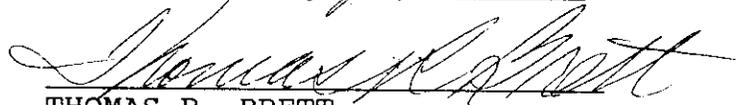


Petitioner presently has a direct appeal at issue before the Oklahoma Court of Criminal Appeals. Accordingly, this habeas action is improperly before this court and should be dismissed. Petitioner argues that he should not be required to exhaust his remedies first because of inordinate delay in his state court appeal. However, Petitioner has failed to show inordinate delay at any stage of Petitioner's appellate proceedings, and the record shows there has been none. In addition, Petitioner's action is distinguishable from Harris v. Champion, 938 F.2d 1062 (10th Cir. 1991), because Petitioner is represented by private counsel on appeal. Further, the court notes there has never been any indication of systemic inordinate delay on the part of the Oklahoma Court of Criminal Appeals.

IT IS, THEREFORE, HEREBY ORDERED that:

1. Respondent's motion to dismiss is granted, and this action is dismissed;
2. Petitioner shall have twenty (20) days to file a motion to reconsider, if he so wishes.

IT IS SO ORDERED this 16th day of Sept., 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT COURT

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

FILED
SEP 16 1993

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

PEARLIE R. GRAVES,)
)
 Plaintiff(s),)
)
 v.)
)
 LINDA J. DANIELS, et al,)
)
 Defendant(s).)

93-C-320-B

ORDER

Now before the Court are two Motions To Dismiss (docket #s 5 and 6).¹ Defendant Linda J. Daniels filed one of the motions on July 13, 1993. The remaining Defendants, Randy Holmes, Barbara Flowers, Jeff Murphy, Rick Shirley, and Steve Golf filed their motion on July 19, 1993. As of September 10, 1993, Plaintiff has failed to respond to either motion.

According to Local Rule 15(A) of the Northern District of Oklahoma, Plaintiff had to file his response to the motions no later than 15 days after they were filed. Failure to comply with 15(A) constitutes a confession of the Defendants' respective motions. Since Plaintiff has not filed a timely response, Defendants' Motion To Dismiss (docket #s 5 and 6) are **GRANTED** with prejudice. In addition, the scheduling conference scheduled on September 16, 1993 is stricken.

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

SO ORDERED THIS 16 day of Sept, 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

RECEIVED

ENTERED ON DOCKET

AUG 3 1993

DATE 9-17-93

RICHARD M. LAWRENCE, CLERK
U.S. DISTRICT COURT

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

FILED

SEP 16 1993

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
 v.)
)
 RESIDUAL TECHNOLOGIES, INC.,)
)
 Defendant.)

Civil Action No. 92-C-253-E

CONSENT DECREE

Plaintiff, the United States of America ("United States"), on behalf of the United States Environmental Protection Agency ("EPA"), filed a Complaint on March 25, 1992, alleging that Defendant, Residual Technologies, Inc. ("RTI"), violated Part C of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300h to 300h-7, its implementing regulations, 40 CFR § 147.1850 et seq., and the "Rules and Regulations for Industrial Waste Management" as adopted by the Oklahoma State Department of Health ("OSDH").

RTI owns and operates a hazardous waste management facility located in Tulsa, Oklahoma (the "Tulsa facility"). As part of its operations at the Tulsa facility, RTI disposes of hazardous and non-hazardous wastes via underground injection through a UIC Class I injection well.

Neither this Consent Decree, the execution thereof nor the approval or entry by the Court of this Consent Decree shall constitute evidence against or admissions by RTI with respect to any issues of fact or law set forth in the Complaint.

13

The United States and RTI have consented to the entry of this Consent Decree without trial of any issues in full and complete settlement of the above-captioned case, and the United States and RTI hereby stipulate to the Court that in order to fully resolve the issues stated in the United States' Complaint, this Consent Decree should be entered.

NOW THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action and over the parties pursuant to Section 1423(b) of the SDWA, 42 U.S.C. § 300h-2(b), and 28 U.S.C. §§ 1331, 1345 and 1355.

2. Venue is proper in this district under 28 U.S.C. §§ 1391(b) and 1395(a).

3. The Complaint states a claim upon which relief may be granted under Section 1423(b) of the SDWA, 42 U.S.C. § 300h-2(b).

II. BINDING EFFECT

4. The provisions of this Consent Decree shall apply to and be binding upon the United States and Defendant RTI and upon Defendant's current and future officers, directors, agents, trustees, servants, employees, successors and assigns and all persons, firms, entities and corporations acting on behalf or under Defendant's control or direction in performing any obligation under this Consent Decree.

III. PURCHASE OF TULSA FACILITY/NOTICE OF INTENT TO TRANSFER

5. Defendant shall give written notice of this Consent Decree to any successor in interest at least thirty (30) days prior to transfer of operation, ownership or any other interest in the Tulsa facility. Defendant shall simultaneously notify OSDH and EPA Region 6 that notice pursuant to this paragraph has been given. Upon transfer of ownership, operation or other interest in the Tulsa facility, Defendant shall provide a copy of this Consent Decree to any successor in interest. Defendant shall condition the transfer of ownership, operation, other interest or any contract related to the performance of the Consent Decree upon the transferee's assumption of the obligation to perform the terms and conditions of this Consent Decree.

IV. DEFINITIONS

6. "Class I injection well" shall mean (1) a well used by a generator of hazardous waste or an owner or operator of a hazardous waste management facility to inject hazardous waste beneath the lowermost formation containing, within one-quarter mile of the well bore, an underground source of drinking water; or (2) an industrial or municipal disposal well which injects fluids beneath the lowermost formation containing, within one-quarter mile of the well bore, an underground source of drinking water.

7. "Court" shall mean the United States District Court for the Northern District of Oklahoma.

8. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, if the last day would fall on a Saturday, Sunday or Federal or State holiday, the period shall continue until the next day other than a Saturday, Sunday or holiday.

9. "Defendant" shall mean Residual Technologies, Inc., "RTI."

10. "EPA" shall mean the United States Environmental Protection Agency.

11. "Hazardous waste management facility" shall mean all contiguous land, and structures, other appurtenances, and improvements on the land used for treating, storing, or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units.

12. "OSDH" shall mean the Oklahoma State Department of Health.

13. "Parties" shall mean the United States of America, on behalf of EPA, and defendant RTI.

14. "Rules and Regulations for Industrial Waste Management" shall mean those regulations promulgated by the Oklahoma State Department of Health.

15. "SDWA" shall mean the Safe Drinking Water Act, 42 U.S.C. § 300f et seq.

16. "State" shall mean the State of Oklahoma.

17. "UIC" shall mean the Underground Injection Control program under Part C of the Safe Drinking Water Act, including an "approved State program."

18. "Well" shall mean a bored, drilled or driven shaft, or a dug hole, whose depth is greater than the largest surface dimension.

V. OBJECTIVES

19. All remedial actions and other obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objectives of causing Defendant to comply with Part C of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300h to 300h-7, its implementing regulations, 40 CFR § 147.1850 et seq., and the OSDH "Rules and Regulations for Industrial Waste Management".

VI. MONITORING PROJECT

20. Defendant has constructed an additional well known as "Deep Monitoring Well # 1," to monitor for contamination of the underground source of drinking water ("USDW") beneath the Tulsa facility. Beginning in April 1993, Defendant shall, at least once per month, sample and analyze the USDW beneath the Tulsa facility. Sampling and analyses of the USDW shall be performed in accordance with the EPA- and OSDH-approved monitoring plan entitled "Monthly and Annual Sampling Plan for RTI's Deep Monitoring Well # 1" as revised by EPA Region 6 on March 16, 1993. Defendant shall report to both EPA Region 6 and

OSDH the results of such sampling and analyses in accordance with the requirements of Section VII of this Consent Decree.

VII. REPORTING

21. Beginning with the first full month following entry of this Consent Decree and for the first twelve (12) months following entry by the Court of the Consent Decree, Defendant shall submit in writing to both EPA Region 6 and OSDH monthly reports containing the following information: sampling and monitoring results from Deep Monitoring Well # 1, and the reasons for any noncompliance with the requirements of this Consent Decree. Each monthly report shall be submitted within the first fifteen (15) days of the month immediately following the completed monthly reporting period.

22. All reports required to be submitted by the terms of this Consent Decree shall contain certification signed by a responsible corporate officer for Defendant. The certification shall read as follows:

"I certify that the information contained in or accompanying this (submission/document) is true, accurate, and complete.

As to (the/those) identified portion(s) of this (submission/document) for which I cannot personally verify (its/their) truth and accuracy, I certify as the official having supervisory responsibility for the person(s) who, acting under my direct instructions, made the verification, that this is true, accurate, and complete."

23. For purposes of Paragraph 22 of this Consent Decree, "responsible corporate officer" shall mean:

A president, secretary, treasurer or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation.

VIII. STIPULATED PENALTIES

24. Subject to the force majeure provisions contained in Section IX hereof, Defendant shall pay stipulated penalties to the United States for violations of the requirements of this Consent Decree as follows:

For each day that the Defendant fails to comply with the monitoring or reporting deadlines established in Sections VI or VII of this Consent Decree, Defendant shall pay stipulated penalties as follows:

<u>Period of Violation</u>	<u>Penalty</u>
1st to 30th day	\$ 3,000 per day per violation
31st to 60th day	\$ 5,000 per day per violation
After 60 days	\$ 10,000 per day per violation

25. The stipulated penalties herein shall be in addition to other remedies or sanctions available to the United States by reason of the failure of Defendant to comply with the requirements of this Consent Decree, the SDWA or the OSDH "Rules and Regulations for Industrial Waste Management".

26. Defendant shall pay all stipulated penalties by cashier's or certified check payable to "Treasurer of the United States," by the fifteenth (15) day of the month following the

month in which the violations occurred, together with a letter describing the basis for the penalties. Defendant shall pay stipulated penalties in the same manner as the civil penalty required by Sections X and XI of this Consent Decree.

IX. FORCE MAJEURE

27. If any event occurs which causes or may cause Defendant to violate any provision of this Consent Decree, Defendant shall notify in writing the Court, the United States Attorney for the Northern District of Oklahoma and EPA Region 6 within ten (10) days of the event. The notice shall specifically reference this Section of the Consent Decree and describe in detail the anticipated length of time the violation may persist, the precise cause or causes of the violation, the measures taken or to be taken by Defendant to prevent or minimize the violation as well as to prevent future violations and the timetable by which those measures will be implemented. Defendant shall adopt all reasonable measures to avoid or minimize any such violation. Failure by Defendant to comply with the notice requirements of this section shall render this section void and of no effect as to the particular incident involved, and shall constitute a waiver of the right of Defendant to obtain an extension of time for its obligations under this section based on such incident.

28. If EPA Region 6 agrees that the violation has been or will be caused entirely by circumstances beyond the control of Defendant or any entity controlled by Defendant, including the consultants and contractors of Defendant, and that Defendant

could not have foreseen and prevented such violation, the time for performance of such requirement may be extended for a period not to exceed the actual delay resulting from such circumstance, and stipulated penalties shall not be due for said delay. In the event EPA Region 6 does not so agree, Defendant may submit the matter to the Court for resolution pursuant to Section XIII of this Consent Decree. EPA Region 6 shall notify Defendant in writing of the Region's agreement or disagreement with Defendant's claim of a delay or impediment to performance within forty-five (45) days of receipt of Defendant's notice under Paragraph 27 of this section. If Defendant submits the matter to the Court for resolution and the Court determines that the violation was caused entirely by circumstances beyond the control of Defendant or any entity controlled by Defendant, including Defendant's consultants and contractors, and that Defendant could not have foreseen and prevented such violation, Defendant shall be excused as to that violation, but only for the period of time the violation continues due to such circumstances.

29. Unanticipated or increased costs or expenses associated with the implementation of this Consent Decree or changed financial circumstances shall not, in any event, serve as a basis for changes in this Consent Decree or extensions of time under this Consent Decree.

30. Compliance with any requirement of this Consent Decree shall not, by itself, constitute compliance with any other requirement. An extension of one compliance date based on a

particular incident does not necessarily result in an extension of a subsequent compliance date or dates. Defendant must make an individual showing of proof regarding each delayed incremental step or other requirement for which an extension is sought.

31. Defendant shall bear the burden of proving that any delay or violation of any requirement of this Consent Decree was caused entirely by circumstances beyond the control of Defendant or any entity controlled by Defendant, including Defendant's consultants and contractors, and that Defendant could not have foreseen and prevented such violation. Defendant shall also bear the burden of proving the duration and extent of any delay or violation attributable to such circumstances.

X. PENALTY FOR PAST VIOLATIONS

32. Defendant shall pay a civil penalty in the amount of Three Hundred Thousand Dollars (\$300,000.00) in satisfaction of the United States' claims against Defendant for violations of Part C of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300h to 300h-7, its implementing regulations, 40 CFR § 147.1850 et seq., and the OSDH "Rules and Regulations for Industrial Waste Management", as set forth in the Complaint.

