

ENTERED ON DOCKET

DATE 6-20-94

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JIMMIE L. GRAHAM aka Jimmie Lee
Graham aka Jimmy Lee Graham;
ROSEMARY A. GRAHAM aka Rosemary
Ann Graham aka Rosemary Graham;
COUNTY TREASURER, Mayes County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Mayes County, Oklahoma,

Defendants.

FILED

JUN 17 1994

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

CIVIL ACTION NO. 93-C-1005-~~P~~K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17 day
of June, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Peter Bernhardt, Assistant United States
Attorney; the Defendants, **County Treasurer, Mayes County,
Oklahoma, and Board of County Commissioners, Mayes County,
Oklahoma**, appear by Sherry Ann Redding, Assistant District
Attorney, Mayes County, Oklahoma; and the Defendants, **Jimmie L.
Graham aka Jimmie Lee Graham aka Jimmy Lee Graham and Rosemary A.
Graham aka Rosemary Ann Graham aka Rosemary Graham**, appear not,
but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, **Rosemary A. Graham aka
Rosemary Ann Graham aka Rosemary Graham**, acknowledged receipt of
Summons and Complaint on November 10, 1993; that the Defendant,
County Treasurer, Mayes County, Oklahoma, acknowledged receipt of

Summons and Complaint on November 16, 1993; and that Defendant, **Board of County Commissioners, Mayes County, Oklahoma**, acknowledged receipt of Summons and Complaint on November 22, 1993.

The Court further finds that the Defendant, **Jimmie L. Graham aka Jimmie Lee Graham aka Jimmy Lee Graham**, was served by publishing notice of this action in the Pryor Daily Times, a newspaper of general circulation in Mayes County, Oklahoma, once a week for six (6) consecutive weeks beginning March 3, 1994, and continuing through April 6, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, **Jimmie L. Graham aka Jimmie Lee Graham aka Jimmy Lee Graham**, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, **Jimmie L. Graham aka Jimmie Lee Graham aka Jimmy Lee Graham**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Farmers Home

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

It appears that the Defendants, County Treasurer, Mayes County, Oklahoma, and Board of County Commissioners, Mayes County, Oklahoma, filed their Answer and Cross-Petition on December 2, 1993; that the Defendants, Jimmie L. Graham aka Jimmie Lee Graham aka Jimmy Lee Graham and Rosemary A. Graham aka Rosemary Ann Graham aka Rosemary Graham, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

**Lot Numbered Three (3) in Block Numbered Four
(4) in the R. DOWNUM SUBDIVISION to SALINA,
Mayes County, State of Oklahoma.**

The Court further finds that on May 5, 1981, Jimmie Lee Graham and Rosemary A. Graham executed and delivered to the

United States of America, acting through the Farmers Home Administration, their promissory note in the amount of \$36,900.00, payable in monthly installments, with interest thereon at the rate of 13 percent per annum.

The Court further finds that as security for the payment of the above-described note, Jimmie L. Graham and Rosemary A. Graham executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated May 5, 1981, covering the above-described property, situated in the State of Oklahoma, Mayes County. This mortgage was recorded on May 5, 1981, in Book 588, Page 829, in the records of Mayes County, Oklahoma.

The Court further finds that Jimmie L. Graham aka Jimmie Lee Graham aka Jimmy Lee Graham and Rosemary A. Graham aka Rosemary Ann Graham aka Rosemary Graham 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 note and mortgage was reduced.

<u>Instrument</u>	<u>Dated</u>	<u>County</u>
Interest Credit Agreement	03/05/82	Mayes
Interest Credit Agreement	01/05/84	Mayes
Interest Credit Agreement	05/04/87	Mayes
Interest Credit Agreement	03/18/88	Mayes
Interest Credit Agreement	03/29/89	Mayes
Interest Credit Agreement	08/13/90	Mayes
Interest Credit Agreement	12/24/90	Mayes

The Court further finds that on December 24, 1990, Jimmie L. Graham and Rosemary A. Graham executed and delivered to the United States of America, acting through the Farmers Home

Administration, a Reamortization and/or Deferral Agreement pursuant to which the entire debt due on that date was made principal.

The Court further finds that the Defendants, **Jimmie L. Graham aka Jimmie Lee Graham aka Jimmy Lee Graham** and **Rosemary A. Graham aka Rosemary Ann Graham aka Rosemary Graham**, made default under the terms of the aforesaid note, mortgage, interest credit agreements and reamortization and/or deferral agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Jimmie L. Graham aka Jimmie Lee Graham aka Jimmy Lee Graham** and **Rosemary A. Graham aka Rosemary Ann Graham aka Rosemary Graham**, are indebted to the Plaintiff in the principal sum of \$35,902.52, plus accrued interest in the amount of \$5,619.69 as of June 21, 1993, plus interest accruing thereafter at the rate of 13 percent per annum or \$15.3800 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 \$11,212.00, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, **County Treasurer, Mayes 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 \$263.47, plus penalties and interest, for the year 1993. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Mayes 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 in rem against the Defendants, Jimmie L. Graham aka Jimmie Lee Graham aka Jimmy Lee Graham and Rosemary A. Graham aka Rosemary Ann Graham aka Rosemary Graham, in the principal sum of \$35,902.52, plus accrued interest in the amount of \$5,619.69 as of June 21, 1993, plus interest accruing thereafter at the rate of 13 percent per annum or \$15.3800 per day until judgment, plus interest thereafter at the current legal rate of 5.28 percent per annum until fully paid, and the further sum due and owing under the interest credit agreements of \$11,212.00, plus interest on that sum at the current legal rate of 5.28 percent per annum from judgment until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Mayes County, Oklahoma, have and recover judgment in the amount of \$263.47, plus penalties and interest, for ad valorem taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Board of County Commissioners, Mayes 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 Defendants, Jimmie L. Graham aka Jimmie Lee Graham aka Jimmy Lee Graham and Rosemary A. Graham aka Rosemary Ann Graham aka Rosemary Graham, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

In payment of Defendant, County Treasurer, Mayes County, Oklahoma, in the amount of \$263.47, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

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

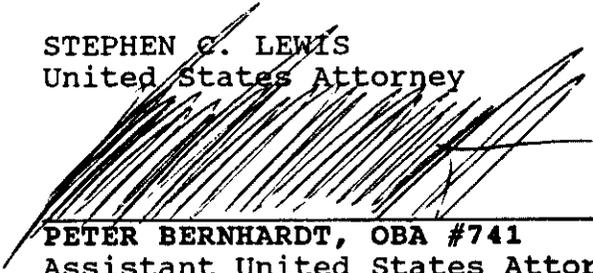
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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

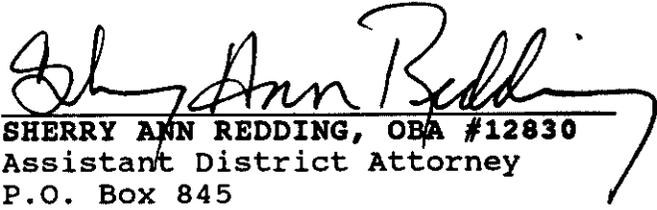
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



SHERRY ANN REDDING, OBA #12830
Assistant District Attorney
P.O. Box 845
Pryor, Oklahoma 74362
(918) 825-2171
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Mayes County, Oklahoma

Judgment of Foreclosure
Civil Action No. 93-C-1005-B

PB:css

ENTERED ON DOCKET

DATE 6-20-94

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

FILED
JUN 17 1994

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

CHARLES ROD STEWART,)
)
Plaintiff,)
)
v.)
)
BARTLETT-COLLINS COMPANY, and)
INDIANA GLASS COMPANY,)
)
Defendants.)

No. 93-C-938-B R ✓

ORDER OF DISMISSAL WITHOUT PREJUDICE

On this 17 day of June, 1994, the above-styled matter came on for hearing on the motion to dismiss without prejudice of Indiana Glass Company, filed on April 29, 1994. For good cause shown, this matter is hereby dismissed without prejudice pursuant to Rule 41(a)(2).


United States District Judge

M
6-9

ENTERED ON DOCKET

DATE 6-20-94

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 THE UNKNOWN HEIRS, EXECUTORS,)
 ADMINISTRATORS, DEVISEES,)
 TRUSTEES, SUCCESSORS AND)
 ASSIGNS OF BEULAH M. TAYLOR aka)
 BEULAH MAE TAYLOR, Deceased;)
 CAROL PETERS; LARRY TAYLOR;)
 STATE OF OKLAHOMA ex rel.)
 Oklahoma Tax Commission;)
 COUNTY TREASURER, Pawnee County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Pawnee County,)
 Oklahoma,)
)
 Defendants.)

FILED

JUN 17 1994

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

CIVIL ACTION NO. 93-C-926-*BR*

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17 day
of June, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Peter Bernhardt, Assistant United States
Attorney; the Defendant, **State of Oklahoma ex rel. Oklahoma Tax
Commission**, appears not, having previously filed its Disclaimer;
the Defendants, **The Unknown Heirs, Executors, Administrators,
Devisees, Trustees, Successors and Assigns of Beulah M. Taylor
aka Beulah Mae Taylor, Deceased; Carol Peters; Larry Taylor;
County Treasurer, Pawnee County, Oklahoma; and Board of County
Commissioners, Pawnee County, Oklahoma**, appear not, but make
default.

The Court being fully advised and having examined the court file finds that the Defendant, **Carol Peters**, acknowledged receipt of Summons and Complaint on October 22, 1993; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, acknowledged receipt of Summons and Complaint on October 21, 1993; that the Defendant, **County Treasurer, Pawnee County, Oklahoma**, acknowledged receipt of Summons and Complaint on October 19, 1993; that the Defendant, **Board of County Commissioners, Pawnee County, Oklahoma**, acknowledged receipt of Summons and Complaint on October 20, 1993.

The Court further finds that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Beulah M. Taylor aka Beulah Mae Taylor, Deceased and Larry Taylor**, were served by publishing notice of this action in the Pawnee Chief, a newspaper of general circulation in Pawnee County, Oklahoma, once a week for six (6) consecutive weeks beginning February 23, 1994, and continuing through March 30, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Beulah M. Taylor aka Beulah Mae Taylor, Deceased and Larry Taylor**, and service

cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Beulah M. Taylor aka Beulah Mae Taylor, Deceased and Larry Taylor.** The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Farmers Home Administration, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, filed its Disclaimer on November 17, 1993; and that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Beulah M. Taylor aka Beulah Mae Taylor, Deceased; Carol Peters; Larry Taylor; County Treasurer, Pawnee County, Oklahoma, and Board of County Commissioners, Pawnee County, Oklahoma**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

LOTS ONE THROUGH EIGHT (1-8), BOTH INCLUSIVE, IN BLOCK ONE (1) IN BRYANT'S ADDITION TO THE TOWN OF RALSTON, PAWNEE COUNTY, OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that this a suit brought for the further purpose of judicially determining the deaths of Lawrence S. Taylor aka Lawrence Samuel Taylor and Beulah M. Taylor aka Beulah Mae Taylor, judicially terminating the joint tenancy of Lawrence S. Taylor aka Lawrence Samuel Taylor and Beulah M. Taylor aka Beulah Mae Taylor, and judicially determining the heirs of Beulah M. Taylor aka Beulah Mae Taylor.

The Court further finds that Lawrence S. Taylor aka Lawrence Samuel Taylor (hereinafter referred to by either of these names) and Beulah M. Taylor aka Beulah Mae Taylor

(hereinafter referred to by either of these names) became the record owners of the real property involved in this action by virtue of that certain Joint Tenancy Warranty Deed dated February 8, 1979, from LaVerda Potter, a single person, to Lawrence S. Taylor and Beulah M. Taylor, husband and wife, as joint tenants, and not as tenants in common, with the right of survivorship, the whole estate to vest in the survivor in event of the death of either, which Joint Tenancy Warranty Deed was filed of record on February 8, 1979, in Book 222, Page 118, in the records of the County Clerk of Pawnee County, Oklahoma.

The Court further finds that Lawrence Samuel Taylor died on July 9, 1991. Upon the death of Lawrence Samuel Taylor, the subject property vested in his surviving joint tenant, Beulah M. Taylor, by operation of law. Certificate of Death No. 16005 issued by the Oklahoma State Department of Health certifying Lawrence Samuel Taylor's death was attached as Exhibit "A" of the Complaint filed in this case.

The Court further finds that Beulah Mae Taylor died on February 1, 1992, while seized and possessed of the real property being foreclosed. Certificate of Death issued by the Oklahoma State Department of Health certifying Beulah Mae Taylor's death was attached as Exhibit "B" of the Complaint filed in this case.

The Court further finds that on February 8, 1979, Lawrence S. Taylor and Beulah M. Taylor, now deceased, who were then husband and wife, executed and delivered to the United States of America, acting through the Farmers Home

Administration, their promissory note in the amount of \$29,450.00, payable in monthly installments, with interest thereon at the rate of 8.75 percent per annum.

The Court further finds that as security for the payment of the above-described note, Lawrence S. Taylor and Beulah M. Taylor, now deceased, who were then husband and wife, executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated February 8, 1979, covering the following described property, situated in the State of Oklahoma, Pawnee County:

LOTS ONE THROUGH EIGHT (1-8), BOTH INCLUSIVE,
IN BLOCK ONE (1) IN BRYAN'S ADDITION TO THE
TOWN OF RALSTON, PAWNEE COUNTY, OKLAHOMA,
ACCORDING TO THE RECORDED PLAT THEREOF.

This mortgage was recorded on February 8, 1979, in Book 222, Page 119, in the records of Pawnee County, Oklahoma.

The Court further finds that the mortgage dated February 8, 1979, and recorded on February 8, 1979, in Book 222, Page 119, in the records of Pawnee County, Oklahoma, states the property is in **Bryan's Addition**, when in truth and in fact the correct spelling is **Bryant's Addition**, as shown on the Joint Tenancy Warranty Deed filed of record on February 8, 1979, in Book 222, Page 118, in the records of the County Clerk of Pawnee County, Oklahoma. The subject mortgage should be reformed to reflect the correct spelling of **Bryant's Addition**.

The Court further finds that on February 3, 1986, Lawrence S. Taylor and Beulah M. Taylor, now deceased, who were

then husband and wife, executed and delivered to the United States of America, acting through the Farmers Home Administration, a Reamortization and/or Deferral Agreement pursuant to which the entire debt due on that date was made principal.

The Court further finds that Lawrence S. Taylor aka Lawrence Samuel Taylor, now deceased, and Beulah M. Taylor aka Beulah Mae Taylor, now deceased, made default under the terms of the aforesaid note, mortgage, and reamortization and/or deferral agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note, mortgage, and reamortization and/or deferral agreement, after full credit for all payments made, the principal sum of \$28,825.81, plus accrued interest in the amount of \$5,381.70 as of June 18, 1993, plus interest accruing thereafter at the rate of 8.75 percent per annum or \$6.9103 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$10.00 (fee for recording Notice of Lis Pendens).

The Court further finds that Plaintiff, United States of America, is entitled to a judicial determination of the deaths of the joint tenants, Lawrence Samuel Taylor and Beulah Mae Taylor, the judicial termination of the joint tenancy of Lawrence S. Taylor and Beulah M. Taylor, and the judicial determination of the heirs of Beulah M. Taylor aka Beulah Mae Taylor.

