

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

AYSEL D. OZTURK,)
)
Plaintiff,)
)
v.)
)
CITY OF TULSA, MAYOR)
SUSAN SAVAGE, TULSA)
POLICE DEPARTMENT, CHIEF)
RON PALMER, OFFICER)
TOMMY TERNEUS, JOAN)
HASTINGS, and JIM SMITH,)
)
Defendants.)

Case No. 94-CV-641-H ✓

ENTERED ON DOCKET

FILED

DATE JUL 20 1995

JUL 19 1995



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

O R D E R

This matter comes before the Court on a Motion to Dismiss by Defendants City of Tulsa ("Tulsa"), Mayor Susan Savage ("Mayor Savage"), the Tulsa Police Department (the "Tulsa Police"), Chief Ron Palmer ("Chief Palmer"), and Officer Tommy Terneus ("Officer Terneus"); a Motion to Dismiss by Defendants Joan Hastings, ("Hastings")¹, Jim Smith ("Smith")², and the Tulsa County Clerk (the "County Clerk"); a Motion to Dismiss by Defendant James M. Lamb ("Lamb"); and a Motion to Amend the Complaint by Plaintiff Aysel D. Ozturk ("Ozturk"). All Defendants argue, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, that Plaintiff's amended complaint fails to state a claim upon which relief can be granted.³

¹ Hastings is the Tulsa County Clerk.

² Smith is an employee in the office of the Tulsa County Clerk.

³ Because Plaintiff has sued individual government officers as well as the government entities where they are employed, the Court construes the lawsuits against the individual Defendants as



Plaintiff Ozturk bases her lawsuit upon Title 42 U.S.C. § 1983 ("Section 1983"). Plaintiff alleges that, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, Officer Terneus falsely arrested her on June 26, 1992 for trespassing.

Specifically, Ozturk claims that she was arrested, handcuffed, removed from her own residence, taken to the Tulsa County police station, and booked on a charge of trespassing at the behest of Lamb and his elderly client, Ayse Sabahat Altinseli. Ozturk was released from jail at 8:00 p.m. on June 26 and instructed to appear in Tulsa Municipal Court on June 30, 1992. The trespassing charge was later dismissed. For purposes of the instant motions to dismiss, the Court, as it must, accepts the factual allegations in Plaintiff's amended complaint as true and construes the allegations in the light most favorable to Plaintiff.⁴

suits in their personal capacity. See Kentucky v. Graham, 473 U.S. 159, 165-66 (1985) ("Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.").

⁴ In addition, because Plaintiff is pro se, the Court holds her complaint "to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972). "We believe that this rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff

To state a claim under Section 1983, Plaintiff must allege facts demonstrating that Defendants deprived her of "a right secured by the Constitution and laws of the United States", Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988), and that the deprivation of this Constitutional right was "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." Id. Plaintiff's claim should not be dismissed "unless it appears beyond doubt that the plaintiff could prove no set of facts in support of [her] claim that would entitle [her] to relief." Id. "Nevertheless, conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." Hall, 935 F.2d at 1110.

It is well settled that a governmental entity cannot be held liable under Section 1983 unless the entity is a "moving force" behind a deprivation of federal rights. Kentucky, 473 U.S. at 166. "The entity's policy or custom must have played a part in the violation of federal law." Id.; City of Oklahoma City v. Tuttle, 471 U.S. 808, 817-18 (1985). Further, the Court may not infer such a policy from a single incident of alleged misconduct. Id.; Meade, 841 F.2d at 1529. Plaintiff makes no factual allegations against the City of Tulsa or the County Clerk in her amended complaint. In fact, despite the inclusion of these Defendants in the caption and

could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements. At the same time, we do not believe it is the proper function of the district court to assume the role of advocate for the pro se litigant." Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

the execution of service of process upon these Defendants, Plaintiff makes no mention of these Defendants in the amended complaint. Plaintiff has not stated a claim as to either the City of Tulsa or the County Clerk.

With respect to the Tulsa Police, Plaintiff only refers directly to the government entity one time.⁵ By implication, however, Plaintiff's amended complaint mentions the Tulsa Police when she refers to "police harassment" which:

continued even after the Plaintiff moved into a new house on 2825 E. 12th. Police officers would park in front of her bedroom window after midnight and speak loudly waking the plaintiff and disturbing her sleep and peace. On one of these occasions the Plaintiff again was awakened by two police cars stopped in front of her bedroom window with their engines running and speaking loudly at 2:00 am in the morning. . . . The same morning around 8:00 am plaintiff's son and his friend found the rear driver side tire of her car flat.

However, even if true, these statements do not allege that the Tulsa Police participated in Plaintiff's alleged false arrest. Instead, these statements are merely superfluous to Plaintiff's claim for relief.⁶ Thus, Plaintiff's amended complaint fails to state a claim against the Tulsa Police as well.

Further, even if the Court were to construe Plaintiff's allegations as asserting a claim for supervisory liability against

⁵ Plaintiff's single reference to the Tulsa Police is that "Plaintiff had to call a friend for [sic] ride to her appointment with an attorney to discuss the case against the Tulsa Police . . . for harassment, malicious prosecution and false arrest." This reference to the instant lawsuit is not sufficient to allege that the Tulsa Police were in fact "a moving force" behind her alleged false arrest.

⁶ At a hearing held on July 13, 1995, Plaintiff stated that her claim rested entirely upon her alleged false arrest on June 26, 1992.

the City of Tulsa, the Tulsa Police, or the County Clerk, Plaintiff's claim still must fail. "A supervisor is not liable under section 1983 unless an affirmative link exists between the constitutional deprivation and either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise." Meade, 841 F.2d at 1527. Here, there are literally no allegations that the City of Tulsa, the Tulsa Police, or the County Clerk had any connection with Plaintiff's alleged false arrest by Officer Terneus.

To establish personal liability in a Section 1983 action, Plaintiff must show that "the official, acting under color of state law, caused the deprivation of a federal right." Kentucky, 473 U.S. at 166. Plaintiff's amended complaint does not contain any allegations that Mayor Savage, Chief Palmer, Hastings, or Smith caused the deprivation of such a right. In fact, her amended complaint does not mention these Defendants. As a result, she fails to state a claim against these Defendants.

Plaintiff complains that Defendant Lamb:

presented himself in the Plaintiff's residence at 1753 S. Xanthus [occupied by Ayse Sabahat Altinseli] with a Notice to Vacate Premises (See Attached). The Plaintiff informed Mr. Lamb of her ownership of the property and showed him her Deed to which he said he had his own copy of the Deed and the Contract and that they were Null and Void and that he would call the police if the Plaintiff refused to leave. Needless to say he called the police. . . Officer Terneus was told by Mr. Lamb that the Plaintiff was trespassing [sic] and refused to leave.

However, Plaintiff does not allege that Lamb was acting under the authority of state law.⁷ Thus, her amended complaint fails to state a claim against Defendant Lamb.

At the July 13, 1995 hearing, the Court permitted Officer Terneus to join in the Motion to Dismiss made by Tulsa, Mayor Savage, the Tulsa Police, and Chief Palmer. However, there are no arguments in the moving papers of those Defendants applicable to Officer Terneus. The amended complaint centers around the alleged conduct of Officer Terneus relating to Plaintiff's alleged false arrest. In his answer, Officer Terneus asserts that he is immune from Plaintiff's lawsuit under the doctrine of qualified immunity:

[q]ualified immunity is an affirmative defense against section 1983 claims. Its purpose is to shield public officials from undue interference with their duties and from potentially disabling threats of liability. The defense provides immunity from suit, not merely from liability. Its purpose is to spare defendants the burden of going forward with trial. However, qualified immunity is not a defense when officials' actions violate clearly established constitutional rights. The question of qualified immunity therefore dovetails almost precisely with the substantive inquiry in a section 1983 action; both depend on the specific contours of the constitutional right at issue.

Wilson v. Meeks, 52 F.3d 1547, 1552 (10th Cir. 1995).

Because Officer Terneus did not address his affirmative defense in his motion papers, the Court grants him leave to supplement his motion by August 8, 1995. Plaintiff is granted until August 29, 1995 to respond to Officer Terneus' supplemental filing. If Officer Terneus presents evidence outside the pleadings

⁷ It is undisputed that Lamb is not employed by any government entity. At all times mentioned in the amended complaint, he was representing Mrs. Altinseli as her private attorney and her legal guardian.

in his supplemental filing, then Plaintiff shall be on notice that the Court intends to treat his motion as one for summary judgment, and Plaintiff should fashion her response accordingly.

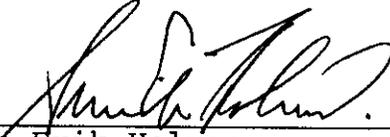
Finally, on July 13, 1995, Plaintiff filed a motion for leave of court to file a second amended complaint. Plaintiff seeks to add Officer Jonella Griffith, Assistant City Prosecutor Alvin Hayes, and the District Attorney's Office as defendants. "[W]hen justice requires", the Court may, in its discretion, permit a party to amend its pleading. Fed. R. Civ. P. 15(a). None of the allegations in Plaintiff's proposed second amended complaint cure the deficiencies in the amended complaint relied upon by the Court herein. Further, at the July 13, 1995 hearing, Plaintiff admitted that the claims she seeks to assert are not related to her alleged false arrest by Officer Terneus. Additionally, the Court notes that Assistant City Prosecutor Alvin Hayes is immune from prosecution under Section 1983. See, e.g., Meade, 841 F.2d at 1532 ("prosecutor enjoys absolute immunity from damages under § 1983 when he initiates a prosecution and presents the State's case"). For the reasons articulated here, the Court denies Plaintiff leave to file a second amended complaint. Cf. Hall, 935 F.2d at 1110 ("when it is patently obvious that the plaintiff could not prevail on the facts alleged . . . allowing him an opportunity to amend his complaint would be futile.").

In conclusion, the Court grants the Motion to Dismiss by Defendants Joan Hastings, Jim Smith, and the Tulsa County Clerk (Docket # 9). The Court grants the Motion to Dismiss by Defendants

Tulsa, Mayor Savage, the Tulsa Police, Chief Palmer (Docket # 12). The Court declines to rule on the Motion to Dismiss by Defendant Officer Terneus (Docket # 12). Officer Terneus is directed to file a supplemental brief no later than August 8, 1995. Plaintiff then has until August 29, 1995 to respond to the supplemental filing. The Court denies Plaintiff's Motion to File a Second Amended Complaint (Docket # 26).

IT IS SO ORDERED.

This 19TH day of July, 1995.



Sven Erik Holmes
United States District Judge

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

FILED

JUL 19 1995

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

RICHARD EUGENE MICKEY,)
)
 Plaintiff,)
)
 vs.)
)
 RICK HUDLEY, and CHARLES)
 GALIPEAU,)
)
 Defendants.)

No. 94-C-959-B

ENTERED ON DOCKET
DATE JUL 20 1995

JUDGMENT

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby **enters judgment** in favor of all Defendants, Charles Galipeau and Rick Hudley, and against Plaintiff, Richard Eugene Mickey. Plaintiff shall take nothing on his claim. Each side is to pay its respective **attorney fees**.

SO ORDERED THIS 19 day of July, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 19 1995

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

RICHARD EUGENE MICKEY,)
)
 Plaintiff,)
)
 vs.)
)
 RICK HUDLEY, et al.,)
)
 Defendants.)

No. 94-C-959-B

ENTERED ON DOCKET
DATE JUL 20 1995

ORDER

Plaintiff, a state prisoner appearing pro se and in forma pauperis, brings this action pursuant to 42 U.S.C. § 1983, alleging that his equal protection rights were violated when he was placed in the custody of the Tulsa County Jail pending escape charges while other inmates who escaped were allegedly punished less severely. Plaintiff also alleges "police brutality" and that he was subjected to "pepper gas and beatings" in violations of his Eighth and Fourteenth Amendment rights. Defendants have moved for summary judgment on the basis of the court-ordered Martinez report. See Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978); Worley v. Sharp, 724 F.2d 862 (10th Cir. 1983). Although Plaintiff has objected, he has failed to submit counter-affidavits or other responsive material as set out in this Court's May 9, 1995 order. For the reasons stated below, the Court concludes that Defendants' motion for summary judgment should be granted.

I. BACKGROUND AND PROCEDURAL HISTORY

The following facts are undisputed.

On May 15, 1994, at approximately 5:30 p.m., officials at

Tulsa Community Corrections Center (TCCC) confirmed that Plaintiff was missing and reported him as an escapee at large. After searching visitor records and determining that Lyn Powell had visited Plaintiff for the past several weekends, Charles Galipeau, Chief of Security for TCCC, Officer Terry Ray, and Tulsa Police Officers Emery and Painter went to Ms. Powell's residence where they discovered Plaintiff hiding behind clothes in the back of a closet. Although the officers ordered Plaintiff to exit the closet, he refused, struck out at Officer Emery, and struggled to remain at the back of the closet. Officer Emery then sprayed Plaintiff in the face with a one second burst of oleoresin capsicum spray. Plaintiff, however, continued to refuse to exit the closet. Therefore, Officer Emery reached into the closet and pulled Plaintiff out by the hair. As Plaintiff was being pulled from the closet, he tripped and fell. Chief Galipeau then handcuffed him and took him outside where Ms. Powell was allowed to wipe Plaintiff's face with a wet towel. Plaintiff was then taken into custody and placed in the Restrictive Housing Unit at TCCC. (Special Report, attachments B, J, K, L, M.)

Upon examination, Registered Nurse David Turney determined that Plaintiff was too intoxicated to audibly respond to verbal questioning. Nurse Turney also determined that Plaintiff was not in acute distress and that he did not exhibit any apparent abnormalities. The next morning, when Plaintiff complained of right lower leg pain, Nurse Turney diagnosed Plaintiff as having a deep tissue bruise and prescribed an anti-inflammatory medication.

(Special Report, attachment N.)

On October 12, 1994, Plaintiff filed the instant complaint against Chief Galipeau and Officer Hudley. He alleges that he was subjected to "pepper gas and beatings." He further alleges that he "has been placed in the custody of Tulsa Co. Jail pending disposition of case - yet other inmates who have been on 'Escape Status' have been allowed to be punished in less sever [sic] way [sic] yet their situations were far more extreme." (Complaint at 3.) In addition to costs and attorney fees, Plaintiff seeks "any and all further relief whether general or specific, actual or equitable which this Court deems fair, just and reasonable."¹

II. SUMMARY JUDGMENT

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988)). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing

¹On October 25, 1994, the Court dismissed as frivolous Plaintiff's claim in Count I of the complaint that Defendants negligently failed "to exercise [their] authority" to prevent Plaintiff from going on the roof of TCCC and leaving the facility while he was drunk. (Docket #4.)

that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Applied Genetics, 912 F.2d at 1241 (citing Celotex Corp v. Catrett, 477 U.S. 317, 324 (1986)). Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the non-movant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a pro se plaintiff is a prisoner, a court authorized "Martinez Report" (Special Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. On summary judgment, the court may treat the Martinez Report as an affidavit, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. This process is designed to aid the court in fleshing out possible legal bases of relief from unartfully drawn pro se

prisoner complaints, not to resolve material factual disputes. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

III. ANALYSIS

A. Equal Protection

In support of his claim that he was discriminated against, Plaintiff refers to the following example: "One female inmate who walked off on the same day was never placed in County Jail. She was taken back into the system, & was not even charged with escape until she filed a writ." (Complaint at 3, emphasis in original.) The undisputed summary judgment evidence indicates that Inmate Golden, the female inmate to which Plaintiff refers, was apprehended on May 16, 1994, and transported to TCCC and then to Eddie Warrior Correctional Center. The Tulsa County District Attorney's Office filed escape charges against her on May 17, 1994. TCCC also charged Inmate Golden with a misconduct for Escape and Inmate Golden subsequently pled guilty. (Special Report, Attachments G and H.)

After viewing the evidence in the light most favorable to Plaintiff, the Court concludes that Plaintiff has failed to establish that Defendants intentionally or purposefully discriminated against him, see Brisco v. Kusper, 435 F.2d 1046,

1052 (7th Cir. 1970) (the "Equal Protection Clause has long be limited to instances of purposeful or invidious discrimination rather than erroneous or even arbitrary administration of state powers"), or that he is a member of a protected group. Plaintiff's equal protection allegation is simply based on the alleged deprivation of an individual right. See Gamza v. Aquirre, 619 F.2d 449, 453 (5th Cir. 1980) (holding that "isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause"). Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's equal protection claim.

B. Police Brutality and Use of Pepper Gas

In his last claim, Plaintiff alleges "police brutality" when he was subjected to "pepper gas and beatings." The undisputed summary judgment evidence reveals that a Tulsa Police Officer sprayed Plaintiff's face with oleoresin capsicum spray after he resisted arrest. Plaintiff, however, has not named the Police Officer as a defendant in this action and there remain no genuine issues of material fact that Chief Galipeau, although present during the conduct at issue, did not personally participate in the challenged action. See Meade v. Grubbs, 841 F.2d 1512, 1528 (10th Cir. 1988) (a defendant cannot be liable under section 1983 unless that defendant personally participated in the challenged action). The only contact that Chief Galipeau had with Plaintiff was after Plaintiff had been sprayed in the face and removed from the closet.

Nevertheless, the court concludes that the alleged conduct did not amount to a constitutional violation under the Eighth Amendment's prohibition against cruel and unusual punishment.² De minimis application of force, such as the one at issue in this case, is excluded from the Eighth Amendment's cruel and unusual punishment calculation. Hudson v. McMillian, 503 U.S. 1, 9-10, 112 S.Ct. 995, 1000 (1992); see also Sampley v. Ruetters, 704 F.2d 491, 494 (10th Cir. 1983); El'Amin v. Pearce, 750 F.2d 829 (10th Cir. 1984). Accordingly, Defendants are entitled to judgment as a matter of law on this claim as well.

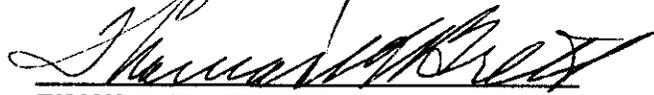
III. CONCLUSION

After viewing the evidence in the light most favorable to Plaintiff, the Court concludes that Defendants have made an initial showing negating all disputed material facts, that Plaintiff has failed to controvert Defendants' summary judgment evidence, and that Defendants are entitled to judgment as a matter of law. Accordingly, Defendants' motion for summary judgment is hereby

²The same analysis would apply even if Plaintiff had alleged excessive force in violation of his Fourth Amendment rights against unreasonable searches and seizures. See Graham v. Connor, 490 U.S. 386, 394-95 (1989); Austin v. Hamilton, 945 F.2d 1155, 1160 (10th Cir. 1991), abrogated on other grounds, Johnson v. Jones, 115 S.Ct. 2151 (1995).

granted.

SO ORDERED THIS 19th day of July, 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 18 1995

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 TERRY E. WARD; UNKNOWN SPOUSE)
 OF TERRY E. WARD, IF ANY; LORI)
 R. WARD aka LORI PERKINS;)
 DAVID WAYNE PERKINS; STATE OF)
 OKLAHOMA ex rel OKLAHOMA TAX)
 COMMISSION; SNOWCREST)
 CONDOMINIUM ASSOCIATION, INC.;)
 COUNTY TREASURER, Tulsa)
 County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET

DATE JUL 19 1995

Civil Case No. 94-C 891B

AMENDED JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18th day
of July, 1995. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Loretta F. Radford, Assistant United States
Attorney; the Defendants, **County Treasurer, Tulsa County,**
Oklahoma, and Board of County Commissioners, Tulsa County,
Oklahoma, appear by Dick A. Blakeley, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, **State of**
Oklahoma ex rel Oklahoma Tax Commission, appears by Assistant
General Counsel Kim D. Ashley; and the Defendants, **Terry E. Ward,**
Unknown Spouse of Terry E. Ward, if any, Lori R. Ward aka Lori
Perkins, David Wayne Perkins, and Snowcrest Condominium
Association, Inc., appear not, but make default.

NOTE: THIS ORDER IS TO BE MAILED
BY MOVANT TO ALL CO-DEFENDANTS AND
PRO SE LITIGANTS PERSONALLY
UPON RECEIPT.

The Court being fully advised and having examined the court file finds that the Defendant, Lori R. Ward aka Lori Perkins will hereinafter referred to as "(Lori R. Ward)"; and the Defendant, Lori R. Ward and Terry E. Ward were granted a Decree of Divorce on December 11, 1989, case number FD 89-6147, in Tulsa County District Court, Tulsa County, Oklahoma.

The Court being fully advised and having examined the court file finds that the Defendant, **Terry E. Ward**, acknowledged receipt of Summons and Complaint via Certified Mail on October 21, 1994; and that the Defendant, **Snowcrest Condominium Association, Inc.**, waived service Summons on October 17, 1994.

The Court further finds that the Defendants, **Unknown Spouse of Terry E. Ward, if any, Lori R. Ward, and David Wayne Perkins**, 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 February 16, 1995, and continuing through March 23, 1995, 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, **Unknown Spouse of Terry E. Ward, if any, Lori R. Ward, and David Wayne Perkins**, 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, **Unknown Spouse of Terry E. Ward, if any, Lori R. Ward, and David Wayne Perkins**. 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 Loretta F. Radford, 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 Answer on September 28, 1994; that the Defendant, **States of Oklahoma ex rel Oklahoma Tax Commission**, filed its Answer on October 19, 1994; and that the Defendants, **Terry E. Ward, Unknown Spouse of Terry E. Ward, if any, Lori R. Ward, David Wayne Perkins, and Snowcrest Condominium Association**,

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 TWENTY-FIVE (25), BLOCK EIGHT (8),
ROSEWOOD ADDITION TO THE CITY OF TULSA,
COUNTY OF TULSA, STATE OF OKLAHOMA,
ACCORDING TO THE RECORDED PLAT THEREOF.**

The Court further finds that on September 23, 1986, the Defendants, Terry E. Ward and Lori R. Ward, executed and delivered to FIRSTIER MORTGAGE CO. their mortgage note in the amount of \$49,400.00, 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, Terry E. Ward and Lori R. Ward, then husband and wife, executed and delivered to FIRSTIER MORTGAGE CO. a mortgage dated September 23, 1986, covering the above-described property. Said mortgage was recorded on September 26, 1986, in Book 4972, Page 1294, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 6, 1988, FirstTier Mortgage Co., (formerly known as Realbanc, Inc.) assigned the above-described mortgage note and mortgage to LEADER FEDERAL SAVINGS & LOAN ASSOCIATION. This Assignment of Mortgage was

recorded on September 20, 1988, in Book 5129, Page 450, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 2, 1990, LEADER FEDERAL BANK FOR SAVINGS assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT, 451 SEVENTH STREET, SW, WASHINGTON D.C. 20410, his successors in office and assigns. This Assignment of Mortgage was recorded on March 7, 1990, in Book 5239, Page 2488, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1990, the Defendants, Terry E. Ward and Lori R. Ward, then husband and wife, 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 February 1, 1991.

The Court further finds that the Defendants, Terry E. Ward and Lori R. Ward, 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, **Terry E. Ward and Lori R. Ward**, are indebted to the Plaintiff in the principal sum of \$68,747.32, plus interest at the rate of 8.5 percent per annum from August 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 \$16.00 which became a lien on the property as of June 23, 1994; and a lien in the amount of \$21.00 which became a lien as of June 26, 1992. Said liens 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 March 1, 1984, filed on March 28, 1984 in the records of Tulsa County, Oklahoma, in the current amount of \$1681.30. Said lien is superior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, **Terry E. Ward, Unknown Spouse of Terry E. Ward, Lori R. Ward, David Wayne Perkins, and Snowcrest Condominium Association, 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, **Terry E. Ward and Lori R. Ward**, in the principal sum of \$68,747.32, plus interest at the rate of 8.5 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.53 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 \$37.00 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 current amount of \$1681.30, for a tax warrant.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Terry E. Ward, Unknown Spouse of Terry E. Ward, if any, Lori R. Ward, David Wayne Perkins, Snowcrest Condominium Association, 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, **Terry E. Ward and Lori R. Ward**, 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 Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of \$1681.30 for a tax warrant.

Third:

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

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$37.00, 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.

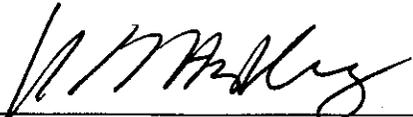
S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463


KIM D. ASHLEY, OBA #14175
Assistant General Counsel
P.O. Box 53248
Oklahoma City, OK 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma ex rel
Oklahoma Tax Commission


DICK A. BLAKELEY, OBA #852
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 891B

LFR:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JUL 14 1995

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 BILLY B. BERRY;)
 MARY CATHRINE BERRY;)
 FEDERAL NATIONAL MORTGAGE)
 ASSOCIATION;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
 CITY OF TULSA;)
)
 Defendants.)

FILED
JUL 14 1995
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT
~~FILED~~
JUL 14 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
ENTERED ON DOCKET
DATE 19 1995
CIVIL ACTION NO. 95-C-0075-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 14 day of July, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, Federal National Mortgage Association, appears not, having previously filed its Disclaimer; the Defendant, City of Tulsa, appears by Alan L. Jackere, Assistant City Attorney, Tulsa, Oklahoma; and the Defendants, Billy B. Berry and Mary Cathrine Berry, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Billy B. Berry, executed a Waiver of Service of Summons on January 31, 1995

NOTE: THIS ORDER IS TO BE MAILED BY ADOVAT... PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

13

which was filed on February 6, 1995; that the Defendant, **Mary Cathrine Berry**, executed a Waiver of Service of Summons on January 31, 1995 which was filed on February 6, 1995; that the Defendant, **Federal National Mortgage Association**, executed a Waiver of Service of Summons through its vice president Addison Terry, Jr., on April 7, 1995 which was filed on April 12, 1995; that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, was served on January 25, 1995 by certified mail, return receipt requested, delivery restricted to the addressee; that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, was served on January 25, 1995 by certified mail, return receipt requested, delivery restricted to the addressee.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answers on February 6, 1995; that the Defendant, **Federal National Mortgage Association**, filed its Disclaimer on June 1, 1995; that the Defendant, **City of Tulsa**, filed its Answer on April 6, 1995; and that the Defendants, **Billy B. Berry and Mary Cathrine Berry**, 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 Nine (9), in VALLEY VIEW ACRES ADDITION to the City of Tulsa, in Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on November 6, 1986, the Defendants, Billy B. Berry and Mary Cathrine Berry, 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 \$20,000.00, payable in monthly installments, with interest thereon at the rate of 10 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Billy B. Berry and Mary Cathrine Berry, 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 real estate mortgage dated November 6, 1986, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on November 7, 1986, in Book 4981, Page 657, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Billy B. Berry and Mary Cathrine Berry, 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, **Billy B. Berry and Mary Cathrine Berry**, are indebted to the Plaintiff in the principal sum of \$16,490.97, plus accrued interest in the amount of \$959.52 as of December 1, 1994, plus interest accruing thereafter at the rate of 10 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, **Federal National Mortgage Association**, disclaims any right, title or interest in or to the real property.

The Court further finds that the Defendants, **County Treasurer, Tulsa County, Oklahoma 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, **City of Tulsa**, has a lien on the property which is the subject matter of this action by virtue of a Notice of Lien recorded on January 19, 1995, in Book 5687, Page 0108 in the records of Tulsa County, Oklahoma, in the amount of \$320.00, plus penalties and interest, for trash, junk, and debris removal from the subject property. Said lien is superior to the interest of the Plaintiff, United States of America.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment against the Defendants, **Billy B. Berry and Mary Cathrine Berry**, in the principal sum of \$16,490.97, plus accrued interest in the amount of \$959.52 as of December 1, 1994, plus interest accruing thereafter at the rate of 10 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.53 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **City of Tulsa**, have and recover judgment in the amount of \$320.00, plus penalties and interest, for trash, junk, and debris removal from the subject property, by

virtue of a Notice of Lien recorded on January 19, 1995, in Book 5687, Page 0108 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Federal National Mortgage Association; County Treasurer, Tulsa County, Oklahoma; 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, **Billy B. Berry and Mary Cathrine Berry,** 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:

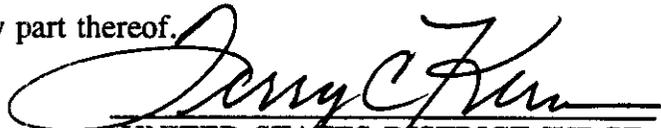
In payment of the judgment rendered herein in favor of the Defendant, City of Tulsa;

Third:

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

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

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


UNITED STATES DISTRICT JUDGE

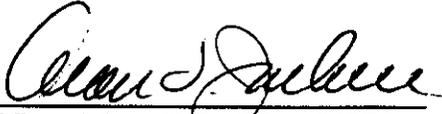
APPROVED:

STEPHEN C. LEWIS
United States Attorney


PHIL PINNELL, OBA #7169
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463


DICK A. BLAKELEY, OBA #0852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4835
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Case No. 95-C-0075-K
PP:css



ALAN L. JACKERE, OBA #4576

Assistant City Attorney

200 Civic Center, Room 316

Tulsa, Oklahoma 74103-3827

(918) 596-7717

Attorney for Defendant,
City of Tulsa

JUL 17 1995

Judgment of Foreclosure
Case No. 95-C-0075-K
PP:css

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

FILED

JUL 18 1995

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

ROBERT G. TILTON, an)
individual,)
)
Plaintiff,)
)
vs.)
)
CAPITAL CITIES/ABC INC., a)
New York corporation; et al.,)
)
Defendants.)

No. 92-C-1032-BU

ENTERED ON DOCKET
DATE JUL 19 1995

ORDER

This matter comes before the Court upon Plaintiff's Motion to Reconsider Order of May 24, 1995, Granting Defendants' Motion to Compel Production of Documents and Things and/or in the Alternative, Application for Stay of Order. Defendants have responded and Plaintiff has replied thereto.

Upon review, the Court finds Plaintiff's motion should be denied and Plaintiff's alternative application should be granted. The Court concludes Plaintiff has failed to provide a sufficient basis for the Court to reconsider its May 24, 1995 Order granting Defendants' motion to compel. However, the Court finds that a stay of Plaintiff's production of the requested documents is appropriate pending resolution of the appellate process.

Accordingly, Plaintiff's Motion to Reconsider Order of May 24, 1995, Granting Defendants' Motion to Compel Production of Documents and Things (Docket Entry #335-1) is DENIED. Plaintiff's Application for Stay of Order (Docket Entry #335-2) is GRANTED. Plaintiff's counsel is DIRECTED to maintain and store the requested

349

documents at his office until final resolution of the appellate process.

DATED this 17th day of July, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

JUL 18 1995

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

ROBERT G. TILTON, an)
individual,)
)
Plaintiff,)
)
vs.)
)
CAPITAL CITIES/ABC INC., a)
New York corporation; et al.,)
)
Defendants.)

No. 92-C-1032-BU

ENTERED ON DOCKET
DATE JUL 19 1995

ORDER

This matter comes before the Court upon Plaintiff's Motion to Reconsider Order of May 24, 1995, Directing Plaintiff to Return Copies of Certain Documents, and/or, in the Alternative, Application for Stay of Order. Defendants have responded and Plaintiff has replied thereto.

Upon due consideration, the Court finds Plaintiff's motion should be denied. The Court concludes Plaintiff has failed to provide a sufficient basis for the Court to reconsider its May 24, 1995 Order denying Plaintiff's request for unrestricted use at trial of 15 documents containing unpublished information concerning W.V. Grant and Larry Lea, and directing the return of 15 documents to Defendants. As to Plaintiff's alternative application, the Court finds a stay should be granted to the extent Plaintiff seeks appellate review of the Court's ruling in regard to these documents. If Plaintiff fails to seek appellate review of the Court's ruling, Plaintiff shall immediately return the documents to Defendants.

Accordingly, Plaintiff's Motion to Reconsider Order of May 24, 1995, Directing Plaintiff to Return Copies of Certain Documents (Docket Entry #336-1) is DENIED. Plaintiff's Application for Stay of Order (Docket Entry #336-2) is GRANTED to the extent above stated.

DATED this 17 day of July, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED
JUL 18 1995
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CHARLES FIELDS,
Petitioner,
vs.
RON CHAMPION,
Respondent.

No. 94-C-440-K

ENTERED ON DOCKET
DATE JUL 19 1995

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his conviction in Tulsa County District Court for Possession of Controlled Dangerous Substance, Possession of Controlled Dangerous Substance with intent to Distribute, and Carrying a Firearm, Case Nos. CRF-87-4637, CRF-87-4639, and CRF-88-306. Respondent filed a Rule 5 Response to which Petitioner replied. As more fully set out below, the Court concludes this petition should be denied.

I. BACKGROUND

On April 18, 1988, Petitioner pled guilty in Case Nos. CRF-87-4637, CRF-87-4639, and CRF-88-306. The second page of the Information listed a 1984 prior felony conviction as two separate convictions for enhancement purposes. At a mitigation and sentencing hearing on June 10, 1988, Petitioner's retained counsel, William John Patterson, argued that the felony acts in the prior conviction were transactional, as the burglaries occurred later one night and in the morning hours of the next day, and therefore,

should be considered as one single felony conviction for enhancement purposes. The Court rejected defense counsel's argument and ruled that Petitioner's two-count felony conviction required a mandatory minimum sentence of twenty years in CRF-88-306 and CRF-87-4639, and ten years in CRF-87-4637. The sentences were ordered to run concurrently. (Tr. at 17, 25, 28-29.)

Thereafter the Court informed Petitioner of his right to appeal and/or to withdraw his guilty pleas and inquired if Petitioner desired immediate transportation to the Oklahoma Department of Corrections. Mr. Patterson declined immediate transportation because he "would like to take up the matter of two or more felonies on the second page" on appeal. (Tr. at 28.) Mr. Patterson, neither appealed nor timely filed a motion to withdraw the guilty pleas, and on March 12, 1990, Petitioner filed a complaint with the Oklahoma Bar Association (OBA). (March 12, 1990 complaint, attached to Petitioner's response, doc. #7.) Although the OBA twice directed Mr. Patterson to file an application for post-conviction relief, he refused to file one until February 11, 1991.¹ The district court denied relief and Petitioner appealed pro se. In December 1992, the Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief and found that Petitioner had not asserted any sufficient reason why he failed to appeal his convictions. The Court also found that he had "not

¹In the application for post-conviction relief, Mr. Patterson contended, as he did at the mitigation and sentencing hearing, that the former convictions used to enhance Petitioner's current sentence should have been considered as a single former conviction.

indicate[d] that he instructed counsel to take such action." (Exs. A attached to Respondent's Response, Doc. #4.)

After filing two additional requests for post-conviction relief, Petitioner initiated the instant action for a writ of habeas corpus.² He requests "an appeal out of time on his convictions and pleas of guilty as he was not properly advised of his rights to appeal." (Doc. #1 at 5.) He alleges that he should be granted an appeal out of time because his waiver of an appeal was not knowing, intelligent, and voluntary. "In each of [the] plea and sentencing hearings . . . , the court failed to advise the Petitioner that if he desired to appeal [his] convictions, that he could receive appellate counsel at public expense, and case made on appeal at public expense." Petitioner also alleges that counsel failed to advise him of his appeal rights. (Id. at 5-6.) Lastly, Petitioner challenges his convictions as constitutionally invalid in that they were improperly enhanced. (Id. at 6.)

Respondent has raised the defense of procedural default. He claims that Petitioner procedurally defaulted his claims when he failed to appeal his guilty plea convictions. Petitioner replies that the procedural default doctrine is not applicable where, as in the instant case, his counsel failed to follow the correct procedures and Petitioner was denied an appeal through no fault of his own. (Doc. #7.) In a supplemental brief filed on October 18,

²In his second and third applications, Petitioner alleged respectively that the plea agreement was constitutionally defective and that the prosecutor improperly viewed a video tape of Petitioner committing the crimes of which he was charged.

1994, Petitioner argues for the first time that his counsel's statement at sentencing--that he "would like to take up the matter of two or more felonies on the second page" on appeal--amounts to a declaration that he would file a direct appeal and is sufficient to bind him to his duty to file a direct appeal under Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991); Abels v. Kaiser, 913 F.2d 821 (10th Cir. 1990), and Jones v. Cowley, 28 F.2d 1067 (10th Cir. 1994). (Docket #13 at 2, and docket #14 at 2.)

II. ANALYSIS

As a preliminary matter, the Court finds that Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509 (1982). 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, 504 U.S. 1 (1992).

A. Denial of an Appeal Through-No-Fault of his Own and Ineffective Assistance of Counsel

Petitioner alleges that neither counsel nor the Court informed him of his right to an appeal free of costs and to appointed counsel on appeal. The Court declines to review Petitioner's claim that the state court had such a duty because that claim is based solely on the alleged violation of state law. See Hardiman v. Reynolds, 971 F.2d 500, 505 n.9 (10th Cir. 1992) (where court liberally construed the petition to assert a claim of ineffective

assistance of counsel because petitioner's claim that the state court should have notified him of his right to an appeal free of cost was grounded only on Oklahoma law).³ It is well established that in a federal habeas corpus action, this Court is only concerned with whether a federal constitutional right was violated. 28 U.S.C. § 2254. Accordingly, the Court will not consider Petitioner's state law argument any further. The Court notes, however, that the state court specifically advised Petitioner of his right to appeal and of the procedures for preserving the same.

To establish ineffective assistance of counsel a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and that if counsel had filed an appeal that petitioner would have had a reasonable probability of obtaining relief. Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1993); Strickland v. Washington, 466 U.S. 668, 694 (1984). A federal habeas court need not consider whether a petitioner can establish prejudice under the second prong of the Strickland test if it finds that counsel was constitutionally inadequate in failing to perfect an appeal--i.e., if the criminal defendant asked his lawyer to file an appeal and the lawyer failed to do so. See Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (holding that when a court has found counsel constitutionally inadequate because counsel failed to properly perfect an appeal, it need not consider the merits of arguments that the defendant might have made on appeal);

³See Copenhaver v. State, 431 P.2d 669 (Okla Crim. App. 1968); Jewel v. Tulsa County, 450 P.2d 833, 835 (Okla. Crim. App. 1967); and Rule 4.1 of the Rules of the Court of Criminal Appeals.

see also Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994); Lozada v. Deeds, 964 F.2d 956, 958 (9th Cir. 1992).

The Court will address first whether counsel had a duty to advise Petitioner of his right to appeal under Strickland and whether he could avail of that procedure without payment and with the aid of appointed counsel. If there was no such duty, the failure to advise in and of itself cannot be ineffective assistance.

Although a defendant has a right to appeal a judgment entered on a guilty plea, failure to appeal an appealable judgment does not amount to ineffective assistance of counsel per se. See Oliver v. United States, 961 F.2d 1339, 1342 (7th Cir.), cert. denied, 113 S. Ct. 469 (1992). "An attorney has no absolute duty in every case to advise a defendant of his limited right to appeal after a guilty plea." Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir. 1989) (citing Marrow v. United States, 772 F.2d 525, 527 (9th Cir. 1985); Carey v. Laverette, 605 F.2d 745, 746 (4th Cir.) (per curiam) (there is "no constitutional requirement that defendants must always be informed of their right to appeal following a guilty plea"), cert. denied, 444 U.S. 983 (1979)); Davis v. Wainwright, 462 F.2d 1354 (5th Cir. 1972). Only "if a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right," counsel has a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock, 880 F.2d at 1188; see also Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (counsel's failure to

file a requested appellate brief, when he had not yet been relieved of his duties through a successful withdrawal, amounted to constitutionally ineffective assistance). "This duty arises when counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim." Hardiman, 971 F.2d 502, 506.

Petitioner has not alleged a constitutional claim of error which could result in setting aside his guilty pleas. The enhancement of Petitioner's sentence on the basis of his 1984 prior conviction is a matter of state law and therefore, it does not present a sufficient ground to set aside his guilty pleas. Cf. Hardiman, 971 F.2d at 506 (where Petitioner alleged that counsel took part in coercing him to plead guilty). Nor has Petitioner alleged that he inquired during the ten-day period following sentencing about his appeal rights. See Laycock, 880 F.2d at 1188. In his counter affidavit, Petitioner attests that he did not talk to Mr. Patterson about filing an appeal until after he arrived at Dick Connors Correctional Center (DCCC), long after the ten-day period to file an application to withdraw his guilty pleas.⁴

⁴In an affidavit, submitted to the Court on May 12, 1995, Mr. Patterson attests that he did not file a motion to withdraw guilty plea because Petitioner "repeatedly stated that he could not take this case before a jury." (Affidavit, docket #20, at 2-3.) Although Mr. Patterson's affidavit does not specify whether the above conversation occurred before or after the expiration of the ten-day period for filing a motion to withdraw the guilty pleas, the Court concludes this conversation did not occur until after Petitioner arrived at DCCC. In his affidavit, Petitioner attests in part as follows:

Furthermore, I never talked to Mr. Patterson, until I got to Dick Connors Correctional Center, at that time,

Therefore, Mr. Patterson had no absolute duty to appeal Petitioner's guilty plea convictions and the fact that Petitioner "has always desired an appeal, and [that] the . . . transcript does not show . . . [that] Petitioner [voluntarily and knowingly] waived his right to appeal" is irrelevant. (Doc. #13 at 2.)

Petitioner's reliance on Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991), and Jones v. Cowley, 28 F.3d 1067 (10th Cir. 1994), is misplaced. The holdings in Baker and Jones apply only in situations where the defendant has not pled guilty. See Hardiman, 971 F.2d 502, 506; see also Briggs v. Carr, 53 F.3d 342, 1995 WL 250796, *5 n.5 (10th Cir. May 1, 1995) (unpublished opinion). Therefore, Petitioner's counsel did not have the additional obligation under Baker "to explain the advantages and disadvantages of an appeal, advise the defendant as to whether there are meritorious grounds for an appeal, and inquire whether the defendant wants to appeal his conviction." See Romero v. Tansy, 46 F.3d 1024 (10th Cir. 1995) (citations omitted), cert. denied, 1995 WL 276407 (1995).

Although the defendant in Abels v. Kaiser, 913 F.2d 821 (10th

I called Mr. Patterson about my appeal and he told me that his time and paperwork would cost. I was shocked as to how Mr. Patterson['s] attitude had changed, from the time of sentencing. And there was not one ounce of remorse left.

Mr. Patterson then agreed, that the six hundred dollars would be sufficient for an appeal. I then beg[ged] my family if they wanted to see me get out that I needed six more hundred dollars, and Mr. Patterson was paid the amount in full once again.

(Counter Affidavit attached to docket #21.)

Cir. 1991), pled guilty, like the Petitioner in this case, the holding is inapplicable to the case at hand because Petitioner at no time during the ten-day period following sentencing instructed his counsel to appeal his guilty plea convictions or inquired about his appeal rights. Abels, 913 F.2d at 822.⁵ Petitioner argues, however, that "he was under the state of mind that his attorney [would] perfect[] his appeal." (Doc. #13 at 2.) He alleges that at the mitigation/sentencing hearing his attorney disagreed with the State's position on the use of the prior conviction and informed the Court that Petitioner should remain in the Tulsa County Jail for the ten-day period following the entry of the Judgment and Sentence because counsel "wanted to appeal the second page matter." (Id. at 2.)

The Court does not find this argument persuasive. The Laycock standard is clear; unless Petitioner inquired about his appeal rights during the ten-day period following sentencing, which he admits he did not, counsel had no absolute duty to perfect an appeal. See Hardiman, 971 F.2d 502, 506. The events following Petitioner's arrival at DCCC and during the next couple of years--

⁵The defendant in Abels instructed his counsel to appeal his conviction and counsel filed a motion to withdraw guilty plea and a notice of appeal. The time for perfecting the appeal expired, however, with no brief being filed by retained counsel because Abels had failed to pay counsel for the services already performed. Abels, 913 F.2d at 822. The Tenth Circuit Court of Appeals construed the filing of the notice of intent to appeal as "an appearance sufficient to bind [counsel] to his duty" and held that "[c]ounsel's failure . . . [to file the necessary brief to perfect the appeal], when he had not been relieved of his duties through a successful withdrawal, was a violation of Abel's constitutional right to effective assistance of counsel on his appeal as of right." Id. at 823.

paying an additional \$600.00 for a "late appeal," and filing an ethical complaint with the Oklahoma Bar Association--are certainly unfortunate. Those events, however, did not occur until after the ten-day period following sentencing and, thus, have no relevance to Petitioner's limited right to the effective assistance of counsel during the ten-day period for filing a motion to withdraw his pleas of guilty.

Because Petitioner's retained counsel did not have an absolute duty to appeal Petitioner's guilty plea convictions, the Court must deny Petitioner's request for an appeal out of time on the basis of ineffective assistance of counsel.

B. Improper Enhancement of his Sentence

Lastly, the Court addresses Respondent's argument that Petitioner procedurally defaulted his enhancement claim when he failed to file a direct appeal. The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2565 (1991).

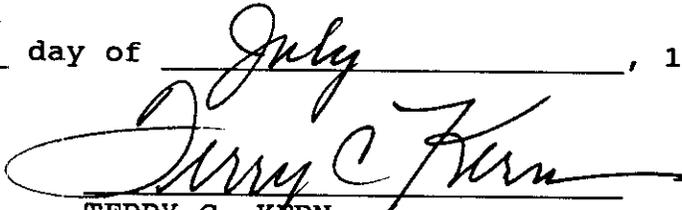
Petitioner does not dispute that he procedurally defaulted his enhancement claim and attempts to show cause by claiming that the

procedural default was caused by the ineffective assistance of counsel and the state court's failure to notify him of all of his appeal rights. Because neither of those arguments is meritorious, Plaintiff cannot show cause to excuse his default. Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S. Ct. 2514, 2519-20 (1992). Petitioner, however, does not claim that he is actually innocent of the crime.

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that Petitioner's enhancement claim is procedurally barred and that Petitioner is not entitled to an out-of-time appeal. Accordingly, this petition for a writ of habeas corpus is hereby **denied**.

SO ORDERED THIS 18 day of July, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 CHERYL L. DIXON aka Cheryl Lynn)
 Dixon; DOUGLAS L. DIXON aka)
 Douglas lee Dixon; W.V. HARRIS;)
 DeVONE HARRIS; ONEOK, INC;)
 COUNTY TREASURER, Osage County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Osage County,)
 Oklahoma,)
)
 Defendants.)

JUL 17 1995

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

ENTERED ON DOCKET

DATE JUL 17 1995

Civil Case No. 95 C 367BU

ORDER

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

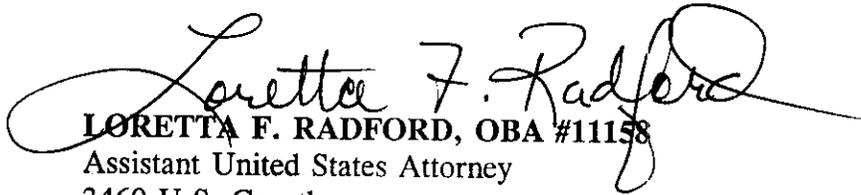
Dated this 17th day of July, 1995.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in black ink that reads "Loretta F. Radford". The signature is written in a cursive style with a large, sweeping initial "L" and a long horizontal flourish extending to the right.

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

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

FILED

JUL 17 1995

Le

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

ROBERT V. FLAMING,)
)
Plaintiff,)
)
vs.)
)
THE MIAMI URBAN RENEWAL &)
HOUSING AUTHORITY, et al.,)
)
Defendants.)

Case No. 94-C-1053-BU

ENTERED ON DOCKET
DATE JUL 18 1995

ADMINISTRATIVE CLOSING ORDER

The Court has reviewed the July 12, 1993 letter of Plaintiff's counsel indicating that the parties have reached an agreement in principle to settle this case but are awaiting approval from Defendants' insurance carrier. Rather than striking the previously scheduled settlement conference and pretrial conference and not requiring the parties to submit a final pretrial order, the Court hereby ORDERS the Clerk to administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 17 day of July, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

9

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

F T T T

STACY J. GAWLIK,
Plaintiff,
vs.
JIM EARP,
Defendant.

)
)
)
)
)
)
)
)
)
)

No. 95-C-134-BU

JUL 17 1995

LC

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

ENTERED ON DOCKET

DATE JUL 18 1995

JUDGMENT

In accord with the Order granting Defendant's motion for summary judgment, the Court hereby enters judgment in favor of Defendant Jim Earp and against Plaintiff, Stacy Gawlik. Plaintiff shall take nothing on his claims. Each side is to pay its respective attorney fees.

SO ORDERED THIS 17th day of July, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

14

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

FILED

JUL 17 1995

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

JERRY L. HAYDEN,)
)
Plaintiff,)
)
vs.)
)
HARTFORD LIFE INSURANCE CO.,)
a Connecticut corporation,)
)
Defendant.)

Case No. 95-C-299-BU

ENTERED ON DOCKET

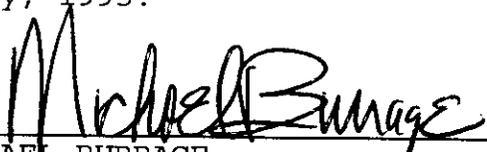
DATE JUL 18 1995

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 17 day of July, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

8

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 17 1995

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DWAYNE E. TWILLEY;)
 WENDY K. TWILLEY;)
 STATE OF OKLAHOMA, ex rel.)
 OKLAHOMA TAX COMMISSION;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

EMERSON LAW FIRM
DATE JUL 18 1995

Civil Case No. 94-C-1086-BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17th day of July, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, 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, DWAYNE E. TWILLEY and WENDY K. TWILLEY, 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, was served a copy of Summons and Complaint on November 28, 1995, by Certified Mail.

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

The Court further finds that the Defendants, DWAYNE E. TWILLEY and WENDY K. TWILLEY, 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 February 28, 1995, and continuing through April 4, 1995, 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, DWAYNE E. TWILLEY and WENDY K. TWILLEY, 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 address of the Defendants, DWAYNE E. TWILLEY and WENDY K. TWILLEY. 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 Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, 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 Answers on December 8, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on January 4, 1995; and that the Defendants, DWAYNE E. TWILLEY and WENDY K. TWILLEY, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, DWAYNE E. TWILLEY and WENDY K. TWILLEY, are husband and wife.

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 THREE A (3-A), BLOCK THREE (3), RE-SUBDIVISION OF PARTS OF BLOCKS TWO (2), THREE (3), SIX (6), AND SEVEN (7), R.T. DANIEL ADDITION IN THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on May 27, 1992, the Defendants, DWAYNE E. TWILLEY and WENDY K. TWILLEY, executed and delivered to MORTGAGE CLEARING CORPORATION, their mortgage note in the amount of \$37,887.00, payable in monthly installments, with interest thereon at the rate of 7.765 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, DWAYNE E. TWILLEY and WENDY K. TWILLEY, executed and delivered to MORTGAGE CLEARING CORPORATION, a mortgage dated May 27, 1992,

covering the above-described property. Said mortgage was recorded on June 2, 1992, in Book 5409, Page 1196, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 13, 1992, MORTGAGE CLEARING CORPORATION, assigned the above-described mortgage note and mortgage to MERCURY MORTGAGE COMPANY, INC. This Assignment of Mortgage was recorded on October 1, 1992, in Book 5440, Page 1667, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 27, 1993, 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 April 28, 1993, in Book 5496, Page 2653, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 7, 1993, the Defendants, DWAYNE E. TWILLEY and WENDY K. TWILLEY, 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, DWAYNE E. TWILLEY and WENDY K. TWILLEY, 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, DWAYNE E. TWILLEY and WENDY K. TWILLEY, are indebted to the Plaintiff in the principal sum of \$43,539.44, plus interest at the rate of 7.765 percent per annum from August 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 ad valorem taxes in the amount of \$402.00, plus penalties and interest, for the year of 1994. Said lien is superior to the interest of the Plaintiff, United States of America.

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 \$17.00 which became a lien on the property as of June 25, 1993 and a lien in the amount of \$17.00 which became a lien on the property as of June 23, 1994. Said liens 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 state taxes in the amount of \$474.25 which became a lien on the property as of March 22, 1993; and a lien in the amount of \$211.37 which became a lien on the property as of December 1, 1993. Said liens 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 Defendants, DWAYNE E. TWILLEY and WENDY K. TWILLEY, 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, DWAYNE E. TWILLEY and WENDY K. TWILLEY, in the principal sum of \$43,539.44, plus interest at the rate of 7.765 percent per annum from August 3, 1994 until judgment, plus interest thereafter at the current legal rate of 5.53 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 \$402.00, plus penalties and interest, for ad valorem taxes for the year 1994, 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 \$34.00, plus costs and interest, for personal property taxes for the years 1992 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 \$685.62. plus costs and accrued and accruing interest, for state taxes due.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, DWAYNE E. TWILLEY and WENDY K. TWILLEY, 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, DWAYNE E. TWILLEY and WENDY K. TWILLEY, to satisfy the judgment in rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$402.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

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

Fourth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of \$474.25, plus accrued and accruing interest and cost, for state taxes due.

Fifth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$17.00, personal property taxes which are currently due and owing.

Sixth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of \$211.37, plus accrued and accruing interest and cost, for state taxes due.

Seventh:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$17.00, 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.

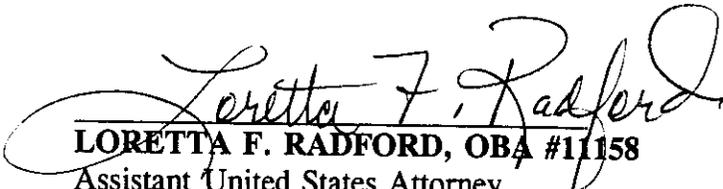
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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/ MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

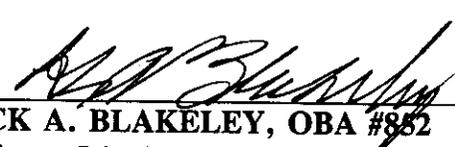
APPROVED:

STEPHEN C. LEWIS
United States Attorney



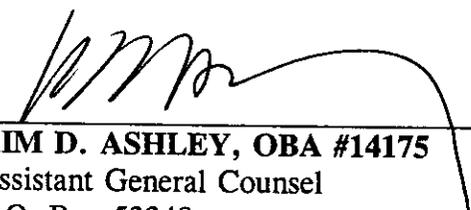
LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852

Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



KIM D. ASHLEY, OBA #14175

Assistant General Counsel
P.O. Box 53248
Oklahoma City, Oklahoma 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 94-C-1086-BU

LFR:flv

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

FILED

JUL 17 1995

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

PATRICIA QUILLIN and RILEY)
QUILLIN, wife and husband,)
)
Plaintiffs,)
)
vs.)
)
AMERICAN HOSPITAL SUPPLY)
CORP. INC., AMERICAN HEYER-)
SCHULTE, CORP., BAXTER)
HEALTHCARE CORPORATION,)
BAXTER INTERNATIONAL, INC.,)
DOW CORNING WRIGHT CORPORATION,)
and DOW CHEMICAL COMPANY, all)
foreign corporations,)
)
Defendants.)

Case No. 94-C-1020-BU

ENTERED ON DOCKET
DATE JUL 18 1995

ORDER

This matter comes before the Court upon the motion of Plaintiffs, Patricia Quillin and Riley Quillin, to dismiss without prejudice their action against Defendants, Dow Corning Wright Corporation and Dow Chemical Company, pursuant to Rule 41(a)(2), Fed.R.Civ.P. For good cause shown, the Court finds that Plaintiffs' motion should be granted.

Accordingly, Plaintiffs' Motion for Voluntary Dismissal of the Above Named Dow Defendants Without Prejudice is hereby GRANTED. Plaintiffs' action against Defendants, Dow Corning Wright Corporation and Dow Chemical Company ^{only} is hereby DISMISSED WITHOUT PREJUDICE.

ENTERED this 17th day of July, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

F I L E D

JUL 17 1995

JOE DUVALL,

Plaintiff,

vs.

AMERICAN PREMIER INSURANCE
COMPANY,

Defendant.

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

No. 95-C-317B

ENTERED

DATE JUL 18 1995

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, Joe Duvall, by and through his attorney of record, Bryan Smith, and the Defendant, American Premier Insurance Company, by and through its attorney of record, David Graves, and pursuant to Rule 41 of the Federal Rules of Civil Procedure, hereby dismiss the above-captioned case with prejudice. The parties would inform the Court that this case has been settled in its entirety.

Bryan L. Smith

Bryan L. Smith
201 West 5th, Suite 530
Tulsa, Oklahoma 74103-4245

ATTORNEY FOR PLAINTIFF

David G. Graves

Jeffrey A. Glendening, OBA 11643
David G. Graves, OBA 14723

BARKLEY, RODOLF & McCARTHY
2700 Mid-Continent Tower
401 South Boston Avenue
Tulsa, Oklahoma 74103-4035
(918) 599-9991

ATTORNEYS FOR DEFENDANT

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

FILED

JUL 17 1995

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

Case No. 95-C-363B

MARK JORDAN,)
)
Plaintiff,)
)
vs.)
)
)
LAKE COUNTRY BEVERAGE, INC.,)
an Oklahoma corporation,)
)
Defendant.)

ENTERED SET
JUL 18 1995
DATE _____

JOINT DISMISSAL WITH PREJUDICE

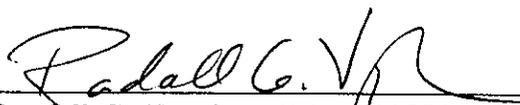
Plaintiff, Mark Jordan, and the Defendant, Lake Country Beverage, Inc., pursuant to Fed. R. Civ. Pro. 41(a), hereby agree to the dismissal with prejudice of this proceeding. The District Court shall retain jurisdiction to enforce the terms of a settlement agreement. The parties shall bear their own costs, expenses, and attorneys fees.

Respectfully submitted,

FRASIER & FRASIER

PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR

By: 
Steven R. Hickman
P.O. Box 799
Tulsa, Oklahoma 74101-0799

By: 
Randall G. Vaughan, OBA #11554
900 ONEOK Plaza
Tulsa, Oklahoma 74103-4218
(918) 581-5500

Attorneys for Plaintiff

Attorneys for Defendant

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 17 1995

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 JAMES N. THOMPSON and)
 FIRST NATIONAL BANK OF MIAMI,)
 OKLAHOMA,)
)
 Defendants.)

ENTREPRENEUR
DATE JUL 18 1995

CIVIL ACTION NO. 94-C-1054-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17th day of July, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendant, James N. Thompson, appears pro se; and the Defendant, First National Bank of Miami, Oklahoma, appears by its attorney James W. Thompson.

The Court being fully advised and having examined the court file finds that the Defendant, James N. Thompson, was served with Summons and Complaint on December 21, 1994 by the United States Deputy Marshal; and that the Defendant, First National Bank of Miami, Oklahoma, executed a Waiver of Service of Summons on November 23, 1994 which was filed on November 30, 1994.

It appears that on February 8, 1995 the Plaintiff filed with the Court the correspondence the Plaintiff received from the Defendant, James N. Thompson; and that the Defendant, First National Bank of Miami, Oklahoma, filed its Answer on or about November 29, 1994.

NOTE: THIS CASE IS NOT TO BE FILED
BY EITHER PARTY WITHOUT THE COURT AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

The Court further finds that this is a suit based upon certain promissory notes and for foreclosure of security agreements securing said promissory notes upon the personal property (chattels) described therein (except the 1979 International Truck) and which chattels are located in Ottawa County, Oklahoma, within the Northern Judicial District of Oklahoma.

The Court further finds that the Defendant, James N. Thompson, executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Consolidated Farm Service Agency, the following promissory notes.

Loan Number	Original Amount	Date	Interest Rate
44-01*	\$90,000.00	03/23/84	10.25%
43-02**	32,230.00	09/25/84	5.00%
43-03***	22,700.00	12/20/85	5.00%
44-04	75,567.81	03/17/87	7.50%
43-05	24,065.19	03/17/87	4.50%
43-06	29,121.13	03/17/87	4.50%
43-07	33,770.00	06/05/87	4.50%
43-08	24,480.00	07/27/89	4.50%

*Loan No. 44-01 rescheduled to Loan No. 44-04 **Loan No. 43-02 rescheduled to Loan No. 43-06
 ***Loan No. 43-03 rescheduled to Loan No. 43-05

The Court further finds that as collateral security for the payment of the above-described notes, the Defendant, James N. Thompson, executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Consolidated Farm Service Agency, the following financing statements, continuation statements and security agreements thereby creating in favor of Farmers Home Administration, now known as Consolidated Farm Service Agency, a security interest in certain crops, farm equipment and motor vehicles described therein.

Instrument	Dated	Filed	County	File Number
Financing Stmt.		03/23/84	Ottawa	828
Continuation Stmt.		12/19/88	Ottawa	1324
Continuation Stmt.		11/29/93	Ottawa	1273
Financing Stmt.		12/02/88	Ottawa	886533
Continuation Stmt.		09/22/93	Ottawa	886533 C
Motor Vehicle Lien	03/23/84			
Security Agreement	03/23/84			
Security Agreement	03/26/85			
Security Agreement	03/11/86			
Security Agreement	03/19/87			
Security Agreement	03/29/88			
Security Agreement	03/10/89			
Security Agreement	02/26/90			
Security Agreement	02/07/91			
Security Agreement	02/28/92			

The Court further finds that the Defendant, **James N. Thompson**, made default under the terms of the aforesaid notes and security agreements by reason of his failure to make the yearly installments due thereon, which default has continued, and that by reason thereof the Defendant, **James N. Thompson**, is indebted to the Plaintiff in the principal sum of \$153,483.00, plus accrued interest in the amount of \$45,732.82 as of June 15, 1995, plus interest accruing thereafter at the rate of \$24.0796 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$28.00 for service of summons and complaint.

The Court further finds that the Defendant, **First National Bank of Miami, Oklahoma**, has liens on a portion of the personal property which is the subject matter of this action in the amount of \$ 11,576.60 , as of June 20, 1995 , plus interest accruing thereafter at the rate of 10.0 percent per annum until paid, by virtue of UCC-1 Lien No.

213 filed in February 1990 and UCC-1 Lien No. 322 filed in March 1992 in the records of Ottawa County, Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of Consolidated Farm Service Agency, formerly Farmers Home Administration, have and recover judgment against the Defendant, James N. Thompson, in the principal sum of \$153,483.00, plus accrued interest in the amount of \$45,732.82 as of June 15, 1995, plus interest accruing thereafter at the rate of \$24.0796 per day until judgment, plus interest thereafter at the current legal rate of 5.53 percent per annum until paid, plus the costs of this action in the amount of \$28.00 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 and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, First National Bank of Miami, Oklahoma, have and recover judgment in the amount of \$ 11,576.60 , as of June 20, 1995 , plus interest accruing thereafter at the rate of 10.0 percent per annum until paid, by virtue of UCC-1 Lien No. 213 filed in February 1990 and UCC-1 Lien No. 322 filed in March 1992 in the records of Ottawa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, James N. Thompson, 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 personal property (chattels) 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 personal property (chattels);

Second:

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

Third:

In payment of the judgment rendered herein in favor of the Defendant, First National Bank of Miami, Oklahoma.

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 personal 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 personal property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Case No. 94-C-1054-B

PP:css

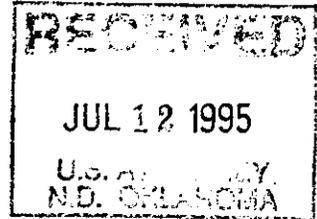
James N. Thompson

JAMES N. THOMPSON, pro se

Route 2, Box 39

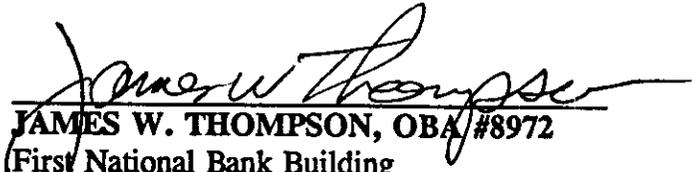
Miami, Oklahoma 74354

(918) 675-5071



**Judgment of Foreclosure
Case No. 94-C-1054-B**

PP:css


JAMES W. THOMPSON, OBA #8972
First National Bank Building
2 North Main, Suite 509
Miami, Oklahoma 74354-6335
(918) 542-3362
Attorney for Defendant,
First National Bank of Miami, Oklahoma

Judgment of Foreclosure
Case No. 94-C-1054-B

PP:css

FILED

JUL 17 1995

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

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

BIGLER JOE STOUFFER, et al.)
)
 Plaintiffs,)
)
 vs.)
)
 STIFEL NICOLAUS AND COMPANY,)
 INC., et al.,)
)
 Defendants.)

No. 94-C-1144-B

ENTERED

DATE JUL 18 1995

ORDER

This matter comes before the Court on Defendants' motion to dismiss for lack of subject matter jurisdiction filed on February 6, 1995. (Docket #4.) Plaintiff has objected.

Plaintiff Bigler Jobe Stouffer, a pro se inmate on death row, brings this diversity action against Stifel Nicolaus Company for conversion of certain accounts held under the Oklahoma Uniform Transfers to Minors Act. Named as Plaintiff is Mr. Stouffer as Trustor/Custodian for Jennifer Reese, Suzanne Reese, Debra Reese, and Brent Grisham, minors.¹ Plaintiff seeks to recover \$108,000 plus costs. Defendants have moved to dismiss for lack of subject matter jurisdiction. They argue that complete diversity is lacking in this case where Plaintiff and at least one of the Defendants are citizens of the State of Oklahoma.

On March 3, 1995, Plaintiff filed a response and requested

¹At the outset the Court notes that this case may present some Rule 11 problems because Mr. Stouffer, proceeding pro se, is seeking to represent other pro se Plaintiffs. Federal Rule of Civil Procedure 11 states that all papers must be signed by the party's attorney, if the party is represented by counsel, or by the party, if he or she is not represented by an attorney.

appointment of counsel. On March 13, 1995, the Court denied Plaintiff's motion for appointment of counsel and granted Plaintiff an additional twenty days to supplement his response. Since then Plaintiff has filed repeated motions for extension of time on the ground that he has had no access to the law library, telephone, and copy machine. On May 8, 1995, the Court granted Plaintiff a twenty-day extension of time to file his final response to Defendants' motion to dismiss and notified Plaintiff that no further extensions of time would be granted in this case. On June 7, 1995, however, Plaintiff again requested an extension of time or in the alternative an order staying the proceedings in this case until he can access the law library. The Court feels that additional extensions of time will not facilitate the disposition of the jurisdictional issues in this case and therefore denies Plaintiff's June 7, 1995 motion for an extension of time.

After carefully reviewing the complaint in this case, the Court concludes that it lacks subject matter jurisdiction as there is no complete diversity between the parties in this case. Owen Equipment and Erection Co. v. Kroger, 437 U.S. 365, 98 S. Ct. 2396 (1978) (complete diversity is a prerequisite for diversity jurisdiction). 28 U.S.C. § 1332 (a)(1) confers federal jurisdiction where the matter in controversy exceeds \$50,000, and is between citizens of different states. McMoran Oil and Gas Co. v. KN Energy, Inc., 907 F.2d 1022, 1024 (10th Cir. 1990). While the Plaintiff in the case at bar has alleged a claim beyond the statutory minimum, complete diversity is not available because

Plaintiff and at least one of the named defendants, Linda Lyon, are both citizens of the State of Oklahoma. See National Insurance Underwriters v. Piper Aircraft Corp., 595 F.2d 546, 549 (10th Cir. 1979) (complete diversity is not available when any plaintiff is a citizen of the same state as any defendant). But see Tuck v. United Services Automobile Association, 859 F.2d 842 (10th Cir. 1988) (unessential parties may be dismissed to find diversity for purposes of preserving subject matter jurisdiction).

Therefore, the Court lacks diversity jurisdiction at this time. Accordingly, Defendants' motion to dismiss (doc. #4) is **granted** and this case is hereby **dismissed without prejudice**. Plaintiff's motion for an extension of time (submitted in letter form, docket #16) is hereby **denied**.

SO ORDERED THIS 17th day of July, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 17 1995

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

INTRUST BANK, N.A., of Wichita,)
Kansas, Conservator of Ian)
Angus Upchurch, a minor; and)
IAN A. UPCHURCH, a minor, by and)
through GEORGE F. UPCHURCH and)
LORI UPCHURCH, his father and)
mother, natural guardians, and)
next friends; and GEORGE F.)
UPCHURCH and LORI UPCHURCH,)
individually,)

Plaintiffs,)

v.)

No. 93-C-533-B

ROBERT D. OLIVER, M.D.; ROBERT)
D. OLIVER, M.D., INC., an)
Oklahoma corporation; and JANE)
PHILLIPS EPISCOPAL HOSPITAL, INC.,)
an Oklahoma corporation,)

Defendants.)

ENTERED

DATE JUL 18 1995

ORDER OVERRULING MOTION FOR NEW TRIAL

In this alleged medical (physician and/or hospital) negligence action the factual question presented to the jury is: Did the minor plaintiff experience permanent brain damage from lack of oxygen (cerebral asphyxia) during delivery due to negligence of the physician and/or hospital in failing to perform a timely cesarean section; or was minor plaintiff's brain damage caused by a cerebral event (hemorrhagic infarction) occurring in utero previous to the mother presenting to the hospital for delivery? On what the Court concludes were proper jury instructions following a fair trial, free of error justifying a new trial, the jury rendered its verdict for the Defendants and against the Plaintiffs. There is adequate evidence in the record to support the fact-finders' verdict so the Court concludes that it should be permitted to stand.

49

This action was originally filed in the state court in Washington County, Oklahoma, in 1988, and subsequently dismissed without prejudice in March 1993. The action was refiled in this court in June 1993, based upon diversity of citizenship. Extensive pretrial discovery took place over a period in excess of five years and the subject jury trial proceeded over a period of two and one-half weeks. The Court addresses each of Plaintiffs' contentions of error in support of the motion for new trial (Docket #89) hereafter.¹

The Court notes that many of Plaintiffs' assertions of error are general in nature, lacking particularity as required by Fed.R.Civ.P. 7(b)(1) regarding a motion for new trial (Fed.R.Civ.P. 59); Moore, Moore's Federal Practice 2d ed., Vol. 6A ¶ 59.09[1] (1995). Where such is the case, it will be hereafter noted because the Court finds it difficult to address post-trial amorphous assertions of error.

1. "A. Bias and prejudice of jury member Julia Vandiver against counsel for Plaintiffs which was expressed to the court and/or its personnel but not communicated to counsel for Plaintiffs during trial of the case and thereby prevented Plaintiffs from moving to have the juror excused for cause."

This asserted error is in violation of Local Rule 47.2 which states:

¹The Court notes Plaintiffs cited no legal authority in support of their motion for new trial filed on June 8, 1995.

"No person shall communicate with any juror concerning said juror's service in any trial prior to the juror's discharge from the case. Upon discharge from service, each juror is free to discuss, or refuse to discuss, said juror's service with any person if juror so desires. Attorneys who are officers of this court and those acting on behalf of such attorneys are prohibited from approaching jurors in any manner at any time concerning said juror's service, except on leave of court upon a showing of good cause."

Fed.R.Evid. 606(b)(1995) states in pertinent part:

"[A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith... Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes."

Following the trial, and without approval of the court, Plaintiffs' counsel's employee, a law student who sat with counsel throughout the trial, communicated with various jurors about the trial. An affidavit of Plaintiffs' counsel's employee and affidavits of some of the jurors is submitted in support of Plaintiffs' motion. The subject of the affidavit is that a particular juror expressed to the bailiff during trial that Plaintiffs' lead counsel stared at her.

This subject is particularly interesting in view of an early trial objection and record made by Defendants' counsel immediately prior to the noon recess on May 9, 1995. Plaintiff's counsel often during the trial would leave the podium and stand near the witness

on the stand to question about a particular exhibit. This placed Plaintiffs' counsel rather close to the jury box. Defendants' counsel, out of the hearing of the jury, objected, stating that Plaintiffs' counsel was getting physically too close to the jury and then looking directly at the juror. The Court overruled Defendants' objection but admonished all counsel to remain near the podium when questioning witnesses unless there was a genuine need to approach the witness. The Court also stated that all counsel were free to look a juror in the eye during the trial if they so chose. Obviously, if overdone by counsel, such might be unsettling to a juror. The Court did note during trial that often counsel for Plaintiffs, when questioning a witness on the stand, would look not at the witness but at the jury or a juror when asking the question. This is simply an attorney trial communication technique or style that may or may not achieve its intended purpose. Thus, the Court, following an objection by Defendants' counsel, had already made a record on the subject of Plaintiffs' counsel staring at jurors, and overruled Defendants' objection.

The Court of Appeals of the Tenth Circuit has stated that district courts are granted wide discretion to restrict attorneys or persons acting on their behalf concerning juror contact in order to shield jurors from post-trial "fishing expeditions" by losing attorneys. It is a matter of the district court balancing the losing party's right to an impartial jury against the risk of juror harassment and jury tampering. Journal Publishing Co. v. Mechem, 801 F.2d 1233, 1236 (10th Cir. 1986); Green Construction Co. v.

Kansas Power & Light Co., 1 F.3d 1005 (10th Cir. 1993). *See also*, Tanner v. United States, 483 U.S. 107, 126-127, 107 S.Ct. 2739, 2750-2751, 97 L.Ed.2d 90 (1987); and Delvaux v. Ford Motor Co., 764 F.2d 469, 471-472 (7th Cir. 1985).

Plaintiffs' counsel's effort to explain away or justify the violation of Local Rule 47.2 is clearly disingenuous. Defendants cite considerable authority that a juror's affidavit or testimony is incompetent to prove any matter that is inherent in the jury process of arriving at its verdict. In this civil action there were seven deliberating jurors. Further, Plaintiffs' claim of juror bias and prejudice against counsel for Plaintiffs is not supported by the record. The affidavit of juror Vandiver did not express any prejudice against Plaintiffs' attorney but only being made ill at ease because Plaintiffs' counsel stared at her. Such does not indicate that the juror was prejudiced in her reception of the evidence or ultimate decision. Neither does the record reflect that any juror violated the admonition of the court not to discuss the merits of the case prior to deliberations.

For the reasons stated above, and/or Plaintiffs' counsel's employee's violation of Local Rule 47.2 in communicating with the jurors, Plaintiff's ground of error 1.A. is hereby OVERRULED. The Court notes Defendants have sought no sanctions against Plaintiffs' counsel or the employee for violation of Local Rule 47.2.

1. "B. Time limitations/restrictions placed upon Plaintiffs during their case-in-chief."

The Court is vested with broad discretion under Fed.R.Evid.

611 (1995), to control the "mode and order of interrogating witnesses so as to avoid needless consumption of time." In pretrial conferences the Court advised counsel the case should not require in excess of two trial weeks to complete. The Court originally stated that Plaintiffs would be allotted five days to put on their case-in-chief and the Defendants would be allowed four days to put on their case-in-chief. During trial the Court, at request of Plaintiffs' counsel, extended Plaintiffs' case-in-chief ultimately to seven trial days. The Defendants introduced their defense in three and one-half trial days. The entire jury trial took place over two and one-half trial weeks and the Court concludes that each side was granted reasonable time for presentation of the evidence both on direct examination and cross-examination. The Court believes it properly exercised its discretion in this regard. It is noted that Plaintiffs' ground of error in this regard is not particularized concerning any evidence or witness. Rule 7(b), Fed.R.Civ.P.

1. "C. Improper and incorrect comments on the evidence by the Court in the presence of the jury."

The Court is unable to respond to this general objection since Plaintiffs do not specify the "improper and incorrect comments on the evidence by the Court." However, the Court's familiarity with the record is such that no such statements were made by the Court that, when taken in context, would qualify to support this asserted error. Rule 7(b), Fed.R.Civ.P.

1. "D. Improper conduct of the Court toward counsel for Plaintiffs during trial and in the presence of the jury."

This assertion of error by Plaintiffs lacks specificity so the Court is at a loss to respond, except to say that the Court is unaware of any such improper conduct and sincerely believes there was none. Rule 7(b), Fed.R.Civ.P.

1. "E. Improper refusal by the Court to strike the testimony of certain defense witnesses after it was shown that the rule of sequestration had been violated by defense counsel in preparing those witnesses for trial or, in the alternative, improper refusal to instruct the jury to consider the violation of the rule of sequestration when weighing the evidence and considering the credibility of the witnesses."

By this assertion of error, again Plaintiffs have chosen a general approach, not specifying the witness or evidence to which they refer. At the outset of the trial, when Fed.R.Evid. 615 was invoked, the Court provided counsel a handout identified as Court's Exhibit No. 1. This exhibit explained to counsel the parameters of rule 615 for the purposes of the trial. In the context of Court's Exhibit No. 1, counsel were directed to comply with the rule and provide the explanation of Court's Exhibit No. 1 to the various witnesses for compliance. The record will reveal there were no violations of Fed.R.Evid. 615 that would justify striking the testimony of any defense witness or instructing the jury as counsel

requests in the ground of error. Further, the Court noted that during the trial Plaintiffs' counsel often in examining a witness would advise the witness as to what a previous witness had already testified. Any violation of Rule 615 during the trial did not justify the grant of a new trial or Plaintiffs' requested relief.

1. "F. Refusal of the Court to allow Plaintiffs to add Sharon Byrd, M.D. as a witness for Plaintiffs prior to trial and refusal of the Court to allow Plaintiffs to call Sharon Byrd, M.D. as a rebuttal witness during trial."

This matter was properly and adequately addressed by the trial court's order of February 6, 1995, which will not be repeated here. In the context of the record made before trial and the fact that Dr. Byrd's proposed testimony was not proper rebuttal testimony but evidence-in-chief, Plaintiffs' assertion of error is without merit.

1. "G. Improper refusal of the Court to instruct or admonish jury not to consider improper questions of defense counsel and the answers of the witness, if given."

The Court is unable to respond to this general ground of error because it does not know the "improper questions" to which Plaintiffs allude. Rule 7(b), Fed.R.Civ.P.

1. "H. Improper refusal of the Court to allow Plaintiffs' counsel to conduct redirect examination of Dr. Gilmarten and specifically to allow a deposition question and answer to be read in context when same had

been read out of context in cross-examination by defense counsel."

The Court permitted direct, cross, redirect and recross examination of Dr. Gilmarten and then concluded under Fed.R.Evid. 611 that re-redirect by Plaintiffs' counsel was not justified.

2. "A. Violations by defense counsel of Orders in Limine concerning the previous abortion of Plaintiff, Lori Upchurch, previous malpractice suits against the Defendant Dr. Oliver and asking jury to find Defendant Dr. Oliver 'not guilty' of negligence or to 'exonerate' him."

The subject of a voluntary abortion by Mrs. Upchurch was never mentioned to the jury. Plaintiffs' witness did testify concerning facts already in evidence and before the jury in the form of a medical record (PX-1) which stated, "Para 1 Gravida III." Witnesses explained this meant Mrs. Upchurch had had three prior pregnancies with one delivery. There was no violation of the *in limine* order that Defendants would not be permitted to mention Mrs. Upchurch's previous voluntary abortion. The Court further concludes there was no error justifying a new trial concerning previous malpractice suits against the Defendant Dr. Oliver or in argument requesting the jury to find the Defendant Dr. Oliver "not guilty" of negligence or to "exonerate" him.

2. "B. Repeated asking of improper questions by defense counsel causing counsel for Plaintiffs to object and thereby emphasize question and answer, if given."

In this ground of error Plaintiffs do not allude to specific "improper questions by defense counsel," and the Court is aware of none that would support granting of a new trial. Rule 7(b), Fed.R.Civ.P.

2. "C. Improper statements of law by defense counsel during opening statement."

This general objection of "improper statements of law by defense counsel" makes it difficult for the Court to respond because the Court is not aware of any such improper statements that would support the granting of a new trial. Rule 7(b), Fed.R.Civ.P.

2. "D. Improper statements of law by defense counsel during closing arguments."

See 2.C.

2. "E. Improper comments to jury by defense counsel that Plaintiffs' counsel have 'sued a great many doctors and hospitals around here.'"

When examined in appropriate context, such was not error justifying the grant of a new trial. Plaintiffs' counsel in cross-examining Dr. Paul McQuillen suggested that Dr. McQuillen acted improperly when he responded to Plaintiffs' counsel's request for an interview by first calling Defendants' counsel. Defendants' counsel responded that it was a natural reaction for Dr. McQuillen to contact counsel for the hospital when approached in an alleged multimillion dollar malpractice action by an attorney known to specialize in Plaintiffs' medical malpractice cases. It was Plaintiffs' counsel that opened the subject, making Defendants'

counsel's response appropriate.

3. "A. Failure of juror Vandiver to follow Court's instructions not to discuss case with other jurors prior to its submission to the jury."

See the Court's discussion concerning 1.A. above.

3. "B. Failure of juror Vandiver to advise Court that her bias against counsel for Plaintiff had become such that she could not render a fair and impartial verdict."

See the Court's discussion concerning 1.A. above.

4. "A. Plaintiffs adopt their grounds for new trial as stated in items 2 A-E above as fully as if repeated herein."

See the Court's discussion in paragraphs 2.A/E above.

5. "A. Statement of witness Dr. Bennett that plaintiff Lori Upchurch had had a miscarriage which was false, and repeated references to the fact that plaintiff Lori Upchurch had been pregnant three times after having been instructed not to mention the fact that she had had an abortion and it was in evidence that she had only delivered two children."

See the Court's discussion of 2.A. above.

6. "Newly discovered information which plaintiffs could not have known at trial."

See the Court's discussion of 1.A. and 3.A.-B. as stated above.

7. "Errors of law occurring at the trial and excepted

to by plaintiffs:

A. Plaintiffs adopt all grounds for new trial previously stated in this motion as fully as if repeated herein."

See the Court's discussion above.

7. "B. Error of law by the Court in refusing to allow plaintiffs to conform the pleadings to the evidence."

See the Court's discussion of 7.C. below.

7. "C. Error of law by the Court in refusing to submit instructions on the issue of Informed Consent."

This action was initially filed in the Washington County, Oklahoma state court in June 1988, absent any claim regarding informed consent. The action was refiled in this court in June 1993, again without any allegation concerning informed consent. Thus, over the seven-year period this action was pending, both in the state and federal court, there was no issue of informed consent. Neither was the issue of informed consent an issue raised in the pretrial order. Oklahoma law provides that the doctrine of informed consent must be both pled and proven by the plaintiff. Scott v. Bradford, 606 P.2d 554 (Okl. 1979). Fed.R.Civ.P. 16(e)(1995) specifically provides for the finality of the pretrial order, stating:

"After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following the final pre-trial conference shall be modified only to prevent manifest injustice."

Local Rule 16.2(D) (10) (1995) further reflects the finality of a pretrial order as it requires a statement in the pretrial order that "the pretrial order shall supersede the pleadings and govern the trial of the case, unless departure therefrom is permitted by the Court in the interest of justice." The Court thinks it acted properly in refusing Plaintiffs' request to belatedly inject the doctrine of informed consent into the case by way of conforming the pleadings to the asserted evidence. It would have been unfair to the Defendants' to permit the requested informed consent amendment mid-trial.

7. "D. Error of law by the Court in refusing to direct a verdict on Informed Consent."

See 7.C. above.

7. "E. Error of law by the Court in admitting the labor and delivery records of Lori Upchurch with respect to the delivery of Joshua Cosby and the medical reports of Joshua Cosby."

The Court allowed introduction of various excerpts of the delivery record of Joshua Cosby, the older sibling of the minor Plaintiff, Ian Upchurch. This medical record (DX-9) of Joshua Cosby reflected that in Mrs. Upchurch's first delivery, which was accomplished vaginally, there was meconium stained amniotic fluid (fetal bowel movement). The Plaintiffs herein were asserting that the presence of meconium stained amniotic fluid during the labor of Ian Upchurch necessitated delivery by cesarean section. The fact of the meconium staining in the amniotic fluid of Mrs. Upchurch's

first child, which was delivered vaginally, was said to be relevant by defense expert, Dr. Ken Nieswander, and was relied upon in expressing his expert opinion that approximately twenty percent of vaginal deliveries reveal meconium staining. The Court's decision in this regard was proper and not an abuse of discretion. Fed.R.Evid. 703. The Court, pursuant to Plaintiffs' request, did require portions of the older sibling's birth record that revealed convulsions be redacted as not relevant herein.

7. "Error of law by the Court in allowing witnesses not designated as expert witnesses, to express opinions on the ultimate issue of the case, i.e. whether the defendants were negligent and causation."

Because of the general nature of this asserted ground of error, the Court finds it difficult to respond. Plaintiffs fail to mention a specific witness or witnesses. Suffice it to say that some of the physicians who appeared as a witness in the case were also percipient witnesses in that they were actually involved in the events as opposed to being exclusively an expert witness reviewing the evidence after the fact. In such instances, the physician percipient witness was also functioning as an expert.

7. "G. Error of law by the Court in giving improper and defense weighted instructions to the jury, including but not limited to, the instruction, 'no presumption of negligence.'"

The Court believes when the instructions are read as a whole the jury was instructed properly on the law of the case, including

the instruction captioned "No Presumption of Negligence." Plaintiffs' general assertion of error is improper because it is lacking in specificity. In the context of motions for a new trial grounds must be stated with sufficient specificity to put the opposing party on notice as to the reasons put forward for the granting of a new trial. Harkins v. Ford Motor Co., C.A.Pa. 1970, 437 F.2d 276; Rule 7(b), and Rule 51, Fed.R.Civ.P.

7. "H. Error of law by the Court in allowing the admission of defense exhibit not previously listed or exchanged -- the radiology log book."

The Court concludes that the radiology log book (DX-101) was properly admitted as a defense exhibit in the case. Plaintiffs' counsel asserted and argued that there existed an ultrasound x-ray document that was later missing. Mid-trial, defense counsel was notified for the first time that the St. Francis Hospital of Tulsa, Oklahoma had a log book record which would reflect all ultrasounds taken of the minor Plaintiff during his hospitalization there. Soon after Defendants' counsel learned that St. Francis Hospital had such a document it was made known to Plaintiffs' counsel and the Court concluded that such in the interest of justice was admissible as an exhibit to clarify the issue and shed light on how many ultrasounds were taken of the minor Plaintiff during his stay at the St. Francis Hospital. The Plaintiffs were not prejudiced by the admission of such radiological log book and had it available to cross-examine the sponsoring witnesses.

7. "I. Error of law by the Court in allowing the defendants to misuse an exhibit which had been designated for use as impeachment only -- Hester exhibit."

The Court is unaware of any misuse of such an exhibit and because of the general nature of the asserted ground of error, the Court is unable to respond further. Rule 7(b), Fed.R.Civ.P.

7. "J. Error of law by the Court in allowing defendants to misuse deposition testimony when the depositions were not in evidence and/or the witnesses were available to testify at the trial including, but not limited to, the depositions of Dr. Hauger and Dr. Svoboda."

Because of the general nature of this contended ground of error, the Court finds it difficult to respond. Based upon the concept of Fed.R.Evid. 703, various expert witnesses from time to time stated they had reviewed various depositions relative to expressing their expert opinion. Plaintiffs' counsel actually read at trial the entire deposition testimony of Dr. Hauger. The Court concludes this asserted ground of error does not justify the granting of a new trial because there was no misuse of such deposition testimony.

7. "K. Error of law in refusing to admit an article written by Dr. Barnes as evidence and refusal to submit same to jury for consideration during deliberations."

The Court's ruling regarding admission of medical literature as exhibits, including such article by Dr. Barnes, was appropriate

and consistently applied in keeping with the Federal Rules of Evidence and particularly Fed.R.Evid. 803(18).

In conclusion, the Court determines that each party herein received a fair trial and no error exists warranting the grant of a new trial. Plaintiffs' motion for a new trial is therefore OVERRULED.

IT IS SO ORDERED this 17th day of July, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 17 1995

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

GOLDIE L. MASTERS,

PLAINTIFF,

vs.

SHIRLEY S. CHATER,
Commissioner of the Social
Security Administration,

DEFENDANT.

CASE NO. 94-C-1085-B

ENTERED
DATE JUL 18 1995

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further development of the administrative record.

DATED this 17th day of July, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 17 1995

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

BANT BRYAN BAIRD,)
)
 Plaintiff,)
)
 v.)
)
 STANLEY GLANZ, TULSA COUNTY)
 SHERIFF, et al.,)
)
 Defendants.)

Case No. 95-C-259-B

ENTERED
DATE JUL 18 1995

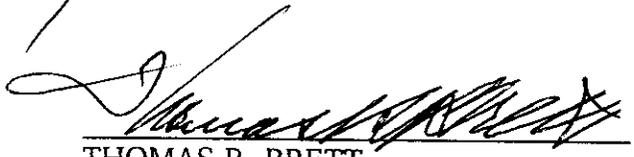
ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed June 16, 1995, in which the Magistrate Judge recommended that the Motions to Dismiss by Defendants Russell Lewis and Stanley Glanz. (Docket #5 and #11) should be granted and the Request for the Production, Inspection, and Copying of Documents (Docket #8) should be denied. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

IT IS THEREFORE ORDERED that the Motions to Dismiss by Defendants Russell Lewis and Stanley Glanz (Docket #5 and #11) are granted, and the Request for the Production, Inspection, and Copying of Documents (Docket #8) is denied.

Dated this 17 day of July, 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

s:Baird/Glanz

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

F I L E D

MILES I. FIDLER,)
)
 Plaintiff,)
)
 vs.)
)
 THE EQUITABLE LIFE ASSURANCE)
 SOCIETY OF THE UNITED STATES,)
)
 Defendant.)

JUL 17 1995

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

No. 91-C-901-Bu

ENTERED ON DOCKET
JUL 18 1995
DATE _____

ORDER

Now on this 17th day of July, 1995, comes on for consideration before this Court the Joint Motion to Remand of Plaintiff and Defendant.

Said Joint Motion being well taken, this case is now remanded to the District Court of Tulsa County for further proceedings.

s/ MICHAEL BURRAGE

**HONORABLE MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE**

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

ENTERED ON DOCKET
DATE JUL 18 1995

B. N. SPRADLING, B. C. DOW,
J. D. FELLINGER, L. M. LAMB,
ROBERT L. McCLARY, PHILIP
MORGANS, EDGAR LEON WILSON,
F. L. COOK, D. R. GRANT,
E. L. SIMPSON, THOMAS E.
HOLLAND, ROBERT E. NANTZ,
BILLY JOE GEIER, KEN LORTON,
and BILLY J. RICHARDSON,

Plaintiffs,

vs.

THE CITY OF TULSA, OKLAHOMA,
a municipal corporation,

Defendant.

FILED

JUL 17 1995

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

No. 92-C-414 E

JUDGMENT

The Court has previously entered findings of fact and conclusions of law, in Orders dated January 27, 1995 and April 24, 1995, which are incorporated by reference. All issues concerning liability and damages have been resolved, and plaintiffs are entitled to an entry of Judgment in their favor. The parties have agreed that prejudgment interest should be awarded on the principal amount of \$333,881.46. The Court reserves consideration of awarding attorney fees and costs.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that plaintiffs should be, and hereby are, granted Judgment in their favor and against the

defendant, in the amount of Three Hundred Seventy-Nine Thousand, Four Hundred seventy-seven dollars and forty-seven cents (\$379,477.47), which includes prejudgment interest. That prejudgment interest has been calculated as shown in Exhibit A attached hereto. This amount is to be awarded to the plaintiffs as a group, and this judgment does not purport to award any specific amount to each individual plaintiff.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that post judgment interest should accrue at an annual percentage rate of ^{5.53}~~6.28~~%.

IT IS SO ORDERED this 17th day of July, 1995.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPROVED AS TO FORM:

Donald M. Bingham
Attorney for Plaintiffs

Charles R. Fisher
Attorney for Defendant

EXHIBIT A

At end of	Annual			
<u>Year*</u>	<u>Int Rate**</u>	<u>Principal</u>	<u>Interest</u>	<u>P + I</u>
One	5.24%	\$333,881.46	\$17,495.39	\$351,376.85
Two	5.24%		\$18,412.15	\$369,789.00
2 1/2	5.24%		\$9,688.47	<u>\$379,477.47</u>

* As an alternative to the complexity of identifying the amount of principal that accumulated each month and compounding interest thereon, the parties have agreed to compound interest annually on the entire amount, beginning halfway through the five-year period during which the judgment accumulated.

** Average of federal post-judgment interest rates beginning 5/3/90 and ending 3/30/95

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

FILED

JUL 14 1995

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

CLAIR MAXINE RODMAN,)
)
Plaintiff,)
)
v.)
)
DONNA E. SHALALA,)
Secretary of HHS,)
)
Defendant.)

Case No. 93-C-1045-H

ENTERED ON DOCKET

DATE JUL 17 1995

ORDER

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge.

In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), any objections to the Report and Recommendation must be filed within ten (10) days of the receipt of the report. The time for filing objections to the Report and Recommendation has expired, and no objections have been filed.

Based on a review of the Report and Recommendation of the Magistrate Judge, the Court hereby adopts the Report and Recommendation (docket #16) reversing the Secretary's decision partially denying benefits. Benefits should be awarded as of April 16, 1991.

IT IS SO ORDERED.

This 14TH day of July, 1995.


Sven Erik Holmes
United States District Judge

18

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

FILED

JUL 14 1995

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

LEVA EDWARD MCKINNEY,)
)
 Plaintiff,)
)
 v.)
)
 PHILLIP M. OWEN and the)
 UNITED STATES POSTAL SERVICE,)
 Defendants.)

Case No. 94-CV-0710-H

ENTERED ON DOCKET

DATE JUL 17 1995

O R D E R

This matter comes before the Court on a Motion for Summary Judgment by Defendants Phillip M. Owen ("Owen") and the United States Postal Service (the "Postal Service").

Defendants moved for summary judgment on March 28, 1995. Plaintiff has failed to respond to Defendants' Motion. Under Local Rule 56.1(B) of the Northern District of Oklahoma, "[a]ll material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party." Thus, the facts set out in Defendants' brief are deemed admitted, and no dispute of genuine material fact remains.

Plaintiff Leva McKinney ("McKinney") began his Postal Service employment on May 14, 1977 and worked as a letter carrier. Plaintiff was arrested on May 14, 1993 and subsequently charged with two counts of feloniously pointing a weapon. As a consequence of this arrest, Plaintiff was issued a notice dated June 2, 1993 proposing to suspend him indefinitely from Postal Service employment. By letter dated June 15, 1993, Plaintiff was issued a letter of decision, indefinitely suspending his Postal Service

employment, effective June 16, 1993, pending disposition of the criminal charges.¹

On July 22, 1994, more than one year after being placed on indefinite suspension, Plaintiff filed this lawsuit asserting various claims regarding reinstatement of medical coverage², restoration of sick leave, return of personal property, and completion of injury compensation claim forms. Plaintiff's union has never filed a grievance on his behalf regarding any of these employment related claims contained in this lawsuit. Moreover, Plaintiff has never attempted to file a grievance regarding the claims asserted in this lawsuit.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Widon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

¹ Plaintiff was removed from Postal Service employment, effective March 10, 1995, after he pled nolo contendere to the criminal charges against him and was placed on five years probation.

² The first page of the attachments to Plaintiff's complaint marked "Part A Medical Coverage, Supporting Documentation", is a notification from the Office of Personnel Management that Plaintiff's health benefits coverage was being terminated in compliance with section 524.74(d) of the Employee and Labor Relations Manual because Plaintiff had been in a nonduty status for 365 days. As stated earlier, Plaintiff was in a nonduty status pending disposition of his criminal charges.

[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In Anderson, the Supreme Court stated:

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff:

477 U.S. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991). In this case, because Plaintiff failed to respond to Defendants' Motion, all material facts set out by Defendants are deemed admitted.

Defendants assert that they are entitled to judgment as a matter of law because this Court lacks subject matter jurisdiction over the instant lawsuit. In his complaint, Plaintiff alleges that Title 28 U.S.C. § 1339 (giving district courts original

jurisdiction of any civil action arising under any Act of Congress relating to the United States Postal Service) is the basis for jurisdiction of his lawsuit. However, this statute is not an independent jurisdictional basis for a lawsuit. See, e.g., O'Connor v. Yezukevicz, 589 F.2d 16, 18-19 (1st Cir. 1978) (upholding dismissal of complaint for lack of subject matter jurisdiction where Plaintiff grounded complaint on 28 U.S.C. § 1339); see also Unicover Corp. v. United States Postal Serv., 859 F. Supp. 1437, 1442-43 (D. Wyo. 1994).

The Court is mindful that pro se pleadings are held to "less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972). However, even if the Court were to allow Plaintiff to amend his complaint to include the correct jurisdictional basis, his complaint would still be subject to dismissal for failure to comply with the prerequisites of the new statute. Plaintiff's claim indisputably relates to the terms and conditions of his employment. Title 39 U.S.C. § 1208(b) vests the district court with subject matter jurisdiction over "[s]uits for violations of contracts between the Postal Service and a labor organization representing Postal Service employees" Before Plaintiff may maintain a cause of action under this statute, he must have exhausted the remedies available to him under the grievance-arbitration process set out in the applicable collective bargaining agreement. See Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563 (1976).

Here, Plaintiff does not allege that he utilized the grievance process to address his claims. Moreover, the Postal Service has no record of Plaintiff or the union filing a grievance regarding any of the claims raised in his lawsuit. Accordingly, he is prohibited from bringing his various claims before the Court because he has failed to exhaust the remedies afforded by the grievance process. See, e.g., Kaiser v. United States Postal Serv., 908 F.2d 47, 49 (6th Cir. 1990) ("It is well settled that a plaintiff must exhaust contract remedies before seeking review in district court."), cert. denied, 498 U.S. 1025 (1991).

Defendants' Motion for Summary Judgment (Docket # 8) is hereby granted.

IT IS SO ORDERED.

This 14TH day of July, 1995.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
SCOTT EDMISTON aka Scott J.)
Edmiston; STACEY EDMISTON; STATE)
OF OKLAHOMA, ex rel. OKLAHOMA)
TAX COMMISSION; SERVICE)
COLLECTION ASSOCIATION, INC.;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)
)

FILED

JUL 14 1995

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

Civil Case No. 95-C 291H

ENTERED ON DOCKET
DATE JUL 17 1995

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 13th day of July, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, SERVICE COLLECTION ASSOCIATION, INC., appears by it Attorney Fred A. Pottorf, the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears through Kim D. Ashley, Assistant General Counsel, and the Defendants, SCOTT EDMISTON aka Scott J. Edmiston and STACEY EDMISTON, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, SCOTT EDMISTON aka Scott J. Edmiston, signed a Waiver of Summons on

April 24, 1995; that the Defendant, STACEY EDMISTON, signed a Waiver of Summons on April 24, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on March 30, 1995, by Certified Mail; that Defendant, SERVICE COLLECTION ASSOCIATION, INC., signed a Waiver of Summons on April 3, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on April 11, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on April 19, 1995; that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., filed its Answer on May 4, 1995; and that the Defendants, SCOTT EDMISTON aka Scott J. Edmiston and STACEY EDMISTON, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, SCOTT EDMISTON, is on and the same person as Scott J. Edmiston, and will hereinafter be referred to as "SCOTT EDMISTON." The Defendants, SCOTT EDMISTON and STACEY EDMISTON, are husband and wife.

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 Three (3), EASTLAND ACRES EXTENDED, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on March 1, 1989, the Defendants, SCOTT EDMISTON and STACEY EDMISTON, executed and delivered to COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., LIMITED PARTNERSHIP, their mortgage note in the amount of \$55,325.00, payable in monthly installments, with interest thereon at the rate of Eight and Seven-Eighths percent (8.875%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, SCOTT EDMISTON and STACEY EDMISTON, husband and wife, executed and delivered to COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., LIMITED PARTNERSHIP, a mortgage dated March 1, 1989, covering the above-described property. Said mortgage was recorded on March 7, 1989, in Book 5170, Page 953, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 9, 1991, COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., assigned the above-described mortgage note and mortgage to ROUSSEAU MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on September 17, 1991, in Book 5349, Page 1440, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 17, 1992, ROUSSEAU 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 June 30, 1992, in Book 5416, Page 873, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 9, 1992, the Defendants, SCOTT EDMISTON and STACEY EDMISTON, 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, SCOTT EDMISTON and STACEY EDMISTON, 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, SCOTT EDMISTON and STACEY EDMISTON, are indebted to the Plaintiff in the principal sum of \$71,145.88, plus interest at the rate of 8.875 percent per annum from January 1, 1995 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 \$36.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$36.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of \$36.00 which became a lien on the property as of June 23, 1994. Said liens 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 state income taxes in the amount of \$211.75, plus accrued and accruing interest, penalties and costs, which became a lien on the property as of September 22, 1992. Said lien is 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 \$313.70, plus Attorney Fees, costs and interest, which became a lien on the property as of August 19, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, SCOTT EDMISTON and STACEY EDMISTON, 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, SCOTT EDMISTON and STACEY EDMISTON, in the principal sum of \$71,145.88, plus interest at the rate of 8.875 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.53 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 \$108.00, plus costs and interest, 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, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment in rem in the amount of \$211.75, plus accrued and accruing interest, penalties and costs, for state income taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., have and recover judgment in the amount of \$313.70, for a judgment, plus attorney fees, costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, SCOTT EDMISTON and STACEY EDMISTON, 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, SCOTT EDMISTON and STACEY EDMISTON, 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, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$36.00, personal property taxes which are currently due and owing.

Fourth:

In payment of Defendant, SERVICE COLLECTION ASSOCIATION, INC., in the amount of \$313.70, plus attorney fees, costs and interest, for a judgment.

Fifth:

In payment of Defendant, OKLAHOMA TAX COMMISSION, ex rel. OKLAHOMA TAX COMMISSION, in the amount of \$211.75, plus accrued and accruing interest, penalties and costs, for state income taxes currently due and owing.

Sixth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$72.00, 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.

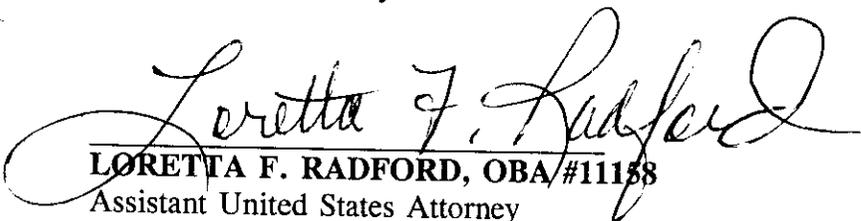
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

SI SVEN ERIK HOLMES

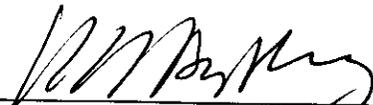
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463


DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



KIM D. ASHLEY, OBA #14675
Assistant General Counsel
P.O. Box 53248
Oklahoma City, Oklahoma 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission



FRED A. POTTORF, OBA #7248
Mapco Plaza Building
1717 South Boulder, Suite 200
Tulsa, Oklahoma 74119
(918) 582-3191
Attorney for Defendant,
Service Collection Association, Inc.,

Judgment of Foreclosure
Civil Action No. 95-C 291H

LFR:flv

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

ENTERED ON DOCKET

DATE ~~JUL 17 1995~~

TAYLOR NORTH,

Plaintiff,

vs.

No. 95-C-278-K

DOWELL SCHLUMBERGER CORP.
and DOWELL SCHLUMBERGER
INCORPORATED,

Defendants.

FILED

JUL 17 1995

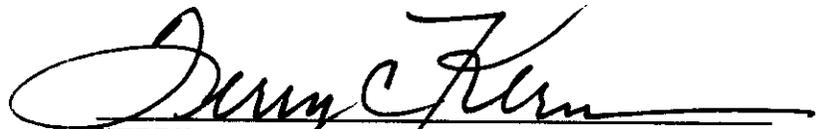
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter came on for case management conference on July 12, 1995. Plaintiff's counsel did not appear, and the record does not reflect service being obtained upon the remaining defendant Dowell Schlumberger Corp. In accordance with the oral record made by the Court at the time, the action is dismissed.

It is the Order of the Court that the above-styled case is hereby DISMISSED without prejudice.

ORDERED this 14 day of July, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Housing)
and Urban Development,)

Plaintiff,)

v.)

COLLEEN L. GRAY, a single person,)
aka Colleen Gray aka Colleen L. Meadors;)
PIONEER FINANCIAL SERVICES, INC.;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)

BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)

Defendants.)

ENTERED ON DOCKET

DATE JUL 17 1995

F I L E D

JUL 1995

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

CIVIL ACTION NO. 95-C-422-K

ORDER

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

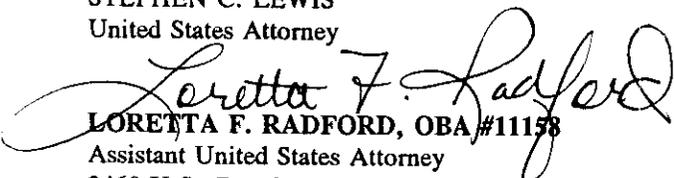
Dated this 14 day of July, 1995.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE JUL 17 1995

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
GARY L. GRAY aka Gary Gray;)
BRENDA S. GRAY aka Brenda Sue Gray)
aka Brenda Gray; CHILDRENS)
MEDICAL CENTER; TULSA)
ADJUSTMENT BUREAU, INC; STATE)
OF OKLAHOMA, ex rel. OKLAHOMA)
TAX COMMISSION; COUNTY)
TREASURER, Tulsa County, Oklahoma;)
BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

F I L E D

JUL 17 1995

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

Civil Case No. 95-C 292K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 14 day of July,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, CHILDREN'S MEDICAL CENTER, appears by its Attorney, Daniel M. Webb; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears through Kim D. Ashley, Assistant General Counsel; the Defendant, TULSA ADJUSTMENT BUREAU, INC., appears not having previously filed a Disclaimer; and the Defendants, GARY L. GRAY

NOTE: THIS ORDER IS TO BE MAILED BY MOVING TO THE COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

AKA GARY GRAY AND BRENDA SUE GRAY AKA BRENDA S. GRAY AKA
BRENDA GRAY, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, GARY L. GRAY aka Gary Gray, signed a Waiver of Summons on April 24, 1995; that the Defendant, BRENDA SUE GRAY aka Brenda S. Gray aka Brenda Gray, signed a Waiver of Summons on April 24, 1995; that the Defendant, TULSA ADJUSTMENT BUREAU, INC., signed a Waiver of Summons on March 31, 1995; that Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on March 30, 1995, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on April 11, 1995; that the Defendant, CHILDREN'S MEDICAL CENTER, filed its Answer on April 12, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on April 19, 1995; that the Defendant, TULSA ADJUSTMENT BUREAU, INC., filed its Disclaimer on March 31, 1995; and that the Defendants, GARY L. GRAY AKA GARY GRAY AND BRENDA SUE GRAY AKA BRENDA S. GRAY AKA BRENDA GRAY, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, GARY L. GRAY, is one and the same person as Gary Gray, and will hereinafter be referred to as "GARY L. GRAY." The Defendant, BRENDA SUE GRAY, is one and the same person as Brenda Sue Gray and Brenda Gray, and will hereinafter be referred to as "BRENDA S. GRAY." The Defendants, GARY L. GRAY and BRENDA S. GRAY, are husband and wife.

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:

**Lots Fifteen (15) and Sixteen (16), Block Four (4),
ORCHARD ADDITION, to the City of Tulsa, Tulsa County,
State of Oklahoma, according to the Recorded Plat thereof.**

The Court further finds that on January 18, 1990, the Defendants, GARY L. GRAY and BRENDA S. GRAY, executed and delivered to CENTRAL MORTGAGE CORPORATION, their mortgage note in the amount of \$34,807.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, GARY L. GRAY and BRENDA S. GRAY, husband and wife, executed and delivered to CENTRAL MORTGAGE CORPORATION, a mortgage dated January 18, 1990, covering the above-described property. Said mortgage was recorded on January 22, 1990, in Book 5232, Page 226-230, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 18, 1990, CENTRAL MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to BANK OF MEEKER. This Assignment of Mortgage was recorded on January 26, 1990, in Book 5233, Page 73, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 30, 1990, Bank of Meeker, assigned the above-described mortgage note and mortgage to J.I. Kislak Mortgage Service Corporation. This Assignment of Mortgage was recorded on February 14, 1990, in Book 5236, Page 994, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 21, 1990, J.I. Kislak Mortgage Service 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 January 4, 1991, in Book 5297, Page 880, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 30, 1990, the Defendants, GARY L. GRAY and BRENDA S. GRAY, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on January 1, 1992, May 22, 1992, June 30, 1993, and November 24, 1993.

The Court further finds that the Defendants, GARY L. GRAY and BRENDA S. GRAY, 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, GARY L. GRAY and BRENDA S. GRAY, are indebted to the Plaintiff in the principal sum of \$51,497.97, plus interest at the rate of 10.5 percent per annum from January 1, 1995 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 \$19.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$10.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of \$10.00 which became a lien on the

property as of June 23, 1994. Said liens 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 state income taxes in the amount of \$334.22, plus accrued and accruing interest, penalties and costs, which became a lien on the property as of March 7, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CHILDREN'S MEDICAL CENTER, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$408.87, plus interest, costs and attorney fees, which became a lien on the property as of December 18, 1991. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, GARY L. GRAY and BRENDA S. GRAY, 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 the Defendant, TULSA ADJUSTMENT BUREAU, INC., Disclaims any 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, GARY L. GRAY and BRENDA S. GRAY, in the principal sum of \$51,497.97, plus interest at the rate of 10.5 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.53 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 \$39.00, plus costs and interest, 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, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment in rem in the amount of \$334.22, plus accrued and accruing interest, penalties and costs, for state income taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, CHILDREN'S MEDICAL CENTER, have and recover judgment in the amount of \$408.87, plus interest, costs and attorney fees for a judgment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, TULSA ADJUSTMENT BUREAU, INC., GARY L. GRAY and BRENDA S. GRAY, 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, GARY L. GRAY and BRENDA S. GRAY, 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 the Defendant, CHILDREN'S MEDICAL CENTER, in the amount of \$408.87, plus interest, costs and attorney fees, for judgment.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$29.00, personal property taxes which are currently due and owing.

Fifth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of 334.22,

plus accrued and accruing interest, penalties and costs, for state income taxes currently due and owing.

Sixth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$10.00, 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.

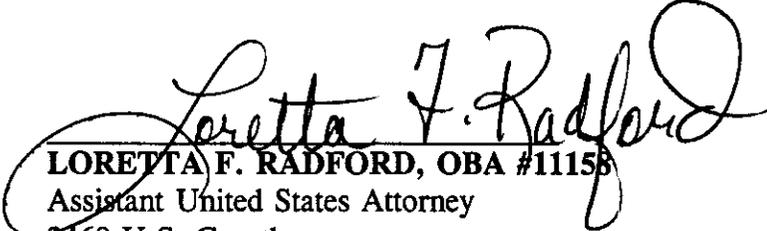
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463


DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma


KIM D. ASHLEY, OBA #14175
Assistant General Counsel
P.O. Box 53248
Oklahoma City, Oklahoma 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission



DANIEL M. WEBB, OBA #11003

Mapco Plaza Building

1437 South Boulder, Suite 900

Tulsa, Oklahoma 74119

(918) 582-3191

Attorney for Defendant,

Children's Medical Center

Judgment of Foreclosure

Civil Action No. 95-C 292K

LFR:flv

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

ENTERED ON DOCKET
DATE JUL 17 1995

WALTER H. HECKELMANN,)
)
 Plaintiff,)
)
 vs.)
)
 PIPING COMPANIES, INC. and)
 INDUSTRIAL SERVICES)
 TECHNOLOGIES, INC.,)
)
 Defendants.)

No. 95-C-345-K

O R D E R

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

Before the Court is the motion of the plaintiff to remand. Plaintiff commenced this action on March 17, 1995 by filing a two-count petition in the District Court of Tulsa County, Oklahoma. In his first cause of action, plaintiff (a Colorado resident) alleges breach of contract against Piping Companies, Inc. ("PCI"), an Oklahoma corporation, and Industrial Services Technologies, Inc. ("IST"), a Colorado corporation. Plaintiff alleges that IST does business in Oklahoma though PCI, a wholly owned subsidiary. The first cause of action alleges plaintiff and IST entered into an employment contract on December 19, 1991, by which plaintiff served as Vice-President and Chief Operating Officer of IST and as a Director of PCI. Plaintiff alleges IST breached the employment agreement by failing to provide certain benefits which were contractually required and ultimately by terminating the contract on July 2, 1993.

In plaintiff's second cause of action, he alleges he was 63 years old at the time of his termination, and defendants replaced

him with a younger person. The petition then states: "Such action by Defendants amounts to discrimination against Plaintiff which violates the public policy of the United States of America, the State of Oklahoma and the State of Colorado." (Petition at 4).

Defendants timely removed the action to this Court. In the Notice of Removal, defendants assert: "This is a civil action over which this Court has original jurisdiction under the provisions of 28 U.S.C. §1331, and is one that may be removed to this Court pursuant to the provisions of 28 U.S.C. §1441(a), (b), and (c) based upon federal question jurisdiction; namely, age discrimination." (Notice of Removal at 1). Plaintiff then filed a motion to remand, contending his second cause of action is brought under state law, not the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621, et seq.. In his supporting brief, plaintiff details his reliance upon Burk v. K-Mart Corp., 770 P.2d 24 (Okla.1989), in which the Supreme Court of Oklahoma recognized a wrongful discharge action "in a narrow class of cases in which the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law." Id. at 28.

Referring to the allegation in the petition that his discharge was contrary to the public policy of the United States, plaintiff avers the "public policy of the United States is represented by the [ADEA]." (Brief of Plaintiff in Support of Motion to Remand at 2, n.4). However, plaintiff reaffirms that his claim is one under Oklahoma common law, citing his failure to even attempt to exhaust

administrative remedies and the absence of federal preemption in this area. Defendants' response is that the face of the petition raises all the allegations necessary to state an ADEA claim, and therefore federal jurisdiction exists.

28 U.S.C. §1441(a) permits removal of a civil action brought in a state court when "the district courts of the United States have original jurisdiction." Under §1441(b), a civil action "of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States" is removable. §1441(c) allows removal of an entire case if a separate and independent claim within a district court's original jurisdiction is joined with an otherwise non-removable claim. The burden of establishing federal jurisdiction is on the party seeking removal. Wilson v. Republic Iron & Steel Co., 257 U.S. 92 (1921). Because removal jurisdiction raises significant federalism concerns, the Court must strictly construe removal jurisdiction. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941). In this case, diversity jurisdiction not being present, the propriety of removal depends on whether the case falls within the provisions of 28 U.S.C. §1331: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

The governing principles in this area are easily stated, but not always easily applied to the facts of a case. The determination of whether plaintiff's case arises under federal law is made by reference to the complaint. Franchise Tax Board v.

Construction Laborers Vacation Trust, 463 U.S. 1, 9-10 (1983). Under the "well-pleaded complaint rule", federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). The vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action. Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 808 (1986). Here, plaintiff made no reference to the specific provisions of the ADEA. He alleged a violation of "the public policy of the United States." It is the Burk decision which permits a cause of action based upon violation of public policy. In light of Burk and the Oklahoma Anti-Discrimination Act, 25 O.S. §1101 et seq., it cannot be said that plaintiff's claim is created by federal law.

However, the Supreme Court has also recognized a case may arise under federal law "where the vindication of a right under state law necessarily turned on some construction of federal law." Franchise Tax, 463 U.S. at 9. In Merrell Dow, the Supreme Court said "this statement must be read with caution". 478 U.S. at 809. The mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction. Id. at 813. Jurisdiction may not be sustained on a theory that the plaintiff has not advanced. Id. at 809 n.6. The party who brings a suit is master to decide what law he will rely upon. The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913). Plaintiff "may

avoid federal jurisdiction by exclusive reliance on state law." Caterpillar, 482 U.S. at 392. Nevertheless, "occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization . . . If, however, there is a choice between federal and state remedies, the federal courts will not ignore the plaintiff's choice of state law as the basis for the action." 14A C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure, §3722 at 268-270, 275-76 (1985) (footnotes omitted).

In their surreply, defendants disavow any reliance on a federal preemption argument; in any event, plaintiff is correct that the ADEA does not preempt state laws permitting recovery for age discrimination. See Moody v. Pepsi-Cola Metropolitan Bottling Co., Inc., 915 F.2d 201, 210 (6th Cir.1990). However, plaintiff has expressed partial reliance upon the ADEA by invoking the "public policy of the United States" in his petition. The Oklahoma Anti-discrimination Act also cites federal law. 25 O.S. §1101(A) states "[t]he general purposes of this act are to provide for execution within the state of the policies embodied in . . . the federal Age Discrimination in Employment Act of 1967. . . ." Both 25 O.S. §1302(A)(1) and 29 U.S.C. §623(a)(1) make it unlawful to discharge an individual because of age.¹ Whether a Burk action which relies, in part, upon violation of federal law is properly

¹Inasmuch as both statutes use the words "because of", the issue of differing burdens of proof is not present. Cf. Bentley v. Cleveland County Bd. of County Commissioners, 41 F.3d 600, 605-06 (10th Cir.1994).

removable appears to be a question of first impression in Oklahoma.

Moore v. Chesapeake & Ohio R. Co., 291 U.S. 205 (1934), has been held to stand for the broad propositions that "violation of a federal standard as an element of a state tort recovery does not fundamentally change the state tort nature of the action" and "[t]he fact that part of the state statutory scheme requires some analysis of federal law . . . is insufficient to invoke federal jurisdiction." Hill v. Marston, 13 F.3d 1548, 1550 (11th Cir.1994). The plaintiff in Moore brought an action under Kentucky's Employer Liability Act. The Act provided a plaintiff could not be held responsible for contributory negligence or assumption of risk where his injury resulted from the violation of any state or federal statute enacted for the safety of employees. Therefore, violation of a federal standard was only "an element" of a state tort recovery in the sense of analyzing the employer's defense, not the plaintiff's claim.

In the case at bar, by contrast, defendants contend the federal standard is an element of the plaintiff's claim, being incorporated by the petition and by state law. While not citing these decisions, defendants essentially argue this case requires application, not of Moore, but of Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921). Smith stands for the principle that federal question jurisdiction exists over a state-created cause of action if the plaintiff's right to relief depends upon the construction or application of federal law, when the federal claim

is not merely colorable and rests upon a reasonable foundation.² See also Franchise Tax Board, 463 U.S. at 28 (there is federal jurisdiction under §1331 where the plaintiff's right to relief "necessarily depends" upon resolution of a substantial question of federal law).

In Merrell Dow, the Supreme Court's most recent decision in this area, a consumers' state court action against a drug manufacturer alleged in part the manufacturer had violated provisions of the Federal Food, Drug and Cosmetic Act (FDCA), 21 U.S.C. 301 et seq.³ The Court assumed, based upon the agreement of the parties, no federal cause of action existed for FDCA violations. The Court stated that the congressional determination not to provide a private cause of action under a federal statute "is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." 478 U.S. at 814 (footnote omitted). The Court concluded federal jurisdiction did not exist. Here, Congress has provided for a private cause of action through the ADEA, but

²In Merrell Dow, the majority sought to reconcile Smith and Moore by focusing on the differences in the nature of the federal issues at stake. 478 U.S. at 814 n.12. The four-member minority in Merrell Dow found the two decisions irreconcilable, and pronounced Moore "moribund" in contrast to Smith's "continuing vitality." Id. at 820-21 & n.1.

³One of the causes of action alleged the drug Bendectin was "misbranded" in violation of the federal act, that the federal violation raised a presumption of negligence and that the violation of the federal statutes was a proximate cause of the injuries suffered.

this does not end the inquiry. "In instances in which a private federal remedy does exist, the ultimate question under Merrell Dow is whether Congress intended that such an action, based on state law but incorporating a violation of federal law, be brought in federal court." Mulcahey v. Columbia Organic Chemicals Co., Inc., 29 F.3d 148, 152 (4th Cir.1994). Congressional intent is plain that an ADEA action may, but need not, be brought in federal court. 29 U.S.C. §626(c)(1) provides in part: "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter" (emphasis added). See also Gilmer v. Interstate/Johnson Lane Corp., 111 S.Ct. 1647, 1654 (1991) (Congress has granted concurrent jurisdiction over ADEA claims to state and federal courts). A fortiori, an age discrimination action based upon state law may be brought in state court.

The fact that the state trial judge and parties may well refer to federal precedents interpreting the ADEA for guidance does not transform the nature of this action into one in which the plaintiff's right to relief depends upon the application or construction of federal law. Congress has not seen fit to establish the ADEA as the exclusive avenue to remedy perceived age discrimination. Oklahoma, through its highest court and its legislature, has chosen to replicate certain federal remedies. A statutory action pursuant to the Oklahoma Anti-Discrimination Act or a common-law action pursuant to Burk remain state remedies, notwithstanding the existence of the ADEA. Plaintiff has elected

a state law remedy for alleged age discrimination, and eschewed the available federal remedy. As the "master" of his lawsuit, plaintiff is free to do so. Under the strict construction which must be placed on removal jurisdiction, the Court concludes federal question jurisdiction does not exist over plaintiff's second cause of action. Defendants concede the plaintiff's first cause of action is before this Court only because of pendent jurisdiction. Accordingly, no basis exists for federal jurisdiction over any aspect of this case.

It is the Order of the Court that the motion of the plaintiff to remand is hereby GRANTED. Pursuant to 28 U.S.C. §1447(c), this action is hereby remanded to the District Court of Tulsa County, State of Oklahoma. Plaintiff's request for fees and costs is DENIED.

ORDERED this 14 day of July, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

JUL 14 1995

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

LYDIA G. RINCONES, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 ROGER COOPER, et al.,)
)
)
 Defendant.)

No. 94-C-561-K

ENTERED ON DOCKET
DATE JUL 17 1995

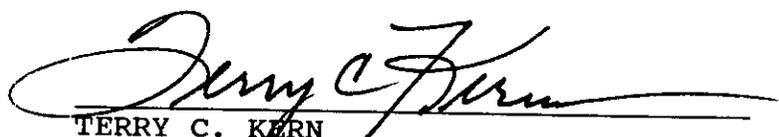
ADMINISTRATIVE CLOSING ORDER

The Court notes that no party has taken any action in the above-captioned case since June 14, 1994. Upon contact from the Court Clerk's office, the parties represent a settlement has been achieved. No party, including the intervenor, objects to the administrative closing of this case.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation.

The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 30 days by either party that this case should not be closed.

ORDERED this 14 day of July, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE JUL 17 1995

RICHARD and MARGIE DAVY,
individually and as Guardians)
ad litem for STACEY MARIE)
DAVY,)

Plaintiffs,)

vs.)

STERLING WINTHROP, INC.,)

Defendant.)

No. 92-C-845-K

FILED

JUL 17 1995

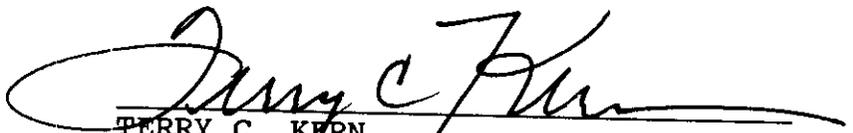
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

This matter came before the Court for consideration of the defendant's motion for partial summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendant and against the plaintiffs Richard Davy and Margie Davy solely as to those plaintiffs' individual claims, and not as guardians ad litem for Stacey Marie Davy.

ORDERED this 14 day of July, 1995.


PERRY C. KERN
UNITED STATES DISTRICT JUDGE

77

RICHARD and MARGIE DAVY,)
individually and as Guardians)
ad litem for STACEY MARIE)
DAVY,)

Plaintiffs,)

vs.)

STERLING WINTHROP, INC.,)

Defendant.)

No. 92-C-845-K

FILED

JUL 17 1995

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

ORDER

Before the Court is the motion of the defendant for partial summary judgment. Plaintiffs allege their daughter Stacey contracted Reye's Syndrome in March, 1984 from the ingestion of defendant's product, Bayer Aspirin, while she suffered from the flu. The Complaint alleges three causes of action: products liability, breach of warranty and gross negligence. Plaintiffs seek recovery on their own behalf and on their daughter's behalf.¹ Defendant contends the parents' individual claims are barred by the applicable statute of limitation. The essential issue is what constitutes sufficient knowledge of injury and causation to result in the accrual of a cause of action.

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

¹It is unclear from the Complaint if the plaintiffs as individuals seek recovery under all three claims.

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).

While cases involving statute of limitations defenses frequently lend themselves to summary disposition, a court should not grant summary judgment for the defendant if there is a viable issue of fact as to when the limitations period began. Maughan v. SW Servicing, Inc., 758 F.2d 1381, 1387 (10th Cir.1985). The issue of when a plaintiff knew or with reasonable diligence should have known of a cause of action is a question of fact for the jury. Id. Summary judgment cannot be granted unless the evidence is so clear that there is no genuine factual issue that the determinations can be made as a matter of law. Id. at 1388.

Plaintiffs do not dispute defendants' assertion that, under Oklahoma law, the statute of limitation on products liability and negligence actions is two years (12 O.S. §95), while the statute of limitation is five years on breach of warranty actions (12A O.S. §2-725).² The Complaint in this case was filed September 18,

²Plaintiffs resided in Georgia at the time of the litigated event. 12 O.S. §105 provides "[t]he period of limitation applicable to a claim accruing outside of this state shall be that prescribed either by the law of the place where the claim accrued or by the law of this state, whichever last bars the claim." The

1992, over eight years after Stacey's injury. Plaintiffs contend in 1984 they were only advised aspirin was a possible cause of Reye's Syndrome, and that defendant engaged in a campaign during the eighties and early nineties to "conceal, retard, and prevent the dissemination of information and knowledge about aspirin as a cause of [Reye's Syndrome]" (Plaintiffs' Brief at 3). Invoking the "discovery rule", plaintiffs argue their causes of action did not accrue until they knew defendant's product had caused the injury.

A statute of limitations begins to run when a cause of action accrues; accrual of a cause of action occurs when a plaintiff could have first maintained his action successfully. Kiamichi Elec. Co-op. v. Underwood, 842 P.2d 358, 359 (Okla.Ct.App.1992). Oklahoma recognizes the discovery rule in certain types of cases, including products liability. "Properly limited, a discovery rule should encompass the precept that acquisition of sufficient information which, if pursued, would lead to the true condition of things will be held as sufficient knowledge to start the running of the statute of limitations." Daugherty v. Farmers Co-op. Ass'n, 689 P.2d 947, 950-51 (Okla.1984). The tolling provisions applicable to a minor's cause of action do not apply to a parent's cause of action arising from the same incident. Brown v. Jimerson, 862 P.2d 91, 93 (Okla.Ct.App.1993). The issue, therefore, is whether the discovery rule applies to the claims of Stacey's parents.

In his deposition, Mr. Davy testified Dr. Kennedy-Jones and

Georgia statutes of limitation are two years for products liability and negligence (§9-3-33) and four years for breach of warranty (§11-2-725).

Dr. Esposito (Stacey's physicians) recommended in March, 1984 that the Davy family stop giving aspirin to their children. The reason given by Dr. Kennedy-Jones, according to Mr. Davy, is "aspirin causes Reye's syndrome." (Richard Davy deposition at 70-71.) Dr. Esposito said "[t]he same thing." Id. at 71. Plaintiffs attempt to draw a distinction between knowledge of causation and mere suspicion of causation. In her deposition, Mrs. Davy testified the doctors "speculated" about aspirin causing Reye's syndrome. (Margie Davy deposition at 126). Dr. Kennedy-Jones testified she told the parents she thought Stacey had Reye's syndrome and related what Dr. Kennedy-Jones's level of knowledge was at the time. She testified that from her level of knowledge she "suspected" aspirin had contributed to the condition. (Deposition of Donna Kennedy-Jones, M.D. at 47). She further testified her understanding had not changed since that time. Id.³ Therefore, plaintiffs received competent medical advice in March, 1984 that aspirin was a possible causative factor in Stacey's condition. The Court concludes this advice represents sufficient knowledge to trigger accrual of the parents' cause of action.

In view of this ruling, the Court need only briefly discuss plaintiffs' contention that defendant wrongfully concealed material facts from the public and the medical community about aspirin as a cause of Reye's syndrome. In their brief, plaintiffs do not specify a date upon which they contend their cause of action accrued. They do state that in Sharkey v. Sterling Drug, Inc., 600

³The deposition of Dr. Kennedy-Jones is dated November 4, 1993.

So.2d 701 (La.Ct.App.1992), "the Louisiana Court of Appeals informed the public for the first time that Sterling was critical in delaying knowledge of the aspirin/R.S. link." (Plaintiffs' Brief at 3).⁴ The implication of this statement is the public in general, and the Davys in particular, regularly read published opinions of the Louisiana Court of Appeals and rely upon those opinions for information concerning potentially dangerous products. The Court does not accept this implication. Further, assuming the truth arguendo of the allegations regarding defendant's disinformation campaign, the campaign was obviously unsuccessful, as witness Dr. Kennedy-Jones and Dr. Esposito. It is the physicians' statements to the parents that represent the point at which the cause of action accrued. Measuring the limitation period from March, 1984, the Court concludes the parents' claims are time-barred.

It is the Order of the Court that the motion of the defendant for partial summary judgment is hereby GRANTED. The individual claims of plaintiffs Richard and Margie Davy are barred by the statute of limitation.

ORDERED this 14 day of July, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

⁴The Sharkey opinion was issued April 23, 1992.

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

FILED

JUL 13 1995

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

LYDIA RINCONES, individually,)
and as personal representative)
the Estate of Juan Rincones,)
deceased,)

Plaintiff,)

vs.)

Case No. 94-C-561-E

ROGER COOPER, individually)
and doing business as ROGER)
COOPER, INC., ROBERT LEWIS)
SHORT, JR., SHIELD OF SHELTER)
INSURANCE COMPANY,)

Defendants.)

and)

HOUSTON GENERAL INSURANCE)
COMPANY,)

Intervenor.)

ENTERED ON DOCKET
DATE JUL 14 1995

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

COME NOW the parties herein and would hereby mutually stipulate that the above-styled matter should be dismissed with prejudice. The parties further agree that this decision has been reached of their own freewill, after consultation with legal counsel. The parties further stipulate that no inference should be drawn as to the merits of the Plaintiff's claim against the Defendants as a result of this dismissal with prejudice.

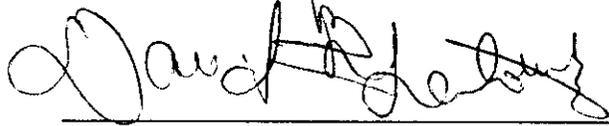
It is, therefore, the request of the Plaintiff, the Defendants, and the Intervenor that the above-styled matter

9

[Handwritten signature]

should be dismissed with a prejudice to its being re-filed, and
this Court enter an Order accordingly.

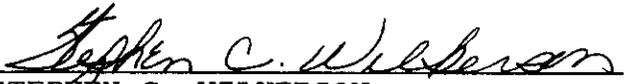
Respectfully submitted,



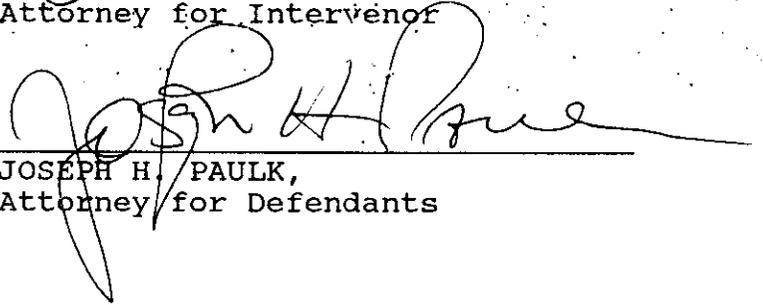
DAVID M. LEIBOWITZ,
Attorney for Plaintiff



RENEE WILLIAMS,
Attorney for Plaintiff



STEPHEN C. WILKERSON,
Attorney for Intervenor



JOSEPH H. PAULK,
Attorney for Defendants

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

ENTERED ON DOCKET
DATE JUL 14 1995

JONATHAN NEAL,
Plaintiff,
vs.
STANLEY GLANZ,
Defendant.

)
)
)
)
)
)
)
)
)
)

No. 94-C-845-K

FILED

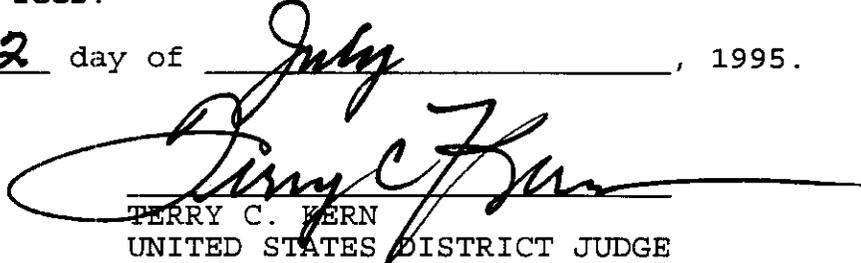
JUL 14 1995

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

JUDGMENT

In accord with the Order granting Defendant's motion for summary judgment, the Court hereby **enters judgment** in favor of Defendant Stanley Glanz and against Plaintiff, Johnathan Neal. Plaintiff shall take nothing on his claims. Each side is to pay its respective **attorney fees**.

SO ORDERED THIS 12 day of July, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED
JUL 14 1995

BRUCE REBERNAK,)
)
 Plaintiff,)
)
 v.)
)
 A.R.B. INC., a California corporation,)
 and/or d/b/a HARCRO,)
)
 Defendant.)

Case No.: 94-C-198-K

ENTERED ON DOCKET

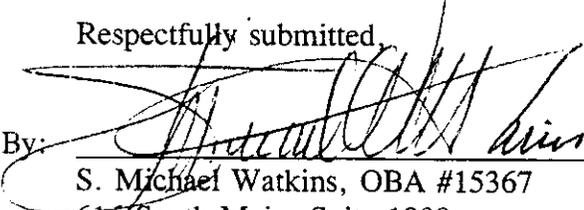
DATE ~~JUL 14 1995~~

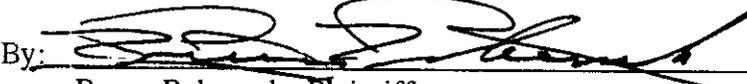
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1)(ii) Fed. R. Civ. P., the parties hereto, hereby stipulate and agree that Plaintiff's Complaint and claims for relief against the Defendant shall be and hereby are dismissed with prejudice. It is further stipulated and agreed that each party shall bear its own cost.

DATED this 12th day of July, 1995.

Respectfully submitted,

By: 
S. Michael Watkins, OBA #15367
616 South Main, Suite 1000
Tulsa, Oklahoma 74103
ATTORNEY FOR PLAINTIFF

By: 
Bruce Rebernak, Plaintiff

By: 
R. Mark Solano
2400 First National Tower
15 East 5th Street
Tulsa, Oklahoma 74103-4391
ATTORNEY FOR DEFENDANTS

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

FILED

JUL 13 1995

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

STEPHEN H. PECK, D.O.,)
)
Plaintiff,)
)
v.)
)
BAPTIST HEALTHCARE OF)
OKLAHOMA, INC.,)
)
Defendant.)

Case No. 94-C-1005-K

ENTERED ON DOCKET

DATE JUL 14 1995

JOINT STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1) and 41(c), the Parties hereto jointly stipulate to the dismissal with prejudice of all Plaintiff's claims and all Defendant's counterclaims, including, without limitation, any claims for costs, expenses, or attorneys' fees.

KENNETH E. CRUMP, JR., OBA No. 11803

DOUGLAS L. INHOFE, OBA No. 4550
MARK A. WALLER, OBA No. 14831

By Kenneth E. Crump Jr.

By Douglas L. Inhofe

MILLER, DOLLARHIDE, DAWSON & SHAW
320 S. Boston, Suite 1605
Tulsa, Oklahoma 74103-4705
(918) 587-8300 (Telephone)
(918) 587-5038 (Facsimile)

INHOFE & WALLER, P.C.
427 South Boston Avenue, Suite 907
Tulsa, Oklahoma 74103-4114
(918) 583-4300 (Telephone)
(918) 583-7100 (Facsimile)

Attorneys for Defendant
BAPTIST HEALTHCARE OF OKLAHOMA, INC.

Attorneys for Plaintiff
STEPHEN H. PECK, D.O.

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

FILED

JUL 12 1995

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

RTC MORTGAGE TRUST 1994-S1,
a Delaware business trust,

Plaintiff,

-vs.-

COLONIAL TERRACE CARE CENTER, INC.,
an Oklahoma corporation,

Defendant.

Case No. C-95-189H

ENTERED ON DOCKET

DATE JUL 13 1995

ORDER FOR ADMINISTRATIVE CLOSURE

Before the Court is the Joint Application of Plaintiff, RTC Mortgage Trust 1994-S1, a business trust, and Defendant, Colonial Terrace Care Center, Inc., an Oklahoma corporation, for an order of administrative closure in the captioned matter. The Court finds that the Joint Application should be granted in the interests of justice and judicial economy. Accordingly,

IT IS HEREBY ORDERED as follows:

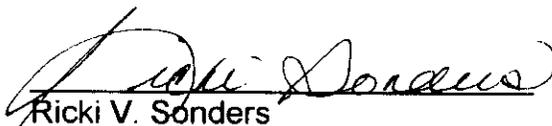
- A. The captioned cause is hereby placed into administrative closure.
- B. On or before November 15, 1995, Plaintiff shall file with the Court a Notice advising if the settlement agreement to which the parties refer in their Joint Application has been successfully concluded.
- C. If the said settlement has been successfully concluded, the Notice shall be accompanied by the parties' joint dismissal of this action pursuant to F.R.Civ.P. 41(a)(ii).
- D. If the said settlement has not been successfully concluded, the Notice shall be accompanied by the stipulation to which the parties refer in their Joint Application.

5

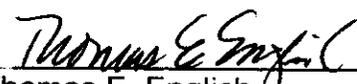
SO ORDERED.


UNITED STATES DISTRICT COURT
JUDGE

Approved:


Ricki V. Sonders
DAY, EDWARDS, FEDERMAN,
PROPESTER & CHRISTENSEN, P.C.
210 Park Avenue, Suite 2900
Oklahoma City, OK 73102
Telephone: (405) 239-2121
Telecopier: (405) 236-1012
ATTORNEY FOR PLAINTIFF,
RTC MORTGAGE TRUST 1994-S1,
a Delaware business trust

- and -


Thomas E. English
ENGLISH & WOOD, P.C.
15 West South Street, Suite 1700
Tulsa, OK 74119-5466
Telephone: (918) 582-1564
ATTORNEYS FOR DEFENDANT,
COLONIAL TERRACE CARE CENTER, INC.,
an Oklahoma corporation

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

FILED

JUL 12 1995

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

JIM D. SHERL,)
)
Plaintiff,)
)
vs.)
)
RODGER RANDLE, SAM KEIRSEY,)
)
ROY HEIM, and the CITY OF)
TULSA, OKLAHOMA, a Municipal)
corporation,)
)
Defendants.)

93-C-9868 #

ENTERED ON DOCKET

DATE JUL 13 1995

JOURNAL ENTRY OF JUDGMENT

Now, the 11th day of July, 1995, this matter comes before the court upon the Joint Application For Judgment filed by the parties to this action. This court, having examined the pleadings filed herein, and being fully apprised in the premises finds that said application, for good cause shown, should be granted.

IT IS THEREFORE HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff Jim D. Sherl shall have judgment against the City of Tulsa in the amount of Seventy Five Thousand, Nine Hundred Eighty Five Dollars and Thirty One Cents (\$75,985.31).

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED, by the Court that the suit of the Plaintiff against Defendants Rodger Randle, Sam Keirsey and Roy Heim, as individuals, is hereby dismissed with prejudice.

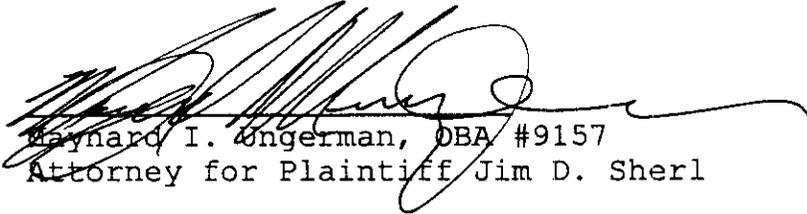
S/ SVEN ERIK HOLMES

Judge

APPROVED AS TO FORM:



Charles R. Fisher, OBA #2933
Attorney for Defendant City of Tulsa



Raymond I. Ungerman, OBA #9157
Attorney for Plaintiff Jim D. Sherl



S. M. Fallis, Jr., OBA #2813
Attorney for Defendants
Sam Keirsey and Roy Heim
Kirk Turner
Attorney for Defendants

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

ENTERED ON DOCKET
DATE JUL 13 1995

TONY LAMAR VANN,
Petitioner,
vs.
MIKE ADDISON, et al.,
Respondents.

No. 95-C-518-C

FILED

JUL 12 1995

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

ORDER

This matter comes before the Court on Petitioner's motion to transfer this case to the Eastern District of Oklahoma.

Because Petitioner was convicted in Osage County, Oklahoma, which is located within the territorial jurisdiction of this district, the Court hereby **denies** Petitioner's motion to transfer this habeas corpus action to the Eastern District of Oklahoma (docket #4). See 28 U.S.C. § 2241(d). The Clerk shall **mail** to Petitioner for this time only the extra copy of his motion to transfer and reply brief although Petitioner failed to submit a self-addressed and stamped envelope as set out in Miscellaneous order No. M-128-L.

SO ORDERED THIS 12th day of July, 1995.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

7

FILED

JUL 12 1995

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

JOHN LEO WAGNER
U.S. MAGISTRATE JUDGE
Northern District of Okla.

RICHARD R. RUSH,)
)
Plaintiff,)
)
v.)
)
DONNA E. SHALALA,)
Secretary of Health and Human)
Services,)
)
Defendant.)

ENTERED ON DOCKET
DATE JUL 13 1995

Case No: 94-C-153-W

FILED

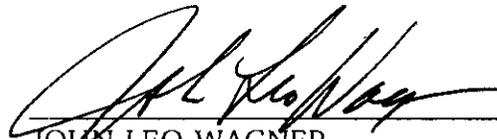
JUL 12 1995

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

AMENDED JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in
accordance with this court's Amended Judgment filed July 12, 1995.

Dated this 12th day of July, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

FILED

FILED

JUL 12 1995

JUL 12 1995

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLA.

JOHN LEO WAGNER
U.S. MAGISTRATE JUDGE
Northern District of Okla.

RICHARD R. RUSH,)
)
Plaintiff,)
)
v.)
)
DONNA E. SHALALA,)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
)
Defendant.)

Case No. 94-C-153-E

ENTERED ON DOCKET
DATE JUL 13 1995

AMENDED ORDER

This Amended Order replaces the Findings and Recommendations erroneously filed in this consent case on June 30, 1995. Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

Plaintiff's most recent application was filed on February 6, 1991, and denied by the ALJ on July 31, 1992. The Appeals Counsel denied Plaintiff's request for review of the ALJ's decision on December 21, 1993.¹ Plaintiff had been granted a prior period of

¹The Administrative Appeals Judge wrote:

The Appeals Council has considered the medical reports which your attorney submitted from Parkside Community Psychiatric Services and Hospital concerning your hospitalization on April 8, 1993.

Under the Social Security Act, applications for Title II (disability insurance benefits) filed after June 30, 1980 and for Title XVI (Supplemental Security Income) filed after April 30, 1986, are effective to establish disability only if the requirements are satisfied on or before the date the hearing decision was issued (20 CFR 404.976.(b) and 416.1476(b)). Since your applications were filed on February 6, 1991, they are subject to this restriction. In determining whether to grant a request for review on these claims, the Appeals Council will consider additional evidence only if it is new and material and concerns the period ending on or before July 31, 1992, when the Administrative Law Judge issued his decision.

The medical reports that your attorney furnished concern medical treatment that was rendered between

disability extending from January 1980 to March 1982. Thereafter, an application filed on August 20, 1984 was denied through the hearing level, and an application filed on March 2, 1988 was denied at the initial level, both without further appeal.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.²

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that the claimant had the residual functional capacity to

April 8, 1993 and April 14, 1993, which is some nine months after the Administrative Law Judge's decision.

The Administrative Appeals Judge also noted that the plaintiff could file a new application for Supplemental Security Income in order to receive a determination of disability after July 31, 1992, but that his insured status for disability insurance benefits expired on June 30, 1991.

The 1993 Parkside medical reports noted that plaintiff suffered from depression after a five year old child died from complications following spina bifida surgery, and had suicidal thoughts after his wife divorced him. The psychiatric condition that resulted from these incidents was a primary consideration of the ALJ in granting benefits as of January 16, 1980, the date of the report containing a mental evaluation by Dr. Holland. However, the record documents that plaintiff's mental state improved with the passage of time, and the initial period of disability was terminated. Plaintiff's mental condition was not a significant consideration with regard to his subsequent applications. See Dr. Koepke's report of September 29, 1994, where he states that Plaintiff "fails to evidence anything suggesting psychotic process or serious psychiatric illness of any kind."

The April 20, 1993 medical report from Parkside (TR 22) documents recent depression and suicidal ideation, but does not relate to the period on or before July 31, 1992, when the ALJ made his decision. The Appeals Council properly declined to consider the 1993 Parkside reports, pursuant to 20 CFR §§ 404.967(b) and 1476(b).

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

³The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

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

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

perform the physical exertion and nonexertional requirements of work, except for lifting/carrying no more than 10 pounds, prolonged standing/walking, and the need to move around occasionally. He concluded that claimant was unable to perform his past relevant work as a convenience store clerk, youth counselor, woodworker, and apartment manager and that his residual functional capacity for the full range of sedentary work was reduced by the need to move around occasionally.

The ALJ concluded that claimant is 51 years old, which is defined as "closely approaching advanced age," but was a "younger person" at the alleged onset of his disability, has a 12th-grade education plus two years of college, and does not have any acquired work skills which are transferable to the skilled or semiskilled work functions of other work. Based on his exertional capacity for sedentary work and his age, education, and work experience, the ALJ found that the regulations directed a conclusion of "not disabled." The ALJ then concluded that, although the claimant's additional nonexertional limitations did not allow him to perform the full range of sedentary work, there were a significant number of jobs in the national economy which he could perform, such as order clerk, record clerk, and general office clerk. Having determined that claimant's impairments did not prevent him from performing jobs that exist in the national economy, the ALJ concluded that he was not disabled under the Social Security ACT at any time through the date of the decision.

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

(1) That the ALJ's finding that claimant was not disabled by a cervical impairment is not supported by substantial evidence.

(2) That the ALJ failed to meet the burden of showing the availability of work claimant could perform despite his limitations.

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 517, 579 (10th Cir. 1984).

Claimant contends he has not engaged in work activity since February 15, 1988, largely because of back and neck problems. He met the disability insured status requirements through June 30, 1991. The medical evidence shows he has severe spina bifida, ankylosing spondylitis, complaints of pain, headaches, and periodic episodes of right eye iritis. He claims the most disabling problem is stiffness and pain in his neck, especially if he sits or stands too long, and resulting headaches (TR 95-96).

Dr. Richard G. Cooper examined claimant on March 28, 1988. He said "This is a 47-year-old white male who is heavily muscled. He stands erect. He can walk on his toes and can walk on his heels, but he comes in with a stick, walking slowly. He did not need to hold on to the furniture much when he was walking on his toes or walking on his heels. Posture is good when he stands up." The doctor went on to find:

Range of motion of the cervical spine is restricted as follows: Right and left side bending 20 degrees. Flexion 15 degrees. Extension 15 degrees. Right rotation and left rotation 45 degrees each. In the thoracolumbar spine, right and left side bending 20 degrees. Flexion 30 degrees. Extension 10 degrees. The range of motion of the fingers, wrists, elbows, shoulders, hips, knees, and ankles are full range of motion. Circumference of the left calf 15-1/4 inches, right calf 15 inches. Left side 20-1/2 inches; right side 20-1/2 inches. He has several minor scratches and abrasions. I asked him about that, and he says he got that from clipping hedges yesterday. The Yeoman tests are negative. Strength of the quadriceps, hamstrings, abductors and abductors of the hips and toe dorsiflexors are full and equal on the two sides. The patient was able to walk on toes and walk on heels. Leg lengths are

equal. Fabere tests are negative. In the seated straight leg raising tests, he leaned back and complained of pain. In the supine, straight leg raising test at 40-45 degrees, he complains of pain shooting into his low back and into his buttocks, specifically not into the thighs or the legs. When I asked that, he said, "Well I have had sciatica in the past." (emphasis added).

(TR 617). The doctor concluded that claimant had "some restricted range of motion of the cervical and thoracolumbar spines," but added "[i]t would be interesting to see on [sic] x-rays of his back" (TR 617-18).

By June 7, 1988, a doctor noted that claimant "feels better than ever - samples given worked well" (TR 591). Claimant was exercising and had no joint swelling or tenderness (TR 591). In June of 1989 a doctor noted claimant had injured his foot "playing basketball" (TR 625).⁴ A myelogram done on November 1, 1989, was "unremarkable" (TR 629).

A year later, on November 5, 1990, claimant was examined by Dr. Richard F. Tenney because of "neck pain and limitation of motion" and the doctor concluded:

On examination, cervical range of motion is as follows: Extension is 10 degrees, flexion is 30 degrees, right rotation is 20 degrees, left rotation is 20 degrees, right tilt is 10 degrees and left tilt is 5 degrees. No motor deficits are present in the upper extremities. Sensation is intact in the upper extremities and in both hands. Biceps reflex is 1+ right and 1+ left. Triceps reflex is 2+ right and 1+ left.

....

I feel that this patient's symptoms are compatible with ankylosing spondylitis or at least severe cervical arthritis and I have suggested to him that he return

⁴The following explanatory testimony appears in the record (TR 107-108):

Q I also noticed in the medical records, in June of '89, you went to the emergency room at St. John's. Exhibit C-42. Said you had a basketball injury. Or injury playing basketball. Can you tell us about that?

A I was watching my, my high school boy and the three friends playing basketball at this friend's house. I was standing there with their dad, and the ball came by me. I wasn't playing. And I make a move to stop the ball with my foot, and there was a hole there. So I went -- knee collapsed. I went down. And the next day, I had a swollen foot -- or the next day or the day after that. And it was very painful. That's why I went to the hospital.

to the Oklahoma University Medicine Clinic for further evaluation and for x-rays. I will give the patient samples of anti-inflammatory medication.

(TR 644).

Plaintiff was not told by Dr. Tenney to restrict activities. An x-ray the next day showed "some anterior osteophytic spurring at the C2-C3 level as well as at the C3-C4, C5-C6 and C6-C7 levels," but the intervertebral disk spaces appeared well maintained and there was no significant loss of vertebral body height (TR 719). The cervical spine was in good alignment with no fracture or dislocation identified, and the prevertebral soft tissues were within normal limits (TR 719). The changes were suggestive of "osteoarthritic involvement of the cervical spine" (TR 719).

On January 7, 1991, Dr. Tenney gave claimant a letter "for his use as he sees fit," discussing claimant's conditions as described to him and concluding: "It is my feeling that this patient is disabled with regards to performing any type of occupational activity" (TR 643). The doctor did not include any laboratory tests or discuss an examination of the claimant.

An x-ray was taken of claimant's dorsal spine and pelvis on January 22, 1991, and the doctor reported:

There is a smooth dorsal kyphosis with no scoliosis. The vertebral bodies are well maintained without evidence of trauma. The intervertebral disk spaces are well maintained and the spine appears to be free of any evidence of arthritic changes Ankylosing arthritis of the sacroiliac joints and L4-L5 vertebral bodies and a comparison with previous film in 1984 reveals that the ankylosis of the left sacroiliac joint is now complete whereas in 1984 there was still some portion of the joint visible. The right sacroiliac joint also shows evidence of progression in that the lower portion of the right sacroiliac joint is now almost completely obliterated.

(TR 690).

However, on March 11, 1991, claimant's physician stated that there was no information at his disposal that would support a claim for disability and he would not write a letter in support of such a claim (TR 579). The next month, on April 4, 1991, his doctor reported he was "doing great on Wellbutrin - no complaints" (TR 578). On June 21, 1991, Dr. Robert D. Grubb reported:

The patient does not appear to have any joint deformity, redness, swelling, heat or tenderness. His grip strength seems weak but the dexterity of gross and fine manipulation is all right. He appears to have very good gait but not as good as one might expect from an individual of his age he seems more unsteady on his heel walking and toe walking the reason for this is not obvious. I do not believe assistive devices would help this patient (TR 677).

On September 16, 1991, claimant's physician commented that claimant continued to make "manipulative comments," such as "if I have to go through another winter like last one I won't be around any longer," and refused to make an effort to obtain Wellbutrin, which had helped in the past (TR 575).

On May 14, 1992, Dr. Raymond Sorensen reported that he examined claimant for chronic pain and found "muscle soreness and areas of spasm throughout the body" (TR 710). He concluded that claimant could work, but was

limited in the degree and type of employment that he would be able to perform. He would be restricted in non-repetitive activity and also restricted in a job position that would not limit him to a sitting or standing position for any length of time. He would also be limited in an occupation that involves lifting more than five pounds.

(TR 711).

There is no merit to claimant's contention that the ALJ's finding that he was not disabled by a cervical impairment is not supported by substantial evidence. While Dr. Tenney concluded he was disabled with regards to performing any occupational activity,

the doctor did not base this conclusion on any laboratory tests and only examined claimant once (TR 46, 643). On the other hand, other doctors have refused to find him totally disabled and suggested he was exaggerating his disability (TR 575, 579, 677). Dr. Sorenson concluded that he was only limited in the type of employment he could perform (TR 711).

The ALJ correctly concluded that claimant's complaints were "disproportionate to the objective findings" (TR 43). The ALJ noted claimant only saw a doctor intermittently for neck pain (TR 44), he received relief with medication (TR 44, 578, 591) and had no side effects (TR 44), and he could clip hedges in March of 1988 (TR 617) and played basketball in 1989 (TR 45, 625). The ALJ noted that claimant's complaints of inability to afford medication and treatment were not credible, because he could afford to buy two packages of cigarettes a day and ordinary ways to reduce neck pain such as exercise or using a pillow behind the back or knees while sleeping, sitting, or driving were cost free (TR 45). The ALJ noted claimant testified he attends church frequently (TR 45, 106).

There is also no merit to claimant's contention that the ALJ failed to show the availability of work he could perform. Once the ALJ determined that plaintiff's residual functional capacity precluded him from returning to his past relevant work and that he could perform sedentary work with certain restrictions, he properly obtained vocational expert testimony, which is preferred by the courts when the hearing record does not contain information on the plaintiff's ability to perform work activities other than those connected with his former work. Decker v. Harris, 647 F.2d 291, 298 (8th Cir. 1981); Warner v. Califano, 623 F.2d 531, 532 (8th Cir. 1980).

The ALJ questioned the vocational expert as follows:

Q Now let me give you a hypothetical.

A Okay.

Q Let's assume that we have a male individual who is 51 years of age. Has 2 years of college. With the ability to read and write and use numbers. And can communicate well.

A Um-hum.

Q Let's assume further, that this individual in general has the physical capacity to perform sedentary work. Now would you describe sedentary work as set out in the Social Security Administration's definitions?

A Yes. It's sitting most of the time, but getting up and moving about occasionally. They [sic] most they have to lift is 10 pounds.

Q All right. That's a 10- pounds maximum?

A Yes.

Q Okay. Let's assume in this case that this individual has a symptomatology from a variety of sources. Including that of chronic pain, which -- the neck and the lower back. And it's of a sufficient severity as to be noticeable to him at all times. And that he finds it necessary to take medications for this symptomatology. And also he suffers from headaches that require medication.

But that with the medication he still can remain reasonably alert to perform functions presented by his work setting. Although he will find necessary to change positions from time to time to relieve the symptomatology of the chronic pain. Now, assuming these circumstances we're talking about sedentary work only.

A Okay.

Q Would this individual -- could he return to any of past relevant jobs?

A Let me review the past relevant jobs. Let me go through them. The -- I got the general idea from hearing his testimony, that the jobs were kind of what I would -- jobs which friends allowed him special privileges. The -- and I'll start out with the woodworking. It's a light job. Should be able to do

that. I'm sorry, that's considered a light job. No.

Q All right.

A It's 10-pounds max. Scratch --

Q Let me carry it a step further.

A Okay.

Q Does this individual retain any skills which are transferrable to any jobs existing in this region of the country which he might be able to perform sedentary --

A Okay.

Q -- work?

A That, that I can.

Q All right.

A That's a little easier. Okay. I would say that there are a number of sedentary type administrative -- I mean, clerical --

(TR 113-115).

.....

Q All right. Now, do you have any other vocationally relevant factors that we want to consider? But I think prior to that, I will ask you another hypothetical question.

A All right.

Q Now, let's assume that the testimony of the claimant, as given here today, was found to be credible.

A Yes.

Q And substantially verified by the third-party medical evidence which is a part of the record. And without any significant contradictions. Would this individual be able to return to any of his past relevant work?

A If we keep him at a sedentary level, apartment manager is considered a light occupation, so he could not do that. I would say, no.

Q Well, I'm not saying sedentary. I'm saying to any of his past relevant work. In other words, I'm not putting sedentary or light. I'm putting based upon the medical evidence in the record. The testimony you've heard today.

A Um-hum.

Q And your answer is no?

A No. I don't think he could.

(TR 116-117).

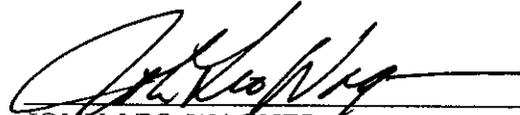
It is true that "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). The ALJ did this, and the vocational expert determined there were sedentary jobs that existed in the national economy that claimant could perform.

The ALJ established that the vocational expert had been present for all of the testimony and studied the record. (TR 110-111). Claimant's representative at the hearing was only able to elicit favorable testimony from the vocational expert by asking the expert to assume impairments that the ALJ properly deemed unsubstantiated, including an inability to look down at a work surface and poor vision (TR 117-119). These opinions, based on unsubstantiated assumptions, were not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993). It was proper for the ALJ to limit the hypothetical

questions to those impairments which were actually supported in the record. Jordan v. Heckler, 835 F.2d 1314, 1316 (10th Cir. 1987).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 12th day of July, 1995.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

t:rush.fr

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

FILED

LILLIE D. DAVIS,)
)
Plaintiff,)
)
v.)
)
DONNA E. SHALALA,)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
)
Defendant.)

JUL 11 1995
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

Case No. 93-C-796-B

ENTERED ON DOCKET
DATE JUL 13 1995

ORDER

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

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

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

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

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

16

evaluation process.² He found that claimant had the residual functional capacity to perform work related activities, except for work involving lifting more than 20 pounds occasionally, 10 pounds frequently, a problem with her shoulders and back, no standing for significant periods of time, and some difficulty lifting. He concluded that her past relevant work as a gager did not require the performance of work related activities precluded by the above limitations, so her impairments did not prevent her from performing her past relevant work. Having determined that claimant's impairments did not prevent her from performing her past relevant work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ erred in failing to find that claimant met Listing §1.05(C) of the Social Security regulations.
- (2) The ALJ erred in finding claimant's allegations of pain not credible.
- (3) The finding of the ALJ that claimant can do her past relevant work is not supported by substantial evidence.

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d

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

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

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

577, 579 (10th Cir. 1984).

The medical evidence establishes that the claimant has severe cervical pain, back pain, and right wrist pain. She was seen by Dr. Philip J. Hess on February 26, 1990, after sustaining a fall in mid December and another fall on January 14, 1990, where she fell backwards with her right arm outstretched and landed on the arm and side (TR 130). She complained of neck and lower back pain (TR 130). An x-ray of her right elbow on February 19, 1995 had been negative (TR 191). The doctor found "little decrease in range of motion" in her neck (TR 130). He prescribed ultrasound and hot pack treatments and Naprosyn and Flexeril (TR 130). He told claimant to stay off work for ten days (TR 130).

Claimant was seen again by Dr. Hess on March 2, 1990 (TR 126, 129). She complained of pain in her neck, shoulder, and right arm and Tylenol #3 was prescribed (TR 129). She was referred to Dr. Allan Fielding, who suggested an MRI scan (TR 128). On March 22, 1990, Dr. Fielding reported that an MRI done on March 19 showed "mild bulging of the C4-C5 and C5-C6 discs without evidence of herniation . . . [or] nerve root compression" (TR 202, 209). He had no explanation for her pain and told her to return to work in four days (TR 202).

On March 27, 1990, Dr. Delbert Williams reported she was having little relief of her pain and Vicodan and Soma were prescribed (TR 125). On April 2, 1990, Dr. John Josephson reported:

At the current time she has reasonably good range of motion with no restrictions of the neck movement. She has good range of motion both active and passive of the shoulder, no evidence of pain around the AC joint. Elbow movement is full however, when one goes to full extension with the forearm supinated she has some tightness in the forearm with pain.

On examination of the elbow she has no tenderness over the lateral epicondyle and minimal tenderness at the brachial radialis group of muscles. She has good forced flexion, extension of the elbow beginning at 90°. Wrist movement is full and intact, there is no sign of carpal tunnel syndrome.

.....

Impression is that of sprain, different muscle groups of the right upper extremity and certainly in one to two week period of time of ultra sound treatment if she is not improved, I would recommend the possibility of changing her job title, if that is possible, to something requiring less strenuous [sic] activities (TR 210).

On April 12, 1990, Dr. Fielding re-evaluated claimant and found "no focal deficit," but continuing pain (TR 201). He reported that x-rays showed "disc degeneration with mild protrusion at C4-5 and at C5-6," and scheduled tests (TR 201). On April 20, 1990, he reported that the myelogram showed "a very small irregularity of the right C6 nerve root" and a CT scan showed no disc herniation or bone spurs, so the root defect was of questionable significance (TR 170, 200, 253). He told claimant he did not know the source of her complaints (TR 200). On May 10, 1990, Dr. Fielding re-examined claimant, and could "see no evidence, on her radiographic studies nor on her clinical examination, for a cervical radiculopathy" (TR 169, 199). He could not provide a diagnosis for her complaints and could not recommend treatment, but told her to "return to her previous job without restrictions and see how things go" (TR 199).

Records of examinations by Dr. Kent G. Farish from May 11, 1990 to July 17, 1990 show claimant was seen every two weeks for shoulder, neck, and hip pain (TR 120-124). On May 11, 1990, the range of motion of her neck was "flexion good to 60°, extension good to 45°" (TR 124). A myelogram showed "some posterior disk bulging of the C4-C5

and C5-C6 discs without evidence of herniation" (TR 124). Trazodone and Soma muscle relaxants were prescribed (TR 124). On May 18, 1990, muscle energy techniques were applied, the dosage of Trazodone was increased, and isometric and isotonic neck stretches were demonstrated (TR 123). On May 24, 1990, a work hardening program was recommended (TR 122). She began such a program in June of 1990 (TR 121). Neurodiagnostic studies were ordered on July 3, 1990 (TR 120).

On May 23, 1990, claimant reported to Dr. William C. Parsons that she had worked seven days and had increased pain in her arm, shoulder, elbow, and hip (TR 167). He found she had full range of motion in her neck, shoulder, elbow, and hip, but pain with all movement (TR 167). She was put on Feldene and a light duty assignment was declined (TR 167). The doctor recommended a work-hardening program (TR 165):

On July 2, 1990, Dr. Ralph W. Richter examined claimant and concluded:

The range of motion is good in the arms and legs. I see no muscle atrophy There are what appear to be definite sensory changes in a C8-T1 nerve root distribution in the right arm and hand. This involves the fourth and fifth fingers of the right hand. The sensory exam which I performed shows a mild deficit all the way up into the anterior chest in a T-1 nerve root distribution.

.....

The right arm pain, I believe, is a very valid pain from a neurologic standpoint and would arise from the lower roots and inferior portion of the brachial plexus. I believe this could be at the level of the thoracic outlet rather than at the level of the origin of the nerve roots. Lifting and reaching above her arm aggravates the pain.

.....

Again, I am convinced that the problem which Mrs. Davis has

is real and is based on definite neurologic dysfunction.

(TR 264-265).

On July 17, 1990, Dr. Richter found that tests "demonstrated obliteration of pulses in the right arm at 180-degree hyperabduction maneuver. The upper limb somatosensory evoked potential response also was abnormal" (TR 263). The doctor concluded that the tests confirmed the presence of thoracic outlet syndrome. He stated: "Mrs. Davis is still temporarily totally disabled in terms of her usual work as a laborer for the oil company. Because of the underlying thoracic outlet syndrome and the predisposition to further aggravation of this condition by the stress of her work, I believe that she needs to be retrained" (TR 263). He recommended surgical decompression of the right carpal tunnel area (TR 263).

Claimant had carpal tunnel decompressive surgery in August of 1990, which "eliminated part of the problem," but Dr. Richter concluded she might have "thoracic outlet syndrome" (TR 260). On September 21, 1990, she reported continued pain in her right hand, arm, and shoulder (TR 260). By October 12, 1990, she reported that she was unable to use her right arm and weather changes increased her pain (TR 149, 260). She was placed in a work hardening program and had eleven sessions (TR 213-214, 228-230, 259). On November 15, 1990, Dr. Richter stated that she still had sore, tight muscles, and neck, arm, and shoulder pain (TR 259).

On November 26, 1990, Dr. Richter reported:

Mrs. Davis had been part of the work hardening program and had finished it. We spoke with Dr. Parsons about her and it would seem unlikely, in view of the pain syndrome which she has, that she would be able to function well in a laboring

capacity that she had been used to. She had been doing heavy lifting, pushing and pulling. On exam, she certainly has shown improvement in right arm function. There is still some pain in the right shoulder and right upper arm and tingling in the forearm. There is also complaint of pains in her right leg which includes sharp pains in this distribution.

(TR 255).

On the same date, Dr. Parsons wrote: "I talked with Dr. Richter, pt. is stalling out and does not appear to want to return to work. Pt. does not want surgery. I also talked with Terry Lenihan - SJMC Work Hardening, Pt. not progressing or taking active part."

(TR 144).

On December 10, 1990, Dr. Parsons recommended her for medium term disability benefits (TR 139). Dr. Richter wrote two days later:

Right hip films were taken which showed slight symmetric bilateral degenerative changes. No evidence of any acute or recent abnormality is seen. There is pain. It may be that she will need injections I do not feel that she will be able to function in a laboring capacity which she has been used to.

(TR 255).

On February 1, 1991, Dr. Ned Harney examined claimant for her shoulder, neck, and chest pain, to determine if she had thoracic outlet syndrome (TR 285). Dr. Ed Jenkins did surgery for the syndrome on February 14, 1991 (TR 284, 313). By March 19, 1991, Dr. Harney reported claimant felt better "concerning pain from the chest wall syndrome" (TR 284). However, Dr. Jenkins reported on June 20, 1991 that she was having pain in her shoulder, neck, and face (TR 313).

Claimant saw Dr. Milton Workman from May 6, 1991 to September 19, 1991 for leg pain (TR 315-317). She was found to have normal range of motion in all joints (TR

315). She was told to start water aerobics (TR 316). She went to aerobics for six weeks, but reported it did not help her leg pain (TR 316). She was given a TENS unit to try for four weeks, but it did not help her pain (TR 316-317). She reported doing back exercises and riding a bike (TR 317). She continued to have back and neck pain and Dr. Workman wrote on September 19, 1991:

Mrs. Davis continues to complain of severe pains. I talked to her again about it today and told her she has had plenty of tests and she has had plenty of time to get well with passive modalities. Now she has to take the responsibility and work this out herself. If she works hard her symptoms will eventually subside.

(TR 317).

The ALJ reviewed treatment notes from Dr. Thomas L. Ashcraft, showing claimant received treatment on January 4 and 18, 1993, February 1 and 16, 1993, March 1, 17 and 29, 1993, April 12 and 28, 1993, May 17, 1993, June 7 and 30, 1993, and July 20 and 26, 1993. The treatments involved a series of cervical epidural steroid injections and medication to treat her "severely sore neck," and "cervical" and "lumbar disc disease," and right shoulder "that frequently locks up on her." (Exhibit 1 to Docket #15, pgs. 18 and 20). On June 10, 1993, Dr. Ashcraft gave her an authorization to attend an arthritis aquatics program (Exhibit 1 to Docket #15, pg. 6). The doctor noted that an MRI of her lumbar spine done in July of 1992 was negative, but the doctor determined on June 30, 1993 that "by the complaints this lady has and her recurrent physical findings, we need to have a repeat MRI" (Exhibit 1 to Docket #15, pg. 5). On July 20, 1993, he reported that she had pain in her face, neck, and right shoulder and had trouble turning her head, so "a cervical discectomy will also be necessary in the near future." (Exhibit 1 to Docket

#15, pg. 3).

By letter dated September 15, 1993, the ALJ stated that he had reviewed this new evidence and determined that "it is not material and would not warrant changing my decision, which I decline to reopen." (Exhibit 2 to Docket #15). This court has no jurisdiction to consider the Secretary's refusal to reopen the claim. Brown v. Sullivan, 912 F.2d 1194, 1196 (10th Cir. 1990). Judicial review under 42 U.S.C. § 405(g) is limited to a final decision made after a hearing. Califano v. Sanders, 430 U.S. 99, 107-08 (1977). "The Secretary's decision not to reopen a previously adjudicated claim for benefits is discretionary and therefore, is not a final decision reviewable by this court under 42 U.S.C. § 405(g)." Brown, 912 F.2d at 1196. Only when constitutional questions are raised will judicial review be authorized under 405(g) notwithstanding the Secretary's decision to deny benefits without a hearing. Califano, 430 U.S. at 109. This is not one of those rare instances where the Secretary's denial of a petition to reopen is challenged on constitutional grounds. Claimant seeks only an additional opportunity to establish that she satisfies the Social Security Act's eligibility standards for disability benefits. Therefore, § 405(g) does not afford subject matter jurisdiction.

Nor is this a case where the ALJ has effectively reopened the case by reviewing the additional reports submitted by the plaintiff. "Only when the agency has clearly stated or otherwise demonstrated that it has in fact reopened the original case on the merits" will the case be considered reopened. Morris v. Sullivan, 897 F.2d 553, 558 (D.C. Cir. 1990). The ALJ considered the additional reports, but specifically declined to reopen the case.

In his decision the ALJ reviewed the medical evidence briefly and then found the

claimant's testimony to be not fully credible (TR 13-16). He particularly noted Dr. Parson's report of November 26, 1990 (TR 144) saying it showed she did not want "to return to work nor try work hardening" (TR 16). The ALJ stated "[i]n other words, she was unwilling to participate in her return to health so that she could return to her former duties" (TR 16). He also noted that in one examination she could flex forward 100 degrees, a greater degree of flexion than normal (TR 16). He concluded she was capable of light work and that "her pain is no more than mild to moderate and would not interfere with her concentration" on work-related activities (TR 16). He relied on her "release to return to work" and daily activities," which he noted were as follows:

[s]he takes care of a 4-year-old grandbaby and takes her step-father to the doctor. She does some cooking but not all that much. She does some driving and does activities with the church such as Bible study, choir, and prayer meeting. She goes shopping only if her children are there to help her with lifting and she will also read.

(TR 16).

There is no merit to claimant's first contention that the ALJ erred in failing to find that claimant met Listing § 1.05(C) of the Social Security regulations. This listing pertains to vertebrogenic disorders:

C. Other vertebrogenic disorders (e.g. herniated nucleus pulposus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last 12 months. With both 1 and 2:

1. Pain, muscle spasm, and significant limitation of motion in the spine, and
2. Appropriate radicular distribution or significant motor loss with muscle weakness and sensory and reflex loss.

The medical evidence clearly shows that claimant does not have significant

limitation of motion in her spine (TR 315).

However, there is merit to claimant's contention that the ALJ erred in finding claimant's allegations of pain not credible. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987) discussed what a claimant must show to prove a claim of disabling pain:

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

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain

is inevitable. 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was objective medical evidence to show that plaintiff had back, neck, shoulder, and leg pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. 816 F.2d at 517.

In making his credibility determination, the ALJ relied upon the medical evidence that showed no specific medical problems, normal range of motion in her joints, and her CT scan and myelograms that were normal (TR 14-15). However, all her doctors believed she was in pain. She has seen many doctors many times, gone through two surgical procedures to reduce her pain, and engaged in several work hardening programs, exercises, water programs, and use of a TENS unit and steroid injections to alleviate pain. She also has taken several pain medications. The ALJ's determination that her allegations of disabling pain were not credible is therefore not supported by substantial evidence. There

is substantial evidence that claimant's pain was a significant non-exertional impairment. An ALJ's finding regarding the claimant's noncredibility does not compel a finding of not disabled. Rather, the credibility determination is just a step on the way to the ultimate decision, whether the claimant has an RFC level and can perform the full range of work at his or her RFC level on a daily basis. 816 F.2d at 512-13 (citing Channel, 747 F.2d at 579). The ALJ must also determine whether the claimant can perform most of the jobs at her RFC level. The ALJ determined that claimant retained the RFC to do her past relevant work. This finding is not supported by substantial evidence. In making his finding that claimant could do her past work, the ALJ relied on the absence of contraindication in the medical records. The absence of evidence is not evidence. Thompson v. Sullivan, 987 F.2d at 1400.

The ALJ should have exercised his discretionary power to order a consultative examination of claimant to determine her capabilities. Baker v. Bowen, 886 F.2d 289, 291-92 (10th Cir. 1989) (ALJ's reliance on absence of medical evidence was erroneous where it was within his power to obtain it); Channel, 747 F.2d at 582-83 (remanded for findings as to whether claimant's nonexertional skin impairments precluded performance of full range of sedentary jobs on a sustained basis).

The finding of the ALJ that claimant can do her past relevant work is not supported by substantial evidence.

This case is remanded in order to secure a consultative examination of claimant to determine her capabilities to do substantial gainful activity on a sustained basis. The vocational expert has already testified that if she cannot sit or stand for very long periods

she cannot do her past jobs or light work (TR 61-63).

Dated this 11th day of July, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:davis1.ord

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

FILED

JUL 12 1995

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

LILLIE D. DAVIS,)
)
 Plaintiff,)
)
 v.)
)
 DONNA E. SHALALA,)
 SECRETARY OF HEALTH AND)
 HUMAN SERVICES,)
)
 Defendant.)

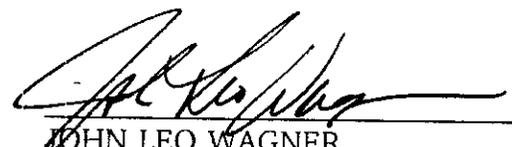
Case No: 93-C-796-B

ENTERED ON DOCKET
DATE ~~JUL 13 1995~~

JUDGMENT

Judgment is entered in favor of the Plaintiff, Lillie D. Davis, in accordance with this court's Order filed July 11, 1995.

Dated this 12th day of July, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

17

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

SANDRA SUE RICHARDSON and
SAMMY RAY RICHARDSON

Plaintiffs,

vs.

PRUDENTIAL PROPERTY AND
CASUALTY COMPANY, a foreign
corporation; and JOHNSON
CLAIM SERVICE, INC.

Defendant.

No. 95-CV-219-K

FILED

JUL 12 1995

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

ENTERED ON DOCKET
DATE JUL 13 1995

ORDER

Pursuant to 28 U.S.C. § 1447, Plaintiffs Sandra Sue Richardson and Sammy Ray Richardson ("Plaintiffs") have moved this Court to remand this case to the District Court of Creek County, Oklahoma.

Plaintiffs originally filed their Petition on January 20, 1994, against Prudential, alleging they were entitled to additional insurance premiums as a result of fires in 1992 that burned their home. On July 15, 1994, Plaintiffs filed an amended petition against not only Prudential but also Johnson Claims Service, Inc.

Defendant Prudential filed its Notice of Removal on March 7, 1995--more than one year from the date the original petition was filed. Plaintiffs state that the one year limit, as set forth in 28 U.S.C § 1446(b), precludes the removal of this action. § 1446(b) states:

The notice of removal of a civil action or proceeding shall 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 of relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant ..., whichever period is shorter.

16

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 complaint, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(emphasis added). Prudential responds that it was not served with the Petition until July 20, 1994 and that its removal came well within one year of that date.

In order to resolve this dispute, it must be determined when an action is commenced for the purposes of § 1446(b). In Oklahoma, an action is commenced when the petition is filed with the court. 12 O.S. § 2003. This definition of commencement is designed to simplify and make certain when commencement occurs. Committee Comment to Section 2003. According to 12 O.S. § 2004, the Court may, but need not, dismiss the action if service is not made within 180 days if plaintiff cannot show good cause why service was not made within that period. Despite this provision regarding service, the Oklahoma statute is clear that commencement occurs at the time of filing. As the Oklahoma Supreme Court recently stated, "Unlike its statutory forerunner--§97--service need not be obtained pursuant to § 2003. The action is commenced by filing a petition with the court." Ross v. Kelsey Hayes, Inc., 825 P.2d 1273, 1277 (Okla. 1992).¹

The use the date of filing to determine whether a year has

¹ The Federal Rules of Civil Procedure are not inconsistent with this view. Fed.R.Civ.P. 3 also provides that a civil action is commenced by filing a complaint with the court.

passed is consistent with the interpretation given this provision of the removal statute in other jurisdictions as well. May v. Dover Elevator, 40 F.3d 1244, 1994 WL 656034 (4th Cir. 1994) (second action commenced at time of filing) (unpublished opinion); Perez v. General Packer, Inc., 790 F. Supp. 1464, 1469 (C.D. Cal. 1992) (stating that with limited exceptions all courts have agreed that commencement begins with filing in state court); Noel v. Pizza Hut, 1991 WL 192117, No. 91-1201-T (D. Kan. 1991) (interpreting Kansas law as holding that commencement is at filing if service made within 90 days); Royer v. Harris Well Service, Inc., 741 F. Supp. 1247 (M.D. La. 1990) (interpreting Louisiana law to mean that action is commenced at time of filing).²

The burden of establishing federal jurisdiction rests on the party seeking removal. Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921). The removal statute is strictly construed against removal as are the time limitations set forth in § 1446(b). Salveson v. Western States Bankcard Ass'n., 731 F.2d 1423, 1426 (9th Cir. 1984); Walker v. Gunn, 511 F.2d 1024, 1026 (9th Cir. 1975), cert. denied, 423 U.S. 849 (1975). The burden rests on the Defendant, since it is the one seeking access to a court of limited jurisdiction. Krantz v. Boneck, 599 F.Supp. 785, 787 (D. Nev. 1984).

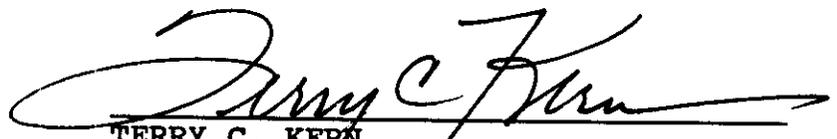
Defendant argues that this interpretation encourages

² Although this use of filing to mark commencement represents a majority view, some district courts have also required a good faith effort at service. See Greer v. Skilcraft, 704 F. Supp. 1570 (N.D. Ala. 1989); Saunders v. Wire Rope Corp., 777 F. Supp. 1281 (E.D. Va. 1991).

gamesmanship designed to defeat jurisdiction, asserting that Plaintiffs should not be allowed to use delay to keep the action in state court. However, Congress knew when it passed the one-year bar on removal that some plaintiffs would attempt to use it, even fraudulently, to defeat diversity jurisdiction. Burns v. Windsor Ins. Co., 31 F.3d 1092, 1097 n.12 (11th Cir. 1994). Nevertheless, the intent of the relevant amendment was a modest curtailment of federal jurisdiction in diversity cases and to prevent the delays caused by removal after substantial time has passed. H.R.Rep. No. 889, 100th Cong. 2d Sess. (1989).

While the one year limitation could lend itself to abuses and inequities, the Congress, not this Court, must rewrite the provisions of section 1446(b). When the language of a statute is clear and unambiguous, judicial inquiry is complete and statutory language controls unless there are rare and exceptional circumstances. O'Connor v. U.S. Dept. of Energy, 942 F.2d 771, 773 (10th Cir. 1991). The Congressional language mandates only one conclusion: defendant may not remove this case beyond January 20, 1995. Thus, the action must be remanded to Creek County, Oklahoma.

ORDERED this 11 day of July, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

DAVID J. BERESOVY,)
)
 Plaintiff,)
)
 vs.)
)
 LARRY FIELDS, et al.,)
)
 Defendants.)

No. 95-C-141-B ✓

ENTERED ON DOCKET

DATE JUL 12 1995

FILED

JUL 11 1995

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

ORDER

This matter comes before the Court on Defendants' motion to dismiss. Defendants contend that Eleventh Amendment immunity protects the State of Oklahoma and the Oklahoma Department of Corrections from civil rights actions such as the one at hand. Additionally, Defendants argue that venue is improper in this district with regard to Defendants Larry Fields and Terry King because neither defendant resides in the Northern District and the cause of action does not arise in this District. Plaintiff has objected only to Defendants' motion to dismiss on the ground that venue is not proper in this District. Accordingly, the State of Oklahoma and the Oklahoma Department of Corrections are hereby dismissed as parties in this case.

The applicable venue provision for this action is found under 28 U.S.C. §1391(b) which provides as follows:

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any

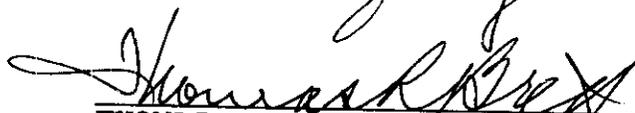
defendant may be found, if there is no district in which the action may otherwise be brought.

There is no applicable law with regard to venue under 42 U.S.C. §1983 which would exempt this case from the general provisions of 28 U.S.C. §1391(b). Coleman v. Crisp, 444 F. Supp. 31 (W.D. Okla. 1977); D'Amico v Treat, 379 F. Supp. 1004 (N.D. Ill. 1974).

Plaintiff bases his Complaint on allegations which occurred at the Department of Corrections Probation and Parole Office in Muskogee, Oklahoma. Defendant King is a resident of Cherokee County, Oklahoma, and Defendant Field is a resident of Oklahoma County, Oklahoma. The Court takes judicial notice that Cherokee County and Muskogee are located within the Eastern District of Oklahoma, and that Oklahoma County is located within the Western District of Oklahoma. 28 U.S.C. §116. Thus, it is clear that venue is not proper before this Court and that this case must be dismissed.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion to dismiss (docket #14) is **granted**. Plaintiff's motion for leave to amend and to change venue and Defendant Fields's initial motion to dismiss (docket #6, #11, and #15) are hereby **denied as moot**.

IT IS SO ORDERED this 10 day of July, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

ONETTA A. WEBSTER,)
)
) Plaintiff,)
)
) v.)
)
) DONNA E. SHALALA,¹)
) Secretary of Health and)
) Human Services,)
) Defendant.)

JUL 11 1995

NO. 94-C-78-B

FILED
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE JUL 12 1995

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiff, Onetta A. Webster, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.²

The role of the court in reviewing the decision of the Secretary under 42 USC § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson*

¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Report and Recommendation continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

² Ms. Webster's July 16, 1992 application for disability benefits was denied August 3, 1992, the denial was affirmed on reconsideration, November 24, 1992. A hearing before an Administrative Law Judge was held August 10, 1993. By order dated September 28, 1993 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on January 6, 1994. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

v. *Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

Plaintiff alleges that the record does not support the determination of the Secretary by substantial evidence and that the ALJ failed to perform the correct analysis. The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has adequately and correctly set forth the relevant facts of this case and applied the proper legal principals to these facts. The Court therefore incorporates those findings into this Report and Recommendation, as the duplication of the ALJ's effort would serve no useful purpose.

The record of the proceedings before the Social Security Administration has been meticulously reviewed by the Court. Plaintiff's chief medical complaint concerns her shoulder. The Court notes that the latest medical record by treating physician concerning Plaintiff's shoulder problems is dated November 14, 1991 [R. 122]. That entry reflects Plaintiff has greatly improved her motion and that the doctor was pleased with her progress. The note also documents "[s]he has given up her job at Homeland because her husband has retired and they don't need the income." *Id.* Further review of the record and consideration of Plaintiff's brief reveals that the records upon which Plaintiff relies to establish disability pre-date the November 14, 1991 entry and also pre-date the alleged date of onset of disability, which is October 10, 1991 [R. 117-121; 165-6]. The consultive physician's assessment does not contradict the most recent records of the Plaintiff's treating physician and supports the ALJ's decision.

The Court finds no support for Plaintiff's contention that the ALJ failed to evaluate much of the medical evidence presented. Plaintiff has not cited any authority which requires the ALJ

to specifically comment upon each piece of medical evidence, nor has the Court discovered any such requirement.

Plaintiff claims that the ALJ failed to properly evaluate the demands of Plaintiff's past relevant work in accordance with *Henrie v. U.S. Dept. of Health & Human Services*, 13 F.3d 359 (10th Cir. 1993) and SSR 82-62. In this regard, the ALJ is required to inquire into the demands of Plaintiff's past relevant work, to compare those demands to Plaintiff's residual functional capacity and to make appropriate findings. *Henrie*, 13 F.3d at 361. The demands of Plaintiff's past relevant work are found in the record at pages 35-37, 49-50, 92-97; findings concerning Plaintiff's residual functional capacity are found at pages 15-17, and 50-51; comparison of the work demands to the residual functional capacity are found at page 52; related findings are found at pages 16-17. The ALJ properly developed the record and properly evaluated the demands of Plaintiff's past relevant work.

However, even if the ALJ were deemed to have fallen short of his duties in developing the demands of Plaintiff's past work, this failing would not merit reversal of the Secretary's decision. The ALJ elicited testimony from the vocational expert establishing the prevalence of occupations Plaintiff could perform given her age, education, work experience and residual functional capacity [R. 51-52]. This is the type of evidence properly used to resolve the question of disability at step-5. See Generally, 20 C.F.R. §§ 404.1520(f), 404.1566, 416.920(f) and 416.966. The record supports a denial of benefits, even at step-5.

The Court finds that the ALJ evaluated the record in accordance with the correct legal standards established by the Secretary and the courts. The Court also finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the undersigned

United States Magistrate Judge recommends that the decision of the Secretary finding Plaintiff not disabled be AFFIRMED.

In accordance with 28 U.S.C. § 636(b) and Fed.R.Civ.P. 72(b), any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of this Report. Failure to file objections within the time specified waives the right to appeal from a judgment of the district court based upon the findings and recommendations of the magistrate. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

Dated this 11th day of JULY, 1995.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

JUL 11 1995

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

TERRY DELANE WALLER,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION,)
)
 Respondent.)

No. 95-C-463-E

ENTERED ON DOCKET
JUL 12 1995
DATE _____

ORDER OF TRANSFER

This matter comes before the Court on Respondent's motion to transfer this habeas corpus action to the Western District of Oklahoma. Petitioner has objected.

Upon review of the petition and Respondent's motion, it has come to the Court's attention that Petitioner was convicted in Oklahoma County, Oklahoma, which is located within the territorial jurisdiction of the Western District of Oklahoma. Therefore, in the furtherance of justice, this matter may be more appropriately addressed in that district.

Accordingly, Respondent's Motion to Transfer Petition to Western District of Oklahoma (docket #7) is **granted** and Petitioner's application for a writ of habeas corpus is hereby **transferred** to the Western District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d).

IT IS SO ORDERED this 10TH day of July, 1995.

James C. Ellison
JAMES C. ELLISON
UNITED STATES DISTRICT JUDGE

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA JUL 11 1995

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

DOYLE KENT KING,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION, et al.,)
)
 Respondent.)

No. 92-C-165-E

ENTERED ON DOCKET

DATE JUL 12 1995

ORDER

It has come to the attention of the Court that the above captioned case is still pending although Petitioner's request for habeas corpus relief was denied by this Court on August 10, 1993, (see attached order) and affirmed by the Tenth Circuit Court of Appeals on May 18, 1995. King v. Champion, 55 F.3d 522 (10th Cir. 1995). Similarly, any relief which Petitioner requested under 42 U.S.C. § 1983 was denied in the consolidated order in Harris v. Champion, 90-C-448-E, on December 27, 1993, and affirmed by the Tenth Circuit Court of Appeals in Harris v. Champion, 51 F.3d 901 (10th Cir. 1995).

ACCORDINGLY, IT IS HEREBY ORDERED that the Clerk shall close the file in this case.

SO ORDERED THIS 11th day of July, 1995.

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

17

Individual - Doyle King

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

ANTHONY HARRIS, et al.,

Plaintiffs,

vs.

RON CHAMPION, et al.,

Defendants.

)
)
)
)
)
)
)
)
)
)

Nos. 90-C-448-B
90-C-475-B; etc.
as consolidated

FILED

AUG 10 1993

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

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER AS TO
DOYLE KENT KING

This matter came on for hearing on June 29, 1993, before the Honorable Thomas R. Brett for the purpose of conducting the individual hearing prescribed by the Findings of Fact, Conclusions of Law and Order filed by the three-judge panel in this action on May 6, 1993. The Petitioner was represented by counsel as were the defendants at the hearing. After carefully considering the pleadings, the testimony, the documentary and other evidence, as well as the briefs and arguments presented by counsel for the parties, and being fully advised in the premises, the Court enters the following Findings of Fact and Conclusions of Law.

1. The Court adopts the 18 Findings of Fact entered herein by the Three-Judge Panel on May 6, 1993.
2. Petitioner was convicted in the district court of Kay County, Oklahoma of:
Escape from a penal institution, after a former conviction; and,

Assault and battery with intent to commit a felony, after a former conviction.

3. Both convictions occurred at a single jury trial.
4. Petitioner received a sentence of 25 years on each charge, enhancement imposed pursuant to 21 O.S. §51. The enhancement was based upon Petitioner's two prior rape convictions.
5. The concurrent sentences were imposed July 22, 1985; however, his judgments and sentences were filed on August 5, 1985.
6. Petitioner timely announced his intention to appeal his conviction.
7. Petitioner's appellate brief was filed September 26, 1986.
8. Appellee's brief was filed on October 22, 1986 by the Attorney General (hereafter "AG").
9. On July 22, 1992, Petitioner filed his petition in this court pursuant to 28 S.C. §2254 alleging appellate delay.
10. On April 23, 1993, the Oklahoma Court of Criminal Appeals (OCCA) affirmed the conviction by summary opinion. No timely request for rehearing was filed on petitioner's behalf so the affirmance is final.
11. The summary affirmance by OCCA in petitioner's case came two weeks after a hearing by the three-judge panel on April 9, 1993, which addressed delay by the OCCA generally, and specifically addressed the petitioner's case as an example.
12. The number of months from the date Mr. King received his sentence (August 5, 1985) to the described event is stated below after having been rounded to the last full month:
 - (a) to the filing of his Appellant's brief by OIDS - 14 months;

- (b) to the filing of the Appellee's brief by the AG - 15 months
- (c) to the filing of the Summary Opinion by OCCA - 93 months.

13. As stated in the Three-Judge Panel's Conclusion of Law #14, in Oklahoma there are four levels of the state appellate process in a direct appeal criminal case:

- (a) Docketing the appeal, to be done within 6 months
- (b) Filing of the Appellant's brief, to be done within 60 days
- (c) Filing of the Appellee's brief, to be done within 60 days
- (d) Decision by the Oklahoma Court of Criminal Appeals (OCCA).

The Three-Judge Panel concluded that a six-month period for transcript and record preparation with one 60 day extension, 60 days for filing of an appellant brief with one 60 day extension, and 60 days for the filing of an appellee brief with one 60 day extension, totalling sixteen months, would satisfy constitutional concerns. Such total should be deducted from 12(b) above; therefore, in this case no inordinate delay is evident prior to the appeal being at issue. Any inordinate delay herein is ascribed to OCCA.

14. Petitioner did not begin to serve his escape and assault and battery convictions until January 24, 1992, as he was serving a prior felony conviction for robbery with a firearm and grand larceny, after former conviction of a felony. Petitioner was incarcerated awaiting trial on the robbery charge at the time of his escape.

15. For purposes of these findings only, conceding all good time credits, Petitioner would have to serve in excess of six years regarding his escape and assault and battery convictions before being considered eligible for release.

16. To the extent that these Findings of Fact constitute Conclusions of Law, they

should be so considered.

CONCLUSIONS OF LAW

1. The Court adopts the 33 Conclusions of Law entered herein by the Three-Judge Panel on May 6, 1993.
2. The Tenth Circuit Court of Appeals remanded Harris v. Champion, 938 F.2d 1063, 1071 (10th Cir. 1991) to the District Court ordering it to conduct a full hearing into possible systemic delays of the Oklahoma Appellate Public Defender's Office (now OIDS) in preparing and filing appellate briefs for their clients. Inquiry was also to take place as to whether an inmate's constitutional rights were violated by the delay in the filing of appellate briefs by OIDS. Delays by the AG or OCCA are also subject to review. (See Tenth Circuit Order of April 22, 1993, at 6-7).
3. In DeLancy v. Caldwell, 741 F.2d 1246, 1248 (10th Cir. 1984), the Court adopted a four-part balancing test from Barker v. Wingo, 407 U.S. 514 (1972), a case involving denial of a speedy trial. The factors to be balanced are as follows: (1) length of delay, (2) reasons for delay, (3) defendant's assertion of his right, and (4) prejudice to the defendant. Barker v. Wingo, at 530. In turn, the fourth DeLancy element of prejudice was detailed in three factors of (1) prevention of oppressive incarceration pending appeal, (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal or retrial, might be denied. Barker specifically points out that no single one of the four factors necessarily indicates a finding of a deprivation of a speedy trial but may be considered with other relevant circumstances.

When applying the Barker and DeLancy analysis to habeas cases it is important to be mindful of two distinguishing factors: Barker concerned speedy trial, not an appeal after conviction and DeLancy involved a §1983 claim, not a habeas corpus action.

4. The reason for OCCA's delay presented to the Court is that three judges, a majority, could not agree on an opinion as a result of conflicts between the judges as to wording in the proposed opinion, and that ultimately agreement was reached after a change in court personnel. The Court concludes that none of the delay may be attributed to the petitioner.

5. Uncontroverted evidence has been presented that petitioner made frequent written inquiries as to the status of his appeal, and raised the issue of appellate delay in this action.

6. The fourth factor, prejudice to the petitioner, is keenly contested by the parties. Petitioner has testified to his anxiety and concern during his lengthy appeal.

7. In response, the defendant Wardens first point to the panel's statement in its May 6, 1993 Order:

18. Further, the panel agrees with the rationale of the Second Circuit that in instances where an appellate decision affirming the conviction has already been rendered, habeas corpus relief based solely on previous inordinate delay is not available. Muwakkil v. Hoke, 968 F.2d 284 (2nd Cir. 1992), cert. denied, 113 S.Ct. 664 (1992) (appellate delay found did not warrant habeas corpus relief because the appeal was affirmed). The panel concludes the same would follow where an appellate decision was rendered reversing with prejudice to retrial.

(Order at 23)

8. Since the petitioner's conviction was affirmed, even after seventy-eight

months, defendant wardens contend no relief is available.

9. Petitioner also asks the Court to consider the manner of affirmance. Petitioners as a group have previously challenged OCCA's summary opinion format before the Tenth Circuit Court of Appeals. That court stated:

Summary procedures and opinions are not inherently bad, and their use may assist a court in reducing its backlog. While we understand petitioners' desire to be assured that OCCA will continue to give adequate consideration to the merits of each case, we note that a summary opinion only indicates that less time has been spent writing a decision, not that less time has been spent reviewing the merits and reaching that decision. Any constitutional error in the state court proceedings can be reviewed on habeas corpus pursuant to the standards set forth in 28 U.S.C. §2254(d). See Sumner v. Mata, 449 U.S. 539 (1981).

(April 22, 1993, Order at 10).

10. The Court concludes that summary opinions by OCCA are not constitutionally infirm.

11. Petitioner further contends that Delfrate v. State, 732 P.2d 900 (Ok. Cr. 1987) prohibited the enhancement of a sentence for an escape conviction under 21 O.S. §51. However, this Court finds that Hughes v. State, 815 P.2d 182 (Ok. Cr. 1991), clarified Oklahoma law, and held enhancement to be proper when the enhancement is not based upon the conviction being served at the time of escape. Hughes is implicit in OCCA's affirmance.

12. Plaintiff began serving his sentence on the escape and assault and battery AFC convictions January 24, 1992, by which time Plaintiff's direct appeal should reasonably have been concluded. Prior to January 24, 1992, the plaintiff was serving an unrelated armed robbery conviction.

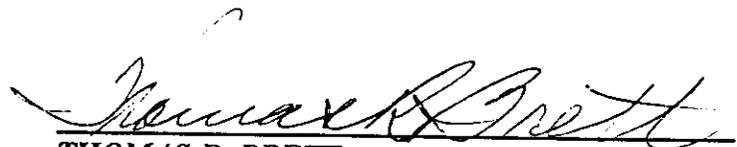
13. The Court concludes inordinate delay attributable to OCCA is evident herein.

14. However, under the facts herein, Petitioner has presented no showing of prejudice entitling him to any relief because until January, 1992, Petitioner was serving an armed robbery sentence and the subsequent escape and assault and battery sentence, which Petitioner began to serve in January, 1992, had reached no available early release date by the time of OCCA's decision.

15. To the extent these Conclusions of Law constitute Findings of Fact, they should be so considered.

It is the Order of the Court that the petition for habeas corpus relief is hereby denied. A separate Judgment, in conformance with these Findings of Fact, Conclusions of Law, and Order, will be simultaneously entered herein.

IT IS SO ORDERED this 9th day of August, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

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

JUL 11 1995

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

LAWRENCE L. CARRUTHERS,)
)
 Plaintiff,)
)
 v.)
)
 DONNA E. SHALALA,)
 SECRETARY OF HEALTH AND)
 HUMAN SERVICES,)
)
 Defendant.)

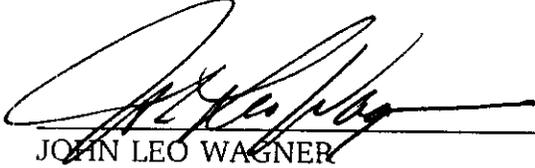
Case No: 93-C-962-E

ENTERED ON DOCKET
DATE JUL 12 1995

JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in accordance with this court's Order filed July 10, 1995.

Dated this 11th day of July, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

152

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

F I L E D

JUL 10 1995

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

LAWRENCE L. CARRUTHERS,)
)
Plaintiff,)
)
v.)
)
DONNA E. SHALALA,)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
)
Defendant.)

Case No. 93-C-962-B

ENTERED ON DOCKET
DATE JUL 12 1995

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and for supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

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

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

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

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

evaluation process.² He found that claimant had the residual functional capacity to perform work-related activities, except for work involving lifting more than 50 pounds at a time and frequently lifting/carrying objects weighing up to 25 pounds, standing/walking more than 6 hours of an 8-hour day with sitting occurring intermittently during the remaining time, precision use of the fingers and hands but allowing use of the arms and hands to grasp, hold, and turn objects, and no more than occasional stooping. He concluded that claimant's past relevant work as a dishwasher did not require the performance of work-related activities precluded by the above limitations, so claimant's impairments did not prevent him from performing his past relevant work. Having determined that claimant's impairments did not prevent him from performing his past relevant work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) That substantial evidence does not support the ALJ's assessment of claimant's residual functional capacity and his finding that no side effects were caused by medication.
- (2) That substantial evidence does not support the ALJ's finding concerning the physical requirements of claimant's past relevant work.

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

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

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

- (3) That the claimant's actual residual functional capacity precludes him from meeting the demands of his past relevant work.
- (4) That the ALJ erred in failing to find claimant disabled under the Advanced Age Regulation, 20 C.F.R. §404.1563(d).

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

Claimant has not engaged in substantial gainful activity since June 18, 1991. The medical evidence establishes that he has hypertension, controlled with medication, moderate osteoarthritis of the neck, arms, hands, and legs, chronic low back syndrome, and a fused PIP joint in the middle finger of his left hand.

On April 13, 1990, Dr. Richard Cooper examined him for complaints of neck, shoulder, back, and leg pain and concluded:

Surprisingly, the cervical spine has full range of motion. Thoracolumbar spine: Right side bending 25 degrees, left side bending 30 degrees. Forward bending or flexion 80 degrees, extension 15 degrees. Range of motion of the wrists, elbows, shoulders, hips, knees and ankles all full range. In the fingers, there is a problem with the 3rd finger left hand. Yeoman tests are negative. Strengths of the quadriceps, hamstrings, adductors and abductors of the hips and toe dorsiflexors full and equal on the 2 sides. Patient was able to walk on toes or walk on heels. Fabere tests were negative. Straight leg raising tests negative both seated and supine, although he does have tight hamstrings bilaterally. Knee structural exams normal. Gait normal within the confines of the office. NEUROLOGICAL EXAM: Grip strength, biceps, triceps, shoulder shrug strength full and equal on the 2 sides He has elevated blood pressure. He has chest pain which we described in detail. It does not sound like angina. Nevertheless, he has been given Nitroglycerin tablets. He says he never uses them. He can only walk about a mile, gets both shortness of breath and pain in the legs when walking. He says he can recover within 5 minutes and then proceed on for another 1/2 mile. However, there are signs of arterial deficit in the left lower extremity with coolness from a few inches above the ankles and impalpable pulses in the left

foot, and reduced pulse of the left femoral artery.
In my opinion, he would be impaired in any activity that required prolonged walking, bending, twisting, lifting, aerobic activity.

(TR 247).

However, claimant reported that he worked as a pot washer at the Westin Hotel six days a week from 1990 to 1991 (TR 298). At the hearing he testified as follows about the reason he stopped working in 1991:

Q Okay. Now, when was the last time you worked?

A That was in -- back in 1991.

Q Okay. And do you remember when in '91, what month?

A Let's see. I think it was about March in '91.

Q Okay. And do you remember when in March?

A About the 20th of March.

Q Okay. And what happened at that time? Why did you stop work?

A Well, the chef fired me. I was working down West Hotel.

Q Okay. Why did he fire you?

A Well, he told me I walked off the job.

Q He told you that you had walked off the job?

A And I didn't.

Q Okay. Why did he think you had?

A I don't know.

Q Okay. If he hadn't fired you, could you still be working? Are you able to still be working?

A Well, yes, I'm, I'm able some -- some, sometime I'm able but my back bother me.

See, I got arthritis in my back and neck and, and, and my fingers, too.

(TR 33, 34).

Dr. Terrance Grewe examined claimant on January 22, 1992, for complaints of chest pain related to exercise, back, neck, arm and hand pain, high blood pressure, and dizzy spells that had "only been going on approximately one week" (TR 345). He found claimant "in no acute distress" (TR 346). The doctor found as follows:

HEART: Regular rate and rhythm, no murmurs His GAIT was very stiff and wide based, but no assistive device was used. His joints, especially shoulders were tender and his hands were tender with some slight heat noted in the shoulders, but no swelling or redness noted. There was a generalized decrease in range of motion throughout the joints, however, nothing marked stood out and the patient did have mild tenderness and spasm in his lumbar spine and in his neck.

ASSESSMENT: 1) Osteoarthritis, moderate. 2) Chest pain, probably noncardiac, but I would like to see a stress treadmill to further evaluate it. 3) Chronic low back syndrome. 4) Hypertension, controlled. 5) Dizzy spells of unknown etiology with syncope.

(TR 346).

He was seen at the Veterans Administration Outpatient Clinic regularly from March 4, 1991, through November 20, 1992, for various complaints (TR 354 - 375). It was noted on August 12, 1991, that his blood pressure condition was stable and he was "feeling ok" (TR 360), on February 19, 1992, the doctor noted "[h]ealthwise-no problem today" (TR 357), on April 26, 1992, the doctor stated claimant came in for a form to be completed and had "no other complaints" (TR 354), on September 11, 1992, his hypertension condition was "controlled" (TR 372), the same was true on October 22, 1992, (TR 371), and on November 20, 1992, he was "doing well except has congestion" (TR 370).

On July 24, 1992, Dr. Charles Harris examined claimant and completed a residual physical functional capacity assessment (TR 328, 336). He concluded that claimant could occasionally lift fifty pounds, frequently lift twenty-five pounds, stand and/or walk about six hours in an eight-hour workday, sit that same amount of time, and had unlimited ability to push and pull (TR 330). The doctor stated "[p]ain does not further affect exertional level" (TR 331). There were no postural limitations, except stooping (TR 331).

At the hearing claimant testified upon examination by the ALJ that he lives in an apartment alone and goes to the grocery store and Wal-Mart (TR 36). Twice a month he goes to church (TR 37). He cleans his apartment, mopping and vacuuming, reads the paper and Bible, and watches television (TR 36-37). He walks to see friends a block away (TR 36). About twice a month, it is hard for him to get out of bed (TR 39). Medication from the Veterans Administration helps "a little bit" (TR 39). He started having neck pain and stiffness three years ago, but medication helps "a little bit" (TR 40). At times, he has pain in his neck and back all day, and it feels "pretty bad" (TR 40). Once a month, his problems keep him from doing housework for an hour (TR 41). His legs also bother him, and about twice a month he can only walk a couple of blocks before he has to rest, instead of being able to walk five miles, as he usually can (TR 41-42). He has never used assistive devices to walk (TR 43). He testified that in the past three months, he could stand two hours, sit two hours or more, and lift fifty pounds (TR 44, 45).

Claimant was then examined by his attorney. He said he didn't know why he said he could walk five miles and lift fifty pounds (TR 46-47). He said he has never lifted fifty pounds and can't walk five miles (TR 47). He felt he could walk two blocks, lift twenty

pounds, and stand for four hours (TR 48, 56).

There is no merit to claimant's contention that there is no substantial evidence to support the ALJ's assessment of his residual functional capacity and his findings that no side effects were caused by his blood pressure medication. No doctor stated that he could not perform the exertional requirements of his past work. Only Dr. Cooper stated he cannot do certain activities, such as "prolonged walking, bending, twisting, lifting, aerobic activity" (TR 247). Claimant performed his past work as a dishwasher for some time after Dr. Cooper rendered this opinion.

The ALJ found that claimant's testimony of his capacity to work was highly suspect.

The Administrative Law Judge observes the contrast between the claimant's initial allegations of functional limitations and those allegations as they were restated with the direction of the claimant's attorney. Aside from the apparent discrepancy on examination by the claimant's attorney, however it is observed that the claimant, himself, indicated what was keeping him from working washing dishes was that he was not called after making job applications. He felt, himself, he was able to wash dishes. References are also made in the treatment notes to counseling by a social worker to the fact that the claimant was looking for work but had been unable to find a job. The social worker encouraged continued efforts on the part of the claimant to find employment, suggesting at least this nonmedical personnel regarded the claimant as capable of working.

(TR 19). It has been recognized that some claimants exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule. Frey v. Bowen, 816 F.2d 508, 517 (10th Cir. 1987).

The ALJ relied heavily on Dr. Cooper's evaluation (TR 247). The ALJ noted that there were no limitations put on claimant's ability to use his hands and fingers to grasp, hold and turn objects, that his blood pressure was well controlled by medication, and that there was no sign of cardiac problems, and concluded:

What is significant about the treatment notes is the occasional nature of such complaints, with even less frequent medical conclusions drawn from these complaints, suggesting the complaints were regarded by evaluating medical personnel as of minor consequence. The consultative examiner noted a generalized decreased [sic] in range of motion throughout the extremity joints, but nothing marked stood out. He concluded the claimant had moderate osteoarthritis and chronic low back syndrome. The Administrative Law Judge finds the conclusion of this consultative examiner and an assessment of the treatment notes do not contradict the claimant's residual functional capacity (as determined in the ALJ's opinion).

(TR 18-19).

The ALJ was not required to accept the allegations of medication side effects as credible. Casias v. Secretary of HHS, 933 F.2d 799, 801 (10th Cir. 1991). He properly noted that plaintiff's dizziness complaint lasted only one week and was not alleged again at the hearing (TR 17, 345-51, 354-61, 370-75). In addition, plaintiff's complaint was in January, 1992, well after the date he began taking the medication in 1990, so the assertion is highly suspect. He also reported on a pain questionnaire that he did not have adverse side effects from medication (TR 313).

There is no merit to claimant's contention that substantial evidence does not support the ALJ's finding that he can do his past relevant work. This assertion is erroneously based on the belief that a finding that a claimant can perform past work can only be made if he can perform his actual past work duties. This assertion ignores the well-settled principle that a claimant may be found not disabled at the fourth step if he can perform either his actual past job or his past type of job. 20 C.F.R. § 416.920(e); Jozefowicz v. Heckler, 811 F.2d 1352, 1356 (10th Cir. 1987); Tillery, 713 F.2d at 607. Since the vocational expert testified that plaintiff's past type of job could be performed based on the abilities and restrictions he was actually found to have by the medical expert (TR 61), his claim was

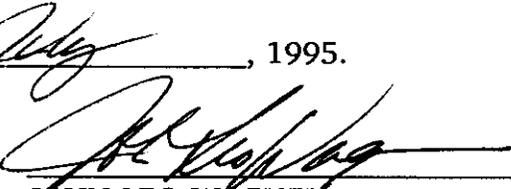
properly denied at the fourth step in the sequential evaluation process. Neither the vocational expert nor the ALJ classified claimant's past relevant work according to the least demanding function of the claimant's past occupations, "as this would be contrary to the letter and spirit of the Social Security Act." Valencia v. Heckler, 751 F.2d 1082, 1086 (9th Cir. 1985). There was substantial evidence to support the ALJ's conclusion.

There is no merit therefore to claimant's third contention that his actual residual function capacity precludes him from doing his past relevant work. The plaintiff performed this work activity through April or June 1991 (TR 298). He testified that he only stopped working because he was fired for allegedly walking off the job (TR 33). He said that he would probably still be working if he was not fired from this job (TR 34), and that he has subsequently searched for work, but was not hired (TR 345).

Finally, there is no merit to claimant's contention that the ALJ erred in failing to find claimant disabled under 20 C.F.R. § 404.1563(d). This regulation is part of the medical-vocational guidelines (grids), which are only used if the ALJ finds a claimant cannot perform his past relevant work to consider how much his work capacity is diminished in terms of any other types of jobs he might perform. Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988).

The decision of the ALJ's is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 10th day of July, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:carruthe.or

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

FILED

JUL 11 1995

GLEND A H. ISOKARIARI,)
)
 Plaintiff,)
)
 v.)
)
 DONNA E. SHALALA,)
 SECRETARY OF HEALTH AND)
 HUMAN SERVICES,)
)
 Defendant.)

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

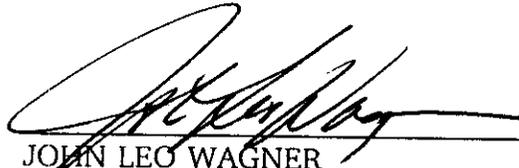
Case No: 93-C-960-B ✓

ENTERED ON DOCKET
DATE JUL 12 1995

JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in accordance with this court's Order filed July 10, 1995.

Dated this 11th day of July, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

JUL 10 1995

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

GLEND A H. ISOKARIARI,)
)
 Plaintiff,)
)
 v.)
)
 DONNA E. SHALALA,)
 SECRETARY OF HEALTH AND)
 HUMAN SERVICES,)
)
 Defendant.)

Case No. 93-C-960-B

ENTERED ON DOCKET
DATE JUL 12 1995

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

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

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

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

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

evaluation process.² He found that the medical evidence established the claimant was severely impaired as the result of chronic lumbar strain. He concluded that she did not experience pain of such intensity and severity as to prevent her from engaging in all substantial gainful activity. He found that she retained the residual functional capacity to perform work of a medium nature not requiring frequent bending and stooping, and her past relevant work as a medical assistant, phlebotomist, nurse's aide, or taxi driver did not require the above limitation. He concluded that she retained the residual functional capacity to return to her past relevant work. Having determined that claimant could return to her past relevant work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ erred in failing to consider all the medical evidence submitted on the issue of disability, including Dr. Moore's report and the report from Associated Centers for Therapy, Inc.
- (2) The ALJ's assessment of the claimant's residual functional capacity is not supported by substantial evidence.
- (3) The ALJ's conclusion that claimant can return to her past relevant work is not supported by substantial evidence.

It is well settled that the claimant bears the burden of proving her disability that

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

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

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

prevents her from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant's back was injured when she was caught in an elevator door in June of 1990. On October 26, 1990, Dr. John A. Karr reported that x-rays showed a "disc wedging at L5/S1" and diagnosed her problem as follows:

Post-traumatic sprain type dynamics resulting in ligamentous instability, motor unit dysfunction, and associated neuronal and myological post-insult residuals in the lumbo-sacral and pelvic regions.

Post-trauma to the right knee with ligamentous dyscrasia and musculotendinous involvement accompanied by weakness.

(TR 135).

On April 3, 1992, Dr. Richard G. Cooper examined claimant and concluded:

Range of motion of the cervical spine, is full range in right/left side bending, flexion and extension. It's 45 degrees right rotation, which of course is good but she rotates further on the left. In the thoracolumbar spine right and left side bending and extension are full range. But she will only forward bend or flex to 60 degrees saying it would hurt if she goes any farther. The knees have full range of motion, left shoulder has full range of motion; her right shoulder, she will only elevate or abduct to 100 degrees. Since she would not lie prone or supine, I cannot give you all ranges of the hip but certainly the hip will flex 90 degrees and at extend at least 5 degrees and on the left leg she did allow me to get her into position to test abduction which was good but not specifically measured. The ankles have full range, the wrists have full range, elbows have full range, fingers have full range. In trying to palpate the paraspinous musculature all of her responses indicate tenderness but the muscle spasm is not necessarily there where she has the tenderness. She does seem to have difficulty rolling over and simply will not lie prone or supine today. In testing her lying on her side, I do find that the Yeoman's test is positive on the left. When we got her lying on the other side she decided that her back hurt too much and essentially

would not allow any further testing on lying on her side. We do have tests of the strengths of the quadriceps full and equal on the two sides; the abductors and adductors of the hips and toe dorsiflexors full and equal on the two sides. Those tests were done with the patient in the seated position. I did not test hamstrings because it seemed like we were going to pull her off the table and she doesn't like too much manipulation. She was able to walk on her toes and walk on her heels without difficulty. I could not do the Fabere tests. Seated straight leg raising was negative. The knee structural exam is negative in so far as I was able to do the McMurray click tests and range of motion and I can move the knee caps around without crepitance or pain. No tenderness about the knees. The gait was normal within the confines of the office.

(TR 197).

On July 31, 1992, Dr. George W. Moore, wrote: "[Y]our TSH was normal at 0.45, suggesting your current dose of Synthroid is just right. I could not find any specific abnormalities on your lumbar spine x-rays" (TR 223). His diagnosis was moderate sciatica and he prescribed Parafon Forte (TR 233).³ His opinion was based on x-rays taken on July 27, 1992, which showed a "normal lumbar spine" with "mild lumbar scoliosis" (TR 224).

On May 11, 1992, Dr. Ronald C. Passmore did a mental status examination and found as follows:

She sat in the chair and her talk was good and she shows a full range of affect. She does not show looseness of association or flight of ideas. She reports some hallucinations about her husband, who is dead, but he encourages her. She does not appear to be delusional. She reports trouble going to sleep. She has had some recent weight loss. She is not crying or having suicidal thoughts but is tired all the time. She is not

³The 1993 edition of Tabers Cyclopedic Medical Dictionary defines **sciatica and low back pain** as "severe pain in the leg along the course of the sciatic nerve felt at back of thigh running down the inside of the leg," and further notes that "about 40% of the population will experience sciatica at some time during their lives...."

having much fun. She has some occasional shortness-of-breath and feels tense much of the time and clenches her teeth. She knew it was Monday the 11th but misidentified the month. She does not know the governor but named Bush, Reagan and Carter as the last three presidents. She could not do 8 x 12 but spelled 'world' forward correctly but spelled it 'dlorw' backward. She knew an apple and a pear were fruit and a coat and dress were clothing. She has some problems, it appears, with concentration.

* * *

She does show some evidence of anxiety with some minimal depression. I think this could be treated very easily. She was supposed to go for a followup visit but did not keep it last October. She was encouraged to do this.

(TR 201).

Records from Associated Centers for Therapy, Inc. show that on July 22, 1992 claimant reported she continued to "obsess/grieve" over her husband's death and felt shame, guilt, and depression and was provided support and told to join a support group (TR 246). On July 28, 1992, she reported she felt her husband's presence, but was bitter about her church family's response after his death, and she was given support (TR 246). On July 30, 1992, she was diagnosed as "oriented in all 3 spheres," but suffering from major depression (TR 245). The entry on January 21, 1993, stated: "[c]lient called to report doing better" after receiving medication (TR 243). She reported depression and sleeplessness again on June 16, 1993 after being off her medication for three days (TR 12).

Two residual functional capacity ("RFC") evaluations were done of claimant in April, 1992 and September, 1992 (TR 141-149, 160-167). Both Dr. Woodcock and Dr. Fiegel concluded that Plaintiff could sit a total of six hours in an eight-hour workday and could stand and/or walk a total of six hours in an eight-hour workday (TR 142, 161). They also

concluded that Plaintiff could occasionally lift and/or carry fifty pounds, and frequently lift and/or carry twenty-five pounds (TR 142, 161).

At the hearing, claimant admitted she cares for her one year old and two year old alone (TR 45-46). She bathes, dresses, and feeds them (TR 46). She does all the household chores, including dusting, sweeping, and mopping (TR 47-48). She does the laundry and shopping (TR 48-49). She can drive a car for thirty minutes without pain (TR 50). She claimed she is forgetful and has trouble concentrating (TR 55).

There is no merit to claimant's first contention that the ALJ committed reversible error in failing to consider all the medical evidence, particularly Dr. Moore's report of July 31, 1992, in which he diagnosed claimant's moderate sciatica and prescribed Parafon Forte, and the reports from Associated Centers for Therapy, Inc. While the ALJ did not specifically discuss these reports, he stated that he examined "the entire record" (TR 20). He recognized that she indeed did suffer from back pain and depression, but her complaints were exaggerated (TR 19). There is nothing in Dr. Moore's report which suggested claimant could not work. In fact, he stated he could find no specific abnormalities on her lumbar spine x-rays (TR 223). The records from Associated Centers for Therapy, Inc. did not mention an inability to work, and showed claimant reported doing better after receiving medication (TR 243). She admitted the therapy was helpful and the Prozac helped her sleep six hours a night (TR 43, 54).

The ALJ was not required to "refute" these reports, but rather to weigh all the evidence in reaching his conclusions. While great weight must be given to the opinion of a treating physician, the determination of the nature and severity of an impairment must

be supported by medically acceptable clinical and laboratory diagnostic techniques and should be consistent with the substantial evidence in the record. Tillery, 713 F.2d at 603-604.

There is also no merit to claimant's second contention that the ALJ's assessment of claimant's residual functional capacity was not supported by substantial evidence. The requirements of medium work set out in 20 C.F.R. § 404.1567(c) include lifting no more than fifty pounds occasionally and carrying weights up to twenty-five pounds frequently. The RFC evaluations done by Dr. Woodcock and Dr. Fiegel conclude that she can do such work. While claimant testified that her back starts to hurt after she sits for thirty minutes (TR 57), the ALJ noted that she sat throughout the hearing with no complaint (TR 19). The hearing lasted sixty-six minutes (TR 34, 79). Claimant admitted she can lift 32 pounds without pain, cares for two small children, and does all the housework, laundry, and shopping (TR 45-49, 58). She admitted that her past work required lifting or carrying only ten pounds on a frequent basis and that ten pounds was the heaviest weight lifted (TR 113). At her intake session at the social security office on January 16, 1991, it was noted that she had no difficulty walking, sitting, or using her hands (TR 115). There is substantial evidence to support the ALJ's assessment of claimant's RFC.

Finally, there is no merit to claimant's third contention that the ALJ's conclusion that claimant can return to her past relevant work is not supported by substantial evidence. She claims that the ALJ made an improper step four determination in failing to specify the specific physical exertional requirements of Plaintiff's past work as a medical assistant, phlebotomist, nurse's aide, and taxi driver. The ALJ specifically asked the Plaintiff what

physical demands were required by her past jobs (TR 69-71). The ALJ questioned a vocational expert also:

Q Let's assume that we have an individual who is 32 years of age . . . a female who has the 12th grade education plus -- I believe she had some training as a phlebotomist . . . or medical assistant and phlebotomy type training . . . assume that she can read and write and use, use numbers. Further assume this person can -- has the physical capacity to perform, let's say, medium, sedentary, light work. The primary restriction would be only occasional bending and stooping. With that restriction would there be jobs in the regional and national economy such a person could perform?

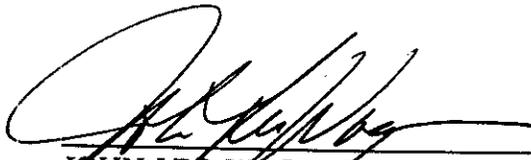
(TR 72-73).

The vocational expert concluded that claimant could return to her former occupations under this hypothetical.

Under 20 C.F.R. § 404.1545(a) the ALJ is to consider the claimant's "ability to meet certain demands of jobs, such as physical demands, mental demands, sensory requirements, and other functions" (emphasis added). The vocational expert, as a specialist, is required to know the physical demands of a job in order to be able to classify that job as sedentary, light, medium, heavy, and very heavy. The ALJ did not rely on this testimony to come to his conclusion, but rather based it on the "medical evidence and testimony" (TR 19). There was substantial evidence to support the ALJ's conclusion that claimant could perform medium work, and thus, could perform the requirements of her past relevant work.

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 10th day of July, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:isokaria.ss

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

BRUCE SHOEBOTTOM,)
)
 Plaintiff,)
)
 vs.)
)
 CITY OF TULSA, OKLAHOMA,)
 a Municipal corporation;)
 TULSA POLICE DEPARTMENT;)
 OFFICER RON HERWIG,)
 individually;)
 OFFICER CHRISTOPHER WITT,)
 individually;)
 CPL. DAN BROWN,)
 individually;)
 R.T. MARTIN, individually;)
 TULSA CONVENTION CENTER;)
 and DAVID MOSS, individually)
 and in his official capacity)
 as the duly qualified and)
 acting District Attorney)
 for Tulsa County,)
 Defendants.)

No. 95-C-258-K

ENTERED ON DOCKET
JUL 12 1995
DATE ~~JUL 11 1995~~

FILED

JUL 11 1995

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

ORDER

Before the Court is the Motion of Defendant David Moss to Dismiss (Docket #10) the claims brought against him by Plaintiff Shoebottom. Moss is the District Attorney of Tulsa County.

Shoebottom alleges that on the evening of March 23, 1994, he was engaged as a player/assistant coach for the Oklahoma City Blazers in Game 1 of the Central Hockey League playoffs between the Blazers and the Tulsa Oilers. The game was held in the Tulsa Convention Center. During the first period of Game 1, Shoebottom was sent to the penalty box. A little later Mike MacWilliam of the Oilers was also sent to the penalty box. On his way, MacWilliam attempted to engage Shoebottom in an altercation. When Shoebottom attempted to enter the ice, Officer Herwig "forcibly grabbed" Shoebottom. Officer Herwig was joined by Officer Witt and Officer

34

Martin, and some 3 to 4 other uniformed off-duty and on-duty officers of the Tulsa Police Department, Oklahoma Highway Patrol, and other law enforcement agencies, who "forcibly assaulted" Shoebottom from behind. At some point, Cpl. Brown sprayed Shoebottom with pepper gas and Officer Witt applied a choke hold on Shoebottom. Shoebottom was rendered unconscious, and as a result of the physical force applied by the police officer defendants, Shoebottom claims he suffered injury to his neck, a concussion, contusions, severe headaches, numbness and partial paralysis to left side. Shoebottom claims Officers Herwig, Witt, Cpl. Brown and Martin overreacted by intervening; acted contrary to recognized rules and regulations applicable to the sport of hockey; were aggressors, without having received a request for assistance from any official; applied physical force when no life-threatening situation existed; lacked necessary training to perform security by their failure to recognize that the altercation was at most a game penalty and not a crime.

Plaintiff states at no time did he commit any offense against the laws of the State of Oklahoma, nor did he intend to strike any police officer, or engage in any conduct that justified the actions of the police officers. Shoebottom alleges his freedom of action was restrained, constituting an arrest under color of law, without probable cause or objective, and without good-faith basis. Unidentified officers of the Tulsa Police Department stood guard over Plaintiff in the emergency room as well as outside his hospital room during the first night of his stay at St. Francis

Hospital. Consequently, Shoebottom claims he was deprived of his right to be free from unreasonable seizure under the Fourth Amendment and his right to due process of law under the Fourteenth Amendment.

As pertinent to the present motion, Plaintiff claims Defendant Moss violated Plaintiff's civil rights under color of law (1) by threatening to file criminal charges against Shoebottom unless Plaintiff agreed to release his civil claims against the defendant officers, thus interfering with Plaintiff's access to federal court; (2) by making statements to the effect that Moss was going to leave the decision of whether to file charges up to the named officer defendants, thereby resulting in an unlawful delegation of Moss' authority and discretion to prosecute; and (3) by filing unfounded criminal charges when Plaintiff refused to execute the requested release. Moss filed, by Information, three counts of assault and battery on May 6, 1994. The present civil action was filed March 21, 1995.

Defendant Moss then filed a motion to dismiss, stating he has not violated Plaintiff's civil rights and claiming absolute prosecutorial immunity to all allegations and to all civil liability. Citing Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), Defendant Moss states his actions are consistent with a long standing public policy of protecting the prosecutor in the performance of his or her duties and assuring the functioning of the criminal justice system. For this reason, Defendant Moss argues the Plaintiff's claims against him should be

dismissed.

In response, Plaintiff filed his objection (Docket #16), alleging that Defendant Moss' actions were outside of and exceeded the lawful scope of his authority and office as Tulsa County District Attorney. Consequently, Plaintiff contends Moss is not entitled to absolute or qualified immunity. Plaintiff also prays for equitable relief to which absolute immunity does not extend.

I. DISCUSSION

Historically the Courts have held that absolute immunity in Section 1983 actions should be extended to prosecutors for their conduct in "initiating a prosecution and in presenting the State's case." Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). The Imbler Court conclusively established that prosecutors are not required to submit to civil actions questioning their judgment in their performance of "quasi-judicial" duties. See also Powers v. Coe, 728 F.2d 97, 104 (2d Cir. 1984) ("If anything is clear in the law of immunity, it is that the prosecutor's decision--malicious or not, with cause or without--to prosecute must be absolutely immune from civil suit.") Furthermore, it is the functional analysis of a prosecutor's role which determines whether immunity is available. Giuffre v. Bissell, 31 F.3d 1241, 1251 (3rd Cir. 1994). A prosecutor is entitled to absolute immunity when his activities are intimately associated with the judicial phase of a criminal process. When a prosecutor is engaged in administrative duties, however, he is entitled only to qualified immunity. DiCesare v. Stuart, 12 F.3d 973, 977 (10th Cir.1993).

In this case, the alleged actions of Defendant Moss (1) by threatening to file criminal charges against Shoebottom unless Plaintiff agreed to release his civil claims against the defendant officers; (2) by making statements to the effect that Moss was going to leave the decision of whether to file charges up to the named officer defendants; and (3) by filing unfounded criminal charges when Plaintiff refused to execute the requested release, while inappropriate if true, are functions arising from and related to the advocacy role of a prosecutor. Here, there is no indication that Defendant Moss acted to further his own private purpose nor any indication that he performed acts related to police activity rather than prosecutorial activity. Furthermore, the decision of a prosecutor to file charges is protected, even in the face of accusations of: vindictive prosecution, reckless prosecution without adequate investigation, prosecution without jurisdiction, or conspiracy to prosecute for a crime that never occurred. Myers v. Morris, 810 F.2d 1437, 1446 (8th Cir. 1987).

In McGruder v. Necaise, 733 F.2d 1146, 1148 (5th Cir. 1984), the court held that claims alleging efforts to intimidate a civil rights plaintiff into dismissing a damage suit in exchange for dismissal of criminal charges were barred by absolute immunity because "the decision to initiate, maintain, or dismiss criminal charges is at the core of the prosecutorial function." In Hammond v. Bales, 843 F.2d 1320, 1322 (10th Cir. 1988), the court acknowledged "several recent decisions have held that absolute immunity attaches in certain situations to a prosecutor who offers

to drop criminal charges if the arrestee agrees to dismiss his action for damages." See also Schloss v. Bouse, 876 F.2d 287, 292 (2d Cir.1989) ("Given the fact that the demand for such a release is not beyond the prosecutor's jurisdiction, we conclude that he enjoys absolute immunity from a suit for damages based on that demand.") Because the Court has concluded absolute immunity applies to the actions of Moss, the issue of qualified immunity need not be addressed.

Plaintiff correctly points out absolute immunity is not a bar to injunctive or declaratory relief against a judge or prosecutor. Pulliam v. Allen, 466 U.S. 522, 541-43 (1984). He argues his requests for equitable relief should not be dismissed. The Fourth and Fifth causes of action in the Amended Complaint, the only ones involving defendant Moss, request money damages and "such other relief as the Court deems just and equitable." It is doubtful this boilerplate phrase amounts to a claim for injunctive or declaratory relief. However, since the issue has not been fully addressed in the briefs, the Court reserves judgment.

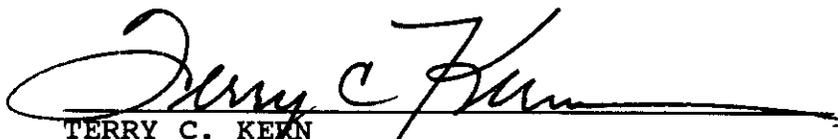
II. CONCLUSION

In conclusion, the claims presented by Plaintiff against Defendant Moss are barred by absolute prosecutorial immunity because they represent an effort to impose liability for his role in initiating adversarial proceedings and presenting the prosecutor's case.

The Motion to Dismiss (Docket #10) of Defendant Moss is

GRANTED as to any claims against defendant Moss for legal, as opposed to equitable, relief.

IT IS SO ORDERED THIS 10 DAY OF July, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

RTC MORTGAGE TRUST 1994-S1,
a Delaware business trust,

Plaintiff,

-vs.-

GRAND VALLEY CARE CENTER, INC.,
an Oklahoma corporation,

Defendant.

ENTERED ON DOCKET

DATE JUL 12 1995

Case No. 94-C-1164K

F I L E D

JUL 12 1995

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

JUDGMENT

Before the Court is the Joint Application of Plaintiff, RTC Mortgage Trust 1994-S1, and Defendant, Grand Valley Care Center, Inc. ("Grand Valley"), for the entry of judgment. Based upon the record herein as a whole, and the stipulation of the parties as reflected in the Joint Application which dispose of all controversy between these parties, it is appropriate that judgment be entered at this time. F.R.Civ.P. 55. Accordingly,

THE COURT HEREBY FINDS that all facts set forth in the parties' Joint Application, the exhibits thereto and the exhibits to the Complaint referenced therein, are true.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, as follows:

A. RTC Mortgage Trust 1994-S1 shall have and recover judgment in its favor and against Grand Valley Care Center, Inc., *in rem only*, in the principal amount of \$767,724.45, together with interest thereon to June 15, 1995 in the amount of \$209,935.83, plus late charges of \$2,614.85, plus further interest from June 15, 1995 at the rate of 9.00% per annum to the date of judgment, plus post-judgment interest at the rate of 5.53 % per annum as provided by 28 U.S.C. §1961 until paid; and

B. The lien of the Mortgage now held by Plaintiff be declared a valid first and

prior lien on the following-described real property and premises situated in Mayes County, Oklahoma:

Lots Numbered One (1), Two (2), Three (3), Four (4) and Five (5), in Block Numbered Three (3), of the FAIR ADDITION to the Incorporated Town of Pryor Creek, Mayes County, Oklahoma, according to the official recorded Plat and Survey thereof,

with all improvements thereon, all appurtenances thereunto belonging, and all income, rents and accounts proceeding therefrom (collectively, "the Mortgaged Property"). The Court hereby COMMANDS that the Mortgaged Property be judicially sold and the proceeds of such sale net of lawful charges be applied as follows:

- First: toward any unpaid court costs and costs of sale;
- Second: to Plaintiff toward satisfaction of its judgment as set forth in Section A above until fully satisfied; and
- Third: to the Clerk of this Court to abide further order;

and after the sale commanded hereby, Grand Valley, and any others claiming by or through said Grand Valley shall be foreclosed and forever barred from having or claiming any right, title, interest or estate in and to the Mortgaged Property; and

C. That certain "Quit Claim Deed," recorded on or about August 25, 1993 at Book 767, Page 28 of the records of the Clerk of Mayes County, Oklahoma, by which Grand Valley purported to convey certain real property to Resolution Trust Corporation in satisfaction of the debt evidenced by the Mortgage; however, said Quit Claim Deed was recorded without the consent of, or acceptance for any purpose by, Resolution Trust Corporation; the said Quit Claim Deed is hereby declared void and of no effect.

D. Plaintiff is entitled to a further *in rem* judgment against Grand Valley for

Plaintiff's costs of enforcing this action, including Plaintiff's reasonable attorney fees, in such amount as shall hereafter be determined in accordance with Local Rules 54.1 and 54.2 of this Court; and

E. Plaintiff has waived any deficiency judgment against Grand Valley.

SO ORDERED.

FOR ALL OF WHICH, LET EXECUTION ISSUE.

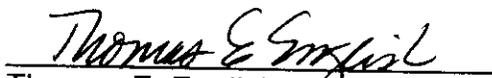
UNITED STATES DISTRICT COURT
JUDGE **s/ TERRY C. KERN**

APPROVED:



Ricki V. Sonders
DAY, EDWARDS, FEDERMAN,
PROPESTER & CHRISTENSEN, P.C.
210 Park Avenue, Suite 2900
Oklahoma City, OK 73102
Telephone: (405) 239-2121
ATTORNEYS FOR PLAINTIFF

- and -



Thomas E. English, Esquire
ENGLISH & WOOD, P.C.
15 West South Street, Suite 1700
Tulsa, OK 74119-5466
ATTORNEYS FOR DEFENDANT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE JUL 12 1995

UNITED STATES OF AMERICA,)
Plaintiff,)
)
vs.)
TIM G. TREAT; CATHY LINDSEY)
TREAT; STATE OF OKLAHOMA ex rel)
OKLAHOMA TAX COMMISSION;)
JOHN C. BURT; DAVID BURT; SARAH)
E. FORBUSH; CITY OF GLENPOOL,)
Oklahoma; COUNTY TREASURER,)
Tulsa County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)
Defendants.)

Civil Case No. 95-CV 253K

F I L E D

JUL 1 1995

ORDER

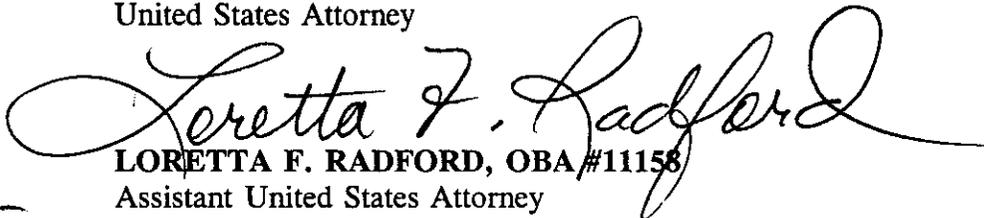
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

Dated this 10 day of July, 1995.
s/ **TERRY C. KERN**

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:
STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
JUL 12 1995
DATE _____

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
GEORGE WILLIAM GENTRY, JR;)
CONNIE S. GENTRY; UNKNOWN)
SPOUSE OF George William Gentry, if)
any; UNKNOWN SPOUSE OF Connie S.)
Gentry, if any; THE FIRST NATIONAL)
BANK & TRUST COMPANY, of Vinita;)
MICHAEL STUART; BARBARA)
STUART; CITY OF PRYOR, Oklahoma)
COUNTY TREASURER, Mayes County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Mayes County,)
Oklahoma,)
)
Defendants.)

FILED

JUL 12 1995

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

Civil Case No. 95-C 283K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 10 day of July, 1995.

The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Mayes County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma, appear by Charles A. Ramsey, Assistant District Attorney, Mayes County, Oklahoma; the Defendant, CITY OF PRYOR, Oklahoma, appears not having previously filed a Disclaimer; the Defendants, MICHAEL STUART and BARBARA STUART, appear not having previously filed their Disclaimer; the Defendant, GEORGE WILLIAM GENTRY, JR., appears not having previously filed a Disclaimer; the Defendants, UNKNOWN SPOUSE OF George William Gentry, Jr., if any

NOTE: THIS ORDER IS TO BE FILED BY MOVING TO SET ASIDE BY PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

and UNKNOWN SPOUSE OF Connie S. Gentry, if any, appear not and should be dismissed from this action; and the Defendant, FIRST NATIONAL BANK & TRUST CO., OF VINITA and CONNIE S. GENTRY, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, GEORGE WILLIAM GENTRY, JR., signed a Waiver of Summons on April 27, 1995; that the Defendant, CONNIE S. GENTRY, signed a Waiver of Summons on May 7, 1995; that the Defendant, FIRST NATIONAL BANK & TRUST CO., OF VINITA signed a Waiver of Summons on April 3, 1995; that the Defendant, CITY OF PRYOR, Oklahoma, was served a copy of Summons and Complaint on March 30, 1995, by Certified Mail; that Defendant, COUNTY TREASURER, Mayes County, Oklahoma, was served a copy of Summons and Complaint on March 30, 1995, by Certified Mail; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma, was served a copy of Summons and Complaint on March 30, 1995, by Certified Mail.

The Court further finds that the Defendant, GEORGE WILLIAM GENTRY, JR., filed his Disclaimer on May 15, 1995; the Defendants, MICHAEL STUART and BARBARA STUART, filed their Disclaimer on May 10, 1995; the Defendant, CITY OF PRYOR, Oklahoma, filed its Disclaimer on April 11, 1995; the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma, filed their Answer on April 7, 1995.

The Court further finds that the Defendants, GEORGE WILLIAM GENTRY, JR. and CONNIE S. GENTRY, were granted a Divorce on September 17, 1991, in Mayes County District Court, in Case No. JFD-90-209. The Defendants, GEORGE WILLIAM GENTRY, JR. and CONNIE S. GENTRY, have both remained single unmarried persons. The Defendants, MICHAEL STUART and BARBARA STUART, are husband and wife.

The Court further finds that the Defendant, GEORGE WILLIAM GENTRY, JR., filed an Affidavit on April 27, 1995, stating he is a single unmarried person. The Defendant, CONNIE S. GENTRY, filed an Affidavit on May 10, 1995, stating that she is a single unmarried person. The Defendants, UNKNOWN SPOUSE OF George William Gentry, Jr., if any, and UNKNOWN SPOUSE OF Connie S. Gentry, if any, should be dismissed from this action.

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 Mayes County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Numbered Seven (7), in Block Numbered Three (3), of WILKERSON VII ADDITION, to the Incorporated City of PRYOR CREEK, Mayes County, State of Oklahoma, according to the official, Recorded Plat and Survey thereof.

The Court further finds that on February 28, 1986, the Defendants, Michael Stuart and Barbara Stuart, executed and delivered to Mortgage Clearing Corporation, their mortgage note in the amount of \$55,377.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Michael Stuart and Barbara Stuart, husband and wife, executed and delivered to Mortgage Clearing Corporation, a mortgage dated February 28, 1986, covering the above-described property. Said mortgage was recorded on March 17, 1986, in Book 655, Page 774, in the records of Mayes County, Oklahoma.

The Court further finds that on April 13, 1989, MORTGAGE CLEARING CORPORATION, assigned the above-described mortgage note and mortgage to the Secretary

of Housing and Urban Development. This Assignment of Mortgage was recorded on April 17, 1989, in Book 699, Page 818, in the records of Mayes County, Oklahoma.

The Court further finds that Defendants, GEORGE WILLIAM GENTRY, JR., and CONNIE S. GENTRY, currently hold title to the property by virtue of a Warranty Deed recorded on July 24, 1986, in Book 662, Page 29, in the records of Mayes County, Oklahoma. The Defendants, GEORGE WILLIAM GENTRY, JR. and CONNIE S. GENTRY are the current assumptors of the subject indebtedness.

The Court further finds that on March 31, 1989, the Defendants, GEORGE WILLIAM GENTRY, JR., and CONNIE S. GENTRY, 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 July 11, 1990. an agreement was made between the Plaintiff and CONNIE S. GENTRY, on October 28, 1991, and a superseding agreement was reached between these parties on January 10, 1992.

The Court further finds that the Defendants, GEORGE WILLIAM GENTRY, JR. and CONNIE S. GENTRY, 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, GEORGE WILLIAM GENTRY, JR. and CONNIE S. GENTRY, are indebted to the Plaintiff in the principal sum of \$89,420.19, plus interest at the rate of 10.5 percent per annum from January 1, 1995 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, FIRST NATIONAL BANK & TRUST CO., OF VINITA and CONNIE S. GENTRY, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, GEORGE WILLIAM GENTRY, JR., MICHAEL STUART, BARBARA STUART, and CITY OF PRYOR, Oklahoma, disclaim any right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Mayes 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 In Rem against the Defendants, GEORGE WILLIAM GENTRY, JR. and CONNIE S. GENTRY, in the principal sum of \$89,420.19, plus interest at the rate of 10.5 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.53 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, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma, GEORGE WILLIAM GENTRY, JR., CONNIE S. GENTRY,

FIRST NATIONAL BANK & TRUST CO., OF VINITA, MICHAEL STUART, BARBARA STUART and CITY OF PRYOR, 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, GEORGE WILLIAM GENTRY, JR. and CONNIE S. GENTRY, to satisfy the judgment in rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

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

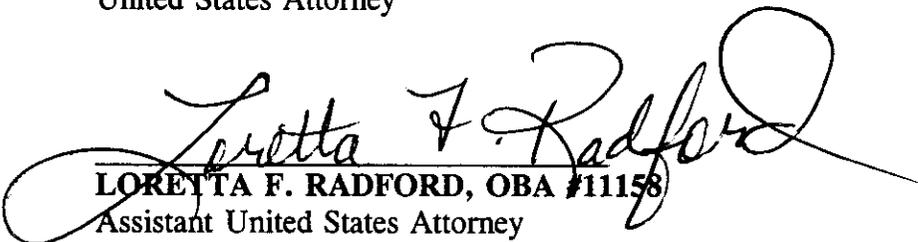
and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

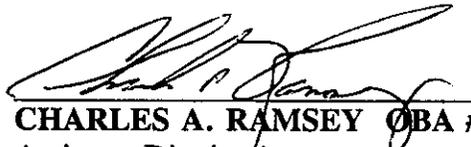
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



CHARLES A. RAMSEY OBA #10116
Assistant District Attorney
P.O. Box 845
Pryor, OK 74362
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Mayes County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 283K

LFR:flv

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE ~~Jul 12~~ 12 1995

SUN COMPANY, INC., (R & M), a Delaware corporation,)
and TEXACO INC., a Delaware corporation,)

Plaintiffs,)

vs.)

Case No. 94-C-820-K

BROWNING-FERRIS, INC., a Delaware corporation, et al.,)

Defendants.)

F I L E D

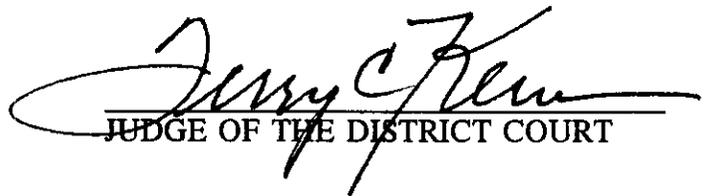
ORDER

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

Upon motion of Plaintiffs and for good cause shown,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs' Motion for
Voluntary Dismissal Without Prejudice of Defendant, O.K. Tank Trucks, Inc. only is granted.

Dated this 10 day of July, 1995.


JERRY C. KLEM
JUDGE OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUN COMPANY, INC., (R & M), a Delaware corporation,
and TEXACO INC., a Delaware corporation,

Plaintiffs,

vs.

BROWNING-FERRIS, INC., a Delaware corporation, et al.,

Defendants.

ENTERED ON DOCKET

DATE JUL 12 1995

Case No. 94-C-820-K

J. J. R. D.
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Upon motion of Plaintiffs and for good cause shown,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs' Motion for Voluntary Dismissal Without Prejudice of Defendant, Brierly Plumbing Technologies Corp. only is granted.

Dated this 10 day of July, 1995.

Jerry C. Kern
JUDGE OF THE DISTRICT COURT

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

ENTERED ON DOCKET

IN RE:

DATE Jul 12 1995

ASBESTOS LITIGATION,

No. 90-C-280-K

RONALD L. MILLER, et al.

Plaintiffs,

v.

FIBREBOARD CORPORATION, et, al.

Defendants

FILED

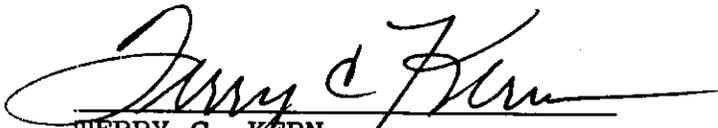
JUL 12 1995

JUDGMENT

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

In accordance with the jury verdict rendered on June 29, 1995, entered in favor of the Defendant Owens-Corning Fiberglas Corporation and against the Plaintiffs, judgment is hereby entered in favor of the Defendant on all claims.

IT IS SO ORDERED THIS 10 DAY OF JULY, 1995


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

45

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

ENTERED ON DOCKET
DATE JUL 12 1995

PUBLIC SERVICE COMPANY OF
OKLAHOMA, an Oklahoma
corporation,

Plaintiff,

vs.

A right-of-way fifty (50)
feet in width, et al.,

Defendants.

No. 93-C-855-K

FILED

JUL 12 1995

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

ORDER

This is a civil action brought by Plaintiff Public Service Company of Oklahoma ("PSO") under the power of eminent domain against the United States of America, Trustee and Owner of the legal title to certain land for use and benefit of Elliott Bim Bruner, a restricted Creek Indian.

In its order of April 27, 1995, this Court found that the governing law in this case arises out of 25 U.S.C. § 357. The Tenth Circuit has squarely held that "federal courts have jurisdiction under section 357 to condemn rights-of-way over allotted Indian land without secretarial or Indian consent." Yellowfish v. City of Stillwater, 691 F.2d 926, 927 (10th Cir. 1982), cert. denied, 461 U.S. 927 (1983). The Court concurs with PSO that it is not bound by the limitations set forth in 25 C.F.R 169.18.

Nevertheless, the merits of whether the easement should be perpetual or limited had not been fully addressed by the parties at the time of the April 1995 Order. The power of eminent domain must

be scrutinized most closely when exercised by a non-governmental entity. Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement, 688 F. Supp. 1245 (N.D. Ohio 1988).

The Court directed the parties to address whether the easement should be perpetual as opposed to a duration of 50 years or some other term. After examining the briefs presented by the parties and evaluating the arguments made therein, the Court determines that the easement should be of a perpetual duration.

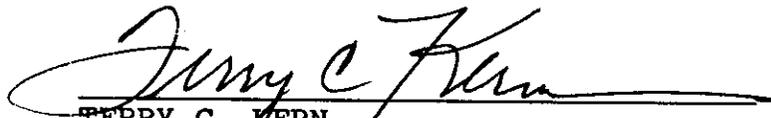
First, the appraiser's report, which assessed damages to the Defendants in the amount of \$24,000, was based on a perpetual easement. See Report of Commissioners at p. 1 (Docket #17). The Report of the Commissioners states that the appraisal is based on the easement described in the Complaint. In the Complaint, PSO clearly states that it seeks "pursuant to its power of eminent domain, to take and appropriate a perpetual easement and right-of-way for ... electric power transmission lines...." (emphasis added). When the extent of an easement is unclear, the language of the appraiser's report may be used to determine this question. J. Sackman, 3 Nichols' The Law of Eminent Domain § 11.08[2] at p. 11-47 (Revised 3rd Edition 1994). See also In re City of Great Bend, 869 P.2d 587 (Kan. 1994).

Second, PSO has demonstrated that a perpetual easement is necessary to the public function performed by PSO and is beneficial to the public. The provision of electric services by PSO to its customers is not a temporary objective, and the needs of Oklahoma citizens who are customers of PSO will probably not end in the foreseeable future. It does not make sense to force PSO, and

ultimately its customers, to repurchase the same easement at a future date, particularly when the purchase price already reflected the perpetual duration.

For the reasons discussed above, the easement taken in this condemnation is a perpetual easement.

ORDERED this 10 day of ~~June~~^{July}, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 1 1995

ANNA GILLIS,
Plaintiff,
vs.
AMERICAN DIRECT MAIL PARTNERS,
INC., an Oklahoma corporation,
and JIM SLUSSER,
Defendant.

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

No. 95C-0017K

ENTERED ON DOCKET
DATE JUL 12 1995

FILED

JUL 1 1995

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

ORDER

On August 12, 1994, Plaintiff filed a petition in Tulsa County Court. In her petition, she claimed that she was "subjected to lewd and unwelcome sexual remarks and gestures" and that she was constructively discharged as a result of the stress of her work environment. On January 6, 1995, the Defendants removed the case to federal court. Now before the Court is the Motion to Remand filed by Plaintiff in which she argues that the time period for removal passed and that the case must be remanded to state court.

The relevant provision of the removal statute, 28 U.S.C. § 1446(b), is clear. It states:

The notice of removal of a civil action or proceeding shall 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 of relief upon which such action or proceeding is based, or within thirty days after the service of summons upon 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 complaint, motion,

8

order, or other paper from which it may first be ascertained that the case is one which is or has become removable....

(emphasis added).

The burden of establishing federal jurisdiction rests on the party seeking removal. Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921). The removal statute is strictly construed against removal as are the time limitations set forth in § 1446(b). Salveson v. Western States Bankcard Ass'n., 731 F.2d 1423, 1426 (9th Cir. 1984); Walker v. Gunn, 511 F.2d 1024, 1026 (9th Cir. 1975), cert. denied, 423 U.S. 849 (1975). The burden rests on the Defendants, since they are the ones seeking access to a court of limited jurisdiction. Krantz v. Boneck, 599 F.Supp. 785, 787 (D. Nev. 1984).

Defendants argue that they could not have removed the petition to federal court until after Plaintiff's deposition on December 8, 1994. Only then, they state, could it first be ascertained that the claim was based on Title VII of the Civil Rights Act. Thus, Defendants believe that the thirty-day time limitation did not begin to run until the Plaintiff's deposition.

The removability of this case was ascertainable from the facts alleged on the face of the complaint. The petition clearly raises a claim of sexual harassment--in the form of a hostile workplace allegation--that resulted in her discharge. Although the petition does not cite Title VII, the action could have been removed under that statute. The plaintiff's failure to make a specific reference in the complaint to an applicable source of federal law will not

prevent removal. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3722. See Hunneman Real Estate Corp. v. Eastern Middlesex Association of Realtors, Inc., 860 F. Supp. 906, 909 (D.Mass. 1994).

Just as there is no specific mention of Title VII in her petition, the deposition portion provided by Defendants makes no more explicit reference to federal statute. While a deposition may reveal facts previously not known to a defendant, this was not true in this case. Defendants already knew that Plaintiff had filed a complaint with the Oklahoma Human Rights Commission and that she received a right to sue letter from the EEOC. Therefore, the deposition added nothing to make the federal basis for removable more ascertainable.

In addition, this situation is not made more complicated by the presence of explicit state law claims in the petition. Both cases provided to the Court by counsel for Defendants involved plaintiffs that specifically relied on state law claims, thus making it more difficult for defendants to ascertain the federal nature of the actions in order to justify removal. See Barraclough v. ADP Claims Services, 2 AD Cases 877, No. C-93-0568-VRW (N.D.Cal., April 19, 1993); Cedillo v. Valcar Enterprises, 64 FEP Cases 25, No. CA3-91-1464 (N.D.Tx., Oct. 1, 1991).

Since a close analysis of the face of the complaint would have permitted removal, the second paragraph of §1446(b) is not applicable. It makes little sense for the Defendants to argue that the Plaintiff's deposition was determinative in evaluating

whether the action would be filed pursuant to state or federal law, since the deposition did not address this question squarely. Because the second paragraph of § 1446(b) is inapplicable, the time period for Defendants to remove the action began to run as soon as they received the initial pleading.

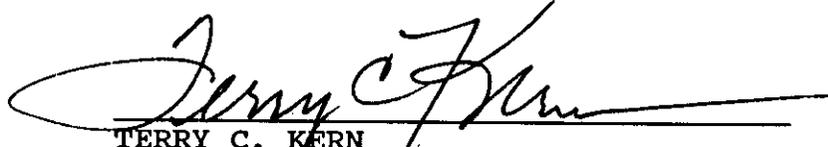
In this case, the Defendants should have scrutinized the petition when it was first filed and removed it within the thirty-day window. Another district court facing an almost identical problem stated:

Where the initial pleading is indeterminate, absent fraud by the plaintiff or pleadings that provide "no clue" that the case is not "not removable", the burden is on the defendants desiring removal to scrutinize the case and to remove it in a timely fashion.

Krantz, 599 F. Supp. at 788 (D.Nev. 1984). Having failed to meet its burden, Defendants cannot now defeat the Plaintiff's motion to remand the case.

Therefore, it is the Order of this Court that the above-captioned case be remanded to the District Court of Tulsa County.

ORDERED this 10 day of July 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE JUL 12 1995

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ROBERT LINDELL ESLICK;)
 UNKNOWN SPOUSE OF Robert Lindell)
 Eslick, if any; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
 Defendants.)

FILED

JUL 12 1995

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

Civil Case No. 95-C 241K

ORDER

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

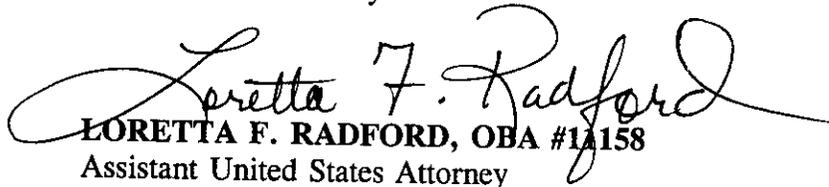
Dated this 10 day of July, 1995.

s/ TERRY KEARN

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in cursive script that reads "Loretta F. Radford". The signature is written in black ink and is positioned above the printed name and title of the signatory.

LORETTA F. RADFORD, OBA #12158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
JUL 12 1995
DATE _____

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 MICHAEL W. THOMASON;)
 MARTHA E. THOMASON;)
 COUNTY TREASURER, Mayes County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Mayes County, Oklahoma,)
)
 Defendants.)

F I L E D

JUL 1 1995

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

CIVIL ACTION NO. 95-C-0096-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 10 day of July,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney; the Defendants, County Treasurer, Mayes County, Oklahoma, and Board of County Commissioners, Mayes County, Oklahoma, appear by Charles A. Ramsey, Assistant District Attorney, Mayes County, Oklahoma; and the Defendants, Michael W. Thomason and Martha E. Thomason, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Michael W. Thomason, executed a Waiver of Service of Summons which was filed on April 27, 1995; that the Defendant, Martha E. Thomason, executed a Waiver of Service of Summons on April 16, 1995 which was filed on April 27, 1995; that Defendant, County Treasurer, Mayes County, Oklahoma, was served by certified mail, return receipt

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

requested, delivery restricted to the addressee on January 31, 1995; and that Defendant, Board of County Commissioners, Mayes County, Oklahoma, was served by certified mail, return receipt requested, delivery restricted to the addressee on January 31, 1995.

It appears that the Defendants, County Treasurer, Mayes County, Oklahoma, and Board of County Commissioners, Mayes County, Oklahoma, filed their Answer on March 3, 1995; and that the Defendants, Michael W. Thomason and Martha E. Thomason, 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 Mayes County, Oklahoma, within the Northern Judicial District of Oklahoma:

A tract of land in the East Half of the Southeast Quarter of the Northeast Quarter of Section 7, Township 21 North, Range 20 East of the Indian Base and Meridian, Mayes County, Oklahoma, more particularly described as: Commencing at the Southeast Corner of the Northeast Quarter of said Section, the true point of beginning; Thence S 89 43' 00" W for a distance of 660.00 feet; Thence N 00 03' 00" W for a distance of 502.60 feet; Thence N 89 43' 00" E for a distance of 660.00 feet; Thence S 00 03' 00" E for a distance of 502.60 feet; to the point of beginning; containing 7.612 acres, more or less, less and except tract CR-18A previously conveyed to the Grand River Dam Authority by a deed recorded in Book 342 at Page 37 as more particularly described therein.

The Court further finds that on March 27, 1987, the Defendants, Michael W. Thomason and Martha E. Thomason, 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 \$48,300.00, payable in monthly installments, with interest thereon at the rate of 8.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Michael W. Thomason and Martha E. Thomason, 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 March 27, 1987, covering the above-described property. This mortgage was recorded on March 27, 1987, in Book 671, Page 471, in the records of Mayes County, Oklahoma.

The Court further finds that the Defendants, Michael W. Thomason and Martha E. Thomason, 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, Michael W. Thomason and Martha E. Thomason, are indebted to the Plaintiff in the principal sum of \$41,906.60, plus administrative charges in the amount of \$442.50, plus penalty charges in the amount of \$115.44, plus accrued interest in the amount of \$1,590.93 as of September 1, 1994, plus interest accruing thereafter at the rate of 8.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$26.00 for recording Notices of Lis Pendens.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs,

have and recover judgment against the Defendants, Michael W. Thomason and Martha E. Thomason, in the principal sum of \$41,906.60, plus administrative charges in the amount of \$442.50, plus penalty charges in the amount of \$115.44, plus accrued interest in the amount of \$1,590.93 as of September 1, 1994, plus interest accruing thereafter at the rate of 8.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.53 percent per annum until paid, plus the costs of this action in the amount of \$26.00 for recording Notices of Lis Pendens, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Mayes 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, Michael W. Thomason and Martha E. Thomason, 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;

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/ TERRY C. KERN

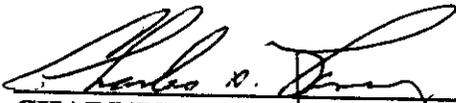
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



for WYN DEE BAKER, OBA #465
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



CHARLES A. RAMSEY, OBA #10116
Assistant District Attorney
P.O. Box 845
Pryor, OK 74362
(918) 825-2171
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Mayes County, Oklahoma

Judgment of Foreclosure
Case No. 95-C-0096-K

WDB:css

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

ENTERED ON DOCKET
DATE JUL 12 1995

CRAIG D. HOPE,)
)
Plaintiff,)
)
vs.)
)
STANLEY GLANZ, et al.,)
)
Defendants.)

No. 95-C-131-K **FILED**

JUL 12 1995
Richard M. ...
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on June 2, 1995. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹

ACCORDINGLY, IT IS HEREBY ORDERED that:

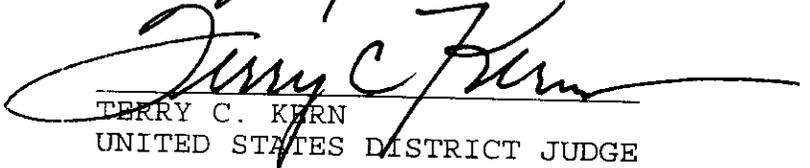
- (1) Defendants' motion to dismiss or for summary judgment (doc. #8) is **granted** and the above captioned case is **dismissed without prejudice** at this time.
- (2) The Court will **reinstate** this action if Plaintiff submits a response to Defendants' motion to dismiss, or in the alternative for summary judgment, no later than ten (10) days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir.

¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 10 day of July, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 10 1995

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
KATHY J. JOHNSON aka Kathy Jean)
Johnson aka Kathy Johnson fka Kathy J.)
Metz;)
UNKNOWN SPOUSE of Kathy J.)
Johnson, if any;)
BANK IV OKLAHOMA, N.A. as)
successor to Admiral State Bank;)
GENERAL ELECTRIC MORTGAGE)
INSURANCE CORPORATION, nka)
General Electric Capital Mortgage)
Services;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
DATE JUL 11 1995

Civil Case No. 94-C-1131-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 10th day of July,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, BANK IV OKLAHOMA, N.A., Successor to Admiral State Bank, appears not having previously filed a Disclaimer; and the Defendants, KATHY J. JOHNSON aka Kathy Jean Johnson aka Kathy Johnson fka Kathy J. Metz, UNKNOWN SPOUSE OF Kathy J. Johnson aka Kathy Jean Johnson aka Kathy

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

Johnson fka Kathy J. Metz, if any, and GENERAL ELECTRIC MORTGAGE INSURANCE CORPORATION nka General Electric Capital, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, KATHY J. JOHNSON aka Kathy Jean Johnson aka Kathy Johnson fka Kathy J. Metz, signed a Waiver of Summons on January 30, 1995; that the Defendant, BANK IV OKLAHOMA, N.A., Successor to Admiral State Bank, signed a Waiver of Summons on January 6, 1995; and that the Defendant, GENERAL ELECTRIC MORTGAGE INSURANCE CORPORATION nka General Electric Capital, was served a copy of Summons and Complaint on March 7, 1995, by Certified Mail.

The Court further finds that the Defendant, UNKNOWN SPOUSE OF Kathy J. Johnson aka Kathy Jean Johnson aka Kathy Johnson fka Kathy J. Metz, if any, was 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 March 29, 1995, and continuing through May 3, 1995, 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, UNKNOWN SPOUSE OF Kathy J. Johnson aka Kathy Jean Johnson aka Kathy Johnson fka Kathy J. Metz, if any, 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, UNKNOWN SPOUSE OF Kathy J. Johnson aka Kathy Jean Johnson aka Kathy Johnson fka

Kathy J. Metz, if any. 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 Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party 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 Defendant 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 December 27, 1994; that the Defendant, BANK IV OKLAHOMA, NA., Successor to Admiral State Bank, filed its Disclaimer on January 27, 1995; and that the Defendants, KATHY J. JOHNSON aka Kathy Jean Johnson aka Kathy Johnson fka Kathy J. Metz, UNKNOWN SPOUSE OF Kathy J. Johnson aka Kathy Jean Johnson aka Kathy Johnson fka Kathy J. Metz, if any, and GENERAL ELECTRIC MORTGAGE INSURANCE CORPORATION nka General Electric Capital, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, KATHY J. JOHNSON, is one and the same and sometimes referred to as Kathy Jean Johnson, Kathy Johnson and formerly as Kathy J. Metz, and will hereinafter be referred to as "KATHY J. JOHNSON."

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 South Sixty-two and five-tenths (62.5) feet of the East One Hundred Sixty-seven and five tenths (167.5) feet of Lot Thirteen (13), WESTROPE ACRES, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof, LESS the East 25 feet for street.**

The Court further finds that on June 19, 1974, the Defendant, KATHY J. METZ now KATHY J. JOHNSON and Gerald W. Metz, executed and delivered to Finance Corporation, their mortgage note in the amount of \$11,650.00, payable in monthly installments, with interest thereon at the rate of Eight and Three-Fourths percent (8.75%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Kathy J. Metz now KATHY J. JOHNSON and Gerald W. Metz, then husband and wife, executed and delivered to Finance Corporation, a mortgage dated June 19, 1974, covering the above-described property. Said mortgage was recorded on June 21, 1974, in Book 4125, Page 296, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 8, 1974, Finance Corporation, assigned the above-described mortgage note and mortgage to Federal National Mortgage Association. This Assignment of Mortgage was recorded on July 15, 1974, in Book 4128, Page 930, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 28, 1988, 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 September 29, 1988, in Book 5131,

Page 349, in the records of Tulsa County, Oklahoma. This Assignment was re-recorded on February 8, 1989, in Book 5165, Page 2123, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 29, 1988, the Defendant, KATHY J. JOHNSON, 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 November 2, 1989, November 17, 1989, September 1, 1989, June 15, 1990, and September 1, 1992.

The Court further finds that the Defendant, KATHY J. JOHNSON, 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 her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, KATHY J. JOHNSON, is indebted to the Plaintiff in the principal sum of \$12,376.37, plus interest at the rate of 8.75 percent per annum from November 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 ad valorem taxes in the amount of \$334.00, plus penalties and interest, for the year of 1994. Said lien is superior to the interest of the Plaintiff, United States of America.

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 \$7.00 which became a lien on the property as of July 7, 1988, a lien in the amount of \$6.00 which became a lien on the property as of

July 5, 1989, and a lien in the amount of \$24.00 which became a lien on the property as of June 26, 1992. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, KATHY J. JOHNSON, UNKNOWN SPOUSE OF Kathy J. Johnson, if any and GENERAL ELECTRIC MORTGAGE INSURANCE CORPORATION nka General Electric Capital, 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 the Defendant, BANK IV OKLAHOMA, N.A., Successor to Admiral State Bank, disclaims any right, title or interest in the 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, KATHY J. JOHNSON, in the principal sum of \$12,376.37, plus interest at the rate of 8.75 percent per annum from November 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.53 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 \$334.00, plus penalties and interest, for ad valorem taxes for the year 1994, 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 \$37.00, plus costs and interest, for personal property taxes for the years 1987, 1988, and 1991, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, KATHY J. JOHNSON, UNKNOWN SPOUSE OF Kathy J. Johnson, if any, and GENERAL ELECTRIC MORTGAGE INSURANCE CORPORATION nka General Electric Capital, 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, KATHY J. JOHNSON, 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 Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$334.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

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

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$37.00, 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.

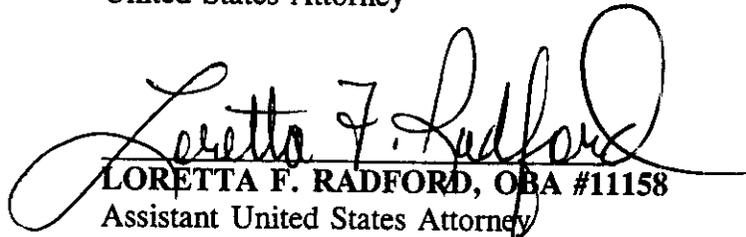
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852

Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-1131-B

LFR:flv

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

JOHNNY MOORE,)
)
Plaintiff,)
)
v.)
)
DONNA E. SHALALA,¹)
Secretary of Health and)
Human Services,)
Defendant.)

NO. 94-C-23-H ✓

FILED
JUL 1 1995
Richard L. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE JUL 1 1 1995 *

ORDER

Plaintiff, Johnny Moore, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.² In accordance with 28 U.S.C. §636(c)(3) the parties have consented to proceed before the undersigned United States Magistrate Judge, any appeal of this decision will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 USC § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the

¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Report and Recommendation continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

² Mr. Moore's August 20, 1991 application for disability benefits was denied January 14, 1992, the denial was affirmed on reconsideration, July 15, 1992. A hearing before an Administrative Law Judge was held March 12, 1993. By order dated July 8, 1993 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on November 12, 1993. The decision of the Appeals Counsel represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

Plaintiff alleges that the record does not support the determination of the Secretary by substantial evidence and that the ALJ failed to perform the correct analysis. Plaintiff also claims that he meets the Listing of Impairment criteria under 20 C.F.R. 404, Subpart P §10.10.³ The entire record of the proceedings before the Social Security Administration has been meticulously reviewed by the Court. The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has adequately and correctly set forth the relevant facts of this case and applied the proper legal principals to these facts [R. 39-47]. The Court therefore incorporates these findings into this order, as the duplication of this effort would serve no useful purpose.

Although Plaintiff meets the weight criteria for disability under Listing 10.10, the record does not demonstrate other medical criteria necessary to meet the Listing. Therefore, the Listing does not mandate a finding of disability in this case. The record also fails to bear out Plaintiff's claim that the ALJ's decision ignored the opinions of Plaintiff's treating physicians. By letter dated November 4, 1991, Dr. Myers specifically addressed Plaintiff's physical complaints and concluded that his G.I. disease "would not preclude him from gainful employment" [R. 198].

³ On July 2, 1993, between the hearing date and the date of the ALJ's decision, the Social Security Administration promulgated new regulations wherein Listing 10.10 was revised and redesignated as 9.09. The revisions were minor and have no effect on the outcome of this case.

Dr. Myers did not address Plaintiff's orthopedic problems because she had not seen a recent orthopedic work up on him. *Id.* Dr. Myers referred Plaintiff to Dr. Mansur who examined him on February 13, 1992. Dr. Mansur noted Plaintiff's desire to establish an effective paper trail to procure disability benefits. Dr. Mansur reported that on physical examination there was no point of maximum tenderness, no redness, swelling or bruising. He was not able to elicit any abnormal areas or feel any masses of the thoracic spine area, and noted that Plaintiff did not appear to have severe lordosis or scoliosis. According to Dr. Mansur, Plaintiff's range of motion of the back was limited by obesity rather than by pain [R. 284]. The Court finds that the ALJ did not ignore the opinions of Plaintiff's treating Doctors.

There is no support for Plaintiff's claim that the ALJ failed to apply the appropriate standards in the evaluation of his pain and credibility. The Secretary is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10 Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 and appropriately applied the evidence to those guidelines. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Secretary and the courts.

The Court finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Secretary finding Plaintiff not disabled is AFFIRMED.

SO ORDERED THIS 10th day of JULY, 1995.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

JUL 10 1995

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

BRIAN LANDON,
Plaintiff,

vs.

JIM EARP, et al.,
Defendants.

No. 94-C-784-B

ENTERED ON DOCKET

DATE JUL 11 1995

JUDGMENT

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby **enters judgment** in favor of Defendants, Jim Earp and David Wilson, and against Plaintiff, Brian Landon. Plaintiff shall take nothing on his claim. Each side is to pay its respective **attorney fees**.

SO ORDERED THIS 10 day of July, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

JUL - 7 1995

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

PHILLIP LEE KELLEY,
Plaintiff,
vs.
CHARLES O'LEARY, et al.,
Defendants.

No. 94-C-442-B

ENTERED ON DOCKET
DATE JUL 11 1995

ORDER

This matter comes before the Court on the motion for summary judgment of Defendants Charles O'Leary and Brad Payas. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion and a confession of the matters raised by the motion, see Local Rule 7.1.C. In any event, having reviewed Defendants' motion for summary judgment, the Court concludes that there remain no genuine issues of material fact and that Defendants are entitled to judgment as a matter of law.

Accordingly, Defendants' motion for summary judgment (docket #15) is hereby **granted**.

SO ORDERED THIS 7 day of July, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

JUL 10 1995

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

PHILLIP LEE KELLEY,)
)
 Plaintiff,)
)
 vs.)
)
 CHARLES O'LEARY, et al.,)
)
 Defendants.)

No. 94-C-442-B

ENTERED ON DOCKET
DATE JUL 11 1995

JUDGMENT

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby **enters judgment** in favor of Defendants Charles O'Leary and Brad Payas and against Plaintiff, Phillip Lee Kelley. Plaintiff shall take nothing on his claim. Each side is to pay its respective **attorney fees**.

SO ORDERED THIS 10 day of July, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

JUL 10 1995

LC

DAVID B. McDERMOTT, II,)
)
 Plaintiff,)
)
 v.)
)
 ALLEN LITCHFIELD,)
)
 Defendant.)

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

Case No. 95-C-307-H

ENTERED ON DOCKET

DATE JUL 11 1995

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This order pertains to Plaintiff's Civil Rights Complaint Pursuant to 42 U.S.C. 1983 (Docket #1)¹, Defendant's Motion to Dismiss (Docket #3), Plaintiff's Opposition to Defendant's Motion to Dismiss (Docket #4), the Reply in Support of Defendant's Motion to Dismiss (Docket #5), Plaintiff's Motion for Leave to File Amended Complaint (Docket #6), Defendant's Motion to Strike Plaintiff's Motion for Leave to File an Amended Complaint (Docket #7), Plaintiff's Amended Complaint (Docket #8), and Defendant's Motion to Strike Plaintiff's Amended Complaint (Docket #9).

Plaintiff claims that Defendant Allen Litchfield ("Litchfield") "accosted Plaintiffs [sic] criminal defense counsel during a break in Peter McMahon's Jury Trial and stated Plaintiff was in the process of filing a suit against Plaintiffs [sic] criminal defense counsel" and therefore violated his attorney-client privilege (Docket #1, pgs. 2-3).

Plaintiff's Motion for Leave to File Amended Complaint (Docket #6) should be denied and Defendant's Motion to Strike Plaintiff's Motion for Leave to File an Amended Complaint (Docket #7) and Motion to Strike Plaintiff's Amended Complaint (Docket #9)

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

should be granted. Federal Rule of Civil Procedure 15 discusses the amendment of pleadings and 15(a) states:

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party

The rule requires leave to amend to be freely given by the court in the absence of prejudice to the opposing party. The Supreme Court in Foman v. Davis, 371 U.S. 178 (1962), stated:

In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be 'freely given.'

Plaintiff has submitted a proposed amended complaint in which he attempts to invoke jurisdiction pursuant to 28 U.S.C. § 1331. However, jurisdiction over a suit against the United States or its agents cannot be based on 28 U.S.C. § 1331, because that statute does not waive the government's sovereign immunity. Eagle-Picher Industries, Inc. v. United States, 901 F.2d 1530, 1532 (10th Cir. 1990). In addition, Plaintiff's amended complaint fails to state a legally cognizable cause of action. Plaintiff alleges merely a conversation between Defendant and Plaintiff's counsel regarding non-confidential, non-privileged matters. The attorney-client privilege to which Plaintiff alleges injury and the acts alleged cannot constitute a claim against Defendant.

Amendment of the complaint would be futile, so the court should not grant leave to amend.

The rule for reviewing the sufficiency of any complaint is that the "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). A court may dismiss an action for failure to state a cause of action "only if it is clear that no relief could be granted under any set of facts which could be proved". Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

To set forth a cause of action under § 1983, plaintiff must show that the conduct complained of was committed by a person acting under color of state law and that this conduct deprived plaintiff of some right, privilege, or immunity secured by the Constitution or laws of the United States. Gunkel v. City of Emporia, Kan., 835 F.2d 1302, 1303 (10th Cir. 1987).

Plaintiff does not allege any action taken by Defendant under color of state law. At all relevant times Mr. Litchfield was an Assistant United States Attorney employed by the federal government. Section 1983 does not reach the acts of federal officials because their acts are taken under color of federal, rather than state, law. District of Columbia v. Carter, 409 U.S. 418, 423-24 (1973); Campbell v. Amax Coal Co., 610 F.2d 701, 701 (10th Cir. 1979).

Plaintiff also has not stated any claim based upon rights, privileges or immunities secured by the Constitution or laws of the United States. Defendant is engaged in the

prosecution of plaintiff. The attorney-client privilege protects confidential communications made by a client to an attorney in order to obtain legal assistance. Plaintiff has not alleged that such confidential communications are involved here, and in his role as prosecutor Defendant is not able to violate plaintiff's attorney-client privilege.

Defendant notes that Plaintiff cites 28 U.S.C. 1346(a)(2) as an alternative basis of jurisdiction, but this section only grants jurisdiction for actions based "upon any express or implied contract with the United States" and no contract exists between Plaintiff and the United States. Plaintiff admits his error in his response and lists jurisdiction as 28 U.S.C. §§ 1331 and 1343(4), which give the federal courts jurisdiction over all civil actions arising under federal law and civil rights acts passed by Congress.

Defendant also argues that sovereign immunity extends to federal officers and agents like defendant. In his response, Plaintiff relies on Burns v. Reed, 500 U.S. 478 (1991), to argue that a § 1983 action can be brought against a prosecutor and absolute immunity is barred. However, the facts in that case are distinguishable, because a state prosecuting attorney was involved and he gave legal advice to police.

Defendant's Motion to Dismiss (Docket #3) should be granted.

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to these findings and recommendations. Failure to object within that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

Dated this 10th day of July, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:McDermott