33. Defendant shall make payment by mailing a certified check within 30 days of entry by the Court of the Consent Decree payable to the "Treasurer of the United States" to the following address:

United States Attorney
Northern District of Oklahoma
U.S. Courthouse
Room 3900

333 West Fourth Street
Tulsa, Oklahoma 74103

Civil Action No. 92-C-253-E and DOJ No. 90-5-1-1-3330 shall be clearly noted on the check. Upon entry of this Consent Decree, the United States shall be deemed a judgment creditor for purposes of collection of this penalty and any stipulated penalties due under this Decree. Interest shall accrue upon any balance unpaid after thirty (30) days from the entry of this Decree at the statutory judgment interest rate prescribed at 28 U.S.C. § 1961 in effect on the date this Consent Decree is entered by the Court.

XI. LATE CHARGES

34. In the event that payment of the civil penalty or stipulated penalties is not made within ten (10) days after the date due, Defendant shall pay to the United States a late charge equal to five percent (5%) of the late payment ("late charge"). Defendant shall pay late charges in the same manner as for the civil penalty requirements of Section X.

35. Pursuant to 28 U.S.C. § 1961 the late charge shall bear interest at the judgment interest rate at the time, and shall be in addition to any other sums due and any other rights and remedies the United States may have hereunder.

XII. NOTICE OF PAYMENT

36. Defendant shall, simultaneously with the payment of the penalty, mail a copy of the certified check and the letter tendering the check to each of the following:

Quinton Farley (6C-AW)
Office of Regional Counsel
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

Camille Hueni (6W-SU)
Water Management Division
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
Re: DOJ No. 90-5-1-1-3300

The transmittal letter shall include the caption, civil action number, DOJ number and judicial district of this action.

XIII. DISPUTE RESOLUTION

37. If the parties are unable to agree upon any plan, procedure, standard, requirement or other matter described herein, or in the event a dispute should arise among the parties regarding the implementation of the requirements of this Consent Decree, Defendant shall follow the position of the United States unless Defendant files a petition with the Court for resolution of the dispute within thirty (30) days of receipt of the United States' final position. Defendant's petition shall set out the nature of the dispute with a proposal for its resolution. The United States shall have thirty (30) days to file a response with an alternate proposal for resolution. In any such dispute, Defendant shall bear the burden of proving that the United States' proposal is arbitrary and capricious and is not in accord

with the objectives of this Consent Decree, and that Defendant's proposal will achieve compliance with Part C of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300h to 300h-7, its implementing regulations, 40 CFR § 147.1850 et seq., and the OSDH "Rules and Regulations for Industrial Waste Management".

XIV. RIGHT OF ENTRY

38. Until termination of this Consent Decree, EPA Region 6 or its representatives, contractors and consultants, and attorneys for the United States shall have the authority to enter the Tulsa facility, at all reasonable times, upon proper presentation of credentials to the manager or managers of the facility, or in the manager's absence, to the highest ranking employee present on the premises, for the purposes of:

a. Monitoring the progress of activities required by this Consent Decree;

b. Verifying any data or information submitted to EPA Region 6 in accordance with the terms of this Consent Decree; and

c. Assessing Defendant's compliance with this Consent Decree.

39. The authority granted in Paragraph 38 of this Consent Decree is in addition to EPA's right of entry and inspection pursuant to Section 1445(b) of the SDWA, 42 U.S.C. § 300j-4(b).

XV. NON-WAIVER PROVISIONS

40. This Consent Decree in no way affects or relieves Defendant of responsibility to comply with any Federal, State or local law, regulation or permit. Nothing contained in this Consent Decree shall be construed to prevent or limit the United States' rights to obtain penalties or injunctive relief under the Safe Drinking Water Act or other Federal statutes or regulations except as expressly specified herein.

41. The parties agree that Defendant is responsible for achieving and maintaining complete compliance with all applicable Federal, State and local laws, regulations and permits, and that compliance with this Consent Decree shall be no defense to any actions commenced pursuant to said laws, regulations or permits.

42. This Consent Decree does not limit or affect the rights of Defendant or the United States as against any third parties, nor does it limit the rights of third parties, not parties to this Consent Decree, against Defendant.

43. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree.

XVI. COSTS OF SUIT

44. Each party shall bear its own costs and attorney's fees in this action. Should Defendant subsequently be determined to have violated the terms and conditions of this Consent Decree, then Defendant shall be liable to the United States for any out-

of-pocket costs and attorney's fees incurred by the United States in any actions against Defendant for noncompliance with this Consent Decree.

XVII. FORM OF NOTICE

45. Except as specified otherwise, when written notification to or communication with the United States, the United States Attorney for the Northern District of Oklahoma, EPA Region 6, OSDH, or the Defendant is required by the terms of this Consent Decree, it shall be addressed as follows:

As to the United States Department of Justice:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7611
Ben Franklin Station
Washington, D.C. 20044
Re: DOJ No. 90-5-1-1-3330

As to the United States Attorney for the Northern District of Oklahoma:

U.S. Attorney
Northern District of Oklahoma
U.S. Courthouse
Room 3900
333 West Fourth Street
Tulsa, Oklahoma 74103

As to EPA Region 6:

Quinton Farley (6C-AW)
Office of Regional Counsel
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

As to OSDH:

Michael Houts, Supervisor
Environmental Health/UIC
Oklahoma State Department of Health
1000 NE 10th Street

Oklahoma City, Oklahoma 73117-1299

As to Residual Technologies, Inc.:

c/o Donald Pray, Esquire
Pray, Walker, Jackman, Williamson & Marlae
900 Oneok Plaza
Tulsa, Oklahoma 74103

46. Notifications to or communications with the United States, the United States Attorney for the Northern District of Oklahoma, EPA Region 6 or OSDH shall be deemed submitted on the date they are postmarked and sent by certified mail, return receipt requested.

XVIII. MODIFICATION

47. Except for non-material modifications to which all parties to this Consent Decree stipulate, there shall be no modification of this Consent Decree without written approval of all of the parties to this Consent Decree and the Court.

XIX. PUBLIC NOTICE AND COMMENT

48. The parties agree and acknowledge that final approval by the United States and entry of this Consent Decree are subject to the requirements of 28 CFR § 50.7, which provides for notice of the lodging of this Consent Decree in the Federal Register, an opportunity for public comment and consideration of any comments. The Defendant consents to the entry of this Consent Decree by the Court without reservation.

XX. CONTINUING JURISDICTION OF THE COURT

49. The Court shall retain jurisdiction to enforce the terms and conditions of this Consent Decree and to resolve

disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Consent Decree.

XXI. TERMINATION

50. This Consent Decree shall terminate without further action by this Court upon receipt by the Court from the United States of notice that Defendant has paid all civil and stipulated penalties due and late charges, and has completed the one-year monitoring project specified herein.

XXII. SIGNATORIES

51. The representatives of each party to this Consent Decree certify that they are fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

Dated and entered this 16th day of September,

1993.


UNITED STATES DISTRICT JUDGE
Northern District of Oklahoma

THE UNITED STATES HEREBY CONSENTS to the entry of this Consent Decree, subject to the public notice requirements of 28 C.F.R. § 50.7. RESIDUAL TECHNOLOGIES, INC. HEREBY CONSENTS to the entry of this Consent Decree without reservation.

FOR THE UNITED STATES OF AMERICA:

Date

8/2/93



MYLES E. FLINT
Acting Assistant Attorney General
Environment and Natural Resources
Division
United States Department of Justice

Date

8/2/93

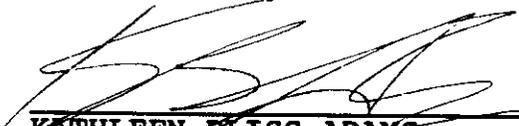


MOLLY ELIZABETH HALL
Trial Attorney
Environmental Enforcement Section
United States Department of Justice
Washington, D.C. 20530
(202) 514-2756

TONY M. GRAHAM
United States Attorney
Northern District of Oklahoma

Date

8/2/93



KATHLEEN BLISS ADAMS
Assistant United States Attorney
U.S. Courthouse
Room 3900
333 West Fourth Street
Tulsa, Oklahoma 74103
(918) 581-7463

FOR THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY:

5/31/93
Date

Scott C. Fulton
SCOTT C. FULTON
Acting Assistant Administrator
for Enforcement
U.S. Environmental Protection Agency
Washington, D.C. 20460

APR 21 1993
Date

Joe D. Winkle
JOE D. WINKLE
Acting Regional Administrator
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

OF COUNSEL:

Quinton Farley
Assistant Regional Counsel
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

FOR RESIDUAL TECHNOLOGIES, INC.:

3-24-93
Date

Michael J. Zumwalt
MICHAEL J. ZUMWALT,
PRESIDENT

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 proceeds of the following-described Postal Money Orders on the 5th day of February 1993:

1)	Money Order No. 4677703156	\$ 700.00
2)	Money Order No. 4677703157	700.00
3)	Money Order No. 4677703158	700.00
4)	Money Order No. 4677703159	700.00
5)	Money Order No. 4677703160	200.00
6)	Money Order No. 4677714793	200.00
7)	Money Order No. 4677714794	700.00
8)	Money Order No. 4677714795	700.00
9)	Money Order No. 4677714796	700.00
10)	Money Order No. 4677714797	700.00
11)	Money Order No. 4677828080	700.00
12)	Money Order No. 4677828081	700.00
13)	Money Order No. 4677828082	700.00
14)	Money Order No. 4677828083	700.00
15)	Money Order No. 4677739438	700.00
16)	Money Order No. 4677739439	700.00
17)	Money order No. 4677739440	700.00
18)	Money Order No. 4677739441	100.00,

The following individuals were determined to be potential claimants in this action with possible standing to file a claim herein, and the United States Marshal for the Northern District of Oklahoma served the following persons and entities having a potential interest in this action, to-wit:

MOHAMED MOHAMED
by serving Gordon S. Harman
Attorney at Law
2021 South Lewis, Suite 640
Tulsa, Oklahoma 74104-5758

Served February 4, 1993

ASHRAF A. KHAMIS
6937 South Trenton Avenue
Tulsa, Oklahoma 74136-4415

Served February 5, 1993

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

All persons interested in the defendant proceeds 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).

The only Claim filed in this matter was that of Mohamed Mohamed filed on February 16, 1993, and whose Answer was thereafter filed on March 4, 1993.

No other persons or entities upon whom personal service was effectuated more than thirty (30) days ago have filed a Claim, Answer, or other response or defense.

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 February 25, March 4, and 11, 1993. Proof of Publication in the Tulsa Daily Commerce and Legal News was filed herein on April 13, 1993.

No other claims in respect to the defendant proceeds 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 proceeds, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant proceeds and all persons and/or entities interested therein, except Mohamed Mohamed, who has stipulated to forfeiture of Five Thousand Five Hundred Dollars (\$5,500.00) of the defendant proceeds.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Judgment be entered against the sum of Five Thousand Five Hundred Dollars (\$5,500.00) of the defendant proceeds, and that such amount 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 by the Court that the remaining Five Thousand Five Hundred Dollars (\$5,500.00) of the defendant proceeds be returned to the Claimant, Mohamed Mohamed, by delivering a check for such amount to his attorney, Gordon S. Harman, 2021 South Lewis Avenue, Suite 640, Tulsa, Oklahoma 74104-5726.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court, pursuant to the Stipulation for Forfeiture filed herein on August 25, 1993, that the Cost and Claim Bond in the amount of One Thousand One Hundred Dollars (\$1,100.00) posted by the Claimant, Mohamed Mohamed, be returned to the Claimant by

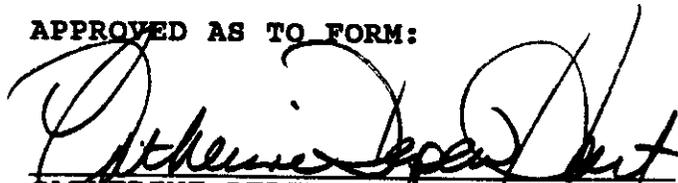
delivering a check for such amount to Claimant's Attorney, Gordon S. Harman.

IT IS THE FURTHER ORDER OF THIS COURT that the return to Claimant Mohamed Mohamed of the Five Thousand Five Hundred Dollars (\$5,500.00) of the defendant proceeds, and the return to Claimant Mohamed Mohamed of the cost and claim bond in the amount of One Thousand One Hundred Dollars (\$1,100.00) be paid by separate checks.

S/ THOMAS R. BRETT

THOMAS R. BRETT, JUDGE OF THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APPROVED AS TO FORM:



CATHERINE DEPEW HART
Assistant United States Attorney

N: \UDD\CHOOK\FC\KHAMIS\03321

ENTERED ON DOCKET

DATE 9-16-93

TGM\347

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

FILED

SEP 15 1993

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

FRANK A. LOCKE and RONDA N.)
LOCKE, Husband and Wife; and)
RICH JESSINA CHEVROLET, INC.,)
D/B/A FRANK LOCKE CHEVROLET,)
GEO,)

Plaintiffs,)

vs.)

No. 93-C-584-E

LARRY BROWN; JACK MARSHALL;)
and PEOPLES STATE BANK,)
a state banking association,)

Defendants.)

JOINT STIPULATION OF DISMISSAL

It is hereby stipulated by and between the Plaintiffs, Frank A. Locke, Ronda Locke and Rich Jessina Chevrolet, Inc., d/b/a Frank Locke Chevrolet-GEO, by their attorney, Thomas G. Marsh, and Defendants, Larry Brown and Jack Marshall, by their attorney, Martha A. Peterson, that the above-styled and captioned matter, on

the Complaint may be, and the same is hereby dismissed without prejudice against each other, without costs to either party.


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Topeka, KS 66603-3881

Attorneys for Defendants,
Larry Brown and
Jack Marshall

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

FILED
DATE SEP 16 1993
SEP 15 93

DEANNA D. YOUNG,

Plaintiff,

vs.

ALLSTATE LIFE INSURANCE COMPANY,
a foreign insurance company,

Defendant.

RICHARD M. LAWRENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK
Case No. 92-B-582-B ✓

O R D E R

Now before the Court is Defendant's Motion for Summary Judgment (Docket #15) pursuant to Fed.R.Civ.P. 56(c).

Plaintiff, Deanna D. Young ("Young"), filed this action in Tulsa County District Court on June 18, 1992, alleging breach of contract and "bad faith" against Defendant Allstate Life Insurance Company ("Allstate").¹

This action arises from Plaintiff's claim for accidental death benefits under an insurance policy issued by Allstate on Plaintiff's husband, Foyle G. Young, who died July 12, 1991. Allstate denies coverage on the grounds Mr. Young's death was not caused by an accident, "directly and independently of all other causes", as required by the policy.²

¹ The Defendant removed the action to this Court on July 7, 1992.

² The Certificate of Insurance provides in pertinent part:

Injury means bodily injury caused by an accident occurring while the insurance is in force and which injury results, within 365 days after the date of the accident, directly and independently of all other causes, in any

RD

It is not in dispute that Plaintiff's decedent died July 12, 1991, while driving his pickup truck in Tulsa, Oklahoma. Witnesses indicated that the decedent's pickup truck swerved, jumped a curb and struck a wall; the decedent's truck then bounced back into the street, striking another pickup truck and a tree. One witness indicated that the decedent had slumped over across the seat before the truck began to swerve out of control.

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." Where there is an absence of material issues of fact, then the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.E.2d 202 (1986); Winton Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986); Commercial Iron & Metal Co. v. Bache & Co., Inc., 478 F.2d 39, 41 (10th Cir. 1973); and Ando v. Great Western Sugar Company, 475 F.2d 531, 535 (10th Cir. 1973).

The cause(s) of Mr. Young's death are very much in dispute. The medical examiner performing the autopsy reached the following conclusion:

At autopsy a traumatic cause of death was excluded. The cause of death was found to be coronary sclerotic heart disease. The manner

of the losses to which the insurance applies, to wit, death, dismemberment and the total and irrecoverable loss of sight.

of death is natural.

(Exhibit "E" to Brief in Support of Defendant's Motion for Summary Judgment). Consequently, the death certificate lists "coronary sclerotic heart disease" as the cause of death. (Exhibit "D" to Brief in Support of Defendant's Motion for Summary Judgment).

Dr. Steven E. Cox, decedent's personal physician, prepared a report dated February 11, 1992, in which he states:

It is my further opinion that coronary sclerotic heart disease was not the cause of the death of Mr. Young. ... In my opinion, Mr. Young suffered a cardiac event which led to the loss of control of his vehicle....

...
In my opinion, due to Mr. Young's age and physical condition, he was capable of being resuscitated immediately following the accident....

...
In summary, I would state that there is no clear evidence that Mr. Young died of natural causes. It is my professional opinion, that Mr. Young's death was caused by blood loss and the failure to receive immediate CPR due to the extensive bleeding, both of which facts are directly related to the accident and are not natural causes of death.

(Exhibit "D" to Opposition Brief of Plaintiff).

Dr. Michael Farrar, an expert witness for the Plaintiff, has concluded:

As stated, I do believe that the trauma of this motor vehicle accident is his direct cause of death, independent of all other causes. ... There is no medical evidence to point to an acute cardiac event as the cause of his death.

(Exhibit "A" to Opposition Brief of Plaintiff).

Clearly, there is a genuine issue as to the cause or causes of Mr. Young's death. For this reason, summary judgment is not warranted and Defendant's motion should be denied as to Plaintiff's

first claim.

Plaintiff's second claim is for bad faith failure to pay a claim. Under Oklahoma law, every insurance contract contains an implied duty of good faith and fair dealing. Thompson v. Shelter Mutual Ins., 875 F.2d 1460, 1462 (10th Cir. 1989). "[T]o prove a breach of the duty of good faith and fair dealing the insured must show by a preponderance of the evidence that the insurer failed to treat the insured fairly" Id. An insurer does not breach its duty "by refusing to pay a claim or by litigating a dispute if there is a 'legitimate dispute' as to coverage or amount of the claim and the insurer's position is 'reasonable and legitimate.'" Id.

To survive Defendant's motion for summary judgment on the bad faith claim, Plaintiff must present some evidence which disputes Allstate's assertion that it has a good faith belief that it has a justifiable reason for withholding payment under the policy. McCoy v. Oklahoma Farm Bureau Mutual Ins. Co., 841 P.2d 568 (Okla. 1992); Capstick v. Allstate Insurance Company, 998 F.2d 810 (10th Cir. 1993) (a jury is entitled to evaluate a bad faith claim, when the legitimacy of the insurer's "good faith" claim was suspect). Plaintiff has failed to provide any evidence which indicates Allstate did not have a reasonable good faith belief that it was correct in denying coverage under the policy.

Plaintiff relies solely on the testimony of Gary Chartier ("Chartier") to support her bad faith claim. Plaintiff offers Chartier as an expert in the field of underwriting and claims for

life insurance and accident policies. In his deposition, Chartier asserts that Plaintiff's claim was mishandled as a result of Allstate failure to "gather all the material." Specifically, Chartier criticizes Allstate for not getting written statements from witnesses and the investigating officer. (Exhibit "E" to Opposition Brief of Plaintiff).

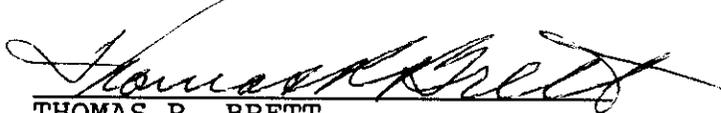
Accepting Chartier's statements as true, and drawing every reasonable inference therefrom, the Plaintiff has still failed to establish a genuine issue as to whether Allstate had a reasonable good faith belief that natural causes were a contributing factor in Mr. Young's death. Chartier does not indicate what specific information Allstate failed to obtain or what effect this "missing" information would have had on the "reasonableness" of Allstate's denial of coverage.

Allstate has relied upon the police report, the medical examiner's report of autopsy and a medical review solicited from Drs. Timothy O'Conner, Charles W. Pfister and Nathaniel McFarland of Underwriting Medical Actuarial Consultants. The Court concludes Plaintiff has failed to present any competent evidence disputing Allstate's assertion that it had a good faith belief it had a justifiable basis for denying coverage. The Court does not find Allstate's "good faith" claim to be "suspect". Capstick, 998 F.2d at 815.

In summary, the Court concludes there is a genuine issue of material fact regarding the cause(s) of Mr. Young's death and therefore, Defendant's Motion for Summary Judgment on Plaintiff's

first claim is hereby DENIED; the Court further concludes Plaintiff has failed to provide evidence sufficient to support a claim of bad faith and therefore, Defendant's Motion for Summary Judgment on Plaintiff's second claim is hereby GRANTED.

IT IS SO ORDERED THIS 15th DAY OF SEPTEMBER, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE _____

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

FILED

SEP 16 1993

E-TECH, INC., an Oklahoma
corporation,

Plaintiff,

v.

ABCO INDUSTRIES, INC., a Texas
corporation,

Defendant.

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

Case No. 93-C-377B

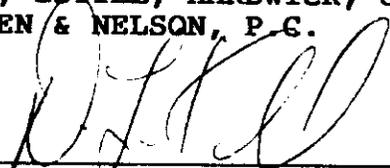
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties in the above-styled and numbered action hereby dismiss with prejudice their respective claims which are asserted or have attempted to be asserted by way of the Complaint, Counterclaims or any other pleadings filed in this matter. Further, each party shall bear its respective costs and attorney fees.

DATED this 16th day of September, 1993.

Respectfully submitted,

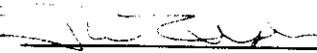
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

By: 

Donald L. Kahl, OBA #4855
John A. Menchaca, OBA #15310
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Tulsa, Oklahoma 74172
(918) 588-2700

ATTORNEYS FOR PLAINTIFF
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ALBRIGHT & RUSHER

By: 

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15 West Sixth Street
Tulsa, Oklahoma 74119
(918) 583-5800

and

CANTERBURY, STUBER, PRATT,
ELDER & GOOCH
Donald O. Pratt
Texas Bar #16239000
Paul H. Sanderford
Texas Bar #17578500
5550 LBJ Freeway, Suite 800
Dallas, Texas 75240
(214) 239-7493

ATTORNEYS FOR DEFENDANT
ABCO INDUSTRIES, INC.

§626(d)(2), plaintiff must file a charge with the EEOC or the OHRC within three hundred days of the incident alleged. It is undisputed that Plaintiffs did not comply with these two statutory prerequisites. For purposes of 29 U.S.C. §626(d)(2) the three hundred day period began to run when the alleged constructive discharge took place in each case. See, Wall v. National Broadcasting Co., Inc., 768 F.Supp. 470 at 474 (S.D.N.Y. 1991) (quoting Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990), cert. denied, _____ U.S. _____, 111 S.Ct. 2916 (1991) and Miller V. International Tel. & Tel. Corp., 755 F.2d 20, 24 (2d Cir.), cert. denied, 474 U.S. 851 (1985)). Thus, the Plaintiffs' federal claims are time-barred unless the doctrine of equitable tolling can be applied. But the case law is clear that the doctrine cannot be applied unless Defendant has fraudulently concealed Plaintiff's cause of action. As stated in Wall, citing Baldwin County Welcome Center v. Brown, 104 S.Ct. 1723, 1725 (1984) (per curiam), equitable tolling is available in the following circumstances, "(1) if a claimant has received inadequate notice [of the employer's decision to discharge him]; (2) if a motion for appointment of counsel is pending and equity would justify tolling the statutory period until a decision on the motion; (3) if the court has led the plaintiff to believe that everything required has been done; or (4) if affirmative misconduct on the part of defendant lulled the plaintiff into inaction." Wall at 475. The fourth circumstance is alleged by Plaintiffs. Here, Plaintiffs allege that the alleged constructive discharge itself; that is, the

demotion and transfer, constituted the affirmative misconduct required to toll the statutory period of limitations. The Court finds that it does not. It is the prevailing view that the doctrine of equitable tolling should be construed narrowly and applied sparingly lest the exception replace the rule. As the Court said in Wall, a plaintiff cannot justify his inaction on the basis that the employer failed to notify him that the action it was taking amounted to discrimination. In Wall, Plaintiff sought protection of the doctrine because Plaintiff believed he was terminated due to a "downsizing" of his department. He was not told that he was being replaced by a younger individual. "In other words, Plaintiff evidently maintains that the filing period for any claim of a discriminatory firing should be tolled unless an employer actually informs the employee of its unlawful act." Id. The case law on the issue makes it clear that equity will not stretch that far. Rather, a plaintiff must show that because of defendant's affirmative misconduct, he could not have been aware of the discriminatory act even by exercising reasonable diligence. The Court finds that Plaintiffs have not met their burden on that issue; hence their federal claim is time-barred and must be dismissed.

II. State Law Claims

Even if the Court were to retain supplemental jurisdiction over the remaining state claims for intentional infliction of emotional distress and violation of Oklahoma public policy, these actions are similarly time-barred by application of the relevant

limitation of actions statute, 12 O.S. §95. See Dupree v. United Parcel Service, Inc., 956 F.2d 219, 221 (10th Cir.) (a Burk cause of action is governed by the statute of limitations applicable to torts in Oklahoma). And, the Court finds that, under the facts alleged by Plaintiffs, the alleged constructive discharges did not amount to fraudulent concealment on the part of Defendant so as to invoke the equitable tolling doctrine. Therefore, the state law claims must also be dismissed.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment is GRANTED; Defendant's Motion to Sever and Motion in Limine are thereby rendered MOOT. Judgment shall be entered in favor of Defendant. This case is dismissed.

Dated this 15th day of September, 1993.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 9-15-93

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

FILED

SEP 14 1993

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

WILTEL, INC., a Delaware corporation,)
)
 Plaintiff,)
)
 v.)
)
 AMERICAN TELEPHONE AND TELEGRAPH)
 COMPANY, a New York corporation, and)
 AT&T BUSINESS COMMUNICATIONS)
 SERVICES, an unincorporated business)
 unit,)
)
 Defendants.)