The Court further finds that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Beulah M. Taylor aka Beulah Mae Taylor, Deceased; Carol Peters; Larry Taylor; and County Treasurer and Board of County Commissioners, Pawnee County, Oklahoma**, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the death of Lawrence Samuel Taylor be and the same hereby is judicially determined to have occurred on July 9, 1991 in the City of Fairfax, Osage County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the joint tenancy of Lawrence S. Taylor and Beulah M. Taylor in the above-described real property be and the same is judicially terminated as of the date of the death of Lawrence S. Taylor aka Lawrence Samuel Taylor on July 9, 1991.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the death of Beulah Mae Taylor be and the same hereby is judicially determined to have occurred on February 1, 1992 in the City of Ralston, Pawnee County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the only known heirs of Beulah M. Taylor aka Beulah Mae Taylor,

Deceased, are Carol Peters and Larry Taylor, and that despite the exercise of due diligence by Plaintiff and its counsel, no other known heirs of Beulah M. Taylor aka Beulah Mae Taylor, Deceased, have been discovered and it is hereby judicially determined that Carol Peters and Larry Taylor are the only known heirs of Beulah M. Taylor aka Beulah Mae Taylor, Deceased, and that Beulah M. Taylor aka Beulah Mae Taylor, Deceased, has no other known heirs, executors, administrators, devisees, trustees, successors and assigns; and the Court approves the Certificate of Publication and Mailing filed on April 1, 1994, regarding said heirs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the the mortgage dated February 8, 1979, and recorded on February 8, 1979, in Book 222, Page 119, in the records of Pawnee County, Oklahoma, is reformed as follows:

LOTS ONE THROUGH EIGHT (1-8), BOTH INCLUSIVE, IN BLOCK ONE (1) IN BRYANT'S ADDITION TO THE TOWN OF RALSTON, PAWNEE COUNTY, OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Farmers Home Administration, have and recover judgment in rem against all named and unnamed Defendants in the principal sum of \$28,825.81, plus accrued interest in the amount of \$5,381.70 as of June 18, 1993, plus interest accruing thereafter at the rate of 8.75 percent per annum or \$6.9103 per day until judgment, plus interest thereafter at the current legal rate of 5.28 percent

per annum until fully paid, plus the costs of this action in the amount of \$10.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Beulah M. Taylor aka Beulah Mae Taylor, Deceased; Carol Peters; Larry Taylor; State of Oklahoma ex rel. Oklahoma Tax Commission; and County Treasurer and Board of County Commissioners, Pawnee County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

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

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

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 93-C-926-B

PB:css

ENTERED ON DOCKET

DATE 6-17-94

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

FILED

JUN 16 1994

MARSHEL ROBINSON,)
)
 Plaintiff,)
)
 vs.)
)
 MICHAEL PARSONS, et al.,)
)
 Defendants.)

No. 93-C-907-B

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

ORDER

Before the Court is Defendants' motion to dismiss or for summary judgment [docket #4] filed on December 21, 1993. Plaintiff has not responded although the Court has granted him an extension of time.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendants' motion to dismiss [docket #4] is granted and the above captioned case is dismissed without prejudice at this time.
- (2) The Court may reopen this case if Plaintiff submits a response to Defendants' motion to dismiss no later than twenty (20) days from the date of entry of this order.

SO ORDERED THIS 16 day of June, 1994.



THOMAS R. BRET
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE JUN 17 1994

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

FILED
JUN 16 1994

Rich. U. ... Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RONALD E. O'DELL and PAULA
O'DELL, husband and wife,

Plaintiffs,

v.

Case No. 93-C-754-B

WILLIAM THOMAS McCOLLOUGH,
SUN REFINING AND MARKETING
COMPANY, JOHN H. TUCKER,
ROBERT P. REDEMANN, AND
RHODES, HIERONYMUS, JONES,
TUCKER & GABLE, a
Professional Corporation,

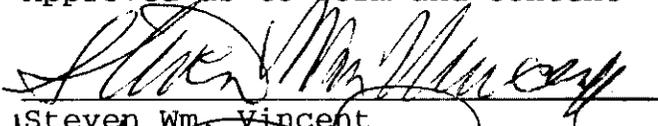
Defendants.

ORDER OF DISMISSAL

Now on this 15th day of June, 1994, comes on to
be heard the Joint Stipulation of Dismissal in the above-styled
case. After considering said Stipulation, this Court hereby orders
the dismissal of this action without prejudice. Said Dismissal
shall become final, and with prejudice, on September 5, 1994.


Judge Thomas R. Brett

Approved as to form and content


Steven Wm. Vincent
Attorney for Plaintiffs

Michael P. Atkison
Galen L. Brittingham
Attorneys for Defendants, John H.
Tucker, Robert P. Redemann, and
Rhodes, Hieronymus, Jones, Tucker,
and Gable

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

FILED

JUN 16 1994

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

FRANCIS L. KIZLINSKI and)
MICHAEL L. OLIVER,)

Plaintiffs,)

vs.)

Case No. 93-C-534-B

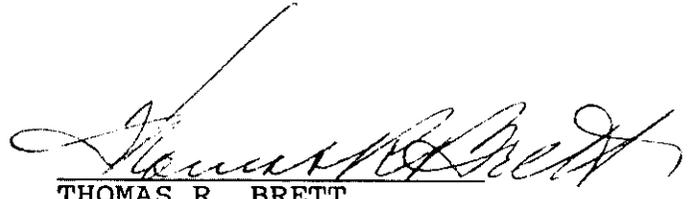
ROCKWELL INTERNATIONAL)
CORPORATION AND)
INTERNATIONAL UNION,)
UNITED AUTOMOBILE,)
AEROSPACE & AGRICULTURAL)
IMPLEMENT WORKERS OF AMERICA)
(UAW))

Defendants.)

J U D G M E N T

Pursuant to Order entered herein this date, granting summary judgment against Plaintiffs Francis L. Kizlinski and Michael L. Oliver and in favor of Defendants Rockwell International Corporation and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), judgment is granted in favor of Defendants Rockwell International Corporation and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and against Plaintiffs Francis L. Kizlinski and Michael L. Oliver in accordance with said Order. Costs are assessed against Plaintiffs if timely applied for pursuant to Local Rule 54.1, with each party to bear its or their own attorneys fees.

DATED THIS 16th DAY OF JUNE, 1994.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett".

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE JUN 17 1994

FILED

JUN 16 1994

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

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

FRANCIS L. KIZLINSKI and)
MICHAEL L. OLIVER,)
Plaintiffs,)
vs.)
ROCKWELL INTERNATIONAL)
CORPORATION AND)
INTERNATIONAL UNION,)
UNITED AUTOMOBILE,)
AEROSPACE & AGRICULTURAL)
IMPLEMENT WORKERS OF AMERICA)
(UAW))
Defendants.)

Case No. 93-C-534-B

ORDER

Now before the Court for its consideration is the Defendant Rockwell International Corporation's Motion to Strike Punitive Damages Claim (Docket #34), Defendant United Automobile, Aerospace & Agricultural Implement Workers Of America's Motion for Summary Judgment (Docket # 35), Defendant, Rockwell's Motion in Limine (Docket # 36) and Motion for Summary Judgment (Docket # 37), and Plaintiffs Francis L. Kizlinski and Michael G. Oliver's Motion to Enter Partial Summary Judgment and/or Interlocutory Order and/or In Limine Orders (#40).

FACTUAL SUMMARY OF CASE FROM AGREED PRETRIAL ORDER

Plaintiffs, Francis Kizlinski ("Kizlinski") and Michael Oliver ("Oliver"), are employees of Rockwell International Corporation ("Rockwell") on layoff, and are members of the International Union,

United Automobile, Aerospace & Agricultural Implement Workers of America (the "Union"). Plaintiffs claim that Rockwell breached the Collective Bargaining Agreement ("CBA") between Rockwell and the Union by not hiring Plaintiffs as structures mechanics at Rockwell's McAlester Plant in April, 1993.

Plaintiffs were number 3 and number 5 on Rockwell's Preferential Recall List for structures mechanics in late March and early April, 1993. On April 2, 1993, Rockwell laid off five structures mechanics in Tulsa. Plaintiffs contend that the five Tulsa structures mechanics were improperly laid off. These five structures mechanics had more seniority than Plaintiff. After these five structures mechanics applied for preferential reinstatement in McAlester, they were hired on April 12, 1993, to go to work on April 13, 1993, in place of Plaintiffs because of their seniority. The structures mechanics hired on April 12, 1993, were all laid off from McAlester on or before August 27, 1993. Plaintiffs allege that they should have been hired instead of the mechanics from Tulsa. Defendants claim that hiring the five Tulsa structures mechanics in McAlester was proper under the CBA.

STATEMENT OF UNDISPUTED FACTS

(The Court essentially adopts the Statement of Undisputed Facts submitted by Defendants in support of their motions for summary judgment as supported by the record before the Court and further because Plaintiffs failed, for the most part, to factually dispute same with references to the record as required by Rule 56, Fed. R. Civ. P. and Local Rule 56.1.)

1. Plaintiffs are former structures mechanics at Rockwell Tulsa on layoff. At all pertinent times, Plaintiffs were members of a collective bargaining unit represented by the Union. Plaintiffs' employment, layoff and recall rights with Rockwell were governed by

the terms of the CBA. [Stipulations of Fact #s 1 and 2, ¶3 of the Agreed Pretrial Order.]

2. Prior to 1981, the CBA between Rockwell and the Union did not contain a provision which allowed a Union employee to volunteer to be laid off. Prior to 1981, all layoffs at Rockwell were involuntary, with the least senior person in the affected department laid off first, then the next least senior, etc. [Statement of Ben Aceves ("Aceves Stmt."), at ¶3 (App. Exhibit "B").]

3. During the 1981 contract negotiations, the Union requested a provision which would allow Union employees to volunteer to be laid off out of seniority order. The provision was called an Inverse Seniority Layoff. [Aceves Stmt., ¶4]

4. Initially in the 1981 negotiations, Rockwell resisted the ISL provision because of the Company's concern that the provision would create too much of an administrative burden for Rockwell's personnel department. [Aceves Stmt., ¶5.]

5. Ultimately, Rockwell agreed to an ISL provision in the 1981 CBA as long as the ISL applications were submitted at least two weeks before the scheduled layoff so that Rockwell's personnel department would have sufficient time to conduct the layoff, including preparation of all of the necessary layoff paperwork. [Aceves Stmt., ¶6.]

6. The two-week ISL application period was intended to solely benefit Rockwell. The two-week provision was designed to allow Rockwell sufficient time to conduct the layoff, including

completing all of the necessary paperwork in a large layoff. The two-week application period was not in any way for the benefit of the Union or the employees. [Aceves Stmt., ¶7]

7. Shortly after the 1981 agreement, Rockwell employees at other Rockwell facilities volunteered for ISLs less than two weeks before the scheduled layoff [Aceves Stmt., ¶10.]

8. At these other Rockwell facilities, Rockwell and the Union agreed to interpret the two-week time period for ISL applications to only require ISL applications to be made more than two weeks before the layoff if Rockwell needed the two weeks to complete all of the necessary paperwork for the layoff. If Rockwell did not need two weeks to complete all of the necessary paperwork, then ISLs could be submitted and approved within less than two weeks of the layoff. [Aceves Stmt., ¶12.]

9. In April of 1989, Rockwell's Tulsa plant initially denied an ISL application as untimely because the application was filed within two weeks of the scheduled layoff. The affected employee appealed the denial of his ISL to the International Union. Through the appeal, the Tulsa personnel department and the local Union were informed of the contractual interpretation at other Rockwell plants. The Tulsa Rockwell personnel department and the local Union agreed to the interpretation, changed the decision, and granted the ISL. [Aceves Stmt., ¶¶13 and 14: Affidavit of Larry England ("England Aff.") at ¶¶4-6 (App. Exhibit "D"), and ¶IV of the Agreed Pretrial Order.]

10. Since 1989, Rockwell's Tulsa plant has not required any

ISL applications to be made more than two weeks before the scheduled layoff and has granted forty-nine ISL applications that were submitted within two weeks of the layoff. [England Aff. ¶7; ¶IV of the Agreed Pretrial Order.]

11. The ISL provision negotiated in 1981 has been readopted in each subsequent CBA between Rockwell and the Union, including the CBA dated July 7, 1990. [Aceves Stmt., ¶9.]

12. The CBA dated July 7, 1990, allows Rockwell and the Union to modify the CBA's seniority provisions, including the ISL provision. Paragraph 18(g) of Article XI of the CBA provides, "Under unusual circumstances and after full discussion of the problem, exceptions to the provisions of this Article may be made by mutual agreement by the Personnel Director of the division involved and the President of the Local Union or their designated representatives." [Paragraph 18(g) of Article XI, attached to the Appendix submitted as Exhibit "E".]

13. The ISL provision was specifically negotiated so that an ISLed employee would immediately have the right to apply to work at another Rockwell plant site. Applications from former Rockwell employees laid off from other Rockwell plant sites are maintained at Rockwell's McAlester plant in seniority order on a Preferential Reinstatement List. Under the CBA, Rockwell is required to fill available positions from the local Union. If there are not enough local employees, then Rockwell is required to hire employees from the Preferential Reinstatement List. Being on the Preferential Reinstatement List only allows a former Rockwell employee to be

hired before Rockwell hires someone without any Rockwell seniority.

[Aceves Stmt., ¶8.]

(Plaintiffs wholly failed to factually refute Defendants' Undisputed Facts 1-13, relying instead on the following response, repeated as to each of the facts as stated:

"Rockwell's Undisputed Fact No. ____ is not material in that it was superseded and is contrary to the explicit terms of the CBA that went into force and effect on July 7, 1990, and are set forth in Exhibit "1" attached."

14. In March of 1993, Tulsa Rockwell structures mechanics, Yandell, Lackey, Dennis, Teague and Gingerich (the Yandell Group), applied for ISLs. The dates of these ISLs were March 22, March 23, March 29, and March 30. [Stipulation #4, ¶3 of the Agreed Pretrial Order.]

(Plaintiffs failed to respond to Undisputed Fact 14.)

15. On April 2, 1993, Rockwell decided to layoff five structures mechanics from department 968 in Tulsa. [April 2, 1993 Memo from D. Wilson to L. England (App. Exhibit "F"); England Aff., ¶8.]

(Plaintiffs disputed this fact upon the ground that Rockwell did not lay off five structures mechanics as a general layoff, but rather granted, denied, and finally re-granted the requested ISLs. The Court concludes from the record that only general layoffs occur, whether implemented by ISLs, involuntary leave-takings, or a combination of the two. Further, Rockwell's vacillation as to granting the requested ISLs, if factual, does not materially alter the outcome herein.)

16. Pursuant to the layoff decision, Rockwell granted the ISL applications of the Yandell Group even though the applications were submitted within two weeks of the layoff. This decision was consistent with the interpretation given the ISL provision in Tulsa since 1989. These ISLs were granted on April 2, 1993. [Stipulation

#5 ¶3 of the Agreed Pretrial Order; England Aff., ¶¶7 and 11.]

(Plaintiffs dispute the Defendants' reference "pursuant to layoff decision", again maintaining there was no general layoff. The Court concludes this is not a material dispute.)

17. On April 6, 1993 the Yandell Group applied for preferential reinstatement at Rockwell's McAlester facility. [Stipulation #6, ¶ of the Agreed Pretrial Order.]

18. The Yandell Group had more seniority than any of the structures mechanics on the McAlester Preferential Reinstatement List. Because they had the most seniority, the Yandell Group was properly placed in positions 1-5 on McAlester's Preferential Reinstatement List. [Affidavit of Debbie Dalton ("Dalton Aff.") at ¶4 (App. Exhibit "G").]

19. The addition of the Yandell Group to the McAlester Preferential Reinstatement List moved Plaintiffs from numbers 3 and 5 on the list to numbers 8 and 10 [Dalton Aff., ¶5.]
(Plaintiffs did not dispute Undisputed Facts 17, 18, & 19.)

20. On April 12, 1993, Rockwell decided to hire five structures mechanics in McAlester. There were no local McAlester employees qualified to fill these positions. Therefore, pursuant to the CBA covering McAlester, Rockwell hired the top five people on the Preferential Reinstatement List. [Stipulation #7, ¶3 of the Agreed Pretrial Order; Dalton Aff., ¶6.]

(Plaintiffs dispute this fact, acknowledging that Rockwell hired five structures mechanics on April 12, 1993, at McAlester, but averring that on March 12, 1993 Rockwell had decided to hire five mechanics as shown by a requisition for five mechanics (Exhibit 2). The relevance of requisitions pre-dating the April 2, 1993 layoff is not immediately apparent to the Court to support disputation of stated facts.)

21. Plaintiffs have admitted that, if the ISL applications filed by the Yandell Group were timely, then it was proper for Rockwell to grant the ISLs and it was proper for Rockwell to hire the Yandell Group in McAlester because the Yandell Group had more seniority than either of the Plaintiffs. [Kizlinski depo. p. 80, 11. 23-25 and p. 81, 11. 1-3 (App. Exhibit "H").]

22. If Rockwell had denied the ISLs as untimely, a layoff would still have occurred and five structures mechanics in department 968 would have been laid off on April 2, 1993. [England Aff., ¶13.]

23. If the Yandell Group's ISL applications had been denied as untimely, then the five least senior structures mechanics in department 968 would have been laid off. The five least senior structures mechanics in department 968, and the people who would have been laid off if the ISLs had been denied, were Gingerich, Dennis, Lackey, Johnson and Butler. [Stipulation #10, ¶3 of the Agreed Pretrial Order; England Aff., ¶14.]

24. If the Yandell Group's ISLs had been denied, then three of Yandell Group, Gingerich, Dennis and Lackey still would have been laid off. [Stipulation #10, ¶3 of the Agreed Pretrial Order; England Aff., ¶14.]

(Plaintiffs dispute Undisputed Facts 21-24 by responding as to each:

"As to Rockwell's Undisputed No. _____, it is not a material fact in that it is "if" and is a speculation and is not a material fact."

25. On May 20, 1993, a problem submittal form was submitted by the Union concerning the ISLs granted by Rockwell on April 2,

1993 [May 20, 1993 Problem Submittal Form (App. Exhibit "I").]

(Plaintiffs admit the submittal form is dated May 20, 1993, but dispute that it was submitted by the Union on May 20, averring that it was received by Rockwell on June 7, 1993, after filing of this lawsuit. Rockwell's reception date, if relevant, has no bearing on the outcome herein.)

26. Submission of a problem submittal form is the beginning of the grievance process in the Collective Bargaining Agreement. [Oliver depo., p. 109, ll. 6-15 (App. Exhibit "J").]

27. The grievance initiated by the filing of the May 20 Problem Submittal Form is still pending with Rockwell. [Affidavit of Ross Pfeffer at ¶4 (App. Exhibit "K").]

28. Plaintiffs have admitted that none of the Union officials had any personal hostility towards them. [Oliver depo., p. 134, ll 17-22 (App. Exhibit "L"); Kizlinski depo., p. 134, ll. 5-8 (App. Exhibit "M").]

29. Plaintiffs have admitted that the Union did not discriminate against them because of their age, sex, race, religion or handicap. [Kizlinski depo., p. 191, ll. 19-21 (App. Exhibit "N"); Oliver depo., p. 169, ll. 8-18 (App. Exhibit "O").]

30. Plaintiffs bring this action against the Union claiming that the Union breached its duty of fair representation. (¶2(c), Agreed Pretrial Order.)

(Plaintiffs did not dispute Undisputed Facts Nos. 26-30.)

31. Article 32 of the Union's Constitution sets up a public review board. This board is a forum made up of persons independent of the Union who, upon request of a Union member, review decisions of the Union with respect to grievances, and determine whether the

Union's handling of the grievance was proper. [Affidavit of David Y. Klein ("Klein Aff.") at ¶2 (App. Exhibit "P"); and Affidavit of Barbara Berger-Hill ("Berger-Hill Aff.") (App. Exhibit "Q").]

32. If the public review board determines that the grievance was improperly handled because of fraud, discrimination, or collusion with management, or that the disposition or handling of the matter was devoid of any rational basis, the public review board has the authority to require the Union to pay money damages to the affected Union member. [Klein Aff., ¶7.]

33. In addition, Rockwell and the Union have an agreement that allows a grievance to be reinstated if the public review board finds that the grievance was mishandled by the Union. The reinstatement of the grievance would allow the grievance to proceed as if it had been properly handled. [Pfeffer Aff/. ¶5.]

34. Numerous articles in the Union newspaper, which was mailed to Plaintiffs, informed Plaintiffs of the available intra-union processes to appeal their grievances, in addition to the Union's Constitution itself. [Affidavit of David A. Elsil at ¶5 (App. Exhibit "R").]

(Plaintiffs failed to factually dispute Undisputed Facts Nos. 31-34, responding instead:

"As to Rockwell's Undisputed Fact No. _____, it is not a material fact and is not relevant in that the Union breached its duty by entering into a secret side, unpublished agreement and did not have Plaintiffs' cause at heart.")

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, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). 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).

DISCUSSION

Rockwell has a collective bargaining agreement ("Agreement") with the Union under the Labor Management Relations Act (LMRA), 29 U.S.C. § 141 et seq. Prior to 1981, layoffs at Rockwell were conducted solely on an involuntary system based upon seniority. The least senior employees were laid off first, then the next least senior, etc. In the course of Agreement negotiations in 1981, the Union requested the inclusion of an inverse Seniority layoff ("ISL") provision, which would allow employees to volunteer to be laid off out of seniority order. Initially Rockwell resisted

inclusion of the provision, but eventually agreed to the provision on the condition that ISL applications be made at least two weeks before the layoff to offset any administrative burdens. Article XI(e)(1) of the Agreement reads as follows:

Employees with one (1) year or more of seniority and who desire to be laid off in inverse or descending order of their seniority shall make application for such layoff to the Transfer Department, on a form supplied by the Company, at least two (2) weeks prior to the next regularly scheduled Seniority Movement Date (SMD). Such application shall remain in force for each succeeding SMD unless canceled by the employee at least two (2) weeks before such succeeding SMD.

Rockwell has contracts which will prospectively insure employment for more than ten years at the McAlester plant, while the labor requirement for its Tulsa Plant is declining. The Rockwell Plant in Tulsa laid off the Plaintiffs on October 27, 1989, on a seniority basis. As of April, 1993, Plaintiffs had been unemployed at their trade for three years and nine months. Their trade classification is aircraft structure mechanics Code 7673.

In early 1993, five additional employees with job classification of Code 7673 were needed at the Rockwell Plant in McAlester. Under the Agreement Rockwell is required to fill available positions from the local Union. A Preferential Reinstatement List ("list") existed composed of unemployed members of the Union, ranked according to the seniority they had obtained for their years of service with Rockwell. Kizlinski's name was

placed on the list on December 1, 1992, and Oliver's name was added to the list on December 16, 1992. At the time of the alleged breach of the Agreement, Kizlinski was No. 3 on the list and Oliver was No. 5 on the list. In March of 1993, Tulsa Rockwell structures mechanics, Yandell, Lackey, Dennis, Teague and Gingerich applied for ISLs. The Yandell Group applied for ISLs on the following dates: one on March 22, one on March 23, two on March 29 and one on March 30, 1993.

On April 2, 1993, Rockwell's Tulsa plant laid off five mechanics, resulting in the Yandell Group's applications for the ISLs being submitted less than two weeks before the SMD or layoff in alleged violation of the Agreement. Since there were five ISL applications, the entire Yandell Group was laid off. The Yandell Group applied, on April 6, 1993, for preferential reinstatement at McAlester in accordance with company policy. The Yandell Group was placed ahead of Plaintiffs on the list because they had more seniority, and the Plaintiffs were adjusted to #8 & #10 on the list. On April 13, 1993, Rockwell's McAlester plant hired the Yandell Group for the five structures mechanic positions. The Yandell Group was hired because they were the first five on the list with the most seniority. Subsequently, the entire Yandell Group were all laid off from the McAlester Plant, in an involuntary layoff, before August 27, 1993. It is reasonable to conclude, and the Court so concludes that the Plaintiffs would have been involved in the same layoff in August, 1993, had they been employed in April, 1993, at McAlester.

The Plaintiffs made demand upon Rockwell to honor the list with Kizlinski at the No. 3 position and Oliver at the No. 5 position and were denied. Subsequently, on May 20, 1993, the Plaintiffs filed a Problem Submittal Form which was allegedly ignored by the Union. The Plaintiffs then applied at the Local Office of the National Labor Relations Board to file an Unfair Labor Practice and were denied.

The Plaintiffs allege that the Yandell Group wanted to be employed at McAlester rather than keep their employment in Tulsa and be subject to expected layoffs. Plaintiffs allege that the Yandell Group conspired with the Union and Rockwell whereby they would defraud the plaintiffs of their right to recall by getting the names of the Yandell Group on the list improperly before the April 9, 1993 deadline.

On May 25, 1993, Plaintiffs filed their Petition in state court alleging that Rockwell and the Union (1) conspired to breach the collective bargaining agreement between the Union and Rockwell, and (2) in the event there was no conspiracy, the Defendants breached the collective bargaining agreement. Defendant's removed the case to this court. Plaintiff's motion to remand was denied.

On April 21, 1993, Rockwell filed a Motion for Summary Judgment claiming that the Plaintiffs could not establish the following: a breach of the Agreement by Rockwell, a breach of duty of fair representation by the Union, or that the breach of the Agreement, if proven, caused injury to the Plaintiffs. The Union filed a Motion for Summary Judgment alleging that Plaintiffs' claim

is barred by failure to exhaust their intra-union remedies, and also supports Rockwell's contention that the Plaintiffs suffered no injury as a result of their alleged wrongful act. The Plaintiffs responded to the Union's and Rockwell's Motions for Summary Judgment by alleging that seniority is a vested property right that is constitutionally protected, and can not be altered or modified without agreement of Union membership.

The Plaintiffs have also filed a Motion for Summary Judgment claiming the Defendants could not establish genuine issues of disputed material facts as to the allegations in the Complaint.

LEGAL ANALYSIS AND CONCLUSION

Section 301 suits such as this one, where employees charge that an employer has breached a collective bargaining agreement and that the Union has breached its duty of fair representation are so-called "hybrid suits." Reed v. United Transportation Union, 488 U.S. 319, 328 (1989); Barnard v. Commercial Carriers, Inc., 863 F.2d 694, 696 (10th.Cir 1990). In order for a Plaintiff to prevail in a hybrid section 301 action, he or she is required to prove both that the employers action violated the terms of the collective bargaining agreement and that the Union breached its duty of fair representation. Local No. 391 v. Terry, 110 S.Ct. 1339, 1344 (1990). While arguably there may exist material issues of fact regarding the alleged breach by the Union of its duty of fair representation, the Plaintiffs have provided no evidence that supports their contention that the employer's action violated the terms of the Agreement. Therefore, since the Plaintiffs cannot

establish the essential elements of a conspiratorial breach of the Agreement by Rockwell and the Union, or alternatively a breach by Rockwell alone, the Defendants are entitled to summary judgment. Celotex Corp. v. Cattrett, 477 U.S. 317, 323-24 (1986). The court will follow the lead of the Tenth Circuit in Mock v. T.G. & Y. Stores Co., 971 F.2d 522 (10th Cir. 1992), wherein the circuit court affirmed a district court ruling that in a hybrid 301 claim, where the plaintiff failed to prove misconduct by the union, summary judgment was proper for both the union and employer. Moreover, the Plaintiffs are unable to prove that they suffered any injury as a result of the Defendants' actions for which they are entitled to relief.

Plaintiff must exhaust the grievance procedures provided for in the collective bargaining agreement unless the union has breached its duty of fair representation. Vaca v. Sipes, 386 U.S. 171, 186 (1967). The Policy requiring an employee to exhaust intra-union grievance and appeals procedures prior to seeking judicial resolution of his or her claim is firmly grounded in the federal statutes regulation of labor-management relations. United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987). However, it remains within the discretion of the court to decide whether to implement that policy and require exhaustion in a particular case. Clayton v. Automobile Workers, 451 U.S. 679, 689 (1981).

In exercising this discretion, at least three factors are relevant: first, whether union officials are so hostile to the

employee that he could not hope to obtain a fair hearing on his claim; second, whether the union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under §301; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. If any of these factors are found to exist, the court may properly excuse the employee's failure to exhaust. Id. at 689. Further, the burden of establishing entitlement to the exhaustion defense lies with the union. Johnson v. General Motors, 641 F.2d 1075, 1079 (2d.Cir. 1981).

Upon review of the record before the court, including pleadings, affidavits, and portions of depositions, it appears the Defendants have sufficiently discharged their burden with respect to the first factor involving hostility. There is concrete affidavit evidence that establishes the Union harbored no hostility toward the Defendants. However, the court concludes the Union has failed to meet its burden as to the other two factors. The undisputed facts of Rockwell, relied on by the Union, only establish that the Plaintiffs filed a grievance on May 20, 1993, and the Union has a Public Review Board that serves as the ultimate resort for Union members dissatisfied with Union's handling of a grievance. To succeed on this issue Defendants must establish that the current procedure would not result in an "unreasonable delay" or the Plaintiffs would have been awarded the full relief they seek under §301. This they have not done. Furthermore, there

is no evidence that the Union has initiated a meeting or taken any action in response to the Problem Submittal Form filed by the Plaintiffs. The evidence simply establishes that a grievance was filed, and the Union has failed to take any action. Therefore, the Court concludes the Plaintiffs should not be required to exhaust their intra-union remedies before pursuing the present case.

Moreover, review of the undisputed facts of Rockwell does arguably establish some issue of whether the Union's actions were arbitrary, discriminatory or in bad faith resulting in a breach of their duty of fair representation concerning processing of the grievance. Vaca, 386 U.S. at 190. Notwithstanding, the Plaintiffs cannot avoid summary judgment on the conspiracy/breach of contract issues unless they establish that there exists material issues of fact related to the alleged breach of the Agreement by Rockwell and/or the Union which Plaintiffs have not done.

The Court agrees with the Defendants' contention that the parties' intent, past practices in the industry and custom should be given effect by the courts even when it appears to contradict the unambiguous language of the collective bargaining agreement. United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 581-82; Loveless v. Eastern Airline, Inc., 681 F.2d 1272, 1279 (11th Cir. 1982); Woodstock Industries v. Local Union 922 of UAW, 699 F.Supp 1259, 1269 (N.D. Ill. 1988). The court can determine the parties' intent as a matter of law where the evidence is uncontroverted and there is no genuine issue regarding any of the essential facts used to interpret the contract. Barlett v.

Safeway Stores, Inc., 538 F.2d 1311, 1313 (8th Cir. 1976); Joyce v. Curtiss-Wright Corporation, 810 F.Supp 67 (W.D.N.Y.1992).

The Defendants have established the past practice and intent of the parties was that an ISL would only be required to be submitted more than two weeks before the scheduled layoff if Rockwell needed two weeks to administer a large layoff.¹ The Plaintiffs have produced no evidence that supports their contention that the two week provision was an absolute requirement, or further that the two week requirement was waived in accordance with a secret agreement between the Union and Rockwell which circumvented the rights of certain employees for the preferential reinstatement of others. The standard for Summary Judgment requires more evidence than simply the Plaintiff's belief.

The Court next discusses Defendants' alternative issue, that Plaintiffs have suffered no damage even if a breach of contract occurred. The Court agrees with the Defendants' contention that damages, as with any contract, are an essential element of a breach of a collective bargaining agreement. The Court concludes that Plaintiffs cannot establish that, had the Yandell Group ISLs been denied, Plaintiffs would have been hired in McAlester. This is due to the fact that if the ISLs granted to the Yandell Group had been denied as untimely, Rockwell would have involuntarily laid off the five least senior structures mechanics three of whom (Gingerich

¹ Plaintiffs failed to counter with refuting evidence UAW representative Ben Aceves' statement, under penalty of perjury, that Rockwell and the Union did, on at least 49 other occasions, grant ISLs with less than the two weeks notice period being observed.

Dennis and Lackey) were members of the Yandell group and all possessed more seniority than Plaintiffs. It is obvious to the Court these three more senior Yandell group structures mechanics would have had their names placed on the Preferential Reinstatement List for recall at McAlester, thereby pushing Plaintiffs to numbers 6 and 8 on the hiring list of which only five were to be hired.

Defendants' contention that Plaintiffs have no provable damage as a result of a breach of the two-week proviso of the CBA is in reality an alternative argument that had the ISLs been denied the ensuing involuntary layoff (which also would have precluded Plaintiffs' employment at McAlester as did the ISL procedure) would not have been a breach of the Rockwell/Union Agreement either. Whether approached from a damages or breach of contract point of view the Court concludes Defendants' arguments and authorities are well taken.

Based upon the above the Court concludes Plaintiffs have failed to come forward with evidence that the alleged breach of the Agreement caused injury to the Plaintiffs resulting in recoverable damages, which is an essential element of the Plaintiffs' breach of contract claim. Alternatively, the Court concludes that had the ISLs been denied and an involuntary layoff ensued, Defendants still would not have been in breach of the CBA.

Lastly, while the Court agrees that an employee's interest in seniority is arguably a property right protected by the constitution, it does not embrace the Plaintiffs' contention that the case at bar establishes interference of those seniority rights

of the Plaintiffs. The Court concludes the seniority rights of the Yandell group stands in higher priority than the property (seniority) rights of the Plaintiffs.

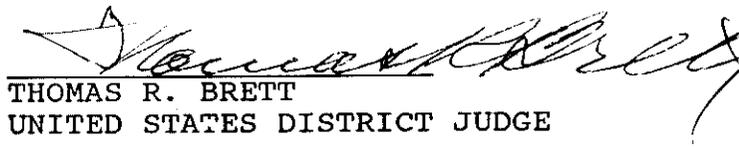
The Plaintiffs have failed to establish that Rockwell breached the Agreement which is designed to protect the seniority of Union members. Furthermore, the overriding purpose of the Agreement is to protect those with the most seniority, and the ultimate result of both Rockwell's and the Union's actions was that the more senior Yandell Group received the available jobs at McAlester.

Therefore, since the Plaintiffs have not established that there exists genuine issues of material fact regarding the existence of a breach of the Agreement by Rockwell and/or the Union, including damages or alternatively an involuntary layoff, or interference with an existing property right, and since Defendants are entitled to relief as a matter of law, summary judgment for the Defendants is proper.

For the above stated reasons, Defendants' Motions for Summary Judgment are granted. Defendants' fair representation issue is denied as moot.

Further, the court denies, as moot, Defendant Rockwell International Corporation's Motion to Strike Punitive Damages Claim (Docket #34), Defendant Rockwell's, Motion in Limine (Docket # 36), and Plaintiffs Francis L. Kizlinski and Michael G. Oliver's Motion to Enter Partial Summary Judgment and/or Interlocutory Order and/or In Limine Orders (#40).

IT IS SO ORDERED THIS 16 DAY OF JUNE, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE JUN 17 1994

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

F I L E D

JUN 17 1994

JEVAN BARRY FITZSIMMONS,

Plaintiff,

vs.

NEW MEDICO ASSOCIATES, a Delaware
corporation; TIMBER RIDGE RANCH
NEUROREHABILITATION CENTER, INC., a
Delaware corporation; and BARBARA
BUNTEN, an individual,

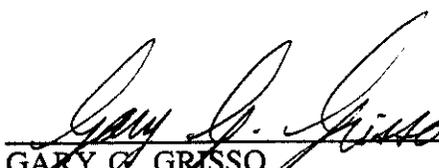
Defendants.

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

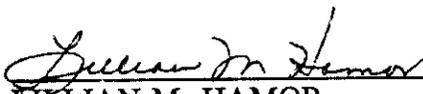
No. CIV-92-C-1077-B

STIPULATION OF DISMISSAL

The parties, by and through their attorneys of record, request the court to dismiss captioned matter with prejudice, with each party bearing their respective costs, including attorney's fees.

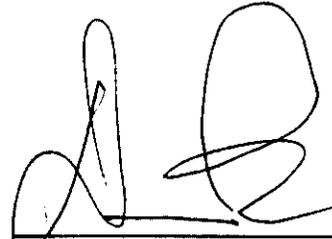

GARY G. GRISSO
WHITE, GRISSO AND ASSOCIATES
1718 WEST BROADWAY
COLLINSVILLE, OKLAHOMA 74021
TELEPHONE: (918)371-2531
ATTORNEYS FOR PLAINTIFF


JOE WHITE
WHITE, GRISSO AND ASSOCIATES
1718 WEST BROADWAY
COLLINSVILLE, OKLAHOMA 74021
TELEPHONE: (918) 371-2531
ATTORNEYS FOR PLAINTIFF


ELLIAN M. HAMOR
3314 E. 51ST STREET, SUITE 214W
TULSA, OKLAHOMA 74135
TELEPHONE: (918) 749-3314
ATTORNEY FOR PLAINTIFF

William A. Fiasco

WILLIAM A. FIASCO - OBA #12662
ATKINSON, HASKINS, NELLIS,
BOUDREAUX, HOLEMAN, PHIPPS &
BRITTINGHAM
1500 PARKCENTRE, 525 SOUTH MAIN
TULSA, OKLAHOMA 74103-4524
TELEPHONE: (918)582-8877
ATTORNEY FOR NEW MEDICO
DEFENDANTS

A handwritten signature in black ink, consisting of several loops and a horizontal line at the bottom.

DUNCAN PARKS - OBA #13862
ELLIOTT AND MORRIS
119 NORTH ROBINSON, SUITE 630
OKLAHOMA CITY, OKLAHOMA
TELEPHONE: (405)236-3600
ATTORNEYS FOR DEFENDANT
BARBARA BUNTEN

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

DATE JUN 17 1994

CLAUDE MILES,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION, et al.,)
)
 Respondent.)

No. 94-C-556-E

FILED

JUN 16 1994

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

ORDER

Petitioner has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

The certificate by an authorized officer reveals that Petitioner has \$289.13 in his inmate accounts. Okla. Stat. Ann. tit. 57, § 549(A)(5) (West Supp. 1994) states that funds from an inmate's savings account may be used for fees or costs in filing a civil action. Accordingly, because Petitioner has cash and securities in his prison accounts exceeding \$200.00, Petitioner's motion for leave to proceed in forma pauperis should be denied. See Uniform Rule 8 for United States District Courts,

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Petitioner's motion for leave to proceed in forma pauperis is denied.
- (2) Petitioner's application for a writ of habeas corpus is dismissed without prejudice at this time for failure to pay the required filing fee. See Local Rule 5.1.F. The court may reopen this action if Petitioner submits to the court the \$5.00 filing fee within thirty (30) days from

the date of entry of this order.

SO ORDERED THIS 15th day of June, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 6-17-94

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

FILED

JUN 16 1994

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

THE ST. PAUL INSURANCE
COMPANY OF TEXAS,

Plaintiff,

vs.

No. 93-C-921-B

HARRY F. PARRISH AGENCY, INC.,
OKLAHOMA FIXTURE COMPANY, and
FIXTURES AND DRY WALL COMPANY
OF OKLAHOMA, INC.,

Defendants.

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW The St. Paul Insurance Company of Texas, Plaintiff herein, and the Harry F. Parrish Agency, Inc., Oklahoma Fixture Company, and Fixtures and Drywall Company of Oklahoma, Inc., Defendants herein, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, do stipulate to dismiss the above styled and numbered cause, and all claims asserted therein as to all parties, with prejudice to the refileing thereof.

Respectfully submitted,



Phil R. Richards, OBA #10457
Richard E. Warzynski, OBA #14079
RICHARDS, PAUL, RICHARDS & SIEGEL
Nine East Fourth Street, Suite 400
Tulsa, OK 74103-5118
(918) 584-2583

ATTORNEYS FOR PLAINTIFF THE
ST. PAUL INSURANCE COMPANY OF
TEXAS



Scott B. Wood, Esq.
BARKLEY, RODOLF & MCCARTHY
401 S. Boston
Tulsa, Oklahoma 74103
(918) 599-9991

ATTORNEY FOR DEFENDANT
HARRY F. PARRISH AGENCY, INC.



Stephen L. Andrew, Esq.
McCormick, Andrew & Clark
Tulsa Union Depot, Suite 100
111 East First Street
Tulsa, Oklahoma 74103
(918) 583-1111

ATTORNEY FOR DEFENDANTS
OKLAHOMA FIXTURE COMPANY AND
FIXTURES AND DRYWALL COMPANY
OF OKLAHOMA, INC.

ENTERED ON FILE

DATE JUN 1 6 1994

FILED
Case No. 3055

JUN 1 1994

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

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

KODAK ELECTRONIC PRINTING)
SYSTEMS, INC.,)
)
Plaintiff,)
)
vs.)
)
ELECTRONIC PUBLISHING)
INFORMATION CONSULTANTS, INC.,)
)
Defendant.)

Case No. 93-C1120-B

ORDER

This matter comes on before the Court upon the motion of Kodak Electronic Printing Systems, Inc. ("Kodak") for recovery of attorneys' fees. No objections to the Motion have been filed. Upon review of the Plaintiff's motion and supporting affidavits and exhibits, the Court finds that Plaintiff Kodak is entitled to an award of attorneys' fees in this action pursuant to 12 O.S. § 936 and Paragraph 10.2 of the dealership agreement between Plaintiff and Defendant, a complete copy of which is attached to the Complaint filed herein. The Court further finds that the amount of attorneys' fees were reasonable and necessary pursuant to the factors set forth in Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983).

IT IS, THEREFORE, ORDERED that Plaintiff Kodak shall be and is hereby awarded judgment of ~~\$5,717.00~~ ^{\$4,997.00} against Defendant

Electronic Publishing Information Consultants, Inc. d/b/a EPIC, for attorneys' fees.

Dated this 15 of June 1994.

S/ THOMAS R. BRETT

HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE JUN 16 1994

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

FILED

JUN 15 1994

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

DONNIE LEWAYNE FOX,
Plaintiff,

vs.

STANLEY GLANZ, et al.,
Defendants.

No. 93-C-1150-B

ORDER

At issue before the Court are the entry of appearance of Plaintiff's attorney and application for extension of time to respond to Defendants' motions to dismiss and for summary judgment [docket #14], Plaintiff's pro-se motion to vacate the judgment [docket #15], and Plaintiff's pro-se motion "to withdraw his pro se status" [docket #17].

After carefully reviewing the above motions, the Court concludes that they should be granted, that Defendants' motions to dismiss and for summary judgment should be reinstated, and that Plaintiff shall proceed only through the representation of his retained counsel.

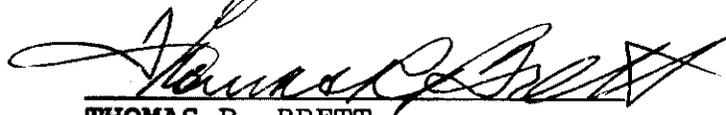
ACCORDINGLY, IT IS HEREBY ORDERED:

- (1) That Plaintiff's motions for an extension of time, to vacate the judgment, and "to withdraw his pro se status" [docket #14, #15, and #17] be granted;
- (2) That the order granting Defendants' motions to dismiss and for summary judgment [docket #12 and #13] be vacated;
- (3) That Defendants' motions to dismiss and for summary judgment [docket #8 and #10] be reinstated; and

4

(4) That Plaintiff shall file a response to Defendants' motions to dismiss and for summary judgment [docket #8 and #10] on or before twenty (20) days from the date of entry of this order.

SO ORDERED THIS 15 day of June, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

M.R. TUDOR, INC. an)
Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
WORLDLINE, INC., a Florida)
corporation, DEAN WORLDWIDE,)
INC., formerly d/b/a MAXXIM)
INTERNATIONAL, RAM-FORWARDING,)
INC., a Texas corporation, d/b/a MAXXIM)
INTERNATIONAL, and ELLIOTT MARINE)
SERVICES, INC., a Texas corporation,)
)
Defendants.)

Case No. 92-C-889-C ✓

F I L E D)
JUN 14 1994

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

JUDGMENT

On the 24th day of May, 1994, this Court entered its Order (the "Order") in the above-styled cause ordering that Plaintiff M. R. Tudor, Inc. ("Tudor") is entitled to judgment in its favor against Defendant Dean Worldwide, Inc., formerly d/b/a Maxxim International ("Maxxim") on Tudor's claims of negligence, breach of contract, fraud, and breach of fiduciary duty in the principal amount of \$62,153.69, plus pre- and post-judgment interest thereon at the rate of 3.54 percent until paid in full. The Order further provides that Tudor is entitled to judgment against Maxxim for exemplary damages in the amount of \$25,000.00, and that Tudor is entitled to its costs and pursuant to 12 O.S. § 936, a reasonable attorneys' fee incurred in this matter to be paid by Maxxim.

The Order additionally provides that Tudor is entitled to judgment against Defendant Worldline, Inc. ("Worldline") in the principal amount of \$62,153.69, plus pre-

84

and post-judgment interest thereon at the rate of 3.54 percent until paid in full.

ACCORDINGLY,

JUDGMENT IS HEREBY ENTERED in favor of Tudor and against Maxxim in the principal amount of \$62,153.69, plus pre-judgment interest thereon from March 13, 1992 through May 24, 1994 in the amount of \$4,836.06, and post-judgment interest thereon at the rate of 3.54 percent until paid in full.

JUDGMENT IS FURTHER ENTERED in favor of Tudor and against Maxxim in the amount of \$25,000.00 for exemplary damages.

JUDGMENT IS FURTHER ENTERED in favor of Tudor and against Worldline in the principal amount of \$62,153.69, plus pre-judgment interest thereon from March 13, 1992 through May 24, 1994 in the amount of \$4,836.06, and post-judgment interest thereon at the rate of 3.54 percent until paid in full.

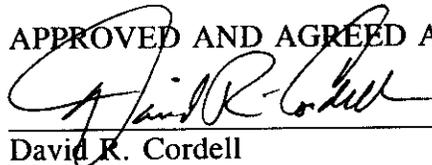
IT IS FURTHER ORDERED that within fourteen (14) days after the entry hereof, Tudor shall file its motion and affidavit in support of its application for attorneys' fees and after the determination of the amount thereof to be awarded, such award shall become part of the Judgment rendered hereby.

IT IS FURTHER ORDERED that within fourteen (14) days after the entry hereof, Tudor shall file its bill of costs in accordance with N.D.L.R. 54.1 and upon determination thereof by the Clerk of the Court, any amount of costs awarded to Tudor shall become part of the Judgment rendered hereby.

JUDGMENT IS SO ENTERED THIS ^{13th} DAY OF ^{June} MAY, 1994.


The Honorable H. Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED AND AGREED AS TO FORM:



David R. Cordell
CONNER & WINTERS
2400 First National Tower
15 East 5th Street
Tulsa, Oklahoma 74103-4391
(918) 586-5711

Attorneys for Plaintiff,
M. R. TUDOR, INC.



Phil R. Richards
RICHARDS, PAUL, RICHARDS & SIEGEL
9 East 4th Street
Suite 400
Tulsa, Oklahoma 74103-5118
(918) 584-2583

Attorneys for Defendant,
DEAN WORLDWIDE, INC. FORMERLY
D/B/A MAXXIM INTERNATIONAL

DATE 6-16-94

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID DARRELL BOOS;
CHRISTINE BRIGITTE BOOS;
MONDRIAN MORTGAGE CORPORATION;
STATE OF OKLAHOMA, ex rel.
OKLAHOMA TAX COMMISSION
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

FILED

JUN 15 1994

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

RECEIVED
JUN 13 1994
U.S. ATTORNEY
N.D. OKLAHOMA

CIVIL ACTION NO. 94-C-328-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15th day
of June, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, COUNTY TREASURER, Tulsa County,
Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County,
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF
OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D.
Ashley, Assistant General Counsel; and the Defendants, DAVID
DARRELL BOOS, CHRISTINE BRIGITTE BOOS and MONDRIAN MORTGAGE
CORPORATION, appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, DAVID DARRELL BOOS,
acknowledged receipt of Summons and Complaint on April 19, 1994;
that the Defendant, CHRISTINE BRIGITTE BOOS, acknowledged receipt

of Summons and Complaint on April 6, 1994; that the Defendant, MONDRIAN MORTGAGE CORPORATION, acknowledged receipt of Summons and Complaint on April 13, 1994; that Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on April 8, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 15, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 8, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on April 25, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on May 2, 1994; and that the Defendants, DAVID DARRELL BOOS, CHRISTINE BRIGITTE BOOS, and MONDRIAN MORTGAGE CORPORATION, have failed to answer and default has therefore been entered by the Clerk of this Court.

The Court further finds that on March 19, 1993, DAVID DARRELL BOOS and CHRISTINE BRIGITTE BOOS filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 93-00886-W. On July 21, 1993, the United States Bankruptcy Court, Northern District of Oklahoma filed its Discharge of Debtor, and the case was subsequently closed on September 8, 1993.

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

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

LOT FIVE (5), BLOCK THREE (3), SUNWOOD HILLS SECOND, AN ADDITION TO THE CITY OF TULSA, OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on August 22, 1979, Greg King and Becky King, executed and delivered to First Continental Mortgage Co., a mortgage note in the amount of \$51,450.00, payable in monthly installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, Greg King and Becky King, executed and delivered to First Continental Mortgage Co., a mortgage dated August 22, 1979, covering the above-described property. Said mortgage was recorded on August 24, 1979, in Book 4422, Page 1260, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 30, 1987, Commonwealth Savings Association, successor by merger to First Continental Mortgage Co., assigned the above-described mortgage note and mortgage to Commonwealth Mortgage Company of America, L.P. This Assignment of Mortgage was recorded on May 21, 1987, in Book 5024, Page 2174, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 23, 1991, Commonwealth Mortgage Company of America, L.P., assigned the above-described mortgage note and mortgage to Mondrian Mortgage

Corporation. This Assignment of Mortgage was recorded on September 6, 1991, in Book 5347, Page 1711, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 11, 1991, Commonwealth Mortgage Company of America, L.P., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns by an Attorney in Fact. This Assignment of Mortgage was recorded on November 21, 1991, in Book 5363, Page 607, in the records of Tulsa County, Oklahoma. A corrected assignment was recorded on March 10, 1992, in Book 5387, Page 614, in the records of Tulsa County, Oklahoma, to correct the execution of the Attorney in Fact.

On April 17, 1987, Greg King and Becky King, husband and wife, granted a general warranty deed to David D. Boos, a single person. This deed was recorded with the Tulsa County Clerk on April 21, 1987, in Book 5017 at Page 96 and David D. Boos assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that the Defendant, DAVID DARRELL BOOS, made default under the terms of the aforesaid note and mortgage, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, DAVID DARRELL BOOS, is indebted to the Plaintiff in the principal sum of \$63,366.89, plus interest at the rate of Ten percent per annum from December 1,

1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a claim on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$50.00 which became a claim on the property as of 1993. Said claim is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, CHRISTINE BRIGITTE BOOS, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, MONDRIAN MORTGAGE CORPORATION, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has liens on the property which is the subject matter of this action by virtue of a Tax Warrant No. ITI8600462800, in the amount of \$922.64, plus accrued and accruing interest, dated June 16, 1986, and filed on June 26, 1986, in the records of Tulsa County Clerk, and Tax Warrant No. ITI9100215000, in the amount of \$1,098.41, plus accrued and accruing interest, dated February 7, 1991, and filed on February 12, 1991, in the records of the Tulsa County Clerk.

Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, DAVID DARRELL BOOS, in the principal sum of \$63,366.89, plus interest at the rate of Ten percent per annum from December 1, 1993 until judgment, plus interest thereafter at the current legal rate of 5.28 percent per annum until paid, plus the costs of this action, and 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, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, recover judgment in the amount of \$2,021.05, plus accrued and accruing interest for taxes due and owing, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and

recover judgment in the amount of \$50.00 for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, has no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, CHRISTINE BRIGITTE BOOS, has no right, title, or interest in the subject real property.

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

First:

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

Second:

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

Third:

In payment of Defendant, STATE OF OKLAHOMA, ex rel.
OKLAHOMA TAX COMMISSION, in the amount of \$2.021.05,
plus accrued and accruing interest, taxes which
are currently due and owing.

Fourth:

In payment of Defendant, COUNTY TREASURER,
Tulsa County, Oklahoma, in the amount of
\$50.00, personal property taxes which are
currently due and owing.

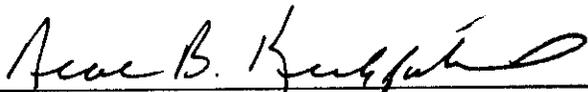
The surplus from said sale, if any, shall be deposited with the
Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that
pursuant to 12 U.S.C. 1710(1) there shall be no right of
redemption (including in all instances any right to possession
based upon any right of redemption) in the mortgagor or any other
person subsequent to the foreclosure sale.

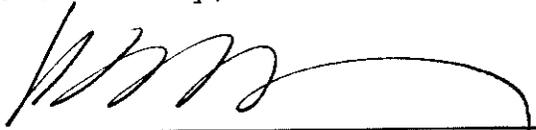
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from
and after the sale of the above-described real property, under
and by virtue of this judgment and decree, all of the Defendants
and all persons claiming under them since the filing of the
Complaint, be and they are forever barred and foreclosed of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

APPROVED:

STEPHEN C. LEWIS
United States Attorney


NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463


J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma


KIM D. ASHLEY
Assistant General Counsel
P.O. Box 53248
Oklahoma City, Oklahoma 73152-3248
Attorney for Defendant,
STATE OF OKLAHOMA, ex rel.
OKLAHOMA TAX COMMISSION

Judgment of Foreclosure
Civil Action No. 94-C-328-B

NBK:flv

ENTERED ON DOCKET

DATE JUN 16 1994

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

FILED

JUN 14 1994

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

MARK LEE WOLFE,)
)
 Petitioner,)
)
 vs.)
)
 L. L. YOUNG, Warden, and the)
 ATTORNEY GENERAL OF THE)
 STATE OF OKLAHOMA,)
)
 Respondents.)

94-C-151-B

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed May 19, 1994, in which the Magistrate Judge recommended that petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be denied. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

It is therefore Ordered that petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied.

Dated this 14 day of June, 1994.


 THOMAS R. BRETT
 UNITED STATES DISTRICT JUDGE

DATE JUN 10 1994
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DELORIS A. ADAMS;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

FILED
JUN 10 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C-7-B

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 15 day of June, 1994.

S/

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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

JUN 1 8 1994

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

AIG Life Insurance Company,)
a subsidiary of)
American International Companies,)
a Delaware Corporation,)

Plaintiff,)

vs.)

Case No. 94-C-292-B

Alan Michael Burnett,)
an individual,)
Elizabeth Alice Burnett,)
a minor, by and through her)
co-guardians Michael F. Nichols)
and Camilla Kay Nichols, and)
Stephen Craig Burnett,)
an individual,)

Defendants.)

FILED

JUN 1 4 1994

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

ORDER OF DISCHARGE AND
JOURNAL ENTRY OF JUDGMENT

Now on this 14th day of June 1994, this case comes on for hearing pursuant to the parties' Joint Application for Order of Discharge and Journal Entry of Judgment.

The Plaintiff, AIG Life Insurance Company, appears through its counsel, Kirsten E. Pace. Defendants Alan Michael Burnett, Elizabeth Alice Burnett, and Michael F. Nichols and Camilla Kay Nichols appear through their counsel, D. Faith Orlowski. Stephen Craig Burnett does not appear, and waived his interest in the subject matter of this lawsuit by a waiver filed on or about April 11, 1994. The Court, having reviewed the Petition for Interpleader, the Answer, and all pleadings and evidence in this case and having heard the arguments of Counsel, finds as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Court has jurisdiction of the subject matter and of the parties. Venue is proper.
2. The Plaintiff, AIG Life Insurance ("AIG"), issued a policy of insurance for accidental death and dismemberment to The Williams Companies in Tulsa, Oklahoma, Policy No. 8039487 (the "Policy").
3. Elizabeth A. Burnett ("the Decedent") was an employee of The Williams Companies. On December 5, 1990, she executed a beneficiary designation card under the Policy listing her husband, Defendant Stephen C. Burnett, as the primary beneficiary and her children, Defendants Alan Michael Burnett ("Alan Burnett") and Elizabeth Alice Burnett ("Lisa Burnett"), as contingent beneficiaries. On November 25, 1991, Decedent executed another beneficiary designation form listing only Stephen C. Burnett as primary beneficiary.
4. The Policy provided for \$150,000.00 in coverage for Decedent's accidental death.
5. Decedent suffered an accidental death under the terms of the policy on or before July 10, 1993. On or about July 14, 1993, the Defendant Stephen C. Burnett was charged by information in Tulsa County District Court, Case No. CF-93-3131 with murder in the first degree of his wife, Elizabeth Burnett, the Decedent.
6. Defendants Lisa and Alan Burnett made demand upon the Plaintiff AIG for payment of the Policy proceeds, plus

interest pursuant to Oklahoma's "Slayer Statute" at 84 O.S. § 231.

7. On March 28, 1994, the Plaintiff AIG filed its Complaint for Interpleader.
8. On April 11, 1994, Defendant Stephen C. Burnett disclaimed and waived any rights or interests he may have in the Policy proceeds in the Interpleader action filed by AIG.
9. On April 12, 1994, Alan and Lisa Burnett Answered.
10. On April 15, 1994, Plaintiff AIG applied for permission to pay the \$150,000.00 Policy proceeds into Court. The application was granted by Court Order on April 20, 1994, and Plaintiff AIG deposited with the Court Clerk a check for \$150,000.00 on April 22, 1994.
11. On April 26, 1994, the Defendant Stephen C. Burnett plead guilty to the charge of murder in the first degree of the Decedent.
12. AIG's Policy provides that for beneficiary designations, proceeds are payable to the first of the following survivors: Legal Spouse, children, parents, sisters/brothers.
13. Decedent's parents and brothers have waived any interest in or claim to the proceeds of any policy insuring Decedent's life.
14. Prior to April 26, 1994, Plaintiff AIG was compelled to employ attorneys and pay Court costs for the purpose of protecting its interests arising out of the potentially conflicting claims of the Defendants, and AIG has incurred reasonable

attorney's fees in the amount of \$2,018.50, and costs in the amount of \$140.00.

15. Under the terms of the policy and Oklahoma law, interest accrued on the unpaid proceeds at 6% per annum after July 10, 1993.
16. The parties have agreed that the interest due and owing on the principal sum is \$7,298.64.

IT IS THEREFORE ORDERED that AIG properly interpleaded the funds, and Defendants Lisa Burnett and Alan Burnett have agreed to equally share their right to the \$150,000.00 proceeds and \$7,298.64 in interest on the Policy.

IT IS FURTHER ORDERED that AIG Life shall pay the \$7,298.64 in interest on the Policy to the Clerk of this Court upon receipt of this Order.

IT IS FURTHER ORDERED that upon payment of the \$7,298.64 in interest on the Policy, AIG is discharged from any further liability on any claims regarding the proceeds and interest due under the Policy.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Alan Burnett, Lisa Burnett and Stephen C. Burnett are permanently enjoined from instituting or prosecuting any suit or proceeding against AIG in any state or federal court regarding the proceeds and interest from the Policy.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that AIG is awarded an attorney fee of \$2,018.50, and Court costs of \$140.00. The Clerk of this Court is directed that upon receipt of the

\$7,298.64 in interest, along with the \$150,000.00 in proceeds already paid, the Clerk is to issue a check for \$2,158.50 to AIG Life, by and through the law firm Atkinson, Haskins, Nellis, Boudreaux, Holeman, Phipps & Brittingham.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Alan Burnett and Lisa Burnett are entitled to equal shares of the \$150,000.00 in proceeds already paid, as well as the \$7,298.64 in interest to be paid, less the award of attorney's fees and costs of \$2,158.50. Lisa and Alan Burnett shall also equally share in any interest earned on the \$150,000.00 in proceeds as a result of the interest-bearing investment account used to hold the funds. Lisa Burnett, a minor, shall be paid these funds by and through the permanent guardian of her property, State Bank & Trust Co., N.A. Therefore, the Clerk of the Court is ordered to issue checks as follows:

A check payable to Alan Michael Burnett, and his attorney D. Faith Orlowski, in the amount of \$77,570.07 plus one-half of interest earned during the investment period with the Court Clerk; a check payable to Elizabeth Alice Burnett, a minor, by and through her property guardian State Bank & Trust Co., N.A., and her attorney D. Faith Orlowski, in the amount of \$77,570.07, plus one-half of interest earned during the investment period with the Court Clerk.

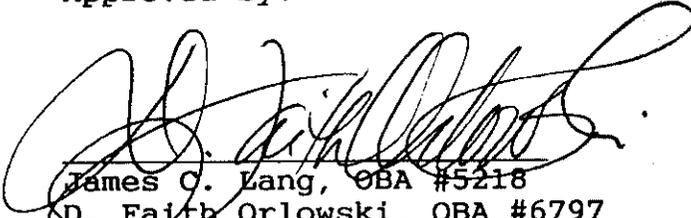
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is no just reason for delay in the preparation and filing of this final judgment relating to the interests of the parties, and the Court hereby expressly directs the filing of this Judgment.

IT IS SO ORDERED this 14 day of June, 1994.

S/ THOMAS C. BRETTE

United States District Judge

Approved by:


James C. Lang, OBA #5218
D. Faith Orlowski, OBA #6797
2300 Williams Center Tower II
Two West Second Street
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Attorneys for Defendants
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Camilla Kay Nichols guardians
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Facsimile: (918) 585-8094

Attorney for AIG Life Insurance Company

336\315\ORD-JEJ.SB\KEP

ENTERED ON DOCKET

DATE 6-16-94

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

IN RE:)
)
 SPECTRUM GAS SYSTEMS, INC.,)
 PACIFIC-MIDWEST GAS COMPANY AND)
 SPECTRUM NATURAL GAS COMPANY,)
)
 Debtors.)
)
 WILLIAM A. ROOKSTOOL,)
)
 Appellant,)
)
 vs.)
)
 SPECTRUM NATURAL GAS COMPANY)
 LIQUIDATING TRUST,)
)
 Appellee.)

FILED

JUN 15 1994

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

Case No. 93-C-835-B ✓

ORDER

Now before the Court is the appeal of William A. Rookstool ("Rookstool"), the Defendant in the action before the United States Bankruptcy Court for the Northern District of Oklahoma and the Appellant herein. Rookstool appeals the Bankruptcy Court's Interlocutory Order denying his motion to dismiss entered November 10, 1992, and the Memorandum Opinion and Judgment Order entered by the Bankruptcy Court on September 1, 1993. An advisory hearing was held before the Magistrate Judge on May 31, 1994.

I. Facts/Procedural History

Appellant William Rookstool was in the business of selling gas to various purchasers. On May 3, 1989, Spectrum Natural Gas Company ("Spectrum") and Rookstool entered into a gas purchase agreement whereby Spectrum agreed to purchase gas from Rookstool. The agreement called for Spectrum to pay Rookstool no later than 25

7

days "following the last day of the month following the month of delivery ... or, if later, within 10 days of receipt by [Spectrum] of all necessary data from the gas transporters."

Rookstool provided gas to Spectrum for the month of May 1989 but did not receive payment until August 1989 in the amount of \$30,803.56. Accompanying this payment was a letter from Debtor dated August 2, 1989, which addressed the delay in payment for the May 1989 gas. The letter explained that Debtor did not receive the necessary data from the gas transporter until August 2, 1989.

Rookstool also supplied gas to Spectrum in June 1989 but did not receive payment until October 6, 1989, in the amount of \$25,789.74. Less than ninety (90) days later, on November 20, 1989, Spectrum filed its Voluntary Petition seeking relief under Chapter 11 of the United States Bankruptcy Code. Spectrum became a debtor-in-possession upon the filing of the Voluntary Petition and remained as such until its Second Amended Joint Plan of Reorganization ("the Plan") was confirmed on October 10, 1990. The Plan created the appellee, the Spectrum Natural Gas Company Liquidating Trust (SNGCLT), to administer the assets of Spectrum and to prosecute its claims. On October 31, 1990, Burk Bishop ("Liquidating Trustee") assumed the duties of the liquidating trustee for the SNGCLT pursuant to the terms of the Plan.

On August 12, 1992, more than two years after Spectrum filed its Voluntary Petition (but less than two years after the Liquidating Trustee assumed his duties), the Liquidating Trustee filed an adversary action against Rookstool, alleging that the

October 6, 1989, payment of \$25,789.74 to Rookstool was a preferential transfer subject to avoidance under §547 of the Bankruptcy Code. On September 14, 1992, Rookstool filed a Motion to Dismiss alleging that the Liquidating Trustee's cause of action was barred by the statute of limitations established by 11 U.S.C. §546(a)(1). The Bankruptcy Court denied the motion to dismiss in an Order entered November 10, 1992.

On July 23, 1993, Rookstool filed a Motion for Summary Judgment, arguing that the \$25,789.74 payment from Spectrum was not avoidable as a preference because it was made in the "ordinary course of business." SNGCLT also filed a motion for summary judgment arguing the October payment was a preference and was not made in the ordinary course of business. The Bankruptcy Court concluded in a Memorandum Opinion filed September 1, 1994, that there was no evidence that Spectrum's payment for the June gas was timely made in accordance with the parties agreement. The Bankruptcy Court also concluded there was no established custom or practice between the parties of accepting late payments and thus the untimely October payment was not made "in the ordinary course of business." Based on the undisputed facts and these legal conclusions, the Bankruptcy Court held that the October payment made by Spectrum to Rookstool was a preference and should be avoided pursuant to §547 of the Bankruptcy Code. Rookstool appealed the Bankruptcy Court's ruling to this Court on September 23, 1993.

Two issues are raised on appeal. First, did the Bankruptcy Court err in granting summary judgment for SNGCLT on Rookstool's

affirmative defense that the October payment fell within the ordinary course of business exception set forth in §547(c)(2) of the Bankruptcy Code. Second, was SNGCLT barred by the statute of limitations of 11 U.S.C. §546(a)(1) from bringing this action.

II. Legal Analysis

A. Ordinary Course of Business Exception

Rookstool argues that granting summary judgment in favor of SNGCLT was improper both procedurally and factually. Rookstool's pleadings filed in the Bankruptcy Court did not dispute that the October payment by Spectrum satisfied all of the §547(b) elements of a preferential transfer. Instead, Rookstool argued the trustee was prohibited from avoiding the transfer by 11 U.S.C. §547(c), which provides:

(c) The trustee may not avoid under this section a transfer --

(2) to the extent that such transfer was --

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms.

Rookstool bears the burden of proving that this "ordinary course of business" exception applies by establishing these three elements by a preponderance of the evidence. 11 U.S.C. §547(g); In re Magic Circle Energy Corp., 64 B.R. 269 (Bankr.W.D.Okla. 1986). The Bankruptcy Court found that Rookstool failed to offer any evidence to sustain his contention that the October payment was made in Spectrum's "ordinary course of business or financial affairs."

"[T]he plain language of Rule 56(c) [Fed.R.Civ.P.] mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986). If there is a complete failure of proof concerning an essential element of the non-movant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. Id. at 323. The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hosp. of Sheridan County, 850 F.2d 1384 (10th Cir. 1988). This Court concludes the Bankruptcy Court properly held that Rookstool had failed to make a sufficient showing to establish an essential element of his "ordinary course of business" defense and thus properly granted summary judgment against Rookstool on this issue.¹

B. Statute of Limitations

The second issue on appeal is whether SNGCLT is barred by the statute of limitations of 11 U.S.C. §546(a)(1) from bringing this action to avoid the October transfer. The question here focuses on

¹ Rookstool's argument that the Bankruptcy Court should not have granted summary judgment for SNGCLT on this issue but rather should have simply denied his motion is not well taken. SNGCLT's motion for summary judgment specifically addressed Rookstool's "ordinary course of business" defense and put Rookstool on notice that he had to come forward with all of his evidence on the issue. Celotex, 477 U.S. at 326; Durtsche v. American Colloid Co., 958 F.2d 1007, 1009 (10th Cir. 1992).

an interpretation of 11 U.S.C § 546(a), which states:

Any action or proceeding under section ... 547 ... of this title may not be commenced after the earlier of -- (1) two years after the appointment of a trustee under sections 702, 1104, 1163, 1302, or 1202 of this title; or (2) the time the case is closed or dismissed.

The Tenth Circuit Court of Appeals has held that this section of the Bankruptcy Code is ambiguous and therefore must be construed. Zilkha Energy Company v. Leighton, 920 F.2d 1520 (10th Cir. 1990).² In Zilkha, the Circuit Court held that a debtor in possession "is the functional equivalent of an appointed trustee"³

² Although bound by Zilkha, this Court is persuaded by the analysis of the United States Bankruptcy Court for the Northern District of Texas:

Initially, this Court finds the wording of §546(a)(1) unambiguous. If it had intended for the word "trustee" to apply to a debtor-in-possession as the Tenth Circuit Court of Appeals believed, Congress could have made it clear by including the words "debtor-in-possession" or referring to the "date of the petition." Instead, Congress made it perfectly clear that §546(a)(1) applies only to trustees appointed under specifically enumerated sections of the Code. (footnotes omitted)

Hunt v. Hunt, 136 B.R. 437 (1991); see also In re Denver/Robins Venture Partners, Ltd., _____ B.R. _____, 1994 WL 187790 (Bankr.M.D.Ga. May 3, 1994) (finding that §546(a)(1) is not ambiguous and strictly construing the section to apply only to trustees appointed under the specifically enumerated sections).

³ As stated in Hunt, the conclusion that the debtor-in-possession and appointed trustee are functional equivalents may be "theoretically correct, but is not in synch with real life." Hunt, 136 B.R. at 448.

Although many of the powers and duties of a trustee are granted to or imposed upon a debtor-in-possession, they are distinct entities, often operating under different agendas. A debtor in possession is concerned primarily with rehabilitating the company by developing a

and applied §546(a)(1) to actions filed by a debtor-in-possession, with the limitations period beginning to run from the date of the filing of the petition for reorganization.⁴

confirmable plan of reorganization. The debtor-in-possession may decide ... to compromise, settle, or abandon any avoidance actions, or simply let potential claims lie until after a plan is confirmed.

A Chapter 11 trustee, however, is primarily interested in obtaining the maximum return possible for the estate's creditors. In order to achieve this result, a trustee generally will be more diligent in pursuing any possible avoidance actions. Even though a debtor-in-possession and a trustee have fiduciary responsibilities to the estate, a trustee is more likely to pursue voidable transfers. ...

Furthermore, a debtor-in-possession has less incentive to bring an avoidance action, since the debtor is the one who made the questioned transfer in the first place. (footnotes and citations omitted).

Id. For another recent discussion of the significant distinctions between a debtor-in-possession and an appointed trustee, see In re Denver/Robins Venture Partners, Ltd., _____ B.R. _____, 1994 WL 187790 (Bankr.M.D.Ga. 1994).

⁴ Zilkha has been criticized by numerous courts. See e.g., In re Denver/Robins Venture Partners, Ltd.; In re Century Brass Products, Inc., 127 B.R. 720, 721 (Bankr.D.Ct. 1991); In re Allegheny Int'l, Inc., 136 B.R. 119, 124 (Bank.N.D.Tex. 1991); In re Pullman Const. Ind., Inc., 132 B.R. 359 (Bankr. N.D. Ill. 1991); In re Tamiami Range & Gun Shop, 130 B.R. 617, 619 (Bankr.S.D.Fla. 1991); and In re Brin Mont Chemicals, Inc., 154 B.R. 903 (M.D.N.C. 1993).

Bankruptcy treatises have also rejected the Zilkha "functional equivalent" approach.

The better view is that section 1107(a), which gives the debtor powers of a trustee and subjects the debtor in possession to the limitations placed on a trustee, does not equate service of the debtor in possession with the appointment of a trustee for the purposes of section 546(a).

⁴ Collier on Bankruptcy (15th Ed), ¶546.02.

In the case at bar, the petition for reorganization was filed November 20, 1989, and according to Zilkha, the two-year limitations period began running on that date. The Liquidating Trustee assumed his duties on October 30, 1990, and commenced the subject action within two years of that date (but not within two years of the filing of the petition for reorganization). Therefore, the issue becomes whether the creation of the SNGCLT and the subsequent appointment of the Liquidating Trustee extends the limitations period or re-starts the running of the statute.

The Zilkha Court, after concluding that the §546(a)(1) limitations period applied to a debtor-in-possession, specifically reserved ruling on the impact of a subsequent appointment of a trustee.

We take no position on whether a subsequent appointment of a trustee in a Chapter 11 case would change the analysis. See Boatman v. E.J. Davis Co., 49 B.R. 719 (Bank.D.Conn. 1985). While we perceive that to be a distinguishable circumstance requiring a different analysis, we leave the issue for a case in which that situation arises.

Zilkha, 920 F.2d at 1524.

Most courts that have reached this issue have concluded that the appointment of a trustee pursuant to one of the enumerated sections starts a new period of limitations. See e.g., Boatman v. E.J. Davis Co., 49 B.R. 719 (Bank.D.Conn. 1985); see generally, In

Section 546(a)(1) is inapplicable to a debtor in possession; thus a debtor in possession may commence a suit to recover a preference more than two years after the filing of the petition.

Id. at fn. 9.

Re Fisher, 162 B.R. 474 (Bankr.N.D.Ohio 1993); In re M&L Business Machines, 153 B.R. 308 (D.Colo. 1993) and 4 Collier on Bankruptcy, §546.02; but see In re San Joaquin Roast Beef, 7 F.3d 1413 (9th Cir. 1993) (holding that statute of limitations did not start running again after the case was converted from Chapter 11 to Chapter 7 and a new trustee was appointed). However, it is not argued by either party that the Liquidating Trustee in this case was appointed under any of the statutory sections specifically enumerated in §546(a)(1).

Rookstool argues that the Liquidating Trustee "was a mere successor to the debtor-in-possession and as such was bound by the Statute of Limitations which began running upon the commencement of the case." (Reply Brief of Appellant, p. 4). SNGCLT asserts that a liquidating trustee, like a debtor in possession, is the functional equivalent of a trustee appointed under one of the enumerated sections and contends the limitations period should be construed to begin again on the date the liquidating trustee was appointed. Based on the Zilkha court's reasoning, this Court agrees that the liquidating trustee had two years from the date of his appointment to commence this action.

This precise issue has not been broached by many courts. However, the Court is convinced that the Tenth Circuit Court of Appeals will follow the reasoning of In re AOV Ind., Inc., 62 B.R. 968 (Bankr.D.D.C. 1986), in which the Bankruptcy Court held that a

disbursing agent, appointed under 11 U.S.C. §1123(b)(3)(B)⁵ and an amended plan of reorganization should be treated like a chapter 11 trustee for the purposes of section 546(a) and should be allowed two years after his appointment in order to bring suit to set aside and recover preferential transfers.⁶ That Court reasoned:

The debtor-in-possession may have no incentive to avoid preferential transfers, he being the one who made those transfers. Furthermore, the debtor may not wish to take money out of the pockets of those with whom he must do business during and after the reorganization. If the two-year period were to begin running from the date of the order of relief, it could expire before an independent trustee is appointed.

The Court finds that the Disbursing Agent stands in the shoes of a trustee for the limited purposes of section 546(a). Since the Disbursing Agent filed the instant preference action well within the two-year period beginning on the date of his appointment, Saltstein's motion to dismiss must be denied.

Id. at 974.

Based on the Circuit Court of Appeals' "functional equivalent" analysis in Zilkha, this Court is convinced the Court of Appeals would likewise conclude that the liquidating trustee in this case is the "functional equivalent" of a trustee appointed under one of the sections enumerated in §546(a)(1) and would hold that he had

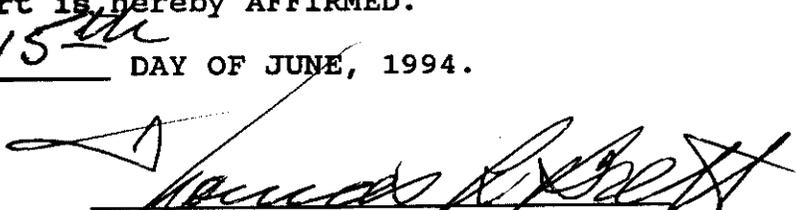
⁵ This is not one of the sections specifically enumerated in §546(a)(1).

⁶ The facts in In re AOV Ind., Inc. are similar to the instant case. The Debtor, AOV Industries, Inc., filed for reorganization under chapter 11 of the Code and became a debtor-in-possession. Less than two years later, a plan of reorganization was approved by the Court which provided for the appointment of a disbursing agent, empowered to institute preference actions and perform other duties. The disbursing agent filed the subject avoidance action within two years of his appointment, but not within two years of the filing of the petition for reorganization. Id. at 970.

two years from the date he was appointed to file the subject avoidance action. See generally, Sparmel Enterprises v. Moffit Realty Corp., 126 B.R. 559 (Bankr.S.D.Ind. 1991) (suggesting that §546(a)(1) also applies to liquidating trustees); compare Hunt, 136 B.R. at 448-49 (holding that liquidating trustees are not trustees appointed under sections enumerated in §546(a)(1) and thus §546(a)(2) is the only federal limitations bar to avoidance actions brought by such trustees). It is undisputed that the Liquidating Trustee in the instant case filed the subject action within two years of his appointment and therefore the action is not barred by the statute of limitations.

For these reasons, Rookstool's appeal is DENIED and the decision of the Bankruptcy Court is hereby AFFIRMED.

IT IS SO ORDERED THIS 15th DAY OF JUNE, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

It is further **ORDERED, ADJUDGED AND DECREED** that plaintiff's complaint is hereby dismissed with prejudice.

Dated this 14 day of ^{June}~~April~~, 1994.

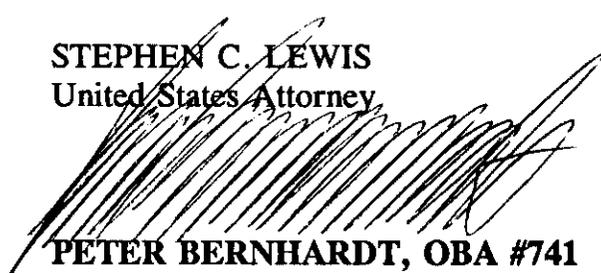
S/ THOMAS R. BRETT

THOMAS R. BRETT
United States District Judge

APPROVED AS TO FORM AND CONTENT:

DONNA E. SHALALA
Secretary of Health & Human Services

STEPHEN C. LEWIS
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
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(918) 581-7463

JAMES R. POLAN
Plaintiff



By: **LOUIS W. BULLOCK, OBA #1305**
320 South Boston
Suite 718
Tulsa, Oklahoma 74103-3783
(918) 584-2001

DATE JUN 1

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JAMES H. GARDNER a/k/a JAMES)
 HARVEY GARDNER; CINDY BATES)
 a/k/a CINDY BATES BARRETT;)
 STACEY ABBITT a/k/a STACEY)
 LEIGH ABBITT; INDIANA)
 LUMBERMENS MUTUAL INSURANCE)
 COMPANY; RONALD W. NUNNELEY)
 d/b/a NUNNELEY BAIL BONDS;)
 FIRST SECURITY MORTGAGE)
 COMPANY; THOMAS H. GALCATCHER;)
 PATSY GALCATCHER; COUNTY)
 TREASURER, Rogers County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Rogers County,)
 Oklahoma; and ANGELA IRENE)
 HERRICK, a minor child by and)
 through, EDNA LOUISE HOLCOMB,)
 her mother and best friend,)
)
 Defendants.)

FILED

JUN 1 1994

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

CIVIL ACTION NO. 92-C-097-B

DEFICIENCY JUDGMENT

This matter comes on for consideration this 14 day
of June, 1994, upon the Motion of the Plaintiff, United
States of America, acting on behalf of the Secretary of Veterans
Affairs, for leave to enter a Deficiency Judgment. The Plaintiff
appears by Stephen C. Lewis, United States Attorney for the
Northern District of Oklahoma, through Phil Pinnell, Assistant
United States Attorney, and the Defendant, James H. Gardner aka
James Harvey Gardner, appears neither in person nor by counsel.

The Court being fully advised and having examined the
court file finds that copies of Plaintiff's Motion and
Declaration were mailed by first-class mail to Gary House,

Attorney for Defendant James H. Gardner aka James Harvey Gardner, P.O. Box 6, Sedan, Kansas 67361, and to all answering parties and/or counsel of record. The Court further finds that the amount of the Judgment rendered on November 5, 1993, in favor of the Plaintiff United States of America, and against the Defendant, James H. Gardner aka James Harvey Gardner, with interest and costs to date of sale is \$37,582.20.

The Court further finds that the appraised value of the real property at the time of sale was \$28,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered November 5, 1993, for the sum of \$24,867.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on

June 6, 1994.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendant, James H. Gardner aka James Harvey Gardner, as follows:

Principal Balance plus pre-Judgment Interest as of 11-5-93	\$35,469.24
Interest From Date of Judgment to Sale	426.99
Late Charges to Date of Judgment	384.88
Appraisal by Agency	500.00
Abstracting	329.00
Evidentiary Affidavit	75.00

Publication Fees of Notice of Sale	172.09
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$ 37,582.20
Less Credit of Appraised Value	- <u>28,000.00</u>
DEFICIENCY	\$ 9,582.20

plus interest on said deficiency judgment at the legal rate of 5.28 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendant, James H. Gardner aka James Harvey Gardner, a deficiency judgment in the amount of \$9,582.20, plus interest at the legal rate of 5.28 percent per annum on said deficiency judgment from date of judgment until paid.

S/ THE COURT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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

PP/esf

ENTERED ON DOCKET
JUN 1 5
DATE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 RONALD J. BURGER;)
 PATSY J. BURGER)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED

JUN 1 4 1994

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

CIVIL ACTION NO. 94-C-348-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 14 day
of June, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, COUNTY TREASURER, Tulsa County,
Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County,
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; and the Defendants, RONALD J.
BURGER and PATSY J. BURGER, appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, RONALD J. BURGER,
acknowledged receipt of Summons and Complaint on or about
April 26, 1994; that the Defendant, PATSY J. BURGER, acknowledged
receipt of Summons and Complaint on April 26, 1994; that
Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged
receipt of Summons and Complaint on April 15, 1994; and that

Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 11, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on April 29, 1994; and that the Defendants, RONALD J. BURGER and PATSY J. BURGER, have failed to answer and default has therefore been entered by the Clerk of this Court.

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

Lot Two (2), Block Eight (8), CHEROKEE VILLAGE SECOND, an Addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on November 20, 1986, the Defendants, RONALD J. BURGER and PATSY J. BURGER, executed and delivered to Commonwealth Mortgage Corporation of America, a mortgage note in the amount of \$62,487.00, payable in monthly installments, with interest thereon at the rate of Eight and One-Half percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, RONALD J. BURGER and PATSY J. BURGER, husband and wife, executed and delivered to Commonwealth Mortgage Corporation of America, a mortgage dated November 20, 1986, covering the above-described

property. Said mortgage was recorded on November 26, 1986, in Book 4985, Page 945, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 4, 1988, Commonwealth Mortgage Corporation of America, assigned the above-described mortgage note and mortgage to Commonwealth mortgage Company of America, L.P. This Assignment of Mortgage was recorded on June 6, 1988, in Book 5104, Page 1419, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 25, 1988, Commonwealth Mortgage Company of America, L.P., assigned the above-described mortgage note and mortgage to The Lomas & Nettleton Company. This Assignment of Mortgage was recorded on June 6, 1988, in Book 5104, Page 1418, in the records of Tulsa County, Oklahoma. A corrected assignment, dated March 5, 1988, was recorded on February 20, 1990 in Book 5237, Page 146, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 20, 1989, The Lomas & Nettleton Company, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on October 23, 1989, in Book 5215, Page 785, and re-recorded on February 20, 1990, in Book 5237, Page 147, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 1, 1989, the Defendants, RONALD J. BURGER and PATSY J. BURGER, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's

forbearance of its right to foreclose. Superseding agreements were reached between these same parties on January 1, 1990, July 1, 1990, January 1, 1991, August 1, 1991, and August 1, 1992.

The Court further finds that the Defendants, RONALD J. BURGER and PATSY J. BURGER, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, RONALD J. BURGER and PATSY J. BURGER, are indebted to the Plaintiff in the principal sum of \$87,746.77, plus interest at the rate of Eight and One-Half percent per annum from March 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover

judgment against the Defendants, RONALD J. BURGER and PATSY J. BURGER, in the principal sum of \$87,746.77, plus interest at the rate of Eight and One-Half percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.28 percent per annum until paid, plus the costs of this action and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, RONALD J. BURGER and PATSY J. BURGER, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that
pursuant to 12 U.S.C. 1710(1) there shall be no right of
redemption, (including in all instances any right to possession
based upon any right of redemption) in the mortgagor or any other
person subsequent to the foreclosure sale.

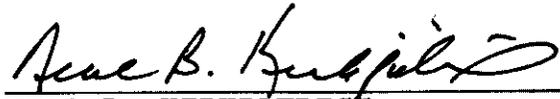
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from
and after the sale of the above-described real property, under
and by virtue of this judgment and decree, all of the Defendants
and all persons claiming under them since the filing of the
Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS S. BERRY

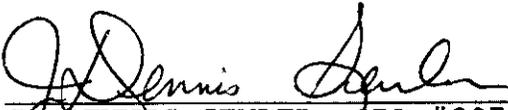
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-348-B

NBK:flv

ENTERED ON DOCKET

DATE 6-15-94

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

BERNADINE G. THEIS, Administrator)
of the Estate of PATRICK A. THEIS,)
Deceased,)

Plaintiff,)

vs.)

No. 92-C-1111E ✓

GARRETT ENGINE DIVISION OF)
ALLIED-SIGNAL, INC., a Delaware)
corporation; INTERCONTINENTAL JET,)
INC.; WOODWARD GOVERNOR COMPANY,)
a Delaware Corporation;)
MITSUBISHI HEAVY INDUSTRIES, LTD.,)
a Japanese corporation; CORPORATE)
AVIATION SERVICES, INC.; MARLENE)
TILKEN as Executor of the Estate)
of ALLEN B. TILKEN;)

Defendants)

FILED

JUN 15 1994

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

ADMINISTRATIVE CLOSING ORDER

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

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

77

necessary.

ORDERED this 14th day of June, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 6-15-94

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

LINDA FERN WALKER, as
surviving spouse,

Plaintiff,

vs.

FARMERS INSURANCE COMPANY,

Defendant.

No. 93-C-897-E

FILED

JUN 14 1994

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

ORDER

The Court has for consideration Plaintiff's Motion to Remand. Plaintiff has filed suit for malicious prosecution. Defendants are all citizens of Wisconsin, with the exception of Richard P. Laster. Laster, an Oklahoma citizen, is a Vice-President of Green Bay Packaging and is General Manager of the Tulsa Plant, Southwest Division, of Green Bay Packaging. Defendants removed from state court in Creek County to this Court. Plaintiff has moved to remand back to state court.

Oklahoma law governs the substance of the malicious prosecution claims. Before the substance of the claims can be considered, however, it must be determined if joinder of Defendant Laster was procedurally correct. A plaintiff may join a non-diverse defendant to defeat the non-resident defendant's right to remove.

However, should the non-resident defendant choose to remove and all other jurisdictional requisites are met, it can submit to the court that the joinder of the resident defendant was a "fraudulent joinder" to defeat diversity. Where the removing defendant pleads fraudulent joinder it must support its claim with clear and convincing evidence.

Town of Freedom, Oklahoma v. Muskogee Bridge Co., Inc., 466 F.Supp 75, 78 (W.D. Okla. 1978).

The standard of proof for fraudulent joinder of a defendant is equivalent to that required for a motion to dismiss. Winton v. Moore, 288 F. Supp. 470, 471 (N.D. Okla. 1968). Plaintiff must state a valid cause of action against the non-diverse defendant. Defendant must provide clear and convincing evidence on which a summary determination that there is no factual basis for Plaintiff's cause of action against the non-diverse defendant could be made. Winton at 472. These issues of fact must be capable of summary determination, as opposed to any pre-trial of doubtful issues of fact. Id., citing Dodd v Fawcett Pub. Co., 329 F.2d 82 (10th Cir. 1964). The joinder is not fraudulent if there is doubt as to whether the plaintiff has stated a cause of action against the non-diverse defendant. Town of Freedom at 78. "Where any substantial doubt concerning this Court's jurisdiction exists, the case should be remanded." Hart v. Wendling, 505 F.Supp. 52, 53 (W.D. Okla. 1980).

Plaintiff has asserted a claim of malicious prosecution against a non-diverse defendant. Under Oklahoma law, malicious prosecution requires plaintiffs to affirmatively prove five elements: "(1) the bringing of the original action by the defendant; (2) its successful termination in plaintiff's favor; (3) want of probable cause to join the plaintiff; (4) malice, and (5) damages." Young v. First State Bank, Watonga, 628 P.2d 707 (Okla. 1981), citing Towne v. Martin, 166 P.2d 98 (Okla. 1946).

Successful termination of the prior action has been proven beyond controversy. Doubt exists as to the remaining elements, but this doubt has not been proven by the Defendants to the standard of clear and convincing evidence. Thus, there is a lack of diversity of citizenship between the parties, as Plaintiff is an Oklahoma citizen and Defendant Laster is an Oklahoma citizen. The Court finds and concludes that it is without jurisdiction of this action, and that the case should be remanded to the state court from which it was removed.

Plaintiff's Motion to Remand is GRANTED.

ORDERED this 13th day of June, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 6-15-94

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

PATRICIA A. STARR,

Plaintiff,

vs.

Case No. 93-C-1006-E

WESTERN PRINTING COMPANY, INC.
RETIREMENT PLAN and PRINCIPAL
MUTUAL LIFE INSURANCE COMPANY,

Defendants.

FILED

JUN 15 1994

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

STIPULATION OF DISMISSAL WITH PREJUDICE

The Plaintiff, Patricia A. Starr, and the Defendants, Western Printing Company, Inc. Retirement Plan and Principal Mutual Life Insurance Company, pursuant to Rule 41(a)(1) of Federal Rules of Civil Procedure, hereby stipulate to the dismissal of this action with prejudice, each party to pay its own costs and attorney's fees.

Dated: June 15, 1994.



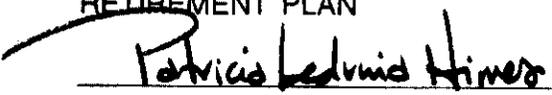
Richard J. Borg, OBA #10621
5314 South Yale, Ste. 206
Tulsa, Oklahoma 74135
(918) 496-9258

ATTORNEY FOR PLAINTIFF



Mitchell D. O'Donnell, OBA #6750
Alan W. Gentges, OBA #11315
Savage, O'Donnell, Scott,
McNulty, Affeldt & Gentges
601 S. Boulder, Ste. 1100
Tulsa, OK 74119
(918) 599-9000

ATTORNEYS FOR DEFENDANT
WESTERN PRINTING COMPANY, INC.
RETIREMENT PLAN



Elsie Draper, OBA #2482
Patricia Ledvina Himes, OBA #5331
GABLE & GOTWALS, INC.
15 West Sixth Street, Suite 2000
Tulsa, Oklahoma 74119-5447
(918) 582-9201

ATTORNEYS FOR DEFENDANT
PRINCIPAL MUTUAL LIFE
INSURANCE COMPANY

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

FILED

JUN 14 1994

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

STATESIDE TRAVEL, INC.,)
JERRY HAMEL, and EARLE COHN,)
)
Plaintiffs,)
)
v.)
)
COMMERCIAL BANK & TRUST)
COMPANY OF TULSA,)
)
Defendants.)

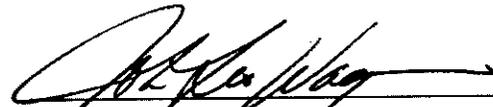
92-C-635-W

AMENDED JUDGMENT

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Judgment is entered in favor of **Plaintiffs**, Stateside Travel, Inc., Jerry Hamel, and Earle Cohn, and against the Defendant, **Commercial Bank & Trust Company of Tulsa**, in the amount of \$60,000.00, plus costs, and post-judgment interest at the rate of 5.02%.

Dated this 14th day of June, 1994.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 6-14-94

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

FILED

JUN 13 1994

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

HAROLD L. HOPKINS,

Plaintiff,

v.

HARSCO CORPORATION, d/b/a
AIR-X-CHANGERS

Defendant.

Case No. ⁹³~~92~~-C-725-E

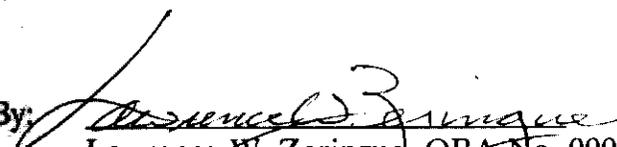
JOINT STIPULATION TO DISMISS WITHOUT PREJUDICE

Plaintiff and Defendant, by and through their respective attorneys, have agreed to dismiss this matter without prejudice. Therefore, pursuant to Rule 41 (a) (1) of the Federal Rules of Civil Procedure, the parties stipulate that this action should be dismissed without prejudice with each side to bear its own costs and attorney fees.

Dated this 13th day of June, 1994.

Respectfully submitted,

By:


Lawrence W. Zeringue, OBA No. 9996
HINKLE, ZERINGUE & SMITH
320 South Boston, Suite 1100
Tulsa, Oklahoma 74103-3700
918/584-6700
Attorneys for Plaintiff



Mary Constance T. Matthies

OBA No. 5789

Matthies Law Firm, P.C.

4025 First National Tower

Tulsa, Oklahoma 74103

918/582-4400

Attorney for Defendant

DATE 6/14/94

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

FILED
JUN 15 1994 JUN 13 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

ROBERT LEE PRICE,)

Defendant.)

No. 88-CR-118-B
(94-C-267-B)

ORDER

Defendant Robert Lee Price's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is now before the Court for consideration. Price alleges that the Court should reduce his sentence because the Tenth Circuit recently held that a second-degree-burglary conviction is not a "crime of violence" for purposes of the career offender guideline. For the reasons stated below, Price's motion to vacate, set aside, or correct sentence should be denied.

I. FACTS

On February 27, 1990, Price was convicted of Possession of a Firearm by a Convicted Felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). Relying on three second-degree burglaries of commercial property from Oklahoma, this Court sentenced Price to fifteen years imprisonment and five years supervised release pursuant to the Armed Career Criminal Act under section 924(e)(1).¹

¹18 U.S.C. § 924(e) provides in part as follows:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court

The Tenth Circuit affirmed Price's conviction and sentence in an unpublished opinion. United States v. Price, No. 90-5105 (10th Cir. Mar. 29, 1991) (unpublished opinion).

In this section 2255 motion, Price alleges that this Court should reduce his sentence because the Tenth Circuit recently held that second-degree burglaries are not "crimes of violence" for purposes of the career offender guideline, U.S.S.G. § 4B1.2(1).² See United States v. Smith, 10 F.3d 724, 733 (10th Cir. 1993). The Government objects, arguing that the Smith case is completely

referred to in section 922(g)(1) of this title for a violent felony . . . such person shall be fined not more than \$25,000 and imprisoned not less than fifteen years. . . .

(2) As used in this subsection--

. . .

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosive, or otherwise involved conduct that presents a serious potential risk of physical injury to another. . . .

²U.S.S.G. § 4B1.2(1) provides as follows:

The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that --

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(ii) is burglary of a dwelling, arson, or extortion, involves use of explosive, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

unrelated to Price's circumstances. Smith involved a "career offender," whereas Price is an "armed career criminal."

In his reply, Price asserts, for the first time, that only one of his prior convictions meets the requirements of an unlawful entry under Taylor v. United States, 495 U.S. 575 (1990). The Government responds that the Tenth Circuit addressed this issue on direct appeal, and thus that Price is not entitled to raise this issue again in this section 2255 motion. In the alternative, the Government argues that all of Price's burglaries contain the elements of a "generic burglary" under Taylor.

II. ANALYSIS

In Smith, the Tenth Circuit Court of Appeals addressed whether a second-degree burglary was a crime of violence under section 4B1.2 where there was no indication that the defendant was armed, or that any confrontation occurred with any person. Smith, 10 F.3d at 729. After meticulously reviewing the legislative history of the career offender guideline and of the Armed Career Criminal Act, the Tenth Circuit concluded that the Sentencing Commission had not adopted the position taken by Congress in the Armed Career Criminal Act "that every burglary inherently presents a serious potential risk of physical injury to another." Id. at 732. The Tenth Circuit then held that the "mere" unlawful entry of a non-dwelling for the purpose of stealing property did not constitute a "crime of violence" as defined in the "otherwise" clause of the career offender guideline. Id. at 733.

Although Price's second-degree burglaries may be factually similar to the one in the Smith case, the Court concludes that the Smith opinion does not control the case at hand. Price was sentenced pursuant to the Armed Career Criminal Act and not pursuant to the career offender guideline as in Smith. While it is undisputed that the guidelines' definition of crime of violence originally derived from the definition of "violent felony" in section 924(e), the Sentencing Commission later departed from that standard in adopting and amending section 4B1.2. See Smith, 10 F.3d at 730-33; United States v. Guerra, 962 F.2d 484, 487 (5th Cir. 1992) (noting that attempted burglary was a "crime of violence" for purposes of the career offender guideline, although it did not qualify as a sentence-enhancing violent felony under the Armed Career Criminal Act). In Smith, the Tenth Circuit recognized that the view taken by the Commission--that "second-degree" or "unaggravated" burglaries of structures are not crimes of violence"--is diametrically opposed to the position taken by Congress in the Armed Career Criminal Act." Smith, 10 F.3d at 732. The commentary to U.S.S.G. § 4B1.4 also acknowledges that "the definitions of 'violent felony' and 'serious drug offense' in 18 U.S.C. § 924(e)(2) are not identical to the definitions of 'crime of violence' and 'controlled substance offense' used in § 4B1.1 (Career Offender)." See § 4B1.4, comment. (n.1); see also United States v. Parson, 955 F.2d 858, 870 (3rd Cir. 1992).

Price argues, nonetheless, that this Court should follow the First Circuit's decision in United States v. Bell, 966 F.2d 703,

704 (1st Cir. 1992), that "[t]he definition of a 'violent' felony for purposes of the Armed Career Criminal Act is the same in all material respects as the definition of a 'crime of violence' for purposes of the sentencing guidelines' career offender provision," and thus, that sections 4B1.1 and 4B1.4 "must be construed in pari pasu." Price's reliance on Bell is misplaced. Moreover, Price has taken the above quotes out of context. Bell addressed only whether the crime of being a felon in possession was a "crime of violence" for purposes of the career offender guideline. Bell nowhere alluded to the divergent views that the Sentencing Commission and Congress have adopted as to whether second-degree burglary presents a "serious potential risk of physical harm to another."

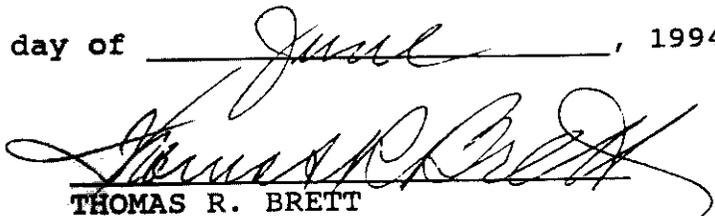
Therefore, this Court concludes that the meaning of "violent felony" for purposes of the Armed Career Criminal Act is not the same as what the Tenth Circuit interpreted "crime of violence" to include for purposes of the career offender guideline in Smith. The Tenth Circuit made it abundantly clear in Smith that Congress views "a 'mere' unlawful entry of a non-dwelling for the purpose of stealing property" as a "violent felony" under the Armed Criminal Act even though no confrontation may ensue. Smith at 733. Accordingly, the Court concludes that Price was properly sentenced as an armed career criminal.

As to Price's second claim (presented for the first time in his reply), the Court concludes that the Tenth Circuit Court of Appeals fully addressed that claim on direct criminal appeal. The Tenth Circuit specifically held that even if Taylor were applicable

retroactively, that the three burglaries used to enhance Price's sentence contained the elements of a generic burglary. Accordingly, the Court declines to revisit this issue in the present motion.

ACCORDINGLY, IT IS HEREBY ORDERED that Price's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 [docket #12] be denied.

SO ORDERED THIS 13 day of June, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE JUN 13 1994

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

FILED

JUN 08 1994

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

ERNESTO HERNANDEZ ROSALES,)
)
 Plaintiff,)
)
 vs.)
)
 RON CHAMPION, et al.,)
)
 Defendants.)

No. 94-C-560-B

ORDER

Plaintiff, a state prisoner, has filed a motion for leave to proceed in forma pauperis and a petition for a writ of mandamus under 28 U.S.C. § 1361. For the reasons state below Plaintiff's motion for leave to proceed in forma pauperis is granted; Defendants Ron Champion and the Oklahoma Department of Corrections are dismissed for lack of jurisdiction; and Petitioner's petition is treated as an action in the nature of mandamus.

In his petition for a writ of mandamus filed against Warden Ron Champion, the Oklahoma Department of Corrections, and the Immigration and Naturalization Service (INS), the Plaintiff requests an order compelling the INS to begin his deportation proceeding before his release date pursuant to 8 U.S.C.S. § 1252(i) (1987) (providing that "the Attorney General shall begin any deportation proceedings as expeditiously as possible after the date of the conviction"). But see 8 U.S.C.S. § 1252(h) (Supp. 1994) (providing that "[a]n alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement"). Plaintiff alleges that "[t]he INS has a long-standing policy of refusing to begin any deportation

proceedings until after release from (Department of Corrections) custody, and 'has no intention' of holding petitioner's hearing before that time 'unless compelled to [do so] by the Court."

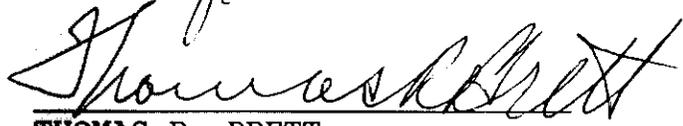
Although the writ of mandamus has been abolished, see Fed. R. Civ. P. 81(b), this Court has original jurisdiction over an action in the nature of mandamus to **compel** an officer or employee of the United States to perform a duty owed to the Plaintiff. 28 U.S.C. § 1361. Accordingly, the Court will construe Plaintiff's petition as an action in the nature of mandamus and dismiss Ron Champion and the Oklahoma Department of Corrections as they are respectively a state officer and a state agency upon whom no duty is imposed by section 1252(i) to do the act demanded.

ACCORDINGLY, IT IS HEREBY ORDERED:

- (1) That Plaintiff's motion for leave to proceed in forma pauperis [docket #2] be granted. The plaintiff is permitted to file this action without prepayment of fees or costs, however any further proceedings in this matter must be specifically authorized in advance by the court.
- (2) That this action be **construed** as a civil action in the nature of mandamus;
- (3) That Ron Champion and the Oklahoma Department of Corrections be **dismissed** as parties in this action; and
- (4) That the Clerk shall **issue summons** and deliver the same to the U.S. Marshall for service. A copy of this order shall be served on the Defendant along with the

complaint.

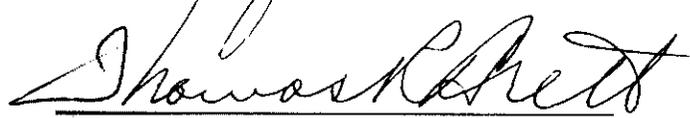
SO ORDERED THIS 8 day of June, 1994.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett".

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

dismissed without prejudice at this time.

SO ORDERED THIS 8 day of June, 1994.

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

THOMAS R. BRET
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE JUN 13 1994

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

FILED

JUN 13 1994

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

JAMES VERNON COLVARD,)
)
 Plaintiff,)
)
 vs.)
)
 JAMES GRAVES, et al.,)
)
 Defendants.)

No. 93-C-0437-B ✓

ORDER

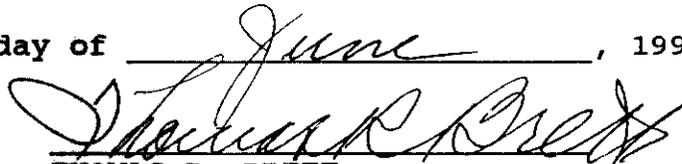
Before the Court is Defendants' motion to dismiss or in the alternative for summary judgment filed on 5/9/95. Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1(C).

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendants' motion to dismiss [docket #7] is granted and the above captioned case is dismissed without prejudice at this time.

SO ORDERED THIS 13 day of June, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE