a dangerous situation for the apartment occupant. As has been stated in Anderson v. Creighton, 107 S.Ct. 3034, 3042 (1987):

"It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that [the search and arrest in question] was objectively unreasonable. We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present and we have indicated that in such cases those officials, like other officials who act in ways they reasonably believe to be lawful, should not be held personally liable. The same is true of their conclusions regarding

exigent circumstances."

The Court concludes as a matter of law that David's conduct was objectively reasonable in light of the undisputed material facts herein.

Next the Court will consider David's qualified immunity claim concerning Peterson's allegations of use of excessive force. The Tenth Circuit has stated that the "reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Dixon, supra, 1462, citing Terry v. Ohio, 392 U.S. at 20-22. The rule articulated by Graham v. Connor, 109 S.Ct. 1865, 1871 (1989), and its progeny, for determining whether qualified immunity applies to a specific charge of excessive force is that if "the police officer reasonably could have believed that the force was necessary under the circumstances," then the defense of qualified immunity protects the officer from personal liability. Dixon, supra, 1463. The United States Supreme Court and the Tenth Circuit have noted that,

"the proper application [of the reasonableness test] requires careful attention to the facts and circumstances of each case, including (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight."

Graham, supra, 1871-1872, and Dixon, supra, 1463.

Under the circumstances presented, Officer David suspected that a serious crime had been or was being committed. Officer

David was justified in concluding under the exigent circumstances that there was an immediate and serious threat to the safety of the occupants of the apartment. Peterson attempted to both evade arrest and then physically resisted Officer David. The Supreme Court in Graham, supra, at 1872 has stated:

"The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments -- in circumstances that are tense, uncertain and rapidly changing -- about the amount of force that is necessary in a particular situation."

The record does not support that David employed excessive force in subduing Peterson. There is no evidence Peterson received significant injury as a result of the incident of February 3, 1991. At the scene Peterson did not indicate to either Officer David or the backup officers, or to the officers at the jail, that he had been or was experiencing pain or was injured. Peterson's evidence of injury was that on the day following the arrest he mentioned to his chiropractor that his shoulder was sore as a result of wrestling. (See February 4, 1991 entry on Peterson's medical records attached as Exhibit H to David's Brief in Support of Motion for Summary Judgment filed 6-1-92.) Peterson's visit to the chiropractor had already been scheduled previous to February 3, 1991, where he was receiving regular treatments regarding injury from a prior automobile accident. The record does not reflect excessive force was employed by Officer David under the facts and circumstances herein. See, Zuchel v. Spinharney, 890 F.2d 273, 274 (10th Cir. 1989). David is entitled to summary judgment based upon

qualified immunity as a matter of law concerning Peterson's first and second claims for relief.

Regarding Oklahoma's Governmental Tort Claims Act, Okla. Stat. tit. 51 § 163(C) states:

"... In no instance shall an employee of the state or political subdivision acting within the scope of his employment be named as defendant . . . (except for cases involving resident physicians and interns)."

Since Officer David was acting within the scope of his employment regarding the incident of February 3, 1991, the Governmental Tort Claims Act, as a matter of law, precludes Plaintiff's third and sixth claim for relief of malicious prosecution, trespass and injury to property.

Next the Court addresses the City of Broken Arrow's Motion for Summary Judgment. Plaintiff joins as a defendant and seeks money damages from the City of Broken Arrow in his first, second, fourth and fifth claims for relief.

In Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), the Supreme Court laid down the principle that local governments cannot be held liable as entities for acts of their employees under 42 U.S.C. § 1983 based on theories of *respondeat superior*, or vicarious liability. In Monell, the court stated:

"The language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort."

Id. at 690-691. Monell continued, stating that a municipality is

responsible under § 1983 only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may be fairly said to represent official policy, inflicts the injury. *Id.* at 694. *See also, City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), and *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). The plaintiff must also establish a causal link between the City's alleged custom and policy and the specific violation of plaintiff's rights. *Canton v. Harris*, 489 U.S. 378 (1989). Isolated civil rights violations by individual city employees, which are not persistent and are not often repeated, do not constitute custom or policy for which a municipality may be held liable under § 1983. *See, Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir. 1984). The Defendant, City of Broken Arrow, is entitled to summary judgment on Plaintiff's first and second claims for relief under 42 U.S.C. § 1983, because Peterson has failed to present by way of significant probative evidence a policy or custom of the City of Broken Arrow which caused a violation of Peterson's federally protected rights.

Concerning Plaintiff's fourth claim for relief, the City of Broken Arrow is exempt from liability for malicious prosecution. The Governmental Tort Claims Act, Okla. Stat. tit. 51, § 151 *et seq.*, states that a political subdivision will not be liable for acts of its employees within the scope of their employment and are immune from tort liability except to the limited extent expressly allowed by the Governmental Tort Claims Act. Okla. Stat. tit. 51, § 155(2) expressly states:

"The state or a political subdivision shall not be liable if a loss or claim results from:

2. Judicial, quasi-judicial, or prosecutorial function; . . ."

The City of Broken Arrow in arresting, incarcerating, and pursuing prosecution of Peterson under the facts and circumstances involved legitimate prosecutorial functions of the City of Broken Arrow.

Concerning Peterson's fifth claim for relief regarding the intentional tort of malicious injury to property and trespass, the Governmental Tort Claims Act, Okla. Stat. tit. 51, § 155(4) and (9) states:

"The state or a political subdivision shall not be liable if a loss or claim results from:

4. Adoption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy;

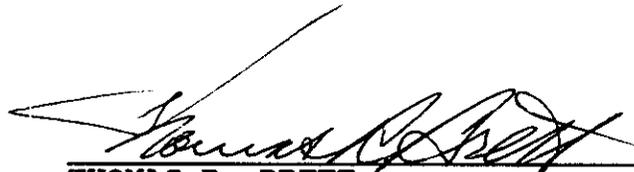
* * *

9. Entry upon any property where that entry is expressly or impliedly authorized by law; . . ."

As has been previously stated above, Officer David's entry upon the subject property was impliedly authorized by law due to his objectively reasonable belief a dangerous situation existed and the occupant's personal safety was at risk. Therefore, the Defendant City of Broken Arrow's Motion for Summary Judgment concerning Plaintiff's first, second, fourth and fifth claims for relief is hereby SUSTAINED. For the reasons set forth above, Plaintiff's Motion for Partial Summary Judgment is hereby DENIED.

A separate Judgment will be filed contemporaneously with the filing of this order in favor of the Defendants, Danny David and the City of Broken Arrow, and against the Plaintiff, Ty Lane Peterson.

DATED this 5th day of November, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED
DATE NOV 12 1994

CLOSED

FILED
NOV 5 1992
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

MARJORIE REED and
TY LANE PETERSON,

Plaintiffs,

vs.

CITY OF BROKEN ARROW
and DANNY DAVID,

Defendants.

No. 92-C-034-B ✓

J U D G M E N T

In keeping with the Court's order filed this date concerning the parties' various motions for summary judgment pursuant to Fed.R.Civ.P. 56, Judgment is hereby entered in favor of the Defendants, City of Broken and Danny David, and against the Plaintiff, Ty Lane Peterson, and said action against said Defendants is hereby dismissed. Costs are hereby assessed against the Plaintiff, Ty Lane Peterson, if timely applied for pursuant to Local Rule 6 by the Defendants. The parties are to pay their own respective attorneys' fees.

DATED this 5th day of November, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

7/6

ENTERED

11-12-92
[Redacted]

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

FILED

NOV 5 1992

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

ROBERT J. PHILLIPS and)
WANDA N. PHILLIPS,)
)
Plaintiffs,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)

91-C-543-B

ORDER

This order pertains to the United States' Motion for Summary Judgment (Docket #3)¹ and Plaintiffs' Objection to United States' Motion for Summary Judgment (Docket #5). A hearing was held on March 31, 1992, and oral arguments were heard.

This is a civil tax refund suit in which the Plaintiffs seek to recover 1986 federal income taxes in the amount of \$3,501.85, plus statutory interest. They allege that they mailed their joint tax return for the taxable year 1986 to the Internal Revenue Service, Austin, Texas on April 15, 1987. The joint tax return claimed an overpayment of tax in the amount of \$3,501.85. Sometime during 1988, the Plaintiffs, not having yet received their refund of the overpayment, forwarded another signed copy of their joint tax return to the Internal Revenue Service Center in Austin, Texas, with a request that their overpayment be refunded.

In 1990, the Plaintiffs, still not having heard from the Internal Revenue Service concerning refund of their overpayment, contacted the District Problem Resolution Staff

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.

10

in the Oklahoma City District Office of Internal Revenue Service. The Plaintiffs once again furnished signed copies of their 1986 joint income tax return to the Internal Revenue Service through the District's Problem Resolution Staff. The Internal Revenue Service processed the third copy of the 1986 return, but the Problem Resolution Staff found that no refund was proper, because the 1986 tax return was filed more than three years after the date it was due.

Plaintiffs contend that their original tax return may have been one of the several hundred tax returns, letters, and documents wrongfully destroyed by employees of the Internal Revenue Service in Austin, Texas, who were attempting to overcome what they considered to be an "overwhelming" current and backlog work burden. In any event, they allege they timely filed two copies of their 1986 return within a period not more than three years after the date it was due.

The United States contends that Plaintiffs did not file their 1986 return until January 15, 1991, after mailing it on December 20, 1990 by certified mail. The return was accepted by the IRS and dated as received on January 15, 1991. The return was a photocopy bearing original signatures. The United States seeks summary judgment on the ground that this court lacks jurisdiction over the subject matter because the complaint seeks a refund of amounts paid more than three years before the filing of an administrative claim for refund.

"[T]he plain language of Rule 56(c) [Fed.R.Civ.P.] 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." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If there is a complete failure of proof concerning an essential element of the non-movant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. Id. at 323.

A party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must affirmatively prove specific facts showing that there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The Court stated that "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252.

The nonmoving party "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 record must be construed liberally in favor of the party opposing the summary judgment, but "conclusory allegations by the party opposing . . . are not sufficient to establish an issue of fact and defeat the motion." McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hosp. of Sheridan County, 850 F.2d 1384 (10th Cir. 1988).

Title 28 of the United States Code, § 1346(a)(1), grants federal district courts original jurisdiction over civil actions against the United States for the refund of federal taxes. This section and section 7422(a) of the Code constitute a waiver by the United

States of its sovereign immunity with respect to refund suits by taxpayers to recover taxes alleged to have been erroneously or illegally assessed or collected. Section 7422 of Title 28 provides that in order for a district court to have subject matter jurisdiction in a refund action for federal taxes, a timely claim for refund must be "duly filed." A taxpayer has the burden of establishing the existence of federal court jurisdiction. Miller v. U.S., 784 F.2d 728, 729 (6th Cir. 1986).

Section 6511(a) of Title 28 requires that a claim for refund be filed within three years of the time the return was filed or two years of the time the tax was paid, whichever is later. Where the claim is filed within the three year period, section 6511(b)(2) prohibits the refund of amounts paid more than three years before the filing of the claim. Freese v. United States, 455 F.2d 1146, 1153 (10th Cir.), cert. denied, 409 U.S. 879 (1972).

A properly executed individual income tax return constitutes a claim for refund for purposes of section 6511 of the Code under Treasury Regulation § 301.6402-3(b)(4). The claim for refund is considered filed on the date on which such return is considered filed. Id. The United States contends that, because the Internal Revenue Service did not accept Plaintiffs' claim until January 15, 1991, more than three years after the taxes were paid in April 1987, this court has no jurisdiction over the complaint.

A timely filing of a claim occurs when the claim is delivered to, and received by, the Internal Revenue Service. Miller, 784 F.2d at 728. Section 7502 of Title 28 sets out how a date of receipt is determined.² Under this statute it is clear that the date of postmark or

² Section 7502 of Title 28 provides in pertinent part:

(a) General Rule.-

the date of registration will be deemed the date of delivery to the Internal Revenue Service. In the case at bar, there are no postmarked envelopes to show the date of receipt by the Internal Revenue Service of the tax returns Plaintiffs allegedly sent and Plaintiffs have no proof of mailing them by registered or certified mail. The only evidence submitted is a sworn affidavit signed by Plaintiffs, which presents their allegations concerning the three mailings.

(1) Date of delivery. - If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.

(2) Mailing requirements. - This subsection shall apply only if -

(A) the postmark date falls within the prescribed period or on or before the prescribed date -

(i) for the filing (including any extension granted for such filing) of the return, claim, statement, or other document, or

(ii) for making the payment (including any extension granted for making such payment), and

(B) the return, claim, statement, or other document, or payment was, within the time prescribed in subparagraph (A), deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the agency, officer, or office with which the return, claim, statement, or other document is required to be filed, or to which such payment is required to be made.

....

(c)(1) Registered mail. - For purposes of this section, if any such return, claim, statement, or other document, or payment, is sent by United States registered mail -

(A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed, and

(B) the date of registration shall be deemed the postmark date.

(2) Certified mail. - The Secretary or his delegate is authorized to provide by regulations the extent to which the provisions of paragraph (1) of this subsection with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail.

In Deutsch v. Commissioner, 599 F.2d 44 (2nd Cir. 1979), cert. denied, 444 U.S. 1015 (1980), a taxpayer's petition for review of a deficiency assessed by the Commissioner was never delivered to the tax court. The taxpayer's accountant offered an affidavit that the petition was mailed within the prescribed period. The Second Circuit held that the legislative history of § 7502 indicated the statute only applied if the petition was actually delivered. The court decided that the taxpayer could not prove delivery and timeliness by evidence other than a postmarked envelope or registered mail receipt, because § 7502 demonstrated Congress' desire to set an easily applied, objective standard. The court said: "We are not persuaded of any unconstitutionality in Congress' intent, manifested in section 7502, to limit proof of mailing to some type of objective evidence. Both administrative convenience and the likelihood that a petition never received was never sent support the rationale of the section." Id. at 46.

In Miller, 784 F.2d at 728, a taxpayer's claims for refund were allegedly not received by the IRS, and the court refused to consider the affidavit of taxpayer's accountant that the claims were timely mailed. The Sixth Circuit construed section 7502 as creating two separate exceptions to the requirement of physical delivery, and held that section 7502(a), "both by its terms and as revealed in the legislative history, applies only in cases where the document is actually received by the I.R.S. after the statutory period." Id. at 730. The court cited the Tax Court's memorandum decision in Foerster v. Commissioner, T.C. Memo. 1981-32, 41 T.C.M. 775 (1981), which had reached a similar conclusion.

Other courts have followed the reasoning in Deutsch and Miller. Sartori v. U.S., 62 A.F.T.R.2d 88-5190 (W.D. Pa. 1988); Benrey v. Commissioner, 51 T.C.M. (CCH), 796,

1986 WL 21851 (Tax Court, 1986).

The court notes that in Wood v. Commissioner, 909 F.2d 1155 (8th Cir. 1990), the Court of Appeals found that Congress did not intend to foreclose the presumption of delivery under § 7502 in a case where the postmark requirements of the section could be conclusively established. In that case, a postmaster testified that she remembered putting postage on the envelope containing the taxpayer's return and the date of the postmark she affixed herself. The court emphasized that its holding was narrow, and could be distinguished from holdings such as those in Deutsch and Miller:

[I]n section 7502 Congress dealt with issues of proof, and determined that a postmark is evidence verifiable beyond any self-serving testimony of a taxpayer who claims that a document was timely mailed. A postmark is proof not only that the document was in fact mailed, but also of the date on which it was mailed. The act of mailing is not significant for purposes of the statute but placement of a postmark is. Thus, any case in which a postmark is actually established is distinguishable from either Miller or Deutsch, in which the only evidence was that of mailing, and in which no postmark was ever established.

[T]he proof of postmark in this case by the testimony of Marvel Staloch, is as certain as if the document were actually received late and viewed, or as if the estate could produce a receipt for registration or certification. (citations omitted). Id. at page 1161.

In the case at bar, Plaintiffs offer no proof of postmark or independent evidence of mailing, save Robert's self-serving affidavit. There is no case authority upon which to deny the motion for summary judgment.

The court notes that the government is not estopped from challenging jurisdiction by its communication with Plaintiffs concerning the second tax return mailing within the statutory period. "A party seeking to estop the government must show the presence of four essential elements: (1) the party to be estopped must know the facts; (2) he must intend

that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury." State of Washington v. Heckler, 722 F.2d 1451, 1455 (9th Cir. 1984) (citing TRW, Inc. v. Federal Trade Commission, 647 F.2d 942, 950-51 (9th Cir. 1981)). No evidence has been presented that the government engaged in any affirmative misconduct. There has been no factual showing that the party at the Internal Revenue Service, who talked to Plaintiff Robert sometime in 1988 and advised him to forward a copy of his 1986 tax return to assist in locating the original return, knew the facts and intended to lull Plaintiffs into inaction until the three year filing limitation period had passed.

The United States' Motion for Summary Judgment (Docket #3) is granted.

Dated this 5th day of Nov., 1992.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET
DATE NOV 12 1992

FILED

NOV 6 1992

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

CLOSED

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

GENERAL ELECTRIC CAPITAL CORPORATION, a New York corporation,

Plaintiff,

v.

FOURTH NATIONAL BANK OF TULSA, a National Banking Association, and FIRST NATIONAL BANK OF PRYOR CREEK, a National Banking Association,

Defendants,

FOURTH NATIONAL BANK OF TULSA,

Third Party Plaintiff,

v.

JUDI E. BEAUMONT as Trustee of Vogue Coach Company, JOSEPH Q. ADAMS as Trustee of Vogue R.V. Sales of California, Inc., and TRANSAMERICA COMMERCIAL FINANCE CORPORATION,

Third Party Defendants.

No. 92-C-017-B

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff General Electric Capital Corporation, Defendant First National Bank of Pryor Creek, Defendant and Third Party Plaintiff Fourth National Bank of Tulsa, and Third Party Defendants Judi E. Beaumont as Trustee of Vogue Coach Company, Joseph Q. Adams as Trustee of Vogue R.V. Sales of California, Inc., and Transamerica Commercial Finance Corporation, by and through their attorneys of record, and pursuant to Fed.R.Civ.P. 41(a)(1), stipulate to the dismissal of, and do hereby dismiss the above-captioned action with prejudice, each party to bear its own costs and attorneys' fees.


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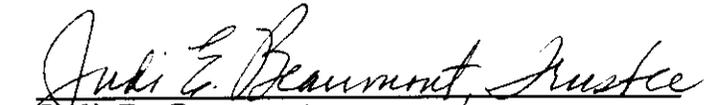
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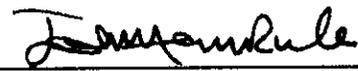


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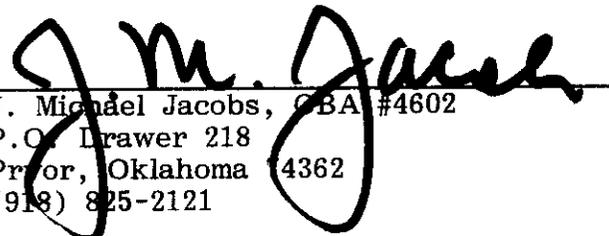
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ENTERED ON DOCKET
NOV 12 1992
DATE

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

FILED

NOV 6 1992

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

TRANSAMERICA COMMERCIAL FINANCE)
CORPORATION, a Delaware corporation,)
)
Plaintiff,)
)
v.)
)
VOGUE R.V. SALES OF CALIFORNIA,)
INC., an Oklahoma corporation;)
VOGUE COACH COMPANY, an Oklahoma)
corporation; HARRY R. PATTY, JR.,)
an individual, BETTY J. PATTY,)
an individual; JO LYNN PATTY,)
an individual; and GENERAL ELECTRIC)
CAPITAL CORPORATION, a New York)
corporation,)
)
Defendants.)

No. 90-C-923-C

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff Transamerica Commercial Finance Corporation and
Defendants Vogue R.V. Sales of California, Inc., Vogue Coach Company,
Harry R. Patty, Jr., Betty J. Patty, Jo Lynn Patty, and General Electric
Capital Corporation, by and through their attorneys of record and, pursuant
to Fed.R.Civ.P. 41(a)(1), stipulate to the dismissal of, and do hereby dismiss
with prejudice, the above-captioned action, each party to bear its own costs
and attorneys' fees.


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Joint Stipulation of Dismissal
With Prejudice
Case No. 90-C-923-C

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Joint Stipulation of Dismissal
With Prejudice
Case No. 90-C-923-C

CLOSED
NOV 12 1992

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

RECEIVED

MUSCOGEE (CREEK) NATION,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES OF AMERICA,)
et al.,)
)
Defendants.)

NOV 10 1992

U. S. ATTORNEY
N. D. OKLAHOMA

Case No. 90-C-782-E

FILED

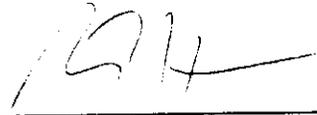
NOV 10 1992

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

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW Plaintiff and Defendants, by and through their respective attorneys of record, each being duly authorized, and hereby stipulate to the dismissal of all claims raised in the above styled and numbered cause, said Dismissal being with prejudice to any future action, each party to bear its own costs and attorneys fees.

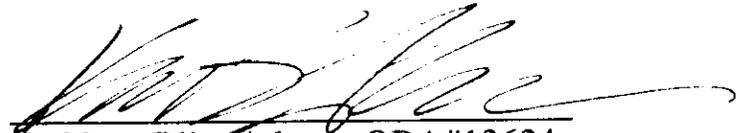
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Attorneys for Plaintiff

TONY M. GRAHAM
UNITED STATES ATTORNEY

BY:



Kathleen Bliss Adams OBA#13624
Assistant U.S. Attorney
3900 U.S. Courthouse
Tulsa, OK 74103
918/581-7463
Attorneys for Defendants

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss is hereby GRANTED; Plaintiff's Motion for Summary Judgment is therefore Moot.

ORDERED this 9TH day of November, 1992.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

CLOSED

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

JOHN A. and CAROLYN BOWLER,

Plaintiffs,

vs.

STATE FARM FIRE & CASUALTY
COMPANY, a foreign insurance
corporation,

Defendant.

Case No. 92-C-416-E

RECORDED
NOV 12 1992

ORDER OF DISMISSAL OF PLAINTIFFS' COMPLAINT

NOW, on this 9th day of Nov., 1992, upon the written stipulation of the Plaintiffs for a dismissal with prejudice of the Plaintiffs' Complaint, the Court having examined said Stipulation for Dismissal finds that the parties have entered into a compromise and settlement of all the claims involved herein and the Court being fully advised in the premises, finds that the Plaintiffs' Complaint against the Defendant should be dismissed with prejudice.

IT IS THEREFORE ORDERED BY THE COURT that the Complaint of the Plaintiffs against the Defendant be and the same is hereby dismissed with prejudice to any further action.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE **NOV 12 1992**

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

FILED

NOV 6th 1992 *[Signature]*

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

ALLEN EUGENE SUENRAM,)
)
 Plaintiff,)
)
 v.)
)
 M/J/L CORP. An Oklahoma Corporation,)
 and DAVID P. WARNING,)
)
 Defendants.)

90-C-1019-B

INTERLOCUTORY FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a shareholder's derivative action brought pursuant to the provisions of Rule 23.1 of the Federal Rules of Civil Procedure for money damages and other relief occasioned by alleged breaches of fiduciary duties and oppressive, fraudulent, and unlawful conduct. The parties consented to proceed before the Magistrate Judge on April 3, 1992. The sole issue of plaintiff's ownership of stock in defendant corporation and his standing to bring suit was tried to the court on October 26, 1992. The court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The court has jurisdiction of the parties and subject matter herein. Plaintiff is a resident and citizen of the State of Kansas. Defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Oklahoma, with its principal office and place of business in the City of Tulsa, Tulsa County, State of Oklahoma. The matter in controversy exceeds the sum of \$50,000.00.

2. Sarah Simpson Suenram ("Sarah") and Allen Eugene Suenram ("plaintiff") were granted a divorce on August 27, 1980. By virtue of the Journal Entry of Judgment

[Handwritten mark]

and Decree of Divorce filed on September 10, 1980, plaintiff was granted all the right, title and ownership interest of the shares of stock owned by either party in M/J/L Corp., an Oklahoma corporation (plaintiff's Exhibit 1, pg. 5). The Decree of Divorce stated that, in the event that plaintiff and defendant failed to execute the necessary assignments or other papers necessary to bring about a change of legal ownership as ordered therein, the Decree would absolutely effect the change of ownership. (Plaintiff's Exhibit 1, page 6).

3. The actual stock certificate transferring title from Sarah to plaintiff was signed on January 6, 1981 (defendant's Exhibit 3). That stock certificate was transmitted by Jerry Muth, plaintiff's attorney, under cover of his letter of February 2, 1981, to M/J/L Corp. at 8507 South Jamestown Street, Tulsa, OK, 74136 (defendant's Exhibit 3), which was the proper mailing address for the corporation according to the testimony of David Warning, an officer of the corporation.

4. On March 26, 1982, M/J/L Corp. acknowledged plaintiff's status as stockholder of the company by virtue of a letter addressed to plaintiff with the greeting "Dear Stockholder" (plaintiff's Exhibit 2).

5. M/J/L Corp. had actual knowledge of the transfer of stock from Sarah to plaintiff prior to March 26, 1982, by virtue of oral conversations between Sarah and Gail Warning. This finding is supported by Sarah's deposition testimony (pages 12, 13, 15, 19, 21, 25, and 26) and David Warning's testimony. Gail Warning was the Secretary of M/J/L Corp., and her knowledge may thus be imputed to the corporation.

6. M/J/L is a closely-held, non-public corporation. The initial stock ownership was as follows: 25% to Sarah, 20% to Gail Warning, her sister, and 55% to David

Warning, Gail's husband. In 1986 David Warning transferred his shares of stock to Gail Warning. At the time of her death in 1989, Gail Warning's 75% of the shares of stock were inherited by David Warning.

7. A lawsuit was instituted in the District Court of Tulsa County, Oklahoma, in 1986 and M/J/L Corp. received service in that case in 1987, noticing M/J/L Corp. of plaintiff's claim to stock ownership in the company.

8. On August 31, 1988, Gail Warning signed a certificate as Secretary of M/J/L Corp., attesting that she and Sarah were shareholders of the corporation as of September 1, 1988. There is no evidence in the record explaining the reason for the certificate's generation, and no other certificates of this nature are in evidence.

9. David Warning testified that at some point he claimed ownership of 100% of the M/J/L Corp. stock for tax purposes, but no tax records are in evidence. He now admits that 25% of the M/J/L stock is owned by either Sarah or plaintiff.

10. Sarah and Gail Warning were sisters and their husbands, plaintiff and David Warning, were brothers-in-law; all the stockholders of M/J/L corp. were related by blood or marriage.

11. The stock certificate transferred by Sarah to plaintiff was duly presented to M/J/L Corp. by virtue of the February 2, 1981 correspondence from Jerry Muth to the corporation. Allowing three days for receipt of the letter, M/J/L Corp. received it on or about February 5, 1981. The M/J/L Corp. corporate books should have shown plaintiff to be a 25% shareholder within a reasonable time after that date. Given that this was a closely-held corporation with only two shareholders, the court determines that ten days is

a reasonable time in which to make the actual bookkeeping entries and issue a new stock certificate. This should have been accomplished by February 15, 1981.

12. M/J/L Corp. acknowledged by implication the receipt of the correspondence from Jerry Muth and the transfer of stock at least as early as March 26, 1982, when plaintiff received the letter to "Dear Stockholder".

13. Although the assigned stock certificate was properly presented to M/J/L Corp., the transfer of ownership it reflected was not appropriately noted on the corporate books. This is shown by Gail Warning's "Certificate of Secretary" (Defendant's Exhibit 1), which demonstrates that the corporate books still showed ownership by Sarah as late as 1988.

14. Any conclusion of law that is also a finding of fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. Any finding of fact above that might be properly characterized a conclusion of law is incorporated herein.

2. A party prosecuting a derivative action must be a shareholder in the corporation. Fed.R.Civ.Pro. 23.1(1).

3. State law requires presentment of a transferred stock certificate to prove ownership (Okla.Stat.tit. 12A, § 8-207(1)); federal law does not require presentment. DeHaas v. Empire Petro. Co., 435 F.2d 1223, 1227 (10th Cir. 1970).

4. Since due presentment of the stock certificate was made, plaintiff has standing to bring this lawsuit and M/J/L Corp. should make the appropriate record of

transfer on its books and present plaintiff with his shares of stock. Plaintiff should be shown as the owner of record as of February 15, 1981.

5. The doctrine of laches should not be applied to the issue of stock ownership. The doctrine of laches is based not on mere delay, but delay that works to the disadvantage of another party. Schmidt v. Farm Credit Services, 1992 WL 277246 (10th Cir. Oct. 13, 1992). There was no failure to present the stock certificates, but rather a failure to reflect the transfer of ownership on the corporate books. Defendant will not be disadvantaged by this ruling, insofar as it is admitted that there has always been a 25% minority owner of the stock. Any legal duty or obligation to the minority stockholders would accrue because there was minority stock outstanding, and not because the stockholder was plaintiff as opposed to Sarah.

6. The law presumes three (3) days for the receipt of a letter posted in the U.S. mail. Fed.R.Civ.Pro. 6(e). Norris v. Florida Dept. of Health & Human Services, 730 F.2d 682, 683 (11th Cir. 1984).

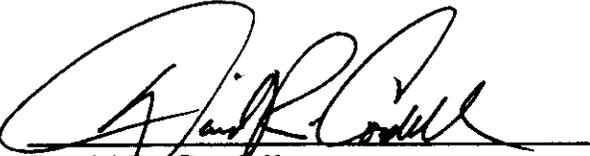
7. A separate judgment will not be filed contemporaneous with the filing of these Interlocutory Findings of Facts and Conclusions of Law. These Interlocutory Findings of Fact and Conclusions of Law, together with the Findings of Fact and Conclusions of Law generated as a result of phase two of the trial, will together serve as the basis for the final judgment to be entered in this case.

Dated this 6th day of Novber, 1992.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

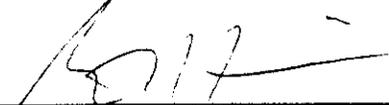
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Workers Union of America,
AFL-CIO, Local 514

CLOSED

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

KEVIN MUNN,)	
)	
Plaintiff,)	
)	
vs.)	No. 92-C-119-E
)	
WELLCRAFT MARINE DIVISION)	
OF GENMAR INDUSTRIES, INC.,)	
a corporation,)	
Defendant.)	

NOV 12 1992

ORDER OF DISMISSAL

This matter comes on for hearing on the Joint Stipulation of the Plaintiff, Kevin Munn, and Defendant, Wellcraft Marine Division of Genmar Industries, Inc., a corporation, for a dismissal with prejudice of the above captioned cause. The Court, being fully advised, having reviewed the Stipulation, finds that the parties herein have entered into a compromise settlement covering all claims involved in this action, which this Court hereby approves, and that the above entitled cause should be dismissed with prejudice to the filing of a future action pursuant to said Stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above entitled cause be and is hereby dismissed with prejudice to the filing of a future action, the parties to bear their own respective costs.

Dated this 9th day of Nov. ~~October~~, 1992.

JAMES O. ELLISON
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF OKLAHOMA