Case No. 93-C-0195E
Chief Judge Ellison

**ORDER TRANSFERRING CASE TO THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

During the hearing held on August 30th 1993, the Court presented various case management proposals it was considering and requested the parties to submit a written statement of position. It is WilTel's position that all of WilTel's tort claims -- including tortious interference with existing and prospective contractual relations, defamation, libel, unfair competition, and violations of the Deceptive Trade Practices Act and the Lanham Act -- should be tried in one forum at one time, and that, if this Court does not wish to treat the claims accordingly, then a transfer of the entire case to the District of Columbia is preferable to splitting or limiting those claims in this forum. It is AT&T's position that the entire case should be transferred to the United States District Court for the District of Columbia. The Court finds that the entire case should be transferred to the District of Columbia. The Court makes no finding or determination on the issues of which case is "first-filed" or whether WilTel's

claims are permissive or compulsory counterclaims to AT&T's claims.

IT IS THEREFORE ORDERED that case number 93-C-0195-E currently pending in the United States District Court for the Northern District of Oklahoma should be, and hereby is, transferred to the United States District Court for the District of Columbia.

IT IS FURTHER ORDERED that:

1. This Court defers to the transferee Court for ruling on any outstanding motions and appeals.

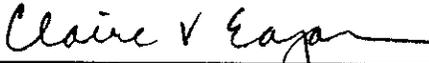
2. Responses or replies to any outstanding motions should be filed after the case is docketed in the transferee Court, or at such time as the transferee Court orders.

DATED this 13 day of September, 1993.

S/ JAMES O. ELLISON

JAMES O. ELLISON
CHIEF UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:



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Golden & Nelson, P.C.
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JAMES L. KINCAID, OBA #5021
ATTORNEY FOR DEFENDANTS
Crowe & Dunlevy
321 S. Boston
Suite 500
Tulsa, OK 74103-3313

SEP 15 1993

DATE

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

ATLANTIC RICHFIELD COMPANY,)
)
Plaintiff,)
)
v.)
)
AMERICAN AIRLINES, INC., ET AL.)
)
Defendants.)

Consolidated Case Nos.

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

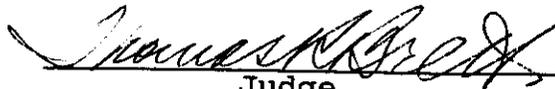
FILED

SEP 15 1993

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

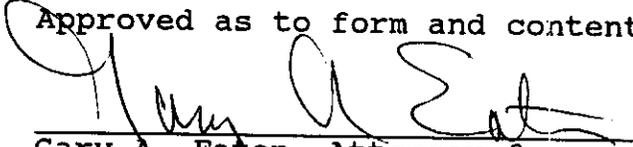
ORDER FOR DISMISSAL WITHOUT PREJUDICE

Now on this 15th day of Sept. July, 1993, upon presentation of the Stipulation for Dismissal Without Prejudice executed by Plaintiff Atlantic Richfield Company and Defendant Steve Magers (named in the Third Consolidated Amended Complaint as "Steve Majors"), the Court finds and adjudges that all claims of Atlantic Richfield Company set forth herein against "Steve Majors" should be and are hereby dismissed without prejudice to any future action upon such claims and that each of these parties shall bear and be responsible for its own costs and expenses incurred herein.

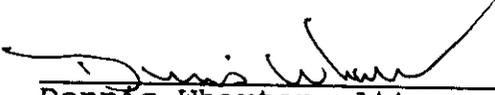


Judge

Approved as to form and content:



Gary A. Eaton, Attorney for
Atlantic Richfield Company



Dennis Wharton, Attorney for
Steve Magers

SECRET
SEP 15 1993
DATE FILED

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

SEP 14 1993
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

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

Plaintiff,)

vs.)

Case No. 93-C-473B

WILLIAM W. TIBBETTS, JR., an)
individual, WILLIAM W.)

TIBBETTS, III, an individual,)

PAUL RITCHIE, an individual,)

DEBBIE H. RITCHIE, an individual,)

RICHARD A. CAILLOUETTE, an)

individual, and JAMES LISTON,)

an individual,)

Defendants.)

JUDGMENT

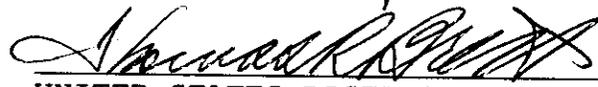
This matter comes on for hearing this 14th day
of Sept upon Application and Affidavit of the
plaintiff duly made for judgment by default. It appears
that Paul Ritchie, Debbie H. Ritchie, and Richard A.
Caillouette, defendants herein (collectively, the
"Defendants"), are in default and that the Clerk of the
United States District Court for the Northern District of
Oklahoma has previously searched the records and entered the
default of the Defendants. It further appears upon
plaintiff's Affidavit that Defendants are indebted jointly
and severally to plaintiff in the sum of \$121,916.71 for
failure to pay in accordance with certain guarantees
executed by Defendants in favor of plaintiff, together with

SPY Howard Howard 1/6 77

interest and plaintiff's expenses incurred in collection of said indebtedness, that default has been entered against Defendants for failure to appear, and that Defendants are not infants or incompetent persons, and not in the military service of the United States. The Court having heard the argument of counsel and being fully advised, finds that judgment should be entered for the plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff recover from Defendants, jointly and severally, the sum of \$121,916.71, together with prejudgment interest in the sum of \$12,540.⁸² reasonable attorneys' fees in the sum of \$46,101.⁶⁹, costs in the sum of \$2,324.⁴⁸ and postjudgment interest at the rate of 3.43%, for all of which let execution issue.

Judgment rendered this 14th day of Sept., 1998.


UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE SEP 15 1993

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

F I L E D

CLIFTON SILVER and)
INTERNATIONAL BROTHERHOOD OF)
ELECTRICAL WORKERS, LOCAL)
UNION 1002, unincorporated)
labor organization,)

Plaintiff,)

vs.)

PUBLIC SERVICE COMPANY OF)
OKLAHOMA,)

Defendant.)

SEP 14 1993

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

Case No. 92-C-1072-B ✓

O R D E R

Now before the court for its consideration is Plaintiff Clifton Silver's Motion for Summary Judgment (Docket #5) filed April 21, 1993, and Defendant Public Service Company of Oklahoma's Cross-Motion for Summary Judgment (Docket #8) filed May 10, 1993.

Undisputed Facts

The Plaintiff, Clifton Silver (Silver), a union employee, was employed by the Defendant, Public Service Company (PSO), for 27 years as a Line Man and Trouble Man. Silver was placed on an 18-month probation after a meeting with PSO supervisors on July 12, 1990.¹ On May 28, 1991, Silver had voluntarily entered the

¹ Silver had a history of disciplinary problems which resulted in the probation. A list of Silver's actions includes:

- stopping by his home during working hours for personal reasons and then not returning to work;
- failing to give adequate notice to supervisors when unable to cover shift;
- using a PSO vehicle for personal reasons;

employee assistance program offered by PSO through St. John's Medical Center in Tulsa, Oklahoma. Silver was successfully discharged from the program on June 28, 1991.

After the discharge, Silver signed a "return to work agreement." Silver's employment with PSO was terminated after receiving a letter dated October 8, 1991 which read:

"On October 4, 1991 your employment with PSO is terminated. This action resulted from your failure to comply with the terms of your 'Return to Work Agreement' dated June 28, 1991."

Upon receiving the termination, Silver and the International Brotherhood of Electrical Workers (the Union) filed a grievance requesting that he be returned to work. PSO refused to reinstate Silver, and an arbitration hearing was held before a neutral arbitrator on April 24, 1992. On June 19, 1992, the arbitrator rendered his decision in writing denying Silver's grievance in its entirety.

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.

-
- being unable to respond to dispatch;
 - being involved in two domestic conflicts on PSO property.

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 moving party 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 Conclusion

Plaintiff, in moving for summary judgment, essentially contends that the arbitrator's decision is unenforceable because it is beyond the scope of the issues submitted to him. This argument is based upon the termination letter where it states, "[t]his action resulted from your failure to comply with the terms of your 'Return to Work Agreement,' dated June 28, 1991." Plaintiff contends that the sole reason for Silver's termination is contained in this letter; therefore, plaintiff argues, the only issue before the arbitrator is framed by the termination letter and the return to work agreement. As a result, Silver asserts that he and the Union spent the better part of the arbitration hearing arguing that the return to work agreement was obtained under duress and was therefore unenforceable. The arbitrator agreed with the plaintiff finding that the Return to Work Agreement was unenforceable² but still denied Silver's grievance because PSO had just cause to terminate him.

It is worthy to note that federal courts are severely

² The arbitrator nullified the Return to Work Agreement at the hearing stating:

"Under these circumstances, I find that the 'Return to Work' Agreement of June 28, 1991 is unenforceable because it was imposed without cause and signed under duress and without any Union representation or counsel. . ."

restricted in the function of judicial review of an arbitrator's decision due to statute.³ "While a court is empowered to determine whether an arbitrator's award exceeded the limits of his contractual authority, it may not review the merits of an arbitration award." Timken Co. v. Local Union No. 1123 United Steelworkers of America, 482 F.2d 1012, 1014 (1973).

The boundary of an arbitrator "is confined to interpretation and application of the Collective Bargaining Agreement . . . his award is legitimate only so long as it draws its essence from the

³ The pertinent statute reads:

"In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators. 9 U.S.C. §10

Collective Bargaining Agreement." United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596; 80 S.Ct. 1358 (1960). It is the duty of courts to ascertain whether the arbitrator's award is derived in some rational way from the Collective Bargaining Agreement. Timken Company, 482 F.2d at 1015 (6th Cir. 1973).

The Collective Bargaining Agreement (the Agreement) between PSO and the Union clearly contemplates an arbitrator passing upon whether a particular termination was for just cause. The Agreement provides for binding arbitration of certain disputes. Article II, Section 7. Article III of the Agreement specifically reserves to PSO the right to terminate an employee's employment for "just cause." Because "just cause" is not defined in the Agreement, the arbitrator's role then is to determine whether PSO had just cause.

The arbitration hearing also establishes that the actual issue before the arbitrator was not limited by the letter of termination nor the return to work agreement. The issue was discussed at the beginning of the hearing and was even set forth by the counsel for the plaintiff. A discussion of the issue at the hearing is as follows:

The Arbitrator: . . . Have you agreed upon an issue?

Mr. Birmingham: I think the issue is framed by the grievance.

Mr. Mattson: Yeah.

Mr. Birmingham: Grievance basically states that the Company discharge was in violation of that portion of the

collective bargaining agreement which calls that only termination and demotion and et cetera can be done for just cause and the Company is in alleged violation of that provision . . . (emphasis added).

The grievance form identifies the grievance as follows:

"Violation of Article III, Section 3, paragraph (A), 6. Employee terminated without just cause." (emphasis added).

The Arbitrator's award also identified the issue as:

"Was the Grievant terminated for 'just cause,' and if not, what is the appropriate remedy?" (emphasis added)

There is no indication that the issue of whether PSO had just cause to terminate Silver was limited by the return to work agreement. Again, the grievance filed by Silver asserted that he was terminated without just cause. The grievance does not indicate that it was limited by the return to work agreement. Additionally, the arbitrator noted in his decision the issue was determining whether the Grievant was "terminated for just cause."

In making his determination, the arbitrator reviewed the Return to Work Agreement and nullified it because of the circumstances surrounding the signing of it. However, the nullification of the Return to Work Agreement did not end the arbitration hearing. As noted in the transcript of the arbitration hearing, the ultimate issue was framed by the grievance which claims that the PSO terminated the grievant without just cause. The arbitrator then reviewed the terms of Silver's 18-month

probation and concluded that PSO had just cause to terminate Silver. This is within the arbitrator's responsibility as defined by Article II, Section 7 of the Collective Bargaining Agreement.

For the above stated reasons the Court therefore concludes that the plaintiff's motion for summary judgement should be and is hereby DENIED, and the defendant's motion should be and is hereby GRANTED.

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


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE SEP 14 1993

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

FILED

SEP 13 1993

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

ALBERT J. WATKINS,)
)
Plaintiff(s),)
)
v.)
)
UNITED STATES CIRCUIT JUDGE)
JAMES K. LOGAN, JUDGE JOHN P.)
MOORE, and JUDGE WADE BRORBY,)
)
Defendant(s).)

93-C-574-B

ORDER

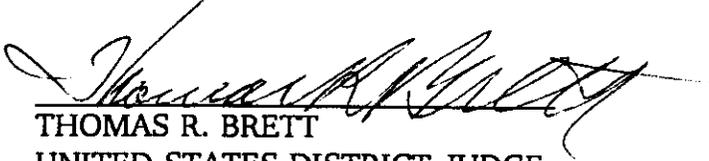
Now before the Court is a Motion To Dismiss (*docket #2*)¹ by Defendants James K. Logan, John P. Moore and Wade Brorby. The motion was filed on June 29, 1993. As of September 10, 1993, Plaintiff has yet to respond to the motion.

According to Local Rule 15(A) of the Northern District of Oklahoma, Plaintiff was required to file his response to the Defendants' Motion To Dismiss by July 14, 1993. Since he did not, he confesses the motion. Therefore, Defendants' Motion To Dismiss (*docket #2*) is **GRANTED** without prejudice. As a result, the September 16, 1993 scheduling conference is stricken.

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

3

SO ORDERED THIS 10th day of Sept, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

WILSON LAUFER and SUZANNE L.)
LAUFER, Husband and Wife,)
)
Plaintiffs,)
)
vs.)
)
ELECTRIC MOBILITY CORPORATION,)
Defendant.)

CASE NO: 92-C-600-B

F I L E D

SEP 1 8 1993

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

ORDER OF DISMISSAL

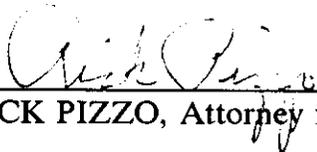
This matter comes on for hearing on the Joint Stipulation of the Plaintiff, Suzanne L. Laufer, Individually, and Suzanne L. Laufer, as Executrix of the Estate of Wilson Laufer, Deceased, and Defendant, Electric Mobility Corporation, for a dismissal with prejudice of the above captioned cause against Electric Mobility Corporation. The Court, being fully advised, having reviewed the Stipulation, finds that the parties herein have entered into a compromise settlement covering all claims involved in this action, which this Court hereby approves, and that the above entitled cause should be dismissed with prejudice to the filing of a future action as to Electric Mobility Corporation pursuant to said Stipulation.

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

Dated this 11 day of ^{Sept}~~August~~, 1993.

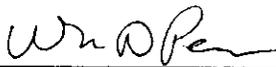
/s/ JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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



RICK PIZZO, Attorney for Plaintiff

RHODES, HIERONYMUS, JONES, TUCKER
and GABLE

BY 

WILLIAM D. PERRINE
15 W. 6th Street, Suite 2800
Tulsa, OK 74119-5430
(918) 582-1173
Attorneys for Defendant

ENTERED ON DOCKET

DATE 9-14-93

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

BRENDA J. HOUSTON,
Plaintiff,

vs.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

No. 91-C-350-E

FILED
SEP 14 1993

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

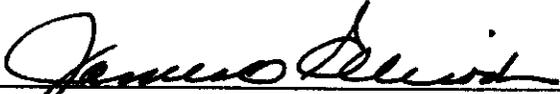
ORDER

The Court has before it for consideration Defendant's objections to the Findings and Recommendations of the Magistrate filed on October 20, 1992 in which it is recommended that Plaintiff's claim for benefits under the Social Security Act be denied and that judgment be entered for the Defendant.

After careful consideration of the matters presented to it, the Court has concluded that the Findings and Recommendations of the Magistrate should be and hereby are affirmed.

IT IS THEREFORE ORDERED that Plaintiff is not entitled to disability benefits under the Social Security Act and that judgment be and hereby is entered for the Defendant.

ORDERED this 14th day of September, 1993.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

DATE 9-14-93

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

FILED

SEP 14 1993

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

BROASTER FOOD SYSTEMS, INC.,)
An Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
BROASTER FOOD SYSTEMS OF THE)
SOUTH, INC., a foreign)
corporation,)
)
Defendant.)

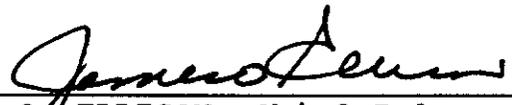
No. 93-C-302-E

ORDER OF DISMISSAL

This case involves a verbal agreement to purchase a Louisiana/Mississippi distributorship. The agreement was later reduced to writing. A dispute arose between the parties. Defendant filed suit in state court in Louisiana on March 25, 1993; the case was removed to federal court by Plaintiff on May 10, 1993. Plaintiff filed suit in this Court on April 16, 1993.

In view of this record, the Court elects to dismiss the case, thus granting Defendant's Motion to Dismiss or Stay (docket #7).

ORDERED this 14th day of September, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 9-14-93

FILED

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

SEP 14 1993

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

ROLEX WATCH U.S.A., INC.,)
)
Plaintiff,)
)
vs.)
)
MIDWEST GEM COMPANY, d/b/a)
Denbo Jewelers, an)
Oklahoma corporation, and)
JOHN O. DENBO,)
)
Defendants.)

Case No. 93-C-700-E

DEFAULT JUDGMENT

The defendants, Midwest Gem Company and John O. Denbo, having failed to plead or otherwise defend in this action, their defaults having been duly entered by the Court Clerk upon application of the plaintiff and upon the Affidavit of counsel for plaintiff that defendants are indebted to plaintiff in the sum of \$203,755.11 plus interest thereon as allowed by law, defendants having been defaulted for failure to appear and it appearing that the defendants are not an infant or incompetent person and are not in the military service of the United States.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff, Rolex Watch U.S.A., Inc., have and recover judgment against the defendants Midwest Gem Company and John O. Denbo in the amount of \$203,755.11, together with interest thereon as provided by law.

Dated this 14 day of September, 1993.

CLERK OF THE UNITED STATES
DISTRICT COURT

By S/ JAMES O. ELLISON
~~Court Clerk~~ *James O. Ellison, Judge*
United States District Court
Northern District of Oklahoma

Boco:Rolex_JE

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

SECURITY NATIONAL INSURANCE)
COMPANY,)

Plaintiff,)

vs.)

Case No. 92-C-881-B ✓

THOMAS G. CHRISTOPOULOS and)
JUDITH A. CHRISTOPOULOS, husband)
and wife, d/b/a CHRISTOPOULOS)
CONSTRUCTION and d/b/a)
CHRISTOPOULOS HOMES; and)
DAVID F. SLATER AND SANDRA L.)
SLATER, husband and wife,)

Defendants.)

FILED

SEP 13 1993

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

ORDER

Defendants, Thomas G. Christopoulos and Judith A. Christopoulos, d/b/a Christopoulos Construction and d/b/a Christopoulos Homes (hereinafter "Christopoulos"), and Plaintiff, Security National Insurance Company (hereinafter "Security") filed respective motions for summary judgment pursuant to Fed.R. Civ. P. 56. Defendant Christopoulos' Motion for Partial Summary Judgment (Docket #25) seeks a ruling on the issue of insurance coverage. Plaintiff filed a combined Motion for Summary Judgment and Response to Defendants Motion for Partial Summary Judgment (Docket #29). Both parties seek a declaratory judgment as to whether the insurance policy of general liability issued by Security on behalf of Christopoulos provides coverage for an underlying lawsuit against Christopoulos. Also, the Defendants, David F. Slater and Sandra L. Slater ("Slaters"), have filed a Motion for Summary Judgment concerning their Counterclaim of alleged bad faith against

Security which has been stayed pending resolution of the coverage dispute between Security and Christopoulos.

The following facts are undisputed and are established by competent evidence in the record pursuant to Fed.R.Civ.P. 56:

1. A commercial general liability insurance policy No. GL 738 28 79 was issued by Security to Christopoulos for the period of July 1, 1988 to July 1, 1989, with coverage under the policy up to Three Hundred Thousand Dollars (\$300,000.00) per occurrence. (Deft. Christopoulos Ex. 1).

2. Pertinent provisions of the subject insurance policy state:

SECTION I - COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement.

(a) We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS - COVERAGES A AND B. This insurance applies only to "bodily injury" and "property damage" which occurs during the policy period. The "bodily injury" or "property damage" must be caused by an "occurrence." . . .

* * *

(2) We may investigate and settle any claim or suit at our discretion; . . .

(Ex. 1 to Christopoulos Motion for Partial Summary Judgment, page 1 of 9).

* * *

SECTION V -- DEFINITIONS

* * *

"Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Ex. 1 to Christopoulos Motion for Partial Summary Judgment, at page 9).

* * *

2. Exclusions.

This insurance does not apply to:

- a. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. . . .
- b. "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. . . .
 - (1) Assumed in a contract or agreement that is an "insured contract;" (not applicable herein); or
 - (2) That the insured would have in the absence of the contract or agreement." (Ex. 1 to Christopoulos Motion for Partial Summary Judgment, page 1 of 9).

* * *

j. "Property damage" to:

* * *

- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf or performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or

replaced because "your work" was
incorrectly performed on it.
(Deft. Christopoulos Ex. 1, p. 2 of 9).

* * *

n. Damages claimed for any loss, cost or
expense incurred by you or others for the
loss of use, withdrawal, recall,
inspection, repair, replacement,
adjustment, removal or disposal of:

- (1) "Your product;"
- (2) "Your work," or
- (3) "Impaired property;"

if such product, work, or property is
withdrawn or recalled from the market or
from use by any person or organization
because of a known or suspected defect,
deficiency, inadequacy or dangerous
condition in it. (Deft. Christopoulos
Ex. 1, p. 3 of 9).

3. On September 2, 1988, Christopoulos entered into a
contract to build a home for the Slaters. (Deft. Christopoulos Ex.
2). The building of the home was substantially complete around
March 1989, and the Slaters occupied the home in April 1989.

4. Christopoulos received a letter dated April 17, 1991, from
the Slaters' attorney, stating that the latter had been retained to
resolve a dispute concerning the construction of the Slater home.
(Deft. Christopoulos Ex. 4). In this letter Slaters' attorney
enclosed a copy of a proposed petition to be filed in the Oklahoma
state court if the dispute could not be resolved short of legal
action. The petition was filed on June 3, 1991, in the Oklahoma
state court but the Slaters' counsel withheld having summons issued
until July 30, 1992, fourteen months later, because the insurance

company was verifying the Slaters' damages and conducting some settlement discussions. (Affidavit Kevin Schoepel, Deft. Christopoulos Ex. 8).

5. The proposed lawsuit of the Slaters against the Christopouloses arose from alleged faulty heating and air conditioning as well as numerous other alleged construction deficiencies and breaches of the written home construction agreement. The proposed state court petition arising from the written home construction contract alleged the following four causes of action: (1) breach of warranty; (2) breach of contract; (3) deceit and misrepresentation; and (4) negligent and/or intentional infliction of emotional distress. The Slaters' claim against the Christopouloses was for actual damages on the first and second causes of action for \$161,842.82, and for in excess of \$10,000.00 actual and punitive damages on the third and fourth causes of action.

6. By May 1, 1991, Christopoulos provided Security with a copy of the April 17, 1991, letter from the Slaters' counsel and with a copy of the proposed state court petition from the Slaters' lawyer in which he stated the petition would be filed within ten days.

7. On May 1, 1991, Security assigned the claim to adjusters Lindsey & Newsom of Tulsa for a full investigation. Lindsey & Newsom assigned the matter to adjuster Chuck Lewis of their office. (Deft. Christopoulos Ex. 5).

8. Security noted in its file on June 3, 1991, that a

reservation of rights letter was to be sent to Christopoulos, but none was sent at that time.

9. On December 31, 1991, attorney Schoepfel for the Slaters sent a letter to Chuck Lewis of Lindsey & Newsom (Deft. Christopoulos Ex. 7) stating it is difficult to determine the Slaters' alleged damage. Attorney Schoepfel acknowledged in this letter that the subject home had been sold by the Slaters to Public Service Company, and Public Service Company in the purchase of the home had paid the Slaters a substantial sum of money toward their alleged damages due to deficiencies in the heating and air conditioning system. Attorney Schoepfel was asserting that the insured, Christopoulos, was jointly and severally liable to the Slaters regarding the home building deficiencies claim. The settlement with Public Service Company of Oklahoma had been placed under seal. (Deft. Christopoulos Ex. 7).

10. On June 26, 1992, a private mediation hearing took place between the Slaters, their attorney, and representatives of Security, Chuck Lewis and Laurie Hawk. Ms. Hawk is an employee claims adjuster for Security who has a law degree. The Christopouloses were not present at the mediation hearing because Security determined it was not necessary that they be present.¹ At the mediation hearing attorney Schoepfel first presented documentation supporting the Slaters' alleged damage claim. (Plff. -

¹ Evidence pertaining to the substance of the mediation hearing is inadmissible (Fed.R.Evid. 408), but the fact that mediation occurred is relevant.

Security's Ex. B to Motion for Summary Judgment filed June 15, 1993).

11. On June 29, 1992, Security sent its insured, Christopoulos, a reservation of rights letter asserting no coverage and that the Slaters' claim exceeded the policy limits (Deft. Christopoulos Exs. 14 and 15).

12. On July 7, 1992, adjuster Lewis reflected in his file: "Conferred Lauri Hawk....Advised her we feel the company has waived any rights to deny coverage by not sending a reservation of rights for a year following the claim being filed." (Deft. Christopoulos Ex. 10).

In adjuster Lewis' July 14, 1992 letter to Security, he stated "We have examined our file and feel the reservation of rights letter, even though issued much later than usual, should be valid if coverage is denied. Mr. Christopoulos has maintained, since the outset, there is no exposure on his part. We also do not see where Mr. Christopoulos' position was tainted by the delay...." (Plff. Security's Ex. B to Motion for Summary Judgment filed June 15, 1993).

On July 10, 1992, the insured, Tom Christopoulos, telephoned Laurie Hawk of Security and stated, "He does not feel we should settle - nothing wrong with house - they never called him to complain about problems with house, thinks they have mental problems - kid tried to commit suicide - Mr. Slater lost his job, etc." (Deft. Christopoulos Ex. 13, p. 14).

13. On July 30, 1992, the Slaters' attorney caused the

Christopouloses to be served with a summons regarding the state court action against them that had been filed fourteen months earlier.

On July 20, 1992, Security's Laurie Hawk advised she intended to contact attorney Niemeyer of Oklahoma City to defend the Slater action, pursuant to the reservation of rights of June 29, 1992, as soon as the summons was served and received. (Deft. Christopoulos Ex. 13, p. 16).

14. In mid-July, after the receipt of the summons that had been served upon the Christopouloses, Security sent the Slater state court action to attorney John Niemeyer pursuant to the prior reservation of rights letter, and directed attorney Beeler of Oklahoma City to commence this subject declaratory judgment action.

15. The record contains no direct evidence of any specific prejudice experienced by the insured, Christopoulos, resulting from the insurer's conduct previous to the service of the state court summons upon the insured on July 30, 1992.

THE SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time

for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

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

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

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

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

evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

LEGAL ANALYSIS AND CONCLUSION

The Oklahoma state court petition filed by the Slaters against Christopoulos is captioned "Petition for Breach of Warranty, Contract, Deceit and Misrepresentation, and Intentional Infliction of Emotional Distress." The first cause of action therein alleges that the Slaters and Christopoulos entered into a written contract on September 2, 1988, in which Christopoulos was to build a single family residence for the Slaters. It is alleged the construction of said residence was substantially completed on or about March 9, 1989. It is alleged Christopoulos breached the implied warranty of fitness and suitability because of many deficiencies and defects that existed in the construction of the residence. Therein the Slaters seek \$161,842.82. In the second cause of action, the Slaters allege Christopoulos breached the written home construction contract by providing poor workmanship and materials, again seeking damage in the amount of \$161,842.82. In the third cause of action for deceit and misrepresentation, the Slaters allege that Christopoulos intentionally deceived and misrepresented the facts concerning the quality of construction and materials of the residence and seeks in excess of \$10,000.00 actual damages and \$10,000.00 punitive damages therefor. In the final alleged cause of action, the Slaters allege in the performance of the written contract Christopoulos intentionally inflicted emotional distress on the Slaters and knew their actions would result in same. In the

alternative, the Slaters allege the Christopouloses' grossly negligent and reckless acts and omissions where of such a nature as to infer the intent to cause emotional distress suffered by the Slaters. The Slaters' emotional distress claim seeks in excess of \$10,000.00 actual damages and in excess of \$10,000.00 punitive damages. (Deft. Christopoulos Ex. 6).

A reading of the language of the insurance policy between Security and the Christopoulos clearly reveals that the insurance policy (Deft. Christopoulos Ex. 1) does not provide coverage to the Slater claims for two reasons; first, the claims do not arise from an accident. U.S.F. & G. v. Briscoe, 239 P.2d 754, 756 (Okla. 1952); Republic National Life Ins. Co. v. Johnson, 317 P.2d 258 (Okla. 1957); Massachusetts Bay Ins. Co. v. Gordon, 708 F.Supp. 1232, 1234 (W.D.Okla. 1989); and Leggett v. Home Indem. Co., 461 F. 2d 257 (10th Cir. 1972). Secondly, because the Plaintiffs' claim arises out of the alleged breach of the written home construction contract between the Slaters and Christopoulos. (Deft. Christopoulos Ex. 2). Dodson v. St. Paul Ins. Co., 812 P.2d 372, 377, at n. 14 (Okla. 1991) (quoting Henderson, Insurance Protection for Products Liability and Completed Operations - What Every Lawyer Should Know, 50 Neb.L.Rev. 415, 441 (1971)).

The Christopouloses assert that under the facts herein Security is estopped to deny coverage concerning the Slaters' claims. The Christopouloses rely upon Braun v. Annesley, 936 F.2d 1105, 1110 (10th Cir. 1991), for the proposition that "an insurer may by its conduct be estopped from denying that its policy

provides coverage for a risk..." Braun at page 1110 also states, "The doctrine of estoppel, however, cannot be invoked to broaden the coverage of an insurance policy to bring within its protection risks that are not included under the terms of the policy." (Citing Western Ins. Co. v. Cimarron Pipeline Constr., Inc., 748 F.2d 1397, 1399 (10th Cir. 1984); Lester v. Sparks, 583 P.2d 1097, 1100 (Okla. 1978); and Security Ins. Co. of New Haven v. Greer, 437 P.2d 243, 246 (Okla. 1968)). An exception to the rule is "when an insurer assumes the defense of an action knowing the grounds which permit it to deny coverage, it may be estopped from subsequently raising the defense of noncoverage." Braun at 1110.

The facts in Braun are distinguishable from the instant case. In Braun the insurer defended its insured through trial and an adverse verdict, and stated at trial that coverage was "unclear," *Id.* at 1110, and provided no reservation of rights letter. The Tenth Circuit in Braun found estoppel stating that the Oklahoma Supreme Court would not ". . . allow an insurer to defend an individual who might be covered and then permit the insurer to deny coverage after the individual is found liable." *Id.* at 1111. In the instant action, while the petition of the Slaters was filed in the state court in June of 1991, service on Christopoulos was intentionally withheld for a period of fourteen months while the Slaters' attorney assembled the facts and documentation concerning their claim and attempted to carry on discussions with Security. In the interim, Public Service Company of Oklahoma acquired the subject Slater residence and at that time settled with the Slaters

relative to their various claims for tangible and intangible damages from the alleged defective heating and air conditioning system. No attorney was employed by Security to appear in and defend the Slater lawsuit until after service was obtained on its insured and after the reservation of rights and excess letters had been sent Christopoulos.

The case of Gay & Taylor, Inc. v. St. Paul Fire & Marine Ins. Co., 550 F.Supp. 710 (W.D. Okl. 1981), is also distinguishable from the instant case. In Gay & Taylor the insurer assumed the defense of the action and continued the defense without a reservation of rights until the eve of trial before announcing that liability under the insurance policy would be denied.

A presumption of prejudice was found in Braun and Gay & Taylor because the insurance carrier, without reserving its rights, assumed the defense through verdict or to the eve of trial before raising a coverage question. Herein, no court appearances were made on behalf of the insured, Christopoulos, or an active defense of the Slater lawsuit undertaken until after the reservation of rights and excess letter had been served on Christopoulos, and until after the Christopouloses had been served with summons. In June 1992, the Slaters, through their attorney, furnished the first documentation in support of their alleged claims and it was contemporaneous with this that Security provided the reservation of rights and excess letter to Christopoulos. In July 1992, Christopoulos contacted Security and advised Security to pay nothing to the Slaters because the Slaters' claim was unfounded.

The latter part of July 1992, the Christopouloses were served with summons and thereafter Security undertook active defense of the Slater lawsuit under the reservation of rights previously furnished the Christopouloses.

The Christopouloses cite the case of Safeco Insurance Co. v. Ellinghouse, 725 P.2d 217, 221 (Mont. 1986), setting forth the three reasons in support of the rule of estoppel and the presumption of prejudice. They are: (1) the insured was deprived of his right to retain private counsel; (2) the insured was deprived of his right to control the investigation, possible settlement and conduct of the lawsuit; and (3) there was a potential conflict of interest on the part of the defense attorney when he must defend the insured and simultaneously formulate a defense against the insured for noncoverage. The facts do not demonstrate that the insured, Christopoulos, was deprived of his right to control the investigation, possible settlement, or conduct of the lawsuit. No appearance was made by Security in the lawsuit until after the Christopouloses had been furnished with a reservation of rights and excess letter, at which time the Christopouloses had a right to conduct and control the defense through their selected lawyer, if they chose.

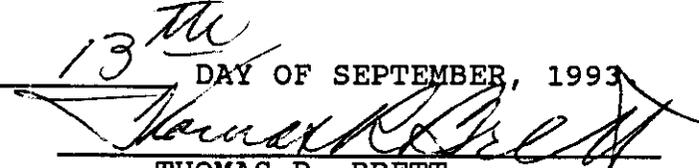
The record contains no direct evidence of prejudice to the Christopouloses and the Court concludes no presumption of prejudice should be inferred from the facts and circumstances herein. Absent specific evidence of prejudice to the insured, no factual issue remains regarding the alleged estoppel. The Court, therefore,

concludes the subject Security insurance policy does not provide coverage to the Slater v. Christopoulos state court case and Security has no duty to defend therein. Further, for the reasons stated herein, the insured, Christopoulos, is not entitled to recover on his alleged bad faith claim against Security and Security is entitled to summary judgment thereon. McCorkle v. Great Atlantic Ins. Co., 637 P.2d 583 (Okla. 1981), and Conti v. Republic Underwriters Ins. Co., 782 P.2d 1357, 1360 (Okla. 1989). Security's motion for summary judgment pursuant to Fed.R.Civ.P. 56 on its declaratory judgment claim is hereby sustained. Additionally, Security is hereby granted summary judgment against the Slaters on their counterclaim of breach of duty to mediate in good faith and a violation of the Unfair Claims Settlement Practice Act.² See, e.g. Niemeyer v. U.S.F. & G. Co., 789 P.2d 1318 (Okla. 1990), and Walker v. Chouteau Lime Co., Inc., 64 O.B.A.J. 971, 972 (decided March 30, 1993); see also, Correction Order at 64 O.B.A.J. 1254.

A separate Judgment in keeping with the Court's order herein shall be filed contemporaneously herewith.

IT IS SO ORDERED THIS

13th DAY OF SEPTEMBER, 1993


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

²Such was previously stayed, but in view of the Court's rulings herein the stay is no longer warranted.

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

SECURITY NATIONAL INSURANCE
COMPANY,

Plaintiff,

vs.

THOMAS G. CHRISTOPOULOS and
JUDITH A. CHRISTOPOULOS, husband
and wife, d/b/a CHRISTOPOULOS
CONSTRUCTION and d/b/a
CHRISTOPOULOS HOMES; and
DAVID F. SLATER AND SANDRA L.
SLATER, husband and wife,

Defendants.

Case No. 92-C-881-B

FILED

SEP 13 1993

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

J U D G M E N T

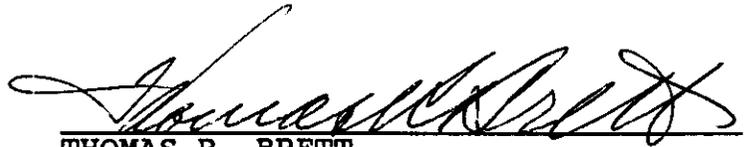
In accordance with the order sustaining Plaintiff's motion for summary judgment pursuant to Fed.R.Civ.P. 56 entered this date, Judgment is hereby entered in favor of the Plaintiff, Security National Insurance Company, and against the Defendants, Thomas G. Christopoulos and Judith A. Christopoulos, husband and wife, d/b/a Christopoulos Construction and d/b/a Christopoulos Homes. The court declares Security National Insurance Company has no obligation under its subject commercial general liability insurance policy to pay or defend the Christopouloses in the Oklahoma state court case of David F. Slater and Sandra L. Slater, husband and wife, Plaintiffs, v. Thomas G. Christopoulos and Judith A. Christopoulos, husband and wife, Defendants, No. CJ-91-2494, in the District Court in and for Tulsa County, State of Oklahoma.

Further, Judgment is hereby entered in favor of Plaintiff, Security National Insurance Company, and against the Defendants,

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Thomas G. Christopoulos and Judith A. Christopoulos, husband and wife, d/b/a Christopoulos Construction and d/b/a Christopoulos Homes, and David F. Slater and Sandra L. Slater, husband and wife, on their respective claims against Security National Insurance Company. Costs are hereby assessed against the Defendants if timely applied for pursuant to Local Rule 6(E), and each party is to pay their own respective attorneys' fees.

DATED this 13th day of September, 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE SEP 14 1993

FILED

SEP 13 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

TOM HOLT,

Plaintiff,

vs.

LINDA J. HOLT and
THOMAS R. FAY,

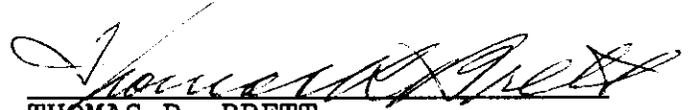
Defendants.

Case No. 92-C-1099-B

O R D E R

Now before the Court is Plaintiff's Motion to Dismiss Without Prejudice (Docket #18) filed August 19, 1993. Defendants have not objected to Plaintiff's motion and for good cause shown the Plaintiff's Motion should be and is hereby GRANTED and this action is hereby dismissed without prejudice.

IT IS SO ORDERED THIS 10th DAY OF SEPTEMBER, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE SEP 14 1993

FILED

SEP 13 1993

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

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

CECELIA M. BAILEY,)
)
 Plaintiff,)
 vs.)
)
 SAND SPRINGS GROUP HOMES, INC.)
)
 Defendant.)

Case No. 91-C-156-B

C O R D E R

Now before the Court is Plaintiff's Appeal of the Order granting Defendant's Motion for Summary Judgment entered January 15, 1992, by the Magistrate Judge.¹ This matter was referred to the Magistrate by order of this Court dated December 11, 1991, pursuant to 28 U.S.C. §636(c)(1) and the consent of the parties. Plaintiff's appeal is now properly before this Court pursuant to 28 U.S.C. §636(c)(4). The Court concludes oral argument is not necessary.

Plaintiff, Cecelia Bailey ("Bailey"), filed this action March 14, 1991, alleging violations of the Fair Labor Standards Act, 29 U.S.C. §201, et seq., by her employer, Defendant Sand Springs Group Homes, Inc. ("Sand Springs Home"). Specifically, Plaintiff alleges that she was not compensated for 380 hours of "sleep time" that she spent on the Defendant's premises between June 1, 1990, and August 31, 1990. Plaintiff seeks to recover \$2,856.84 in unpaid "sleep time," plus an equal amount as liquidated damages.

Defendant filed a motion for summary judgment on September 16, 1991, and the Magistrate Judge granted Defendant's motion on January 15, 1992. Plaintiff now appeals the Order granting summary

¹ A separate Judgment for the Defendant has never been entered.

judgment on the grounds it is at variance with Rule 56.

Standard of Review

When a trial court has granted summary judgment, the appeals court "applies a *de novo* standard of review" and "must examine the issues anew." Hydro Conduit Corp. v. American-First Title & Trust Co., 808 F.2d 712, 714 (10th Cir. 1986).

Undisputed Facts

The following facts are not in dispute:

1. Plaintiff was hired by Defendant on May 29, 1990, as a full-time hourly employee. (Exhibit "A" to Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Brief"), Affidavit of Plaintiff at ¶3).

2. Defendant is a non-profit corporation that owns and operates several "group homes" that care for the mentally and physically disabled.

3. On June 1, 1990, Plaintiff and Defendant signed a contract which stated Plaintiff would be compensated at the rate of \$5.00 per hour. The employment contract was silent as to whether plaintiff would be paid for her "sleep time", but the employment contract did make reference to the Defendant's Staff Policies and Procedures, which provided:

.... The Relief Staff and Direct Care Staff will be paid an hourly rate. Sleep time for Group Homes is not considered work time; however, time up due to job related demands (client ill, fire, etc.) will be compensated. If an employee is unable to get five (5) hours total sleep (not necessarily consecutive) due to job related demands, the entire eight (8) hour period will be compensated.

(Exhibits "A" and "C" to Plaintiff's Brief).

4. Pursuant to her employment contract, plaintiff was assigned to work in the group home located at 3102 S. Everett in Sand Springs. During the time period in issue (June 1, 1990, through August 31, 1990), there were six mentally retarded men living at that group home, whose ages ranged from 19 to 35. (Exhibit "A" to Plaintiff's Brief at ¶¶ 3 and 5).

5. During the time period in issue, Plaintiff generally worked 5 day work weeks and spent up to 16 hours of each 24 hour day on the premises. Eight of the 16 hours were considered normal work hours for which Plaintiff was paid \$5.00 an hour and up to 8 hours were considered "sleep time", for which Plaintiff was compensated pursuant to the Staff Policies and Procedures provision set forth above. (Exhibits "D" and "E" to Defendant's Brief in Support of its Motion for Summary Judgment).

6. Defendant paid Plaintiff at her regular hourly rate for all of the normal (standard shift) work hours shown on her time sheets, and it paid her at the overtime rate for all of the sleep time that she was up and tending to residents. On nights when she did not get at least five hours of rest during sleep time, she was paid at the overtime rate for all of the sleep time whether she was up or not. She was not paid for sleep time when she was not tending to clients, unless the five hour rule applied. (Exhibits "E" and "F" to Defendant's Brief).

7. The group home where plaintiff worked consisted of four (4) bedrooms located across the hall from each other at one end of the

house. There were two residents in each of three of the bedrooms. The fourth bedroom served as an office and as a place for the staff to sleep overnight. (Exhibit "A" to Plaintiff's Brief at ¶¶ 6-8). During the day the office/bedroom was used by other staff members and by residents. (Exhibit "A" to Plaintiff's Brief at ¶20).

8. The office/bedroom was approximately 11 feet by 11 feet in size and had the following furniture and lighting:

- a. a fluorescent ceiling light;
- b. one single bed;
- c. a night stand with two drawers which were filled with tools and another staff member's personal items;
- d. a lamp;
- e. a carpet on the floor;
- f. a desk with a telephone and office supplies which were used by the staff during the day; and
- g. a file cabinet which contained forms, check books of the residents, and discontinued medication for the residents.

(Exhibit "A" to Plaintiff's Brief at ¶11).

9. The office/bedroom did not contain a TV or have a connected private bathroom or any running water. The office/bedroom did have a closet which was filled with books, pamphlets, a blood pressure kit, a first aid kit, fluorescent light bulbs, the residents' clothes, and a locked medicine cabinet. (Exhibit "A" to Plaintiff's Brief at ¶¶ 12 and 14).

10. Plaintiff did not have any place to lock up any of her

personal belongings. The office/bedroom did not have a lock or latch on its door. (Exhibit "A" to Plaintiff's Brief at ¶¶15-16).

11. Residents would occasionally walk into the office/bedroom during the night while Plaintiff was asleep. (Exhibit "A" to Plaintiff's Brief at ¶17).

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."

Analysis and Authorities

Plaintiff contends Defendant violated 29 U.S.C. §207 of the Fair Labor Standards Act by failing to pay her for all the "sleep time" she spent on the premises of the Defendant. The Sand Springs Home contends Plaintiff's employment falls within an exception to the general rule and she is not entitled to compensation for "sleep time" periods during which she did not work, unless she was unable to get five hours of rest during the eight hour shift.

The parties agree Plaintiff's employment is covered by 29 C.F.R. §785.23, which provides:

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is of course difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. [citations omitted.]

The Administrator of the Wage and Hour Division of the Employment Standards Administration of the U.S Department of Labor is authorized to issue rulings and interpretations of the provisions of the Fair Labor Standards Act. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Both parties have directed the Court to "Wage and Hour Memorandum 88.48" issued by the Administrator on June 30, 1988, which sets forth the Administrator's interpretation of 29 C.F.R. §785 regarding overtime labor at community residences (group homes) for the mentally retarded and similar residential care facilities. Memorandum 88.48 provides:

In order to deduct sleep time for full time and relief employees, **such employees must be provided private quarters in a home-like environment. Further, a reasonable agreement must be reached, in advance, regarding compensable time.** The employer and the employee may agree to exclude up to eight hours per night of uninterrupted sleep time. ... These exclusions must be the result of an employee-employer agreement and not a unilateral decision of the employer. Such an agreement should normally be in writing to

preclude any possible misunderstanding of the terms and conditions of an individual's employment. (emphasis added).

Plaintiff contends there are genuine issues of material fact in this case regarding:

1. Whether Plaintiff and Defendant agreed that "sleep time" would be paid to the Plaintiff;
2. Whether the sleep quarters provided to the Plaintiff by Defendant were in a "home-like environment"; and
3. Whether the sleep quarters provided to the Plaintiff by Defendant were "private".

Wage and Hour Memorandum 88.48 specifically defines "private quarters" as follows:

... living quarters that are furnished; are separate from the "clients" and from any other staff members; have as a minimum the same furnishings available to clients (e.g. bed, table, chair, lamp, dresser, closet, etc.) and in which the employee is able to leave his or her belongings during on-and off-duty periods.

Memorandum 88.48 specifically defines "home-like environment" as:

... facilities including "private quarters" as above and also including on the same premises facilities for cooking and eating; for bathing in private; and for recreation (such as TV). The amenities and quarters must be suitable for long-term residence by individuals and must be similar to those found in a typical private residence or apartment, rather than those found in institutional facilities such as dormitories, barracks, and short-term facilities for travelers.

Defendant's motion for summary judgment simply contends that Plaintiff was paid according to the terms of her employment, and

that the terms of her employment were within federal law. However, Memorandum 88.48 requires more than an agreement between the employee and employer regarding compensation for sleep time. It also requires that the employee be provided "private quarters in a home-like environment." Lott v. Rigby, 746 F.Supp. 1084 (N.D.Ga. 1990).

Defendant's motion for summary judgment did not provide any specific details regarding the sleeping quarters provided to Plaintiff. Defendant did attach the affidavit of Sheila D. Hueste ("Hueste"), the executive director of the Sand Springs Group Homes, which stated that "[Plaintiff] had home-like, private sleeping quarters." Such a parroting of the applicable standard is of no assistance to the Court.

Defendant's brief in opposition to Plaintiff's appeal includes the following "Material Fact":

7. Plaintiff's duty location was in a house located in a residential neighborhood. She slept in a private bedroom with a closet in which she could hang clothes, and it had other lockable space in which she could secure other belongings. Her bedroom was furnished similarly to the bedrooms occupied by the clients and it was next door to a fully equipped bathroom. The house had an equipped kitchen area and it was otherwise furnished similarly to other ordinary homes.

However, Defendant's counsel has failed to point to any evidence in the record to support these "facts". Summary judgment can not be based on unsupported "facts" asserted by counsel.

Thus, the only substantiated evidence in the record regarding whether Plaintiff was provided "private quarters in a home-like

environment" is Plaintiff's affidavit. In her affidavit, Plaintiff contends the fourth bedroom of the residence was used as the staff office as well as a place for the staff to sleep overnight. She also contends she had no place to lock up her personal belongings and that there was no way of securing the door while she slept.¹

There is no evidence in the record regarding whether the residence contained facilities for cooking and eating; for bathing in private; and for recreation (such as TV). There is also no evidence in the record regarding whether the office/bedroom has "as a minimum the same furnishings available to clients."

Regarding Plaintiff's "privacy" concerns, the Magistrate Judge concluded

[Plaintiff's] complaints could have been easily remedied by defendant had they ever been voiced during her employment. ... Instead, plaintiff continued to work in the environment provided without complaint. Defendant had no opportunity to take the simple measures of rearranging storage or installing a door lock.

Magistrate Judge's January 15, 1992, Order, at p. 7. Although Plaintiff's failure to voice her complaints may ultimately be considered in weighing her credibility, such failure to report her privacy concerns to the Defendant does not eliminate the question of whether the quarters were "private". The Defendant is not permitted to deduct Plaintiff's "sleep time" from her pay unless it

¹ Plaintiff states that she slept in her slacks and blouse because residents would walk into her room in the middle of the night without knocking. She also states she kept a chair in front of the bedroom/office door so that she would have some warning of any such intrusions. (Exhibit "A" to Plaintiff's Brief at ¶¶ 17 and 18).

provides her with "private quarters." The Court concludes there is a genuine issue regarding whether Plaintiff was provided quarters that were sufficiently private. Specifically, there is a question whether Plaintiff's living quarters 1) were "separate from the clients" 2) had "the same furnishings available to clients" and 3) provided Plaintiff a place to leave her belongings during on and off-duty periods.

Regarding whether the Plaintiff was provided a "home-like environment", the Magistrate Judge stated:

Although Plaintiff asserts that "the office/bedroom did not contain a TV or have a private connected bathroom or any running water" ... there is no showing that the house lacked facilities for cooking and eating; for bathing in private and for recreation (such as TV) on the same premises. (emphasis in original).

...
Plaintiff has failed to show that the quarters provided were not within the Department of Labor's definition of "home-like environment."

...
Presumably, this four bedroom residence had a kitchen, bathroom(s), living room, etc., in addition to the four bedrooms.

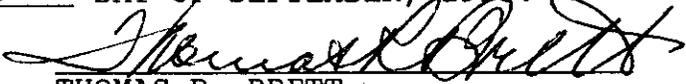
Magistrate Judge's Order of January 15, 1993, at p. 5, fn. 3 and pp. 7-8.

Viewing the evidence in a light most favorable to the Plaintiff, the Court concludes there are genuine issues of material fact regarding whether Plaintiff was provided "private quarters" and whether such quarters were in a "home-like environment." For this reason, the Court need not address whether Plaintiff's employment contract was "reasonable" or whether the exclusion of compensation for "sleep time" was the unilateral decision of the

Defendant.

For the reasons set forth above, the Court hereby REVERSES the Order of the Magistrate Judge granting summary judgment and REMANDS this matter to the Magistrate Judge for further proceedings.

IT IS SO ORDERED THIS 13th DAY OF SEPTEMBER, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

SEP 14 1993

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

WILSON LAUFER and SUZANNE L.)
LAUFER, Husband and Wife,)
)
Plaintiffs,)
)
vs.)
)
ELECTRIC MOBILITY CORPORATION,)
Defendant.)

CASE NO: 92-C-600-B

FILED

SEP 13 1993

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

ORDER OF DISMISSAL

This matter comes on for hearing on the Joint Stipulation of the Plaintiff, Suzanne L. Laufer, Individually, and Suzanne L. Laufer, as Executrix of the Estate of Wilson Laufer, Deceased, and Defendant, Electric Mobility Corporation, for a dismissal with prejudice of the above captioned cause against Electric Mobility Corporation. The Court, being fully advised, having reviewed the Stipulation, finds that the parties herein have entered into a compromise settlement covering all claims involved in this action, which this Court hereby approves, and that the above entitled cause should be dismissed with prejudice to the filing of a future action as to Electric Mobility Corporation pursuant to said Stipulation.

