

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

F I L E D

AUG 9 1994

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

DOROTHY M. JENKINS,)
)
Plaintiff,)
)
v.)
)
DEPARTMENT OF HEALTH AND HUMAN)
SERVICES, Donna Shalala, Secretary,)
)
Defendant.)

93-C-0217-E

ORDER

Now before the Court is Plaintiff Dorothy Jenkins' appeal of a decision by the Secretary of Health and Human Services to deny her Social Security disability benefits. On appeal, Ms. Jenkins asserts that substantial evidence does not support the Secretary's decision. She also alleges the following issues: (1) Whether she meets or equals Listings 1.02 and/or 8.03; (2) Whether she can perform the full range of light work; (3) Whether the ALJ properly analyzed her alleged mental impairments; (4) Whether the ALJ properly evaluated her complaints of pain; and (5) Whether previous decisions by the Secretary should be re-opened by this court. After examining the record, the court remands the case to the Secretary.

I. Standard of Review

In examining whether the Secretary erred, this court's review is limited in scope by 42 U.S.C. § 405(g).¹ The court's role "on review is to determine whether the Secretary's

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

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decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985).²

II. Legal Analysis

The Administrative Law Judge ("ALJ") found that Plaintiff Jenkins could perform light work. Ms. Jenkins disputes that finding, arguing that substantial evidence does not support such a decision. In addition, Ms. Jenkins asserts four other issues: (1) Whether the ALJ violated the "treating physician" rule; (2) Whether Jenkins meets Listing 1.02 and/or 8.03; (2) Whether the ALJ improperly evaluated her allegations of mental impairments and (3) Whether the ALJ improperly evaluated her complaints of pain.³

by substantial evidence, shall be conclusive."

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

³ This is Jenkins' fourth applications for Social Security benefits. She was first denied benefits on June 30, 1988. She applied again on July 26, 1988 and was again denied. A third application was filed on August 3, 1990 and that was denied because her second application was still pending. Those decisions will not be re-opened by the Court. Ms. Jenkins' filed the instant application on March 18, 1991 and claimed an onset date of February 6, 1990. Therefore, the question is whether she was disabled for 12 continuous months between February 6, 1990 and June 24, 1992.

On review, the issue of most concern to this court is the ALJ's handling of the "treating physician" rule. That rule directs the ALJ to give substantial weight to the claimant's treating physician unless good cause dictates otherwise. If there is "good cause" for discounting or ignoring the treating physician's evidence, specific and legitimate reasons must be set forth by the ALJ and/or the Secretary. *Byron v. Heckler*, 742 F.2d 1232, 1235 (10th Cir. 1984).⁴

In this case, Dr. Rodney L. Huey began treating Ms. Jenkins in May of 1986 and there is no dispute that he was one of her "treating physicians." On March 18, 1991, Dr. Huey wrote the following letter:

Mrs. Jenkins has been under my care intermittently since May of 1986. At that time her diagnosis was erythema multiforma bullosum. Since that time Mrs. Jenkins' course has been complicated by the development of a seronegative spondyloarthyopathy with increasing joint pain, stiffness and swelling. Her symptoms at this time include severe fatigue, generalized malaise, and diffuse arthralgias. She was recently hospitalized for a flare-up of her erythema multiform requiring IV Zoviraz and IV corticosteroids. At this time she is stable as an outpatient; however, her underlying inflammatory condition is severe and has been associated with potentially life-threatening skin rashes. She continues to complain of fatigue, diffuse weakness, joint pain, fever, chills and skin rashes. As a result, I do not feel that Mrs. Jenkins is able to work at any capacity at this time. Record at 622.

In the ALJ's extensive review of the medical evidence, the March 18, 1991 letter was not specifically addressed. This is puzzling, because the ALJ appears to rely heavily on Dr. Huey's report and residual functional capacity assessment. *See, Record at 22.* The March 18 letter clearly states that Ms. Jenkins cannot work "at this time." As a result, the ALJ

⁴ *The treating physician rule governs the weight to be accorded the medical opinion of the physician who treated the claimant...relevant to other medical evidence before the fact-finder, including opinions of other physicians. The rule...provides that a treating physician's opinion on the subject of medical disability, i.e., diagnosis and nature and degree of impairment is (i) binding on the fact-finder unless contradicted by substantial evidence; and (ii) entitled to some extra weight because the treating physician is usually more familiar with a claimant's medical condition than are other physicians, although resolution of genuine conflicts between the opinion of the treating physician, with its extra weight, and any substantial evidence to the contrary remains the responsibility of the fact-finder. *Kemp v. Bowers*, 816 F.2d 1469, 1476 (10th Cir. 1987).*

should have given substantial weight to such a finding or, in the alternative, spelled out specific and legitimate reasons as to why he discounted or ignored Dr. Huey's conclusion. Since he did not, the court finds the "treating physician" rule was not properly followed.⁵

In making his decision, the ALJ **relied, in part**, on the residual functional capacity evaluations submitted by Drs. Lawrence, Jacobs and Huey. Based on these evaluations, the ALJ concluded that "a review of Dr. Huey's report and Dr. Jacobs' reports clearly indicates that claimant could perform a restricted **range** of medium exertional activity or the full range of light exertional activity." The ALJ also writes:

While the two results [evaluations] are not exact, they are significantly similar in how they approach claimant, her condition, and the restrictions they placed upon her. Both indicate that claimant can sit for at least 2 to 3 hours at a time without the need to change position. While Dr. Huey says claimant can only sit for three hours in an 8-hour day, Dr. Jacobs says claimant can sit for 6 hours. Both agree claimant could stand for...four hours in an 8-hour day. Dr. Huey said claimant could walk for 3 hours and Dr. Jacobs said claimant could walk for four hours in an 8-hour day. There is some disagreement over the amount of weight that could be lifted and carried, but the ALJ will find claimant can lift and carry no more than 20 pounds of weight. Record at 21-22.

Had the ALJ clearly stated his reasons for discounting Dr. Huey's March 18 letter, substantial evidence could still arguably support his resulting decision. But, without clarification, the court deems it proper to remand the case to the ALJ on this issue.⁶

⁵ A second "treating physician", Dr. Jacqueline M. Petray, M.D. wrote an April 24, 1992 letter in which she stated: "I do not feel that she [Jenkins] is able to work in any capacity at this time..." The ALJ, however, specifically rejected Dr. Petray's findings because her "assessments are not consistent with her own medical findings." Record at 22. The ALJ properly followed the "treating physician" rule concerning Dr. Petray. It is nonetheless notable that Dr. Petray's assessment follows that of Dr. Huey, making the ALJ's failure to comment that much more an issue.

⁶ The ALJ need not provide a written explanation of every piece of evidence presented. *Steward v. Bowen*, 858 F.2d 1295, 1299 (7th Cir. 1988). However, in this case, the Court believes the letter from Dr. Huey to be an important part of the claimant's evidence and, as a result, should be addressed. See, note 5, above.

Another issue raised by Ms. Jenkins also merits discussion.⁷ Ms. Jenkins alleged that part of the reason for her disability is "nerves" and "memory loss." *Record at 569*. The record also suggests she suffers from **depression**. These allegations fall in the category of mental impairments. In analyzing these **allegations**, the ALJ noted that the evidence "did not indicate that claimant is suffering from any significant mental impairment." *Id. at 19*. As a result, the ALJ found that Jenkins **did not** have a "medically determinable" mental impairment. *Id.*

The procedure for evaluating an **alleged** mental impairment is outlined in *Andrade v. Secretary of Health and Human Services*, 985 F.2d 1045 (10th Cir. 1993). First, when a record "contains evidence of a mental **impairment** that allegedly prevented claimant from working, the Secretary [is] required to **follow** 42 U.S.C. § 421(h):

Section 421(h) provides that an initial determination...than an individual is not under a disability in any case where there is evidence which indicates the existence of a mental impairment, shall be made only if the Secretary has made every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the **medical portion of the case review and any applicable residual functional capacity assessment. *Andrade*, 985 F.2d at 1049.**

In *Andrade*, the Tenth Circuit **did not** paint bright lines for this court to follow. On one hand, the decision noted that Section **421(h)** **did not** impose an "absolute duty" on the ALJ to have a psychologist or psychiatrist **complete** the medical portion of the case review and the residual functional capacity **assessment** on every claimant alleging a mental impairment. *Id. at 1050*. Instead, the **first** requirement of Section 421(h) is determining whether there is a mental impairment **in the record**. If such evidence is found, then the

⁷ *The ALJ did not err in his evaluation of Jenkins' subjective complaints of pain. Whether Jenkins can perform the full range of light work should be re-examined on remand.*

ALJ must make "every reasonable effort" to ensure that a mental health professional assist him in the case.⁸

Using that analysis in the case at bar, the first question is whether evidence indicating the existence of mental impairment is found in the record. The answer is unclear. On one hand, Ms. Jenkins' testimony that she had memory problems constitutes evidence. Additional "evidence" concerning her alleged depression can be found in the medical record prior to her current onset date of February 6, 1990. On the other hand, the medical record (with the exception of the aforementioned testimony) since February 6, 1990 contains little, if any, specific evidence concerning a mental impairment.

Under the circumstances (i.e. the case is being remanded), the court will, as a practical matter, order the ALJ to have a qualified psychiatrist or psychologist complete the medical portion of the case review and a residual functional capacity assessment on Ms. Jenkins' mental impairment. Such a determination is not meant to set out a rigid rule that, in every mental impairment case, the ALJ must solicit the assistance of a mental health professional. Instead, the ruling is limited to the situation here: The case is being remanded on a separate issue and, as a practical matter, the ALJ should re-examine the claimant's allegations of a mental impairment. This will allow claimant yet another opportunity to make her case on the mental impairment issue.

In sum, the Court REMANDS the case to the Secretary on two issues. First, the ALJ must clarify how he analyzed the March 18, 1991 letter from treating physician Huey. If

⁸ In *Andrade*, the Tenth Circuit discussed two factors to help guide courts examine cases involving Section 421(h). First, a court should determine whether the record supports the ALJ's conclusion that no mental impairment exists. Second, a court should decide whether the claimant was prejudiced by the ALJ's failure to enlist the help of a mental health professional. *Id.*

the letter is to be given substantial weight, the ALJ must then re-examine the evidence in light of such a finding.

Second, the ALJ must have Ms. **Jenkins** undergo a consulting examination with a qualified psychologist or psychiatrist. **Once** the examination is complete, a supplemental hearing shall be held where the **psychologist** testifies regarding the issue of mental impairment. If the ALJ finds that a **mental impairment** exists, he shall re-evaluate the other evidence in the record in light of this **finding**.

SO ORDERED THIS 9th day of Aug., 1994.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

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

FILED

SHARON GRAY,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

AUG 8 1994

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

CIVIL ACTION NO. 93-C-400-E

ORDER

This matter comes on before the court upon the stipulation of all parties and the court being fully advised in the premises, orders, adjudges and decrees that all claims asserted herein by plaintiff, Sharon Gray, against the United States of America are hereby dismissed with prejudice.

Dated this 5 day of Aug, 1994.

S/ JAMES C. ELISON
UNITED STATES DISTRICT JUDGE

APPROVED AS TO CONTENT AND FORM:

Phil Pinnell
PHIL PINNELL, OBA # 7169
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U.S. Courthouse
333 West 4th Street, Suite 3460
Tulsa, OK 74103
Attorney for the Defendant

Scott Ash
SCOTT ASH
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5508 S. Lewis
Tulsa, OK 74105-7105
Attorneys for Plaintiff

ENTERED ON DOCKET
DATE 8-9-94

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 11 1994

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JACK D. SCRAPER; BETTY SUE)
 SCRAPER; COUNTY TREASURER, Tulsa)
 County, Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

CIVIL ACTION NO. 94-C 551E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 8 day
of August, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, **County Treasurer, Tulsa County,
Oklahoma, and Board of County Commissioners, Tulsa County,
Oklahoma**, appear not, having previously claimed no right, title,
or interest; and the Defendants, **Jack D. Scrapper and Betty Sue
Scrapper**, appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, **Jack D. Scrapper**, waived
service of Summons on June 19, 1994, which was filed on June 21,
1994; and that the Defendant, **Betty Sue Scrapper**, waived service
of Summons on June 20, 1994, which was filed on June 21, 1994.

It appears that the Defendants, **County Treasurer, Tulsa
County, Oklahoma, and Board of County Commissioners, Tulsa
County, Oklahoma**, filed their Answer on July 14, 1994; and that

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the Defendants, **Jack D. Scrapper and Betty Sue Scrapper**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Six (6), Block Twenty-two (22), of Blocks 19 thru 25, WAGON WHEEL ADDITION, a Subdivision in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on June 29, 1978, Tommy M. Corntassel and Gloria Corntassel, executed and delivered to CHARLES F. CURRY COMPANY their mortgage note in the amount of \$31,850.00, payable in monthly installments, with interest thereon at the rate of nine and one-half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Tommy M. Corntassel and Gloria Corntassel, husband and wife, executed and delivered to CHARLES F. CURRY COMPANY a mortgage dated June 29, 1978, covering the above-described property. Said mortgage was recorded on July 3, 1978, in Book 4338, Page 528, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 26, 1988, CHARLES F. CURRY COMPANY assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban

Development his successors and assigns. This Assignment of Mortgage was recorded on October 14, 1988, in Book 5134, Page 785, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Jack D. Scrapper and Betty Sue Scrapper, currently hold the fee simple to the property by virtue of General Warranty Deed dated September 24, 1987, and recorded on September 29, 1987 in Book 5054, Page 2180, in the records of Tulsa county, Oklahoma; and the Defendants, Jack D. Scrapper and Betty Sue Scrapper, are the current assumptors of the subject indebtedness.

The Court further finds that on October 1, 1988, the Defendants, Jack D. Scrapper and Betty Sue Scrapper, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on April 1, 1989, May 1, 1990, and October 1, 1990.

The Court further finds that the Defendants, Jack D. Scrapper and Betty Sue Scrapper, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Jack D. Scrapper and Betty Sue Scrapper, are indebted to the Plaintiff in the principal sum of \$49,220.85, plus interest at the rate of 9.5 percent per annum from May 18, 1994 until

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

The Court further finds that the Defendants, **County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma**, claim no right, title or interest in the subject real property

The Court further finds that the Defendants, **Jack D. Scrapper and Betty Sue Scrapper**, are in default, and have no right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, **Jack D. Scrapper and Betty Sue Scrapper**, in the principal sum of \$49,220.85, plus interest at the rate of 9.5 percent per annum from may 18, 1994 until judgment, plus interest thereafter at the current legal rate of 5.49 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Jack D. Scrapper, Betty Sue Scrapper, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

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

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

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

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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

Judgment of Foreclosure
Civil Action No. 94-C 551E

NBK:lg

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

FILED

AUG 8 - 1994

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

MAPCO, INC., and MAPCO
INTERNATIONAL INC.,

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT OF
ENERGY AND THE UNITED STATES
OF AMERICA,

Defendants.

C.A. No. 93-C-712BU

ENTERED ON DOCKET
DATE AUG 9 1994

ORDER

The Court has been informed that MAPCO Inc. has paid the Department of Energy the sum of money required to be paid by the terms of the June 23, 1994 Settlement Agreement between the parties. Therefore, in accordance with the Agreed Order previously executed by the parties,

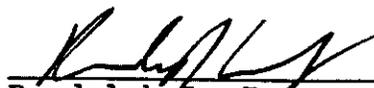
IT IS HEREBY ORDERED THAT:

Civil Action No. 93-C-712BU, and all counterclaims and crossclaims therein, now pending in this Court be and hereby are dismissed with prejudice.

Dated: Aug 8, 1994.


UNITED STATES DISTRICT JUDGE

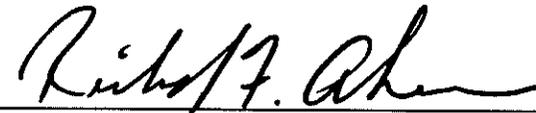
Approved as to form:



Randolph L. Jones, Jr.
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ATTORNEYS FOR DEFENDANTS
The United States Department of
Energy and the United States of
America

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order were served this 1st day of August 1994, by Federal Express, Overnight delivery service to:

Randolph L. Jones
John T. Schmidt
Conner & Winters
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15 East Fifth Street
Tulsa, Oklahoma 74103-4391

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Attorney for Party Plaintiff and
Counterclaim Defendant
MAPCO International Inc.


Richard F. O'Connell

DATE ~~AUG 9 1994~~

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

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AUG 8 1994

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

WILLIAM BROWN

Plaintiff,

vs.

K MART CORPORATION,
A Michigan Corporation.

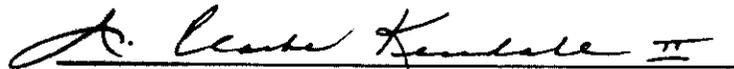
Defendant.

Case No. 93-C-573-BU

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff William Brown, and Defendant K Mart Corporation, hereby stipulate and agree that the above captioned action, and all claims and causes of action asserted therein at any time, be dismissed with prejudice, with each party to bear his or its own costs and attorneys' fees.

Dated: August 1, 1994.



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Attorneys for Defendant

John F. Walsh

John F. Walsh, Esq.
K Mart Corporation

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 WILLIS J. WALKER; ANNIE WALKER;)
 LOCAL AMERICA BANK OF TULSA)
 successor by merger to)
 MIDAMERICA FEDERAL SAVINGS & LOAN)
 ASSOCIATION; COUNTY TREASURER,)
 Tulsa County, Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED

AUG 8 1994

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

CIVIL ACTION NO. 94-C 185E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 8 day
of Aug, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, **County Treasurer, Tulsa County,**
Oklahoma, and **Board of County Commissioners, Tulsa County,**
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; Defendant, **Willis J. Walker,**
appears by his attorney, H.W. Conyers, Jr.; Defendant, **Local**
America Bank of Tulsa successor by merger to Midamerica Federal
Savings and Loan, appears not, having previously filed its
disclaimer; and the Defendant, **Annie Walker,** appears not, but
makes default.

The Court being fully advised and having examined the
court file finds that the Defendant, **Willis Walker,** was served

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DATE 8-9-94

with Summons and Complaint on **April 13, 1994**; that the Defendant, **Local America Bank of Tulsa successor by merger to Midamerica Federal Savings and Loan**, acknowledged receipt of Summons and Complaint on March 4, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 3, 1994; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 2, 1994.

The Court further finds that the Defendant, **Annie Walker**, was served by publishing notice of this action in the **Tulsa Daily Commerce and Legal News**, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning **May 13, 1994**, and continuing through June 17, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, **Annie Walker**, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, **Annie Walker**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the

evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answer on March 21, 1994; that the Defendant, Local America Bank of Tulsa successor by merger to Midamerica Federal Savings and Loan, filed its Disclaimer on July 20, 1994; and that the Defendant, Annie Walker, has failed to answer and her default has therefore been entered by the Clerk of this Court.

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

**Lot Eight (8), Block Six (6), NORTHGATE
SECOND ADDITION to the City of Tulsa, Tulsa
County, State of Oklahoma, according to the
recorded plat thereof;**

The Court further finds that on October 16, 1974, the Defendant, Willis J. Walker, then a single person, executed and delivered to Modern American Mortgage Corporation his mortgage note in the amount of \$14,250.00, payable in monthly installments, with interest thereon at the rate of nine and one-half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Willis J. Walker, then a single person, executed and delivered to Modern American Mortgage Corporation a mortgage dated October 16, 1974, covering the above-described property. Said mortgage was recorded on October 18, 1974, in Book 4141, Page 630, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 24, 1974, Modern American Mortgage Corporation assigned the above-described mortgage note and mortgage to Mortgage Investors of America. This Assignment of Mortgage was recorded on November 12, 1974, in Book 4144, Page 75, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 25, 1974, Mortgage Investors of America assigned the above-described mortgage note and mortgage to Federal National Mortgage Association. This Assignment of Mortgage was recorded on November 12, 1974, in Book 4144, Page 76, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 15, 1989, Federal National Mortgage Association assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on February 27, 1989, in Book 5168, Page 1906, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1989, the Defendant, Willis J. Walker, then a single person, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on March 1, 1990 and April 1, 1991.

The Court further finds that the Defendant, Willis J. Walker, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Willis J. Walker, is indebted to the Plaintiff in the principal sum of \$16,760.04, plus interest at the rate of 9.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal

property taxes in the amount of \$13.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$11.00 which became a lien on June 25, 1993; and a claim against the subject property in the amount of \$11.00 for the tax year 1993. Said liens and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, **Willis J. Walker and Board of County Commissioners, Tulsa County, Oklahoma**, claim no right, title or interest in the subject real property

The Court further finds that the Defendant, **Annie Walker**, is in default, and has no right, title or interest in the subject real property.

The Court further finds that the Defendant, **Local America Bank of Tulsa successor by merger to Midamerica Federal Savings and Loan**, disclaims any right, title or interest in the subject property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, **Willis J. Walker**, in the principal sum of \$16,760.04, plus interest at the rate of 9.5 percent per annum from March 1, 1994 until judgment, plus

interest thereafter at the current legal rate of _____ percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$35.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Willis J. Walker, Annie Walker, Local America Bank of Tulsa successor by merger to Midamerica Federal Savings and Loan, and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

In payment of the costs of this action accrued and accruing incurred by the

Plaintiff, including the costs of sale of said real property;

Second:

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

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$35.00, personal property taxes which are currently due and owing.

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

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

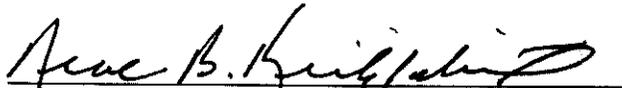
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

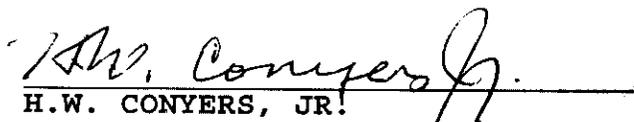
S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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


H.W. CONYERS, JR.
CONYERS & CONYERS
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115 West 3rd Street
Tulsa, OK 74103
Attorney for Defendant,
Willis J. Walker


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

Judgment of Foreclosure
Civil Action No. 94-C 185E

NBK:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BERNARD LEON CURLEE
aka B. Leon Curlee
aka Leon Curlee;
JO LYNN CURLEE;
STATE OF OKLAHOMA, ex rel.
OKLAHOMA TAX COMMISSION;
CITY OF BROKEN ARROW, Oklahoma
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C-340-E

FILED

AUG 8 1994

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

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 8 day
of Aug, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, COUNTY TREASURER, Tulsa County,
Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County,
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF
OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D.
Ashley, Assistant General Counsel; the Defendant, CITY OF BROKEN
ARROW, Oklahoma, appears by Michael R. Vanderburg, City Attorney,
Broken Arrow, Oklahoma; and the Defendants, BERNARD LEON CURLEE
and JO LYNN CURLEE, appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, BERNARD LEON CURLEE, was

ENTERED ON DOCKET

DATE 8-9-94

served a copy of Summons and Complaint on May 17, 1994; that the Defendant, JO LYNN CURLEE, was served a copy of Summons and Complaint on May 17, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on April 8, 1994; the Defendant, CITY OF BROKEN ARROW, Oklahoma, acknowledged receipt of Summons and Complaint on April 25, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 15, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 8, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on April 29, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on May 2, 1994; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its answer on May 12, 1994; and that the Defendants, BERNARD LEON CURLEE and JO LYNN CURLEE, have failed to answer and default has therefore been entered by the Clerk of this Court.

The Court further finds that on March 15, 1991, BERNARD LEON CURLEE and JO LYNN CURLEE, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-B-802-C. On April 11, 1991, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor, the case was subsequently closed on October 2, 1991.

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

Lot One (1), Block Eleven (11), LEISURE PARK II, an Addition to the City of Broken Arrow, Oklahoma, according to the recorded Plat thereof.

The Court further finds that on April 4, 1983, Michael S. Huie and Janet K. Huie, executed and delivered to First Security Mortgage Company, a mortgage note in the amount of \$58,800.00, payable in monthly installments, with interest thereon at the rate of Twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, Michael S. Huie and Janet K. Hue, husband and wife, executed and delivered to First Security Mortgage Company, a mortgage dated April 4, 1983, covering the above-described property. Said mortgage was recorded on April 12, 1983, in Book 4683, Page 701, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 31, 1985, First Security Mortgage Company, assigned the above-described mortgage note and mortgage to CFS Mortgage Corporation. This Assignment of Mortgage was recorded on January 22, 1986, in Book 4920, Page 91, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 15, 1988, Commercial Federal Mortgage Corporation fka CFS Mortgage

Corporation, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on November 17, 1988, in Book 5140, Page 1858, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 19, 1984, Michael S. Huie and Janet K. Huie, granted a general warranty deed to Randy Lynn Gaylor and Susan Marie Gaylor. This deed was recorded with the Tulsa County Clerk on June 22, 1984, in Book 4799 at Page 461 and Randy Lynn Gaylor and Susan Marie Gaylor, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on April 17, 1987, Randy Lynn Gaylor and Susan Marie Gaylor, granted a general warranty deed to the Defendants, BERNARD LEON CURLEE and JO LYNN CURLEE. This deed was recorded with the Tulsa County Clerk on April 21, 1987, in Book 5017 at Page 53, and the Defendants, BERNARD LEON CURLEE and JO LYNN CURLEE, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on November 1, 1988, the Defendants, BERNARD LEON CURLEE and JO LYNN CURLEE, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on May 1, 1989, and January 1, 1990.

The Court further finds that the Defendants, BERNARD LEON CURLEE and JO LYNN CURLEE, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, BERNARD LEON CURLEE and JO LYNN CURLEE, are indebted to the Plaintiff in the principal sum of \$107,755.15, plus interest at the rate of Twelve percent per annum from December 1, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has liens on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$46.00 which became a lien on the property as of June 26, 1992; in the amount of \$44.00 which became a lien on the property as of June 25, 1993; and a claim in the amount of \$48.00 for taxes in 1993. Said liens and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has liens on the property which is the subject matter of this action by virtue of state taxes in the amount of \$477.40 which became a lien on the property as of February 29, 1988; in the amount of \$794.48 which became a lien on the property as of February 29, 1988; in the amount of \$74.16 which became a lien on the property as of

August 4, 1989; in the amount of \$198.06 which became a lien on the property as of July 30, 1990; in the amount of \$249.97 which became a lien on the property as of March 2, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CITY OF BROKEN ARROW, Oklahoma, claims no right title or interest in the subject real property, except insofar as is the lawful holder of certain easements as shown on the duly recorded plat of LEISURE PARK II.

The Court further finds that the Defendants, BERNARD LEON CURLEE and JO LYNN CURLEE, are in Default, and have no right, title or interest in the subject real property.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, BERNARD LEON CURLEE and JO LYNN CURLEE, in the principal sum of \$107,755.15, plus interest at the rate of Twelve percent per annum from December 1, 1993 until

judgment, plus interest thereafter at the current legal rate of _____ percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover In Rem judgment in the amount of \$1,544.10 for state taxes, Tax Warrants filed, 1988-1990, plus accrued and accruing interest, and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$138.00 for personal property taxes for the years 1991-1993, plus accrued and accruing interest, and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment in the amount of \$249.97 for state taxes, Tax Warrant filed, March 2, 1994, plus accrued and accruing interest, and the cost of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BERNARD LEON CURLEE and JO LYNN CURLEE, have no right, title or interest in the subject property.

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

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

First:

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

Second:

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

Third:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. STATE OF OKLAHOMA, in the amount of \$1,544.10, state taxes which are currently due and owing, plus accrued and accruing interest.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$138.00, personal property taxes which are currently due and owing.

Fifth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel.
STATE OF OKLAHOMA, in the amount of \$249.97,
state taxes which are currently due and owing,
plus accrued and accruing interest.

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

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

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

S/ JAMES O. ELLISON

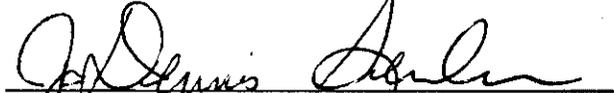
UNITED STATES DISTRICT JUDGE

APPROVED:

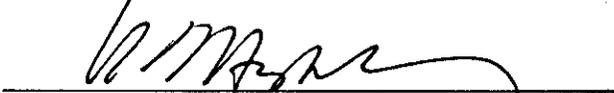
STEPHEN C. LEWIS
United States Attorney



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



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



KIM D. ASHLEY, OBA #14175
Assistant General Counsel
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Oklahoma City, Oklahoma 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission



MICHAEL R. VANDERBURG, OBA #9180
City Attorney,
CITY OF BROKEN ARROW
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Broken Arrow, OK 74012
(918) 251-5311
Attorney for Defendant,
City of Broken Arrow, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-340-E

NBK:flv

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

FILED

AUG 5 1994

CARROLL WAYNE BRUMLEY,

Plaintiff,

vs.

CELTIC LIFE INSURANCE COMPANY,

Defendant.

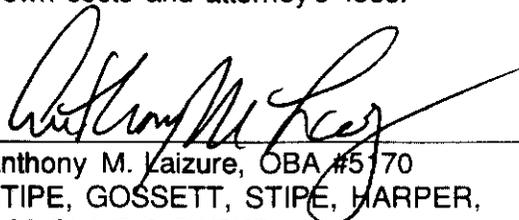
Case No. 93-C-968-BU

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

STIPULATION OF DISMISSAL WITH PREJUDICE

The Plaintiff, Carroll Wayne Brumley, and the Defendant, Celtic Life Insurance Company, pursuant to Rule 41(a)(1) of Federal Rules of Civil Procedure, hereby stipulate to the dismissal of this action with prejudice, each party to pay its own costs and attorney's fees.

Dated: August 5th, 1994.



Anthony M. Kaizure, OBA #5170
STIPE, GOSSETT, STIPE, HARPER,
McCUNE & PARKS
P.O. Box 701110
Tulsa, Oklahoma 74170
(918) 749-0749

ATTORNEY FOR PLAINTIFF
CARROLL WAYNE BRUMLEY



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

ATTORNEYS FOR DEFENDANT
CELTIC LIFE INSURANCE COMPANY

ENTERED ON DOCKET

DATE 8-8-94

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LIBERTY MUTUAL INSURANCE COMPANY,)
a Massachusetts corporation, UNITED)
PARCEL SERVICE OF AMERICA, INC.,)
and ALKO CORPORATION,)

Plaintiffs,)

vs.)

No. 93-C-1105-B

KAN-ARK INDUSTRIES, INC., now)
KAI, INC., and AETNA CASUALTY &)
SURETY COMPANY OF ILLINOIS,)

Defendants/
Third Party Plaintiffs,)

v.)

BUILDERS STEEL CO., INC., an)
Oklahoma corporation; and)
CONTINENTAL ASSURANCE COMPANY,)
an Illinois corporation,)

Third Party Defendants.)

FILED

AUG 5 1994

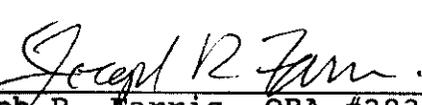
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

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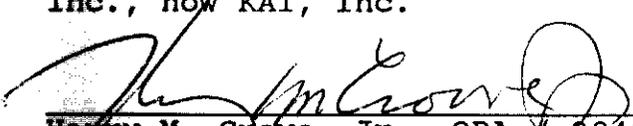
DATE AUG 8

STIPULATION OF DISMISSAL

The parties above named hereby stipulate, pursuant to Fed. R. Civ. P. 41(a)(1), to the voluntary dismissal of Continental Insurance Company, with prejudice.



Joseph R. Farris, OBA #2835
Feldman, Hall, Franden, Woodard &
Farris
Attorneys for Kan-Ark Industries,
Inc., now KAI, Inc.



Harry M. Crowe, Jr., OBA #2049
Crawford, Crowe & Bainbridge, PA
Attorneys for Builders Steel Co.

(signatures continued)

Larry Lipe

Larry B. Lipe, OBA # 5451
Lipe, Green, Paschal, Trump &
Gourley

Attorneys for Defendant, Aetna
Casualty & Surety Company of
Illinois

Eugene Robinson

Eugene Robinson, OBA # 10119
McGivern, Scott, Gilliard, Curthoys
& Robinson

Attorneys for Plaintiffs

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

ALVIN L. DORSEY,
Plaintiff,

v.

DON MONKS d/b/a SUNBURST MOBILE
HOMES; DON THOMASON d/b/a
ADVANTAGE SALES AND SERVICE;
IMPERIALS CORPORATION OF AMERICA;
CIT FINANCIAL SERVICES
CORPORATION; IMPERIAL SAVINGS
CORPORATION; THE CIT GROUP/SALES
FINANCING INC.; RESOLUTION TRUST
CORP., successor in interest to
IMPERIAL SAVINGS CORPORATION; AND
1ST ASSOCIATES MORTGAGE
CORPORATION,
Defendants.

No. 92-C-722 E

FILED

AUG 5 1994

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

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Alvin L. Dorsey, and dismisses the
above captioned action with prejudice.

Respectfully Submitted,


Alvin L. Dorsey


Gary W. Farabough, OBA No. 2816
BICKFORD, PASLEY & FARABOUGH
P. O. Box 1027
Ardmore, Oklahoma 73402
(405) 223-5566

ATTORNEY FOR THE PLAINTIFF

LAW OFFICES
BICKFORD, PASLEY
& FARABOUGH
ARDMORE, OKLAHOMA

ENTERED ON DOCKET
DATE 8-8-94

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

FILED

AUG 4 1994

SENECA COWAN,

Plaintiff,

vs

JAMES LAHMAN,

Defendant.

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

Case No. 93-C-998-B

ENTERED ON DOCKET
AUG 0 5 1994

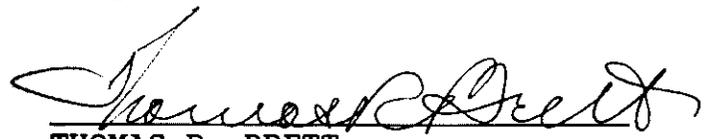
DATE

ADMINISTRATIVE CLOSING ORDER

The Parties having filed a joint application for administrative hold and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication of the State Court proceedings in Ottawa County, Okla. styled Farm Bureau Mutual Ins. Co. vs Jerry Wayne Saunders, et al, case #CJ-94-92, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 4th day of August, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

4

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

FILED

AUG 4 1994

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

THE FEDERAL DEPOSIT INSURANCE)
CORPORATION, in its corporate)
capacity as successor in)
interest to certain assets of)
UTICA NATIONAL BANK & TRUST)
COMPANY,)

Plaintiff,)

v.)

Case No. 92-C-003 B

JAMES M. SCHMIDT and SOPHIA L.)
SCHMIDT, husband and wife;)
MICHAEL TRAP SCHMIDT, an)
individual; TRAP BRISCOE,)
an individual; EXPERIUS)
CORPORATION, an Oklahoma)
corporation; EXPERIUS HEALTH)
CARE, INC., a Missouri)
corporation; and DONALD HINER,)
an individual,)

Defendants.)

ENTERED ON RECORD

DATE AUG 05 1994

ORDER ADMINISTRATIVELY CLOSING CASE

This cause comes before the Court on the Motion to Administratively Close Case (the "Motion") filed by Plaintiff, the Federal Deposit Insurance Corporation.

The Court having jurisdiction over the parties and the subject matter hereto and being fully advised as to the premises, hereby finds that good cause exists to grant the relief requested in the Motion.

IT IS THEREFORE ORDERED that the instant case is hereby administratively closed.

DATED this 4th day of August, 1994.

S/ THOMAS R. BRETT

Thomas R. Brett
United States District Court Judge

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
James M. Reed, OBA #7466
Pamela H. Goldberg, OBA #12310
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

ATTORNEYS FOR ATTORNEYS FOR THE
FEDERAL DEPOSIT INSURANCE CORPORATION
IN ITS CORPORATE CAPACITY AS SUCCESSOR
IN INTEREST TO CERTAIN ASSETS OF UTICA
NATIONAL BANK & TRUST COMPANY

FILED

IN THE UNITED STATES DISTRICT COURT AUG 3 1994
FOR THE NORTHERN DISTRICT OF OKLAHOMA

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

MANUEL GONZALES,)
)
 Petitioner,)
)
 vs.)
)
 L.L. YOUNG, WARDEN)
)
 Respondent.)

Case No. 94-C-152-B ✓

ENTERED IN DOCKET
DATE AUG 04 1994

ORDER

Now before the Court is the Report and Recommendation of United States Magistrate Judge (Docket #6) and the Petitioner's Objection to Report and Recommendation of United States Magistrate Judge (Docket #7).

Petitioner Manuel Gonzales's pro se Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 alleges he is being denied his constitutional right to equal protection by the application of an unconstitutional state statute. Specifically, Petitioner argues he is being denied "emergency time credits" under the Prison Overcrowding Emergency Powers Act, Okla.Stat.tit. 57, §570-576, which provides in pertinent part:

On the effective date of such an emergency, the Director shall grant sixty (60) days of emergency time credit to any person confined in the prison system who is:

1. Classified as medium security or any lower security level;
2. Incarcerated for a nonviolent offense; and
3. Not incarcerated for a second or subsequent offense under the provisions of Section 51 or 52 of Title 21 of the Oklahoma Statutes.

Petitioner is currently incarcerated for a second offense under the provisions of Section 51 of Title 21 of the Oklahoma

8

Statutes and thus is not eligible for emergency time credits. Petitioner contends that his constitutional equal protection rights are being violated because he is being denied emergency time credits while other "repeat offenders" are receiving the credits because they were not convicted under the provisions of Okla.Stat.tit. 21 §§51 or 52 (1983 & Supp. 1994).

The Respondent filed a Motion to Dismiss for failure to exhaust state remedies on April 6, 1994. Magistrate Judge Wolfe entered his Report and Recommendation July 1, 1994, and recommended that the motion to dismiss for failure to exhaust state remedies be denied. However, the Magistrate Judge also reviewed the merits of the matter and concluded the Petition should be dismissed as frivolous pursuant to 28 U.S.C. §1915.¹

The Court has conducted a de novo review of the matter pursuant to 28 U.S.C. §636(b) and now affirms in part and reverses in part the Magistrate's Report and Recommendation. The Court agrees that Petitioner is not required to exhaust his state remedies in this instance because he is effectively foreclosed from relief in the state court. Goodwin v. State of Oklahoma, 923 F.2d 156 (10th Cir. 1991). However, the Court is not inclined to sua sponte dismiss the Petition as frivolous pursuant to 28 U.S.C. §1915(d). Jones v. Bales, 58 F.R.D. 453 (D.C.Ga. 1972) (court has

¹ This section provides:

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

broad discretion in management of in forma pauperis actions). Although the Tenth Circuit Court of Appeals has recently upheld the constitutionality of the Oklahoma Prison Overcrowding Emergency Powers Act on three occasions², Petitioner is asserting a variation of the equal protection argument that has not yet been directly addressed by the Court of Appeals.

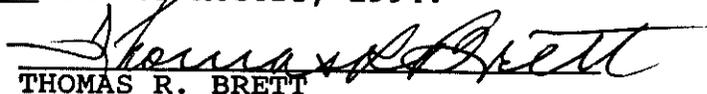
Construing the pro se petition liberally, Petitioner contends he is being treated differently than other "repeat offenders" who were not convicted under Okla.Stat.tit. 21 §51 and that such a classification of "repeat offenders" is not rationally related to a legitimate state interest. As this issue has not been briefed by either party, the Court reverses the Magistrate's Report and Recommendation to the extent it recommends dismissal pursuant to 28 U.S.C. §1915(d).

The parties shall comply with the following dispositive motion schedule:

August 19	Discovery deadline
August 26	Dispositive motions due
September 12	Responses to dispositive motions
September 22	Replies to responses

² Johnson v. Fields, 1994 WL 127145 (10th Cir. 1994) (holding the law does not violate the Equal Protection Clause as it is rationally related to a legitimate state purpose); Martin v. State of Oklahoma, 1994 WL 131754 (10th Cir. 1994) (the classifications employed by the State of Oklahoma in the Act are rationally related to a legitimate state interest); and Day v. Reynolds, 1994 WL 118204 (10th Cir. 1994) (the differential treatment accorded repeat offenders under the Act does not constitute a violation of due process or the equal protection clause.)

IT IS SO ORDERED THIS 3rd DAY OF AUGUST, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE AUG 4 1994

UNITED STATES OF AMERICA,)
)
)
 Plaintiff,)
)
)
 vs.)
)
)
 DONALD RAY ROBERSON aka)
 DONALD R. ROBERSON; ELLA MARIE)
 ROBERSON aka ELLA M. ROBERSON;)
 STATE OF OKLAHOMA, ex rel.)
 OKLAHOMA TAX COMMISSION;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED
AUG 4 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C 268B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3 day
of Aug, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, **County Treasurer, Tulsa County,
Oklahoma, and Board of County Commissioners, Tulsa County,
Oklahoma**, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, **State of
Oklahoma ex rel Oklahoma Tax Commission**, appears by Kim D.
Ashley, Assistant General Counsel; and the Defendants, **Donald Ray
Roberson aka Donald R. Roberson and Ella Marie Roberson aka Ella
M. Roberson**, appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendants, **Donald Ray Roberson aka
Donald R. Roberson and Ella Marie Roberson aka Ella M. Roberson**,

NOTE:

PROCE LITIGANDS IMMEDIATELY
UPON RECEIPT.

waived service of Summons on May 7, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, acknowledged receipt of Summons and Complaint on March 24, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 22, 1994; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 22, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on April 12, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, filed its Answer on April 14, 1994; and that the Defendants, **Donald Ray Roberson aka Donald R. Roberson and Ella Marie Roberson aka Ella M. Roberson**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Eleven (11), Block Fifteen (15), IRVING PLACE, an Addition to Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on May 4, 1983, the Defendants, **Donald Ray Roberson aka Donald R. Roberson and Ella Marie Roberson aka Ella M. Roberson**, executed and delivered to **CHARLES F. CURRY COMPANY** their mortgage note in the amount of

\$38,600.00, payable in monthly installments, with interest thereon at the rate of twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Donald Ray Roberson aka Donald R. Roberson and Ella Marie Roberson aka Ella M. Roberson, executed and delivered to CHARLES F. CURRY COMPANY a mortgage dated May 4, 1983, covering the above-described property. Said mortgage was recorded on May 6, 1983, in Book 4689, Page 1731, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 17, 1984, CHARLES F. CURRY COMPANY assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on September 20, 1984, in Book 4817, Page 2056, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 1, 1984, the Defendants, Donald Ray Roberson aka Donald R. Roberson and Ella Marie Roberson aka Ella M. Roberson, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that on October 10, 1990, the personal liability of the Defendant, Ella Marie Roberson aka Ella M. Roberson, on the debt represented by the subject note and mortgage was discharged in United States Bankruptcy Court for the Northern District of Oklahoma, Case Number 90-1659C, a Chapter 7 Bankruptcy, which was closed on December 10, 1990.

The Court further finds that on February 21, 1991, the personal liability of the Defendant, Donald Ray Roberson aka Donald R. Roberson, on the debt represented by the subject note and mortgage was discharged in United States Bankruptcy Court for the Northern District of Oklahoma, Case Number 90-3285C, a Chapter 7 Bankruptcy, which was closed on April 16, 1991.

The Court further finds that the Defendants, Donald Ray Roberson aka Donald R. Roberson and Ella Marie Roberson aka Ella M. Roberson, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Donald Ray Roberson aka Donald R. Roberson and Ella Marie Roberson aka Ella M. Roberson**, are indebted to the Plaintiff in the principal sum of \$72,551.94, plus interest at the rate of 12 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$22.00 which became a lien on the property as of June 26, 1992; and a claim against the subject property in the amount of \$14.00. Said lien and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, has a lien on the property which is the subject matter of this action by virtue of a tax warrant, dated October 31, 1991, number ITI9101123700, in the amount of \$417.76, plus interest, penalties, and costs. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Internal Revenue Service has a lien on the property which is the subject matter of this action by virtue of a Federal Tax lien, number 739127613, dated October 10, 1991, in the amount of \$5,092.30, and inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Internal Revenue Service is not made a party hereto; however, the lien will be released at the time of sale should the property fail to yield an amount in excess of the debt to the Plaintiff.

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

The Court further finds that the Defendants, **Donald Ray Roberson aka Donald R. Roberson and Ella Marie Roberson and Ella M. Roberson**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of

redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, Donald Ray Roberson aka Donald R. Roberson and Ella Marie Roberson aka Ella M. Roberson, in the principal sum of \$72,551.94, plus interest at the rate of 12 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.49 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$36.00 for personal property taxes for the years 1991 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, have and recover judgment in rem in the amount of \$417.76, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Donald Ray Roberson aka Donald R. Roberson, Ella Marie Roberson aka Ella M. Roberson and Board of County

Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

Third:

In payment of Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of \$417.76, plus accrued and accruing interest for state taxes which are currently due and owing.

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of

\$36.00 for personal property taxes which are currently due and owing.

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

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

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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

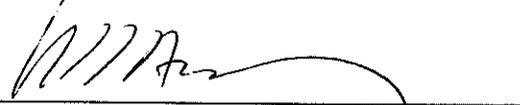
STEPHEN C. LEWIS
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County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



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Attorney for Defendant
State of Oklahoma ex rel
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 94C 268B

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ENTERED ON DOCKET
DATE AUG 4 1994

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

FILED

AUG 3 1994

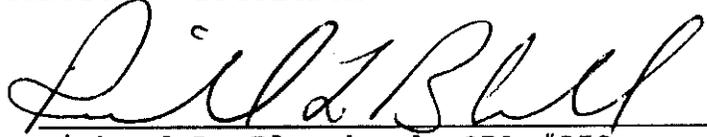
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ROLAND McBEE, JR.,)
)
Plaintiff,)
)
vs.)
)
CENTRAL STATE COMMUNITY SERVICES,)
INC., a corporation, and BARBARA)
SMITH,)

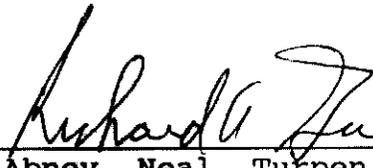
Civil Action No. 93-C-1126-B

JOINT STIPULATION OF DISMISSAL

COME NOW, the Plaintiff, by and through his undersigned attorney of record, Richard L. Blanchard, and the Defendants, by and through their attorneys of record, Riggs Abney, Neal, Turpen, Orbison and Lewis, and hereby stipulate to the dismissal of the above-captioned matter with prejudice. Settlement of this matter has been consummated.



Richard L. Blanchard, OBA #858
RICHARDS, PAUL, RICHARDS & SIEGEL
9 E. 4th Street, Ste. 400
Tulsa, OK 74103-5118
(918) 584-2583

By:  OBA# 3229
Riggs, Abney, Neal, Turpen, Orbison and Lewis
Frisco Building
502 W. 6th Street
Tulsa, OK 74119-1010

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JAMES E. DAILEY, a single person;)
 TERRY LYNN FORTNER)
 fka Terry Lynn Jacobson)
 fka Terry Lynn Little;)
 SERVICE COLLECTION)
 ASSOCIATION, INC., a corporation;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

CIVIL ACTION NO. 94-C-140-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 1 day
of Aug, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, COUNTY TREASURER, Tulsa County,
Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County,
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, SERVICE
COLLECTION ASSOCIATION, INC., appears by Fred A. Pottorf; and the
Defendants, JAMES E. DAILEY and TERRY LYNN FORTNER aka Terry Lynn
Fortner aka Terry Lynn Jacobson fka Terry Lynn Little, appear
not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, SERVICE COLLECTION
ASSOCIATION, INC., acknowledged receipt of Summons and Complaint

ENTERED ON DOCKET
DATE 8-3-94

on February 17, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on February 24, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on February 18, 1994.

The Court further finds that the Defendant, JANE DOE, unknown spouse of Jim Leon Fortner on August 25, 1988, is one and the same person as TERRY LYNN FORTNER fka Terry Lynn Jacobson, and fka Terry Lynn Little.

The Court further finds that the Defendants, JAMES E. DAILEY and TERRY LYNN FORTNER aka Terry Lynn Fortner aka Terry Lynn Jacobson fka Terry Lynn Little, were served by publishing notice of this action in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning April 14, 1994, and continuing through May 19, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, JAMES E. DAILEY and TERRY LYNN FORTNER aka Terry Lynn Fortner aka Terry Lynn Jacobson fka Terry Lynn Little, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the

last known addresses of the Defendants, JAMES E. DAILEY and TERRY LYNN FORTNER aka Terry Lynn Fortner aka Terry Lynn Jacobson fka Terry Lynn Little. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 10, 1994; that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., filed its Answer on February 28, 1994; and that the Defendants, JAMES E. DAILEY and TERRY LYNN FORTNER aka Terry Lynn Fortner aka Terry Lynn Jacobson fka Terry Lynn Little, have failed to answer and default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real

property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Five (5), Block Twelve (12), Blocks 7 through 13 of TANGLEWOOD ADDITION to the City of Tulsa, Tulsa, County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on December 17, 1985, the Defendant, Robert L. Dailey and Helen E. Dailey, executed and delivered to First Security Mortgage Company, a mortgage note in the amount of \$85,635.00, payable in monthly installments, with interest thereon at the rate of Eleven and One-half percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Robert L. Dailey and Helen E. Dailey, husband and wife, executed and delivered to First Security Mortgage Company, a mortgage dated December 17, 1985, covering the above-described property. Said mortgage was recorded on December 27, 1985, in Book 4915, Page 180, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 27, 1985, First Security Mortgage Company, assigned the above-described mortgage note and mortgage to Associates National Mortgage Corporation. This Assignment of Mortgage was recorded on February 6, 1986, in Book 4923, Page 830, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 30, 1989, Associates National Mortgage Corporation, assigned the above-described mortgage note and mortgage to the Secretary of Housing

and Urban Development. This **Assignment** of Mortgage was recorded on February 7, 1989, in Book 5165, Page 1489, in the records of Tulsa County, Oklahoma.

The Court further **finds** that on January 9, 1986, Robert L. Dailey and Helen E. Dailey, granted a general warranty deed to Jim Leon Fortner, a single man. This deed was recorded with the Tulsa County Clerk on January 9, 1986, in Book 4917 at Page 1759 and Jim Leon Fortner, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further **finds** that on August 25, 1988, Jim Leon Fortner, a married person, granted a general warranty deed to James E. Dailey, a single person. This deed was recorded with the Tulsa County Clerk on August 30, 1988, in Book 5124 at Page 2107 and the Defendant, JAMES E. DAILEY, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further **finds** that the Defendant, Jane Doe, the unknown spouse of Jim Leon Fortner is one and the same person as Terry Lynn Fortner aka Terry Lynn Jacobson fka Terry Lynn Little, the spouse of Jim Leon Fortner, and is named to extinguish any interest she may have in the subject property pursuant to her status as the wife of Jim Leon Fortner on August 25, 1988, and to cure the title defect caused by her failure to join in the execution of such deed.

The Court further **finds** that on February 1, 1989, the Defendant, JAMES E. DAILEY, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due

under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendant, JAMES E. DAILEY, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, JAMES E. DAILEY, is indebted to the Plaintiff in the principal sum of \$138,206.94, plus interest at the rate of Eleven and One-Half percent per annum from January 3, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$64.00 which became a lien on the property as of June 26, 1992; in the amount of \$46.00 which became a lien on the property as of June 25, 1992; and a claim in the amount of \$47.00 for 1993 taxes. Said liens and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of \$4,184.02 which became a lien on the property as of April 7, 1989. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, JAMES E.

DAILEY and TERRY LYNN FORTNER aka Terry Lynn Jacobson fka Terry Lynn Little, are in default, and have no right, title or interest in the subject real property.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, JAMES E. DAILEY, in the principal sum of \$138,206.94, plus interest at the rate of Eleven and One-Half percent per annum from January 3, 1994 until judgment, plus interest thereafter at the current legal rate of 5.49 percent per annum until paid, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., have and recover judgment in the amount of \$4,184.02, plus the costs of this action.

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

recover judgment in the amount of \$157.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, JAMES E. DAILEY and TERRY LYNN FORTNER aka Terry Lynn Jacobson fka Terry Lynn Little, have no right, title or interest in the subject property.

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

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

First:

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

Second:

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

Third:

In payment of Defendant, SERVICE COLLECTION ASSOCIATION, INC., in the amount of \$4,184.02.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$157.00, personal property taxes which are currently due and owing.

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

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

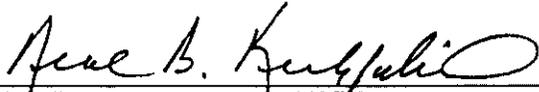
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ JAMES O. ELLISON

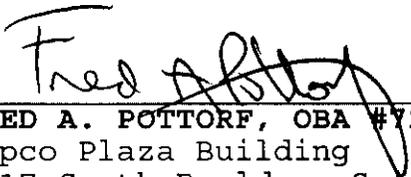
UNITED STATES DISTRICT JUDGE

APPROVED:

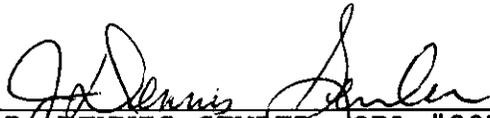
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County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-140-E

NBK:flv

FILED

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

AUG 2 1994

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

RENA DUNN and LUTHER DUNN,)
)
 Plaintiffs,)
)
 vs.)
)
 RYDER TRUCK RENTAL, INC., a)
 Florida Corporation,)
 domesticated in Oklahoma)
)
 Defendant)

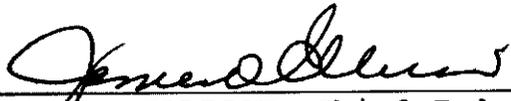
No. 93-C-277-E ✓

JUDGMENT

This action came on for consideration before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered in favor of the Defendants,

IT IS THEREFORE ORDERED that the Plaintiffs take nothing from the Defendant and that the action be dismissed on the merits.

ORDERED this 1st day of August, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 8-3-94

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

FILED
AUG 2 1994

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

CARL DEMETRIUS MITCHELL,)
)
 Petitioner,)
)
 vs.)
)
 JACK COWLEY,)
)
 Respondent.)

No. 93-C-249-B

ENTERED ON DOCKET
AUG 02 1994
DATE

ORDER

Petitioner's pro-se application for a writ of habeas corpus is now at issue before the Court. The Respondent filed a Rule 5 response. As more fully set out below, the Court concludes that Petitioner's application should be denied.

I. BACKGROUND

On March 12, 1987, Petitioner pled guilty to larceny of merchandise from a retailer, after former conviction of a felony in Tulsa County District Court, Case No. CF-87-876. In exchange for the plea, the State dismissed two allegations of former convictions and dismissed Tulsa County Information No. CRF-87-36, charging Petitioner with escape from house arrest. The state court sentenced the Petitioner to ten years imprisonment. Later, Petitioner succeeded in having his guilty plea vacated by this Court on his petition for a writ of habeas corpus. Petitioner was tried on the renewed escape charge, Case No. CRF-87-36, and was found guilty and sentenced to three years. Petitioner then went to trial on May 14 and 15, 1990, on the larceny charge and was found

guilty by a jury during the first stage of the trial. Upon agreement between the parties, the Petitioner waived the second stage of the trial and pled guilty to three former convictions of felony crimes. The state court sentenced the Petitioner to twenty years imprisonment to run consecutive to the three-year sentence in Case No. CRF-87-36 (the escape conviction). The Oklahoma Court of Criminal Appeals affirmed the judgement and sentence in an unpublished opinion.

The trial transcript reveals that on the evening of January 31, 1987, Deborah Brockman, a K-Mart security officer, followed a man from the entrance of the store to the hardware department, where he opened a cardboard box, extracted a chain saw, and carried it to the service desk. (Tr. at 7-8.) Brockman testified that the man asked the service-desk clerk where the chain saw cases were located and upon direction returned to the chain saw display. (Id. at 9.) Brockman testified that the man looked around and then returned to the service desk with the chain saw in his hand. (Id.) Brockman then approached the man and asked him personally if he was seeking a refund. The man responded that he was not, that he couldn't find the chain saw case he needed, and therefore, that he was going to leave. Brockman advised the man that she had seen him enter the store with nothing, and that she would arrest him for shoplifting if he left with the chain saw. The man, however, proceeded out the front doors and outside the store where he was stopped by Brockman and two other store employees David Frederick and Steven Wayne who had previously been alerted. (Id. at 10.)

At trial Brockman identified the Defendant as the perpetrator only insofar as he fit the general description of the person she remembered. (Id. at 12-13.) Brockman testified, however, that she recalled identifying the man with certainty at a preliminary hearing on March 10, 1987. (Id. at 13.)

David Frederick, a stockman at K-Mart on the day in question, testified that he had no independent recollection of the events at issue because he had been involved in quite a few apprehensions. (Id. 25.) He read, however, from a written statement which he had submitted to the police over three years previously while the event were fresh in his mind. (Id. at 26.) The statement declared the following:

I saw a tall black man walk back to the back of the store with a chain saw and Debbie asked me to go outside, wait for the man who attempted to steal the chain saw. He came back to the service desk with the chain saw and proceeded outside with the merchandise.

(Id. 26-28.)

Tulsa Police Officer Steven Niemitalo testified that he could not recall the events in question, but acknowledged his handwriting on the arrest and booking report. (Id. 35-43.) Gregg Patrick, the jail booking officer on January 31, 1987, identified his signature on the arrest and booking report and specifically recognized the Defendant as the individual from whom he took the fingerprint on the booking report. (Id. at 41-44.) Lastly, Tulsa Police Officer Robert Yearton testified that the fingerprint on the booking report belonged to the Defendant. (Id. 46-49.)

In the present petition for a writ of habeas corpus, Petitioner alleges (1) that the trial court failed sua sponte to relate to the jury a cautionary eyewitness identification instruction in violation of his due process and equal protection rights; (2) that his larceny conviction was not supported by the evidence; and (3) that the trial court vindictively increased his sentence and imposed a consecutive sentence in violation of the Double Jeopardy Clause.

II. ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 112

S. Ct. 1715 (1992), and that the Attorney General is not a proper party in this case because the Petitioner is presently in custody pursuant to the state judgment in question. See Rule 2(a) and (b) of the Rules Governing Section 2254 Cases.

A. Cautionary Eyewitness Identification Instruction

In his first ground for relief, Petitioner claims that the jury instructions were erroneous and violated his right to due process and equal protection. He argues that the trial court failed to instruct sua sponte on the need to scrutinize the eyewitness identification testimony.

A habeas corpus petitioner "bears a 'great burden . . . when [he] seeks to collaterally attack a state court judgment based on an erroneous jury instruction.'" Lujan v. Tansy, 2 F.3d 1031, 1035 (10th Cir. 1993) (quoting Hunter v. New Mexico, 916 F.2d 595, 598 (10th Cir. 1990), cert. denied, 500 U.S. 909 (1991)), cert. denied, 114 S. Ct. 1074 (1994). Federal habeas corpus relief is not available for alleged errors of state law, and this Court examines only "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" Estelle v. McGuire, 502 U.S. 62, ___, 112 S. Ct. 475, 482 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). It is well established that "[h]abeas proceedings may not be used to set aside a state conviction on the basis of erroneous jury instructions unless the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial

in the constitutional sense.'" Shafer v. Stratton, 906 F.2d 506, 508 (10th Cir.) (quoting Brinlee v. Crisp, 608 F.2d 839, 854 (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980)), cert. denied, 498 U.S. 961 (1990).

After carefully reviewing the record in this case, the Court finds no fundamental unfairness in Petitioner's trial which would be sufficient to set aside Petitioner's larceny conviction. Moreover, Petitioner's trial counsel's failure to object to the jury instructions given at trial or to request alternate instructions waived any error for review. See Dickson v. State, 761 P.2d 860, 861 (Okla. Crim. App. 1988). In any event, a cautionary instruction regarding the identification of the Petitioner by the eye witness was not necessary in this case. The Oklahoma Court of Criminal Appeals has held that a cautionary instruction is not necessary if the following conditions are met:

(1) If there was a good opportunity for positive identification; (2) if the witness is positive in his identification; (3) if the identification is not weakened by prior failure to identify; and (4) if the witness remains positive as to the identification, even after cross-examination.

Berry v. State, 834 P.2d 1002, 1006 (Okla. Crim. App. 1992).

These conditions were clearly met in the instant case. Security Officer Deborah Brockman had ample opportunity to observe the Petitioner at the K-Mart store. She testified she saw the Petitioner when he entered the store and twice followed him to the hardware department and back to the service desk. Ms. Brockman also had an opportunity to observe the Petitioner when she asked him if he wanted a refund, when she warned him not to leave the

store with the merchandise, and when she questioned him after his detention at the store. The fact that Ms. Brockman could not positively identify the Petitioner at trial is understandable because more than three years had passed since the events in question. It is undisputable, however, that Ms. Brockman positively identified the Petitioner at the preliminary hearing. Additionally, Officer Patrick positively identified the petitioner as the man he booked for this offense, and Mr. Yearnton testified that the fingerprint placed on the booking sheet belonged to the Petitioner.

Accordingly, the Court concludes that the alleged error regarding the jury instruction does not rise to a due process violation sufficient to set aside Petitioner's state conviction.

B. Sufficiency of the Evidence

Next, Petitioner alleges that there was insufficient evidence to support his conviction. In particular he claims that the evidence did not show that he fraudulently or secretly took the chain saw as required under Oklahoma law. Okla. Stat. tit. 21, § 1701 defines larceny as "the taking of personal property accomplished by fraud or stealth, and with intent to deprive another thereof."

Petitioner's sufficiency of the evidence claim is controlled by the analysis set forth in Jackson v. Virginia, 443 U.S. 307, 318-19 (1979). Sufficient evidence exists to support a conviction if any rational trier would accept the evidence as establishing

each essential elements of the crime beyond a reasonable doubt. Id. at 319. In reviewing a sufficiency claim, the Court must not weigh conflicting evidence or consider witness credibility. United States v. Davis, 965 F.2d 804, 811 (10th Cir. 1992), cert. denied, 113 S. Ct. 1255 (1993). Instead the Court must view the evidence in the light most favorable to the prosecution, Jackson, 443 U.S. at 319, and "accept the jury's resolution of the evidence as long as it is within the bounds of reason." Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir.1993).¹

Based on the evidence presented at trial, the Court concludes that a reasonable juror could have found the evidence sufficient to show that Petitioner committed the crime of grand larceny. The Security Officer testified that she followed the Petitioner from the time he entered the K-Mart store, that Petitioner went to the hardware department, opened a box and took a chain saw out, and that he ultimately carried the chain saw out of the K-Mart store although he had been advised that if he left the store with the chain saw that he would be arrested. Petitioner's claim that the taking of the chain saw did not involve any secrecy or fraud is unpersuasive. The jury could have reasonably inferred that Petitioner intended to secretly and without consent of the owner take the chain saw from the store. In fact, it is plausible that he wanted the person at the service desk to believe that he had

¹The Court does not analyze this issue under 28 U.S.C. § 2254(d) because the state court did not issue detailed findings of fact on the sufficiency issue which would be entitled to a presumption of correctness unless challenged by convincing evidence. See Sumner v. Mata, 455 U.S. 591, 597 (1982).

entered the store with the chain saw and was only seeking a case to store it in. Accordingly, the Court concludes that there is substantial evidence to support Petitioner's conviction.

C. Sentencing Errors

In his last two grounds for relief, Petitioner alleges that the trial judge vindictively increased his punishment (1) by running his sentence concurrently whereas the plaintiff had previously been sentenced to only one term; (2) by increasing the fines by four and one-half times what they were in the first conviction; and (3) by permitting the prosecutor to refile two allegations of prior convictions the judge had dismissed in the first proceeding pursuant to a plea bargain. Petitioner also argues that the Double Jeopardy Clause was violated when the trial court ordered the sentence in this case to be served consecutively to his escape conviction.

It is generally recognized that a federal habeas court will not review the severity of a sentence which has been imposed within statutory limits. See e.g. Haynes v. Butler, 825 F.2d 921, 923 (5th Cir. 1987), cert. denied, 484 U.S. 1014 (1988); Smith v. Wainwright, 664 F.2d 1194, 1196 (11th Cir. 1981). "Alleged impropriety in the sentencing process itself, however, is subject to judicial examination." Smith, 664 F.2d at 1196. In North Carolina v. Pearce, 395 U.S. 711, 725-26 (1969), the Supreme Court held that the Due Process Clause impedes the vindictive increase of a sentence. "When a sentence is increased, Pearce requires the

sentencing judge to place on the record nonvindictive reasons supporting the increase." Macomber v. Hannigan, 15 F.3d 155, 156 (10th Cir. 1994). Over the years, the Supreme Court has limited the application of the Pearce rule. For instance the Court has determined that the Pearce presumption does not apply where the original sentence came after a guilty plea and the later, increased sentence followed a jury trial. Alabama v. Smith, 490 U.S. 794, 801 (1989).

After carefully reviewing the record in this case, the Court finds no impropriety in the sentencing process. Petitioner's claim that the trial judge vindictively sentenced him to a longer period of time following the jury trial than he had received after his guilty plea is unsupported by the record. The reversal of Petitioner's original guilty plea by this Court rendered the plea bargain null and void. Petitioner's prior convictions, including the escape conviction, were thus properly before the State court for enhancement purposes. In any event, following Petitioner's voluntary plea of guilty to his three prior felony convictions during the second-stage of the trial, the trial court had no choice but to sentence the Petitioner to the minimum sentence of twenty years. See Okla. Stat. tit. 21, § 51(B) (1981) ("Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of not less than twenty (20) years").

Similarly, the Court finds no double jeopardy in Petitioner's consecutive sentences. Consecutive sentences are not per se violations of the Double Jeopardy Clause. See Albernez v. United States, 450 U.S. 333 (1981). Moreover, the crimes at issues involved separate transactions and two distinct statutory provisions. See Mansfield v. Champion, 992 F.2d 1098, 1100 (10th Cir. 1993) (Double Jeopardy Clause protects against multiple punishments for the same offense); see also Johnson v. State, 611 P.2d 1137, 1141-44 (Okla. Crim. App. 1980), cert. denied, 449 U.S. 1132 (1981). Nor does the record contain any evidence that the trial court abused its discretion in deciding to run Petitioner's sentences consecutively. Custer v. State, 727 P.2d 973, 975 (Okla. Crim. App. 1986) (decision to run sentences consecutively or concurrently rests within the discretion of the trial court). Although Petitioner claims the trial court made its decision before trial, the Petitioner forgets that during the enhancement proceeding, the trial Court specifically asked the Petitioner if he had been promised anything other than the twenty-year minimum sentence, and advised him that the sentence would run consecutive with the three-year sentence on his escape conviction. (Tr. at 78.) Accordingly, Petitioner's reliance on the exchange at page 84-85 of the transcript is insufficient to establish that the trial court had made its decision before trial.²

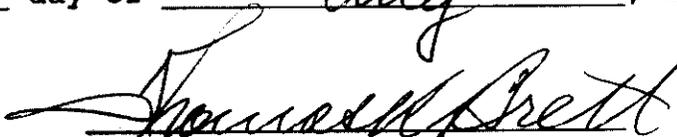
²Petitioner relies on this part of the proceeding only:
THE COURT: Mr. Nigh, do you know of any reason I should not proceed?
MR. NIGH: No your Honor, I would request that sentence run concurrent with the sentence in the escape charge.

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. **ACCORDINGLY, IT IS HEREBY ORDERED:**

- (1) That the Attorney General be dismissed as a party in this case; and
- (2) That the petition for a writ of habeas corpus be denied.

SO ORDERED THIS 2nd day of Aug, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

THE COURT: Well, it will be denied, give you an exception. I told Mr. Mitchell at the beginning of these proceedings that they would run consecutive. Is that what you understood, Mr. Mitchell?

MR. MITCHELL: Yes, it is.

(Tr. at 84-85.)

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

FILED
AUG 1 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

LARRY J. GRIFFITH,
Petitioner,
vs.
JOHN R. HALLAHAN, et al.,
Respondent.

No. 93-C-827-B

~~SECRET~~
DATE AUG 6 2 1994

ORDER

Petitioner's pro-se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now at issue before the Court. The Respondent has filed a Rule 5 response. The Petitioner has neither objected to Respondent's response nor advised the Court of his address changes.

After carefully reviewing the record in this case, the Court concludes that Petitioner's petition is now moot. In his petition, Petitioner requests that this Court issue a writ of habeas corpus compelling the State of Oklahoma to have him brought to this state for disposition of the detainer which was lodged against him by the State of Oklahoma. The Respondent advises the Court that the Oklahoma Department of Corrections received Petitioner back into its custody on August 21, 1993, and that Petitioner remained incarcerated at the Jess Dunn Correctional Center in Taft, Oklahoma, at least until the date of the response.

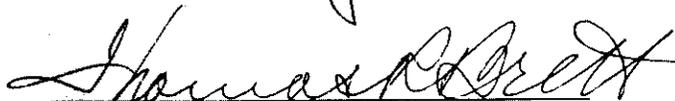
ACCORDINGLY, IT IS HEREBY ORDERED:

- (1) That the Attorney General be dismissed as a party in this action, see Rule 2(a) and (b) of the Rules Governing Section 2254 Cases; and

4

(2) That Petitioner's application for a writ of habeas corpus
be dismissed as moot.

SO ORDERED THIS 19 day of aug., 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

EVERETT R. WAGONER and
MADELEINE WAGONER,

Plaintiffs,

vs.

GRAND RIVER DAM AUTHORITY
and RONALD COKER, in his
official capacity as General
Manager and Chief Executive
Officer of the Grand River
Dam Authority,

Defendants.

WAYNE E. ROBERTS,

Plaintiff,

vs.

GRAND RIVER DAM AUTHORITY
and RONALD COKER, in his
official capacity as General
Manager and Chief Executive
Officer of the Grand River
Dam Authority,

Defendants.

Case No. 94-C-358-BU ✓

FILED

AUG 1 - 1994 *pw*

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

ENTERED ON DOCKET
DATE AUG 2 1994

Case No. 94-C-359-BU

ORDER

These matters come before the Court upon the motions of the plaintiffs, Everett R. Wagoner, Madeleine Wagner and Wayne E. Roberts, to remand the above-entitled cases to state court. The defendants, Grand River Dam Authority and Ronald Coker, in his official capacity as General Manager and Chief Executive Officer of the Grand River Dam Authority, have responded to the motions and the plaintiffs have replied thereto. Upon due considerations of the parties' submissions, the Court makes its determination.

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The plaintiffs filed these actions in the District Court for Ottawa County, Oklahoma seeking damages to their property caused by flooding. The plaintiffs allege in their petitions that the flooding was caused by the acts of the defendants in operating Pensacola Dam. Shortly after the petitions were filed, the defendants removed the cases to this Court pursuant to 28 U.S.C. § 1442(a)(1), which authorizes removal of state suits by any federal officer or persons acting under any federal officer. In their amended removal notice, the defendants alleged that the complained acts were performed upon orders of an officer of the United States.

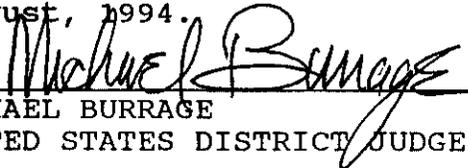
The plaintiffs object to removal of the cases on the ground that the defendants have not met the requirements specified by the § 1442(a)(1). The plaintiffs contend that the defendants acted under an agency of the United States and a federal agency cannot remove actions to federal court under § 1442(a)(1) based upon the ruling in International Primate Protection League v. Administrators of Tulane Educational Fund, 500 U.S. 72 (1991). The plaintiffs also contend that the defendants have not met their burden for establishing removal jurisdiction and that the defendants acts do not constitute federal acts. The defendants, on the other hand, contend that removal is proper based upon Teague v. Grand River Dam Authority, 279 F.Supp. 703 (N.D. Okla. 1968), wherein the court found that removal was proper because the defendant therein was acting under the direction of the United States Army Corps of Engineers.

The burden of establishing federal jurisdiction is upon the

party seeking removal. Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97, 42 S.Ct. 35, 37, 66 L.Ed. 144 (1921). In the Court's view, the defendants have not sufficiently established that they were "acting under" any officer of the United States for purposes of § 1442(a)(1). The defendants have simply stated in their amended removal notice that they were acting under the direction of the Secretary of War and that removal is proper under the decision in Teague. The defendants, however, have not offered any evidence in this case which shows that they were acting under the direction and control of a federal officer when the complained acts occurred. The Court further notes that in Teague, the operation of the flood gates was ordered by the United States Army Corps of Engineers. Under Primate Protection League, removal is not available under § 1442(a)(1) when a party is acting under the direction of a federal agency.

Based upon the foregoing, the plaintiffs, Everett R. Wagoner and Madeleine Wagoner's Motion to Remand (Docket No. 6) and the plaintiff, Wayne E. Roberts' Motion to Remand (Docket No. 6) are GRANTED. The Clerk of the Court is DIRECTED to send a certified copy of this Order to the Clerk of the District Court of Ottawa County, Oklahoma. In light of the Court's ruling, the Court declines to rule on the Defendants' Special Appearance, Motion to Dismiss (Docket No. 4 in Case No. 93-C-359-BU) and Defendants' Special Appearance, Motion to Dismiss (Docket No. 5 in Case No. 93-C-358-BU)

ENTERED this 1st day of August, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE AUG 2 1994

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

F I L E D
AUG 1 1994
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

LOREN R. BEESLEY,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES,)
)
 Defendant.)

93-C-0210-E

ORDER

Now before the Court is Plaintiff's Loren R. Beesley's appeal of a decision by the Secretary of Health and Human Services ("Secretary") to deny him disability benefits. Beesley raises three issues: (1) Whether the Administrative Law Judge ("ALJ") erred in evaluating Beesley's claims of pain; (2) Whether the ALJ erred in his questioning of the vocational expert; (3) Whether substantial evidence supports the finding of no disability. For the reasons discussed below, the Secretary's decision is remanded.

I. Standard of Review

In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g).¹ The Court's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate

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

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to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985).²

II. Summary of Evidence

Beesley was born August 30, 1942, has a high school education and took vocational training in electricity. He applied for benefits on May 20, 1991, claiming that he was unable to work since December 7, 1990. Beesley contends he became disabled after a roll of plastic struck him in the lower back on October 30, 1990.

The medical evidence is as follows: Four doctors examined Beesley -- Dr. Thomas Russell, Dr. Richard Tenney, Dr. J.M. Bazih and Dr. Michael Farrar.

Dr. Russell, a treating physician, examined Beesley several times beginning on December 14, 1990. At that time, Dr. Russell noted the "possibility of a nerve root connection at about L5 level" but recommended only conservative therapy.³ *Record at 158*. On March 11, 1991, Dr. Russell examined Beesley again, concluding that Beesley was

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

³ Dr. Rodney Myers conducted an EMG and nerve conductor study on Beesley December 14, 1990. Dr. Myers found "no significant evidence of a clear-cut neuropathic change." But he concluded there was a possibility of a nerve root contusion at the L5 level. *Id.* at 158.

"unable to carry out his usual employment" at this time. Dr. Russell stated that Beesley could not "carry out any type of employment where bending, lifting, pushing, pulling type activity is involved," *Id.* at 163. On April 14, 1992, Russell again stated that he believed Beesley is "unemployable at any type of work." *Id.* at 177.

The second physician to examine Beesley was Dr. Tenney, a neurological surgeon. Dr. Tenney's January 7, 1991 examination of Beesley was unremarkable, although he found limited range of movement in Beesley's lumbar mobility.⁴ *Id.* at 122. A day later, Dr. Tenney conducted further tests on Beesley, which were, for the most part, also unremarkable.⁵ Dr. Tenney subsequently recommended that Beesley undergo further conservative treatment. *Id.* at 131. On April 8, 1991, Dr. Tenney again examined Beesley.⁶ He noted improvement in his lumbar mobility, but acknowledged that Beesley continued to have pain.

Dr. Bazih examined Beesley on May 1, 1991. His diagnosis was that Beesley had a "mild degenerative disk disease in the lumbar spine." Dr. Bazih recommended Beesley use Parafon Forte, heat pack and a back and muscle exercise program. Dr. Bazih also noted he had no objective explanation for Beesley's complaints of pain.⁷ *Id.* at 114.

⁴ Dr. Tenney found Beesley's lumbar mobility as follows: Flexion was 70 degrees, extension was 10 degrees, right tilt was 30 degrees, left tilt was 30 degrees, right rotation is 20 degrees and left rotation is 20 degrees. *Id.* at 122.

⁵ Dr. Tenney wrote: "[The] myelogram appeared to be virtually normal except for a slight asymmetry of the S1 and S2 nerve roots which were felt to be likely a normal variant." *Id.* at 131.

⁶ Dr. Tenney wrote: "He continues to experience pain in the upper mid lumbar area which radiates into the right buttock and then into the upper anterior tibial region. He also notes a burning of the dorsum of the right foot and a tingling sensation in the plantar surface of the right foot." *Id.* at 142.

⁷ Dr. Bazih wrote: "I am at a loss at this point [as to] why the patient has shown no improvement in his symptoms in spite of seven months of extensive physical therapy and rest. I am pessimistic as to whether the patient will ever be able to go back and do the kind of work he did before of his symptoms improve unless his workmen's compensation case is settled." *Id.* at 114.

Dr. Bazih examined Beesley again two weeks later. Dr. Bazih reiterated that, while Beesley could not longer return to his past work, he had no "objective findings" keeping Beesley from doing so. Dr. Bazih released Beesley from treatment, finding "no evidence of permanent impairment." *Id. at 120.*

Beesley was also examined by Dr. Farrar. On July 1, 1991, Dr. Farrar found Beesley 21 percent impaired. Dr. Farrar also wrote:

It is my opinion that Mr. Beesley will be unable to return to his former work employ. In my opinion, he should be limited to weight lifting of 20 pounds and not perform repetitive lifting, stooping, or bending from the waist. Based upon his past education, training, and experience, it is my opinion he will require vocational rehabilitation and aptitude testing to be able to return to the work force in some acceptable position. His periods of temporary total disability extended form his injury date, October 30, 1990, until the date of this examination, July 1, 1991. *Id. at 151.*

In addition to the medical evidence, Beesley and a Vocational Expert testified during a May 11, 1992 hearing before the ALJ. Beesley, whose previous work was as a machinist, a swimming pool service man and as a carpenter, said severe pain in his back, right leg and right hip prevented him from working. He testified that he "can't lift or bend for any length of time" and that he could not "sit or stand for any length of time." *Id. at 40.* Beesley said his pain rates seven on a scale of 10. *Id. at 41.* He also testified that he can sit for 35 to 45 minutes at a time, stand for 40 minutes at time, lift 15 pounds and work only two to three hours a day. *Id. at 43-48.*

The Vocational Expert testified that Beesley could work at his past relevant work as a machinist and interior carpenter if he were restricted to lifting 25 pounds frequently and 50 pounds occasionally. *Id. at 50.* The expert also testified that, if Beesley was limited

to lifting no more than 20 pounds, he could perform sedentary and light work as a drill press operator, an assembler and as a grinder, buffer and polisher. *Id. at 51.*

Following the hearing, the ALJ found Beesley was not disabled under the Social Security Act. While the medical evidence established that Beesley had "mild degenerative changes in the lumbar spine", the ALJ concluded the impairment did not prevent him from working at medium-level jobs in which he only had to lift 25 pounds frequently and 50 pounds occasionally. In addition, the ALJ noted that he found Beesley's complaints of disabling pain "exaggerated, self-serving and not credible." *Id. at 24.*

III. Legal Analysis

The principal issue is whether substantial evidence supports the Secretary's decision to deny Beesley disability benefits. Entwined with that issue are two questions: (1) whether the ALJ erred in evaluating Beesley's complaints of pain and (2) whether the ALJ improperly questioned the vocational expert.

The issue of whether the ALJ properly found that Beesley does not have disabling pain is easily dismissed. The record clearly shows that the ALJ followed the analysis in *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987). The ALJ found that Beesley had a pain-producing impairment. The ALJ then analyzed the various factors discussed in *Luna* before concluding that Beesley did not have disabling pain. See Record at 20-22. Consequently, this issue is without merit.

Beesley's other two issues cannot be as easily dismissed. First, the Court finds that substantial evidence does not support the ALJ's finding that Beesley can return to medium work.

Medium work is defined as "involv[ing] lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds." 20 C.F.R. §404.1567(c). In addition, the regulations state that

A full range of medium work requires standing or walking, off and on, for a total of approximately 6 hours in an 8-hour workday in order to meet the requirements of frequent lifting or carrying objects weighing up to 25 pounds...the considerable lifting required for a full range of medium work usually requires frequent bending-stooping (stooping is a type of bending in which a person bends his or her body downward and forward by bending the spine at the waist)...In most medium jobs, being one's feet for most of the workday is critical. Being able to do frequent lifting or carrying of objects weighing up to 25 pounds is often more critical than being able to lift up to 50 pounds at a time.

Although the ALJ's opinion, for the most part, thoroughly discusses the evidence, several questions surface. First, Beesley testified that he can lift 15 pounds. Dr. Farrar concluded that Beesley could lift up to 20 pounds. No other medical evidence specifically addresses that issue, but the ALJ found that Beesley could lift 25 pounds frequently and 50 pounds occasionally. The ALJ found Beesley's testimony to not be credible, which is within his province. He also discounted Dr. Farrar's testimony, which he can also do.⁸ But the Court finds no specific medical evidence in the record supporting the fact that Beesley can lift 25 pounds frequently and 50 pounds occasionally.

A similar issue was discussed in *Thompson v. Sullivan*, 987 F.2d 1482, 1491 (10th Cir. 1991). The ALJ found the claimant's testimony to not be credible and eventually found no disability. The *Thompson* court first noted that a finding of a claimant's

⁸The ALJ discounted Dr. Farrar's opinion for the following reasons: (1) The opinion was based more on the claimant's complaints than diagnostic findings; (2) The opinion was "incongruent" with Dr. Tenney's evaluation; (3) Dr. Farrar was not a "treating physician" and (4) Since Dr. Farrar does a "significant number" of workmen's compensation claims, he would be inclined to offer opinions that would assist the claimant. Record at 17. It also should be noted that the ALJ discounted the findings of Russell, Beesley's treating physician because he [Russell] was "exhibiting compassion for his patient's complains" and because Russell's opinions were not supported by the diagnostic findings.

noncredibility does not compel a finding of no disability. The court then wrote:

In making his finding that Ms. Thompson could do the full range of sedentary work, the ALJ relied on the absence of contraindication in the medical records. The absence of evidence is not evidence. The ALJ's reliance on an omission effectively shifts the burden back to the claimant. It is not her burden, however, to prove she cannot work at any level lower than her past relevant work; it is the Secretary's to prove that she can. *Id.* at 1490.

The facts in *Thompson* are different from this case. However, it appears the ALJ rejected evidence supporting Beesley (i.e. his testimony, Dr. Farrar's opinion) on the issue of how much he could lift and arbitrarily came to his own conclusions. Arguably, Beesley's evidence was suspect, but is the only evidence addressing the issue. Once the ALJ found that Beesley could not return to his past relevant work, the burden shifted to the Secretary to establish that Beesley can do other work. *Ragland v. Shalala*, 992 F.2d 1056, 1057 (10th Cir. 1993). Consequently, the Secretary must point to specific evidence showing that Beesley can lift 25 pounds frequently and 50 pounds occasionally.

Another similar concern with the ALJ's opinion concerns how much Beesley can sit and/or stand at one time. He testified that he could sit for 35 to 45 minutes at a time, stand for 40 minutes at time and work **only** two to three hours a day. *Id.* at 43-48. That is the only evidence addressing that issue. None of the other doctors offered any probative evidence on the issue, although Dr. Tenney that Beesley's pain was "accentuated by activity." *Record at 121.* Again, on Step 5, the burden rests with the Secretary. The ALJ discounted Beesley's testimony on his **ability** to sit and stand, but pointed to no other evidence addressing that issue. On this point, the ALJ cannot simply rely on an absence of evidence to meet the Secretary's burden.

In addition, the court in *Thompson* also noted that "pain, even if not disabling, is still a nonextertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant." *Thompson*, 987 F.2d at 1490-1491. Here, the ALJ properly found that Beesley's pain was not disabling. However, it is unclear as to whether the ALJ found Beesley's pain to be insignificant. Four doctors acknowledged that Beesley suffered from pain. Beesley testified that he could no longer work because of his pain. Such evidence suggests that Beesley's pain may be less than disabling but more than insignificant.

A second issue raised by Beesley is that the ALJ improperly questioned the vocational expert. Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991).

Here, the ALJ did not address the sit/stand issue in the hypothetical. Furthermore, he included questions involving a claimant who can lift 25 pounds frequently and 50 pounds occasionally (which he deemed to be true) and one who lift up to 20 pounds (which he apparently deemed to be not credible.) Therefore, for the reasons already stated, the vocational expert's testimony also poses a problem.

The Secretary also argues that, even if the Court finds that Beesley is not capable of medium work, the record still supports the ALJ's finding that Beesley could do light and/or sedentary work. That argument has merit. However, at this juncture, the Court believes it would be more appropriate to remand the case to the Secretary with instructions to have Beesley examined by a consulting physician. A supplemental hearing should then

be held, including the testimony of a vocational expert, to gather more specific evidence on (1) Beesley's contention that he can lift only 15 pounds; (2) Beesley's contention that he has difficulty sitting and/or standing for less than an hour at a time. The case is REMANDED.⁹

SO ORDERED THIS 29th day of July, 1994.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

⁹ Substantial evidence does not support the ALJ's decision that Beesley can return to medium-level work. The Court renders no opinion as to whether Beesley can do light and/or sedentary work. That is the ALJ's decision on remand, in light of the additional evidence.

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

FILED

AUG 11 1994

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

DEBRA GANUS,)
)
 Plaintiff,)
)
 vs.)
)
 METROPOLITAN LIFE INSURANCE)
 COMPANY, DARLENE GANUS,)
 LLOYD S. GANUS and LORI A.)
 EVANS,)
)
 Defendants.)

Case No. 94-CV-472-K

AGREED FINAL JUDGMENT

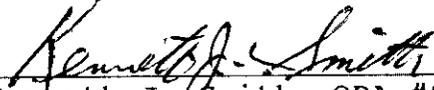
The Court, pursuant to Fed. R. Civ. P. 54 and 58, upon being advised by the parties that they have reached an agreement regarding this dispute involving a \$68,100.00 death benefit which became payable on the death of Lloyd Ganus under an employee benefit plan, hereby enters final judgment as follows:

1) Debra Ganus is entitled \$18,000.00 of the \$68,100.00 death benefit at issue; 2) Darlene Ganus is entitled to \$50,100.00, which is the balance of the \$68,100.00 death benefit at issue; and 3) the other defendants are not entitled to any of the \$68,100.00 death benefit at issue. Metropolitan Life Insurance Company shall therefore issue a check payable to the order of Debra Ganus and her attorney, Joe Francis, in the amount of \$18,000.00,

plus applicable interest thereon, and a check payable to the order of Darlene Ganus and her attorney, Kenneth J. Smith, for \$50,100.00, plus applicable interest thereon. Interest shall be calculated at 6% per annum. Said checks shall be issued and delivered to counsel for those parties on or before August 15, 1994. The parties are further discharged from all claims and liability to each other arising out of the facts and circumstances described in the petition and counterclaim filed herein.


UNITED STATES DISTRICT JUDGE

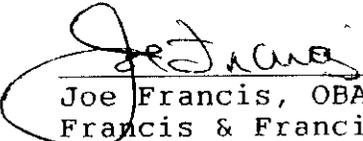
APPROVED:


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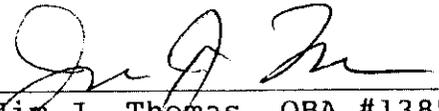
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ATTORNEYS FOR METROPOLITAN
LIFE INSURANCE COMPANY


Jim J. Thomas, OBA #13852
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Tulsa, OK 74101-2365

ATTORNEY FOR LLOYD S. GANUS

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

FILED

AUG 1 - 1994

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

WILLIAM ALLEN JORDAN,)
)
Plaintiff,)
)
vs.)
)
CITY OF COLLINSVILLE, OKLAHOMA,)
a municipal corporation,)
)
Defendant.)

Case No. 93-C-1051-BU

ENTERED ON DOCKET

AUG 2 1994

ORDER

This matter comes before the Court upon the application of Defendant to enter judgment on its motion for summary judgment pursuant to N.D. LR 7.1(C). The Court has reviewed the file and has found no response by Plaintiff to Defendant's application or to Defendant's motion. The Court therefore deems the application and motion confessed pursuant to N.D. LR 7.1(C).

Having conducted an independent review of Defendant's summary judgment motion, the Court finds that no genuine issues of material fact exist and that Defendant is entitled to judgment as a matter of law.

Accordingly, the Application to Enter Judgment on Defendant's Motion for Summary Judgment Pursuant to Local Rule 7.1 (Docket No. 14) and Defendant's Motion for Summary Judgment (Docket No. 12) are GRANTED. Judgment shall issue forthwith.

Entered this 1 day of August, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

15

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

FILED

AUG 1 - 1994

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

WILLIAM ALLEN JORDAN,)
)
 Plaintiff,)
)
 vs.)
)
 CITY OF COLLINSVILLE, OKLAHOMA,)
 a municipal corporation,)
)
 Defendant.)

Case No. 93-C-1051-BU ✓

AUG 2 1994

J U D G M E N T

This action came before the Court upon Defendant's Motion for Summary Judgment, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Defendant, City of Collinsville, Oklahoma, a municipal corporation, and against Plaintiff, William Allen Jordan, and that Defendant, City of Collinsville, Oklahoma, a municipal corporation, recover of Plaintiff, William Allen Jordan, its costs of action.

Dated at Tulsa, Oklahoma, this 1 day of August, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

F I L E D

AUG 1 - 1994

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

NELSON ALVAREZ)
)
Plaintiff,)
)
v.)
)
STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY, a foreign)
corporation,)
)
Defendant.)

Case No. 94-CV-408-BU

ENTERED ON DOCKET

DATE AUG 2 1994

ORDER OF REMAND

On this 29th day of July, 1994, the Motion to Remand filed May 2, 1994 by the Plaintiff herein (Docket entry #7), the Response thereto filed by the Defendant on May 9, 1994 (Docket entry #8) and the Reply to the Response filed by the Plaintiff on May 13, 1994 (Docket entry #9) came before this Court for consideration.

After review of the above-named pleadings, this Court does hereby find that on July 15, 1993, this action was commenced by the Plaintiff with the filing of a petition in the Oklahoma state District Court in and for Tulsa County. Said action sought recovery from the Plaintiff's uninsured/underinsured motorist coverage with the Defendant as the result of alleged damages resulting from an automobile accident. Plaintiff sought damages in excess of \$10,000.00.

Subsequently, on or about March 28, 1994, Plaintiff filed a First Amended Petition, which included an additional cause of action alleging Defendant's breach of its insurance contract with Plaintiff resulting from Defendant's alleged refusal to pay upon demand and that Defendant breached "its duty to deal fairly and in good faith" with Plaintiff. By virtue of the Amended Complaint,

Plaintiff sought actual damages in excess of \$10,000.00 and punitive damages in excess of \$10,000.00. Both Petitions were brought to issue with the filing of answers by the Defendant.

On or about April 22, 1994, Defendant filed a Notice of Removal, removing the above-referenced action to this Court. Plaintiff filed a Motion to Remand on May 2, 1994 to which responsive pleadings were filed.

Removal to federal court is governed by 28 U.S.C. §1446. Removal is effectuated by filing an appropriate notice, such as was accomplished by the Defendant in this case. However, the timing for the filing of the notice is not unfettered. A notice of removal must be filed

within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of the summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable. . .

28 U.S.C. §1446(b).

Defendant alleges that the Amended Complaint raises a "completely new and separate cause of action, sounding in tort. . . therefore allowing the removal of all matters." However, Defendant fails to state how this is so. Defendant cites no authority for the proposition that the addition of a new cause of action in an

amended petition resurrects the thirty day time period for removal. The circumstances of the case demonstrate that the basis of removal existed at the time of the filing of the original petition and the Defendant failed to take the steps necessary to remove the action to this Court in a timely manner. The addition of a second cause of action in and of itself did not alter the deadline for requesting removal.

The burden is upon the party removing to establish his right to do so. Moreover, removal jurisdiction, when challenged by motion to remand must be clearly demonstrated; and if there are significant doubts about its propriety, those doubts must be resolved against removal. State of New Jersey v. Moriarty, 268 F. Supp. 546, 554 (D. N.J. 1967). Defendant has failed to demonstrate its right to remove this action arose with the filing of the Amended Complaint.

IT IS THEREFORE ORDERED THAT the Motion to Remand filed by the Plaintiff (Docket entry #7) is hereby GRANTED. Accordingly, the action is remanded to the District Court for Tulsa County for further disposition.

SO ORDERED THIS 29th DAY OF JULY, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JIM LOWE aka JIMMY W. LOWE;
TENA LOWE aka TENA M. LOWE;
COUNTY TREASURER, Tulsa
County, Oklahoma; and BOARD
OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

FILED

AUG 1 1994

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

CIVIL ACTION NO. 94-C-680-B

ENTERED ON DOCKET

AUG 1 1994

ORDER

DATE

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

Dated this 1st day of August, 1994.

S/ THOMAS R. LEE

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

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

PB/esf

~~NOTE: THIS DOCUMENT IS TO BE FILED IN THE OFFICE OF THE CLERK OF THE COURT AND UPON RECEIPT.~~

~~NOTE: THIS DOCUMENT IS TO BE FILED IN THE OFFICE OF THE CLERK OF THE COURT AND UPON RECEIPT.~~

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	F
)	
vs.)	
)	
CARL NICOSIA; JOYCE NICOSIA;)	
BURNIDGE WELDING SUPPLIES, INC.)	
CITY OF BROKEN ARROW, OKLAHOMA;)	
COUNTY TREASURER, Tulsa County)	
Oklahoma; BOARD OF COUNTY)	
COMMISSIONERS, Tulsa County,)	
Oklahoma,)	
)	
Defendants.)	CIVIL ACTION NO. 94-C 220E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 29 day of July, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **City of Broken Arrow, Oklahoma**, appears by Michael R. Vanderburg, City Attorney; and the Defendants, **Carl Nicosia, Joyce Nicosia, and Burnidge Welding Supplies, Inc.**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Burnidge Welding Supplies, Inc.**, acknowledged receipt of **Summons and Complaint** on March 11, 1994; that the Defendant, **City of Broken Arrow, Oklahoma**,

ENTERED ON DOCKET
DATE 7-1-94

acknowledged receipt of Summons and Complaint on March 21, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 14, 1994; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 11, 1994.

The Court further finds that the Defendants, **Carl Nicosia and Joyce Nicosia**, were served by publishing notice of this action in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning May 5, 1994, and continuing through June 9, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Carl Nicosia and Joyce Nicosia**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **Carl Nicosia and Joyce Nicosia**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary

evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answer on March 23, 1994; that the Defendant, City of Broken Arrow, Oklahoma, filed its Answer on April 15, 1994; and that the Defendants, Carl Nicosia, Joyce Nicosia, and Burnidge Welding Supplies, Inc., have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

LOT NINETEEN (19), BLOCK FOUR (4), FAIRFAX WEST, AN ADDITION TO THE CITY OF BROKEN ARROW, COUNTY OF TULSA, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on December 6, 1984, Arjumund Abid and Sadia Abid, husband and wife, executed and delivered to COMMONWEALTH MORTGAGE CORPORATION their mortgage note in the amount of \$73,386.00, payable in monthly installments, with interest thereon at the rate of twelve and one-half percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Arjumund Abid and Sadia Abid, husband and wife, executed and delivered to COMMONWEALTH MORTGAGE CORPORATION a mortgage dated December 6, 1984, covering the above-described property. Said mortgage was recorded on December 10, 1984, in Book 4832, Page 3145, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 23, 1985, COMMONWEALTH MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to Associates National Mortgage Corporation. This Assignment of Mortgage was recorded on August 12, 1985, in Book 4883, Page 1844, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 20, 1988, Associates National Mortgage Corporation assigned the above-described mortgage note and mortgage to The Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on October 25,

1988, in Book 5136, Page 54, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Carl Nicosia and Joyce Nicosia husband and wife, currently hold the fee simple title to the property by virtue of a General Warranty Deed dated May 17, 1988, and recorded on May 20, 1988 in Book 5100, Page 2434, in the records of Tulsa County, Oklahoma, and that the Defendants Carl Nicosia and Joyce Nicosia, husband and wife, are the current assumptors of the subject indebtedness.

The Court further finds that the Defendants, Carl Nicosia and Joyce Nicosia, made default under the terms of the aforesaid note and mortgage, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Carl Nicosia and Joyce Nicosia, are indebted to the Plaintiff in the principal sum of \$128,953.04, plus interest at the rate of 12.5 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$57.00 which became a lien on the property as of June 26, 1992; and a lien in the amount of \$57.00, which became a lien as of June 25, 1993; and a claim against the subject property in the amount of \$62.00 for the tax year 1993.

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

The Court further finds that the Internal Revenue Service has a lien upon the property by virtue of a Federal Tax Lien, number 739301770, against the Defendant, Carl Nicosia, dated February 2, 1993, and recorded on February 16, 1993 in Book 5477, Page 488, in the records of Tulsa County, Oklahoma; and a Federal Tax Lien, number 739305602, against the Defendant, Carl Nicosia, dated May 10, 1993, and recorded on May 17, 1993, in Book 5503, Page 876, in the records of Tulsa County, Oklahoma; inasmuch as government policy prohibits the joining of another Federal agency as party defendant, the Internal Revenue Service is not made a party hereto; however, the lien will be released at the time of sale should the property fail to yield an amount in excess of the debt to the Plaintiff.

The Court further finds that the Defendant, **City of Broken Arrow, Oklahoma**, has no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

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

The Court further finds that the Defendants, **Carl Nicosia, Joyce Nicosia and Burnidge Welding Supplies, Inc.**, are in default, and have no right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, Carl Nicosia and Joyce Nicosia, in the principal sum of \$128,953.04, plus interest at the rate of 12.5 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.49 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$176.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, City of Broken Arrow, Oklahoma, has no right, title, or interest in the subject real property except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Carl Nicosia, Joyce Nicosia, Burnidge Welding Supplies, Inc. and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$176.00, personal property taxes which are currently due and owing.

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

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

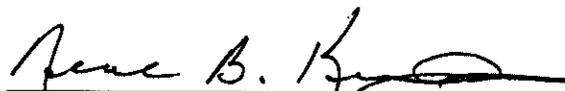
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ JAMES O. ELLISON

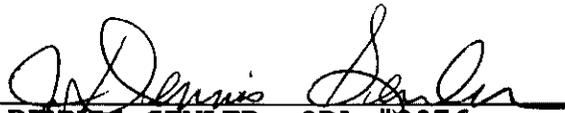
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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



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

Judgment of Foreclosure
Civil Action No. 94-C 220E

NBK:lg

March 3, 1994; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 3, 1994.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, filed his Answer on March 21, 1994; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on March 21, 1994, claiming no right, title or interest in the subject property; and that the Defendant, Larry Wayne Lang aka Larry W. Lang, has failed to answer and his default has therefore been entered by the Clerk of this Court.

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

The North Half (N/2) of the Northeast Quarter (NE/4) of the Northeast Quarter (NE/4) of the Northeast Quarter (NE/4) of Section Twelve (12), Township Twenty-two (22) North, Range Twelve (12) East of the Indian Base and Meridian, Tulsa County, State of Oklahoma, according to the United States Government Survey thereof.

The Court further finds that this is suit brought for the further purpose of judicially determining the death of Paulette Marie Lang and of judicially terminating joint tenancy.

The Court further finds that Larry Wayne Lang aka Larry W. Lang and Paulette Marie Lang became the record owners of the real property involved in this action by virtue of that certain Warranty Deed dated February 22, 1990, from J.C. Mathis as the

Secretary of Veterans Affairs, to Larry Wayne Lang and Paulette Marie Lang, husband and wife, as joint tenants and not as tenants in common, with full right of survivorship, the whole estate to vest in the survivor in the event of the death of either, which Warranty Deed was filed of record on February 26, 1990, in Book 5237, Page 2627 in the records of the County Clerk of Tulsa County, Oklahoma.

The Court further finds that on February 23, 1990, Larry Wayne Lang aka Larry W. Lang and Paulette Marie Lang, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$30,000.00, payable in monthly installments, with interest thereon at the rate of 7.5 percent (7.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Larry Wayne Lang and Paulette Marie Lang, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated February 23, 1990, covering the above-described property. Said mortgage was recorded on February 26, 1990, in Book 5237, Page 2629, in the records of Tulsa County, Oklahoma.

The Court further finds that Paulette Marie Lang died on April 10, 1994. Upon the death of Paulette Marie Lang, the subject property vested in her surviving joint tenant, Larry Wayne Lang aka Larry W. Lang, by operation of law. The

Certificate of Death No. 010406 was issued by the Oklahoma State Department of Health certifying Paulette Marie Lang's death.

The Court further finds that the Defendant, Larry Wayne Lang aka Larry W. Lang, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Larry Wayne Lang aka Larry W. Lang, is indebted to the Plaintiff in the principal sum of \$29,020.39, plus interest at the rate of 7.5 percent per annum from July 1, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$27.84 fees for service of Summons and Complaint.

The Court further finds that Plaintiff is entitled to a judicial determination of the death of Paulette Marie Lang, and to a judicial termination of joint tenancy.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$3.00 which became a lien on the property as of June 25, 1993; and a claim for \$3.00 for the year 1993. Said lien and claim are inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendant, Larry Wayne Lang aka Larry W. Lang, is in default and has no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Larry Wayne Lang aka Larry W. Lang, in the principal sum of \$29,020.39, plus interest at the rate of 7.5 percent per annum from July 1, 1993 until judgment, plus interest thereafter at the current legal rate of _____ percent per annum until paid, plus the costs of this action in the amount of \$27.84 fees for service of Summons and Complaint, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the death of Paulette Marie Lang be and the same is hereby judicially determined to have occurred on April 10, 1994 in the City of Tulsa, County of Tulsa, State of Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the joint tenancy of Larry Wayne Lang aka Larry W. Lang and Paulette Marie Lang in the above-described real property be and the same hereby is judicially terminated as of the date of death of Paulette Marie Lang on April 10, 1994.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$ 6.00 for personal property taxes, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Larry Wayne Lang aka Larry W. Lang and the Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$ 6.00 for personal property taxes which are currently due and owing.

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

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

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



KATHLEEN BLISS, OBA #13625
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
Attorney for Defendant,
County Treasurer,
Tulsa County, Oklahoma

Judgment of Foreclosure
USA v. Larry Wayne Lang, et al.
Civil Action No. 94-C-189-E

KB/esf

FILED

JUL 29 1994

United States District Court

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

Northern DISTRICT OF Oklahoma

ENTERED ON DOCKET

AUG 01 1994

DATE

GEORGE CRITESER,
Plaintiff,

JUDGMENT IN A CIVIL CASE

v.

DONNA E. SHALALA, Dept. Health and Human Services,
Defendant. CASE NUMBER: 92-C-1109-B ✓

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

IT IS ORDERED AND ADJUDGED

that the case be remanded to the Secretary with instructions to **REVERSE** its decision to deny benefits. Plaintiff is awarded benefits from the onset date of March 15, 1987.

7/29/94

Date

Richard M. Lawrence
Clerk - RICHARD M. LAWRENCE

(By) Deputy Clerk

24

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.)
JAMES D. MINTON; VIRGINIA F.)
MINTON, CITY OF GLENPOOL,)
Oklahoma; STATE OF OKLAHOMA)
ex rel. OKLAHOMA TAX COMMISSION;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
Defendants.)

F

ENTERED ON DOCKET
AUG 0 1 1994
DATE _____

CIVIL ACTION NO. 94-C 521E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 29 day
of July, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, **County Treasurer, Tulsa County,**
Oklahoma, and Board of County Commissioners, Tulsa County,
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, **State of**
Oklahoma ex rel Oklahoma Tax Commission, appears not having
previously filed its disclaimer; and the Defendants, **James D.**
Minton, Virginia F. Minton, and City of Glenpool, Oklahoma,
appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendants, **James D. Minton and**
Virginia F. Minton, waived service of Summons on May 24, 1994;
that the Defendant, **City of Glenpool, Oklahoma,** acknowledged
receipt of Summons and Complaint via certified mail on May 23,
1994; and that the Defendant, **State of Oklahoma ex rel Oklahoma**

Tax Commission, acknowledged receipt of Summons and Complaint via certified mail on May 20, 1994.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answer on June 9, 1994; that the Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, filed its Disclaimer on June 8, 1994; and that the Defendants, James D. Minton, Virginia F. Minton, and City of Glenpool, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Sixteen (16), Block Five (5), BRENTWOOD II, an Addition to the City of Glenpool, Tulsa County, State of Oklahoma, according to the recorded Amended plat thereof.

The Court further finds that on December 13, 1992, the Defendants, James D. Minton and Virginia F. Minton, executed and delivered to MIDLAND MORTGAGE CO. their mortgage note in the amount of \$54,7⁵~~7~~0.00, payable in monthly installments, with interest thereon at the rate of twelve and one-half percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, James D. Minton and Virginia F. Minton, husband and wife, executed and

delivered to MIDLAND MORTGAGE CO. a mortgage dated December 13, 1982, covering the above-described property. Said mortgage was recorded on December 21, 1982, in Book 4657, Page 1951, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 7, 1983, Midland Mortgage Co assigned the above-described mortgage note and mortgage to SECURITY PACIFIC MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on February 7, 1983, in Book 4667, Page 851, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 23, 1985, SECURITY PACIFIC MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to MANUFACTURERS HANOVER MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on December 18, 1985, in Book 4913, Page 1243, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 11, 1988, Firemen's Fund Mortgage Corporation fka Manufacturers Hanover Mortgage Corp. assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., his successors and assigns. This Assignment of Mortgage was recorded on October 17, 1988, in Book 5134, Page 1630, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, James D. Minton and Virginia F. Minton, made default under the terms of the aforesaid note and mortgage, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, James D.

Minton and Virginia F. Minton, are indebted to the Plaintiff in the principal sum of \$82,446.17, plus interest at the rate of 12.5 percent per annum from June 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$18.00 which became a lien on the property as of June 30, 1987; a lien in the amount of \$9.00 which became a lien as of June 20, 1991; a lien in the amount of \$40.00 which became a lien as of June 25, 1993; and a claim against the subject property in the amount of \$39.00 for the tax year 1993. Said liens and claim are inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, **James D. Minton, Virginia F. Minton, and City of Glenpool, Oklahoma**, are in default, and have no right, title or interest in the subject real property.

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

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all

instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, **James D. Minton and Virginia F. Minton**, in the principal sum of \$82,446.17, plus interest at the rate of 12.5 percent per annum from June 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.49 percent per annum until paid, plus the costs of this action in plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$106.00 for personal property taxes for the years 1986, 1990, 1992, and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **James D. Minton, Virginia F. Minton, City of Glenpool, Oklahoma, State of Oklahoma ex rel Oklahoma Tax Commission and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$106.00, personal property taxes which are currently due and owing.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession

based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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


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

Judgment of Foreclosure
Civil Action No. 94-C 521E
NBK:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES W. ARTHUR;
CATHY M. ARTHUR;
THE CUMMINS CONSTRUCTION
COMPANY, INC.;
ITT COMMERCIAL FINANCE CORP.;
STATE OF OKLAHOMA ex rel.
Oklahoma Tax Commission;
CITY OF SAND SPRINGS;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

F

ENTERED ON DOCKET

DATE AUG 01 1994

CIVIL ACTION NO. 94-C-28-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 29 day
of July, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, COUNTY TREASURER, Tulsa County,
Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County,
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF
OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION, appears not having
previously filed a Disclaimer; the Defendant, CITY OF SAND
SPRINGS, Oklahoma, appears not having previously filed a
Disclaimer; and the Defendants, JAMES W. ARTHUR, CATHY M. ARTHUR,
THE CUMMINS CONSTRUCTION COMPANY, INC., and ITT COMMERCIAL
FINANCE CORP., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on January 14, 1994; that the Defendant, CITY OF SAND SPRINGS, Oklahoma, acknowledged receipt of Summons and Complaint on January 12, 1994; that the Defendant, THE CUMMINS CONSTRUCTION COMPANY, INC., acknowledged receipt of Summons and Complaint on February 1, 1994, with a written statement disclaiming any interest, however has failed to further answer; the Defendant, ITT COMMERCIAL FINANCE CORP., was served with process on February 18, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 15, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 13, 1994.

The Court further finds that the Defendants, JAMES W. ARTHUR and CATHY ARTHUR, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning April 28, 1994, and continuing through June 2, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, JAMES W. ARTHUR and CATHY ARTHUR, and service cannot be made upon said Defendants within the Northern Judicial

District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, JAMES W. ARTHUR and CATHY ARTHUR. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on February 7, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Disclaimer on February 2, 1994; the

Defendant, CITY OF SAND SPRINGS, Oklahoma, filed its Disclaimer on February 3, 1994; and that the Defendants, JAMES W. ARTHUR, CATHY M. ARTHUR, THE CUMMINS CONSTRUCTION COMPANY, INC., and ITT COMMERCIAL FINANCE CORP., have failed to answer and default has therefore been entered by the Clerk of this Court.

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

Lot Seventeen (17), Block One (1), OAK PARK ADDITION to the City of Sand Springs, in Tulsa County, State of Oklahoma, according to the recorded Plat No. 1878.

The Court further finds that on December 13, 1991, the Defendants, JAMES W. ARTHUR and CATHY ARTHUR, executed and delivered to Mercury Mortgage Co., Inc., their mortgage note in the amount of \$38,457.00, payable in monthly installments, with interest thereon at the rate of Eight and One-Half percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, JAMES W. ARTHUR and CATHY ARTHUR, executed and delivered to Mercury Mortgage Co., Inc., a mortgage dated December 13, 1991, covering the above-described property. Said mortgage was recorded on December 16, 1991, in Book 5368, Page 0276, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 15, 1992, Mercury Mortgage Co., Inc., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on September 15, 1992, in Book 5435, Page 2628, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 1, 1992, the Defendants, JAMES W. ARTHUR and CATHY ARTHUR, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, JAMES W. ARTHUR and CATHY ARTHUR, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, JAMES W. ARTHUR and CATHY ARTHUR, are indebted to the Plaintiff in the principal sum of \$45,058.04, plus interest at the rate of Eight and One-Half percent per annum from December 6, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$22.00 which became a lien on the

property as of June 26, 1992; a lien in the amount of \$12.00 as of June 23, 1993; and a claim in the amount of \$12.00. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, JAMES W. ARTHUR, CATHY M. ARTHUR, THE CUMMINS CONSTRUCTION COMPANY, INC., and ITT COMMERCIAL FINANCE CORP., are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma; STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION; and CITY OF SAND SPRINGS, Oklahoma, claim no right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, JAMES W. ARTHUR and CATHY ARTHUR, in the principal sum of \$45,058.04, plus interest at the rate of Eight and One-Half percent per annum from December 6, 1993 until judgment, plus interest thereafter at the current legal rate of 5.49 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be

advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$46.00 for personal property taxes for the years 1991, 1992, and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, JAMES W. ARTHUR, CATHY M. ARTHUR, THE CUMMINS CONSTRUCTION COMPANY, INC., and ITT COMMERCIAL FINANCE CORP., have no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; and CITY OF SAND SPRINGS, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$46.00, personal property taxes which are currently due and owing.

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

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any

right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-28-E

NBK:flv

ENTERED ON DOCKET
DATE AUG 1 1994

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

FILED

JUL 29 1994

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

DONNA PATRICK,

Plaintiff,

vs.

THE WILLIAMS COMPANIES, INC.,

Defendant.

No. 92-C-1166-K

ORDER

Now before the Court is the motion of the defendant for summary judgment. Plaintiff brings this action alleging violation, in the course of her employment with the defendant, of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and 42 U.S.C. §1981. Defendant contends it is entitled to judgment as a matter of law.

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." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

Upon review of the record, the Court finds that plaintiff was employed by the defendant over a period of years (1977-1992) in the financial section as, first, a Cash Forecasting Assistant, then a Cash Forecasting Analyst and finally a Treasury Analyst, Debt Administration. In the first two positions, she primarily handled covenant compliance calculations, and also consolidated statements and deconsolidated statements for reports. In the third position, her job duties changed and she was given basically the compliance duties (i.e., covenant compliance calculations). Plaintiff, who is black, was terminated in 1992, which termination she alleges was racially motivated.

In response, defendant alleges that prior to 1986 its financial condition was rated "below investment grade", requiring it to finance its ventures primarily through bank borrowings and institutional loans rather than issuing public bonds, and that non-public financing (loans) involve substantially more covenants in the loan documents, including financial restrictions that require constant monitoring to maintain compliance. In 1987, defendant began expanding its in-house legal department, which took over most of the remaining loan agreements and covenant monitoring. This further diminished the need for treasury personnel and plaintiff's involvement in covenant monitoring. In 1990, many of defendant's loan agreements were renegotiated, which resulted in even fewer financial covenants. Defendant's financial condition is now rated "investment grade", allowing it to primarily finance its debt by issuing bonds to the public. This, according to defendant, has

drastically reduced the number of covenants requiring compliance monitoring. In either December, 1991 or January 1992, a study of plaintiff's job indicated that her position was only 52% of a full-time position, which was in part due to defendant now being rated "investment grade". Defendant then eliminated plaintiff's position and reassigned her remaining responsibilities.

A three-part test has been established to determine whether the plaintiff has established a prima facie case under Title VII for a wrongful termination claim. Initially, a plaintiff must show that (i) she belongs to a protected class; (ii) she was qualified and satisfactorily performing her job; and (iii) she was terminated under circumstances giving rise to an inference of discrimination. Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410, 1416-17 (10th Cir.1993). Defendant has not seriously disputed that the first two elements have been established sufficiently to survive summary judgment. As to (iii), plaintiff presents undisputed evidence that her position was the only position eliminated in the Treasury Department. Viewing the record in the light most favorable to the plaintiff, the Court concludes that a prima facie case has been established.

At this point, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the decision which adversely affected the employee. Id. at 1417. Defendant presents as the reason that as a result of the defendant's loan compliance responsibilities being sharply reduced, the Treasury Department could not maintain the plaintiff's position. Once the

defendant has set forth a facially nondiscriminatory reason for the decision, the factual inquiry proceeds to a new level of specificity. The plaintiff assumes the burden to prove that the employment decision was the result of intentional discrimination based on an impermissible motive. The plaintiff can prevail either directly by proving that the employer acted with a discriminatory motive or indirectly by showing that the stated reason for the discharge was a pretext for the sort of discrimination prohibited by Title VII. Id. A finding of pretext does not mandate a finding of illegal discrimination. EEOC v. Flasher Co., 986 F.2d 1312, 1321 (10th Cir.1992). A plaintiff is required to do more than prove that the articulated reasons for choosing her for termination are unworthy of belief. She is required to prove that "the reason for their lack of credence [is] the underlying presence of proscribed discrimination." Id. (quoting Holder v. City of Raleigh, 867 F.2d 823, 828 (4th Cir.1989)). Plaintiff's summary judgment proof must consist of more than a mere refutation of the employer's legitimate nondiscriminatory reason, but must offer some proof that unlawful discrimination motivated the employer's action. Moore v. Eli Lilly & Co., 990 F.2d 812, 815-16 (5th Cir.), cert. denied, 114 S.Ct. 467 (1993). See also St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993). Even though all doubts must be resolved in the nonmovant's favor, allegations alone will not defeat summary judgment. Cone v. Longmont United Hospital Association, 14 F.3d 526, 530 (10th Cir.1994). The issue at this stage is whether plaintiff has offered sufficient evidence that a

reasonable jury could find that defendant intentionally discriminated against her. Durham v. Xerox Corp., 18 F.3d 836, 839 (10th Cir.1994).

With the appropriate standard in view, the Court turns to the evidence present in the record. Initially, defendant points to the statute of limitation contained in 42 U.S.C. §2000e-5(e), which bars alleged discriminatory acts occurring more than 300 days before the filing of plaintiff's charge with the Oklahoma Human Rights Commission (OHRC). Plaintiff filed her OHRC charge on February 24, 1992. Defendant notes many references in plaintiff's materials to incidents which allegedly occurred from 1977 to 1987, and contends that reference to such matters is time-barred. The parties recognize the existence of the continuing violation doctrine, an equitable principle which permits a Title VII plaintiff to challenge incidents which occurred outside the statutory time limitations of Title VII if such incidents are sufficiently related and thereby constitute a continuing pattern of discrimination. Hunt v. Bennett, 17 F.3d 1263, 1266 (10th Cir.1994). To invoke the doctrine, plaintiff must show either (1) a series of related acts taken against a single individual, one or more of which falls within the limitations period, or (2) the maintenance of a company-wide policy of discrimination both before and during the limitations period. Purrington v. University of Utah, 996 F.2d 1025, 1028 (10th Cir.1993). Nonexclusive considerations relevant to the continuing violation question include: (i) subject matter--whether the violations constitute the

same type of discrimination; (ii) frequency; and (3) permanence-- whether the nature of the violations should trigger an employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate. Martin, 3 F.3d at 1415.¹

Plaintiff has made no effort to fit her allegations within the factors articulated above; however, the Court will do so, being required to construe the record favorably to the nonmovant. Plaintiff cannot seriously be said to have attempted to demonstrate a company-wide policy of discrimination. However, a few incidents cited in plaintiff's moving papers were not taken against her as an individual. Therefore, any relevance they might have would fall within this category. Plaintiff contends that during her tenure with defendant, the Treasury Department had about ten employees, of whom three were black females. Plaintiff describes this number as "one-half of the count in the entire company." (Plaintiff's Response to Motion for Summary Judgment at 2). This statement is apparently in reference to "Employer Information Report EEO-1", a form filed with the EEOC by defendant Williams Companies, and dated 11/27/91, which lists 6 as the number of black female professionals working for the defendant. The same form lists 1 female black in

¹ Defendant also urges that the plaintiff is impermissibly raising acts wholly unrelated to her administrative charge. Consideration of complaints not expressly included in an EEOC charge is appropriate where the conduct alleged would fall within the scope of an EEOC investigation which would reasonably grow out of the charges actually made. Martin, 3 F.3d at 1416 n.7. The Court finds that the incidents recited by plaintiff would fall within the scope of such an investigation and may be considered.

the category of "officials and managers", 15 black females under the category of "office and clerical" and 1 black female under the category of "operatives (semi-skilled)." The listed totals are 23 black female employees, 195 white female employees, 3 Hispanic female employees, 2 female Asian or Pacific Islander employees and 13 female American Indian or Alaskan native employees. Plaintiff does not assert that these figures demonstrate systemic discrimination, and defendant has not responded to the figures.

Plaintiff relates a meeting held in 1987 between defendant's top management and minority employees to discuss job discrimination. The meeting was apparently held to discuss the need for more blacks in upper management. Such a meeting is not evidence of discrimination. Plaintiff alleges that in 1987 the Treasury Department had a luncheon but no blacks were invited. Little corroborative detail appears in the record. Finally, plaintiff contends that G.L. Best, a supervisor in the Treasury Department, admitted to her, perhaps in 1989, that there was racism in the department. (Plaintiff's deposition at 83). In the pages of Best's deposition which have been submitted to the Court, neither plaintiff's counsel nor defendant's counsel make an attempt to ascertain if this statement was in fact made. Best is not asked to confirm or deny the remark. However, nowhere does Best state that racism played a role in plaintiff's discharge and there is no evidence in the record that the alleged statement, if made, was in temporal proximity to plaintiff's discharge. Viewing these purported incidents in totality, the Court concludes that they do

not demonstrate a pervasive, institutionalized "system" of discrimination. Purrington, 996 F.2d at 1029. Therefore, the focus becomes those acts outside the statute of limitation allegedly taken against plaintiff herself.

Plaintiff asserts that she was kept from "visibility" to upper management, and was not invited to executive meetings on her special projects. She cites no specific incidents and supplies no dates of these supposed occurrences. She also does not relate whether her treatment differed from that of other Treasury Department employees. Plaintiff relates an incident, without providing the date of occurrence, when defendant tried two different men in a cash forecasting analyst position before finally offering the job to her. (Plaintiff's Response at 2). However, plaintiff does not identify whether these two men were white or black or of some other race. Plaintiff's allegation in this case is discrimination based upon race not upon sex. Accordingly, the alleged incident as it has been presented to the Court is not probative of the claim asserted. Plaintiff cites the 1987 promotion of a white female, Amy Ruf, over plaintiff. Best testified that Ruf was the better candidate and plaintiff has not offered evidence in refutation. Plaintiff asserts that Best stated at the time that the job was "too visible to upper management" and that he did not want his career "set back" by promoting plaintiff. Again, Best was apparently not asked during his deposition regarding these alleged statements. As they stand, they do not carry a racial implication as they could simply refer to consequences of promoting a less-

qualified person.

Plaintiff relates that in August, 1987 she felt she was getting the "runaround" from supervisors Kastl and Best (i.e., lack of clarity as to work assignments). She thought it was discriminatory because she never saw white employees treated in the same fashion. The record does not reflect any factual basis plaintiff had for such "feeling" of discrimination. Nothing before the Court reflects what opportunities plaintiff had to observe other employees discuss work assignments with supervisors. Mere carelessness in delegating work does not rise to the level of discrimination. Next, plaintiff protests that Debbie Fleming was hired from outside the company for a job for which plaintiff applied. (No date for the incident has been provided to the Court.) Plaintiff testified that Best told her that she might grow into the job, but that right now he could not take a chance on her. (Plaintiff's deposition at 102). Again, such a statement does not necessarily suggest racial animus. Best testified that other candidates were stronger than plaintiff. (Best deposition at 17). Best also testified that plaintiff began receiving poor performance reviews in 1990. (Best deposition at 47). The parties have not established for the Court what the relationship in time was between the Fleming hiring and the plaintiff's declining performance reviews.

The preceding paragraph encompasses the incidents involving plaintiff herself which occurred outside of the statute of limitation period. Upon review, the Court concludes that they do

not amount to a "dogged pattern" of discrimination as distinguished from "isolated and sporadic outbreaks." Purrington, 996 F.2d at 1028. No racial epithets or comments carrying racial implications were directed at the plaintiff. She was subjected to a series of "slights" which she has interpreted as racially-motivated. Such subjective interpretation, standing alone, does not establish a pattern sufficient to invoke the continuing violation doctrine. The Court therefore concludes that those incidents referred to by plaintiff which took place 300 days or more prior to the filing of her administrative claim are time-barred.

The Court must next consider those incidents detailed by plaintiff which fall within the statute of limitation. Plaintiff contends that in late 1991, defendant promoted a secretary to the position of paraprofessional to assist Delores Stephens, another black employee in the Treasury Department. Plaintiff states that she was not given the opportunity to do any of that work. She asserts her conclusion that defendant was trying to "squeeze her out by reshuffling the work." (Plaintiff's Response at 4). In its "position statement" submitted to the Oklahoma Human Rights Commission, (attached as Exhibit D to Defendant's Reply Brief herein), defendant stated that plaintiff had been asked to do such work in 1990, that plaintiff had objected to the assignment and that her work contained numerous errors. (Exhibit D at 2). Plaintiff has not rebutted this factual allegation, and her subjective conclusion as to defendant's reason does not satisfy the requisite burden of proof. Plaintiff contends that "toward the

end" of her employment, defendant gave her fewer "special projects" and has stated her opinion that this was an attempt to get her out. (Plaintiff's deposition at 68). The mere fact of declining special projects, which term has not been defined, is consistent with defendant's explanation of reduced workload and does not raise a factual issue as to intentional discrimination. Likewise, plaintiff's complaint of incorrect performance reviews makes no showing of racial bias.

As to plaintiff's discharge itself, she has failed to satisfactorily demonstrate in response to a summary judgment motion that a genuine issue of material fact exists that the discharge was racially motivated. The possible inference to be drawn from the fact that she was the only employee discharged from the Treasury Department is weakened by the fact that other black employees remained within the Department. Plaintiff contends that she was not given the opportunity to transfer to another area, but that at least one other white employee had been given such an opportunity. Best testified in his deposition that company policy did not permit transfer to other departments of employees at plaintiff's low performance level. (Best deposition at 32, 40). Plaintiff had descended below a "three" performance rating and was therefore untransferable. (Id. at 40-41). Patti Kastl denied any discussion of race discrimination in the termination. (Kastl deposition at 69). The Court finds that the evidence related above is insufficient to survive defendant's pending motion.

Two other separate categories of proffered evidence appear in

plaintiff's presentation. First, plaintiff notes that at the time of her discharge, defendant offered her \$15,000 if she would sign a release, waiving her right to sue the company. Plaintiff refused to do so, and now urges that the offer demonstrates discrimination. In Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338 (9th Cir.1987), cert. denied, 484 U.S. 1047 (1988), the appellate court held that the trial court had not abused its discretion in admitting evidence in an ADEA case regarding such an enhanced severance package, reasoning that since no claim was in existence at the time of the offer, Rule 408 F.R.Evid. was not implicated. Id. at 1342-43. Cassino does not hold that such an offer is in any sense determinative of the discrimination issue. It is established that both Title VII and §1981 employment discrimination claims may be waived by agreement. Torrez v. Public Service Co. of New Mexico, Inc., 908 F.2d 687, 689 (10th Cir.1990). The most appropriate treatment of the issue is probably that in Libront v. Columbus McKinnon Corp., 832 F.Supp. 597 (W.D.N.Y.1993), in which the court held that the burden is on the plaintiff to show that such an enhanced severance offer was a subterfuge to evade the purposes of the ADEA. Plaintiff has not presented sufficient evidence that the \$15,000 offered by defendant was a subterfuge to evade the purposes of Title VII.

Plaintiff also seeks to present the testimony of plaintiff's African-American co-worker, Deborah Hart-Seward, to bolster plaintiff's case. The case cited by plaintiff, Hansard v. Pepsi-Cola Metropolitan Bottling Co., 865 F.2d 1461, 1466 (5th Cir.),

cert. denied, 493 U.S. 842 (1989), held, while finding that the trial court did not abuse its discretion in admitting such testimony, that "[c]ourts often have permitted lay witnesses to express opinions about the motivation or intent of a particular person if the witness has an adequate opportunity to observe the underlying circumstances." This Court concludes that Hart-Seward does not meet this test. She did not know the specifics of plaintiff's job. (Hart-Seward deposition at 14). She testified that she did not recall discussing with plaintiff whether the termination was unfair (Id. at 64-65). She testified that she did not know if defendant's treatment of plaintiff was potentially related to race discrimination (Id. at 66). She testified that she agreed with plaintiff's filing a charge against defendant based upon what plaintiff had told her. (Id. at 67). Hart-Seward's ultimate "lay opinion" does not rest upon her own observations, but upon plaintiff's statements to her. Therefore, Hart-Seward's testimony likewise does not establish a factual issue for purposes of the present motion. The Court concludes that summary judgment is appropriate in defendant's favor as to plaintiff's Title VII claim.

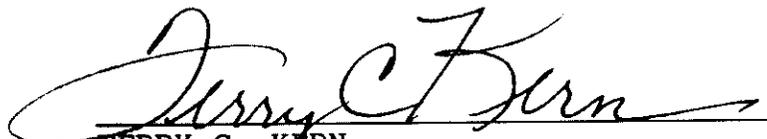
As noted, plaintiff also asserts a claim under 42 U.S.C. §1981.² The allocation of burdens under Title VII applies to

² Defendant perfunctorily raised Patterson v. McLean Credit Union, 491 U.S. 164 (1989), which limited the scope of §1981 by excluding claims based upon conduct by the employer subsequent to the contract relation being established. Defendant now appears to concede that the Civil Rights Act of 1991 superseded Patterson and expanded the scope of §1981 to include such conduct. See 42 U.S.C. §1981(b).

proving intentional discrimination under section 1981 as well. Durham v. Xerox Corp., 18 F.3d 836, 839 (10th Cir.1994). Based upon the reasoning above, (amended only by the fact that a two-year statute of limitation applies to §1981, as noted in Scheerer v. Rose State College, 950 F.2d 661, 664 (10th Cir.1991), cert. denied, 112 S.Ct. 2995 (1992)), the Court, after separate consideration, concludes that defendant is also entitled to entry of summary judgment as to plaintiff's §1981 claim.

It is the Order of the Court that the motion of the defendant for summary judgment is hereby granted.

ORDERED this 28th day of July, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

