

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

BETTY JO FAHLER, individually,)
and BETTY J. FAHLER, as)
Administratrix of the Estate)
of JOHN C. FAHLER, JR.,)
Deceased,)

Plaintiff,)

vs.)

AMERICAN FIDELITY ASSURANCE)
COMPANY, JEFF LUNGREN)
CHEVROLET-OLDS-GEO, INC.,)
and HERBERT J. LUNGREN,)

Defendants.)

No. 92-C-962-C

FILED

MAY 13 1993

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

ORDER

Before the Court is the motion of the plaintiff to remand. Plaintiff filed her petition in state court on September 24, 1992, alleging fraud against the defendants. Defendant American Fidelity Assurance Company filed a notice of removal on October 22, 1992, within the thirty day limit of 28 U.S.C. §1446(a). The stated grounds for removal were that plaintiff's action was a suit on an employee benefit plan as defined in 29 U.S.C. §1002(1) and that jurisdiction is proper in this Court under 29 U.S.C. §1132(e) and (f), or in the alternative, that diversity jurisdiction exists, a position which has now been abandoned. Included in the notice was the following sentence: "Co-Defendants Jeff Lungren Chevrolet-Olds-Geo, Inc., and Herbert J. Lungren join in and consent to this removal." Plaintiff filed a motion to remand on November 20, 1992, timely under 28 U.S.C. §1447(c).

22

Plaintiff seeks remand on the basis that the notice of removal is defective because it is on behalf of only one named defendant. §1446(a) has been interpreted to require that all then served properly joined defendants join the removal petition. Getty Oil Corp. v. Insurance Co. of North America, 841 F.2d 1254, 1261 n.9 (5th Cir. 1988). Failure of a co-defendant to join renders the petition procedurally defective. Cornwall v. Robinson, 654 F.2d 685, 686 (10th Cir. 1981). Is expression by the removing defendant of another co-defendant's "consent" sufficient? The Getty Oil court appears to be the only Court of Appeals to address the issue. In a similar situation it stated:

But while it may be true that consent to removal is all that is required under section 1446, a defendant must do so itself. This does not mean that each defendant must sign the original petition for removal, but there must be some timely filed written indication from each served defendant, or from some person or entity purporting to formally act on its behalf in this respect and to have authority to do so, that it has actually consented to such action. Otherwise, there would be nothing on the record to "bind" the allegedly consenting defendant. In the present case, nothing in the record, except INA's unsupported statement in the original removal petition, indicates that NL actually consented to removal when the original petition was filed. INA's removal petition alleged that NL had not been served and "therefore . . . need not join the removal Petition," and that NL "do[es] not oppose and consent[s] to this Petition for Removal"; it does not allege that NL has authorized INA to formally (or otherwise) represent to the court on behalf of NL that NL has consented to the removal. Accordingly, there was no adequate allegation or showing of NL's actual joinder in or consent to the original removal petition.

841 F.2d at 1262 n.11.

The overwhelming weight of authority among the published district court opinions is that a defective removal notice such as this one may not be cured by amendment after the thirty day period of §1446(b) has passed. See Knickerbocker v. Chrysler Corp., 728 F. Supp. 460 (E.D. Mich. 1990) and cases cited therein. Therefore, the affidavit filed on December 7, 1992, in which co-defendants' counsel expresses his formal consent comes too late. While it is represented to the Court that at the time of removal, co-defendants' counsel was in the hospital and could not sign any removal documents, said counsel signed a motion to dismiss filed in state court on October 13, 1992, and there is nothing to indicate that his signature or formal authorization could not have been obtained prior to the actual filing date of the notice of removal. The fact that a false representation of consent would subject the removing defendant's counsel to sanctions has not been deemed a sufficiently countervailing consideration. See Moody v. Commercial Ins. Co., 753 F.Supp. 198, 200 n.6 (N.D. Tex. 1990).

Defendants also cite Hendrix v. New Amsterdam Casualty Co., 390 F.2d 299 (10th Cir. 1968), but this Court finds the case distinguishable. In Hendrix, the removal petition failed to adequately allege diversity jurisdiction. The district court permitted an amendment to the petition outside of the thirty day period. The Tenth Circuit Court of Appeals upheld the amendment, specifically relying upon 28 U.S.C. §1653, which permits the amendment of defective allegations of jurisdiction. Id. at 301 &

n.5. The use of §1653 for amendment in situations such as the case at bar has been rejected. See Moody, 753 F. Supp. at 201. The Court will deny plaintiff's request for costs and fees, as the notice of removal was not obviously defective and was clearly not filed in bad faith. The Court is aware of the relative harshness of the result, but the removal statutes must be strictly construed and the burden is on the defendant to demonstrate the propriety of removal. See Town of Freedom v. Muskogee Bridge Co., Inc., 466 F. Supp. 75 (W.D. Okla. 1978). All of the arguments contained in the pending motions to dismiss may be presented in the state forum. See, 29 U.S.C. §1132(e) (state courts have concurrent jurisdiction over private ERISA actions). By this citation, the Court is not concluding that plaintiff's action is pre-empted by ERISA, but merely acknowledging that such is defendants' contention.

It is the Order of the Court that the motion of the plaintiff to remand is hereby granted. This action is hereby remanded to the District Court for Tulsa County, State of Oklahoma.

IT IS SO ORDERED this 18th day of May, 1993.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 5-20-93

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

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

CIVIL ACTION NO. 93-C-0018-E

SURFACE RIGHTS IN AND TO)
THE WEST HALF (W/2) OF)
TRACT 7, LECHTENBERG)
SUBDIVISION, IN)
SECTION 6, TOWNSHIP 25)
NORTH, RANGE 3 EAST OF)
THE I.M., OSAGE COUNTY,)
OKLAHOMA, CONTAINING 4.5)
ACRES, MORE OR LESS, AND)
ALL BUILDINGS, APPURTENANCES,)
AND IMPROVEMENTS THEREON,)

Defendant.)

FILED

MAY 19 1993

U.S. District Court
Northern District of Oklahoma

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Application for Judgment of Forfeiture by Default Against Defendant Real Property As To Certain Individuals/Entities and For Judgment of Forfeiture By Stipulation As to Other Individuals/Entities, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 8th day of January 1993, alleging that the defendant real property was subject to forfeiture pursuant to 18 U.S.C. § 981, because it was involved in a transaction or attempted transaction in violation of 18 U.S.C. §§ 1956 and pursuant to 18 U.S.C. § 1955 because it was used in violation of the gambling laws of the United States.

A Warrant of Arrest and Notice In Rem was issued on the 12th day of January 1993, by The Honorable James O. Ellison, Chief Judge of the United States District Court for the Northern District of Oklahoma.

The United States Marshals Service served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on the defendant real property on February 24, 1993.

The following individuals and entities were determined to be potential claimants in this action with possible standing to file a claim herein:

ANGIE HARGRAVES, a Minor,
by serving GRACE BATT, her
mother and natural guardian.

ANGIE HARGRAVES

JEFF JAKE HARGRAVES, a/k/a
JEFF J. HARGRAVES and
BOB HARGRAVES

STATE OF OKLAHOMA, ex rel.
LARRY D. STUART,
District Attorney of Osage County

COUNTY TREASURER OF OSAGE COUNTY, OKLAHOMA

The United States Marshals personally served the following persons and entities having a potential interest in this action, to-wit:

ANGIE HARGRAVES, a Minor,
by serving GRACE BATT,
her mother and natural
guardian.

Served:
February 19, 1993

ANGIE HARGRAVES, by
serving GRACE BATT,
(Mother).

Served:
February 19, 1993

JEFF JAKE HARGRAVES,
a/k/a JEFF J. HARGRAVES
and BOB HARGRAVES.

Served:
March 2, 1993.

STATE OF OKLAHOMA, ex rel.
LARRY D. STUART,
District Attorney of
Osage County, Oklahoma.

Served:
February 24, 1993

COUNTY TREASURER OF
OSAGE COUNTY, OKLAHOMA.

Served:
February 24, 1993

United States Marshals 285s reflecting the services set forth above are on file herein.

All persons interested in the defendant real property hereinafter described were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

Pursuant to Plea Agreement of Jeff Jake Hargraves on November 10, 1992, in Criminal Case No. 92-CR-83-B, a copy of which was attached to the Complaint for Forfeiture filed herein,

Jeff Jake Hargraves entered into a Stipulation for Forfeiture with the plaintiff, United States of America, consenting to the forfeiture of the defendant real property. This Stipulation for Forfeiture was filed herein on January 13, 1993.

In addition to executing a Stipulation for Forfeiture, Jeff Jake Hargraves, a/k/a Jeff J. Hargraves and Bob Hargraves, executed a Quit-Claim Deed to the defendant real property. This Deed was filed in the Office of the County Clerk of Osage County, Oklahoma, on February 25, 1993, in Book 0829 at Page 0252, as Instrument No. 77757.

The only persons or entities upon whom personal service was effectuated more than thirty (30) days ago filing a response herein is the County Treasurer of Osage County, Oklahoma, who failed to file a Claim, as required, but did file an Answer on February 25, 1993. The Answer of the County Treasurer alleges that ad valorem taxes for 1991 and all preceding years have been paid, but that taxes for 1992 are due and owing; the amount of such taxes was not stated therein. Thereafter, on the 5th day of May 1993 the County Treasurer, by and through Larry D. Stuart, District Attorney for Osage County, Oklahoma, by John S. Boggs, Assistant District Attorney, executed a Stipulation for Payment of Taxes and for Forfeiture, thereby agreeing that the payment by plaintiff, the United States of America, of taxes in the amount of \$410.44, plus interest in the amount of \$12.31, for a total of \$422.75, constitutes full, final, and complete payment of all

taxes, interest, and penalty due on the defendant real property to the date of transfer of the property by the United States of America to a bona fide purchaser, pursuant to the doctrine of sovereign immunity accorded the United States of America, and further agreeing that the defendant property can be forfeited and sold according to law.

The following-named persons and entities upon whom personal service was effectuated more than thirty (30) days ago, have failed to file their claim(s) or answer(s), as directed in the Warrant of Arrest and Notice In rem on file herein:

**ANGIE HARGRAVES,
either individually
or through her Mother
and natural guardian,
GRACE BATT.**

**STATE OF OKLAHOMA, ex rel.
LARRY D. STUART,
District Attorney of
Osage County, Oklahoma.**

Angie Hargraves, who was a minor at the time this action was commenced, attained the age of 18 on April 10, 1993, at which time majority rights were automatically conferred upon her and she became entitled to file a claim on her own behalf in this cause of action. No such claim has been filed by Angie Hargraves.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a

newspaper of general circulation in the district in which this action is pending, on April 1, 8, and 15, 1993; and in the Pawhuska Journal-Capital, a newspaper of general circulation in the county where the defendant real property is located, on March 31 and April 7 and 14, 1993, and that Proof of Publication was filed of record herein on the 22nd day of April, 1993.

No other claims in respect to the defendant real property have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant real property, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, upon information and belief, default exists as to the defendant real property, its buildings, appurtenances, and improvements, and all persons and/or entities interested therein.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Judgment be entered against the following-described defendant property:

**SURFACE RIGHTS ONLY IN AND TO:
The West Half (W/2) of Tract Seven
(7), LECHTENBERG SUBDIVISION, in
Section Six (6), Township Twenty-
five (25) North, Range Three (3)
East of the I.M., Osage County,
Oklahoma, containing 4.5 acres,
more or less,**

and that such property be, and it is, hereby forfeited to the United States of America for disposition by the United States Marshals Service according to law.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the United States Marshals Service shall distribute the proceeds of the sale of the defendant real property as follows:

a) First, from the sale of the real property, payment to the United States of America of all expenses of forfeiture of the defendant real property, including, but not limited to, expenses of seizure, custody, advertising, and sale;

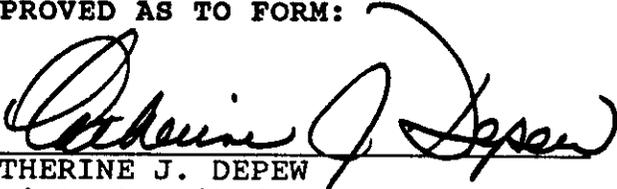
b) Second, from the sale of the defendant real property, real estate taxes and interest in the amount of \$422.75 owed to the County Treasurer of Osage County, Oklahoma, constituting full, final, and complete payment of all taxes, interest, and penalty due on the defendant real property to the date of transfer of the property by the United States of America to a bona fide purchaser.

c) The remaining proceeds from the sale of the defendant real property shall be deposited in the asset forfeiture fund according to law.

S/ JAMES O. ELLISON

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

APPROVED AS TO FORM:


CATHERINE J. DEPEW
Assistant United States Attorney

CJD/ch

N:\UDD\CHOOK\FC\HARGRAVES\03013

ENTERED ON DOCKET
DATE MAY 20 1993
F I L E D

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

MAY 19 1993

LOWRANCE CONTRACTS,
INC.,

Plaintiff,

vs.

POM, INCORPORATED,

Defendant.

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

Case No. 92-C-951-C

ORDER OF DISMISSAL

Upon the Joint Application for Dismissal filed by Plaintiff,
LOWRANCE CONTRACTS, INC., and Defendant POM, INCORPORATED, the
Court finds and orders that this action shall be dismissed with
prejudice, with each party to bear its own costs.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

Submitted by:

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON
ROBERT F. BIOLCHINI, OBA NO. 800
CHARLES GREENOUGH, OBA NO. 12311
320 South Boston, Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211
Attorneys for Plaintiff

WRIGHT, LINDSEY & JENNINGS
ALSTON JENNINGS, ARK. BAR NO. 41014
RAY F. COX, JR., ARK. BAR NO. 88087
2200 Worthen Bank Building
200 W. Capitol Ave.
Little Rock, Arkansas 72201-3699
(501) 371-0808

CROW & DUNLEVY
ANDREW M. COATS, OBA NO.
MICHAEL J. GIBBENS, OBA NO.
500 Kennedy Bulding
321 S. Boston Ave.
Tulsa, OK 74103-3313

ENTERED ON DOCKET

DATE 5-19-93

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JAMES L. FISK,

Plaintiff,

vs.

COMMISSIONER OF INTERNAL
REVENUE SERVICE, *ex rel*, and
Revenue Officer Dale Baustert,

Defendants.

FILED

MAY 18 1993

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

CIVIL ACTION NO. 93-C-389-E

ORDER

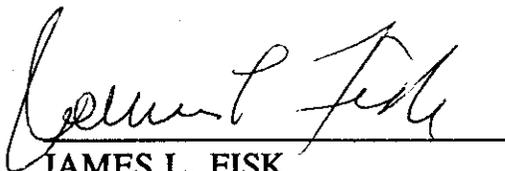
This matter comes on before the court upon the Stipulation of all parties and the court being fully advised in the premises **ORDERS, ADJUDGES AND DECREES** that all claims asserted herein by plaintiff, James L. Fisk, against the defendants, Commissioner of Internal Revenue Service, *ex rel*, and Revenue Officer Dale Baustert, are hereby dismissed with prejudice, the parties to bear their own costs and attorneys' fees.

Dated this 18th day of May, 1993.


UNITED STATES DISTRICT JUDGE

FISK v. UNITED STATES
CIVIL ACTION NO. 93-C-389-E

APPROVED AS TO FORM AND CONTENT:



JAMES L. FISK
2217 East 59th St.
Tulsa, OK 74105

F. L. DUNN, III
United States Attorney



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

ENTERED ON DOCKET

MAY 18 1993

FILED
MAY 10 1993

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

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

ANTHONY STOKES,
Plaintiff,
vs.
RON CHAMPION, et al.,
Defendants.

No. 93-C-260-B

ORDER

Plaintiff has filed an amended complaint pursuant to the court's last order. However, Plaintiff's amended complaint is insufficient in that it is not complete in itself and not on a proper court-authorized complaint form. Further, Plaintiff's assertions of a state created liberty interest are without merit.

Plaintiff's action is **dismissed** on the court's own motion.

SO ORDERED THIS 10 day of May, 1993.

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

4

ENTERED ON DOCKET

DATE 5-18-93

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

FILED

MAY 18 1993

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

HARLEY ANN PATRICK,
individually and as personal
representative of the estate
of Lynn Dvid Patrick,

Plaintiff,

vs.

No. 92-C-998-E

MISSOURI PACIFIC RAILROAD,
a Delaware Corporation d/b/a
Union Pacific Railroad
Company; MISSOURI-KANSAS-TEXAS
RAILROAD COMPANY, a Delaware
Corporation;

Defendants.

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 18th day of May, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

MAY 1 1993

IN THE UNITED STATES DISTRICT COURT **F I L E D**
NORTHERN DISTRICT OF OKLAHOMA

MAY 17 1993

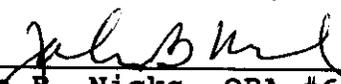
MARY KATHERINE TIPTON,
Plaintiff,
vs.
GENERAL MOTORS CORPORATION,
Defendant.

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

Case No. 93-C-321B

NOTICE OF DISMISSAL WITHOUT PREJUDICE

Comes now Plaintiff and dismisses this action without prejudice.



John B. Nicks, OBA #6678
Attorney for Plaintiff
1448 South Carson Avenue
Tulsa, Oklahoma 74119-3438
(918) 584-2047

MAY 18 1993

DATE

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

ST. PAUL FIRE & MARINE
INSURANCE COMPANY,

Plaintiff,

vs.

J.W. MORGAN, INC. d/b/a
CROSTOWN DISCOUNT FOODS;
GREGORY M. WHITE; STACIE LYNNE
SANDERS, by and through her parents
and guardians, JAMES FRANKLIN
SANDERS and JEANNE MARIE
SANDERS,

Defendants.

No. CIV-92-C-189-B

FILED

MAY 17 1993

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

JOINT STIPULATION OF DISMISSAL

Come now the parties and dismiss this declaratory judgment action with prejudice on the grounds that the recent decision of the Supreme Court of Oklahoma in Stacie Lynne Sanders, by and through her parents and guardians, James Franklin Sanders and Jeanne Marie Sanders v. Crosstown Market, Inc.; J.W. Morgan, Inc.; Scrivner, Inc.; Jerry W. Morgan and Fred G. Latham, Jr., Case No. 75,435, reh'g denied, renders all issues pending herein moot.

WILKINSON & MONAGHAN

FOLIART, HUFF, OTTAWAY &
CALDWELL

By

Robyn R. Sanzalone

Bill V. Wilkinson
Robyn R. Sanzalone
7625 E. 51st Street
Suite 400
Tulsa, OK 74145
918/663-2252

By

Michael C. Felty

Larry D. Ottaway
Michael C. Felty
20th Floor
First National Center
Oklahoma City, OK 73102
405/232-4633

ATTORNEYS FOR
DEFENDANTS SANDERS

ATTORNEYS FOR
PLAINTIFF

DATE 5-17-93

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

FILED

MAY 17 1993

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

NATIONAL UNION FIRE INSURANCE)
COMPANY, et al.,)
)
Plaintiffs,)
)
vs.)
)
A.A.R. WESTERN SKYWAYS, INC.,)
)
Defendant.)

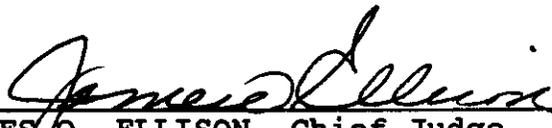
No. 87-C-5-E

ORDER AND JUDGMENT

Pursuant to the Mandate of the Tenth Circuit filed on the 3rd day of May, 1993, the Order of this Court filed on the 22nd day of October, 1991 (docket #87) and the Judgment of this Court filed on the 10th day of January, 1992 (docket #93), along with the Stipulated Orders filed June 18 (docket #100) and August 26, 1992 (docket #104) are hereby VACATED.

IT IS THEREFORE ORDERED that judgment be and it is hereby entered in favor of Defendant A.A.R. Western Skyways, Inc.

Ordered this 17th day of May, 1993.


JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

FC 92-2014

CLERK OF DISTRICT COURT

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

DATE **MAY 17 1993**

JOHN E. DEAS,)
)
Plaintiff,)
)
vs.) Case No. 92-C-400-B
)
PETE HEIST and ROGER DAVIS,)
)
Defendants.)

RECEIVED

APR 30 1993

ATTORNEY GENERAL
LITIGATION DIVISION

FILED

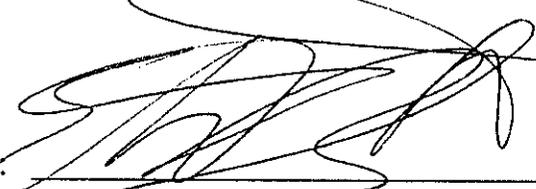
MAY 14 1993

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

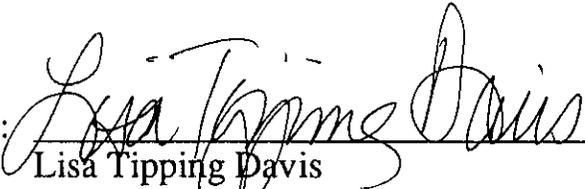
DISMISSAL BY STIPULATION WITHOUT PREJUDICE

COMES NOW the Plaintiff, John Deas, by and through his attorney, Everett R. Bennett, Jr. of the law firm of Frasier & Frasier, and the Defendants, Pete Heist and Roger Davis, by and through their attorney, Lisa Tipping Davis, pursuant to Rule 41A(ii), and hereby stipulate and dismiss the above-styled action without prejudice to the refiling of this case at a later date. Any outstanding costs which are due and owing to the Court Clerk of the United States District Court for the Northern District of Oklahoma shall be born by the Plaintiff. Any and all other costs at this time shall be born by each of the respective parties.

Respectfully submitted,
FRASIER & FRASIER

By. 
Everett R. Bennett, Jr. OBA#11224
1700 Southwest Boulevard
Tulsa, OK 74107
(918) 584-4724

OFFICE OF THE
ATTORNEY GENERAL

By: 
Lisa Tipping Davis
Assistant Attorney General
4545 N. Lincoln, Suite 260
Oklahoma City, OK 73105-3498

DATE MAY 17 1993

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

FILED

MAY 14 1993

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

OIL CHEMICAL AND ATOMIC WORKERS)
INTERNATIONAL UNION LOCAL 5-391,)
a labor organization,)
)
Plaintiff,)
)
vs.)
)
PETROLITE CORPORATION,)
)
Defendant.)

Case No. 92-C-821-B

J U D G M E N T

In accord with the Order filed this date, the Court hereby enters judgment in favor of the Plaintiff, Oil Chemical and Atomic Workers International Union Local 5-391, and against the Defendant, Petrolite Corporation, and hereby finds that this matter should be submitted to arbitration pursuant to the parties' collective bargaining agreement. Costs are assessed against the Defendant, if timely applied for pursuant to Local Rule 6, and each party is to pay its respective attorney's fees.

Dated, this 12th day of May, 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

150

ENTERED IN DOCKET
MAY 17 1993
DATE _____

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

FILED
MAY 14 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOHN ELLISON,

Plaintiff,

vs.

COLONEL RAFAEL GONZALES,
United States Army,

Defendant.

NO. 89-C-711-B ✓

J U D G M E N T

In keeping with the order entered this date, Judgment is hereby entered in favor of Plaintiff and against the United States of America as and for attorney's fees and expenses in the total amount of \$21,443.52. Said award of attorney's fee and expenses relates to the service-connected medical care and treatment aspect of the claim. Post-judgment interest is awarded on said sum at the rate of 3.25% per annum.

DATED this 14th day of May, 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE MAY 17 1993

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RUBY WEST,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

FILED

MAY 14 1993

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

CIVIL ACTION NO. 92-C-802-B

ORDER

This matter comes on before the court upon the stipulation of all parties and the court being fully advised in the premises **ORDERS, ADJUDGES AND DECREES** that all claims asserted herein by plaintiff, Ruby West, against the defendant, United States of America, are hereby dismissed with prejudice.

Dated this 14 day of May, 1993.

8/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO CONTENT AND FORM:

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

Ruby West
RUBY WEST
Plaintiff
11612 North 192 East Avenue
Collinsville, OK 74021
(918) 272-3732

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

DATE MAY 1 / 1993

DAVID A. CACY,)
)
 Plaintiff,)
)
 vs.)
)
 BS&B SAFETY SYSTEMS, INC., and)
 PREMO INCORPORATED,)
)
 Defendants.)

Case No. 93-C-152-B

FILED

MAY 14 1993

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

O R D E R

Before the Court for consideration is Plaintiff's Motion to Remand (Docket #2) pursuant to 28 U.S.C. §1447.

Plaintiff's petition, filed in the Tulsa County District Court, alleges that his employment with the Defendants was wrongfully terminated after he reported numerous safety violations to the Occupational Safety and Health Administration ("OSHA"). The petition further states that "Plaintiff reserves the right to utilize any and all theories or recovery or remedies available to him under any existing federal or state law." (emphasis added).

The Defendants removed the matter to this Court based on Plaintiff's reference to federal law. Plaintiff now moves to remand this case to state court and states that the reference to "federal law" was a scrivener's error. Plaintiff contends that the federal statute¹ that prohibits discrimination against an employee who reports safety violations does not provide for a private right of action and therefore no cause of action is available to Plaintiff

¹ 29 U.S.C. §660.

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wmd

under existing federal law. Plaintiff thus argues there is no federal question providing subject matter jurisdiction. Plaintiff also seeks attorney fees and costs pursuant to 28 U.S.C. §1447.

The Court concludes Plaintiff's petition does not sufficiently raise a federal question and therefore this Court lacks subject matter jurisdiction. This matter is hereby remanded to Tulsa County District Court pursuant to 28 U.S.C. §1447. Both parties are to pay their own respective costs and attorney fees.

IT IS SO ORDERED THIS 14th DAY OF MAY, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

SECRET
DATE MAY 17 1993

blc

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

OBA #8382
FILED

MAY 14 1993

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

STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY, an)
Illinois corporation,)
)
Plaintiff,)
)
-vs-)
)
WILMA JEAN FOSTER,)
)
Defendant.)

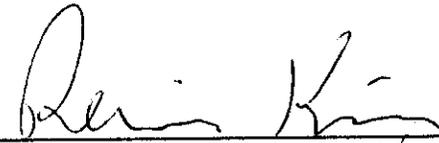
No. 93-C-358-B

NOTICE OF DISMISSAL

COMES NOW the Plaintiff, State Farm Mutual Automobile Insurance Co., and hereby dismisses with prejudice its Complaint against the Defendant herein. Plaintiff advises the Court that the parties have reached a settlement of the insurance claim involved, and this dismissal is a part and parcel of that dismissal. No responsive pleadings or motions have been filed in this case and Dismissal without order of court is proper under Rule 41 (a)(1).

Respectfully submitted,

KNOWLES, KING & SMITH

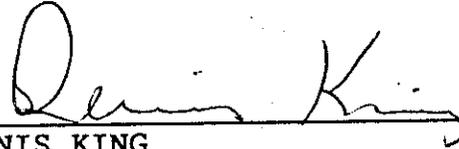
By 

DENNIS KING - OBA # 5026
603 Expressway Tower
2431 East 51 Street
Tulsa, OK 74105
(918) 749-5566

CERTIFICATE OF MAILING

I, DENNIS KING, hereby certify that on the _____ day of May, 1993, I mailed a true and correct copy of the above and foregoing instrument with proper postage thereon fully prepaid to:

Mr. Mike Thornton
525 South Main
Suite 660
Tulsa, OK 74103



DENNIS KING

DATE MAY 14 1993

FILED

MAY 13 1993

[Handwritten signature]

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

REX McCracken and CARL OWENS,)
)
 Plaintiffs,)
)
 v.)
)
 JOHN MEIER, and MID-STATES)
 ADJUSTMENT, INC., a corporation,)
)
 Defendants.)

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

Case No. 92-C-728-B

O R D E R

This is an action wherein Plaintiffs alleged three causes of action, breach of contract, fraud and promissory estoppel. These causes arise out of Defendants' alleged promises to employ Plaintiffs, provided Plaintiffs move to Salina, Kansas, as insurance adjustors in Defendants' Kansas offices. The Plaintiffs were allegedly wrongfully terminated in contravention of Defendants' promises.

Plaintiff McCracken and Defendants entered into a settlement agreement and McCracken has been dismissed from this action, with prejudice.

By Order entered March 9, 1993, attorney Michael E. Yeksavich has been allowed to withdraw his representation of Plaintiff Carl Owens. In such Order, Owens was directed in immediately secure, within twenty days from the date of the Order, other legal representation or to appear in propria persona. No appearance has been entered for Owens nor has he appeared in propria persona.

Further, Plaintiff Owens failed to appear at a scheduled pretrial conference held this date.

Based upon the foregoing the Court concludes this action should be and the same is hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED this 13 day of May, 1993.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED
MAY 11 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

EDITH PAULI,)
)
 Plaintiff,)
)
 v.)
)
 LOUIS W. SULLIVAN,)
)
 Defendant.)

92-C-198-B ✓

ORDER

Edith Pauli now appeals the Secretary's decision to deny her Social Security disability benefits. The Secretary found that Ms. Pauli could return to her past relevant work as a medical records clerk, a bookkeeper and a draftsman.

Ms. Pauli refutes that finding, raising the following issues: 1) The Administrative Law Judge ("ALJ") improperly analyzed her mental impairments; 2) The ALJ ignored the "treating physician rule"; and 3) The ALJ improperly analyzed her complaints of pain. For the reasons discussed below, the case is remanded so the ALJ can further examine Ms. Pauli's mental impairments.

I. Standard Of Review

Judicial review of the Secretary's decision is limited in scope by 42 U.S.C. § 405(g).¹ The undersigned's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521

¹ Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow..."

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(10th Cir. 1987). The court "may not reweigh the evidence or try the issues de novo or substitute its judgment for that of the Secretary." *Pierre v. Sullivan*, 884 F.2d 799, 802 (5th Cir. 1989).²

The claimant bears the burden of proving disability under the Social Security Act. *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984). If he shows that his disability precludes returning to his prior employment, the burden of going forward shifts to the Secretary, who must then show that the claimant retains the capacity to perform another job and that this job exists in the national economy. *Id.*

II. Legal Analysis

When deciding a claim for benefits under the Social Security Act, the Administrative Law Judge ("ALJ") must use the following five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation;³ (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). If the Secretary finds the claimant disabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988). In this case, the Secretary found, at the fourth step, that Ms. Pauli could return to her past relevant work.

² Substantial evidence is "more than a scintilla; it is relevant evidence as a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" will be found only where there is a conspicuous absence of credible choices or no contrary medical evidence. *Trimiar v. Sullivan*, No. 90-5249, slip op. at 6 (10th Cir. April 23, 1989).

³ Appendix 1 is a listing of impairments for each separate body system. 20 C.F.R. Pt. 404, Subpt. P, App. 1 (1991).

At the time of her hearing, Ms. Pauli was 53 years old. She has a high school education, and her past relevant work was as a draftsman, a medical records keeper and a bookkeeper. Her alleged onset disability date is June 15, 1989.

The ALJ found that Ms. Pauli, who underwent a cervical discectomy and fusion, had a severe physical impairment. He concluded, however, that she did not have an impairment or combinations of impairments listed in Appendix 1, Subpart P, Regulations No. 4. The ALJ subsequently found that Ms. Pauli, despite her complaints of pain and allegations of mental impairment, could return to her past relevant work.

The issue at bar is whether the ALJ adequately followed required procedures for evaluating a mental impairment.⁴ 20 C.F.R. §416.920a(d)(1) discusses how the assessment of a mental impairment must be done by the ALJ:

(1) At the initial and reconsideration levels the standard document must be completed and signed by our medical consultant. At the administrative law judge hearing level, several options are available:

(i) The administrative law judge may complete the document without the assistance of a medical advisor;

(ii) The administrative law judge may call a medical advisor for assistance in preparing the document; or

(iii) Where new evidence is received...the administrative law judge may decide to remand the case to the State agency for completion of the document and a new determination...

⁴ 42 U.S.C. § 421(h) provides: *An initial determination...that an individual is not under a disability, in any case where there is evidence which indicates the existence of a mental impairment, shall be made only if the Secretary has made every effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment."*

The Tenth Circuit recently examined §416.920(a)(d)(1). In *Andrade v. Secretary of Health and Human Services*⁵, the claimant's treating physician diagnosed him as "totally mentally disabled." The ALJ recognized that diagnosis, but found no other reference in the record regarding the claimant's inability to work. As a result, the ALJ assessed claimant's residual functional capacity without assistance from a qualified psychiatrist or psychologist. He later found the claimant to be able to work.

On appeal, the Tenth Circuit indicated there is no "absolute duty" for the ALJ to have a psychologist or psychiatrist complete the medical portion of the case review and the residual functional capacity assessment. *Bernal v. Bowen*, 851 F.2d 297, 302-303 (10th Cir. 1988). But, it further noted that, in *Bernal*, unlike *Andrade*, the record "lacked any evidence seriously challenging the ALJ's assessment of Mr. Bernal's residual functional capacity or the ALJ's conclusions regarding the severity of Mr. Bernal's mental impairment."

Id. In *Andrade* the Court then wrote:

In *Bernal*, we did not 'delineate the boundaries of the duties imposed under section 421(h)...' And, we do not, by this decision, attempt to define the phrase 'every reasonable effort.' We hold only that, based on the particular circumstances of this case, the ALJ abused the discretion afforded to him by the regulations, 20 C.F.R. 404.1520(a) and 416.920(a), by assessing claimant's residual functional capacity without making any effort to obtain the assistance of a mental health professional. Accordingly, we remand this case for proper consideration of claimant's alleged mental impairment. *Andrade at 1050.*

In this case, unlike *Andrade*, Ms. Pauli's treating physician did not find her to be "totally mentally disabled." However, the ALJ here did fill out the residual functional capacity assessment without assistance from a mental health professional. While he has

⁵ 985 F.2d 1045 (10th Cir. 1993).

no absolute duty to so do, the undersigned finds that several pieces of evidence indicate the ALJ abused the discretion afforded to him under §404.1520(a) and §416.920(a).

The Tulsa Evaluation Center conducted examinations of Ms. Pauli's mental status on March 31, 1989 and April 6, 1989. Below is an excerpt from those findings:

Ms. Pauli should avoid stressful occupations and occupations requiring emotional stability. She should avoid occupations which would require her to relate to others in a close, trusting or empathetic manner. She should avoid occupations which would require her to relate well to external authority or behave in a highly conforming or reliable manner...She should avoid occupations which require good judgment, good concentration, efficiency, speed, good insight or self-analysis skills. The client should avoid occupations which require self-reliance, a stable, positive self-image, assertiveness or creativity. She should avoid occupations which would subject her to a great deal of criticism or rejection. She should avoid routine occupations, as she appears easily bored...She should avoid highly abstract occupations. *Record at 232.*

On September 17, 1990, Dr. Joe Tyler, a treating physician, noted the following in his psychiatric examination of Ms. Pauli:

Ms. Pauli appears capable of understanding, carrying out and remembering simple instructions. She is able to respond appropriately to supervision and interact appropriately with co-workers. She is, however, unable at this time to handle the customary pressures associated with work. Any attempt to work either on a full-time or part-time basis would be expected to result in a deterioration of Ms. Pauli's current level of functioning and an exacerbation of her symptoms of depression." *Id. at 268-269.*

The ALJ discounted both of the foregoing conclusions. He found Dr. Tyler's assessment to be of "decreased material value". *Id. at 16.* Writes the ALJ:

Furthermore, he [Tyler] specifically noted that the claimant was working in a county building on a part time basis and he raised no objection to this either. Given the fact that claimant's treating physician never imposed these limitations upon the claimant throughout her treatment history and instead allowed her to continue her job search, the undersigned finds this assessment

to be of decreased material value. Relatedly, a Psychiatric Review Technique Form is attached to this decision and made a part hereof. (emphasis added).
Id. at 16.

The ALJ's decision to reject both of the above findings from Ms. Pauli's treating physicians is error. It appears that the ALJ simply discounted the conclusions of the two mental health professionals and substituted his own judgment; for no explanation is otherwise offered to discount the physician's findings. Therefore, this Court finds that the ALJ abused the discretion given him under §404.1520(a) and §416.920(a).

III. Conclusions

While the ALJ is under no "absolute duty" to have a mental health professional assist him in medically reviewing the case and filling out the residual functional capacity assessment, the circumstances here, particularly in light of findings from the Tulsa Evaluation Center, dictate the need for assistance by a trained psychiatrist.

Therefore, the ALJ shall hold a supplemental hearing where such a trained professional will testify, fully considering the already extensive mental health record. In addition, Ms. Pauli may call her treating physicians or other health care professionals to testify concerning her mental impairments.⁶ This case is REMANDED.

SO ORDERED THIS 11th day of May, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

⁶ *The Secretary should also re-evaluate Pauli's complaints of stress.*

DATE MAY 14 1993

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

FILED

MAY 11 1993

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

LOIS SARTEN,)
)
Plaintiff,)
)
v.)
)
LOUIS W. SULLIVAN, M.D.,)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
)
Defendant.)

92-C-302-B

FINDINGS AND RECOMMENDATIONS OF U. S. MAGISTRATE JUDGE

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge, which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.¹

In the case at bar, the ALJ made his decision at the fifth step of the sequential

¹ Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

evaluation process.² He found that claimant had the residual functional capacity to perform the physical exertion requirements of work except for lifting greater than ten pounds at a time. He found that claimant was unable to perform her past relevant work as a winder/operator. He found that she has the residual functional capacity to perform the full range of sedentary work, is thirty-four years old, which is defined as a younger individual, has completed ninth grade, and in view of her age and residual functional capacity, the issue of transferability of work skills is not material. He concluded that, considering her residual functional capacity, age, education, and work experience, she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) That the ALJ's decision that claimant is not disabled is not supported by substantial evidence.
- (2) That the ALJ's finding that plaintiff's allegations of pain were not credible to the extent that they precluded work was in error.
- (3) That the ALJ failed to give proper weight to plaintiff's treating physician's opinion that she is totally disabled.
- (4) That the ALJ ignored her nonexertional limitations, including limitation of cervical range of motion, a lumbar impairment, a hand impairment, chronic pain, and impaired concentration, and improperly applied the grids.

² The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

- (5) That the ALJ failed to satisfy his burden of demonstrating that she is capable of performing other work existing in significant numbers in the region or national economy.

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

The medical evidence establishes that plaintiff has limitation of motion of the cervical spine and sensory loss to touch and pinprick in the C-6 dermatome of the right hand and forearm. An anterior cervical microdiscectomy with right iliac crest dowel graft fusion at C5-6 was performed to correct a herniated cervical disc at C5-6 on September 13, 1988. (TR 139-155). On September 16, 1988, her treating surgeon, Dr. Frank S. Letcher, reported that she had done very well and was free of her preoperative complaints. (TR 139-40).

On November 16, 1988, Dr. Letcher reported:

She has done very well and is free of her preoperative complaints. Her flexion and extension views of her cervical spine showed excellent fusion at the fusion site. She is complaining today of some pain in her right lower extremity which goes down into her right great toe and will occasionally be in her right buttock down to her right popliteal space. This does not appear to be a prominent symptom. I have explained to her that I do not at this time know the cause of this symptom.

I have asked Mrs. Sarten to resume a normal level of activity at this point, without any physical restrictions whatsoever. I have given her permission to return to work at full time, unrestricted activity as of November 23rd. (TR 160). (emphasis added).

On December 19, 1988, Dr. Letcher reported plaintiff had been successfully carrying

out the requirements of her job since November 23, but complained of headaches and right lower extremity pain. (TR 158). Plaintiff felt the headaches and leg pain were related to her operation and were preventing her from working satisfactorily. (TR 158). Dr. Letcher's examination found no evidence of inflammation of the right iliac crest incision and plaintiff's gait and station normal. (TR 158). Dr. Letcher told plaintiff the headaches were not the sort that are related to disease in the neck and that they probably represent muscle contraction headaches caused by nervous tension. (TR 159). He also tried to reassure her that the discomfort in her right groin going into her right foot was not related to her operation and should not prevent her from working. (TR 159). The doctor reported that she seemed satisfied with his explanation for her headaches, but remained unsatisfied with the explanation of the groin pain, so he referred her to Dr. Milton Workman. (TR 159).

On January 6, 1989, Dr. Workman examined plaintiff. A neurological examination was unremarkable, and x-rays of the right ilium showed no abnormalities other than those expected from the surgery. Dr. Workman stated:

I discussed this problem with the patient at length today assuring her that she indeed has already started the curative treatment for symptoms such as these and that means she has returned to work. If she will continue her normal work activities all of her symptoms will in time subside spontaneously. I explained to her also that the symptoms of which she complains are a product of the scar tissue around the origin of these locomotive muscles combined with her somewhat unusual activity level. I gave her a prescription for an anti inflammatory medication to help her through the next few weeks. She will have no permanent disability nor symptoms this aspect of her surgery. (TR 157). (emphasis added).

On January 30, 1989, Dr. Letcher reported to claimant's family physician, Dr. Rodney Myers, that plaintiff had been at work fulltime with unrestricted activity and had been able to carry out the responsibilities of her job satisfactorily. The doctor noted:

Ms. Sarten continued to be hostile and argumentative over things that are not entirely clear to me. I feel that she is quite dissatisfied with certain aspects of her job. Indeed she showed me several emergency room reports from Grand Valley Hospital which indicated that she had had multiple minor injuries on the job.

I feel that the treatment for her herniated cervical disc is now at a close and I have released her from my care. (TR 156).

On February 1, 1989, plaintiff saw a doctor at the Salina Community Clinic and complained that her neurosurgeon had not helped her with her neck pain and finger numbness and that she was suffering hip pain from the bone graft site. (TR 178). On February 17, 1989, she was again seen at the clinic with similar complaints. (TR 177). On that date, she stated she had been lifting 68 pound shafts over her head at work. (TR 177). Her grip was within normal limits, but her cervical range of motion was reduced to the right, so she was given a note to her employer to stop heavy lifting and do light duty only and scheduled for an electromyographic study. (TR 177).

The electromyographic study on March 9, 1989 was normal for radiculopathy, but plaintiff complained of shoulder pain, especially on lifting, her range of motion was 45° bilaterally, and her up and down range was very limited. (TR 177). She was again restricted to limited duty at work. (TR 177). Her employer told her there was nothing she could do at work on March 13, 1989, so she was given a note that she was unable to work by her doctor and recommended for a work-hardening program. (TR 176). On April 10,

1989, she complained of back pain for four days after mopping a floor. (TR 176).

On April 28, 1989, plaintiff saw Dr. Jeanne M. Edwards, a neurologist, for evaluation of continued pain in her neck and right arm and a second opinion concerning disability. (TR 166). She told the doctor she had initially weighed 135 pounds in 1987, but had gone up to 175 pounds. She said she suffered severe pain if she did any kind of physical activity whatsoever and was unable to sleep at night because of the pain. (TR 166). Neurological examination showed plaintiff to be awake, alert, and oriented, with no lethargy or confusion. (TR 166). Deep tendon reflexes were diminished in the right biceps and triceps. (TR 166). Motor and strength were good and equal in all muscle groups, with no asymmetry or atrophy, but plaintiff did have some mild giveaway weakness in the right upper extremity, as well as the right quadriceps. (TR 166). Sensation and perception were intact to pinprick, position, light touch, vibratory, and thermal sensations. (TR 166). Plaintiff believed, however, that sensation in the right side was perhaps somewhat diminished when compared to the left as to pinprick and light touch. (TR 167). Gait was essentially within normal limits, and plaintiff was able to tandem walk and walk on her toes and heels without difficulty. (TR 167). The doctor reported that plaintiff felt she was unable to continue work and was very concerned about the continued pain. (TR 167).

Plaintiff was placed on an anti-inflammatory drug and returned to Dr. Edwards on May 12, 1989, stating she felt much better. (TR 165). The doctor told her that she expected claimant to continue to show improvement. (TR 165). Plaintiff returned on July 14, 1989, stating she was still having chronic pain, but that, in general, she felt she was getting somewhat better. (TR 165). Plaintiff was told to return in four months. (TR

165). Dr. Edwards still believed Plaintiff needed to be on a work-hardening program and that because there was a lot of lifting on her job, she was definitely disabled. (TR 165). Plaintiff did not return to Dr. Edwards for further evaluation or treatment.

On June 29, 1989, plaintiff reported to the doctor at Salina Community Clinic that she was not having as much pain and had been able to sleep better. (TR 174). However, on July 28, 1989, she reported she had no change in pain. (TR 174). Dr. Mobley prescribed Tylenol III, Norflex, Naprosyn, and Elavil. (TR 174). On August 28, 1989, plaintiff told Dr. Mobley that her pain was worse, and she was taking Vicodin from Dr. Edwards with poor relief. (TR 173). She was advised to get another neurosurgical opinion and was given refills for Elavil, Norflex, and Naprosyn. (TR 173). On October 27, 1989, Dr. Mobley referred plaintiff for an appointment on November 6, 1989, with Dr. Anthony Billings for a neurosurgical opinion. (TR 172). On November 29, 1989, it was noted that the appointment was canceled by Dr. Billings. There was no explanation. (TR 171). Plaintiff stated her legs had given out recently and she was quite depressed. (TR 171). She was referred to another doctor for consultation. (TR 171).

Claimant continued to complain of back pain in January of 1990. (TR 170). On February 28, 1990, she was instructed regarding Williams' exercises and hot soaks. (TR 170). On May 14, 1990, she stated that the pain was about the same and that her activity level was minimal, but she did not seem depressed. (TR 169). She was assessed with chronic pain and was to continue with Ibuprofen and Vicodin. (TR 169).

Plaintiff was not seen again until August 31, 1990, and she reported she was not having difficulty with sleep and denied being depressed. (TR 195). She walked with a

"stoop." (TR 195). On November 19, 1990, she was referred for a magnetic resonance imaging (MRI) test. (TR 194). On November 27, 1990, claimant underwent an MRI scan which reflected an essentially negative study of the lumbar spine. (TR 193 and 206).

On July 6, 1990, plaintiff was seen for a consultative examination at the request of the Social Security Administration. Dr. David B. Dean reported that plaintiff complained of chronic lumbosacral pain which was nonradiating in character. (TR 186). She complained of numbness in both feet, but had no complaints of loss of muscle mass or motor strength in either lower extremity. (TR 186). Examination of the cervical spine indicated a modest limitation in range of motion, without pain. (TR 187). Circumferences were equal in both upper extremities, and there was sensory loss present in the C-6 dermatome involving the right hand and right forearm. (TR 187). There was tenderness to palpation over C4-5-6 of the cervical spine, but no muscle spasm was noted. (TR 187). There was full range of motion of all joints in both upper and lower extremities, shoulder girdle and pelvic girdle. (TR 188). Gait and station were totally within normal limits and gait was safe and effective without the use of an assistive device. (TR 188). Dr. Dean concluded that claimant would certainly be limited to sedentary work activities as a result of the cervical radiculopathy with sensory loss in the right upper extremity. (TR 188).

The ALJ noted that throughout the record, including the hearing, plaintiff stated that she could not sit, walk or stand for any appreciable periods of time, but there was no medical evidence in the record to indicate any impairment that would preclude her from standing, walking, or sitting for six hours out of an eight-hour day. (TR 13). The ALJ noted that at the hearing plaintiff testified that she couldn't look down, but again, there

was nothing in the record to indicate significantly diminished flexion of the neck or pain upon flexion of the neck. (TR 13).

The ALJ concluded that plaintiff's complaints were not consistent with the record as a whole. (TR 13). He noted that at the hearing she stated her weight was 190 pounds and she had gained from 60 to 70 pounds over the last two years, but the medical evidence reflected her weighing 163-1/2 pounds on December 1, 1987, 170 pounds on March 1, 1988, and a continued gradual weight increase of considerably less than claimant alleged. (TR 13). Two years prior to the hearing, claimant weighed approximately 20 pounds less and at no time since the injury in 1987 had she gained 60 to 70 pounds. (TR 13).

The ALJ pointed out that in her Reconsideration Disability Report plaintiff stated "spine is crooked (lower back)", but there was no medical evidence of a crooked lumbar spine. (TR 13). The ALJ also pointed out that there is no evidence that plaintiff sought any further evaluation from an orthopedic surgeon or neurological surgeon or neurologist after July 1989. (TR 13). The ALJ also noted that there is nothing in the record to reflect that plaintiff has undergone a work-hardening program, as recommended by one neurologist. (TR 13). A transcutaneous electrical nerve stimulator (TENS) unit was never prescribed. (TR 13). There is no indication that she has followed through with the Williams' exercises. (TR 13). The ALJ found no indication of muscle atrophy. (TR 13). The ALJ noted that in spite of claimant's complaints regarding her inability to move her neck, there is no indication that she has been wearing a cervical collar at any time since she was removed from it in October 1988. (TR 13). The ALJ pointed out that there were no restrictions placed on plaintiff by her surgeon or by the examining orthopedic surgeon

in January 1989. (TR 13).

The ALJ questioned plaintiff's motivation in bringing her claim, since the record showed she was receiving Workers' Compensation until April of 1990, by which time she was in the process of making her claim for social security disability benefits. (TR 13). Also, the ALJ noted that she testified at the hearing that she had difficulty with concentration, but there was no record that she ever mentioned this to any of her doctors or sought treatment for a mental disorder or for the depression she reported in November of 1989. (TR 13).

There is substantial evidence in the record to support the decision of the ALJ that plaintiff can perform sedentary work and therefore is not disabled. The evidence shows that she fully recovered from her back surgery and returned to her job involving heavy lifting by January of 1989. Since then her complaints of pain have led to recommendations that she be limited to sedentary work, but no doctor has concluded she cannot work at all. There is no medical evidence that she cannot perform light work. The only support for her total disability is her self-serving multiple complaints.

The ALJ did not err in concluding that plaintiff's allegations of pain were not credible to the extent that they precluded work. Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d at 165-66, discussed what a claimant must show to prove a claim of

disabling pain:

[W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

Plaintiff's complaints of pain were not consistent with the record as a whole. There is no objective medical evidence to support her complaints. She never underwent a work-hardening program and did not follow through with the Williams' exercises recommended by her physicians. There is no record of muscle atrophy. She did not wear a cervical collar after 1988, nor has she ever used any assistive devices to ambulate.

While it is true that the ALJ did not give substantial weight to the statements of plaintiff's treating physician, Dr. Mobley, that she cannot work (TR 173, 175, and 176), as required by Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985), this was not significant error, as the physician's opinion was based on plaintiff's complaints and unsupported by medical evidence and therefore might be rejected, according to Allison v. Heckler, 711 F.2d 145, 148 (10th Cir. 1983). The ALJ's decision to disregard the opinion was proper in this case. "It 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).

There is no merit to plaintiff's argument that the ALJ failed to recognize her non-exertional impairments, including limitation of cervical range of motion, a lumbar impairment, a hand impairment, chronic pain, and impaired concentration, and improperly applied the grids. He discussed all of these alleged complaints and concluded there was no objective medical evidence to support them. The ALJ applied the Medical Vocational Guidelines after concluding that plaintiff did not have any nonexertional limitations. Use of the Medical-Vocational Guidelines ("the grids"), 20 C.F.R. § 404, Subpt. P, App. 2, is predicated on an impairment that limits the physical strength or exertional capacity of a claimant. Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); Frey v. Bowen, 816 F.2d 508, 512 (10th Cir. 1987). The Social Security Regulations note, however, that certain mental, sensory, or skill impairments, environmental restrictions, or postural and manipulative restrictions may be independent from exertional limitations. Id. at 515-16. Where "nonexertional" limitations, such as pain, combine with exertional limitations which do not in and of themselves establish a disability, then the "grids" are to provide no more than a framework for determining disability. 814 F.2d at 1460. The ALJ is not to automatically or mechanically apply the grids, but instead must consider all the relevant facts in determining whether the nonexertional limitations diminish the claimant's ability to perform other work. Id. In this case, there were no nonexertional limitations to preclude the ALJ from applying the grids in the way that he did.

Finally, plaintiff claims that the ALJ did not satisfy his burden of demonstrating that

plaintiff could do "a significant number of jobs"³ in the economy. The ALJ asked the vocational expert the following hypothetical question:

All right. Now, let's take a hypothetical situation. Assume that the claimant's 35 years old, has an eighth grade education with the ability to read, write and use numbers. Assume further that this individual in general has the physical capacity to perform sedentary and light work. However, assume that this individual would have the following physical limitations. She'd have restrictive, modest restrictive neck motion, resulting from the cervical spine area and a stiffness. And that she could not stand or sit for more than one hour without changing positions. Couldn't walk further than a half block, suffered from a symptomatology from a variety of sources, but that despite such symptoms, she would be able to remain attentive to conversations, to respond appropriately thereto, and would be able to process or handle matters as part of a normal work situation. And that this individual would be afflicted with a chronic pain of a sufficient severity as to be noticeable to her at all times, but that nonetheless, she could carry out work assignments satisfactorily. And, we would further assume that this individual is taking medication relief of the symptomatology, but said medication does not preclude her from functioning at the sedentary or light level and that she would remain reasonably alert to perform functions presented by her work setting. Assuming all of the foregoing, could this individual return to any of her past relevant work? (TR 48).

The vocational expert responded: "No. Primarily because it would either require her walking further than a half a block, standing for periods of time, of approximately two hours, and, and would, machine operator ones in particular, would, would require fairly

³ Title 42 of the United States Code, § 423(d)(2)(A), states that disability is to be found:

[When] physical or mental impairment or impairments are of such severity that [the claimant] 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. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

constant full range of motion of the neck." (TR 48-49). The ALJ then asked: "Okay. Now, given the same hypothetical situation, does this individual retain skills which are transferable to the jobs existing in the region of her residence? Which are semi-skilled or skilled?" and the vocational expert answered "No." (TR 49).

The ALJ asked: Now, again assuming further that the foregoing hypothetical, with the restrictions on standing or walking, the walking would still be limited to one block, standing would be no more than one hour without relief or sitting for no more than one hour without relief, and by relief, I mean changing positions. Now, can you identify any light or sedentary occupations which you believe could be performed by such an individual?" and the expert responded "Yes sir. These would be entry level or unskilled ones." (TR 49).

The ALJ asked the expert to describe some of the jobs existing in the national or regional economy and the expert said:

At a sedentary level, there would be a small number of assembly jobs, approximately 500, which is a reduction of, of 5/6 from the occupational base that is in Oklahoma, that was 500 assembly at a sedentary level. That reduction is, is primarily because of the neck motion and this limits the jobs to one where a person is working in a fixed area that is in front of them and would allow them to alternate or to change their position. There would be some cashier jobs, approximately 2,000, which is a reduction of 2/3. These are sedentary. Telephone solicitor, 1,500, which is at the sedentary level, and office helper or clerk, would be 1,000 at a sedentary level, which is a reduction of 50 percent. Again, primarily because of the limited range of motion in the neck. And I would not name any at the light exertional level because with the combination of the limitations in the hypothetical, primarily the walking or the standing and the range of motion of the neck. (TR 49-50).

The ALJ asked whether with the hypothetical he'd given, there were light jobs, and the expert said:

Not, they are light primarily because they involve standing for a fairly length of, you know, two hours at a stretch or sitting or walking so that there is that component where you could alternate the sitting or standing, but the time periods or the length of distance that the person is going to be walking, are usually a little bit larger than the ones specified, or else that they require a full range of motion on the neck, observing assembly processors or whatever the task is. (TR 50).

Plaintiff's attorney attempted to further limit the jobs plaintiff could do by asking the vocational expert whether the jobs he had described required an individual to look down and whether the jobs could be done if a person could not concentrate. (TR 50-52). The expert stated that all the jobs required an individual to look down and also concentrate on the task. (TR 50-52). However, there is no medical evidence that plaintiff cannot look down or concentrate on a task. The vocational expert's responses to the plaintiff's attorney's questions were properly disregarded by the ALJ. In his decision, he relied on the vocation expert's testimony set out earlier that plaintiff was capable of performing work existing in significant numbers in the regional and national economy.

The Secretary's decision that plaintiff was not disabled is supported by substantial evidence and is a correct application of the pertinent regulations. The decision is affirmed.

Dated this 11th day of May, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
MAY 13 1993

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

SPACECOM SYSTEMS, INC.,)
a Delaware corporation,)
)
Plaintiff,)
)
vs.)
)
INTERNATIONAL DATACASTING)
CORPORATION, a foreign)
corporation,)
)
and)
)
ASCII OF AMERICA, INC.,)
a California corporation,)
)
Defendants.)

Case No. 93-C-0122B

FILED

MAY 11 1993

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

DISMISSAL WITHOUT PREJUDICE

COMES NOW the Defendant, International Datacasting Corporation and would, pursuant to Federal Rule of Civil Procedure 41, dismiss its Counterclaim against the Plaintiff, SpaceCom, without prejudice to the refiling of same.

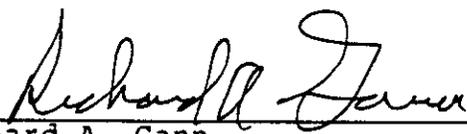
RIGGS, ABNEY, NEAL & TURPEN

BY: Richard A. Gann
Richard A. Gann, OBA# 3225
502 West Sixth Street
Tulsa, Oklahoma 74119-1010
(918) 587-3161

ATTORNEYS FOR DEFENDANT,
INTERNATIONAL DATACASTING
CORPORATION

CERTIFICATE OF MAILING

I hereby certify that on this 10 day of May, 1993, I mailed a true and correct copy of the above and foregoing document to R. Jay Chandler, 2900 Mid-Continent Tower, Tulsa, Oklahoma, 74103, and James Kincaid, 321 South Boston, Suite 500, Tulsa, Oklahoma, 74103.



Richard A. Gann

ENTERED ON DOCKET
DATE MAY 13 1993

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

PHILLIP MARTIN,)
Plaintiff,)
vs.)
DALE MOBBS,)
Defendants.)

No. 93-C-334-E

FILED

MAY 13 1993

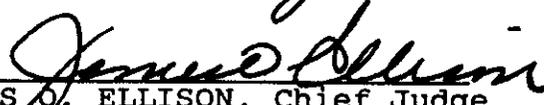
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

Now before the court is Plaintiff's motion for leave to proceed in forma pauperis and civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in forma pauperis is hereby granted.

Upon review of the complaint, it appears to the court that proper venue does not lie in this district. See 28 U.S.C. § 1391(b). Therefore, Plaintiff's complaint is hereby dismissed. See 28 U.S.C. § 1406(a).

IT IS SO ORDERED this 10th day of May, 1993.


JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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

ROLAND DANIEL FOSTER,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 93-C-338-E

FILED

MAY 13 1993
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Petitioner has filed an application for a writ of habeas corpus. However, he has not submitted the proper filing fee or a motion for leave to proceed in forma pauperis. Therefore his action shall be dismissed at this time.

In addition, the court notes that the sole issue presented in this action concerns the delay in Petitioner's state appeal. However, Petitioner states that the Oklahoma Court of Criminal Appeals decided his appeal on July 17, 1991. Therefore, habeas corpus relief is not available. Furthermore, it appears that Petitioner is seeking damages as relief, and a petition for a writ of habeas corpus is not the proper forum in which to bring an action for damages.

Petitioner's action is hereby **dismissed**.

SO ORDERED THIS 10TH day of May, 1993.

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

ENTERED ON DOCKET

DATE 5-13-93

FILED

MAY 12 1993

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

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

UNISYS FINANCE CORPORATION,)	
)	
Plaintiff,)	
)	
vs.)	No. 92-C-250-E
)	
RMP SERVICE GROUP, INC.,)	
et al.,)	
)	
Defendants.)	

ORDER AND JUDGMENT

In its previous Order dated April 16, 1993, the Court entered judgment in favor of the Plaintiff against the Defendant on the issue of liability. Now before the Court for its consideration comes the issue of damages due Plaintiff as a result of Defendants' breach of the master lease agreement ("master lease"). After review of the record and the laws of the State of Michigan,¹ the Court enters the following Order:

Although under Michigan law failure to mitigate damages is an affirmative defense, it is not an absolute duty. Skyline Steel Corp. v. A. J. Dupuis Co., 648 F.Supp. 360 (E.D. Mich. 1986) citing Willis v. Ed. Hudson Towing, Inc., 109 Mich.App. 344, 311 N.W.2d 776 1981). The Court finds the facts and circumstances of this case support rejecting the rule requiring the injured party to mitigate its damages where the invasion of property rights is due to the

¹Pursuant to master lease agreement between the parties to this action.

Defendant's intentional, or positive and continuous, tort.

Accordingly, mitigation of damages is unavailable in defense of Plaintiff's claim for breach of the master lease because of Defendants' retention of the equipment after default and Defendants' refusal to voluntarily surrender the equipment on October 24, 1991.

IT IS THEREFORE ORDERED that Plaintiff recover damages in the amount of \$105,408.01 from Defendants.

So ORDERED this 12th day of May, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 5-13-93

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

CITY OF JENKS, a municipality, and)
JENKS PUBLIC WORKS AUTHORITY,)

Plaintiffs,)

vs.)

CREEK COUNTY RURAL WATER)
DISTRICT NO. 2, an agency and)
legally constituted authority of the)
STATE OF OKLAHOMA,)

Defendant.)

Case No. 92-C-718-E

FILED

MAY 12 1993

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

**ORDER DISMISSING ACTION
UPON STIPULATION OF PARTIES**

UPON the stipulation of the parties filed hereon on May 11, 1993.

IT IS HEREBY ORDERED that the above-entitled action brought by the plaintiffs, the City of Jenks and the Jenks Public Works Authority and the amended counterclaims brought by the defendant, Creek County Rural Water District No. 2, are hereby dismissed. Each party shall bear their own fees and costs incurred herein.

DATED this 11/day of May.

s/ JAMES O. ELLISON

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 5-13-93

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

FILED

MAY 12 1993

ST. JOHN MEDICAL CENTER, INC.)
an Oklahoma corporation,)

Plaintiff,)

vs.)

LIFE GENERAL SECURITY INSURANCE)
COMPANY, a Louisiana corp.,)

Defendant.)

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

Case No. 92-C-711-E

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes before the Court on the Joint Stipulation of Dismissal With Prejudice by the parties. The parties represent to the Court that they have entered into a Settlement Agreement and desire an Order of Dismissal.

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

S/ JAMES O. ELLISON

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

ENTERED ON DOCKET

DATE 5-13-93

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 MARSTON E. JOHNSON; HILLCREST)
 MEDICAL CENTER, an Oklahoma)
 Corporation; COUNTY TREASURER,)
 Delaware County, Oklahoma; and)
 BOARD OF COUNTY COMMISSIONERS,)
 Delaware County, Oklahoma,)
)
 Defendants.)

FILED

MAY 11 1993

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

CIVIL ACTION NO. 91-C-569-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 11 day
of May, 1993. The Plaintiff appears by Tony M.
Graham, United States Attorney for the Northern District of
Oklahoma, through Peter Bernhardt, Assistant United States
Attorney; the Defendants, County Treasurer, Delaware County,
Oklahoma, and Board of County Commissioners, Delaware County,
Oklahoma, appear not, having previously filed their Answer
disclaiming any right, title or interest in the subject real
property; Defendant, Hillcrest Medical Center, an Oklahoma
Corporation, appears by its attorney Mark G. Robb; and the
Defendant, Marston E. Johnson, appears not, but makes default.

The Court being fully advised and having examined the
court file finds that the Defendant, Hillcrest Medical Center, an
Oklahoma Corporation, acknowledged receipt of Summons and
Complaint on August 5, 1991; that the Defendant, County
Treasurer, Delaware County, Oklahoma, acknowledged receipt of
Summons and Complaint on August 5, 1991; and that Defendant,

Board of County Commissioners, Delaware County, Oklahoma, acknowledged receipt of Summons and Complaint on August 12, 1991.

The Court further finds that the Defendant, Marston E. Johnson, was served by publishing notice of this action in the Delaware County Journal, a newspaper of general circulation in Delaware County, Oklahoma, once a week for six (6) consecutive weeks beginning November 25, 1992, and continuing through December 30, 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, Marston E. Johnson, 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, Marston E. Johnson. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Farmers Home Administration, and its attorneys, Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, fully exercised due diligence in

ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, County Treasurer, Delaware County, Oklahoma, and Board of County Commissioners, Delaware County, Oklahoma, filed their Answer on August 15, 1991, disclaiming any right, title or interest in the subject real property; that the Defendant, Hillcrest Medical Center, an Oklahoma Corporation, filed its Answer on August 9, 1991; and that the Defendant, Marston E. Johnson, has failed to answer and his default has therefore been entered by the Clerk of this Court.

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

Lot 1, in Section 30, Township 20 North,
Range 23 East, Delaware County, Oklahoma.

SUBJECT TO, HOWEVER, ALL VALID OUTSTANDING
EASEMENTS, RIGHTS-OF-WAY, MINERAL LEASES,
MINERAL RESERVATIONS AND MINERAL CONVEYANCES
OF RECORD.

The Court further finds that this is a suit for the further purpose of foreclosure of security agreements securing

certain promissory notes on personal property (chattels) located in Delaware County, Oklahoma, within the Northern District of Oklahoma.

The Court further finds that on July 19, 1985, the Defendant, Marston E. Johnson, executed and delivered to the United States of America, acting through the Farmers Home Administration, his promissory note in the amount of \$72,000.00, payable in 41 yearly installments, with interest thereon at the rate of 5.25 percent per annum.

The Court further finds that on July 19, 1985, the Defendant, Marston E. Johnson, executed and delivered to the United States of America, acting through the Farmers Home Administration, his promissory note in the amount of \$1,300.00, payable in 41 yearly installments, with interest thereon at the rate of 10.75 percent per annum.

The Court further finds that as security for the payment of the above-described notes, the Defendant, Marston E. Johnson, executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated July 19, 1985, covering the above-described property. Said mortgage was recorded on July 19, 1985, in Book 488, Page 489, in the records of Delaware County, Oklahoma.

The Court further finds that the Defendant, Marston E. Johnson, executed and delivered to the United States of America, acting through the Farmers Home Administration, the following promissory notes:

<u>Loan Number</u>	<u>Original Amount</u>	<u>Date</u>	<u>Interest Rate</u>
42-21	\$12,567.14	07/19/85	5.25%

This is a reschedule of the following-described loan:

42-21	\$14,000.00	04/18/84	7.25%
-------	-------------	----------	-------

The Court further finds that as collateral security for the payment of the above described promissory notes, the Defendant, Marston E. Johnson, executed and delivered to the United States of America, acting through the Farmers Home Administration, the following financing statements and security agreements:

<u>Instrument</u>	<u>Dated</u>	<u>Filed</u>	<u>County</u>	<u>File Number</u>
Financing Stmt.		04/18/84	Delaware	5649
Continuation Stmt.		02/24/89	Delaware	1150
Financing Stmt.		04/20/84	Oklahoma	036613
Continuation Stmt.		02/24/89	Oklahoma	010775
Security Agreement	04/18/84			
Security Agreement	08/08/84			
Security Agreement	08/28/85			

The Court further finds that all chattels have been liquidated or otherwise disposed of and all proceeds have been applied to the proper account.

The Court further finds that the Defendant, Marston E. Johnson, made default under the terms of the aforesaid notes, mortgage, and security agreements by reason of his failure to make the yearly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Marston E. Johnson**, is indebted to the Plaintiff for the secured real property in the principal sum of \$71,687.45, plus accrued interest in the amount of \$33,391.13 as of February 26, 1993, plus interest accruing thereafter at the rate of \$17.1883 per day until judgment, plus

interest thereafter at the legal rate until fully paid; and that the Defendant, **Marston E. Johnson**, is indebted to the Plaintiff for amounts which remain owing on chattels after liquidation in the principal sum of \$11,819.41, plus accrued interest in the amount of \$540.57 as of February 26, 1993, plus interest accruing thereafter at the rate of \$2.7525 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$253.12 (\$18.12 fees for service of Summons and Complaint, \$225.00 publication fees, \$10.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, Hillcrest Medical Center, an Oklahoma Corporation, has a lien on the property which is the subject matter of this action in the amount of \$13,156.01, plus interest, attorney's fees and costs by virtue of a judgment in Case No. CJ 87-02565 recorded on June 24, 1987, in Book 524, Page 561 in the records of Delaware County, Oklahoma. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Delaware County, Oklahoma, disclaim any right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendant, **Marston E. Johnson**, for the secured real property in the principal sum of \$71,687.45, plus accrued interest in the amount of \$33,391.13 as of February 26, 1993, plus interest accruing

thereafter at the rate of \$17.1883 per day until judgment, plus interest thereafter at the current legal rate of 3.25 percent per annum until paid; and that the Plaintiff have and recover judgment in rem against the Defendant, **Marston E. Johnson**, for amounts which remain owing on chattels after liquidation in the principal sum of \$11,819.41, plus accrued interest in the amount of \$540.57 as of February 26, 1993, plus interest accruing thereafter at the rate of \$2.7525 per day until judgment, plus interest thereafter at the current legal rate of 3.25 percent per annum until paid, plus the costs of this action in the amount of \$253.12 (\$18.12 fees for service of Summons and Complaint, \$225.00 publication fees, \$10.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Hillcrest Medical Center, an Oklahoma Corporation, have and recover judgment in the amount of \$13,156.01, plus interest, attorney's fees and costs by virtue of a judgment in Case No. CJ 87-02565 recorded on June 24, 1987, in Book 524, Page 561 in the records of Delaware County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Delaware 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, **Marston E. Johnson**, to satisfy the

in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

In payment of the judgment rendered herein in favor of the Plaintiff for the secured real property in the principal sum of \$71,687.45, plus accrued interest in the amount of \$33,391.13 as of February 26, 1993, plus interest accruing thereafter at the rate of \$17.1883 per day until judgment, plus interest thereafter at the current legal rate of 3.25 percent per annum until paid;

Third:

In payment of the judgment rendered herein in favor of Defendant, Hillcrest Medical Center, an Oklahoma Corporation.

Fourth:

In payment of the judgment rendered herein in favor of the Plaintiff for the amounts which remain owing on chattels after liquidation in the principal sum of \$11,819.41, plus accrued interest in the amount of \$540.57 as of February 26, 1993, plus interest accruing thereafter at the rate of \$2.7525 per day until judgment, plus interest thereafter at the current legal rate of 3.25 percent per annum until paid.

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.

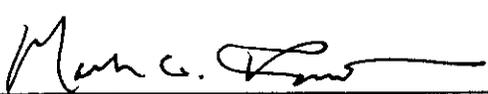
S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:



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



MARK G. ROBB, OBA #11489
Mapco Plaza Building
1717 South Boulder, Suite 200
Tulsa, Oklahoma 74119
(918) 582-3191
Attorney for Defendant,
Hillcrest Medical Center, an Oklahoma Corporation

Judgment of Foreclosure
Civil Action No. 91-C-569-E

PB/css

DATE 5-13-93

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

FILED

MAY 11 1993

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

ADAMS AFFILIATES, INC., an)
Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
DAMIAN J. GRECO, a citizen)
of the State of Montana,)
)
Defendant.)

No. 92-C-96-E

ORDER AND JUDGMENT

Comes now the above-styled matter for determination on its merits after trial before the Court on the 9th day of March, 1993. After careful consideration of all the evidence presented the Court finds as follows.

Adams Affiliates, Inc. (hereinafter "AAI") is an Oklahoma corporation with its principal place of business in the Northern District; Damian J. Greco (hereinafter "Greco") is a citizen and resident of the State of Montana. The dispute between these parties arises from a consulting agreement (hereinafter "Agreement") entered on May 20, 1988 between AAI and Greco under the terms of which Greco was to perform financial and consulting services to third parties on behalf of AAI in exchange for a \$7,500.00 monthly stipend, reimbursement of expenses, and other bonus items.

The particular provisions involved in this dispute relate to the division of compensation received by Greco from third parties on termination of the Agreement. The pertinent portions read in

substantial part as follows:

* * *

3. Compensation

....

(d) Any fees, commissions, equity participation rights and any and all other rights, benefits and other compensation of any nature whatsoever (collectively, the "Third Party Compensation"), received by Greco, any partner, agent, representation, employer or employee of Greco or any other person or entity acting for or with Greco (hereinafter collectively referred to as merely "Greco") from persons or entities other than AAI, as a result of the rendition of services by Greco during the term of this agreement, shall be deemed acquired by Greco for the joint benefit of Greco and AAI and shall be divided, annually on each anniversary date of the date hereof (or on the date of termination of this Agreement during the year in which termination of this Agreement occurs), as follows:

...

(iii) All compensation other than cash received by Greco, if any, shall be divided - 50% to Adams and 50% to Greco.

Before agreeing to the form of Third Party Compensation Greco is to receive, Greco shall consult with AAI and the form of Third Party Compensation Greco may accept shall only be as is mutually agreed to by AAI and Greco.

...

6. Termination. Either Adams or Greco may terminate this agreement upon ten (10) days' [sic] notice to the other. Upon such termination, all covenants, agreements and obligations of both Adams and Greco (except the covenants, agreements and obligations pursuant to ... 3(d) ...) shall immediately cease.

(a) If AAI terminates this Agreement at any time after the date in which is ninety (90) days after the

date hereof but before the Termination date, for any reason other than breach of the Agreement by Greco, AAI shall continue to pay Greco the salary required pursuant to paragraph 3(a) hereof for ten (10) months after the date of termination or until the Termination date, if earlier....

* * *

The parties do not dispute that under these provisions, AAI has a right to 50% of all non-cash compensation received by Greco, whether actually received before or after termination, if that compensation is from a third-party and is "the result of rendition of services by Greco" before termination of the consulting agreement.

In early 1988, Gary Adams (hereinafter "Adams")--the founder, shareholder, director and President of AAI--initiated business relations with Larry Lippon (hereinafter "Lippon")--founder and President of Video Lottery Consultants, Inc. (hereinafter "VLC") as well as the shareholder, director and officer in several related companies. After executing the consulting arrangement with AAI in May of 1988, Greco provided business and financial consulting services to VLC on behalf of AAI. Greco eventually entered into his own separate consulting arrangement with VLC. In a letter to Lippon dated August 1, 1988, Greco outlined his understanding of the terms of his consulting arrangement with VLC, as follows:

* * *

Compensation:

Fee - \$2,500 per month

Bonus - Upon completion of the "initial" financing, I

will be granted a "carried" ownership in VLC on a fully diluted basis, considering all conversions and warrants then outstanding, of two percent (2%) of the common stock of VLC.

Additionally, from time to time, as opportunities present themselves, I will be given the option to participate with you at the same cost on a minority basis.

Expenses- VLC will reimburse me for all expenses. Any major charges will be pre-authorized by VLC.

Term - Two (2) years.

* * *

On or about February 1, 1991, AAI exercised its right of termination over Greco, effective on or about February 10, 1991. At that time, Greco and AAI mutually agreed to the following amendments to the provisions relating to Termination: (1) AAI agreed to pay Greco \$5,000 per month for a period of fifteen (15) months following termination (in lieu of the \$7,000 per month for 10 months required by the original Agreement), and (2) AAI additionally agreed to cover six (6) months of Greco's insurance premiums.

On February 14, 1991, four days after the AAI-Greco agreement was effectively terminated, the VLC Board of Directors conducted a special meeting for the purpose of approving the following resolution:

* * *

IT IS HEREBY RESOLVED:

- (1) That the corporation pay Damian J. Greco \$205,000.00 for business and financial consulting services rendered to the corporation.
- (2) That the corporation pay Stephen M. Barrett

- \$112,500 for business consulting services rendered to the corporation.
- (3) The corporation will issue thirteen (13) new shares of stock to Michael Eide as a bonus for past performance.

. . . .

- (5) In lieu of receiving payments referred above for their services [sic] Mr. Greco and Mr. Barrett will be given the opportunity to purchase stock at the same effective price per share as the stock being issued to Mr. Eide.
- (6) Any shares issued to Messrs. Barrett, Greco and Eide¹ shall be restricted and subject to non-competition and other restrictions to be agreed upon.
- (7) After consideration and discussion the Board finds that the value of the consideration received by the corporation from Messrs. Barrett, Greco, and Eide would be fair consideration for the shares which may be issued to such persons.

* * *

Sometime during February of 1991, Greco accepted an offer of employment with VLC, to be effective July of 1991. A letter dated February 17, 1991, from Lippon, memorialized the terms of his verbal agreement with Greco of a few days earlier, as follows:

* * *

1. Compensation:

\$160,000 per annum beginning when you become [Senior Vice-President]. In the interim the per month fee will be increased to \$3,500 beginning in February.

2. Consulting Fees:

An amount of \$205,000 will be paid in March for your

¹ The evidence at trial established, and the parties did not dispute, that Stephen Barrett had been with an outside firm that represented VLC, but he became VLC's full-time in-house counsel in February of 1991. Further, Michael Eide had been the Treasurer and Chief Financial Officer of VLC both prior to and after this resolution.

services on behalf of the company. You may use this payment to purchase VLC stock at the same effective price per share as the stock being issued to Mr. Eide, as noted below.

3. Stock:

In keeping with my philosophy of participating in the ownership of the Company with key Executive Officers, I would like to work out a stock purchase of 42 shares for you (hereinafter referred to as "Employee") at the value associated with the deal that broke up 3 weeks ago with IGT. Please work the terms out with Mike Eide.

* * *

As Senior Vice-President of VLC, Greco was intimately involved in the plans for its initial public offering (hereinafter "IPO"). In preparation for the IPO, VLC and its other related companies reorganized in mid-1991. The reorganization resulted in a parent corporation by the name of Video Lottery Technologies, Inc. (hereinafter "VLT") with VLC situated as a wholly-owned subsidiary.

Immediately prior to consummation of the reorganization, VLC distributed earnings to its shareholders. Greco, as a shareholder of VLC, received a cash dividend in the form of \$29,000.00 cash and a promissory note in the amount of \$149,852.00.

In April of 1991, VLC retained Montgomery Securities, an underwriting firm, to assist in the necessary activities relating to the IPO, including the preparation and filing of the necessary registration statements and other required forms with the Securities and Exchange Commission (hereinafter "SEC"). Greco, and others in what was referred to as the "working group", collaborated with the underwriters and the VLT-retained lawyers in drafting and revising the registration statements relating to the reorganization

and IPO. The following provisions appeared in the final drafts of the VLT Prospectus/Registration Statements filed with the SEC:²

* * *

Consulting Services

The law firm of Kirwan & Barrett, Bozeman, Montana, has acted as legal counsel to VLC and the other Subsidiaries since June 1989. Mr. Barrett, who is a director of the Company and became an officer of the company effective as of the closing of the Reorganization, is a partner at Kirwan & Barrett. VLC and the other Subsidiaries paid Kirwan & Barrett an aggregate of \$81,000 in legal fees during 1990. In addition, VLC paid Mr. Barrett \$112,500 in the form of VLC common stock in the first quarter of 1991 for business consulting service provided to VLC which were outside the scope of services being provided by the Kirwan & Barrett firm. Mr. Greco, who became an officer of the Company effective as of the closing of the Reorganization, was paid \$205,000 in the form of VLC common stock in the first quarter of 1991 by VLC for business and financial consulting services provided to VLC.

Recent Common Stock Issuances

In the first quarter of 1991, VLC authorized and issued shares of its common stock to Mr. Eide as a bonus, and to Messrs. Greco and Barrett as consideration for the business and financial consulting services rendered to VLC as described above. The shares issued to Mr. Eide were valued at \$63,500.00 and constituted 56.5% of Mr. Eide's shares of VLC common stock. The shares issued to Messrs. Greco and Barrett were valued at \$205,000.00 and \$112,500.00 respectively which VLC determined represented the fair value of such services and represented all of the shares of VLC common stock held by them.

² On June 16, 1992, VLT made a secondary public offering (hereinafter "SPO") of 2,000,000 shares of common stock. The same language which was contained in the registration statements relating to the initial offering was also contained in the registration statements relating to the secondary offering.

* * *

On February 18, 1991, Greco and Lippon both signed a document acknowledging that Greco had exercised his right to acquire VLC common stock.

Sometime in July of 1991, Adams was made aware of the initial public offering to be made by VLT. Upon reviewing the VLT documents filed with the SEC, Adams concluded that Greco was in breach of the consulting agreement by not paying AAI 50% of the compensation he received from VLC in February of 1991. AAI therefore ceased making the monthly post-termination payments to Greco.

On or about July 24, 1991 VLT made its IPO of 2,850,000 shares of common stock at \$14.00 per share. Greco exchanged his 42 shares of VLC common stock for 268,532 shares of VLT common stock, an amount equivalent to 2.69% of the then outstanding VLT shares, for a total cash value of \$3,759,448.00.

After failed attempts at mediation and settlement, AAI filed this lawsuit in early 1992 claiming breach of contract by Greco. AAI seeks to recover 50% of the 268,532 shares of VLT stock that were exchanged for the 42 shares of VLC stock, 50% of all dividends paid relating thereto (equivalent to \$116,536.00), \$25,000.00 of post-termination salary payments, and \$2,110.00 of the post-termination insurance premium payments. Greco has filed counterclaims alleging that AAI is in breach by virtue of its cessation of post-termination payments, and by virtue of its failure to reimburse certain expenses incurred by Greco.

The primary issue raised by virtue of this action is whether the "bonus" received by Greco was non-cash third-party compensation, within the meaning of paragraph 3(d) of the Consulting Agreement between Greco and AAI, such that Greco's failure to pay AAI 50% of such bonus amounted to a breach of that agreement. If Greco was in breach of the agreement, then AAI cannot be liable to Greco for the remaining ten months of unpaid post-termination payments and insurance benefits which amount to \$50,522.00.

AAI contends that under the terms of the consulting agreement entered with Greco, Greco was bound to pay AAI the "other than cash" third-party compensation from VLC, received in the form of \$205,000.00 worth of common stock as payment for the consulting services rendered by Greco during the term of the AAI-Greco consulting agreement. Greco contends that he merely received a \$205,000.00 "credit" and an option to buy stock in VLC as a "sign-on" bonus.

This case presents the age-old conflict between the written and the verbal word. Courts have long since resolved this matter in favor of the written word where the writings are clear and unambiguous on their face. The writings here, all of which were prepared by persons associated with the defendant, who now opposes their meaning, are clear: The 1988 letter from Greco to Lippon outlines Greco's own understanding that he would receive an ownership interest in VLC upon completion of the initial financing. The minutes of the special board meeting of the directors of VLC,

and the subsequent letter from Lippon to Greco, in February of 1991, both reflect the payment of a right to purchase stock to Greco worth \$205,000.00 for "business and financial consulting services rendered" to VLC. The Registration Statements, filed by VLT with the SEC at the time of both the initial and secondary offerings, reflect the payment of \$205,000.00 to Greco "in the form of VLC common stock ... for business and financial consulting services provided to VLC".

The court finds from all of the documents and the testimony presented, that AAI gave to Greco a right to acquire stock, which was valued at \$205,000.00, as "fair consideration" for the business and financial consulting services rendered by Greco prior to the termination of the AAI-Greco Agreement. That compensation, which was paid in the form of a "right," clearly falls within the meaning of Paragraph 3(d) of the AAI-Greco Agreement concerning "other than cash" third-party compensation.

Accordingly, the court finds Greco was in breach of the Agreement by virtue of his failure to transfer 50% of that right to AAI. The court further finds that by virtue of Greco's breach, AAI was excused from all obligations relating to post-termination payments otherwise to be made under the Agreement.

Greco also counterclaims alleging AAI is in breach of the Agreement by virtue of its failure to reimburse Greco for expenses he incurred in performing consulting services on behalf of AAI. AAI disputes whether those expenses were incurred on behalf of AAI, and submits that they were incurred by virtue of Greco's own

personal interests in DeSoto. The court finds, from all of the evidence presented on these matters, as follows.

During 1988, Greco, negotiating on behalf of AAI, attempted to arrange an acquisition of DeSoto, whereby AAI would allow DeSoto to utilize AAI's net-operating loss carry forward in exchange for a controlling interest in DeSoto. The DeSoto acquisition never transpired and ultimately the business relationship between the two entities was terminated.

Greco claims that he was not notified by Adams of AAI's termination of its relationship with DeSoto, and therefore Greco continued to incur expenses in pursuit of the DeSoto acquisition. AAI claims that Adams withdrew AAI from the DeSoto transaction in 1989 when the negotiations broke, and therefore the expenses Greco seeks to recover relate to Greco's own personal interests in DeSoto.

The court finds from all the evidence presented, in light of the credibility of the testifiers thereto, that those expenses, though actually incurred by Greco were not incurred on behalf of AAI. AAI had terminated its relationship with DeSoto when the acquisition failed to transpire sometime in 1989. The record is wholly devoid of evidence tending to show that the expenses, for which Greco only now seeks reimbursement, were actually incurred on behalf of AAI. The evidence instead tends to show that the expenses claimed by Greco were incurred not on behalf of AAI, but

instead on behalf of Greco himself.³ AAI clearly is not in breach of its obligation to reimburse Greco's expenses.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Plaintiff Adams Affiliates, Inc. on all claims pursued against Defendant Damian J. Greco, AND that judgment is entered against Defendant Damian J. Greco on all counterclaims pursued against Plaintiff Adams Affiliates, Inc.

ACCORDINGLY IT IS FURTHER ORDERED, ADJUDGED AND DECREED that AAI is entitled to recovery of the following: (1) 134,266 shares of VLT common stock free and clear of any liens or encumbrances, (2) \$116,536.00 for the dividends paid out on the aforementioned shares, (3) \$89,426.00 as the amount equivalent to one-half of all cash dividends and other earnings distributions paid on the aforementioned shares, (4) \$25,000.00 for post-termination salary payments actually made by AAI, (5) \$2,110.00 for post-termination insurance premium payments actually made by AAI, and (6) costs of this action, including a reasonable attorneys fee, pursuant to 12 O.S. §936.

SO ORDERED this 11th day of May, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

³ Greco is the owner of 25% of Coatings Group. Coatings Group in turn owns 68.75% of Management Partners. Management Partners is the controlling shareholder of Sutton. Sutton ultimately acquired control of DeSoto.

ENTERED ON DOCKET

DATE 5-13-93

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

MAY 11 1993

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

**LILLIAN EDNA ALEXANDER and
JOY BYRON ALEXANDER,**

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION NO. 92-C-657-E

ORDER

This matter comes on before the Court upon the stipulation of all parties and the Court being fully advised in the premises, orders, adjudges and decrees that all claims asserted herein by Plaintiffs, Lillian Edna Alexander and Joy Byron Alexander, against the United States of America are hereby dismissed with prejudice.

Dated this 10 day of May, 1993.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED AS TO CONTENT AND FORM:


KATHLEEN BLISS ADAMS, OBA# 13625
Assistant United States Attorney
3900 U.S. Courthouse
333 West 4th Street
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(918) 581-7463


PAUL T. BOUDREAUX, ESQ.
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Tulsa, OK 74103-4524

ENTERED ON DOCKET

DATE 5-13-93

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

FILED

MAY 11 1993

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

DIANN WATSON,)
)
 Plaintiff,)
)
 vs.)
)
 CHILDREN'S MEDICAL CENTER, INC.,)
 An Oklahoma Corporation,)
)
 Defendant.)

CASE NO. 92-C-820 E

ORDER

NOW on this 10 day of May, 1993, this matter comes on for hearing pursuant to the Joint Stipulation of Dismissal With Prejudice. The Court, being fully advised in these premises, finds that the Stipulations are true and correct and that the above styled case be and is hereby dismissed with prejudice against the filing thereof.

IT IS SO ORDERED.

S/ JAMES O. ELLISON

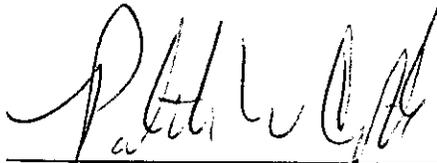
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FROM:



Joseph C. Fallin, OBA #002812
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4150 S. 100th E. Avenue
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Tulsa, Oklahoma 74146-3661

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100 West Fifth Street
1000 Oneok Plaza
Tulsa, Oklahoma 74103-4219
(918) 585-8141

Attorneys for Children's Medical
Center, Inc.

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

PHILLIP MARTIN,
Plaintiff,
vs.
GLYNN BOOHER, et al.,
Defendants.

No. 93-C-347-E

FILED

MAY 13 1993

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

O R D E R

Now before the court is Plaintiff's motion for leave to proceed in forma pauperis and civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in forma pauperis is hereby granted.

Upon review of the complaint, it appears to the court that proper venue does not lie in this district. See 28 U.S.C. § 1391(b). Therefore, Plaintiff's complaint is hereby dismissed. See 28 U.S.C. § 1406(a).

IT IS SO ORDERED this 10th day of May, 1993.

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

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

WILLIAM HENRY GAHAGANS,)
)
 Petitioner,)
)
 vs.)
)
 DAN REYNOLDS,)
)
 Respondent.)

No. 93-C-349-B

FILED
MAY 13 1993
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Petitioner has filed an application for a writ of habeas corpus, but has not submitted the proper filing fee or a motion for leave to proceed in forma pauperis. Therefore, his petition shall be **dismissed** without prejudice at this time. See Local Rule 6(A).

The court may reinstate this action if Petitioner submits to the court either the proper filing fee or a motion for leave to proceed in forma pauperis within twenty (20) days from the date this order is entered.

SO ORDERED THIS 7 day of May, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 5-12-93

FILED

MAY 11 1993

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

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

GEORGE BROWN,

Plaintiff,

-vs-

CITY OF TULSA, OKLAHOMA;
et al,

Defendants.

Case No. 92-C-405-E

JOURNAL ENTRY OF JUDGMENT UPON AGREED SETTLEMENT

The above styled and numbered cause came before this Court on the parties' notice to the Court that a settlement agreement had been reached between Plaintiff and Defendants. The Court, having reviewed the allegations set forth in Plaintiff's Complaint and, upon being advised that Defendant City of Tulsa's Mayor has authorized entry of a consent judgment in the sum of Six Thousand and 00/100 Dollars (\$6,000.00) and, further, the Court being satisfied that Plaintiff fully understands the nature of this action with regard to its finality which precludes additional or further compensation for damages arising from the occurrence of the events identified in Plaintiff's Complaint and upon being further advised that Plaintiff desires to settle the entirety of all claims and causes of action relating to the events alleged in Plaintiff's Complaint upon payment of damages in the sum of Six Thousand and 00/100 Dollars (\$6,000.00) the Court finds:

1. The Court has jurisdiction over the subject matter of this lawsuit and the parties hereto;

2. The Plaintiff is fully aware of his rights in this matter and it is Plaintiff's desire to compromise his right to trial by jury;

3. The Plaintiff desires to accept the sum of Six Thousand and 00/100 Dollars (\$6,000.00) as full, final and complete settlement for any and all damages, losses and expenses he may have sustained as a result of the events alleged in Plaintiff's Complaint;

4. The Plaintiff is aware of the circumstance of this agreed settlement that Defendant City of Tulsa's payment to him will preclude any further or separate action by Plaintiff against any employee or Department of Defendant City of Tulsa arising from or relating to the events alleged in Plaintiff's Complaint;

5. The Defendant City of Tulsa's Mayor has formally authorized settlement of Plaintiff's lawsuit for the sum of Six Thousand and 00/100 Dollars (\$6,000.00);

6. That all parties to this action request the Court to approve and finalize their mutual settlement;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that Plaintiff have and recover from Defendant City of Tulsa, Oklahoma, damages in the sum of Six Thousand and 00/100 Dollars (\$6,000.00), inclusive of costs, interest, and attorney fees, as full, final and complete compensation for any and all damages, losses and expenses incurred or sustained by Plaintiff incident to the events alleged in Plaintiff's Complaint.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that payment to Plaintiff by Defendant City of Tulsa, Oklahoma, will

preclude any further or separate action by Plaintiff against any employee or Department of Defendant City of Tulsa, Oklahoma, arising from or pertaining to the events alleged in Plaintiff's Complaint;

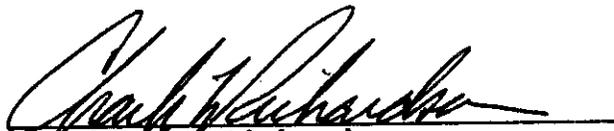
IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that upon entry of this Journal Entry of Judgment Upon Agreed Settlement, each party, their heirs, assigns, personal representatives, and any other person or entity are hereby forever barred from any and all claims arising from the events which form the basis of this lawsuit.

DATED this 10 day of May, 1993.

S/ JAMES O. ELLISON

JUDGE OF THE U.S. DISTRICT COURT

AGREED AND APPROVED AS TO FORM AND CONTENT:



Charles L. Richardson
Attorney for Plaintiff



Larry V. Simmons
Attorney for Defendants

DATE **MAY 11 1993**

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

FILED
MAY 10 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUAN J. RINCONES, et al,)
)
Plaintiff,)
)
v.)
)
ROGER COOPER, et al,)
)
Defendants.)
)
HOUSTON GENERAL INSURANCE CO.,)
)
Intervenor.)

91-C-0565-B/

ORDER

This order addresses Defendant's Motion for Dismissal (docket #116), filed April 30, 1993. Upon review of both the Discovery Order (May 5, 1993) entered by Magistrate Judge Wolfe, and the court's Minute of the expedited hearing held May 4, 1993, the undersigned finds that Defendant's Motion to Dismiss, wherein Defendant seeks dismiss as a discovery sanction under Rule 37(D), *Federal Rules of Civil Procedure*, should be and hereby is denied. Plaintiff's Motion Set Aside Order on Physical Examination (docket #115), filed April 30, 1993, was addressed by the Magistrate Judge on an expedited basis on May 4, 1993. The issues giving rise to Plaintiff's Motion have been addressed in the Discovery Order entered by the Magistrate Judge.¹

¹ On April 26, 1993 Defendant filed its Unopposed Application for An Order for An Examination (docket #113) wherein it represented that "Counsel for Plaintiff has been contacted and has no objection to this application." Upon the strength of this representation, an accompanying Order was signed, directing the examination of Plaintiff on April 29, 1993. Plaintiff contends that the "unopposed application" was not unopposed; and that no discussion was held with her or co-counsel. Defendant's disagree, as set out in the Motion for Dismissal.

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Dismissal is a harsh sanction, and not lightly applied. The circumstances evident here do not warrant such a sanction.

Accordingly, Defendant's Motion for Dismissal (docket #116) is hereby **denied**.

SO ORDERED THIS 10th day of May, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 5/11/93

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

FILED

MAY 7 1993

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

LEE A. KEELING, an individual,)
 KENNETH RENBERG, an individual,)
 and GORDON ROMINE, an individual,)
 Plaintiffs,)
 vs.)
 BANKERS TRUST COMPANY, a)
 New York banking corporation,)
 Defendant.)

No. 93-C-0091-B ✓

O R D E R

The Court has before it for decision the motions for summary judgment of the Plaintiffs and Defendant (docket #8 and #4), pursuant to rule 56 of Fed.R.Civ.P.

The issue presented herein is whether the trial court in Bankers Trust Company v. Lee Keeling and Associates, Inc., and Lee A. Keeling, U.S.D.C. (Northern District of Oklahoma), Case No. 87-C-20-B, decided as a matter of law that Lee Keeling and Associates, Inc., was a "professional corporation" organized under the Professional Corporation Act, 18 O.S. 1991 § 801 *et seq.*, or was a "business corporation" organized under the former Oklahoma Business Corporation Act, 18 O.S. 1951 § 1.1 *et seq.*, implicating concepts of collateral estoppel or *res judicata*. The issue is presented by way of this declaratory judgment action pursuant to 28 U.S.C.A. § 2201 filed by Plaintiffs, Lee A. Keeling ("Keeling"), Kenneth Renberg ("Renberg") and Gordon Romine ("Romine"), Oklahoma resident shareholders of Lee Keeling and Associates, Inc. ("LKA") against Bankers Trust Company ("BTC"), a New York banking corporation. The

2

aforesaid action of Bankers Trust Company v. Lee Keeling and Associates, Inc., and Lee A. Keeling, supra, was originally commenced by BTC in the Southern District of New York against LKA and Keeling individually. Neither Renberg nor Romine were parties to that case and no verdicts were sought, or awarded, against Renberg or Romine therein. The Court entered judgment upon the verdict against LKA, but set aside the jury verdict against Keeling by order of the trial court docketed November 5, 1992. Both the judgment against LKA and the order setting aside the verdict against Keeling are now on appeal to the Court of Appeals for the Tenth Circuit.

Since November 1992, BTC has been urging that its judgment against LKA renders Keeling, Renberg and Romine individually liable for the judgment. The Plaintiffs filed the instant declaratory judgment action to obtain a judicial declaration that the Plaintiffs are not responsible for the debts and obligations of LKA as shareholders, because LKA is a corporation incorporated under the 1951 version of the "Business Corporation Act," 18 O.S. 1951 § 1.1 *et seq.* BTC answered the Plaintiffs' complaint by alleging LKA is a professional corporation pursuant to 18 O.S. 1991 § 801 *et seq.* BTC asserts that because Plaintiffs are shareholders of a professional corporation, the judgment against LKA operates to create "partnership liability" against the Plaintiffs, rendering them subject to individual liability if LKA is unable to satisfy the judgment.

Statement of Record Uncontroverted Facts

1. LKA was incorporated on August 18, 1960. (Affidavits of Lee A. Keeling, Kenneth Renberg, Gordon Romine, and Richard Sonberg, attached as Exhibits A through D to Brief in Support of Plaintiffs' Motion for Summary Judgment filed March 23, 1993).

2. LKA was incorporated as a business corporation under the 1951 version of the "Business Corporation Act" of Oklahoma, 18 O.S. 1951 § 1.1 *et seq.* (now repealed). (Sonberg Affidavit, Exhibit D).

3. Oklahoma's Professional Corporation Act was enacted in 1961.

4. On November 21, 1980, LKA filed an amendment to its Certificate of Incorporation. The amendment was not an election to become a professional corporation. (Keeling, Renberg, Romine, and Sonberg Affidavits).

5. LKA at no time elected to convert to a "professional corporation" pursuant to 18 O.S. § 817. (Keeling, Renberg and Romine Affidavits).

6. Some of LKA's current and past shareholders have not been "professional engineers" as defined by 59 O.S. 1991 § 475.2(2). (Keeling, Renberg and Romine Affidavits).

7. BTC sued LKA and Keeling in an action eventually styled Bankers Trust Company v. Lee Keeling & Associates, Inc. and Lee A. Keeling, U.S.D.C. (Northern District of Oklahoma) Case No. 87-C-20-B (the "LKA litigation"). (BTC's Answer, ¶¶ 3 and 6, Exhibit E to Brief in Support of Plaintiffs' Motion for Summary Judgment filed March 23, 1993).

8. On November 2, 1992, judgment was entered in favor of BTC and against LKA in the LKA litigation for \$12,888,304.56 (the "Judgment"). (Exhibit F). A jury verdict against Keeling individually was vacated also on November 2, 1992. (BTC's Answer, ¶ 6, Exhibit E).

9. BTC does not contend Plaintiffs are personally liable for the judgment in Paragraph 8 above. (BTC's Answer, ¶ 8, Exhibit E). However, BTC asserts the Plaintiffs, as stockholders, are liable as functional "partners" of LKA, in the event LKA is unable to satisfy the judgment.

10. The question whether LKA is a business corporation or a professional corporation was not decided in the LKA litigation. (Transcript of Proceedings had on May 14 and 15, 1992, at pp. 1902 through 1906, attached as Exhibit G to Brief in Support of Plaintiffs' Motion for Summary Judgment filed March 23, 1993).

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); Widon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential

to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

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

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

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

Legal Analysis and Conclusions

The Defendant asserts it was decided in Bankers Trust Company v. Lee Keeling & Associates, Inc. and Lee A. Keeling, U.S.D.C. (Northern District of Oklahoma), Case No. 87-C-20-B, that Lee Keeling & Associates, Inc., is a "professional corporation" organized under the Professional Corporation Act, 18 O.S. 1991 § 801 *et seq.* In a jury instruction conference just previous to the jury being instructed, this precise matter was discussed with counsel. (Tr. pp. 1902-1906, Exhibit G to Brief in Support of Plaintiffs' Motion for Summary Judgment filed March 23, 1993). Clearly, the issue of whether LKA was a "business corporation" under the Business Corporation Act of Oklahoma, 18 O.S. 1951 § 1.1 *et seq.*, or a "professional corporation" under the Oklahoma Professional Corporation Act, 18 O.S. 1991 § 801 *et seq.*, was not decided in Bankers Trust Company v. Lee Keeling & Associates, Inc., and Lee A. Keeling, *supra*. The Court specifically advised counsel that a particular instruction referring to LKA as a professional corporation or a professional service corporation was not intended to be a finding that LKA was a professional corporation under Oklahoma law, and thus its shareholders subject to liability as partners for the debts of the entity. Pages 16 through 32 of the Court's jury instructions dealt with the subject of negligence, and the one captioned Professional Corporation - Personal Liability at page 32, was the last in the negligence series and had as its purpose, along with the others in the series, to instruct on New York state law relative to negligence and negligent

misrepresentation as set out in Ossining Union Free School District v. Anderson LaRocca Anderson, et al., 541 N.Y.S.2d 335 (1989). Relative to the issue of LKA's professional corporation status and shareholder liability, the Court specifically stated, "We're saving that for another day." (Tr. p. 1906). Any reasonable review of the record (Tr. pp. 1902-1906) on that subject permits no other conclusion.

In the particular instruction captioned Professional Corporation - Personal Liability, LKA is referred to as a professional service corporation merely to be descriptive of it being a group of engineers providing engineering services as a corporate entity. The instruction explains under what circumstances an employee defendant of LKA can be personally liable for his negligence in the scope of employment which proximately caused Plaintiff's loss. The instruction did not nor was it intended to decide the issue of whether LKA was a business corporation under Oklahoma's Business Corporation Act, 18 O.S. 1951 § 1.1 *et seq.*, or a professional corporation under Oklahoma's Professional Corporation Act, 18 O.S. 1991 § 801 *et seq.* Thus, BTC's contention that Bankers Trust Company vs. Lee Keeling & Associates and Lee A. Keeling, *supra*, establishes that LKA is a professional corporation under Oklahoma law implicating principles of collateral estoppel and *res judicata* is not supported by the record.

Whether under the federal rule, the New York rule or the Oklahoma rule of collateral estoppel, the issue involved must have been both decided and necessary to the judgment in the first

action. The issue herein was neither decided nor necessary to the judgment in Bankers Trust Company v. Lee Keeling & Associates and Lee A. Keeling, supra. See, Murdock v. Ute Indian Tribe of Uintah & Ouray Resv., 975 F.2d 683 (10th Cir. 1992); D'Arata v. New York Central Mutual Fire Ins., 564 N.E.2d 634 (N.Y. 1990); Bras v. First Bank & Trust Co., 735 P.2d 329 (Okla. 1985).

Although the Court is of the view Oklahoma law applies in deciding the corporate form of LKA, if New York law were to be applied it is clear that shareholders of a professional service corporation are not personally liable for the acts of others in the corporation unless they directly supervised those individuals or personally participated in the questioned actions with them. Krouner v. Koplovitz, 572 N.Y.S.2d 959 (N.Y.App.Div. 1991), and Paciello v. Patel, 443 N.Y.S.2d 403 (N.Y.App.Div. 1981).

The uncontroverted facts reflect that LKA was incorporated on August 18, 1960, under Oklahoma's Business Corporation Act, 18 O.S. 1951 § 1.1 *et seq.* (now repealed). LKA's incorporation was valid pursuant to 59 O.S. § 445, which permitted a "firm, co-partnership, corporation, or a political subdivision of the State of Oklahoma [to] engage in the practice of professional engineering in this State." Professional engineers had the option of practicing in a corporate form and LKA took advantage of the Oklahoma law in this regard. The record reflects that some of LKA's current and past stockholders have not been professional engineers. Ownership by nonprofessional engineers is permissible for a business corporation but prohibited for a professional corporation. See, 18 O.S. 1991 §

809.

Engineers were not authorized to incorporate under the Professional Corporation Act of Oklahoma until 1982, when the act was amended to include professional engineers. Oklahoma's Professional Corporation Act in 1982 did not alter the extent of the Plaintiffs' liability as stockholders in LKA. 18 O.S. § 817 of the Professional Corporation Act states:

"This act shall not apply to persons within this state who prior to the passage of this act were permitted to organize a corporation and perform professional services by means of such corporation, and this act shall not apply to any corporation organized by such persons prior to the passage of this act..."

Thus, the Professional Corporation Act does not apply to corporations organized prior to its passage and does not purport to alter the law with regard to the liability of the stockholders of those corporations.

The Professional Corporation Act does allow a corporation to elect to convert from a business corporation to a professional corporation by way of an affirmative statement in the Amended Certificate of Incorporation that the shareholders have elected to bring the corporation within the provisions of the Professional Corporation Act (18 O.S. § 817). The uncontroverted facts establish LKA did not make the affirmative election to convert from that of business corporation to that of professional corporation.

Defendants point out that in documents filed in Bankers Trust Company v. Lee Keeling & Associates, Inc., and Lee A. Keeling, supra, Lee A. Keeling or his counsel have stated that LKA is a

professional corporation. (Exhibit A, Brief in Support of Plaintiffs' Motion for Summary Judgment filed March 23, 1993; Exhibit 1, Supplemental Brief of BTC in Support of Motion for Summary Judgment filed April 22, 1993). Lee A. Keeling in response has stated such a statement was made to describe the professional engineering services performed by the corporation, not for the purpose of declaring LKA to be formed under the Oklahoma Professional Corporation Act (18 O.S. 1991 § 801 *et seq.*). Whatever the purpose, LKA's incorporation must be determined from the record facts regarding the actual incorporation as opposed to post-factum statements.¹

The fundamental principle of limited liability derives from the separation of the stockholder from the corporation. As stated in Buckner v. Dillard, Okl., 89 P.2d 326, 329 (1939), "A recognized purpose of a corporation is to permit persons to avoid personal liability either entirely or beyond a statutory amount." 1 Fletcher, Cyclopedia of the Law of Private Corporations, § 25. See also, Hulme v. Springfield Life Ins. Co., Okl., 565 P.2d 666, 670 (1977).

Therefore, the uncontroverted facts in the record before the Court establish that Lee Keeling & Associates, Inc., is and has as an entity always functioned as a "business" corporation under the

¹Neither Plaintiffs nor Defendant submitted the incorporation documents so the court must look to relevant uncontroverted material facts in the affidavits concerning the filing for and receipt of the certificate of incorporation.

Oklahoma Business Corporation Act and that Plaintiffs as shareholders of Lee Keeling & Associates, Inc., are not responsible for the debts and obligations of the corporation as a result of such shareholder status.²

For the reasons outlined above, Plaintiffs' motion for summary judgment pursuant to Fed.R.Civ.P. 56 is SUSTAINED and Defendant's same motion is hereby OVERRULED. A separate Judgment declaring the above shall be filed contemporaneously herewith.

DATED this 7th day of May, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

²Defendant herein has not asserted that LKA was the alter ego of Plaintiffs or urged a piercing of the corporate veil.

ENTERED ON DOCKET

DATE 5/11/93

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

FILED

MAY 7 1993

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

LEE A. KEELING, an individual,)
 KENNETH RENBERG, an individual,)
 and GORDON ROMINE, an individual,)
 Plaintiffs,)
 vs.)
 BANKERS TRUST COMPANY, a)
 New York banking corporation,)
 Defendant.)

No. 93-C-0091-B ✓

J U D G M E N T

In keeping with the Court's order filed May 7th, 1993, sustaining the Plaintiffs' motion for summary judgment pursuant to Fed.R.Civ.P. 56, and overruling Defendant's same motion, Judgment is hereby entered in favor of the Plaintiffs, Lee A. Keeling, Kenneth Renberg and Gordon Romine, and against the Defendant, Bankers Trust Company. The Court hereby declares that the judgment against Lee Keeling & Associates, Inc., in the case of Bankers Trust Company v. Lee Keeling & Associates, Inc., and Lee A. Keeling, USDC (Northern District of Oklahoma), No. 87-C-20-B, does not operate as a judgment against nor is it enforceable against the named Plaintiffs herein individually as a result of their shareholder status owning an equity interest in Lee Keeling & Associates, Inc. The Court further declares, based upon the record herein, that Lee Keeling & Associates, Inc., is a business corporation under the Oklahoma Business Corporation Act, 18 O.S. 1951 § 1.1 *et seq.* (now repealed), and was not incorporated under Oklahoma's Professional Corporation Act nor did it elect to convert

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to a "professional corporation." 18 O.S. 1991 § 801 *et seq.* The parties are to pay their own respective costs and attorneys fees herein.

DATED this 7th day of May, 1993.


THOMAS R. BRET
UNITED STATES DISTRICT JUDGE

United States District Court
for Northern District of Oklahoma
May 11, 1993

pw

EOD: 5-11-93

Per MJ Wagner, case dismissed without prejudice

C I V I L M I N U T E S

4:92-cv-01165

Jackson v. O'Neal

DOCKET ENTRY

MINUTES: by Magistrate John L. Wagner ; Status hearing
held 5/11/93, and dismissing case without prejudice.
entered

Hon. Thomas R. Brett, Judge