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

Dated this 11 day of ~~August~~ ^{Sept}, 1993.

/s/ JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

Rick Pizzo
RICK PIZZO, Attorney for Plaintiff

RHODES, HIERONYMUS, JONES, TUCKER
and GABLE

BY *W.D. Perrine*
WILLIAM D. PERRINE
15 W. 6th Street, Suite 2800
Tulsa, OK 74119-5430
(918) 582-1173
Attorneys for Defendant

ENTERED ON DOCKET
SEP 15 1993
FILED

SEP 14 1993

United States District Court
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NORTHERN DISTRICT OF OKLAHOMA

FRED M. SIEGMEIER,

Plaintiff,

v.

MEMOREX TELEX CORP.,

Defendant.

JUDGMENT IN A CIVIL CASE

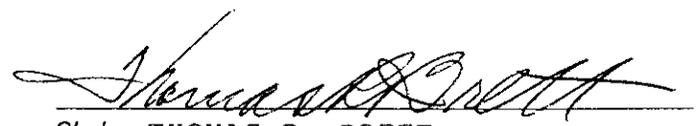
CASE NUMBER: 92-C-442-B ✓

- Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the defendant Memorex Telex Corp. and against the plaintiff Fred M. Siegmeier and costs are assessed against the plaintiff if timely applied for pursuant to Local Rule 6; each party to pay their own respective attorneys fees.

September 14, 1993

Date



Clerk THOMAS R. BRETT
U.S. DISTRICT JUDGE

(By) Deputy Clerk

78

9-13-93

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 GENEVA M. TAGG aka GENEVA MARIE)
 TAGG aka GENEVA TAGG; COUNTY)
 TREASURER, Delaware County,)
 Oklahoma; and BOARD OF COUNTY)
 COMMISSIONERS, Delaware County,)
 Oklahoma,)
)
 Defendants.)

FILED

SEP 13 1993

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

CIVIL ACTION NO. 93-C-370-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 10 day of September, 1993. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney; the Defendants, County Treasurer, Delaware County, Oklahoma, and Board of County Commissioners, Delaware County, Oklahoma, appear by Winston H. Connor, II, Assistant District Attorney, Delaware County, Oklahoma; and the Defendant, Geneva M. Tagg aka Geneva Marie Tagg aka Geneva Tagg, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, Geneva M. Tagg aka Geneva Marie Tagg aka Geneva Tagg, was served with Summons and Complaint on July 7, 1993; that the Defendant, County Treasurer, Delaware County, Oklahoma, acknowledged receipt of Summons and Complaint on April 27, 1993; and that the Defendant, Board of County

Commissioners, Delaware County, Oklahoma, acknowledged receipt of Summons and Complaint on May 17, 1993.

It appears that the Defendants, County Treasurer, Delaware County, Oklahoma, and Board of County Commissioners, Delaware County, Oklahoma, filed their Answer on May 18, 1993; that the Defendant, Geneva M. Tagg aka Geneva Marie Tagg aka Geneva Tagg, has failed to answer and her default has therefore been entered by the Clerk of this Court.

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

That portion of the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ and NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13, Township 20 North, Range 23 East, more particularly described as follows, to-wit: Beginning at a point which is 2058 feet South and 875.6 feet East of the NW corner of the NE $\frac{1}{4}$ of said Section 13, thence South 89° 04' 50" East 310.00 feet, thence South 0° 06' 20" West 1038.00 feet to the true point of beginning; thence South 88° 36' 50" East 251.92 feet; thence South 104.00 feet; thence North 88° 34' 10" West 252.11 feet; thence North 0° 06' 20" East 103.80 feet to the true point of beginning, Delaware County, Oklahoma.

The Court further finds that on July 6, 1977, Willie A. Murphy and Fannie M. Murphy executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of \$19,100.00, payable in monthly installments, with interest thereon at the rate of 8 percent per annum.

The Court further finds that as security for the payment of the above-described note, Willie A. Murphy and Fannie M. Murphy executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated July 6, 1977, covering the above-described property, situated in the State of Oklahoma, Delaware County. This mortgage was recorded on July 6, 1977, in Book 359, Page 103, in the records of Delaware County, Oklahoma.

The Court further finds that on January 21, 1981, Geneva Marie Tagg executed and delivered to the United States of America, acting through the Farmers Home Administration, an Assumption Agreement assuming liability for the unpaid amount on the above-described note and mortgage in the amount of \$19,322.81, payable in monthly installments, with interest thereon at the rate of 13 percent per annum.

The Court further finds that on April 2, 1993, the United States of America, acting through the Farmers Home Administration, released Willie A. Murphy and Fannie M. Murphy from personal liability to the government for the indebtedness and obligation of the above-described note and mortgage.

The Court further finds that on January 21, 1981, Geneva M. Tagg executed and delivered to the United States of America, acting through the Farmers Home Administration, her promissory note in the amount of \$1,700.00, payable in monthly installments, with interest thereon at the rate of 10 percent per annum.

The Court further finds that as security for the payment of the above-described assumption agreement and note, Geneva M. Tagg executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated January 21, 1981, covering the above-described property, situated in the State of Oklahoma, Delaware County. This mortgage was recorded on January 21, 1981, in Book 410, Page 498, in the records of Delaware County, Oklahoma.

The Court further finds that on September 20, 1989, Geneva M. Tagg executed and delivered to the United States of America, acting through the Farmers Home Administration, her promissory note in the amount of \$810.00, payable in monthly installments, with interest thereon at the rate of 1 percent per annum.

The Court further finds that as security for the payment of the above-described note, Geneva M. Tagg executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated September 20, 1989, covering the above-described property, situated in the State of Oklahoma, Delaware County. This mortgage was recorded on September 20, 1989, in Book 562, Page 830, in the records of Delaware County, Oklahoma.

The Court further finds that the Defendant, Geneva M. Tagg aka Geneva Marie Tagg aka Geneva Tagg, executed and delivered to the United States of America, acting through the Farmers Home Administration, the following Interest Credit

Agreements pursuant to which the interest rate on the above-described assumption agreement, notes and mortgages was reduced.

<u>Instrument</u>	<u>Dated</u>	<u>County</u>
Interest Credit Agreement	01/21/81	Delaware
Interest Credit Agreement	11/03/82	Delaware
Interest Credit Agreement	04/09/84	Delaware
Interest Credit Agreement	06/17/85	Delaware
Interest Credit Agreement	04/29/86	Delaware
Interest Credit Agreement	06/01/87	Delaware
Interest Credit Agreement	05/02/88	Delaware
Interest Credit Agreement	05/08/89	Delaware
Interest Credit Agreement	01/14/91	Delaware

The Court further finds that the Defendant, Geneva M. Tagg aka Geneva Marie Tagg aka Geneva Tagg, made default under the terms of the aforesaid notes, assumption agreement, mortgages, and interest credit agreements by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Geneva M. Tagg aka Geneva Marie Tagg aka Geneva Tagg, is indebted to the Plaintiff in the principal sum of \$18,904.11, plus accrued interest in the amount of \$1,835.49 as of May 21, 1992, plus interest accruing thereafter at the rate of \$6.4006 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of \$1,063.22, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action in the amount of \$27.80 (\$19.80 fees for service of Summons and Complaint, \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, County Treasurer, Delaware County, Oklahoma, has a lien on the property

which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$99.19, plus penalties and interest, for the year 1992. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, County Treasurer, Delaware County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$22.76 which became a lien on the property as of 1991 (\$15.30) and 1992 (\$7.46). Said lien is inferior to the interest of the Plaintiff, United States of America.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Farmers Home Administration, have and recover judgment against the Defendant, Geneva M. Tagg aka Geneva Marie Tagg aka Geneva Tagg, in the principal sum of \$18,904.11, plus accrued interest in the amount of \$1,835.49 as of May 21, 1992, plus interest accruing thereafter at the rate of \$6.4006 per day until judgment, plus interest thereafter at the current legal rate of 3.43 percent per annum until fully paid, and the further sum due and owing under the interest credit agreements of \$1,063.22, plus interest on that sum at the current legal rate of 3.43

percent per annum from judgment until paid, plus the costs of this action in the amount of \$27.80 (\$19.80 fees for service of Summons and Complaint, \$8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Delaware County, Oklahoma, have and recover judgment in the amount of \$99.19, plus penalties and interest, for ad valorem taxes for the year 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Delaware County, Oklahoma, have and recover judgment in the amount of \$22.76 for personal property taxes for the years 1991 (\$15.30) and 1992 (\$7.46), plus the costs of this action.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Geneva M. Tagg aka Geneva Marie Tagg aka Geneva Tagg, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United

States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

In payment of Defendant, County Treasurer, Delaware County, Oklahoma, in the amount of \$99.19, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

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

Fourth:

In payment of Defendant, County Treasurer, Delaware County, Oklahoma, in the amount of \$22.76, personal property taxes which are currently due and owing.

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

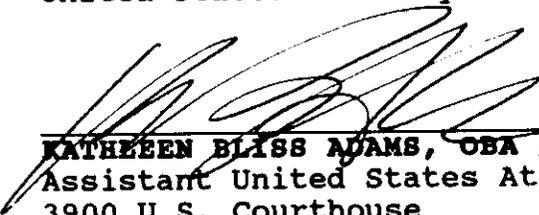
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ JAMES O. ELLISON

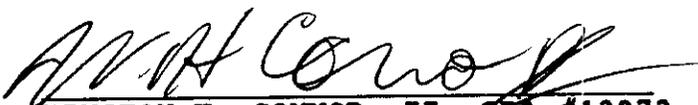
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Delaware County, Oklahoma

Judgment of Foreclosure
Civil Action No. 93-C-370-E

KBA/css

DOCKET
DATE SEP 13 1993

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

FILED

SEP 9 1993

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

NATIONAL UNION FIRE INSURANCE)
COMPANY OF PITTSBURGH, PA,)
a Pennsylvania Corporation,)
)
Plaintiff,)
)
vs.)
)
LERoy COURSEY,)
)
Defendant.)

Case No. 91-C-820-B ✓

ORDER

Now before the court for its consideration is Plaintiff's Motion For Reconsideration (Docket #8) of this court's Order of February 12, 1992, wherein it declined to exercise jurisdiction over this case.

Plaintiff, National Union Fire Insurance Company of Pittsburgh, Pa, (National Union), an insurer, brought this action seeking a declaration that the subject policy of insurance did not provide uninsured motorist coverage to its insured's (Flint Industries) employee (Defendant, Leroy Coursey). In the alternative, Plaintiff sought a declaration that coverage was limited to \$10,000.00. Defendant filed a motion to dismiss, arguing that this court should decline to exercise jurisdiction over Plaintiff's complaint inasmuch as coverage is at issue in a case pending in state court.¹ National Union admits that it has a motion for summary judgment on the coverage issues pending in state court. This court granted the Motion to Dismiss and National Union

¹ In the state court action Coursey seeks to recover \$1,005,000 under the policy issued by National Union alleging that the policy covered the vehicle he was driving when he was involved in an accident caused by an underinsured motorist.

requested reconsideration.

In its Motion for Reconsideration, National Union relies on Horace Mann Insurance Co. v. Johnson, 953 F.2d 575 (10th Cir. 1991), for the proposition that a federal court should not decline jurisdiction in a declaratory judgment case because to do so would be to leave the insurer without a remedy. National Union interprets Horace Mann too broadly. The court held that a district court cannot correctly decline to hear a declaratory judgment case for the reason that "the public policy of Oklahoma 'manifestly expressed' in Oklahoma's declaratory judgment statute militated against doing so." Id. at 576. In Horace Mann, the district judge determined that he could not hear a declaratory judgment case because the state court could not hear it. In rejecting this contention, the court stated: "The considerations of comity and federalism upon which the district court relied did not warrant closing the doors of a federal court in Oklahoma to parties seeking a declaration of their rights and liabilities under a liability insurance policy, especially when doing so left the parties without an adequate remedy." Id. at 579.

The holding in Horace Mann is not applicable to the present facts. This court did not decline to exercise jurisdiction because state courts did not have jurisdiction, but declined to exercise jurisdiction because an adequate remedy existed in a pending state court action. Kunkel v. Continental Casualty Co., 866 F.2d 1269 (10th Cir. 1989) and ARW Exploration Corp. v. Aguirre, 947 F.2d 450 (10th Cir. 1991). Plaintiff's argument that an adequate remedy does not exist in state court is not well taken. The pending state

court case is not a declaratory judgment action, but rather is one wherein the rights and liabilities of the parties under the contract must be determined in order to determine the Plaintiff's right to his requested damages. Under Oklahoma law, "[t]he fact that relationships and status may have to be determined in the course of [an] action does not make it one seeking a declaratory judgment; [plaintiff] is asserting its right under the insurance contracts to have that judgment against it paid." Zahn v. General Ins. Co. of America, 611 P.2d 645, 650 (Okla. 1980).

Accordingly, National Union's Motion for Reconsideration is hereby DENIED.

IT IS SO ORDERED THIS 9th DAY OF SEPTEMBER, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE