

ENTERED ON DOCKET

DATE 7-8-94

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OBA #5706

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

ANGELA BOLTON,

Plaintiff,

vs.

RIVERSIDE NISSAN, INC.,

Defendant.

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No. 93-C-933-K

FILED

JUL 7 1994

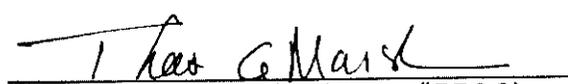
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL

It is hereby stipulated by and between the Plaintiff, Angela Bolton, by her attorney, Fred Schraeder, and Defendant, Riverside Nissan, by its attorneys, Thomas G. Marsh and David T. Marsh, that the above-styled and captioned matter, on the Complaint may be, and the same is hereby dismissed with prejudice against each other, without costs to either party.



Fred M. Schraeder, Esq.
HOWARD & WIDDOWS
2021 S. Lewis, Suite 470
Tulsa, OK 74104-5714
Attorneys for Plaintiff



Thomas G. Marsh (OBA #5706)
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(918) 587-0141
Attorneys for Defendant,
Riverside Nissan, Inc.

ENTERED ON DOCKET
DATE JUL 8 1994

FILED

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

JUL 7 1994

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

ANGELA BOLTON,)
)
 Plaintiff)
)
 v.)
)
 KEYSTONE CHEVROLET, INC., an)
 Oklahoma corporation, and)
 TIM THOMPSON, an individual,)
)
 Defendants.)

Case No. 93-C-797-B

ORDER

This matter comes on for consideration of cross motions for summary judgment (docket entries #9 and #13).

Defendants Keystone Chevrolet, Inc. and Tim Thompson, in their Motion For Summary Judgment And Memorandum Brief In Support Thereof filed March 18, 1994, set forth a Statement of Uncontroverted Facts with citations to the record referring with particularity to those portions of the record before the court upon which Defendants rely, all in compliance with Rule 56, F.R.Civ.P. and Local Rule 56.1. Plaintiff, in her response to Defendants' motion, in disregard of Local Rule 56.1, failed to dispute with particularity those facts with which Plaintiff contends a genuine issue exists. Further, in Plaintiff's own Motion For Summary Judgment, Plaintiff failed to set forth a concise statement of material facts, numbered, as to which she contends no genuine issue exists.

Pursuant to Rule 56, F.R.Civ.P. and Local Rule 56.1, the material facts set forth in Defendants' initial motion and brief are deemed admitted for the purpose of summary judgment.

ik

GENERAL HISTORY OF THE CASE

In her Complaint Plaintiff alleges she visited Keystone Chevrolet on March 18, 1993, to possibly purchase a vehicle. Plaintiff alleges she advised Defendant Thompson, a salesman for Keystone, that she needed no financing arranged for her since she had previously made such arrangements with her credit union, Green Country Credit Union. Plaintiff alleges that despite such advice, Thompson ordered a credit report on Plaintiff in violation of the Fair Credit Reporting Act 15 U.S.C. §1681 et seq.

Defendants deny that Plaintiff so advised them of her lack of need for financing and allege they had a legitimate business interest in obtaining a credit report on her because they "spot delivered" to Plaintiff a truck in the \$16,000/17,000 range without receiving immediate payment therefor. Defendants further alleged Plaintiff returned the vehicle on March 25, 1993, due to her inability to obtain financing for the truck.

STATEMENT OF UNCONTROVERTED FACTS

1. On or about the 18th day of March, 1993, Angela Bolton ("Bolton") entered the business of Keystone with the intention of purchasing a new motor vehicle. (Thompson Affidavit, Exhibit "1" of Appendix).

2. She was met on the property by Tim Thompson, a sales person for Keystone. (Thompson Affidavit, Exhibit "1" of Appendix).

3. Keystone sells new and used motor vehicles and trucks at retail to consumers. (Thompson Affidavit, Exhibit "1" of Appendix).

4. Bolton expressed an interest in purchasing a vehicle from

Keystone. (Thompson Affidavit, Exhibit "1" of Appendix).

5. Various vehicles were shown to Bolton and through the sales person, an agreement to purchase a 1993 Chevrolet pickup was made. (Thompson Affidavit, Exhibit "1" of Appendix).

6. Bolton and Keystone agreed upon the price of the pickup, the trade-in allowance on a 1986 Ford Taurus, the balance due under the Purchase Order, and the cash due on delivery of the vehicle. (Exhibit "2" of Appendix).

7. The total amount due on delivery of the vehicle was Sixteen Thousand Four Hundred Ninety-Five Dollars (\$16,495). (Exhibit "2" of Appendix).

8. Bolton informed Keystone that she thought she could secure financing for the vehicle through her credit union. (Thompson Affidavit, Exhibit "1" of Appendix).

9. Bolton was a member of the Green Country Credit Union ("Green Country"). (Ford Depo., P. 4, l. 11-15; Exhibit "3" of Appendix).

10. Prior to delivery of the vehicle to Bolton, Keystone obtained a credit bureau report on Bolton. (Thompson Affidavit, Exhibit "1" of Appendix).

11. Keystone "spot delivered" the vehicle to Bolton on March 18, 1993, contingent upon financing being obtained by Bolton for the purchase of the vehicle. (Farley Affidavit, Exhibit "1A" of Appendix).

12. On March 18, 1993, Bolton left the dealership in possession of the pickup. (Thompson Affidavit, Exhibit "1" of

Appendix).

13. Deposition of Connie Ford, Loan Officer and Collection Officer for Green Country, was secured on March 3, 1994, and reveals additional facts, to-wit:

a. Beginning in 1992, Green Country changed its method of handling loan applications and now keeps every scrap of paper in connection with a loan. (Ford Depo., P. 7, l. 17-25; P. 8, l. 1-8; Exhibit "4" of Appendix).

b. Green Country has no records in its customer file indicating Ms. Bolton made a loan application in January or February, 1993. (Ford Depo., P. 64, l. 5-8; Exhibit "5" of Appendix).

c. Prior to March 25, 1993, Ms. Bolton called the Green Country and asked for permission to buy a car. (Ford Depo., P. 14, l. 17-18; Exhibit "6" of Appendix).

d. Ms Bolton was told she should be able to find a vehicle between \$16,000-\$17,000. (Ford Depo., P. 15, l. 7-8; Exhibit "7" of Appendix).

e. The next activity in Green Country's file involving Ms. Bolton asking for a loan occurs on March 25, 1993, seven days after Bolton took possession of the vehicle. (Ford Depo., P. 9, l. 15-25; Exhibit "8" of Appendix).

f. A work sheet, dated March 25, 1993, was prepared in contemplation of a loan application being submitted by Bolton. (Ford Depo., P. 10, l. 1-9; Exhibits "9" and "10" of Appendix).

g. It was prepared by loan officer, Kathy Williams. (Ford

Depo., P. 34, l. 13-24; Exhibit "11" of Appendix).

h. Green Country asked for and received, by fax, a copy of Keystone's purchase order on March 24, 1993. (Ford Depo., P. 13, l. 16-18; Exhibits "12" and "13" of Appendix).

i. On March 25, 1993, Green Country then checked Ms. Bolton's place of employment and obtained a credit report. (Ford Depo., P. 17, l. 14-25; Exhibits "14" and "15" of Appendix).

j. A credit report is for the loan committee to determine whether or not a loan will be approved and if the consumer will qualify. (Ford Depo., P. 18, l. 1-25; P. 19, l. 1-7; P. 20, l. 1-25; and P. 21, l. 1-9; Exhibit "16" of Appendix).

k. Green Country's loans are not approved without the concurrence of two members of the loan committee. (Ford Depo., P. 45, l. 21-23; Exhibit "17" of Appendix).

l. The credit bureau report obtained by Green Country reflects an account charge-off. (Ford Depo., P. 26, l. 1-20; Exhibits "15" and "18" of Appendix).

m. The credit bureau report also reflects seventeen (17) inquiries on Ms. Bolton since August of 1991. On July 1, 1993, Ms. Bolton was asked to come in and re-submit a new application for a car loan. (Ford Depo., P. 30, l. 1-7; Exhibits "15" and "19" of Appendix).

n. This loan application was declined because of her credit and debt/ratio. (Ford Depo., P. 46, l. 1-9; Exhibits "20" and "21" of Appendix).

14. Bolton was unable to obtain financing for the purchase of

the vehicle from Keystone and the vehicle was returned to Keystone on or after March 25, 1993.¹

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322. 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

"[T]he 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, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his

¹ Plaintiff's version of this is: "Ultimately Ms. Bolton opted not to purchase the Chevrolet pick-up truck from KEYSTONE CHEVROLET, . . .", Plaintiff's Objection To Defendant's Motion For Summary Judgment, p. 2.

pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., *supra*, wherein the Court stated that:

" . . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

The 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 Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

At issue here are the constraints and allowances decreed by the Fair Credit Reporting Act (FCRA), 15 U.S.C.A. §§ 1681 *et seq.* Congress has declared that the statement and purpose of FCRA is:

"To provide an elaborate mechanism for investigating and evaluating the credit worthiness, credit standing, credit capacity, character and general reputation of consumers. 15 U.S.C.A., §1681(2)."

Fairness to the consumer, having due regard to the confidentiality, accuracy, relevancy and proper utilization of such information in accord with FCRA, is an inherent goal of FCRA.

"Consumer" and "consumer report" are carefully defined in FCRA and in the instant matter no party disputes that Plaintiff was a "consumer" and the credit report obtained by Defendants was a "consumer report", the typical starting point in determining the applicability of FCRA. Ippolito v. WNS, Inc., 864 F.2d 440 (7th Cir.1988).

Plaintiff's complaint alleges violations of §1681(b), (n), (o) and (q). 15 U.S.C.A. § 1681(b) provides in relevant part:

"A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(3) To a person it has reason to believe---

(E) . . . has a legitimate business need for the information in connection with a business transaction involving the consumer."

However, Ippolito, at 448, fn 8, not cited by either party, suggest the acts complained of herein may not be violative of § 1681(b) of FCRA, not because of the reasons cited by Defendants, but because § 1381(b) applies only to consumer reporting agencies, not to a subscriber of a consumer reporting agency's services such as Keystone Chevrolet.

The reasoning employed in Ippolito has been held to support the view that FCRA imposes civil liability only for the dissemination of consumer credit reports by consumer reporting agencies. See, Frederick v. Marquette Nat. Bank, 911 F.2d 1 (7th Cir. 1990).

The Court concludes Defendants' have no exposure under § 1681(b) because that section only pertains to consumer reporting agencies which Defendants are not. Assuming *arguendo* that Defendants were subject to exposure under § 1681(b) the Court concludes, under the facts herein, that Defendants had a legitimate business need to justify ordering a credit report on Plaintiff, as more fully discussed herein.

Plaintiff also alleges the consumer credit information obtained by Keystone Chevrolet was obtained under false pretenses

presumably in violation of §1681(q).² Typically, reference to the permissible purposes for which consumer reports may be obtained under (b) controls this issue. Hansen v. Morgan, 582 F.2d 1219 (9th Cir.1978). If the use was not for a permissible purpose the user may be liable for obtaining the information under false pretenses under § 1681(q). Zamora v. Valley Federal Savings & Loan Association of Grand Junction, 811 F.2d 1368 (10th Cir. 1987).

In the instant matter the Court concludes that Defendants had a legitimate business need for the credit report information in connection with a business transaction involving the consumer. Defendants, on March 18, 1993, obliged Plaintiff by "spot delivering" to her a truck in the \$16,000/\$17000 range without having first received a check or cash from either Plaintiff or her credit union. The Court further concludes it would have, indeed, been poor business practice for a car dealer to accept the statement of a prospective buyer that, since the buyer was "pre-approved", there was no need to make credit inquiries³ before turning over possession of a new and considerably valuable vehicle.

The crux of Plaintiff's complaint is that Keystone's obtaining of a credit report on her on March 18, 1993, caused her to not be able to obtain financing on an attempted truck purchase from

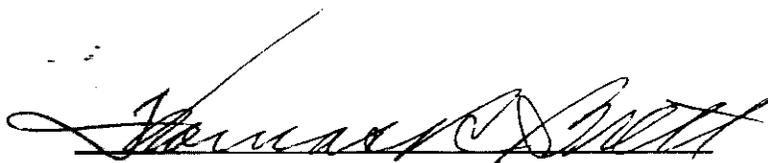
² Although § 1681(q) on its face only provides a basis for criminal liability, some courts have held this section also provides a basis of civil liability under §§ 1681(n) and 1681(o). Yohay v. Alexandria Employees Credit Union, Inc., 827 F.2d 967 (4th Cir.1987); Kennedy v. Border City, 747 F.2d 367 (6th Cir.1984); Hansen v. Morgan, 582 F.2d 1214 (9th Cir.1978).

³ Defendants, however, contend the statement was never made.

Riverside Chevrolet in July, 1993, because "there were too many inquiries on her credit report." Plaintiff's Objection, p. 2. This allegation as well as the instant action borders on the frivolous. Undisputed Fact 13 (m) states that the credit bureau report reflects seventeen credit inquiries on Ms. Bolton from August, 1991. It is disingenuous to assert that a single, legitimate credit inquiry on March 18, 1993, by Keystone Chevrolet, who was preparing to hand over to Ms. Bolton possession of an expensive vehicle, was the straw that broke the camel's back in her July, 1993 quest for automotive purchase from Riverside Chevrolet.

The Court concludes Plaintiff's Motion For Summary Judgment should be and the same is hereby DENIED. The Court further concludes that Defendants' Motion For Summary Judgment should be and the same is hereby GRANTED. A judgment in conformance herewith will be entered simultaneously herein.

IT IS SO ORDERED, this 7th day of July, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE JUL 8 1994

FILED

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

JUL 7 1994

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

ANGELA BOLTON,

Plaintiff

v.

Case No. 93-C-797-B

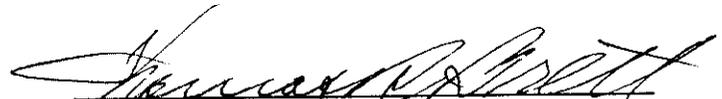
KEYSTONE CHEVROLET, INC., an
Oklahoma corporation, and
TIM THOMPSON, an individual,

Defendants.

J U D G M E N T

In accord with an Order entered this date, granting summary judgment in favor of Defendants Keystone Chevrolet, Inc. and Tim Thompson, judgment is herewith entered in favor of Defendants Keystone Chevrolet, Inc. and Tim Thompson, and against the Plaintiff Angela Bolton on all claims. Costs are assessed against the Plaintiff if timely applied for pursuant to Local Rule 54.1. Each party is to bear their own attorneys fees.

DATED THIS 7th DAY OF July, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

23

ENTERED ON DOCKET
DATE JUL 8 1994

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

MASSACHUSETTS MUTUAL LIFE)
INSURANCE COMPANY,)

vs.)

BANK OF OKLAHOMA, N.A.,)
AMERICAN GUARANTY)
INVESTMENT CORPORATION,)
JOHN A. RAYLL, JR., and)
G. SCOTT DAMUTH as Executor)
for the ESTATE OF ALLEN V.)
DAVID, deceased.)

Case No. 93-C-1084K ✓
(Formerly No. 93-C-1084E)

FILED

JUL 07 1994

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

AGREED ORDER OF
DISMISSAL WITH PREJUDICE

FOR GOOD CAUSE SHOWN, and upon the consent of all the parties to this action; and

WHEREAS, the parties have advised the Court that they have agreed to a settlement of all claims of all parties in this action and have agreed that, upon the disbursement of the interpled funds from the Treasury registry pursuant to an Order of this Court dated June 23, 1994, this case should be dismissed WITH PREJUDICE; and

WHEREAS, the interpled funds from the Treasury registry have been disbursed pursuant to the Order of this Court dated June 23, 1994; it is hereby

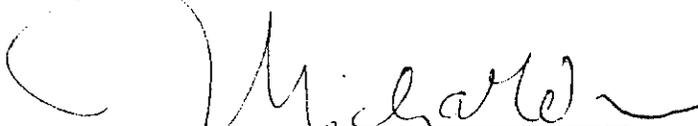
ORDERED, that this matter is DISMISSED WITH PREJUDICE to its
refiling.


UNITED STATES DISTRICT JUDGE

AGREED:



JOHN A. RAYLL, JR.
Defendant



J. MICHAEL MEDINA
Holliman, Langholz, Runnels
& Dorwart
Attorneys for Defendant Bank
of Oklahoma, N.A.



RICHARD R. STUTSMAN
Attorney for Defendants
American Guaranty Investment
Corporation and G. Scott Damuth
as Executor for the Estate of
Allen V. David

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

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

Plaintiffs,

vs.

Case No. 93-C-754-K

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

Defendants.

FILED

JUL 7 1994

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

STIPULATION FOR DISMISSAL OF CERTAIN CAUSES OF ACTION

Come now the plaintiffs, by and through their attorney, Steven
Wm. Vincent, and hereby stipulate to the dismissal without
prejudice of Causes of Action Nos. 1, 6, 9(a), 13, 15, 19, and 20.

Dated this 6th day of July, 1994.

Respectfully submitted,



Steven Wm. Vincent, OBA # 9237
3314 E. 51st St., Suite 201-B
Tulsa, OK 74135-3527
(918) 743-3700

ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 7th day of July, 1994, a true and correct copy of the above and foregoing Document was mailed, with postage thereon fully prepaid, to:

James M. Sturdivant
Patricia Ledvina Himes
GABLE & GOTWALS, INC.
2000 Bank IV Center
15 West Sixth Street
Tulsa, OK 74119-5447

Michael P. Atkinson
Walter D. Haskins III
ATKINSON, HASKINS, NELLIS, BOUDREAU,
HOLEMAN, PHIPPS & BRITTINGHAM
1500 ParkCentre
525 South Main
Tulsa, OK 74103-4524


Steven Wm. Vincent

ENTERED

DATE JUL

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

ERVIN W. HAWKINS,)
)
Petitioner,)
)
v.)
)
EDWARD L. EVANS, et al,)
)
Respondents.)

No. 94-C-0178-B ✓

FILED

JUL 6 1994

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

ORDER

Before the Court is Petitioner Ervin Hawkins' (Hawkins) objection to the Magistrate Judge's recommendation to deny Petitioner's request for a Writ of Habeas Corpus.

Petitioner is challenging his conviction in Tulsa County District Court that resulted from guilty pleas to the following offenses; First Degree Rape (Counts I-III), Causing a Minor to Participate in a Lewd Photograph (Count IV), and Forcible Sodomy (Count V). Petitioner's sentence for these offenses was thirty years each on the first four counts and twenty years on the fifth count, all sentences to run concurrently.

On April 18, 1992, Petitioner filed a Petition for a Writ of Habeas Corpus in this Court in which he raised three issues; (1) whether the trial court erred by not eliciting a factual basis for his guilty plea (2) ineffective assistance of counsel, and (3) due process violations during trial and post-trial proceedings. The issue before the United States Magistrate Judge was whether the petition was procedurally defaulted because Hawkins failed to file a direct appeal to his conviction. On January 7, 1993 the Magistrate recommended dismissing the

petition on the grounds of procedural default. This Court affirmed the Report and Recommendation on July 13, 1993 and the case was dismissed. Petitioner did not appeal the decision to the Tenth Circuit.

On February 28, 1994, Petitioner filed the instant petition in which Hawkins seeks habeas relief on the following claims; (1) he is entitled to file successive habeas petitions, (2) the trial court failed to follow the required procedures for acceptance of a guilty plea resulting in a plea which was not knowing, and (3) the bias and prejudice of the trial court resulted in a guilty plea which was not voluntary and knowing. In the Report and Recommendation, the Magistrate stated that Petitioner was raising the same issues in the instant petition that he raised in his earlier petition and that this Court had found those claims to be procedurally barred because Hawkins did not directly appeal his state convictions. Furthermore, Hawkins argument that this Court's earlier dismissal was not a decision on the "merits" and as a result his petition cannot be dismissed as successive under Rule 9(b) was rejected by the Magistrate on the grounds that the dismissal of the petition by this Court based on the state procedural default was a determination on the merits. As a result, the Magistrate recommended that the petition be dismissed as a Rule 9(b) (Rules governing §2254 cases) successive petition.

On May 6, 1994, Petitioner filed an Objection to Report and Recommendation claiming that the Petition was not successive and that the "ends of justice" would be best served by reconsideration of the breach of the plea bargain claim and the

ineffective assistance of counsel claim. The claims in the first petition centered around the ineffective assistance of counsel concerning his guilty plea and the post sentence phase which resulted in his receiving a longer sentence than was agreed upon in the plea bargain. Hawkins second petition centers around this same conduct by his attorney and the trial court. Therefore, Hawkins is raising the same issues as his earlier plea.

According to Rule 9(b) of the rules governing Section 2254 cases:

A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Therefore, the question becomes whether or not this Court's finding that Hawkins' claims were procedurally barred due to the fact that Hawkins did not directly appeal his state convictions constituted a prior determination on the merits. This Court holds that the dismissal of a petition due to procedural default is a determination on the merits. Although the dismissal of Hawkins first petition did not determine the merits of his underlying claims, the dismissal did make a determination on the merits in that it determined that the claims would not be heard in this Court. See Howard v. Lewis, 905 F.2d 1318, 1322-23 (9th Cir. 1990) (holding that "dismissal of a habeas petition on the basis of state procedural default is a decision on the merits for the purposes of the successive petition doctrine."); See also, Bates v. Whitely, 19 F.3d 1066, 1069 (5th Cir. 1994); Shaw v. Delo, 971 F.2d 181, 184 (8th Cir. 1992). In such a situation the

basis for the dismissal of the first petition, the procedural default, still exists, and as such the second petition is successive because the merits of the petition have been determined.

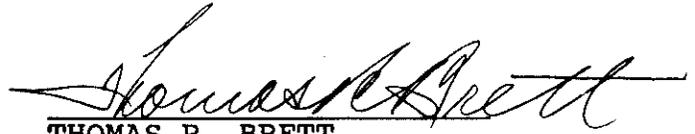
This position is strengthened by the Congressional intent to curb successive petitions. The Supreme court states that "[i]t is clear that Congress intended for district courts, as the general rule, to give preclusive effect to a judgment denying on the merits a habeas petition alleging grounds identical in substance to those raised in a the subsequent petition." Kuhlmann v. Wilson, 477 U.S. 436, 451 (1986). There are instances in which a second or successive petition that does not allege new or different grounds for relief should not be dismissed. However, "successive federal habeas review should be granted only in rare cases, but ... it should be available when the ends of justice so require." *Id.* at 454. The "ends of justice" require successive federal habeas review "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Id.*

In the instant case, Petitioner argues that the "ends of justice" would be best served by a reconsideration of his claim. However, Petitioner has not brought forth any claim or evidence of his factual innocence. Therefore, the ends of justice do not require this Court to conduct a successive habeas review.

This Courts holds that Petitioner Hawkins' Petition for Writ of Habeas Corpus is successive and that there was a prior determination on the merits. The Court concludes that the

Magistrate Judge's Report and Recommendation that Hawkins' Petition for Writ of Habeas Corpus be dismissed should be and the same is hereby adopted and affirmed. The Court further concludes Hawkins' request for a Writ of Habeas Corpus should be and the same is hereby DENIED.

IT IS SO ORDERED, this 6th day of July, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON CLERK'S

DATE JUL 6 1994

FILED

JUL 0 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

CLARENDON NATIONAL INSURANCE)
COMPANY and VAN-AMERICAN INSURANCE)
COMPANY, INC.,)
Plaintiffs,)

vs.)

INDUSTRIAL MANAGEMENT SERVICES,)
INC.; GREEN ACRES ENTERPRISES, INC.;)
LARRY W. POMMIER and KAY L. POMMIER)
Defendants.)

Case No. 93-C-1127-B ✓

J U D G M E N T

Pursuant to the Order granting Plaintiffs' Motion for Summary Judgment against Defendant Green Acres Enterprises, Inc., filed this date and the Order granting Plaintiffs' Motion for Summary Judgment against Defendants Industrial Management Services, Inc., Larry W. Pommier and Kay L. Pommier, filed April 15, 1994, judgment is hereby entered as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Plaintiffs shall have and recover judgment against Defendants, Industrial Management Services, Inc., Larry W. Pommier and Kay L. Pommier, in the amount of \$228,513.00,¹ plus prejudgment interest from December 21, 1993, to this date at the rate of 6.99 percent per annum, plus post-judgment interest from this date until paid at the current legal rate of 5.31 percent per annum, plus the costs of this action and a reasonable attorney's fee if timely applied for

¹ This includes damages in the amount of the Bond forfeited to the ODOM (\$216,600.00) and damages for the non-payment of premiums (\$11,913.00).

Handwritten initials

pursuant to Local Rule 54;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiffs have and recover judgment in rem to the extent of the following described property against the Defendant Green Acres Enterprises, Inc., in the principal sum of \$216,600.00:

1. A tract of land lying in the northwest quarter of Section 36, Township 21 north, Range 9 east in Osage County, Oklahoma. Said tract of land being described by metes and bounds as follows, to wit:

Beginning at the quarter corner between sections 35 and 36. Township 21 north, Range 9 east; thence south 89 degrees 30' east along the half section line for a distance of 1138.8 feet to the Corps of Engineers marker; thence north 0 degrees 26' west for a distance of 165.0 feet; thence north 44 degrees 45' west for a distance of 699.4 feet; thence north 9 degrees 30' west for a distance of 328.71 feet; thence north 89 degrees 56' west for a distance of 326.0 feet; thence north 0 degrees 32' feet west for a distance of 1311.51 feet; thence north 89 degrees 29' east for a distance of 654.0 feet; thence south 0 degrees 26' feet east for a distance of 823.9 feet; thence south 63 degrees 22' east for a distance of 366.5 feet; thence north 89 degrees 55' east for a distance of 979.0 feet; thence south 0 degrees 16' east for a distance of 333.0 feet; thence north 86 degrees 37' east to the East line of the northwest quarter of said section 36, township 21 north, range 9 east, for a distance of 264.0 feet; thence north 0 degrees 15' west along the half section line to the quarter corner between sections 25 and 36, township 21 north, range 9 east, for a distance of 1783.0 feet; thence south 88 degrees 45' west to the northwest corner of the northwest quarter of section 36, township 21 north, range 9 east, for a distance of 2627.5 feet; thence south 0 degrees 34' west along the section line for a distance of 2616.5 feet to the point of beginning and containing 88.50 acres, more or less.

AND

2. The NW/4 and W/2 of the SW/4 of the NE/4 all in Section 36, Township 21 North, Range 9 East, less that portion taken by condemnation in Case No. 5219 in the United State District Court for the Northern

District of Oklahoma, described as follows:

The W/2 of the SE/4 and the SW/4, S/2 SW/4 SW/4 NE/4, W/2 SE/4 NW/4 W/2 E/2 SE/4 NW/4, SE/4 SE/4 SE/4 NW/4, W/2 NE/4 SE/4 SE/4 NW/4, Southwest Diagonal Half of the E/2 NE/4 SE/4 SE/4, NW/4, Southwest Diagonal Half of the W/2 SE/4 NE/4 SE/4 SW/4, E/2 SE/4 SE/4 SE/4 SW/4 NW/4, Northeast Diagonal Half of the NW/4 SE/4 SE/4 SW/4 NW/4, NE/4 SE/4 SW/4 NW/4, Northeast Diagonal Half of the NW/4 SE/4 SW/4 NW/4 NE/4 SW/4 NW/4, NE/4 NW/4 SW/4 SW/4, E/2 SW/4 NW/4 NW/4 SE/4 NW/4 NW/4 NW/4 SE/4 NW/4 SW/4 NE/4 NW/4 NW/4, Southwest Diagonal Half of the S/2 of the SE/4 SE/4 NW/4 NW/4, and excepting the perpetual easement designated as Tract 2801 E-2 and E-3 taken by condemnation in the same case, and excepting the perpetual easement designated as Tract No. 1036-IM in Case No. 5763 United States District Court for the Northern District of Oklahoma, all of said perpetual easements comprising 17.50 acres, more or less;

AND

The South Half (S/2) of the Northwest Quarter (NW/4) and the North Half (N/2) of the North Half (N/2) of the Southwest Quarter (SW/4) all in Section 32, Township 21 North, Range 10 East, Osage County, Oklahoma, subject to the reservation of the oil, gas and other minerals to the Osage Tribe of Indians pursuant to Acts of Congress

* Subject to the reservation of the oil, gas coal and other minerals to the Osage Tribe of Indians by Act of Congress, June 28, 1906, (34 Stat.L. 539) and acts amendatory thereof and supplementary thereto.

IT IS FURTHER ORDERED that the Sheriff of Osage County, Oklahoma shall cause the above described mortgaged property to be appraised and to advertise and sell the same and to 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 attorney's fees and 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 FINALLY ORDERED that upon confirmation of sale, the Defendants herein and all persons claiming by, through or under them, be forever barred, foreclosed and enjoined from asserting or claiming any right title, interest, estate or equity of redemption in and to the mortgaged property or any part thereof.

DATED this 5 day of ~~June~~^{July}, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
JUL - 6 1994
DATE _____

FILED
JUL 06 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

CLARENDON NATIONAL INSURANCE)
COMPANY and VAN-AMERICAN INSURANCE)
COMPANY, INC.,)
Plaintiffs,)

vs.)

INDUSTRIAL MANAGEMENT SERVICES,)
INC.; GREEN ACRES ENTERPRISES, INC.;)
LARRY W. POMMIER and KAY L. POMMIER)
Defendants.)

Case No. 93-C-1127-B

O R D E R

Now before the Court are the Plaintiffs' Motion for Summary Judgment Against Defendant Green Acres Enterprises, Inc. (Docket #16), Plaintiffs' Motion to Strike Defendant Green Acres Enterprises, Inc.'s Answer and Response to Plaintiffs' Motion for Summary Judgment (Docket #30) and Plaintiffs' Application for Rule 54(b) Determination of Finality (Docket #26). The Court previously granted summary judgment for the Plaintiff and against Defendants Industrial Management Services, Inc; Larry W. Pommier and Kay L. Pommier.

Background

Plaintiffs, Clarendon National Insurance Company and Van-American Insurance Company, Inc., filed their complaint against, among others, Green Acres Enterprises ("Green Acres"), on December 21, 1993. On February 14, 1994, Plaintiffs filed and served their amended complaint on Green Acres. Attorney David Sobel entered an appearance on behalf of the Defendant on March 21, 1994, and filed

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motions seeking an extension of time to respond to the Plaintiff's amended complaint and a continuance of the case management conference.

Two weeks later, Plaintiffs filed and served their motion for summary judgment against Green Acres. On April 11, counsel for Green Acres filed an application for additional time to respond to the motion for summary judgment. Nine days later, counsel for Green Acres filed an application to withdraw and for an extension of time to respond to the amended complaint and motion for summary judgment, in order to allow Green Acres to secure new counsel.

At a case management conference held May 12, 1994, the Court ordered Green Acres to answer the amended complaint and to respond to Plaintiffs' motion for summary judgment on or before May 31, 1994. The Court further ordered Green Acres to secure new counsel and cause that counsel to file an entry of appearance in compliance with Local Rule 83.3(L) on or before May 31, 1994. The parties were instructed that no further extensions would be granted.

On May 23, 1994, an answer to the original complaint and a response to the motion for summary judgment were filed. These filings were only signed by W.K. Jenkins, Green Acres' registered service agent. There is no indication that W.K. Jenkins is an attorney licensed to practice law or admitted to the bar of this Court. The Court judicially notices that W.K. Jenkins is not on the roll of attorneys of the Northern District of Oklahoma.

Plaintiffs move to strike the responses filed by W.K. Jenkins on the grounds that a non-lawyer corporate officer can not

represent the corporation. It is well established that a corporation can appear in a court of record only by an attorney at law. Flora Construction Co. v. Fireman's Fund Insurance Co., 307 F.2d 413,414 (10th Cir. 1962). Green Acres was previously informed that it must obtain counsel and that such counsel must enter an appearance by May 31, 1994. The documents purportedly filed on Green Acres' behalf on May 23, 1994, were not signed by an attorney on this Court's roll of attorneys and therefore should be and are hereby stricken.

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

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

"The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be

viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

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

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

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

In this instant case, the following facts are not in dispute and the Court so finds as follows:

1. On or about April 24, 1991, Defendants Industrial Management Services, Inc. ("Industrial"), Larry W. Pommier ("L. Pommier") and Kay L. Pommier ("K. Pommier") submitted an application to Plaintiffs for the issuance of surety bonds on

behalf of Defendant Industrial to the State of Oklahoma Department of Mines ("ODOM") to secure performance of Defendant Industrial's coal mining reclamation obligations with respect to certain property in Wagoner County, Oklahoma. (Exhibit 1 to Plaintiffs' Motion for Summary Judgment (hereinafter "Plaintiffs' Motion") at ¶ 3.)

2. To induce Plaintiffs to issue such bonds, Defendant Industrial executed and delivered to Plaintiffs a Premium Agreement agreeing to pay the premium on such bonds. (Exhibit 2 to Plaintiffs' Motion).

3. To further induce Plaintiffs to issue such bonds, Defendants Industrial, L. Pommier and K. Pommier executed and delivered to Plaintiffs a General Contract of Indemnity agreeing to pay all premiums on such bonds and to indemnify Plaintiffs from and against any loss and expenses, including court costs and attorney's fees, that Plaintiffs sustained by reason of issuing such bonds. (Exhibit 3 to Plaintiffs' Motion at ¶ 1-3).

4. To further induce Plaintiffs to issue such bonds, Defendants Industrial, L. Pommier and K. Pommier executed and delivered to Plaintiffs a Collateral trust Agreement agreeing to indemnify Plaintiffs against any and all claims, suits, actions, debts, damages, costs, charges and expenses, including court costs and attorney's fees, and against any and all liability, losses and damages of any nature whatsoever that Plaintiffs sustained by reason of issuing such bonds. (Exhibit 4 to Plaintiffs' Motion at ¶ 1).

5. To further induce Plaintiffs to issue such bonds, Defendants Industrial, L. Pommier and K. Pommier executed and delivered to Plaintiffs a Guaranty agreeing to indemnify Plaintiffs against any and all liabilities, losses, claims, damages, suits, actions, debts, costs, charges and expenses, including attorney's fees, that Plaintiffs might sustain by reason of issuing such bonds, including premiums due on such bonds. (Exhibit 5 to Plaintiffs' Motion).

6. By resolution of its board of directors, dated April 24, 1991, Defendant Industrial authorized the execution of the Premium Agreement, the Indemnity Contract, the Collateral Trust Agreement, the Guaranty (collectively, "the Agreements") and any other necessary agreements. (Exhibit 6 to Plaintiffs' Motion).

7. Pursuant to the Agreements, to induce Plaintiffs to issue the Bond, Defendant Green Acres executed and delivered a mortgage to Plaintiffs on certain real property in Osage County, Oklahoma (the "Mortgage") as collateral for the Bond and to enable Defendants to engage in coal mining operations in the state of Oklahoma. The Mortgage was in the amount of \$216,600.00 and was filed of record on November 16, 1993, in Book 845 at Page 279 of the Osage County Clerk's records (Exhibit 7 to Plaintiffs' Motion) on the following described property:

1. A tract of land lying in the northwest quarter of Section 36, Township 21 north, Range 9 east in Osage County, Oklahoma. Said tract of land being described by metes and bounds as follows, to wit:

Beginning at the quarter corner between sections 35 and 36. Township 21 north, Range 9 east; thence south 89 degrees 30' east along the half section

line for a distance of 1138.8 feet to the Corps of Engineers marker; thence north 0 degrees 26' west for a distance of 165.0 feet; thence north 44 degrees 45' west for a distance of 699.4 feet; thence north 9 degrees 30' west for a distance of 328.71 feet; thence north 89 degrees 56' west for a distance of 326.0 feet; thence north 0 degrees 32' feet west for a distance of 1311.51 feet; thence north 89 degrees 29' east for a distance of 654.0 feet; thence south 0 degrees 26' feet east for a distance of 823.9 feet; thence south 63 degrees 22' east for a distance of 366.5 feet; thence north 89 degrees 55' east for a distance of 979.0 feet; thence south 0 degrees 16' east for a distance of 333.0 feet; thence north 86 degrees 37' east to the East line of the northwest quarter of said section 36, township 21 north, range 9 east, for a distance of 264.0 feet; thence north 0 degrees 15' west along the half section line to the quarter corner between sections 25 and 36, township 21 north, range 9 east, for a distance of 1783.0 feet; thence south 88 degrees 45' west to the northwest corner of the northwest quarter of section 36, township 21 north, range 9 east, for a distance of 2627.5 feet; thence south 0 degrees 34' west along the section line for a distance of 2616.5 feet to the point of beginning and containing 88.50 acres, more or less.

AND

2. The NW/4 and W/2 of the SW/4 of the NE/4 all in Section 36, Township 21 North, Range 9 East, less that portion taken by condemnation in Case No. 5219 in the United State District Court for the Northern District of Oklahoma, described as follows:

The W/2 of the SE/4 and the SW/4, S/2 SW/4 SW/4 NE/4, W/2 SE/4 NW/4 W/2 E/2 SE/4 NW/4, SE/4 SE/4 SE/4 NW/4, W/2 NE/4 SE/4 SE/4 NW/4, Southwest Diagonal Half of the E/2 NE/4 SE/4 SE/4, NW/4, Southwest Diagonal Half of the W/2 SE/4 NE/4 SE/4 SW/4, E/2 SE/4 SE/4 SE/4 SW/4 NW/4, Northeast Diagonal Half of the NW/4 SE/4 SE/4 SW/4 NW/4, NE/4 SE/4 SW/4 NW/4, Northeast Diagonal Half of the NW/4 SE/4 SW/4 NW/4 NE/4 SW/4 NW/4, NE/4 NW/4 SW/4 SW/4, E/2 SW/4 NW/4 NW/4 SE/4 NW/4 NW/4 NW/4 SE/4 NW/4 SW/4 NE/4 NW/4 NW/4, Southwest Diagonal Half of the S/2 of the SE/4 SE/4 NW/4 NW/4, and excepting the perpetual easement designated as Tract 2801 E-2 and E-3 taken by condemnation in the same case, and excepting the perpetual easement designated as Tract No. 1036-IM in Case No. 5763 United States

District Court for the Northern District of Oklahoma, all of said perpetual easements comprising 17.50 acres, more or less;

AND

The South Half (S/2) of the Northwest Quarter (NW/4) and the North Half (N/2) of the North Half (N/2) of the Southwest Quarter (SW/4) all in Section 32, Township 21 North, Range 10 East, Osage County, Oklahoma, subject to the reservation of the oil, gas and other minerals to the Osage Tribe of Indians pursuant to Acts of Congress

* Subject to the reservation of the oil, gas coal and other minerals to the Osage Tribe of Indians by Act of Congress, June 28, 1906, (34 Stat.L. 539) and acts amendatory thereof and supplementary thereto.

8. Pursuant to the Mortgage, Defendant Green Acres agreed that upon default or bond forfeiture by Defendant Industrial, Plaintiffs could proceed against the subject property for satisfaction of any indebtedness created thereby in an amount up to \$216,600.00. (Exhibit 7 to Plaintiffs' Motion at p. 2). Defendant Green Acres further agreed that upon issuance of a final notice of bond forfeiture under Part 800.50 of the Oklahoma Permanent Rules and Permanent Regulations and the failure of Defendant Industrial or Defendant Green Acres to remedy such forfeiture or pay the indebtedness created thereby, Plaintiffs could foreclose the Mortgage and take possession of the property without notice. (Exhibit 7 to Plaintiffs' Motion at ¶ 3). Defendant Green Acres further agreed to pay any attorney's fees and court costs Plaintiffs incurred in enforcing the Mortgage or their rights thereunder. (Exhibit 7 to Plaintiffs' Motion at ¶ 2).

9. On or about April 25, 1991, pursuant to the terms of the

Agreements, Plaintiffs caused to be issued Bond No. VAN-91-0032 in the amount of \$216,600.00 on Defendant Industrial's behalf to ODOM. (Exhibit 1 to Plaintiffs' Motion at ¶ 4).

10. In or about January, 1993, Plaintiffs discovered through their field agents that one or more of the Defendants were not performing their reclamation obligations as required under the Agreements and state statutes and regulations governing surface mining and the surface effects of underground mining. (Exhibit 1 to Plaintiffs' Motion at ¶ 5).

11. ODOM issued Cessation Order Nos. 93-28-01 TV1 and 93-28-05 TV1 (Exhibits 8 and 9 to Plaintiffs' Motion) on Permit No. 91/96-4218, which was the permit upon which Plaintiffs issued the Bond on behalf of Defendant Industrial, the permittee. (Exhibit 10 to Plaintiffs' Motion).

12. Cessation Order 93-28-01 TV1 was issued on April 6, 1993, and has existed unabated and uncorrected by Defendants. (Exhibit 8 and Exhibit 1 at ¶ 6 to Plaintiffs' Motion).

13. Pursuant to paragraph 2(b) of the Guaranty Agreement, Defendants agreed that if Plaintiffs determined that default was reasonably imminent, Plaintiffs had the right to demand that Defendants Industrial, L. Pommier and K. Pommier deposit the amount of any reserve against such loss with Plaintiffs. (Exhibit 3 at ¶ 2(b) and Exhibit 5 at p. 2).

14. On or about June 18, 1993, Plaintiffs informed Defendants Industrial, L. Pommier and K. Pommier in writing that Plaintiffs determined that default was reasonably imminent and deemed

themselves to be insecure and made written demand on Defendants Industrial, L. Pommier and K. Pommier to deposit \$216,600.00, the amount of the bond to ODOM, with Plaintiffs. (Exhibit 1 at ¶ 7 and Exhibits 11-13).

15. Despite Plaintiffs' demand, Defendants Industrial, L. Pommier and K. Pommier failed to deposit \$216,000.00 with Plaintiffs. (Exhibit 1 at ¶ 8).

16. On September 15, 1993, ODOM held a show cause hearing on the revocation of the permit held by Defendant Industrial and bonded by Plaintiffs. Defendant Industrial appeared by and through its representative, Defendant L. Pommier. (Exhibits 15 and 16 to Plaintiff's Motion).

17. On September 30, 1993, ODOM's hearing examiner ordered that Defendant Industrial's permit, which was bonded by Plaintiffs, should be revoked. (Exhibit 15 to Plaintiff's Motion at p. 4).

18. On November 3, 1993, ODOM's director adopted the hearing officer's proposed report and ordered Defendant Industrial's permit revoked. (Exhibit 16 at p. 3).

19. On or about November 4, 1993, as a result of Defendant Industrial's failure to perform its obligations on the permitted area, ODOM served a Notice of Bond Forfeiture regarding the Bond. (Exhibit 17 to Plaintiff's Motion).

20. On January 19, 1994, Defendant Industrial's appeal of the Notice of Bond Forfeiture came on for hearing before ODOM. At that hearing, Defendant Industrial, through its representative, Defendant L. Pommier, stipulated that no reclamation work had been

performed on the permit site. (Exhibit 18 to Plaintiffs' Motion).

21. On or about February 2, 1994, ODOM issued a Proposed Order of Bond Forfeiture ordering forfeiture of the \$216,600.00. (Exhibit 18).

22. On March 8, 1994, ODOM's Director adopted the hearing officer's Proposed Order of Bond Forfeiture and ordered the Bond in the amount of \$216,600.00 forfeited. (Exhibit 19 at p. 4; Exhibit 1 at ¶ 10).

23. On March 10, 1994, ODOM made demand upon Plaintiffs for a payment of \$216,600.00, the amount of the Bond. Exhibit 20 and Exhibit 1 at ¶ 11).

24. Despite demand from Plaintiffs (Exhibits 11-13), Defendants also failed to pay the required premiums on the Bond.

25. The issuance of, and failure to abate the violations asserted under, the Cessation Orders; the failure to deposit \$216,600.00; the revocation of the permit; the Notice of the Bond Forfeiture; the Proposed Order of Bond Forfeiture; the issuance of the Order Adopting the Proposed Order of Bond Forfeiture and ODOM's demand on Plaintiffs for payment of \$216,600.00; and the failure to pay the premiums on the Bond constitute events of default under the Agreements. (Exhibits 3-5).

26. Pursuant to the Mortgage, Plaintiffs are, upon issuance of a final order after notice of Defendant Industrial's forfeiture under Part 800.50 of the Oklahoma Permanent Rules and Permanent Regulations and the failure of Defendant Industrial or Defendant Green Acres to remedy such forfeiture or pay the indebtedness

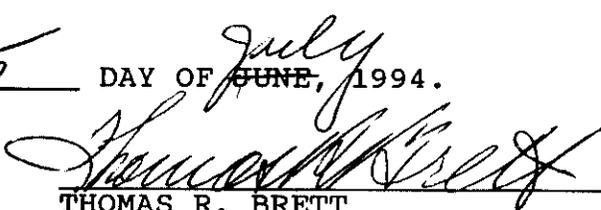
created thereby, to foreclose the Mortgage and to take possession of the subject property without notice. (Exhibit 7 at ¶ 3). Notice of Bond Forfeiture pursuant to Part 800.50 was issued on or about November 4, 1993. (Exhibit 17). A Final Order of Bond Forfeiture was issued on March 8, 1994. (Exhibit 19). Defendants have failed to remedy such forfeiture or to pay the indebtedness created by that forfeiture. (Exhibit 1 at ¶ 12).

Analysis and Authorities

Pursuant to the terms of the subject Mortgage and the undisputed facts and findings set forth above, the Court concludes that Defendant Green Acres is in default of its obligations to Plaintiffs and therefore Plaintiffs are entitled to foreclosure of the Mortgage. For this reason, Plaintiffs' motion for summary judgment (Docket #16) against Defendant Green Acres should be and is hereby GRANTED.

A judgment in accordance with this Order and the Court's Order of April 15, 1994, will be entered simultaneously herewith and therefore, Plaintiffs' application for Rule 54(b) determination of finality (Docket #26) is MOOT.

IT IS SO ORDERED THIS 5 DAY OF ^{July} ~~JUNE~~, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE JUL - 6 1994

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

Richard M. [unclear], Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
)
v.)
)
DAVID BRUCE McDERMOTT,)
)

CRIMINAL NO. 93-CR-163-E ✓

FINAL ORDER OF FORFEITURE

WHEREAS, on April 8, 1994, this Court entered an Order of Forfeiture pursuant to the provisions of 21 U.S.C. §§ 846, 841(a)(1) and 853, based upon the trial jury's Guilty Verdict against the above Defendants on Counts One, Three, Four and Five and the Special Verdict forfeiting all of the property alleged to be subject to forfeiture in Count Two (incorporated in Count One) of the Indictment;

AND WHEREAS, on April 28, May 5 and May 12, 1994, the United States published in a newspaper of general circulation notice of this forfeiture and of the intent of the United States to dispose of the property in accordance with the law and further notifying all third parties of their right to petition the Court within thirty (30) days for a hearing to adjudicate the validity of their alleged legal interest in the property;

One 1990 Chevrolet pickup,
VIN 1GCDC14N8LZ222550

One 1982 Thunderbird 21 foot powerboat,
Serial No. TNRD3827M82F

One 1992 Bombadier 8 foot waterbike,
Serial No. ZZN20224K192,
Okla. Reg. No. OK7819CF

AND WHEREAS, it appears from the record that no other claims, contested or otherwise, have been filed for any of the properties described in this Court's April 8, 1994 Order of Forfeiture.

It is HEREBY ORDERED, ADJUDGED and DECREED:

1. That the right, title and interest to all of the hereinafter described property, whether real, personal and/or mixed, of the Defendant David Bruce McDermott, is hereby condemned, forfeited and vested in the United States of America, and shall be disposed of according to law.

2. That the following property belonging to David Bruce McDermott, who is the subject of this Order, is hereby condemned and forfeited to the United States of America, as follows:

3. That any and all forfeited funds, including but not limited to currency, currency equivalents and certificates of deposit, as well as any income derived as a result of the United States Marshals management of any property forfeited herein, and the proceeds from the sale of any forfeited property, after the payment of costs and expenses incurred in connection with the forfeiture, sale and disposition of the forfeited property, shall be deposited forthwith by the United States Marshal into the Department of Justice Assets Forfeiture Fund in accordance with 28 U.S.C. § 524(c) and 21 U.S.C. § 881(e).

SO ORDERED this 5th of day July, 1994.


JAMES O. ELLISON, Chief
United States District Judge

ENTERED ON DOCKET

DATE 7-6-94

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

THE UNITED STATES OF AMERICA
for the use and benefit of
BRAZEAL MASONRY, INC., an Oklahoma
Corporation,

Plaintiff,

vs.

NATIONAL INTERIOR CONTRACTORS,
INC., a corporation; WESTCHESTER
FIRE INSURANCE COMPANY,

Defendants,

WESTCHESTER FIRE INSURANCE
COMPANY,

Third Party Plaintiff,

vs.

PETER M. DAIGLE and GRACE M.
DAIGLE, individuals,

Third Party Defendants.

Case No. 93-C-1008-B ✓

FILED

JUL 6 1994

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

J U D G M E N T

In accord with the Order filed this date sustaining Westchester Fire Insurance Company's Motion for Summary Judgment, the Court hereby enters judgment in favor of Westchester Fire Insurance Company and against National Interior Contractors, Inc., Peter M. Daigle and Grace M. Daigle for the amount of \$7,802.00, plus all prejudgment interest and costs resulting from Plaintiff's judgment against Westchester entered this same date. Judgment is likewise entered in favor of Westchester Fire Insurance Company and against National Interior Contractors, Inc., Peter M. Daigle and Grace M. Daigle in the amount of \$1,523.17, representing

Westchester's attorney fees and expenses incurred herein.

DATED this 5 day of JULY, 1994.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 7-6-94

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

THE UNITED STATES OF AMERICA)
 for the use and benefit of)
 BRAZEAL MASONRY, INC., an Oklahoma)
 Corporation,)
)
 Plaintiff,)
)
 vs.)
)
 NATIONAL INTERIOR CONTRACTORS,)
 INC., a corporation; WESTCHESTER)
 FIRE INSURANCE COMPANY,)
)
 Defendants,)
)
 WESTCHESTER FIRE INSURANCE)
 COMPANY,)
)
 Third Party Plaintiff,)
)
 vs.)
)
 PETER M. DAIGLE and GRACE M.)
 DAIGLE, individuals,)
)
 Third Party Defendants.)

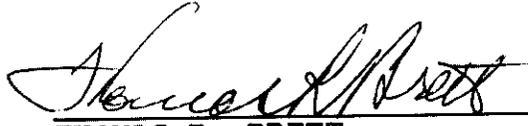
Case No. 93-C-1008-B ✓

FILED
 JUL 06 1994
 Richard M. Lawrence, Clerk
 U. S. DISTRICT COURT
 NORTHERN DISTRICT OF OKLAHOMA

J U D G M E N T

In accord with the Order filed this date sustaining the Plaintiff's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Plaintiff and against Defendant Westchester Fire Insurance Company, for the amount of \$7,802.00, plus interest accruing from November 10, 1993, until this date at the rate of 6 percent per annum, plus interest from this date forward at the legal rate of 5.31 percent per annum. Costs are awarded to the Plaintiff and against Defendant Westchester Fire Insurance Company if properly applied for pursuant to Local Rule 54.

DATED this 5 day of JULY, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

JUL 6 1994

DATE

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

THE UNITED STATES OF AMERICA)
for the use and benefit of)
BRAZEAL MASONRY, INC., an Oklahoma)
Corporation,)

Plaintiff,)

vs.)

NATIONAL INTERIOR CONTRACTORS,)
INC., a corporation; WESTCHESTER)
FIRE INSURANCE COMPANY,)

Defendants,)

WESTCHESTER FIRE INSURANCE)
COMPANY,)

Third Party Plaintiff,)

vs.)

PETER M. DAIGLE and GRACE M.)
DAIGLE, individuals,)

Third Party Defendants.)

Case No. 93-C-1008-B ✓

FILED
JUL 6 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Now before the Court is Plaintiff's Motion for Summary Judgment against the Defendant Westchester Fire Insurance Company ("Westchester").

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Where there is an absence of material issues of fact, then the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct.

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2505, 91 L.E.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986); Commercial Iron & Metal Co. v. Bache & Co., Inc., 478 F.2d 39, 41 (10th Cir. 1973); and Ando v. Great Western Sugar Company, 475 F.2d 531, 535 (10th Cir. 1973).

In the instant case, no genuine issue exists as to the following material facts:

1. Plaintiff Brazeal Masonry, Inc. ("Brazeal") entered into a contract with National Interior Contractors, Inc. ("National") to perform certain labor and material to the U.S. Marshall's Office located in Tulsa, Oklahoma. Brazeal completed the work on or about the 20th day of December, 1993.

2. The Defendant Westchester as surety and Defendant National as contractor duly executed and delivered to the United States of America a payment bond for the protection of all persons supplying labor and material to the project pursuant to the United States Code title 40, Section 270 A and identified as Bond No. WF 00036279.

3. On March 16, 1993, Brazeal faxed a letter to Westchester providing notice of its unpaid claim in the sum of \$7,802.00.

4. On November 10, 1993, Brazeal filed suit in this Court against National and Westchester (within one year of the last day work was completed on the job) for payment for services rendered in the sum of \$7,802.00 plus interest, attorney fees and costs.

5. On March 22, 1994, Judgment was entered by this Court for Plaintiff and against Defendant National in the sum of \$7,802.00 with interest thereon at the rate of 6% from the date said

Complaint was filed before the Court and for the costs of this action.

Defendant Westchester candidly concedes that based on these undisputed facts, Plaintiff is entitled to summary judgment in the principal amount of \$7,802.00, with prejudgment interest at the rate of 6% from the date the complaint was filed, plus court costs.

For these reasons, the Court concludes Plaintiff's Motion for Summary Judgment against Defendant Westchester should be and is hereby GRANTED.

IT IS SO ORDERED THIS 5 DAY OF JULY, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 7-6-94

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

IN RE:)
)
Debtor.)
)
UNITED STATES OF AMERICA,)
)
Appellant,)
)
v.)
)
LAURA M. PARMELE,)
)
Appellee.)

FILED
 JUL 11 1994
 Richard M. Lawrence, Clerk
 U. S. DISTRICT COURT
 NORTHERN DISTRICT OF OKLAHOMA
 93-C-0652-B ✓

ORDER

Now before the Court is Appellee's Motion For Rehearing (docket #17). Appellee raises virtually the same issues already examined in this Court's April 25, 1994 Order. After reconsideration and further examination of the issues, however, the Court denies Appellee's Motion For Rehearing.

The pertinent facts are as follows: Prior to November of 1992, Appellee Laura M. Parmele owed the Internal Revenue Service ("IRS") \$34,624.57 for back taxes. On November 6, 1992, Parmele filed Chapter 13 Bankruptcy. About a month later, Appellant United States ("IRS") filed a Proof of Claim for the \$34,624.57 owed by Parmele to the IRS. The IRS also had a lien on Parmele's property.

Parmele objected to the IRS claim on December 16, 1992. She argued that the value of her property (on which the IRS had a lien) was substantially less than the amount owed. The IRS refuted Parmele's argument, noting the value of her property was

approximately \$35,057 or more than the IRS's secured claim (\$34,624.57).¹

Subsequently, on June 21, 1993, the Bankruptcy Court, relying on 28 U.S.C. §6334, reduced the IRS claim by \$3,226 -- "the amount the parties have stipulated is the value of the exempt property which cannot be levied by [the] United States." *June 21, 1993 Order*.

Then, on July 13, 1993, the Bankruptcy Court ordered the Trustee to pay \$5,160 from the estate property for Parmele's 1993 estimated federal and state income taxes. *Order Determining Amount of Allowable Secured Claim of the United States, July 15, 1993*.

Three days later, Parmele filed a Modified Chapter 13 Plan. On July 20, 1993, the IRS filed the instant appeal. A day later, on July 21, 1993, the Bankruptcy Court -- acknowledging it knew about the IRS appeal -- confirmed Parmele's First Modified Chapter 13 Plan.²

On April 25, 1994, this Court issued an Order reversing the Bankruptcy Court decision (*docket #15*). That decision prompted Parmele to file this Motion For Rehearing pursuant to Bankruptcy Rule 8015.³

II. Legal Analysis

To support her Motion For Rehearing, Parmele raises four issues. First, she contends the Bankruptcy Court properly reduced the secured claim of the IRS. Second,

¹ Parmele obtained a deficiency judgment against Feng Shiang Shu and Chin Jung Shu on August 8, 1989. On April 5, 1993, Parmele filed a Motion To Approve Settlement Of Deficiency Judgment. On May 5, 1993 -- without objection by the United States -- the Bankruptcy Court approved the \$20,000 settlement. Of the \$20,000, \$300 was spent on attorney fees and \$19,700 was transferred to Parmele's trustee. She also had properties worth \$15,357.

² The IRS did not appear for the confirmation hearing. However, at the confirmation hearing, the Bankruptcy Judge stated: "The Court is knowledgeable of, in the last 15 to 30 minutes, the appeal being filed in this matter, and with said knowledge, and upon the knowledge that service has been had upon the United States of America, ex rel IRS, the Court confirms the plan."

³ Rule 8015 states that a motion for rehearing may be filed within 10 days after entry of the district court's judgment. This Court entered its Order on April 26, 1994. Parmele filed her motion on May 6, 1994. The IRS did not respond to Parmele's motion.

Parmele argues that the Bankruptcy Court's decision to categorize her 1993 post-petition income taxes as a "reasonable and necessary" expense was correct. Third, Parmele asserts that the IRS appeal was not timely. Last, she claims the Bankruptcy Court's confirmation of her Chapter 13 Plan prevented the IRS from filing an appeal. Each issue is briefly discussed below.

A. Reduction of Secured Claim Pursuant to 26 U.S.C. § 6334

The IRS had a secured claim for \$34,624.57. However, relying on 26 U.S.C. § 6334, the Bankruptcy Court reduced the claim by \$3,226.⁴ As noted in this Court's April 25, 1994 Order, nothing in the language of Section 6334 provides for such a reduction. The statute addresses the question of a levy and does not provide a mechanism for reducing a secured claim. See *United States v. Barbier*, 896 F.2d 377 (9th Cir. 1990).⁵

B. The Post-Petition Taxes

Parmele's estimated federal and state income taxes for 1993 was \$5,160.⁶ The Bankruptcy Court concluded that those estimated taxes should be paid from the estate property. No case authority was cited by the Bankruptcy Court, although it did mention 11 U.S.C. §105.⁷

⁴ Section 6334 states that certain property shall be exempt from levy, including personal effects, wearing apparel, etc.

⁵ *Barbier* stands for the proposition that Section 6334 does not grant a taxpayer an exemption from a tax lien. But see *In Re Voelker*, 164 B.R. 308 (Bankr. W.D. Wis. 1993). In this case, similar reasoning should apply. Neither the language or any case law found supports using Section 6334 to "reduce" a secured claim.

⁶ This amount was "stipulated" to by the parties. According to Mr. Long, the estimated tax was based on both Parmele's \$20,000 settlement proceeds and her \$13,000 net income. See June 22, 1993 Transcript. The Court relied on Mr. Long's representation in deciding that Parmele owed \$5,160.

⁷ The Court stated: "Well, in all fairness -- and I don't really know whether or not that property of the estate -- as far as I'm concerned, that property of the estate is encumbered with the legal obligations. That it seems to me, in addition, that it would be completely unfair and to defeat the purposes of Chapter 13 to burden and laden the debtor with an additional \$5,000, which in this budget, she'd never be able to pay. That that, in addition, is a proper deduction as to a determination of disposable income. And then if I have any other problem, I'll just

On appeal, Parmele also fails to cite any applicable case authority for the Bankruptcy Court's decision. Parmele, however, points to 11 U.S.C. §506(c) (not mentioned by the Bankruptcy Court) as statutory authority. Section 506(c) states that the "trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim."

A similar argument, however, was addressed *In Re Bellman Farms Inc.*, 86 B.R. 1016, 1021 (Bankr. D.S.D. 1988) where the debtor argued that post-petition real estate taxes were a "reasonable, necessary cost and expense of preserving the estate." *Id.* The court rejected that argument, noting that the debtor had failed to specify how the secured creditor directly benefitted by the debtors' payment of the taxes. *Id.*

The facts in the instant case are different, but the Court finds the reasoning in *Bellman* persuasive. Neither the debtor nor the Bankruptcy Court specified how the debtors' payment of the taxes directly benefitted the IRS concerning its secured claim. In effect, the payment simply reduced the IRS secured claim by an additional \$5,160. That does not benefit the IRS. Consequently, the Court finds that Parmele's estimated post-petition income taxes cannot be classified as a Section 506(c) expense.

The Bankruptcy Court also noted that Section 105 gave it the authority to order the post-petition taxes be paid. However, Section 105 does not support the Bankruptcy Court's decision. That section allows bankruptcy courts to "issue any order, process or judgment that is necessary to carry out the provisions" of the Bankruptcy Act, but the power is not

throw in 105." See June 22, 1993 Transcript.

limitless. *See, generally, In Re Lapiana*, 909 F.2d 221, 223 (7th Cir. 1990) ("It is true of course that bankruptcy, despite its equity pedigree, is a procedure for enforcing pre-bankruptcy entitlement under specified terms and conditions rather than a flight of redistributive fancy or a grant of free-wheeling discretion such as the medieval chancellors enjoyed.")⁸

In this case, using Section 105 in this manner is contra to 26 U.S.C. § 6321, which states: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount...shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." That language clearly suggests that Congress wanted to assure the collection of taxes. The circumstances in this case do not justify using Section 105 to allow Parmele to, in effect, avoid payment of federal income taxes.

C. The Timeliness of the IRS Appeal

Parmele contends the IRS did not file a timely appeal. This allegation focuses on the following facts: In a June 21, 1993 Order, the Bankruptcy Court reduced the secured claim of the IRS by \$3,226. The IRS did not appeal. On July 13, 1993, the Bankruptcy Court entered a second Order concerning the post-petition taxes. The IRS appealed the Order to this Court on July 20, 1993.

Parmele argues that, since the IRS did not appeal (within 10 days) of the June 21, 1993 Order, its appeal is untimely. The Court disagrees. The two Orders focused on the

⁸ Also, see, generally, *United States v. Pepperman*, 976 F.2d 123, 131 (3rd Cir. 1992) ("Section 105 does not give the court the power to create substantive rights that otherwise would be unavailable under the Code...The fact that a bankruptcy proceeding is equitable does not give the judge a free-floating [power] to redistribute rights in accordance with his or her personal views of justice and fairness, however, enlightened those views may be.")

same dispute between the IRS and Parmele. As discussed *In Re Vause*, 886 F.2d 794, 797 (6th Cir. 1989), "the mere fact that a dispute is 'separable' does not automatically make it a final appealable order. Finality of the order comes from the fact that it resolves all of the creditor's claims against the estate. *Id.* In this case, the July 13 Order, not the June 21 Order, resolved the issue of the IRS secured claim.⁹ Therefore, the IRS appeal was timely filed.

D. Parmele's Argument That Plan Confirmation Served As Res Judicata

The fourth issue involves a procedural question. On July 20, 1993, the IRS filed its appeal. A day later, the Bankruptcy Court confirmed Parmele's Chapter 13 Plan. At the confirmation hearing, the Bankruptcy Court stated that the confirmation either mooted the IRS appeal or served as *res judicata*.

Support for the Bankruptcy Court's decision is found in Section 1327(a) of the Bankruptcy Code. It provides that "the provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted or rejected the plan."

In Re Howard, 972 F.2d 639 (5th Cir. 1991) discusses Section 1327(a) and concludes that when a debtor objects to a claim it puts the creditor on notice that "it must participate in the bankruptcy proceedings." *Id.* at 642. If the creditor has notice, but does not participate, the confirmation of the plan can preclude that creditor from raising the issues on appeal.*Id.*

⁹ It also should be noted that the Bankruptcy Court reserved the right to "enlarge, expand, and supplement" its June 21 Order. That language suggests that the court did not consider its decision to be a final order.

In the case at bar, the IRS filed a claim. Parmele objected. Parmele filed the Chapter 13 Plan, but the IRS did not object or participate in the confirmation hearing. The Bankruptcy Court then confirmed the plan. Arguably, since the IRS did not object and/or participate in the plan confirmation, it would be precluded from raising the same issues to this Court.

However, this case has a factual twist that did not exist in *Howard, supra*. The IRS filed a Notice of Appeal on July 20, 1993 -- one day before the Bankruptcy Court confirmed Parmele's Chapter 13 Plan. This fact raises a different question: Did the Chapter 13 plan confirmation, in effect, moot the IRS appeal? After review, the Court answers that question in the negative.

A similar circumstance took place in *In Re Appletree Markets, Inc.*, 155 B.R. 431 (S.D. Tex. 1993). The debtor argued that the creditor was precluded from questioning a bankruptcy court's order because it failed to argue at confirmation that the plan was not feasible. *Id. at 436*. Similar to the case at bar, the creditor had filed an appeal with the district court prior to the plan confirmation. The court rejected that argument, writing:

Under the facts it can hardly be contended that the bankruptcy court and the parties to the confirmation process were not aware that the UFCW [creditor] disagreed with the bankruptcy court's rejection of the CBA's. Furthermore, the [creditor] had no need to contest the propriety of that order during the plan confirmation process. The bankruptcy court had recently and thoroughly considered the issue, and there is no indication that raising the issue again during the plan confirmation process would cause the bankruptcy court to change its mind. In addition, and perhaps more importantly, the [creditor's] notice of appeal from the bankruptcy court's order...divested the bankruptcy court of jurisdiction of that aspect of the case. *Id. (emphasis added)*.

In the instant case comparable reasoning should apply because the filing of a timely notice of appeal to a district court divests a bankruptcy court of jurisdiction to proceed with respect to matters raised by such appeal.

III. Conclusion

Before the Court is Parmele's Motion For Rehearing pursuant to Bankruptcy Rule 8015. Parmele re-urges various issues, questioning the decision in the Court's April 25, 1994 Order. However, for the foregoing reasons, the Court DENIES the Motion For Rehearing (docket #14). The case is REVERSED and REMANDED to the Bankruptcy Court to proceed consistent with this Order.

SO ORDERED THIS 5 day of July, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

GRANT HOUSEWRIGHT, Personal)
Representative of the Estate of)
GEORGE HOUSEWRIGHT, Deceased;)
on behalf of the Estate of)
GEOFFREY HOUSEWRIGHT, Deceased;)
on behalf of the Estate of)
BARBARA HOUSEWRIGHT, Deceased;)
GRANT HOUSEWRIGHT,)
Individually; GAIL VIEL;)
Individually; and GREG)
HOUSEWRIGHT, Individually,)

Plaintiffs,)

v.)

MALLARD COACH COMPANY, INC.,)
d/b/a MALLARD ACQUISITION)
CORPORATION, a Delaware)
corporation,)

Defendant.)

Case No. 94-C-36-BU

FILED

JUL 7 1994

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

NOTICE OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Rule 41(a)(1)(i), Federal Rules of Civil Procedure, Plaintiffs dismiss their cause of action against Defendant without prejudice to the filing of any future actions. As of the filing of this notice, Defendant has not answered.

MCCAFFREY & TAWWATER

By



Larry A. Tawwater, OBA #8852
Jo L. Slama, OBA #13426
Bank of Oklahoma Plaza
201 Robert S. Kerr, Ste. 1100
Oklahoma City, OK 73102
(405) 232-0135

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing DISMISSAL WITHOUT PREJUDICE was mailed, postage pre-paid, this 5th day of JULY, 1994, to:

MILLS & WHITTEN
Reggie Whitten
Kent McGuire
Suite 500
One Leadership Square
211 North Robinson
Oklahoma City, OK 73102


Larry Tawwater

JS:864

ENTERED ON DOOR

FILED

DATE **JUL 5 1994**

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

JUL 1 1994

BRYAN K. ARMSTRONG,)
)
Plaintiff,)
)
vs.)
)
ASSOCIATED MILK PRODUCERS,)
)
Defendants.)

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

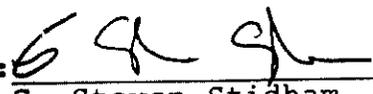
Case No. 94 C 156 B

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The Plaintiff and Defendants jointly request this Court to enter an order of Dismissal with Prejudice for the Plaintiff's causes of action against the Defendants, Associated Milk Producers in the above styled action, pursuant to Rule 41 FRCP(a)(1).

WHEREFORE, premises considered, the Plaintiff and Defendants respectfully request this Court to enter its Order of Dismissal with Prejudice of the Plaintiff's claims against the Defendants herein.

SNEED, LANG, ADAMS & BARNETT

By: 
G. Steven Stidham
2300 Williams Center Tower II
Two West Second Street
Tulsa, Oklahoma 74103
(918) 583-3145

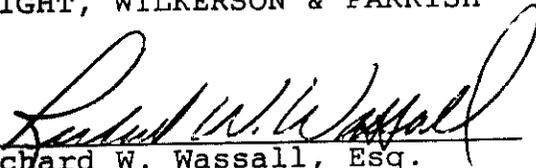
and

MEYER, HENDRICKS, VICTOR,
OSBORN & MALEDON
Mark D. Samson, Esq.
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ATTORNEYS FOR PLAINTIFFS

and

KNIGHT, WILKERSON & PARRISH

By 

Richard W. Wassall, Esq.

233 W. 11th Street

P.O. Box 1560

Tulsa, Oklahoma 74101-1560

ATTORNEYS FOR DEFENDANTS

ENTERED ON DOCKET

DATE 7-5-94

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

REPO COMPANY, INC.,)

Plaintiff,)

vs.)

DONALD S. WELLS,)

Defendant.)

NO. 94-C-71-~~JK~~

FILED

JUL 01 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

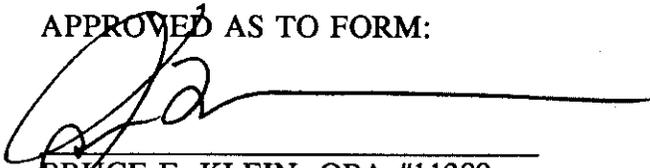
ORDER OF DISMISSAL WITHOUT PREJUDICE

NOW, on the 1st day of July, 1994 pursuant to the Stipulated Dismissal Without Prejudice filed herein by the Plaintiff and Defendant, IT IS ORDERED, ADJUDGED AND DECREED that the cause of action filed herein be dismissed without prejudice to refileing. The parties shall each bear their own costs and attorneys fees.

s/ TERRY C. KERN

JUDGE OF THE UNITED STATES DISTRICT COURT

APPROVED AS TO FORM:



BRUCE F. KLEIN, OBA #11389
MARK J. PEREGRIN, OBA #12438
205 N.W. 63rd, Suite 160
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(405) 848-8842
Attorneys for Plaintiff



MELINDA J. MARTIN, OBA #5737
MARTIN & SHELTON, P.C.
320 South Boston Avenue,
Suite 905
Tulsa, OK 74103
Attorneys for Defendant

ENTERED ON DOCKET

DATE JUL 1 1994

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

CATHY T. MAY, Individually and)
as Administratrix of the Estate)
of Timothy L. May, Deceased, and)
as Parent and Next of Kin to)
ERIN L. MAY, CAROLINE E. MAY,)
and LUKE J. MAY, Minor Children,)
Individually, and)
JESSE and SHANDA WORSHAM,)
Husband and Wife,)

Plaintiffs,)

vs.)

NATIONAL UNION FIRE INSURANCE)
COMPANY OF PITTSBURGH,)
PENNSYLVANIA, and NATIONWIDE)
MUTUAL INSURANCE COMPANY,)

Defendants.)

FILED

JUL 1 1994

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

Case No. 92-C-859-B

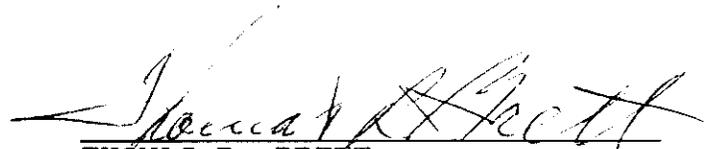
J U D G M E N T

Pursuant to Order entered simultaneously herein this date, granting summary judgment in favor of Plaintiffs and against the Defendant National Union Fire Insurance Company, Judgment is hereby granted in favor of Plaintiffs CATHY T. MAY, Individually and as Administratrix of the Estate of Timothy L. May, Deceased, and as Parent and Next of Kin to ERIN L. MAY, CAROLINE E. MAY, and LUKE J. MAY, Minor Children, Individually, and JESSE and SHANDA WORSHAM, Husband and Wife, and against the Defendant, National Union Fire Insurance Company, in the amount of \$10,000.00 plus pre-judgment interest at the rate of 6.99% per annum from September 24, 1992, until the present date, plus post-judgment interest from the present date at the rate of 5.31% per annum until paid. Costs are

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assessed against Defendant, National Union Fire Insurance Company, if timely applied for pursuant to Local Rule 54.1. Attorneys fees, if applicable, may be addressed by appropriate application under Local Rule 54.2.

DATED this 15th day of July, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE JUL 1 1994

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

CATHY T. MAY, Individually and)
as Administratrix of the Estate)
of Timothy L. May, Deceased, and)
as Parent and Next of Kin to)
ERIN L. MAY, CAROLINE E. MAY,)
and LUKE J. MAY, Minor Children,)
Individually, and)
JESSE and SHANDA WORSHAM,)
Husband and Wife,)

Plaintiffs,)

v.)

NATIONAL UNION FIRE INSURANCE)
COMPANY OF PITTSBURGH,)
PENNSYLVANIA, and NATIONWIDE)
MUTUAL INSURANCE COMPANY,)

Defendants.)

Case No. 92-C-859-B

FILED

JUL 1 1994

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

ORDER

Now before the Court for its consideration are summary judgment motions filed by the plaintiffs (docket # 17) and by defendant, National Union Fire Insurance Company of Pittsburgh ("National Union") (docket # 22).

The basic facts are undisputed by the parties. This action arises from an automobile accident on September 13, 1991, in which plaintiff Cathy May's husband, Tim May, died, and plaintiff Jesse Worsham was severely injured. The automobile in which Tim May and Jesse Worsham were traveling was struck head-on by a vehicle operated by an intoxicated driver. Neither Cathy May ("May") nor any of the minor children she represents in this action, nor plaintiff Shanda Worsham were present at the time of the accident or sustained any bodily injuries. Jesse Worsham and Tim May were

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employed by Gold Bond Building Products ("Gold Bond") and they were acting in the course and scope of their employment at the time of the accident, and the automobile in which they were traveling was owned or leased by Gold Bond. That automobile was insured pursuant to a Commercial Auto Liability Policy (#RM CA 145-89-94) ("the policy") which was issued by defendant National Union to National Gypsum Company ("National Gypsum"). National Gypsum owns Gold Bond; although defendant contends that Gold Bond is a wholly owned subsidiary of National Gypsum, the record provided to the Court does not support that contention.

The intoxicated driver causing the accident carried only the statutory minimum of uninsured motorist ("UM") insurance in the amount of \$10,000. Plaintiffs' claimed losses exceed that amount, and the insurance policy of the culpable driver is not at issue here. The policy under consideration in this action was for automobile liability coverage and was originally issued effective January 1, 1988. In 1988, National Union executed a multistate UM acceptance/rejection form in which UM coverage was rejected in all states, including Oklahoma, where UM coverage could be rejected. In 1989, the policy was amended to decrease the original amount of dollars available for liability from \$5,000,000.00 to \$3,000,000.00.

In 1990, the policy that National Union issued to National Gypsum erroneously contained 20 UM and property damage endorsements conferring coverage in states where National Gypsum had originally rejected such coverage. In 1991, National Gypsum specifically

included Gold Bond, as well as other business entities related to National Gypsum, on the policy as additionally endorsed "named insureds." The policy also included the 20 UM and property damage endorsements which had been erroneously issued during the 1990-91 policy period. For the first time, the 1991-92 policy contained an endorsement conferring uninsured motorist coverage in the State of Oklahoma. This erroneous inclusion of UM coverage for Oklahoma conflicted with National Gypsum's intent not to purchase UM coverage in any amount for its vehicles in the State of Oklahoma. The policy's declaration sheets, both in the original policy and in subsequent policies, specifically rejected UM coverage in all states permitting such rejection. At the time of the accident involving Tim May and Jesse Worsham, National Gypsum's risk insurance manager had not received or reviewed the 1991-92 policy issued by National Union, and was not aware of the erroneous inclusion of the UM coverage for vehicles in Oklahoma.

Both plaintiffs and National Union filed motions for summary judgment, alleging that there are no material factual disputes, and that all issues may be decided by the Court as matters of law. Under Fed.R.Civ.P. 56, summary judgment is appropriate where "there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law." The Court finds that no material issues of fact are present here to preclude the entry of summary judgment.

I. Whether Oklahoma UM coverage became a part of the policy.

A. Effect of the erroneous inclusion of the Oklahoma UM endorsement.

As noted above, it is undisputed that the addition of an endorsement to the 1991-92 policy, which purported to confer Oklahoma UM coverage, was a mistake. The parties agree that the intent of both National Gypsum and National Union was that Oklahoma UM coverage should continue to be rejected.

Plaintiffs contend that the addition of the UM coverage endorsement, although an error, changed the policy and made such coverage an unalterable part of the policy. Plaintiffs argue that the Oklahoma UM endorsement controls over the declarations sheet and any other provisions in the policy which purport to reject such UM coverage.

National Union responds that the Oklahoma UM endorsement is contrary to the policy's declarations sheet, which provides that such coverage was rejected. National Union contends that the rejection of UM coverage in the declaration sheet is controlling, and the erroneously-included UM endorsement should have no effect.

In insurance disputes, Oklahoma law specifically recognizes that "[w]here a policy of insurance does not represent the intention of the parties thereto, because of the fault or negligence of the agent writing the policy, such policy may be reformed, so as to express the contract as it was intended to be made." Security Ins. Co. of New Haven, Conn. v. Deal, 53 P.2d 271, 274 (Okla. 1936) (quoting Phenix Ins. Co. v. Ceaphus, 51 Okla. 89, 151 P. 568 (Okla. 1915)).

The Oklahoma statutes also direct what effect the erroneously-attached UM coverage endorsement should be given here. Okla. Stat. tit. 15, §156 provides:

When through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded.

Here, there is no dispute that the parties, National Gypsum and National Union, never intended to provide Oklahoma UM coverage in the 1991-92 policy, and that the endorsement conferring such coverage was attached to the policy by mistake or accident. Accordingly, the Court must enforce the policy consistent with the parties' intent not to provide Oklahoma UM coverage, and disregard the erroneously-attached UM coverage endorsements in this action.

Plaintiffs rely on the Tenth Circuit's decision in Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828 (10th Cir. 1986) to argue that the parties' intent behind the policy should not be considered in this action. In Pasternak, the Tenth Circuit held that "[u]nder Oklahoma law, to justify a change in a written contract on the ground of mutual mistake, the party seeking reformation must show that he was free of neglect in making the agreement." Id. at 835. In Pasternak, the signatory to a farmout agreement failed to read that agreement before signing it; that failure to read could not later constitute a basis for claiming mutual mistake to avoid the written terms of the agreement, according to the Tenth Circuit. Id. Plaintiffs allege that National Union was negligent in attaching the Oklahoma UM endorsement to the 1991-92 policy and, pursuant to Pasternak,

should be precluded from asserting mistake as a ground for disregarding that endorsement in this action.

After reviewing Pasternak and decisions from the Oklahoma courts on the reformation of contracts for mistake, the Court finds that Pasternak is distinguishable from the factual situation here, and does not preclude the application of §156 in this instance. In Pasternak, it appears that the offending provision was present in the document possibly during the parties' negotiations and certainly at the time that the parties executed their agreement. The parties in Pasternak had opportunity to discover and remove the objectionable provision before concluding their agreement. Here, unlike the parties in Pasternak, National Union and National Gypsum had negotiated, executed and renewed their agreement over several years, and always specifically excluded the unwanted Oklahoma UM endorsement. During the process of renewing that agreement, the unwanted endorsement was erroneously attached. The Court finds that the Oklahoma UM endorsement which was erroneously attached to the 1991-92 policy did not become part of that policy and the terms and provisions of that endorsement have no effect in this action.

B. Attribution of Oklahoma UM coverage by operation of law.

Since 1968, Oklahoma has required the provision of UM coverage. Okla. Stat. tit. 36, §3636. Subsection (F) of §3636 permits an insured to reject UM coverage, but such rejection must be made in writing by the insured. Subsection (F) also states an exception to the mandatory UM coverage in that such coverage "need not be provided in or supplemental to a renewal policy where the

named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer." (emphasis added). If an insurer fails to offer the required UM coverage, then the coverage will be written into the policy by operation of law. Moon v. Guarantee Ins. Co., 764 P.2d 1331, 1335 (Okla. 1988).

In their motions, both parties ask the Court to determine whether the policies National Union issued to National Gypsum after 1988 were "renewals" of the 1988 policy or should be considered as "new" policies. National Union argues that the policies it issued to National Gypsum after 1988 were "renewals" of the policy it issued in 1988, and thus it was not required to seek a written rejection of UM coverage by National Gypsum, pursuant to §3636(F) after 1988.

Plaintiffs contend that National Gypsum made "material changes" in its auto liability policies that were issued after 1988, qualifying those policies as "new" policies, rather than as renewals. Plaintiffs assert that the addition of Gold Bond and other business entities as "named insureds" on the 1990-91 National Gypsum policy was one such "material change." Plaintiffs argue that under §3636(F), National Union was required to offer UM coverage with the policy it issued to National Gypsum, and obtain a new rejection from National Gypsum of UM coverage. Plaintiffs argue that National Union's failure to offer and obtain a rejection of UM coverage thus means that by operation of law, such UM coverage was part of the National Gypsum automobile liability policies in effect at the time of Tim May's death and Jesse

Worsham's injuries.

In 1990, the Oklahoma legislature amended §3636 by adding a new subsection which prescribed when an offer of UM insurance must be made by the insurer with a "renewal" policy. That subsection provides

G. Notwithstanding the provisions of this section, the following are the only instances in which a new form affecting uninsured motorist coverage shall be required:

1. When an insurer is notified of a change in or an additional named insured;
2. When there is an additional vehicle that is not a replacement vehicle;
3. When the amount of bodily injury liability coverage is amended. Provided, any change in premium alone shall not require the issuance of a new form.

(emphasis added). Subsection G to §3636 took effect on September 1, 1990. In 1991, National Gypsum requested that Gold Bond and other business entities be added as "named insureds" on its auto liability policy. Under subsection G(1) above, National Union clearly was required to send National Gypsum the statutory form offering UM coverage prescribed in Okla. Stat. tit. 36, §3636(H). It is undisputed that National Union never provided that statutory form to National Gypsum.

National Union argues that adding Gold Bond as a named insured was not a material change to the policy, since Gold Bond was always included as an insured as a subsidiary of National Gypsum. The Court's examination of the record before it does not find support for the argument that Gold Bond was a subsidiary. Rather, Gold

Bond is consistently described as a division of National Gypsum.¹ The Court, however, deems Gold Bond's status to be immaterial to this issue. The fact remains that Gold Bond, as well as other related business entities of National Gypsum were specifically added to the list of "named insureds" on the National Gypsum policy in 1991. This act is sufficient to meet the mandate of §3636(G)(1) and required National Union to offer Oklahoma UM coverage to National Gypsum with the 1991-92 policy. Thus, under Oklahoma law, National Union's failure to offer UM coverage with the 1991-92 policy and to obtain a written rejection of that coverage from National Gypsum, resulted in the inclusion of Oklahoma UM coverage as part of the 1991-92 policy. That UM coverage was therefore in effect at the time of the accident killing Tim May and injuring Jesse Worsham.

II. Exclusion of Liability to Employees under the Policy.

National Union argues that plaintiffs have no standing to make a claim under an exclusionary provision in the policy. The provision on which National Union relies states, in pertinent part:

B. EXCLUSIONS

This insurance does not apply to any of the following:

* * * *

3. WORKERS COMPENSATION

Any obligation for which the "insured" or the "insured's" insurer may be held liable under any workers compensation, disability benefits or unemployment compensation law or any similar law.

4. EMPLOYEE INDEMNIFICATION AND EMPLOYER'S LIABILITY "Bodily injury" to:

¹ In his deposition, National Gypsum employee Harold Huisinga described Gold Bond as "merely a division" of National Gypsum, and indicated that it was not a separate entity. See Plaintiff's Exhibit 12D, Deposition of Harold Huisinga, p. 122.

a. An employee of the "insured" arising out of an in the course of employment by the "insured;" or

b. The spouse, child, parent, brother or sister of that employee as a consequence of paragraph a. above.

This exclusion applies:

- (1) Whether the "insured" may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

But this exclusion does not apply to "bodily injury" to domestic employees not entitled to workers compensation benefits or to liability assumed by the "insured" under an "insured contract".

5. FELLOW EMPLOYEE

"Bodily injury" to any fellow employee of the "insured" arising out of and in the course of the fellow employee's employment.

Plaintiffs argue that since their claims are not made under the liability coverage of the policy, but rather the imputed Oklahoma UM coverage, this exclusion does not preclude their claims. The Court finds merit in this argument. The Oklahoma courts have imputed UM coverage in situations such as the present case, because those courts have found a "very clear legislative intent in favor of coverage." Chambers v. Walker, 653 P.2d 931, 935 (Okla. 1982). Because the Oklahoma UM coverage here is imputed, rather than contractually agreed upon by National Union and National Gypsum, the Court will not apply the exclusions set forth in the policy to that imputed UM coverage.

III. What are the limits of liability under the imputed UM coverage.

Having determined that Oklahoma UM coverage existed at the time of the accident by operation of law, the Court now considers the limits of liability of that coverage for which National Union may be held responsible. National Union argues that its liability should be limited to \$10,000.00, as the minimum amount of coverage provided in Okla. Stat. tit. 47, § 7-204. Plaintiffs contend that the erroneously-included Oklahoma UM coverage endorsement in the 1991-92 policy references the \$3,000,000.00 bodily injury limit in the policy's declarations page as the limit of liability for Oklahoma UM coverage under the policy.

The Court has previously determined that the erroneously-attached Oklahoma UM coverage endorsement should be disregarded in this action; thus, that endorsement's reference to the bodily injury limits are of no effect here. However, Oklahoma law does not support the plaintiffs' claim for the higher limits of liability. The Oklahoma Supreme Court has stated that "[t]he purpose of the uninsured motorist provision, when viewed in light of the requirement that it provide minimum standards of protection, is that it place the insured in the same position he would have been in if the negligent uninsured motorist had complied with Oklahoma laws concerning financial responsibility." Moser v. Liberty Mutual Insurance Co., 731 P.2d 406, 408 (Okla. 1986) (emphasis added). In Mann v. Farmers Ins. Co. Inc., 761 P.2d 460 (Okla. 1988), the Oklahoma Supreme Court rejected the insured's

theory that the insurer's failure to obtain a written rejection as to the highest available limits of UM coverage resulted in those limits being written into the UM provisions of the policy by operation of law. The Oklahoma Supreme Court reasoned in Mann that the acceptance of the insured's theory would "result in the insured being placed in the position as though an insured motorist, with whom the insured was involved in an accident, had purchased the same liability policy as that purchased by the insured." Id. at 464. According to the Mann court, "this result goes beyond the mandate of 36 O.S. 1981 §3636." Id.

Here, the UM coverage has been imputed under Oklahoma law by National Union's failure to obtain a rejection of that coverage in the 1991-92 policy from National Gypsum. To place the UM coverage limits in the same amount as the bodily injury limits of \$3,000,000.00 in the National Gypsum policy would go beyond the mandate of §3636, as recognized by the Mann decision. The Court finds that the statutory minimum of \$10,000.00 is the appropriate limit of liability under the Oklahoma UM coverage imputed here by operation of law.

Plaintiffs also assert a claim, based on their interpretation of the definition of "insured" in the erroneously-attached Oklahoma UM endorsement, that they can "stack" the UM coverage under National Gypsum's fleet policy. Having found that endorsement to have no effect in this action, the Court rejects plaintiffs' argument for "stacking".

Additionally, the Court finds no support under Oklahoma law for

plaintiffs' ability to "stack" in this action. The Oklahoma Supreme Court has stated that

we remain committed to the practice that courts cannot substitute the name of each of the many employees of a given company in place of the employer as the named insured and thus stretch the coverage of the policy to include each employee and all of the members of his household. To do so would rewrite the contract of the parties and distort the public policy as set out in our cases.

Aetna Cas. and Sur. Co. v. Craig, 771 P.2d 212, 214 (Okla. 1989). In Stanton v. American Mut. Liability Ins., 747 P.2d 945 (Okla. 1987), the Oklahoma Supreme Court held that an occupant or permissive user of a vehicle insured under a business fleet policy is not entitled to "stack" UM coverage for each and every vehicle covered under the fleet policy. Under Oklahoma law, a permissive user employee, who is not a named insured under his employer's commercial fleet policy, only occupies the status of a Class 2 insured, and is only entitled to the UM coverage provided for the specific vehicle he was driving when he was injured. Rogers v. Goad, 739 P.2d 519, 521 (Okla. 1987).

Here, plaintiffs are not named either specifically or categorically as "insureds" anywhere in the policy. The Court cannot assume that Tim May or Jesse Worsham would similarly be included in an Oklahoma UM endorsement to the policy, had one been agreed upon by National Union and National Gypsum. At best, the Court could only conclude that Tim May and Jesse Worsham were Class 2 insureds, in that they were permissive-users and/or occupants of the Gold Bond vehicle they were using at the time of the accident. As noted above, such a Class 2 insured status does not permit the

"stacking" of UM coverage for each vehicle in National Gypsum's fleet.

The Court thus finds that National Union's liability for the imputed Oklahoma UM coverage is the statutory minimum of \$10,000.00

IV. Collateral Estoppel Effect of Bankruptcy Court's Order.

In 1990, as part of its bankruptcy action in the Northern District of Texas, National Gypsum filed a motion to assume certain insurance agreements, including the policy in issue, and for approval of a 1991 insurance program. The bankruptcy court approved that motion. National Union now argues that the bankruptcy court's order collaterally estops plaintiffs from attempting to modify the terms of the policy as approved by the bankruptcy court.

The Second Circuit has described a bankruptcy court's role in ruling on a motion to assume a contract, in stating,

a motion to assume should be considered a summary proceeding, intended to efficiently review the trustee's or debtor's decision to adhere to or reject a particular contract in the course of the swift administration of the bankruptcy estate. It is not the time or place for prolonged discovery or a lengthy trial with disputed issues.

In Re Orion Pictures Corp., 4 F.3d 1095, 1098-99 (2d Cir. 1993).

In particular, the Second Circuit noted that

it is important to keep in mind that the bankruptcy court's "business judgment" in deciding a motion to assume is just that - a judgment of the sort a business man would make. In no way is this decision a formal ruling on the underlying disputed issues, and thus will receive no collateral estoppel effect.

Id. at 1099 (emphasis added).

The Court finds the Second Circuit's evaluation persuasive

here, and holds that the bankruptcy court's order granting National Gypsum's motion to assume insurance contracts with National Union does not collaterally estop plaintiffs in this action.

Conclusion

In summary, the Court finds as follows:

1. The erroneously-attached Oklahoma UM endorsement was never intended by National Union and National Gypsum to be added to the policy, and that Oklahoma UM endorsement is of no effect. Plaintiffs' motion for summary judgment is **DENIED**, and defendant's motion for summary judgment is **GRANTED**, as to this issue.

2. By operation of law, Oklahoma UM coverage was effective at the time of the accident which killed Tim May and injured Jesse Worsham. Plaintiffs' motion for summary judgment is **GRANTED**, and defendant's motion for summary judgment is **DENIED**, as to this issue.

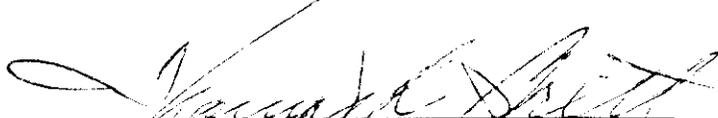
3. The Oklahoma UM coverage imputed by law is not affected by the policy's exclusion for liability to employees. Defendant's motion for summary judgment is **DENIED** as to this issue.

4. The limit of coverage under the imputed Oklahoma UM coverage is \$10,000.00, the minimum provided under Okla. Stat. tit. 47, §7-204. Plaintiffs' motion for summary judgment is **DENIED**, and defendant's motion for summary judgment is **GRANTED**, as to this issue.

5. Plaintiffs are not collaterally estopped in this action by the bankruptcy court's order permitting National Gypsum to assume and continue its insurance contracts with National Union.

Defendant's motion for summary judgment is DENIED as to this issue.

IT IS SO ORDERED this 1ST day of July, 1994.

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

THOMAS R. BRETT
U.S. District Judge

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

FILED
JUL 1 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

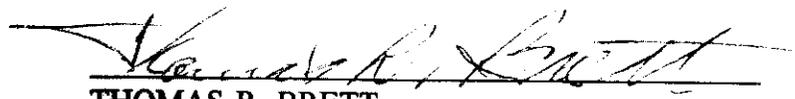
THOMAS J. THOMA,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant and)
 Counterclaim Plaintiff,)
)
 vs.)
)
 ALLEN E. KROBLIN, et al.,)
)
 Counterclaim Defendants.)

Civil Action No. 90-C-616-B

ORDER

This matter comes on for consideration of Counterclaim Defendants, Allen E. Kroblin's and Thomas E. Kroblin's, Motion for Administrative Closure. The Court concludes that the Counterclaim Defendants' Motion should be and the same is hereby GRANTED. The pre-trial conference and jury trial are continued until further order by this Court and this case is administratively closed until motion to reopen is made by either party.

DATED this 1st day of July, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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