

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

FILED

SEP 28 1995

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

475342 ALBERTA LTD., an
Alberta corporation,

Plaintiff,

vs.

DATAPHON CELLULAR PARTNERSHIP
and JOHN F. KANE,

Defendants.

Case No. 95-C-174-BU

ENTERED ON DOCKET
SEP 29 1995
DATE _____

ORDER

This matter comes before the Court upon the motion of Defendants, Dataphon Cellular Partnership and John F. Kane, for summary judgment pursuant to Rule 56, Fed.R.Civ.P. Based upon the parties' submissions and the record herein, the Court makes its determination.

In the late 1980s, the Federal Communications Commission ("FCC") began to hold lotteries to award the rights to construct and operate cellular telephone systems in Rural Service Areas ("RSAs") throughout the United States. In order to be eligible for such lotteries, applicants had to establish, inter alia, their financial qualifications to construct and operate a system for one year. To demonstrate their financial qualifications, applicants were required to show that they had a financial commitment from a qualified lender or that they had personal or internal financial resources sufficient to provide the necessary financing.

On or about July 8, 1988, Defendant, Dataphon Cellular Partnership ("Dataphon"), entered into a letter agreement with NovAtel Communications, Ltd. ("NovAtel"). The letter agreement was

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executed on behalf of Dataphon by Defendant, John F. Kane ("Kane"). In the agreement, NovAtel committed to lend Dataphon the maximum amount of \$1,000,000.00, to be used for the purpose of constructing and operating for one year cellular radio telephone systems in one or more of the RSAs listed in the schedule attached to the letter agreement. The letter agreement was renewed by NovAtel and Dataphon on June 22, 1989.¹

Paragraph 5 of the letter agreement provided as follows:

The system[s] to be constructed using the proceeds of the loan we have committed to providing herein must utilize cellular system equipment and ancillary equipment and services supplied by NovAtel. Should you refer to this commitment in any filing or application presented to the FCC in connection with one of the proposed systems listed on Schedule A, and fail to purchase NovAtel equipment in connection with the construction of a system listed on Schedule A, there shall become immediately due and payable from applicant to NovAtel a fee of U.S. \$100,000.00 in liquidated damages.

In its application to the FCC seeking to construct and operate a cellular telephone system in the South Carolina-4 RSA, Dataphon attached a copy of the letter agreement between Dataphon and NovAtel. After considering Dataphon's application, the FCC, on October 4, 1989, awarded Dataphon a permit to construct and operate a cellular telephone system in the South Carolina-4 RSA. Dataphon's permit was then assigned to Dataphon SC Limited Partnership. Thereafter, on December 23, 1991, Dataphon SC Limited Partnership sold the permit to United States Cellular Corporation ("U.S. Cellular"). U.S. Cellular then constructed the cellular

¹NovAtel also renewed its financial commitment to Dataphon by commitment letters dated October 12, 1989 and December 7, 1989.

telephone system for the South Carolina-4 RSA.

Dataphon never borrowed any money from NovAtel under the letter agreement. In addition, Dataphon never purchased any cellular telephone equipment from NovAtel.

Plaintiff, 475342 Alberta Ltd. ("Alberta"), succeeded to the contractual rights of NovAtel under the letter agreement with Dataphon. On February 27, 1995, Alberta filed this diversity action against Dataphon and Kane alleging theories of breach of contract and unjust enrichment. Alberta specifically seeks \$100,000.00 in liquidated damages for the failure of Dataphon to purchase cellular telephone equipment from NovAtel pursuant to paragraph 5 of the letter agreement.

In their motion, Defendants assert that the letter agreement between NovAtel and Dataphon consisted of two components, namely, NovAtel's commitment to lend Dataphon up to \$1,000,000.00 for the construction and operation of a cellular telephone system for one year for which NovAtel would receive a \$1.00 commitment fee, and a proposal by NovAtel to sell Dataphon cellular telephone equipment after the occurrence of two condition precedents. The two condition precedents, set forth in paragraph 5 of the letter agreement, were that a cellular telephone system would be constructed by Dataphon or its successors and that NovAtel would furnish the loan proceeds for the construction of a cellular telephone system. Defendants argue that because neither of these conditions were satisfied, Dataphon's performance under the letter agreement was excused. Consequently, Defendants contend that they

are not required under paragraph 5 to pay liquidated damages based upon a failure to purchase such equipment from NovAtel.

However, even if the condition precedents of the letter agreement were satisfied, Defendants argue that the liquidated damages provision is not enforceable because the letter agreement was merely an "agreement to agree." Defendants assert that paragraph 6 of the letter agreement required the parties to reach further agreement regarding applicable loan documents. Because further agreement as to the various loan documents was necessary, Defendants contend the letter agreement was an incomplete and unenforceable "agreement to agree."

Defendants additionally argue that they did not breach the letter agreement as it had already expired when it assigned the license to U.S. Cellular and when U.S. Cellular constructed the South Carolina-4 RSA. Because the letter agreement had expired, Defendants argue that NovAtel cannot enforce the liquidated damages provision.

In response, Plaintiff argues that even if the construction of a cellular telephone system and advancement of funds were condition precedents of its obligation to purchase NovAtel equipment, or failing that, to pay liquidated damages, Dataphon is not entitled to rely upon the non-occurrence of that condition precedent because Dataphon prevented the non-occurrence. Specifically, Plaintiff argues that Dataphon prevented the non-occurrence of condition precedent by selling the FCC's permit to U.S. Cellular. Plaintiff contends that Defendants cannot avoid

their liability under the liquidated damages provision by selling the FCC's permit.

Plaintiff also argues that the letter agreement was not an "agreement to agree." Although various loan documents had to be executed between the parties after the loan commitment was executed, Plaintiff contends that the loan commitment was still a binding contract. Plaintiff contends that the courts have concluded that loan commitments are binding contracts despite the fact that the execution of loan documents is required. In addition, Plaintiff contends that Defendants should be estopped from claiming they did not have a binding financial commitment since Dataphon relied upon that commitment to obtain its permit from the FCC. Furthermore, Plaintiff argues that the alleged expiration of the loan commitment does not in any way affect Dataphon's contractual obligations. Plaintiff contends that the letter agreement was supported by consideration and therefore did not lack mutuality of obligation as asserted by Defendants.

Under Oklahoma and California law, contract interpretation is a question of law for the courts.² Ferrell Constr. Co., Inc. v. Russell Creek Coal Co., 645 P.2d 1005, 1007 (Okla. 1982); Garcia v. Truck Insurance Exchange, 682 P.2d 1100 (Cal. 1984). A condition precedent is one which calls for the performance of some act or the happening of some event after the contract is entered into and the

²As noted by Plaintiff in its brief, it is uncertain from the record whether the law of Oklahoma or California governs this case. Therefore, for purposes of determining Defendants' motion, the Court has relied upon both states' laws.

performance or happening of which its obligations are made to depend. Rollins v. Rayhill, 200 Okla. 192, 191 P.2d 934, 937 (1948); Platt Pacific, Inc. v. Andelson, 6 Cal. 4th 307, 862 P.2d 158, 161-162, 24 Cal. Rptr. 2d 597, 600 (1993). In this regard, a condition precedent is a condition which must be satisfied before the obligation under the contract becomes due. 3A Corbin on Contracts, § 628 (1960).

Upon review of the letter agreement, the Court finds that Dataphon's construction and operation of a cellular telephone system and NovAtel's advancement of loans proceeds were condition precedents to Dataphon's obligation to either purchase NovAtel equipment or pay liquidated damages. Such condition precedents are expressed in paragraph 5 of the letter agreement wherein it states "[t]he system[s] to be constructed using proceeds of the loan . . . must utilize cellular system equipment and ancillary equipment and services supplied by NovAtel." Moreover, the condition precedent of constructing a cellular telephone system is expressed in paragraph 5 wherein it states "[should you] fail to purchase NovAtel equipment in connection with the construction of a system listed on Schedule A." Notwithstanding paragraph 5, the Court, from a review of the letter agreement as a whole, concludes that it was the parties' intention that NovAtel equipment was to be utilized in a cellular telephone system that was constructed and operated with the loan proceeds provided by NovAtel and that Dataphon's construction and operation of a cellular telephone system and NovAtel's advancement of funds for that system were

condition precedents to Dataphon's obligation to purchase NovAtel equipment.

The undisputed evidence reveals that Dataphon did not construct or operate a cellular telephone system as its successor in interest sold the FCC's license to U.S. Cellular. It also reveals that NovAtel did not provide any loan proceeds to Dataphon. Hence, the condition precedents for either purchasing NovAtel's equipment or paying liquidating damages did not occur. Dataphon's performance under the letter agreement was therefore discharged.

The Court rejects Plaintiff's argument that Defendants cannot rely upon the failure of the condition precedents to avoid liability because Dataphon prevented their occurrence by transferring the license. At the time the license was transferred to U.S. Cellular, the loan commitment had expired by its express terms. The loan commitment was therefore no longer effective or enforceable. Moreover, the letter agreement did not in any manner prohibit the transfer or assignment of the FCC's license to a third party.

Even if Dataphon's construction and operation of a cellular telephone system and NovAtel's advancement of loan proceeds were not condition precedents, the Court finds that the liquidated damages provision in paragraph 5 is still unenforceable. The Court concurs with Defendants that the letter agreement between Dataphon and NovAtel is an "agreement to agree." Although Plaintiff argues that the essential terms of the parties' agreement are present in the letter agreement, the Court concludes otherwise. The terms of

the loan, set forth in paragraph 4, are prefaced with the language "[a]s presently envisioned." With this language and the language of paragraph 6 requiring the parties to "enter into all necessary agreements reasonably required by NovAtel and typically required by NovAtel in connection with similar transactions," the Court finds that the parties had not reached a definite agreement as to the terms of the loan and had intended to conduct further negotiations in regard thereto.

For an enforceable contract to exist, the parties must agree to its essential and material terms. Eckles v. Sharman, 548 F.2d 905, 909 (10th Cir. 1977) (interpreting California law); Sarber v. Harris, 368 P.2d 93, 96 (Okla. 1962). With the absence of an agreement on so important a specification as the basic terms of a loan agreement, the Court finds that the letter agreement was an unenforceable "agreement to agree."

Plaintiff argues that Defendants are estopped from claiming that Dataphon did not have a binding letter agreement since Dataphon relied upon the letter agreement in its application before the FCC. Plaintiff contends that under both Oklahoma and California law, one who accepts the benefits of a contract must assume or bear its burdens. See, Local Fed. Sav. & Loan Ass'n v. Burkhalter, 735 P.2d 1202, 1205 (Okla.Ct.App. 1987); Halperin v. Raviile, 176 Cal. App. 3d 765, 773, 222 Cal. Rptr. 350, 354 (1986). Because Dataphon accepted the benefits of the letter agreement by relying upon it in the FCC application, Plaintiff argues that Defendants cannot escape its liability under the letter agreement.

The Court finds Plaintiff's argument unavailing. Equitable estoppel is not applicable to this case as there is no evidence that Plaintiff was misled to its injury. An essential element of estoppel is that the party invoking it must have been misled to its injury. Moss v. Underwriters' Report, 12 Cal. 2d 266, 83 P.2d 503, 506 (1938); Wisel v. Terhune, 204 P.2d 286, 290 (Okla. 1949). In the instant case, NovAtel was not injured because no loan proceeds were ever provided to Dataphon in connection with the loan commitment. NovAtel simply committed the loan proceeds to Dataphon. Moreover, the Court finds that Dataphon did not accept the primary benefit of the loan commitment, which was the loan proceeds. As Dataphon did not accept the loan proceeds, the Court finds that Defendants are not estopped to challenge the non-enforceability of the letter agreement.

Plaintiff states in its response brief that if Defendants' motion for summary judgment is not denied, then it requests, pursuant to Fed.R.Civ.P. 56(f), a continuance of the ruling on Defendants' motion until discovery is completed. The Court, however, finds that Plaintiff is not entitled to relief under Rule 56(f) as Plaintiff has not proffered an affidavit which complies with Rule 56(f). See, Fed.R.Civ.P. 56(f).³ Although Plaintiff

³Fed.R.Civ.P. 56(f) provides in pertinent part:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment. . . .

has attached to its response brief an affidavit of Kathryn Heath, wherein she states that Plaintiff has not had opportunity to conduct discovery, Ms. Heath fails to state in that affidavit that she is an employee or officer of Alberta. Ms. Heath only states that at all times relevant to this action, she was employed by NovAtel. Plaintiff has therefore not proffered "affidavits of a party" as required by Rule 56(f).⁴ Moreover, to invoke the protection of Rule 56(f), the party must state with specificity how "the desired time would enable [the party] to meet its burden in opposing summary judgment." Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828, 833 (10th Cir. 1986). Rule 56(f) may not be invoked by the mere assertion that discovery is incomplete or that specific facts necessary to oppose summary judgment are unavailable. Id. In the instant case, Plaintiff has not stated with specificity how the additional time would enable it to rebut Defendants' assertions of no genuine issue of fact.

In any event, the Court finds that relief under Rule 56(f) is not appropriate as the question before the Court is one of law rather than fact. Further discovery relating to possible factual issues is unnecessary.

Based upon the foregoing, the Motion of Defendants for Summary

⁴The Court is aware of cases where an attorney of a party has been permitted to file an affidavit for purposes of Rule 56(f). Resolution Trust Corp. v. North Bridge Associates, Inc., 22 F.3d 1198, 1204 (1st Cir. 1994). The Court, however, has been unable to find cases where a nonparty witness' affidavit has been found sufficient for purposes of Rule 56(f); particularly, when that nonparty witness does not have first hand knowledge of why facts essential to a party's opposition cannot be presented.

Judgment (Docket Entry #15) is GRANTED. Judgment shall issue forthwith.

Entered this 28th day of September, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 28 1995

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

475342 ALBERTA LTD., an)
Alberta corporation,)
)
Plaintiff,)
)
vs.)
)
DATAPHON CELLULAR PARTNERSHIP)
and JOHN F. KANE,)
)
Defendants.)

Case No. 95-C-174-BU ✓

ENTERED ON DOCKET

DATE SEP 29 1995

JUDGMENT

This matter came before the Court upon the motion of Defendants, Dataphon Cellular Partnership and John F. Kane, for summary judgment pursuant to Rule 56, Fed.R.Civ.P. The issues having been duly considered and rendered a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of Defendants, Dataphon Cellular Partnership and John F. Kane and against Plaintiff, 475342 Alberta Ltd., an Alberta corporation, and that Defendants are entitled to recover their costs of action against Plaintiff.

DATED at Tulsa, Oklahoma, this 28th day of September, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 28 1995

475342 ALBERTA LTD., an)
Alberta corporation,)
)
Plaintiff,)
)
vs.)
)
CONSTITUTION CELLULAR and)
JOHN B. KANE,)
)
Defendants.)

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

Case No. 95-C-175-BU

ENTERED ON DOCKET
SEP 29 1995
DATE _____

ORDER

This matter comes before the Court upon the motion of Defendants, Constitution Cellular and John B. Kane, for summary judgment pursuant to Rule 56, Fed.R.Civ.P. Based upon the parties' submissions and the record herein, the Court makes its determination.

In the late 1980s, the Federal Communications Commission began to hold lotteries to award the rights to construct and operate cellular telephone systems in Rural Service Areas ("RSAs") throughout the United States. In order to be eligible for such lotteries, applicants had to establish, inter alia, their financial qualifications to construct and operate a system for one year. To demonstrate their financial qualifications, applicants were required to show that they had a financial commitment from a qualified lender or that they had personal or internal financial resources sufficient to provide the necessary financing.

On or about July 6, 1988, Defendant, Constitution Cellular ("Constitution"), entered into a letter agreement with NovAtel

Communications, Ltd. ("NovAtel"). The letter agreement was executed on behalf of Constitution by Defendant, John B. Kane ("Kane"). In the agreement, NovAtel committed to loan Constitution \$1,000,000.00, to be used for the purpose of constructing and operating for one year cellular radio telephone systems in one or more of the RSAs listed in schedule attached to the letter agreement.

Paragraph five of the letter agreement provided as follows:

The system[s] to be constructed using the proceeds of the loan we have committed to providing herein must utilize cellular system equipment and ancillary equipment and services supplied by NovAtel. Should you refer to this commitment in any filing or application presented to the FCC in connection with one of the proposed systems listed on Schedule A, and fail to purchase NovAtel equipment in connection with the construction of a system listed on Schedule A, there shall become immediately due and payable from applicant to NovAtel a fee of U.S. \$100,000.00 in liquidated damages.

Constitution attached the letter agreement to its application seeking to construct and to operate a cellular telephone system in the California-3 RSA. Based upon its application, Constitution was awarded a permit to construct and operate a cellular telephone system in the California-3 RSA by the FCC. Constitution's assignee, Alpine CA-3 L.P., constructed the cellular telephone system for the California-3 RSA. However, neither Constitution nor its assignee borrowed any money from NovAtel under the letter agreement. In addition, neither Constitution nor its assignee purchased any equipment from NovAtel to construct and operate the cellular telephone system in the California-3 RSA.

Plaintiff, 475342 Alberta Ltd. ("Alberta"), succeeded to the

contractual rights of NovAtel under the letter agreement with Constitution. On February 27, 1995, Alberta filed this diversity action against Constitution and Kane alleging theories of breach of contract and unjust enrichment. Alberta seeks \$100,000.00 in liquidated damages for the failure of Constitution to purchase NovAtel equipment pursuant to paragraph five of the letter agreement.

In their motion, Defendants assert that the letter agreement between NovAtel and Constitution consisted of two components, namely, NovAtel's commitment to lend up to \$1,000,000.00 for the construction and operation of a cellular telephone system for one year for which NovAtel would receive a \$1.00 commitment fee, and a proposal by NovAtel to sell Constitution cellular telephone equipment after the occurrence of certain condition precedents. According to Defendants, one of those condition precedents was Constitution's ability to construct and operate a cellular telephone system for one year for an amount not exceeding \$1,000,000.00. Defendants argue that the evidence reveals that the cost of constructing and operating the California-3 RSA considerably exceeded \$1,000,000.00 and that Defendants eventually had to obtain the funding for the cost of the cellular telephone system from a source other than NovAtel. Because the cost of constructing and operating the cellular telephone system exceeded \$1,000,000.00, Defendants assert that Constitution was excused from performing its obligation to purchase cellular telephone equipment from NovAtel. Consequently, Defendants contend that they are not

required under paragraph five to pay liquidated damages based upon a failure to purchase such equipment from NovAtel.

However, even if the construction and operation of a cellular telephone system for \$1,000,000.00 were not a condition precedent of the letter agreement, Defendants argue that the liquidated damages provision is not enforceable because the letter agreement was an "agreement to agree." Defendants assert that paragraph six of the letter agreement required the parties to reach further agreement regarding applicable loan documents. Because further agreement as to the various loan documents was necessary, Defendants contend the letter agreement was an incomplete and unenforceable "agreement to agree."

In response, Plaintiff argues that the construction and operation of the cellular telephone system for an amount less than \$1,000,000.00 was not a condition precedent to Defendants' obligation to purchase NovAtel equipment and, failing that, to pay liquidated damages. Plaintiff asserts that while paragraph four of the letter agreement stated that the amount NovAtel committed to lend to Constitution was based upon Constitution's estimation of the funds which would be required to construct and operate a cellular telephone system for one year, such paragraph did not in any way express or imply that Constitution's obligation to pay liquidated damages for failure to purchase NovAtel's equipment was conditioned upon Constitution's ability to construct and operate a cellular telephone system at a cost not exceeding \$1,000,000.00. According to Plaintiff, the letter agreement stated in no uncertain

terms that if Constitution referred to Plaintiff's financial commitment in its application to the FCC and received the FCC's authorization to construct a cellular system but then failed to purchase NovAtel equipment, Constitution was responsible for payment of liquidated damages.

Plaintiff also argues that the letter agreement was not an "agreement to agree." Although various loan documents had to be executed between the parties after the loan commitment was executed, Plaintiff contends that the loan commitment was still a binding contract. Plaintiff contends that the courts have concluded that loan commitments are binding contracts despite the fact that the execution of loan documents is required. In addition, Plaintiff contends that Constitution should be estopped from claiming that it did not have a binding financial commitment since it relied upon that commitment to obtain its permit from the FCC.

Under Oklahoma and California law, contract interpretation is a question of law for the courts.¹ Ferrell Constr. Co., Inc. v. Russell Creek Coal Co., 645 P.2d 1005, 1007 (Okla. 1982); Garcia v. Truck Insurance Exchange, 682 P.2d 1100 (Cal. 1984). A condition precedent is one which calls for the performance of some act or the happening of some event after the contract is entered into and the performance or happening of which its obligations are made to

¹As noted by Plaintiff in its brief, it is uncertain from the record whether the law of Oklahoma or California governs this case. Therefore, for purposes of determining Defendants' motion, the Court has relied upon both states' laws.

depend. Rollins v. Rayhill, 200 Okla. 192, 191 P.2d 934, 937 (1948); Platt Pacific, Inc. v. Andelson, 6 Cal. 4th 307, 862 P.2d 158, 161-162, 24 Cal. Rptr. 2d 597, 600 (1993). In this regard, a condition precedent is a condition which must be satisfied before the obligation under the contract becomes due. 3A Corbin on Contracts, § 628 (1960).

Upon review of the letter agreement, the Court finds that Constitution's construction and operation of a cellular telephone system in an amount not to exceed \$1,000,000.00 and NovAtel's advancement of loans proceeds were condition precedents to Constitution's obligation to either purchase NovAtel equipment or pay liquidated damages. Such conditions precedents are expressed in paragraph 5 of the letter agreement wherein it states "[t]he system[s] to be constructed using proceeds of the loan . . . must utilize cellular system equipment and ancillary equipment and services supplied by NovAtel" and "fail to purchase NovAtel equipment in connection with the construction of a system listed on Schedule A." Notwithstanding paragraph 5, the Court, from a review of the letter agreement as a whole, including the next to last unnumbered paragraph, concludes that it was the parties' intention that NovAtel equipment was to be utilized in a cellular telephone system that was constructed and operated with the loan proceeds provided by NovAtel and that Constitution's construction and operation of a cellular telephone system in an amount not in excess of \$1,000,000.00 and NovAtel's advancement of funds for that system were condition precedents to Constitution's obligation to

purchase NovAtel equipment.

The undisputed testimonial and documentary evidence submitted by Defendants reveals that the amount required to construct and operate the cellular telephone system in California-3 RSA for one year exceeded \$1,000,000.00.² The testimonial evidence also shows that NovAtel did not provide any loan proceeds to Constitution under the letter agreement.³ Consequently, the condition precedents for either purchasing NovAtel's equipment or paying liquidating damages did not occur. Constitution's performance under the letter agreement was therefore discharged.

Even if Constitution's construction and operation of a cellular telephone system in an amount not to exceed \$1,000,000.00 and NovAtel's advancement of loan proceeds were not condition

²Plaintiff attempts to dispute Defendants' evidence through the affidavit testimony of Kathryn Heath. In paragraph 9 of the affidavit, Ms. Heath states that based upon her experience in the industry, Constitution could have constructed the system for less than \$1,000,000.00. The Court, however, has not considered this evidence in determining Defendants' motion since such evidence would not be admissible at trial. See, Zampos v. United States Smelling & Refining Min. Co., 206 F.2d 171, 174 (10th Cir. 1953); see generally, 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2721 (1983). There is no foundation laid in Ms. Heath's affidavit to establish her experience in the industry or her personal knowledge as to construction and operation costs of a system. In any event, the Court further finds that such testimony does not defeat summary judgment because Ms. Heath's testimony does not refute Defendants' evidence that the system was, in fact, constructed and operated for one year at an amount in excess of \$1,000,000.00.

³Plaintiff again attempts to dispute Defendants' evidence through Ms. Heath's affidavit. In her affidavit, Ms. Heath states that "[u]pon information and belief, NovAtel did not refuse additional funding that was reasonably required." The Court, however, has not considered this evidence as it would not be admissible at trial because the information is not within the personal knowledge of Ms. Heath. Zampos, 206 F.2d at 174.

precedents, the Court finds that the liquidated damages provision in paragraph five is still unenforceable. The Court concurs with Defendants that the letter agreement between Constitution and NovAtel is an "agreement to agree." Although Plaintiff argues that the essential terms of the parties' agreement are present in the letter agreement, the Court concludes otherwise. The terms of the loan, set forth in paragraph four, are prefaced with the language "[a]s presently envisioned." With this language and the language of paragraph 6 requiring the parties to "enter into all necessary agreements reasonably required by NovAtel and typically required by NovAtel in connection with similar transactions," the Court finds that the parties had not reached a definite agreement as to the terms of the loan and had intended to conduct further negotiations in regard thereto.

For an enforceable contract to exist, the parties must agree to its essential and material terms. Eckles v. Sharman, 548 F.2d 905, 909 (10th Cir. 1977) (interpreting California law); Sarber v. Harris, 368 P.2d 93, 96 (Okla. 1962). With the absence of an agreement on so important a specification as the basic terms of a loan agreement, the Court finds that the letter agreement was an unenforceable "agreement to agree."

Plaintiff argues that Defendants are estopped from claiming that Constitution did not have a binding letter agreement since Constitution relied upon the letter agreement in its application before the FCC. Plaintiff contends that under both Oklahoma and California law, one who accepts the benefits of a contract must

assume or bear its burdens. See, Local Fed. Sav. & Loan Ass'n v. Burkhalter, 735 P.2d 1202, 1205 (Okla.Ct.App. 1987); Halperin v. Raville, 176 Cal. App. 3d 765, 773, 222 Cal. Rptr. 350, 354 (1986). Because Constitution accepted the benefits of the letter agreement by relying upon it in the FCC application, Plaintiff argues that Defendants cannot escape its liability under the letter agreement.

The Court finds Plaintiff's argument unavailing. Equitable estoppel is not applicable to this case as there is no evidence that Plaintiff was misled to its injury. An essential element of estoppel is that the party invoking it must have been misled to its injury. Moss v. Underwriters' Report, 12 Cal. 2d 266, 83 P.2d 503, 506 (1938); Wisel v. Terhune, 204 P.2d 286, 290 (Okla. 1949). In the instant case, NovAtel was not injured because no loan proceeds were ever provided to Constitution in connection with the loan commitment. NovAtel simply committed the loan proceeds to Constitution. Moreover, the Court finds that Constitution did not accept the primary benefit of the loan commitment, which was the loan proceeds. As Constitution did not accept the loan proceeds, the Court finds that Defendants are not estopped to challenge the non-enforceability of the letter agreement.

Plaintiff requests, pursuant to Fed.R.Civ.P. 56(f), a continuance of the ruling on Defendants' motion until discovery is completed to allow Plaintiff to rebut the testimonial evidence set forth in the affidavit of Mr. Kearney. The Court, however, finds that Plaintiff is not entitled to relief under Rule 56(f) as Plaintiff has not proffered an affidavit which complies with Rule

56(f). See, Fed.R.Civ.P. 56(f).⁴ Although Plaintiff has attached to its response brief an affidavit of Kathryn Heath, wherein she states that Plaintiff has not had opportunity to conduct discovery, Ms. Heath fails to state in that affidavit that she is an employee or officer of Alberta. Ms. Heath only states that at all times relevant to this action, she was employed by NovAtel. Plaintiff has therefore not proffered "affidavits of a party" as required by Rule 56(f).⁵ Moreover, to invoke the protection of Rule 56(f), the party must state with specificity how "the desired time would enable [the party] to meet its burden in opposing summary judgment." Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828, 833 (10th Cir. 1986). Rule 56(f) may not be invoked by the mere assertion that discovery is incomplete or that specific facts necessary to oppose summary judgment are unavailable. Id. In the instant case, Plaintiff has not stated with specificity how the additional time would enable it to rebut Defendants' assertions of no genuine issue of fact.

⁴Fed.R.Civ.P. 56(f) provides in pertinent part:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment. . . .

⁵The Court is aware of cases where an attorney of a party has been permitted to file an affidavit for purposes of Rule 56(f). Resolution Trust Corp. v. North Bridge Associates, Inc., 22 F.3d 1198, 1204 (1st Cir. 1994). The Court, however, has been unable to find cases where a nonparty witness' affidavit has been sufficient for purposes of Rule 56(f); particularly, when that nonparty witness does not have first hand knowledge of why facts essential to a party's opposition cannot be presented.

Based upon the foregoing, the Motion of Defendants for Summary Judgment (Docket Entry #11) is GRANTED. Judgment shall issue forthwith.

Entered this 28th day of September, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

SEP 28 1995

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

475342 ALBERTA LTD., an)
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CONSTITUTION CELLULAR and)
JOHN B. KANE,)
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Case No. 95-C-175-BU

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JUDGMENT

This matter came before the Court upon the motion of Defendants, Constitution Cellular and John B. Kane, for summary judgment pursuant to Rule 56, Fed.R.Civ.P. The issues having been duly considered and rendered a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of Defendants, Constitution Cellular and John B. Kane and against Plaintiff, 475342 Alberta Ltd., an Alberta corporation, and that Defendants are entitled to recover their costs of action against Plaintiff.

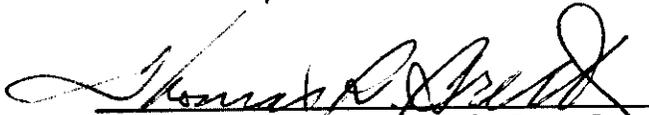
DATED at Tulsa, Oklahoma, this 28th day of September, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

September 28, 1995, Mr. Duke offered no explanation for his failure to comply with the September 1, 1995 Order. He mentioned that he has not been able to locate his client and that he plans to appear at docket call on Monday October 2, 1995, and request a continuance.

While dismissal for failure to prosecute is a harsh sanction, the Court finds it appropriate in this action where the Court warned the parties in advance that this case would be tried to the Court on October 2, 1995, or dismissed. See Fed. R. Civ. P. 41(b)¹ Mr. Duke has ignored this Court's warnings. He has informed the Court he has no intention to begin trial on Monday and comply with Court's September 1, 1995 Order. Accordingly, this action is hereby **dismissed with prejudice for failure to prosecute.** Defendant's motion for sanction (docket #29) is hereby granted.

SO ORDERED THIS 29th day of September, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

¹Rule 41(b) vests the district courts with discretion to dismiss an action "[f]or failure of the plaintiff to prosecute or to comply with . . . any order of court." Fed. R. Civ. P. 41(b).

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 28 1995

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 PATRICK C. RODERICK; REGINA A.)
 RODERICK; CITY OF BROKEN)
 ARROW, Oklahoma;COUNTY)
 TREASURER, Tulsa County, Oklahoma;)
 BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET
DATE SEP 20 1995

Civil Case No. 95-C 302B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 28 day of Sept.,

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 not having claimed no interest in the subject property; the Defendant, CITY OF BROKEN ARROW, Oklahoma, appears by Michael R. Vanderburg, City Attorney; the Defendant, RECEIVABLES MANAGEMENT, INC. appears not having previously filed its disclaimer; and the Defendants, PATRICK C. RODERICK and REGINA A. RODERICK, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, PATRICK C. RODERICK and REGINA A. RODERICK, are husband and wife.

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

The Court being fully advised and having examined the court file finds that the Defendants, PATRICK C. RODERICK and REGINA A. RODERICK, were each served with process as evidenced by the U.S. Marshal service; and that the Defendant, CITY OF BROKEN ARROW, Oklahoma, acknowledged receipt of Summons and Complaint via certified mail on April 3, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on April 18, 1995; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its Answer on July 25, 1995; that the Defendant, RECEIVABLES MANAGEMENT, INC., filed its Disclaimer on May 24, 1995; and that the Defendants, PATRICK C. RODERICK and REGINA A. RODERICK, 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 Eighty-eight (88), Block Four (4), SOUTHBROOK III, an Addition in the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded Plat No. 4443.

The Court further finds that on April 8, 1987, the Defendants, PATRICK C. RODERICK and REGINA A. RODERICK, executed and delivered to COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P. A LIMITED PARTNERSHIP their mortgage note in the amount of \$76,867.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, PATRICK C. RODERICK and REGINA A. RODERICK, husband and wife, executed and delivered to COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., LIMITED PARTNERSHIP a mortgage dated April 8, 1987, covering the above-described property. Said mortgage was recorded on April 15, 1987, in Book 5015, Page 2232, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 8, 1989, COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., LIMITED PARTNERSHIP assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., his successors and assigns. This Assignment of Mortgage was recorded on February 12, 1990, in Book 5235, Page 1723, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 1, 1989, the Defendants, PATRICK C. RODERICK and REGINA A. RODERICK, 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 May 1, 1991.

The Court further finds that the Defendants, PATRICK C. RODERICK and REGINA A. RODERICK, 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, PATRICK C. RODERICK and REGINA A. RODERICK, are indebted to the Plaintiff in the principal sum of \$125,687.76, plus interest at the rate of 10

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, CITY OF BROKEN ARROW, Oklahoma, has no right, title, or interest in the subject real property except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

The Court further finds that the Defendants, PATRICK C. RODERICK and REGINA A. RODERICK, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, RECEIVABLES MANAGEMENT, INC., disclaims any right title or interest in the subject 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 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, PATRICK C. RODERICK and REGINA A. RODERICK, in the principal sum of \$125,687.76, plus interest at the rate of 10 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.52 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, CITY OF BROKEN ARROW, Oklahoma, has no right, title or interest in the subject property except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, RECEIVABLES MANAGEMENT, INC., PATRICK C. RODERICK, REGINA A. RODERICK, 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, PATRICK C. RODERICK and REGINA A. RODERICK, 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 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.

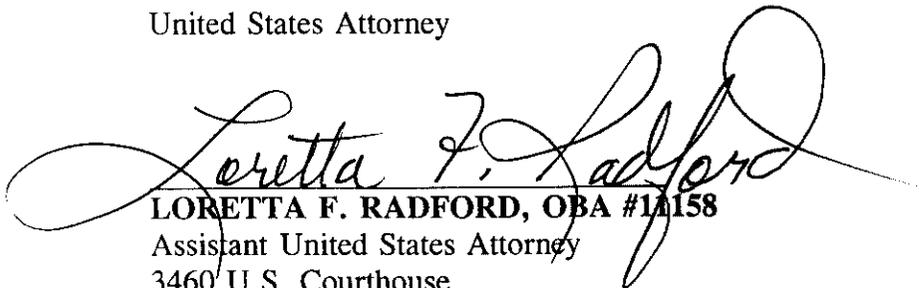
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

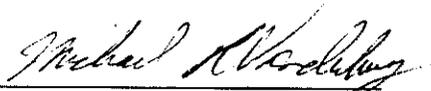
UNITED STATES DISTRICT JUDGE

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



MICHAEL R. VANDERBURG, OBA #9180

City Attorney

220 South First Street

Broken Arrow, Oklahoma 74012

(918) 251-~~8123~~

Attorney for Defendant,

City of Broken Arrow, Oklahoma

Judgment of Foreclosure

Civil Action No. 95-C 302B

LFR/lg

FILED

SEP 28 1995

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

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 TWELVE (12.0) ACRE TRACT)
 OF LAND LOCATED ON RICES)
 CREEK ROAD, a/k/a McBULO)
 ROAD, PICKENS COUNTY,)
 SOUTH CAROLINA, WITH ALL)
 BUILDINGS, APPURTENANCES,)
 AND IMPROVEMENTS THEREON,)
)
 Defendant.)

CIVIL ACTION NO. 94-C-175-B

ENTERED ON DOCKET
SEP 29 1995
DATE _____

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the Stipulation for Forfeiture entered into by and between the plaintiff, United States of America, and Mary B. Davis, Mortgagee, and Marion Davis, her husband, for payment to the United States of America for the equity value in the defendant real property of the sum of Seventeen Thousand Three Hundred Nineteen and 81/100 Dollars (\$17,319.81) in lieu of the defendant real property, to-wit:

REAL PROPERTY:

All that certain piece, parcel, or tract of land lying, situate, and being in the State of South Carolina, County of Pickens, shown to contain 12.00 acres, on plat entitled, "Survey for James William McPeek and Roselyn W. McPeek," dated March 13, 1991, prepared by John C. Smith & Son, Surveyors, recorded in the Office of the Clerk of Court for Pickens County in Plat Book 45 at Page 175-A, reference to said plat

being hereby made for a more complete, accurate, and particular description.

Also:

An easement, right-of-way, right to use, and right of passage for the purpose of ingress and egress from Rices Creek Road over and across property of Grantor and into property hereinabove described, said easement extending over and across an area designated as "25' Easement - Gravel Drive" on plat prepared by J.C. Smith & Son, Surveyors, dated February 16, 1990, recorded in the Office of the Clerk of Court for Pickens County, South Carolina, in Plat Book 43 at Page 67.

This is the identical property conveyed to Mortgagors James William McPeek and Roselyn W. McPeek named by Deed of Mary B. Davis, and being recorded in the Office of the Clerk of Court for Pickens County in Deed Book 127, at Page 86, T.M.S. F14-00-047R.

Mary B. Davis and Marion Davis have entered into a Stipulation for Forfeiture in this action, wherein they agree to the payment of the sum of Seventeen Thousand Three Hundred Nineteen and 81/100 Dollars (\$17,319.81) for forfeiture by the United States of America in lieu of the defendant real property, pursuant to 19 U.S.C. § 1613.

James William McPeek and Roselyn W. McPeek, the record title owners of this property and the Mortgagors on the Mortgage to Mary B. Davis, have heretofore deeded to the United States of America all of their right, title, and interest in and to the defendant real property to the United States of America. Said deed

is recorded in Book 251 at Page 154, as Instrument No. 015521, in the office of the Register of Mesne Conveyances in Pickens County, South Carolina, on August 19, 1994.

James William McPeek and Roselyn W. McPeek have each heretofore executed separate Stipulations for forfeiture of the defendant real property. The Stipulation of James William McPeek was filed in this action on April 7, 1994, and the Stipulation of Roselyn W. McPeek was filed on April 12, 1994.

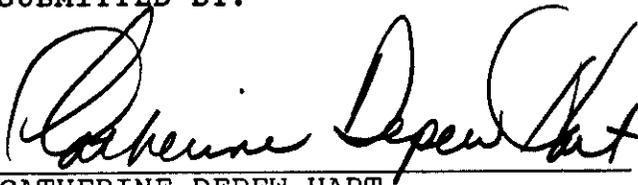
IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that judgment of forfeiture be entered against the sum of Seventeen Thousand Three Hundred Nineteen and 81/100 Dollars (\$17,319.81) paid by Mary B. Davis, Mortgagee, and Marion Davis, her husband, in lieu of the defendant real property, and that such sum be, and it is, forfeited to the United States of America for disposition according to law.

IT IS FURTHER ORDERED by the Court that upon entry of Judgment of Forfeiture for the sum of Seventeen Thousand Three Hundred Nineteen and 81/100 Dollars (\$17,319.81), the defendant real property be deeded by the United States of America, through the United States Marshal in the district where the real property is located, to Mary B. Davis, Mortgagee, with prejudice and without costs.

S/ THOMAS R. BRETT

THOMAS R. BRETT, Chief Judge of the
United States District Court

SUBMITTED BY:

A handwritten signature in cursive script, reading "Catherine DepeW Hart". The signature is written in black ink and is positioned above a horizontal line.

CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\CHOOK\FC\VANOVER3\04827

FILED

SEP 28 1995

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

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

WAYNE LEE TAYLOR,
Plaintiff,
vs.
RON CHAMPION,
Defendant.

Case No. 95-C-324-B

ENTERED ON DOCKET
DATE SEP 29 1995

AMENDED ORDER TO TRANSFER CAUSE¹

The Court having examined the Petition for Writ of Habeas Corpus which the Petitioner has filed finds as follows:

- (1) That the Petitioner was convicted in Brevard County, Titusville, Florida.
- (2) That the Petitioner demands release from such custody and as grounds therefore alleges he is being deprived of his liberty in violation of rights under the Constitution of the United States.
- (3) In furtherance of justice this case should be transferred to the United States District Court for the Middle District of Florida.

IT IS THEREFORE ORDERED:

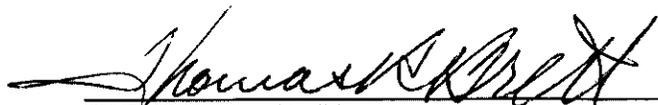
(1) Pursuant to the authority contained in 28 U.S.C. §2241(d) and in the exercise of discretion allocated to the Court, this cause is hereby transferred to the United States District Court for the Middle District of Florida for all further proceedings.

(2) The Clerk of this Court shall mail a copy of this Order to

¹This Order renders moot Plaintiff's Motion to Clarify (Docket #3).

the Petitioner.

IT IS SO ORDERED THIS 28th DAY OF SEPTEMBER, 1995.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

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

SEP 28 1995

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

ORTHOPEDECS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

Civil Case No. 95-C-0043B

ENTERED ON DOCKET
DATE SEP 29 1995

ORDER

IT IS THEREFORE ORDERED AND ADJUDGED that the Stipulation of Dismissal entered between the plaintiff, Orthopedics, Inc., and the defendant, the United States of America, is hereby approved and adopted by the Court.

IT IS SO ORDERED this 28 day of Sept., 1995.

S/ THOMAS R. BRETT

HONORABLE THOMAS R. BRETT
United States District Court
Northern District of Oklahoma

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

FILED

CONAGRA FERTILIZER COMPANY, d/b/a)
THE CATOOSA FERTILIZER TERMINAL, a)
Nebraska corporation,)
)
Plaintiff,)
)
vs.)
)
TRUCKERS EXPRESS, INC., a Delaware)
corporation,)
)
Defendant.)

SEP 28 1995
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Case No. 94-C-766-E

ENTERED ON DOCKET
DATE SEP 29 1995

O R D E R

The Court, upon consideration of the evidence presented at trial, the briefs submitted, and arguments of counsel, enters the following findings of fact and conclusions of law:

Findings of Fact

1. The ConAgra Fertilizer Company, d/b/a The Catoosa Fertilizer Terminal, is a Nebraska corporation, with its principal place of business located in Nebraska. ConAgra operates and does business as The Catoosa Fertilizer Terminal, which is located at the port of Catoosa, Rogers County, in the state of Oklahoma.
2. Truckers Express, Inc. (TEI) is a Delaware corporation with its principal place of business in Missoula, Montana. TEI is a carrier engaged in interstate commerce.
3. The injury to personal property at issue in this suit occurred in Rogers County, State of Oklahoma, located within the Northern District of Oklahoma, and therefore venue is proper.
4. All necessary parties are properly joined in this suit.
5. The truck scales, which are the subject of this action, are owned by the Port of Catoosa and leased to ConAgra. They were

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"dump-type" scales. ConAgra is liable under the terms of the lease for all repairs to the damaged scales and any loss or diminution in their value. ConAgra has paid for all costs of replacement of the destroyed scales.

6. ConAgra operated the truck weighing scale at the Port. These scales may be used by the public for a fee of \$5.00.

7. On May 14, 1993, TEI sent two trucks from ProQuip at the Port to be weighed at ConAgra. Doug Garrison drove the first truck to be weighed and Tom Gould drove the second truck.

8. The scale operator on May 14, 1993 was Dana Stratton. She had only been employed as a scale attendant for 6 weeks at the time of the accident and was not experienced in the weighing of overweight vehicles or "split weighing." When Garrison's truck was weighed Stratton merely assisted a more experienced attendant.

9. Garrison weighed his truck by weighing the front three axles, and then the rear axles. The truck weighed 142,380 lbs.

10. Gould was experienced in the hauling of oversized and overweight loads. He defines an overweight load as one which exceeds 80,000 lbs.

11. Stratton informed Gould that the maximum capacity of the scales was 100,000 lbs. Gould's truck, unloaded, weighed approximately 76,000 lbs, and he was told by ProQuip that the equipment loaded on his truck weighed approximately 100,000 lbs.

12. Gould advised Stratton that he would conduct a "split weighing" by weighing first the front portion of his truck and then the rear portion, so that the entirety of the truck would never be

on the scales at one time. He also advised Stratton that the weight of the truck on the scale would not exceed the capacity of the scale, and should not be any heavier than the previous TEI truck.

13. When Gould weighed the rear portion of the truck, the scale collapsed into the pit where the weighing mechanisms are located. The truck and its load were dropped into the pit.

14. After the scale collapsed, Gould determined that the weight of the truck and equipment was approximately 201,540 lbs, with 116,260 lbs being loaded over the rear axles of the trailer. Therefore, the loaded equipment weighed approximately 125,000 lbs.

15. The ConAgra scale appeared to have had all normal repairs, maintenance and inspections suggested or recommended by the manufacturer of the scale. The scale did not appear to have had any design or latent defect which either caused or contributed to the collapse. The scale collapsed as a result of the excessive weight placed upon them.

16. Scales of the type and character which broke on May 14, 1993, commonly remain operable for 50 or more years provided they receive proper maintenance and inspection.

17. Because of the difficulty in obtaining parts for the replacement of the dump type scale, ConAgra replaced it with a platform scale. The cost of the repairs to the dump scale were at least \$20,000.00 more than the repair using a platform scale.

18. Dana Stratton has been employed by ConAgra at all times since the collapse of the scales.

19. The actual costs associated with the repair of the scales, including parts, labor, and incidental costs, is \$47,843.20.

20. The difference in value between the dump scale that was destroyed and the current platform scale is \$14,000. Therefore, the total financial loss suffered by ConAgra is \$61,843.20.

21. Any findings of fact that are actually conclusions of law should be considered as such.

Conclusions of Law

22. This Court has jurisdiction and venue is proper.

23. TEI, through its driver, Tom Gould, negligently destroyed the scales after having been advised that the maximum capacity of the scales was 100,000 lbs.

24. Neither assumption of the risk nor consent of the station attendant are applicable defenses to this claim, due to the assurances of the driver that there would never be more than 100,000 lbs on the scale.

25. TEI is liable to ConAgra for all damages which Conagra sustained as a result of the negligent destruction of its scales, which damages total \$61,843.20

26. Any conclusions of law that are actually findings of fact should be considered as such.

IT IS SO ORDERED THIS 28TH DAY OF SEPTEMBER, 1995.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

SEP 27 1995

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

CAROLYN SWITZER,

Plaintiff,

-vs-

BIOS,INC.,

Defendant.

)
)
)
)
)
)
)
)
)
)

Case No. 94-C-1028-K

ENTERED ON DOCKET
DATE SEP 28 1995

Stipulation of Dismissal with Prejudice

The parties hereby stipulate that this action and all claims be dismissed with prejudice. Each party to bear her/its own attorneys' fees and costs.

Dan Morgan

J. Daniel Morgan, OBA # 10550
Gable & Gotwals
Suite 2000
15 West Sixth Street
Tulsa, OK 74119
Phone: 586-8330
Attorneys for Defendant

Joy Kay Williams

Joy Kay Williams
2121 S. Columbia, Suite 560
Tulsa, OK 74114
Attorney for Plaintiff

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

F I L E D

BIZJET INTERNATIONAL SALES &
SUPPORT, INC., an Oklahoma
corporation,

Plaintiff,

vs.

INTERLEASE AVIATION
CORPORATION, an Illinois
corporation,

Defendant and Third-Party
Plaintiff,

vs.

JET AVIATION INTERNATIONAL,
INC., a Delaware corporation,
JET AVIATION, FLUGZEUGWARTUNG,
GMBH, a German corporation;
and JET AVIATION, DUSSELDORF,
GMBH, a German corporation,

Third-Party Defendants.

SEP 27 1995

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

Case No. 94-cv-533-H

ENTERED ON DOCKET

DATE SEP 28 1995

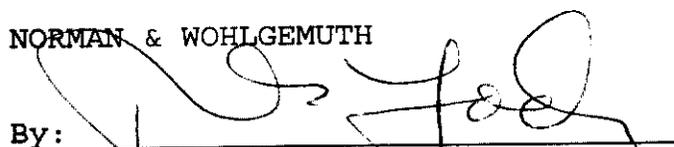
**JOINT STIPULATION
OF DISMISSAL WITH PREJUDICE**

It is hereby stipulated that the above-entitled action as between Bizjet International Sales & Support and Interlease Aviation Corporation may be dismissed with prejudice, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

DATED this 27th day of September, 1995.

Respectfully submitted,

NORMAN & WOHLGEMUTH

By: 

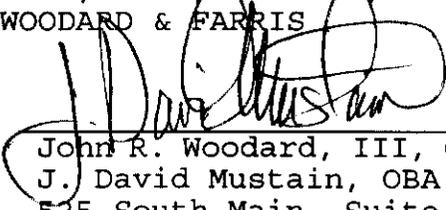
Joel L. Wohlgemuth, OBA #9811
Thomas M. Ladner, OBA #5161
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
918/ 583-7571

ATTORNEYS FOR PLAINTIFF
BIZJET INTERNATIONAL SALES & SUPPORT

and

FELDMAN, HALL, FRANDEN,
WOODARD & FARRIS

By:


John R. Woodard, III, OBA #9853
J. David Mustain, OBA #13132
525 South Main, Suite 1400
Tulsa, Oklahoma 74103-4523
918/ 583-7129

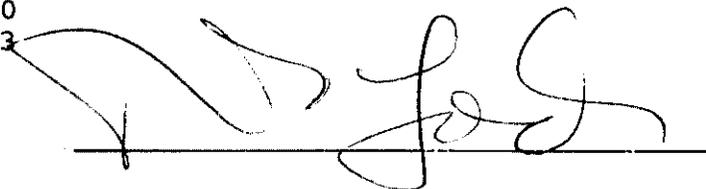
ATTORNEYS FOR DEFENDANT AND
THIRD-PARTY PLAINTIFF
INTERLEASE AVIATION CORPORATION

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing document was mailed, with postage prepaid thereon, this 27th day of September, 1995 to:

Philip J. Harvey
Lori L. Vaughn
SHAW, PITTMAN, POTTS & TROWBRIDGE
115 South Unin Street
Alexandria, Virginia 22314

James L. Kincaid
C. Robert Burton
CROWE & DUNLEVY
321 South Boxton, Suite 500
Tulsa, Oklahoma 74103-3313



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

FILED

SEP 27 1995

ORTHOPEDECS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

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

Civil Case No. 95-C-0043B

ENTERED ON DOCKET

DATE SEP 28 1995

STIPULATION OF DISMISSAL

The plaintiff, Orthopedics, Inc., and the defendant, the United States of America, hereby stipulate that the plaintiff's complaint shall be dismissed with prejudice. Each party shall bear its respective costs, including attorney's fees or any other expenses of this litigation.

Approved and Submitted By:

STEPHEN C. LEWIS
United States Attorney
Northern District of Oklahoma



TED M. RISELING, Esquire
JEFF K. RHODES, Esquire
Riseling & Associates, P.C.
P.O. Box 52561
Tulsa, Oklahoma 74152
Telephone: (918) 747-0111

COUNSEL FOR ORTHOPEDICS, INC.

Dated: September 27, 1995



VIRGINIA N. BROOKS
Trial Attorney, Tax Division
U.S. Department of Justice
Box 7238, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 514-6499

COUNSEL FOR UNITED STATES OF AMERICA

Dated: September 26, 1995

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

PUBLIC SERVICE COMPANY OF)
OKLAHOMA, an Oklahoma)
corporation,)
)
Plaintiff,)
)
vs.)
)
A right-of-way fifty (50))
feet width across one tract)
of land in Tulsa County,)
Oklahoma; and)
)
The United States of America)
Trustee and owner of the)
legal title to said land for)
the use and benefit of)
certain Restricted Indians;)
and)
)
ELLIOTT BIM BRUNER,)
)
Defendant.)

ENTERED ON DOCKET
DATE SEP 28 1995

Case No. 93-C-855-K

FILED

SEP 27 1995

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

AMENDED JUDGMENT

COMES NOW before the Court the Complaint filed herein by Plaintiff Public Service Company of Oklahoma ("PSO") against a right-of-way fifty (50) feet in width across one tract of land in Tulsa County, Oklahoma; The United States of America, Trustee and owner of the legal title to said land for the use and benefit of certain Restricted Indians; and Elliott Bim Bruner ("Defendants"). Based upon a review of the pleadings and being fully apprized in all relevant matters, the Court finds and orders as follows:

1. This form of Judgment is an amendment of and replaces the form of Judgment entered herein on August 9, 1995 and is entered by the Court upon the Motion of PSO filed August 18, 1995. This Amended Judgment does not change the substance of the previous Judgment of the Court or any previous order in this action, but

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provides additional information within the form of Judgment to facilitate record title and notice filing in appropriate land records.

2. Proper service has been made upon Defendants United States and America and Elliott Bim Bruner.

3. Said Defendants United States of America and Elliott Bim Bruner have received proper notice of the Report of Commissioners filed herein on December 17, 1993.

4. The amount of the commissioners' award attributable to all injuries suffered by Defendants by the taking of the perpetual easement and right-of-way sought to be condemned by PSO in its Complaint is the sum of \$24,000.00 ("commissioners' award") and is reflected in the Report of Commissioners filed December 17, 1993.

5. Upon the application of PSO on December 22, 1993 and the Order of the Court on December 27, 1993, PSO paid into Court the amount of the commissioners' award on December 29, 1993, and the amount of said award was withdrawn from the Treasury Registry of the Court and paid, pursuant to Court Order dated February 28, 1994, to the Bureau of Indian Affairs, Department of the Interior, for the Individual Indian Money Account of Elliott Bim Bruner.

6. No demand for jury trial has been made on behalf of Defendants United States of America or Elliott Bim Bruner. However, the Defendant United States of America sought a determination by the Court of whether the easement condemned by PSO would be perpetual or for a specific term of years. The parties presented argument and authority on this issue as required by the Court and on July 11, 1995 the Court determined and ordered that

the easement taken by PSO in this condemnation action is perpetual.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff Public Service Company of Oklahoma has properly condemned the perpetual easement sought to be condemned in its Complaint, with the date of taking being December 28, 1993, and is vested with full right, title, and interest in and to the easement sought to be condemned in said Complaint, as follows:

A perpetual easement and right-of-way for an electric power transmission line or lines upon, over, and across the lands owned by Defendants, as described below, in the manner and at the location described herein, for the purposes of constructing, maintaining, operating, reconstructing, and removing its said electric power transmission line or lines, and lines for the transmission or communication of data, audio, and video information, including necessary fixtures and appurtenances, together with the perpetual right and privilege of reasonable ingress and egress from the nearest convenient, accessible public road and together with the perpetual right and privilege to cut down, trim, and remove trees and undergrowth within said easement and right-of-way and such trees outside of the easement and right-of-way that may, in PSO's judgment, interfere with said line or lines or the construction, maintenance, operation, or reconstruction thereof, and together with the perpetual right and privilege to prohibit the placement of or to remove any objects within the easement and right-of-way at any time which may, in PSO's judgment, interfere with or endanger said line or lines or the

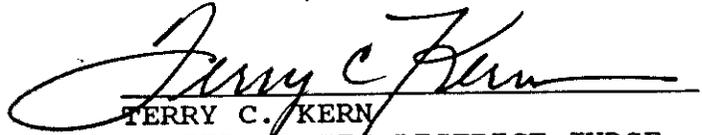
construction, operation, maintenance, or reconstruction thereof, subject to existing easements for roads, railroads, canals, ditches, pipelines, telegraph lines, telephone lines, and other electric lines, but reserving, nevertheless, to the landowner, lessees, and tenants of said lands, at any and all times, the right to make such use of any such lands included within the said easement and right-of-way as is not inconsistent with or dangerous to the construction, operation, maintenance, or reconstruction of said line or lines and easement and right-of-way. PSO shall not have a fee interest in the lands involved herein, or any interest in the oil, gas, coal, or other minerals underlying the lands involved herein, but following the construction of facilities by PSO or its successors or assigns upon said right-of-way easement, the exploitation of such oil, gas, coal, or other minerals may be subject to certain limitations imposed by applicable laws and regulations. PSO shall not have the right to fence all or any part of this easement or right-of-way. The legal description of said perpetual right-of-way and easement is as follows:

The South Fifty Feet (S/50 ft.) of the following described land:

The North-Half of the North-Half of the South-Two-Thirds of the East-Half of the Southeast-Quarter (N/2 N/2 S-2/3 E/2 SE/4) Section 34, Township 18 North, Range 14 East, I.B. & M., Tulsa County, Oklahoma, LESS AND EXCEPT a tract of land described as BEGINNING at a point on the North line of the North-Half of the North-Half of the South-Two-Thirds of the East-Half of the Southeast-Quarter (N/2 N/2 S-2/3 E/2 SE/4) 382.9 feet West of the East line of Section 34, THENCE S0°01'E 290.4 feet, thence N89°39'19.38"W 165.0 feet; THENCE

N0°01"W 290.4 feet to a point on the North line of the North-Half of the North-Half of the South-Two-Thirds of the East-Half of the Southeast-Quarter (N/2 N/2 S-2/3 E/2 SE/4); THENCE East along said North line 165.0 feet to THE POINT OF BEGINNING.

AND IT IS SO ORDERED this 26 day of September, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

DOERNER, SAUNDERS,
DANIEL & ANDERSON



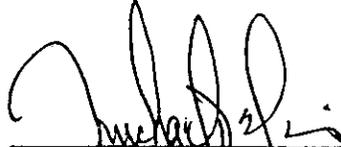
S. Douglas Dodd, OBA No. 2389
Robert A. Burk, OBA No. 16188
320 South Boston, Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for Plaintiff,
Public Service Company of Oklahoma

STEPHEN C. LEWIS
UNITED STATES ATTORNEY



Cathryn McClanahan, OBA No. 14853
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333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463



Michael D. Harris, Esq.
3015 E. Skelly Drive, Suite 270
Tulsa, Oklahoma 74105-6365

Attorney for Elliott Bim Bruner

FILED

SEP 27 1995

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ROBERT B. REICH, Secretary of)
Labor, United States Department)
of Labor,)

Civil Action

Plaintiff,)

vs.)

No. 94-C-134-K

PUBLIC SERVICE COMPANY OF)
OKLAHOMA,)

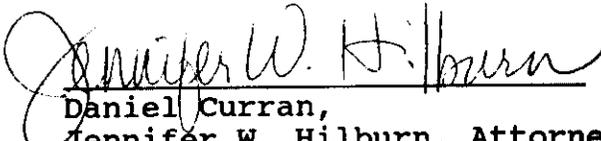
Defendant.)

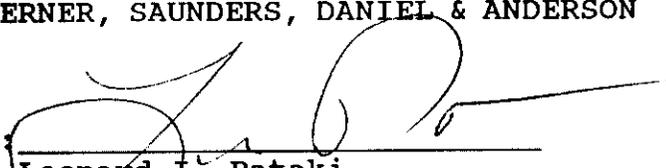
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DATE SEP 28 1995
DATE

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Federal Rules of Civil Procedure Rule 41, the parties hereby stipulate to a dismissal of this action with prejudice. The parties agree that they shall bear their own respective attorneys' fees and costs incurred in connection with this action. The parties further agree that the Northern District of Oklahoma shall retain jurisdiction of this matter in order to enforce the Settlement Agreement between the parties, if required.

DOERNER, SAUNDERS, DANIEL & ANDERSON


Daniel Curran,
Jennifer W. Hilburn, Attorney
U.S. Department of Labor
Office of the Solicitor
525 Griffin Street, #501
Dallas, Texas 75202
(214) 767-4902

By: 
Leonard I. Pataki
Shelly L. Dalrymple
320 S. Boston, Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for Plaintiff

Attorneys for Defendant Public
Service Company of Oklahoma

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

ENTERED ON DOCKET
DATE SEP 28 1995

AMERICAN SHUTTLE SYSTEMS, INC.
Plaintiff,

v.

CASE # 95 CV 895K

Airport Taxi,
Executive Passenger Service,
Fine Cab
A-Cab,
Double Tree Hotels,
Adams Mark Hotel,
Fine Airport Parking,
Marriot Hotels,
Defendants.

FILED

SEP 27 1995

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

ORDER

NOW ON THIS 26 day of September 1995 the Court being informed by motion finds that this matter should be dismissed without prejudice.

IT IS THEREFORE Ordered that the above referenced case is dismissed without prejudice, cost to petitioner.

IT IS SO ORDERED.

s/ TERRY C. KERN

U.S. DISTRICT COURT JUDGE

investigate the crucial facts, the probable type of evidence, Plaintiff's capability to present his case, and the complexity of the legal issues, see Rucks, 57 F.3d at 979 (cited cases omitted); see also McCarthy, 753 F.2d at 838-40; Maclin v. Freake, 650 F.2d 885, 887-89 (7th Cir. 1981), the Court denies Plaintiff's motion for appointment of counsel without prejudice to it being reasserted after the Court has ruled on Defendants' motion to dismiss or for summary judgment.

Accordingly, Plaintiff's motion for appointment of counsel (docket #12) is hereby **denied without prejudice**. Plaintiff's motion to dismiss David C. Miller as a defendant (docket #13) is **granted**.

SO ORDERED THIS 27 day of September, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

FILED

SEP 27 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT
ENTERED ON DOCKET
DATE ~~SEP 27 1995~~
SEP 28 1995

CIVIL ACTION NO. 94-C 521E

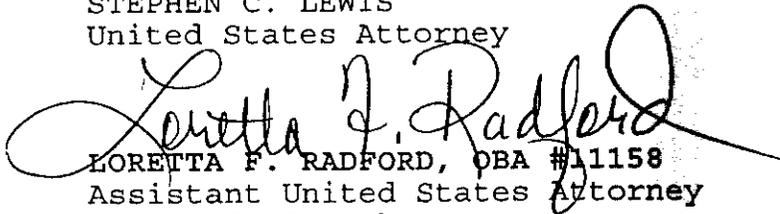
ORDER

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 the Judgment of Foreclosure entered herein on the 29th day of July, 1994, is vacated and this action is dismissed without prejudice.

Dated this 26 day of Sept, 1995.

W. JAMES O. ELLIS, JR.
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

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

FILED

SEP 27 1995

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

ROBERT LEE BALLARD,
Plaintiff,

vs.

CORRECTIONAL MEDICAL SERVICES,
et al.,

Defendants.

No. 95-C-663-E

ENTERED ON DOCKET

DATE SEP 28 1995

ORDER

Before the Court is the motion to dismiss of Defendant Stanley Glanz. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendant Glanz's 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 In any event, Plaintiff has not alleged an affirmative link sufficient to establish liability as to Defendant Glanz. It is well established that for a supervisor to be liable in a civil rights suit for the actions of others there must be an affirmative link between the supervisor and the deprivation of the constitutional right. Meade v. Grubbs, 841 F.2d 1512, 1527 (10th Cir. 1988). That link can take the form of personal participation, an exercise of control or discretion, or a failure to supervise. Id. Plaintiff must allege that the defendant expressly or otherwise

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.

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authorized, supervised, or participated in the conduct which caused the deprivation. Snell v. Tunnell, 920 F.2d 673, 700 (10th Cir. 1990), cert. denied, 499 U.S. 976 (1991). Absent such a link, a supervisor is not liable for the actions of his employees. Id.

Accordingly, the motion to dismiss of Defendant Stanley Glanz (docket #5) is **granted** and Defendants Stanley Glanz and the Tulsa County Jail are hereby **dismissed with prejudice** at this time.

SO ORDERED THIS 26th day of September, 1995.


JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 26 1995

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

ANNETTE A. BLANKE, individually,)
and ANNETTE A. BLANKE, as)
mother and guardian of KRISTA)
BLANKE,)

Plaintiffs,)

vs.)

BILLY E. ALEXANDER,)
individually, BUILDERS)
TRANSPORT, INC., a foreign)
corporation, and PLANET)
INSURANCE COMPANY a/k/a)
RELIANCE NATIONAL)
INDEMNITY COMPANY, a)
foreign corporation,)

Defendants.)

Case No. 94-C-1165-BU

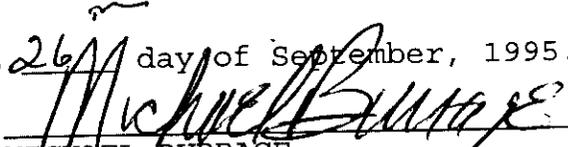
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DATE SEP 27 1995

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Michael Burrage, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff, Annette A. Blanke, individually, recover of the defendants the amount of \$450,000.00 and that the plaintiff, Annette A. Blanke, as mother and guardian of Krista Blanke, recover of the defendants the amount of \$17,000.00, with interest on those amounts as provided by law, and their costs of action.

Dated at Tulsa, Oklahoma, this 26th day of September, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

82

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

F I L E D

SEP 27 1995

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

LORI A. SMITH)
)
 Plaintiff,)
)
 v.)
)
 LOWRANCE ELECTRONICS, INC.)
)
 Defendant.)

Case No. 94-C-881K

ENTERED ON RECORD
DATE SEP 27 1995

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) and the Joint Stipulation of Dismissal with Prejudice filed by the parties, the Court hereby orders that this case be dismissed with prejudice, with no finding of discrimination or other misconduct on the part of Defendant Lowrance Electronics, Inc.

s/ TERRY C. KERN

JUDGE OF THE DISTRICT COURT

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

ENTERED ON DOCKET

DALE NOVAK,)
)
 Plaintiff,)
)
 vs.)
)
 UNIVERSAL GYM EQUIPMENT and)
 ORAL ROBERTS UNIVERSITY,)
)
 Defendants.)

DATE ~~SEP 27 1995~~
SEP 27 1995

No. 95-C-205-K

FILED

SEP 28 1995

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

ORDER

Now before the Court is the motion of Defendants Universal Gym Equipment and Oral Roberts University to dismiss the Complaint filed by Plaintiff Dale Novak. Defendants move to dismiss for Plaintiff's failure to comply with the Order of this Court filed on July 11, 1995.

On July 10, 1995, this Court held a case management conference. Plaintiff's counsel failed to attend. Consequently, this Court entered an Order that this case would be dismissed in fifteen days unless Plaintiff was able to show sufficient cause as to why:

counsel had not been in attendance for the case management conference;

Plaintiff had failed to respond to discovery requests; and

no local counsel had made an appearance pursuant to Rule 83.3(K), Local Civil Rules of the Northern District of Oklahoma.

Plaintiff has not responded to this Order.

Pursuant to this Court's Order of July 11, 1995 and Rule

41(b), Federal Rules of Civil Procedure, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that motion by Defendants to dismiss is GRANTED.

ORDERED this 26 day of September, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 UNKNOWN HEIRS, EXECUTORS,)
 ADMINISTRATORS, DEVISEES,)
 TRUSTEES, SUCCESSORS AND)
 ASSIGNS OF AUSTRALIA L. COX)
 aka AUSTRALIA L. MCGHEE)
 aka AUSTRALIA COX MCGHEE)
 aka AUSTRALIA LORRAINE MCGHEE,)
 Deceased; ROBERT MCGHEE aka)
 ROBERT E. MCGHEE aka ROBERT)
 EARL MCGHEE; GENERAL CREDIT)
 COMPANY nka FIDELITY FINANCIAL)
 SERVICES, INC.; AVCO FINANCIAL)
 SERVICES OF OKLAHOMA, INC.)
 nka BENEFICIAL MORTGAGE CO. OF)
 OKLAHOMA; STATE OF OKLAHOMA)
 ex rel. OKLAHOMA TAX)
 COMMISSION; COUNTY TREASURER,)
 Tulsa County, Oklahoma; and)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET
DATE SEP 27 1995

FILED

SEP 27 1995

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

CIVIL ACTION NO. 94-C-730-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 26 day
of Sept., 1995. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Peter Bernhardt, Assistant United States
Attorney; the Defendant, County Treasurer, Tulsa County,
Oklahoma, appears by Dick A. Blakeley, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, Board of County
Commissioners, Tulsa County, Oklahoma, appears not, having
previously claimed no right, title or interest in the subject
property; the Defendant, Robert McGhee aka Robert E. McGhee aka

NOTE: THIS ORDER IS TO BE MAILED
BY MAIL TO ALL COUNSEL
PRO SE
UPON RE...

Robert Earl McGhee, appears not, having previously filed a Disclaimer; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee, Deceased; General Credit Company nka Fidelity Financial Services, Inc.; and AVCO Financial Services of Oklahoma, Inc. aka Beneficial Mortgage Company of Oklahoma aka Beneficial Oklahoma, Inc., appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, General Credit Company nka Fidelity Financial Services, Inc., by Robert J. Bartz, executed a Waiver of Service of Summons on July 29, 1994, which was filed on August 2, 1994; that Defendant, AVCO Financial Services of Oklahoma, Inc. aka Beneficial Mortgage Company of Oklahoma aka Beneficial Oklahoma, Inc., was served with Summons and Complaint on March 28, 1995.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on August 23, 1994; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on August 23, 1995, claiming no right, title or interest in the subject property; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer on August 26, 1994; the Defendant, Robert McGhee aka Robert E. McGhee aka Robert Earl McGhee, filed his Disclaimer on

September 2, 1994; and that the Defendants, Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee, Deceased, General Credit Company nka Fidelity Financial Services, Inc., and AVCO Financial Services of Oklahoma, Inc. aka Beneficial Mortgage Company of Oklahoma aka Beneficial Oklahoma, Inc., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee, Deceased, 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 November 23, 1994 and continuing through December 28, 1994, as more fully appears from the verified proof of publication duly filed on March 8, 1995; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee, Deceased, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or

the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee, Deceased. 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 on behalf of the Secretary of Veterans Affairs, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

The Court further finds that on August 27, 1993, Robert Earl McGhee filed his voluntary petition in bankruptcy in

Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 93-02839-C; was discharged on December 21, 1993; and the case was closed on February 2, 1994.

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 Thirteen (13), Block Ten (10),
NORTHRIDGE, an addition in Tulsa County,
State of Oklahoma, according to the recorded
Plat thereof.

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee and of judicially determining the heirs of Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee.

The Court further finds that Australia L. Cox, a single person, became the record owner of the real property involved in this action by virtue of that certain General Warranty Deed dated November 13, 1975, which was filed in the records of the County Clerk of Tulsa County, Oklahoma, on November 17, 1975 in Book 4191, Page 1408.

The Court further finds that Australia Lorraine McGhee died on August 18, 1993, while seized and possessed of the real property being foreclosed. The Certificate of Death No. 20222

was issued by the Oklahoma State Department of Health certifying Australia Lorraine McGhee's death.

The Court further finds that on November 14, 1975, Australia L. Cox, now deceased, 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, her mortgage note in the amount of \$10,750.00, payable in monthly installments, with interest thereon at the rate of nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, Australia L. Cox, now deceased, 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 November 14, 1975, covering the above-described property. Said mortgage was recorded on November 17, 1975, in Book 4191, Page 1429, in the records of Tulsa County, Oklahoma.

The Court further finds that Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee, Deceased, 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, Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee, Deceased, is indebted to the Plaintiff in the principal sum of \$5,904.71, plus interest at the rate of 9 percent per annum from August 1, 1993 until judgment, plus

interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$388.31 (\$8.68 fees for service of Summons and Complaint, \$379.63 publication fees).

The Court further finds that the Plaintiff is entitled to a judicial determination of the death of Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee, Deceased and to a judicial determination of the heirs of Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee, Deceased.

The Court further finds that AVCO Financial Services of Oklahoma, Inc. is also known as Beneficial Mortgage Company of Oklahoma and is also known as Beneficial Oklahoma, Inc.

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: 1988 taxes of \$1.00 which became a lien on July 5, 1989; 1989 taxes of \$1.00 which became a lien on July 2, 1990; 1992 taxes of \$6.00 which became a lien on June 25, 1993; and 1993 taxes of \$6.00 which became a lien on Juen 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 Okahoma ex rel. Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action by virtue of tax warrant no. ITI8800970900 in the amount of \$891.52 filed on August 3, 1988; tax warrant no. ITI8801271900 in the amount of \$218.56 filed on August 23, 1988; tax warrant no. ITI8801271700

in the amount of \$801.73 filed on August 23, 1988; tax warrant no. ITI9000311900 in the amount of \$398.50 filed on April 11, 1990; and tax warrant no. ITI9202379300 in the amount of \$703.95 filed on January 4, 1993.

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, Robert McGhee aka Robert E. McGhee aka Robert Earl McGhee, disclaims any right, title or interest in the subject property.

The Court further finds that the Defendants, Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee, Deceased; General Credit Company nka Fidelity Financial Services, Inc.; and AVCO Financial Services of Oklahoma, Inc. aka Beneficial Mortgage Company of Oklahoma aka Beneficial Oklahoma, Inc., are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem in the principal sum of \$5,904.71, plus interest at the rate of 9 percent per annum from August 1, 1993 until judgment, plus interest thereafter at the current legal rate of 5.52 percent per annum until paid, plus the costs of this action in the amount of \$388.31 (\$8.68 fees for service of Summons and Complaint, \$379.63 publication fees), 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 AVCO Financial Services of Oklahoma, Inc. is also known as Beneficial Mortgage Company of Oklahoma and is also known as Beneficial Oklahoma, Inc.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the death of Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee, Deceased, be and the same is hereby judicially determined to have occurred on August 18, 1993 in the City of Tulsa, County of Tulsa, State of Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the only known possible heir of Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee, Deceased, is Robert McGhee aka Robert E. McGhee aka Robert Earl McGhee, and that despite the exercise of due diligence by Plaintiff and its counsel, no other known heirs of Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee, Deceased, have been discovered and it is hereby judicially determined that Robert McGhee aka Robert E. McGhee aka Robert Earl McGhee is the only known possible heir of Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee, Deceased, and that Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee, Deceased, has no other known heirs,

executors, administrators, devisees, trustees, successors and assigns; and the Court approves the Certificate of Publication and Mailing filed by Plaintiff regarding said heirs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$14.00 for personal property taxes for the years 1988, 1989, 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 the amount of \$3,014.26, plus interest and penalty according to law and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Australia L. Cox aka Australia L. McGhee aka Australia Cox McGhee aka Australia Lorraine McGhee, Deceased; General Credit Company nka Fidelity Financial Services, Inc.; AVCO Financial Services of Oklahoma, Inc. aka Beneficial Mortgage Company of Oklahoma aka Beneficial Oklahoma, Inc.; Robert McGhee aka Robert E. McGhee aka Robert Earl McGhee; and the Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise

and sell, according to Plaintiff's election with or without appraisal, the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, in the amount of \$891.52 plus penalties, interest and costs.

Fourth:

In payment of Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, in the amount of \$218.56 plus penalties, interest and costs.

Fifth:

In payment of Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, in the amount of \$801.73 plus penalties, interest and costs.

Sixth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$1.00 for 1988 personal property taxes which are currently due and owing.

Seventh:

In payment of Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, in the amount of \$398.50 plus penalties, interest and costs.

Eighth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$1.00 for 1989 personal property taxes which are currently due and owing.

Ninth:

In payment of Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, in the amount of \$703.95 plus penalties, interest and costs.

Tenth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$6.00 for 1992 for personal property taxes which are currently due and owing.

Eleventh:

In payment of Defendant, County Treasurer,
Tulsa County, Oklahoma, in the amount of
\$6.00 for 1993 personal property taxes which
are currently due and owing.

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

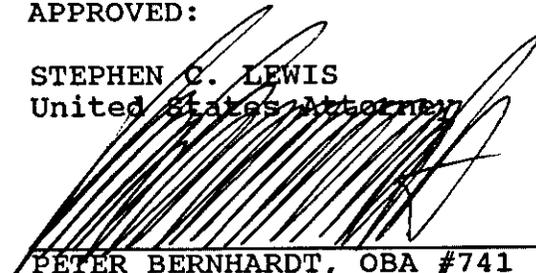
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from
and after the sale of the above-described real property, under
and by virtue of this judgment and decree, all of the Defendants
and all persons claiming under them since the filing of the
Complaint, be and they are forever barred and foreclosed of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

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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

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P.O. Box 53248
Oklahoma City, OK 73152-3248
Attorney for State of Oklahoma
ex rel. Oklahoma Tax Commission

DICK A. BLAKELEY, OBA #852
Assistant District Attorney
Attorney for Defendant,
County Treasurer,
Tulsa County, Oklahoma

Judgment of Foreclosure

USA v. Unknown Heirs, Executors, Administrators, Devisees,
Trustees, Successors and Assigns of Australia L. Cox aka
Australia L. McGhee aka Australia Cox McGhee aka Australia
Lorraine McGhee, Deceased, et al.

Civil Action No. 94-C-730-K

PB/esf

APPROVED:

STEPHEN C. LEWIS
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Attorney for Defendant,
County Treasurer,
Tulsa County, Oklahoma

Judgment of Foreclosure

USA v. Unknown Heirs, Executors, Administrators, Devisees,
Trustees, Successors and Assigns of Australia L. Cox aka
Australia L. McGhee aka Australia Cox McGhee aka Australia
Lorraine McGhee, Deceased, et al.

Civil Action No. 94-C-730-K

PB/esf

APPROVED:

STEPHEN C. LEWIS
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DICK A. BLAKELEY, OBA #852
Assistant District Attorney
Attorney for Defendant,
County Treasurer,
Tulsa County, Oklahoma

Judgment of Foreclosure

USA v. Unknown Heirs, Executors, Administrators, Devisees,
Trustees, Successors and Assigns of Australia L. Cox aka
Australia L. McGhee aka Australia Cox McGhee aka Australia
Lorraine McGhee, Deceased, et al.

Civil Action No. 94-C-730-K

PB/esf

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

F I L E D

SEP 26 1995

LC

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

DOYLE ALLAN CLAGG,
Plaintiff,
vs.
BUCK JOHNSON, Rogers County
Sheriff, et al.,
Defendants.

Case No. 95-C-374-BU

ENTERED ON DOCKET
DATE SEP 27 1995

ORDER

This matter comes before the Court upon the Report and Recommendation issued by United States Magistrate Judge Frank H. McCarthy on August 23, 1995, wherein he recommended that Plaintiff's action be dismissed as frivolous under 28 U.S.C. § 1915(d). In the Report and Recommendation, Magistrate Judge McCarthy advised the parties that in accordance with 28 U.S.C. § 636(b) and Fed.R.Civ.P. 72(b), any objections to the Report and Recommendation were to be filed within ten (10) days of receipt of the Report and Recommendation. To date, neither Plaintiff nor Defendants have filed any objections to Magistrate Judge McCarthy's Report and Recommendation.

Having reviewed the matter, the Court agrees with the findings and recommendation of Magistrate Judge McCarthy and accepts Magistrate Judge McCarthy's Report and Recommendation in its entirety.

Accordingly, the Court hereby AFFIRMS the Report and Recommendation (Docket Entry #3) and hereby DISMISSES Plaintiff's action as frivolous under 28 U.S.C. § 1915(d).

ENTERED this 26th day of September, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 GEORGE M. THOMAS; STATE OF)
 OKLAHOMA *ex rel* OKLAHOMA TAX)
 COMMISSION; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
 Defendants.)

ENTERED ON DOCKET
DATE SEP 27 1995

FILED

SEP 27 1995

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

Civil Case No. 95-C 195K

ORDER

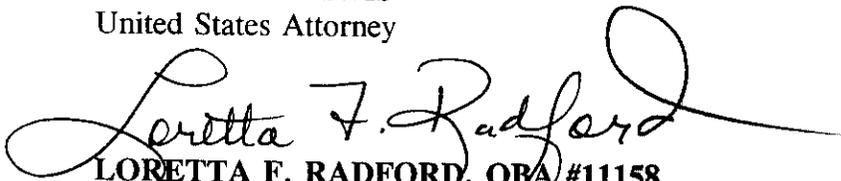
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED**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

Dated this 26 day of Sept, 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
LFR: lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
RONALD G. TRACY aka RONALD)
GLENN TRACY; CYNTHIA L. TRACY)
aka CYNTHIA LEA TRACY; 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

SEP 2 1995

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

Civil Case No. 95-C 351K

ENTERED ON DOCKET
DATE SEP 27 1995

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 26 day of September, 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, CYNTHIA L. TRACY aka CYNTHIA LEA TRACY, appears not having previously filed her disclaimer; the Defendant, STATE OF OKLAHOMA ex rel; OKLAHOMA TAX COMMISSION, appears not having previously filed its disclaimer; and the Defendant, RONALD G. TRACY aka RONALD GLENN TRACY, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, RONALD G. TRACY aka RONALD GLENN TRACY will hereinafter be referred to as ("RONALD G. TRACY"); and the Defendant, CYNTHIA L. TRACY aka

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

CYNTHIA LEA TRACY will hereinafter be referred to as ("CYNTHIA L. TRACY").

RONALD G. TRACY and CYNTHIA L. TRACY were granted a divorce in Tulsa County District Court on September 24, 1986, Case number FD-85-7274.

The Court being fully advised and having examined the court file finds that the Defendant, RONALD G. TRACY, was served with process on July 26, 1995; and that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint via certified mail on April 25, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on May 3, 1995; that the Defendant, CYNTHIA L. TRACY, filed her disclaimer on April 27, 1995; that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, filed its disclaimer on May 5, 1995; and that the Defendant, RONALD G. TRACY, has failed to answer and his default has therefore been entered by the Clerk of this Court.

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

The East 65.0 Feet of Lot 9, and the East 65.0 Feet of the South 10.0 Feet of Lot 10, all in Block 14, of CHEROKEE HEIGHTS ADDITION, being an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on June 23, 1983, the Defendants, RONALD G. TRACY and CYNTHIA L. TRACY, executed and delivered to TURNER CORPORATION

OF OKLAHOMA, INC. their mortgage note in the amount of \$29,300.00, payable in monthly installments, with interest thereon at the rate of twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, RONALD G. TRACY and CYNTHIA L. TRACY, then Husband and Wife, executed and delivered to TURNER CORPORATION OF OKLAHOMA, INC. a mortgage dated June 23, 1983, covering the above-described property. Said mortgage was recorded on July 14, 1983, in Book 4706, Page 924, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 8, 1988, TURNER CORPORATION OF OKLAHOMA, INC. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development, its successors and assigns. This Assignment of Mortgage was recorded on December 7, 1988, in Book 5144, Page 1075, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 12, 1988, the Defendant, RONALD G. TRACY, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on March 14, 1990, March 6, 1991, and October 7, 1991.

The Court further finds that the Defendant, RONALD G. TRACY, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, RONALD G. TRACY, is indebted to the Plaintiff in the principal sum of

\$38,865.48, plus interest at the rate of 12 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 \$1.00 which became a lien on the property as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, CYNTHIA L. TRACY and STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, disclaim any right, title or interest in the subject real property.

The Court further finds that the Defendant, RONALD G. TRACY, is in default, and has 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 Defendant, RONALD G. TRACY, in the principal sum of \$38,865.48, plus interest at the rate of 12 percent per

annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.52 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 \$1.00, plus costs and interest, for personal property taxes for the year 1993, plus the costs of this action.

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

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

First:

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

Second:

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

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$1.00, 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.

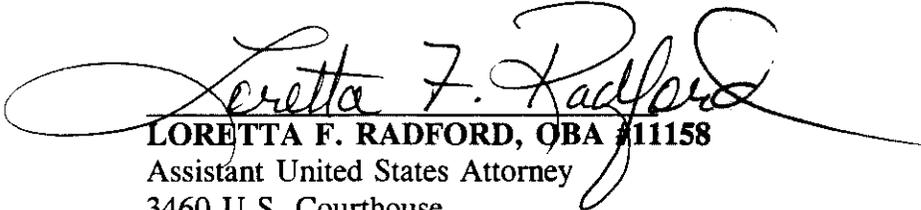
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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.


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. 95-C 351K

LFR/lg

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

REGINALD KEITH LONG,)
)
 Petitioner,)
)
 vs.) No. 95-C-585-K
)
 RON CHAMPION,)
)
 Respondent,)

ENTERED ON DOCKET

DATE ~~SEP 27 1995~~

F I L E D

SEP 27 1995

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

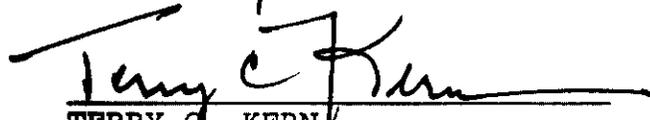
ORDER

Before the Court is Respondent's motion to dismiss for failure to fulfill "in custody" requirement. Petitioner, a pro se litigant, has not responded.

Petitioner's failure to respond to Respondent's 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 Nevertheless, it is clear from the petition that Petitioner is no longer in custody pursuant to CRF-87-4246.

According, Respondent's motion to dismiss (doc. #6) is granted and the above captioned habeas action is hereby dismissed without prejudice at this time.

SO ORDERED THIS 26 day of September, 1995.


TERRY Q. KERN
UNITED STATES DISTRICT JUDGE

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.

8

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

GRAVELY, a division of ARIENS
COMPANY, a Wisconsin corporation,

Plaintiff,

vs.

ALL-SAW SERVICES, INC., an
Oklahoma corporation, ROBERT W.
CHRISTIE, Individually, L.W.
CHRISTIE, Individually, and
GRAVELY TURF EQUIPMENT, INC., an
Oklahoma corporation,

Defendants.

ENTERED ON DOCKET

DATE SEP 27 1995

No. 93-C-1087-K ✓

FILED

SEP 26 1995

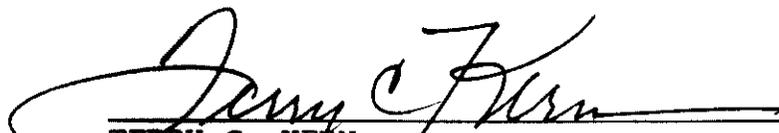
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 26 day of September, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

35

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

FILED

SEP 25 1995

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

PAM HICKERSON, individually and as next
friend for CHRISTOPHER E. HICKERSON, a
minor, and ANDREA K. HICKERSON, a minor,
Plaintiffs,

versus

THOMAS WILLIAM MEENTS, PAUL SHAFER,
JIM HARBUCK, ROY SUMPTER, LARRY
JARRETT, and KEITH ADDISON,
Defendants.

ENTERED ON DOCKET
DATE SEP 27 1995

CASE NO. 94 C 923 B

**ORDER APPROVING SETTLEMENT,
DISTRIBUTING SETTLEMENT PROCEEDS, AND
DISMISSING CLAIMS WITH PREJUDICE**

On September 30, 1995, this matter came on for consideration of the parties' Joint Application for Court Approval of Settlement, Distribution of Settlement Proceeds, and Dismissal With Prejudice. Plaintiff Pamela Hickerson appeared personally and through her counsel of record. The defendants appeared through their respective counsel of record. The Court, having reviewed the stipulations included in the parties' Joint Application, and considering the evidence presented on the record, took the matter under advisement, subject to receiving and considering additional testimony of the the minor plaintiffs, Christopher E. Hickerson and Andrea K. Hickerson. Subsequently, the parties submitted transcripts of the sworn testimony of the minor plaintiffs. Having reviewed the additional testimony, the Court finds as follows:

1. Plaintiff Pam Hickerson is the surviving spouse of Michael E. Hickerson, who

died July 22, 1994 in Claremore, Oklahoma. **Plaintiffs** Christopher E. Hickerson and Andrea K. Hickerson are the only children of Michael E. Hickerson. (The three are collectively referred to herein as “**Plaintiffs.**”) No **personal** representative has been appointed over the estate of Michael E. Hickerson and, therefore, pursuant to Okla. Stat. tit. 12, § 1054 (1991), Pam Hickerson, the decedent’s widow, is the **person** exclusively entitled to bring this wrongful death action on behalf of the plaintiffs.

2. Christopher E. Hickerson was born on May 26, 1978, and Andrea K. Hickerson was born on January 26, 1981. At the time **this** Order is entered, both are under eighteen (18) years of age.

3. Plaintiffs have alleged that **the** death of Michael Hickerson was proximately caused by the negligent conduct of Defendants Thomas William Meents, Paul Shafer, Jim Harbuck, Roy Sumter, Larry Jarrett, and **Keith Addison** (collectively “**Defendants**”). Plaintiffs further contend that, as a result of **said** negligence, they are entitled to recover damages pursuant to Okla. Stat. tit. 12, § 1053 (1991).

4. Defendants have denied the **Plaintiffs’** allegations and have asserted various affirmative defenses.

5. Under reservation of rights, **non-party** Sphere Drake Insurance Company (“**The Company**”) has provided a defense on **behalf** of Defendants. The Company contends that its policy of insurance does not provide **coverage** for the claims asserted by Plaintiffs or any judgment that results herein.

6. The parties have reached a **compromise** settlement whereby Plaintiffs agree to release and discharge Defendants and **The Company** from any and all claims arising from the

accident of July 22, 1994, in exchange for payment of the sum of Thirty-six Thousand Six Hundred Twenty-one and 85/100 Dollars (\$36,621.85).

7. In determining the reasonableness of the settlement, the Court has carefully considered all of the surrounding circumstances, including the risk in proceeding at trial and the additional stress imposed on the decedent's family in being subjected to a trial, the absence of any insurance to satisfy a judgment and the due diligence of the plaintiffs and their counsel to seek out such coverage, and the close relationship between the plaintiffs and the defendants and the express desire of the plaintiffs to limit their recovery to available insurance monies. The Court has also given careful consideration to the testimony of the children who, although minors, are of such age and intelligence that they are able to express their understanding and desires as to the resolution of these claims.

8. Based upon the Court's review of the evidence submitted on the record, the settlement proceeds shall be distributed in the following manner:

- A. \$17,425.70 shall be paid to Joseph Farris and Lloyd Messick as reimbursement for litigation expenses incurred herein;
- B. \$ 6,398.72 shall be paid to Lloyd Messick and Joseph Farris as a reasonable attorneys' fee;
- C. \$ 12,797.43 shall be distributed to Pam Hickerson as widow of Michael
E. Hickerson, deceased.

9. The settlement agreement between the parties is deemed to be fair and just, and is entered into by the parties of their own free will, having been fully advised upon consultation with their respective counsel, and having been made fully aware of the

circumstances.

10. Defendants and The Company should be and hereby are released and forever discharged from liability to Plaintiffs or those claiming through the Plaintiffs for any and all claims that have been asserted or could have been asserted as a result of the accident that is the subject of this lawsuit.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Joint Application for Court Approval of Settlement, Distribution of Settlement Proceeds, and Order of Dismissal With Prejudice filed the parties to this action should be and the same is hereby granted. The Court approves the terms of the settlement agreement as set forth above. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs' claims are dismissed with prejudice to further litigation.

Entered this 25 day of September, 1995.

S/ THOMAS R. BRETT

THOMAS R. BRETT
U.S. DISTRICT JUDGE

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

FILED

SEP 25 1995

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

LEONARD RENAL ROBERTS,

Plaintiff,

vs.

MARY BEARS, et al.,

Defendants.

No. 93-C-676-B

ENTERED ON DOCKET
DATE SEP 26 1995

ORDER

Plaintiff, a muslim prisoner appearing pro se, brings this action against several prison officials at Dick Conner Correctional Center (DCCC) based upon the strip search of his visitors and his confinement in disciplinary segregation and subsequent transfer to Oklahoma State Penitentiary (OSP) after officers filed a misbehavior report. He claims retaliation for exercising his right to practice his religion. Defendants have moved to dismiss or, in the alternative, for summary judgment, on the basis of the court-ordered Martinez report (Special Report). For the reasons stated below, Defendants' motion for summary judgment is hereby granted.

I. UNDISPUTED FACTS

1. On February 7, 1993, Officer Krushee charged Plaintiff with Individual Disruptive Behavior. After an investigation, DCCC's officials decided to handle the misconduct informally. There was no finding of guilt, punishment or notation on Plaintiff's Consolidated Record Card. (Special report, attachments A, F, and H.)

2. On June 12, 1993, Plaintiff's wife, stepson, and

51

grandson, were subjected to strip searches prior to being permitted to visit with Plaintiff. (October 13, 1993 Special Report, attachment B.)

3. On July 26, 1993, Officer Carol Raines, conducted a strip search on Plaintiff's wife and mother prior to permitting them to visit Plaintiff. (Special Report, attachments C and D in camera review.)

4. On August 9, 1993, Stephen Moles, Unit Manager, mentioned Plaintiff's name at a staff meeting in connection with the finding of \$465.00 in inmate Vernon Brown's property. Stephen Moles believed that Brown was working with or for Plaintiff in illegal drug trades. (Special Report, attachment G.)

5. On August 25, 1993, popcorn belonging to the Muslim community were stolen from the vault of the A & C Unit. (Id.)

6. On August 27, 1993, an offense report was filed against Plaintiff, charging him with "Group Disruption" for purchasing, selling, and distributing controlled dangerous substances. Plaintiff was transferred to OSP the same day and placed in the disciplinary unit pending an investigation. Lorene Kramer, the investigating officer, took statements from Special Investigator McKenzie and two witnesses listed by Plaintiff. Following a hearing on September 3, 1993, Plaintiff was found guilty and sentenced to 30 days in disciplinary segregation and loss of 365 days of earned credit. Plaintiff remained in disciplinary segregation until October 21, 1993, due to lack of bed space in the general population. On November 15, 1993, the Director/Designee

reversed and expunged the decision of the disciplinary hearing officer on procedural grounds. (Id., attachments M and O.)

II. SUMMARY JUDGMENT STANDARD

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 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. Strip Search of Family Members

In Count I and II of his complaint, Plaintiff challenges the strip searches of his wife, mother, son, and grandson prior to

their visit with Plaintiff. Plaintiff alleges that Defendants' conduct violated his visitors' right to freedom from unreasonable searches and seizures. Defendants submit that Plaintiff has no standing to challenge the search of these individuals. The Court agrees. It is well established that one may not sue or recover damages for violations of another's civil rights under 42 U.S.C. § 1983. See McGowan v. State of Maryland, 366 U.S. 420, 429 (1961); Reynoldson v. Shillinger, 907 F.2d 124, 125 (10th Cir. 1990).¹ Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's claim under the Fourth Amendment.²

B. Cruel and Unusual Punishment

In Count II of his complaint, Plaintiff alleges that defendants conspired to inflict cruel and unusual punishment.

The Eighth Amendment ban against cruel and unusual punishment bars punishments

¹ See Romo v. Champion, 46 F.3d 1013 (10th Cir. 1995) (wife and daughter of inmate sued for violation of their fourth amendment right to be free from unreasonable searches and seizures prior to visiting husband at state penitentiary), petition for cert. filed, ___ U.S.L.W. ___ (U.S. Jul. 26, 1995) (No. 955745); Boren v. Deland, 958 F.2d 987 (10th Cir. 1992) (same); Long v. Norris, 929 F.2d 1111 (6th Cir. 1990) (inmates and visitors brought action; visitors alleged that searches violated visiting plaintiffs' fourth amendment rights to freedom from unreasonable searches and seizures; inmate plaintiffs instead alleged that wardens violated the inmate plaintiff's fourteenth amendment liberty interest in visitation, created by Tennessee prison regulation), cert. denied, 502 U.S. 863 (1991).

² On January 20, 1995, the Court denied Plaintiff's Motion for Permissive Joinder of his wife, mother, son, and grandson. The Court found that, even if joinder was permissive, Plaintiff was proceeding pro se and, therefore, could not represent any of the proposed plaintiffs in this action. (Docket #40.)

which, although not physically barbarous, "involve the unnecessary and wanton infliction of pain," Gregg v. Georgia, 428 U.S. 153, 173 (1976), or are grossly disproportionate to the severity of the crime. Among "unnecessary and wanton" infliction of pain are those that are "totally without penological justification." Gregg v. Georgia, supra, at 183; Estelle v. Gamble, 429 U.S. 97, 103 (1976).

Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (some citations omitted). Conditions that deprive inmates of "the minimal civilized measure of life's necessities" may also constitute cruel and unusual punishment. Id. at 337.

Viewing the evidence in the light most favorable to Plaintiff, the Court concludes that Plaintiff's claims that Defendants falsely charged him with misconducts and retaliatory transferred him to OSP do not amount to a sufficiently serious deprivation to be considered cruel and unusual punishment. The emotional harm Plaintiff allegedly suffered as a result of confinement in disciplinary segregation does not represent a "wanton or unnecessary infliction of pain" nor was it "grossly disproportionate" to the severity of the infraction charged. As discussed below, the confinement that resulted from the disciplinary charge was not unconstitutionally imposed. Moreover, Plaintiff does not allege that the specific conditions of that confinement were cruel and unusual.

Even if a prison transfer is intended to be punitive such action does not constitute cruel or unusual punishment within the meaning of the Eighth Amendment. Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's Eighth Amendment claims.

C. FALSE CHARGES

The filing of false charges is normally not actionable under section 1983 as long as the prisoner's due process rights are protected. Freeman v. Rideout, 808 F.2d 949, 951-53 (2d Cir. 1986). To determine if Plaintiff's procedural due process rights were violated in connection with the misconduct report and disciplinary segregation, the Court must first determine whether Plaintiff had a liberty or property interest with which the State has interfered. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). Because the Due Process Clause, itself, does not create a protected liberty interest in remaining in the general population, Plaintiff must show that state law created such an interest. See Hewitt v. Helms, 459 U.S. 460, 468-69 (1982).

The Supreme Court recently reformulated the test for determining whether a state law creates a protected liberty interest. See Sandin v. Connor, 115 S.Ct. 2293 (1995).³ In Sandin, the court abandoned the methodology established in Hewitt and Thompson and decided to return to the due process principles established in Wolff v. McDonnell, 418 U.S. 539 (1974) and Meachum v. Fano, 427 U.S. 215, 224-225 (1976).⁴ Under Sandin, therefore,

³ The Supreme Court's decision in Sandin applies retroactively to the instant case because the Court applied the rule announced in Sandin to the parties in that case. See Harper v. Virginia Dep't of Taxation, ___ U.S. ___, 113 S.Ct. 2510, 2517 (1993) (no court may refuse to apply rule of federal law retroactively once the Court applies it to the parties before it).

⁴ Under Hewitt, in order for a state law establishing procedural guidelines for prisons to create a liberty interest, the law must use "explicitly mandatory language" that forbids certain outcomes absent "specific substantive predicates." Hewitt, 459

courts no longer examine the language of prison regulations to determine whether such regulations place substantive restrictions on an official's discretion. Rather, courts must focus on the particular discipline imposed and ask whether it "present[s] the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Id.

Based on the Supreme Court's decision in Sandin, the Court finds that there is no liberty interest at issue in the case at hand. The deprivation allegedly suffered by Plaintiff, 55 days in disciplinary segregation, is not of the "atypical" or "significant" kind that the Supreme Court has determined constitute deprivations in which a state might create a liberty interest. See Mujahid v. Meyer, 59 F.3d 931, 932 (9th Cir. 1995) (fourteen days in disciplinary segregation as a result of a misconduct did not implicate any liberty interest pursuant to Sandin). The conditions in disciplinary segregation are not dramatically different from what prisoners expect to encounter in the general population. Since no liberty interest was implicated, Plaintiff was not even entitled to a hearing. See Brown v. Champion, 1995 WL 433221 (10th Cir. July 24, 1995) (unpublished opinion) (inmate was not entitled to hearing because no constitutional liberty interest was implicated either by his ten-day disciplinary segregation or by his reclassification by prison officials).

U.S. at 472. This approach focused on the language of the regulation rather than the nature of the deprivation and "encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges." Sandin, 115 S.Ct. at 2299.

D. RETALIATION

As noted above, the filing of false charges is generally not actionable under section 1983. See Freeman, 808 F.2d 949, 951. Franco v. Kelly, 854 F.2d 584, 589 (2d Cir. 1988), however, held that a prisoner stated a valid claim against prison guards by alleging that the guards falsely accused the prisoner of insubordination in retaliation for the prisoner's cooperation with authorities investigating abuse of inmates. Plaintiff here similarly asserts interference with his First Amendment right of freedom of religion.

While prisoners have no independent expectation that they will never be transferred or placed in segregated confinement during incarceration, prison officials nevertheless deprive an inmate of his constitutional rights by transferring him or by placing him in segregated confinement in retaliation for exercising his constitutionally protected rights. Smith v. Maschner, 899 F.2d 940, 947-48 (10th Cir. 1990). Plaintiff's retaliation claim is controlled by Mount Healthy City of Education v. Doyle, 429 U.S. 274 (1977). Therefore, to make out a prima facie case of retaliation, Plaintiff bears the burden of demonstrating that his conduct was constitutionally protected and that the retaliation was a substantial or motivating factor behind Defendants' action. The burden then shifts, and Defendants must prove by a preponderance of the evidence that they would have taken the same action in the absence of the protected conduct. Id. at 287. If the undisputed facts "demonstrate that the challenged action would have been taken

on the valid basis alone, and such a conclusion will frequently be readily drawn in the context of prison administration where we have been cautioned to recognize that 'prison officials have broad administrative and discretionary authority over the institutions they manage,' the Court should find that the prisoner was not denied his constitutional right. Sher v. Coughlin, 739 F.2d 77, 82 (2d Cir. 1984) (quoting Hewitt v. Helms, 459 U.S. 460 (1983)).

Viewing the evidence in the light most favorable to Plaintiff, the Court finds that Plaintiff has not met his initial burden of proving that his religious activity was a 'motivating factor' in the decision to charge him with the August 1993 misconduct. Plaintiff must show more than a subsequent disciplinary charge. A claim of retaliation must include a "chronology of events from which retaliation may plausibly be inferred." Cain v. Lane, 857 F.2d 1139, 1143 n.6 (7th Cir. 1988). In this case, Defendants have also submitted affidavits denying retaliatory motives and explaining that their actions were based on the need to maintain institutional order and security. Plaintiff has submitted no facts to rebut these contentions, or to support his claim of a retaliatory conspiracy. Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's claim of retaliation.

E. DENIAL OF EQUAL PROTECTION

In Count VI of his complaint, Plaintiff alleges that because of his race and religious preference his rights to equal protection

of the laws were violated.⁵ 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. Kasper, 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"). Contrary to Plaintiff's allegations, muslim inmates at DCCC have been permitted to possess religious oils, whether purchased or donated. Moreover, as of July 14, 1994, muslim inmates at DCCC are allowed to wear "Kufi Caps" on the compound and are no longer required to shave their beards or cut their hair as long as there is no conflict with health or safety requirements. Lastly, no religious group is allowed to travel away from the facility.

Therefore, summary judgment is hereby granted in favor of Defendants on Plaintiff's equal protection claims.

F. DENIAL OF ACCESS TO THE LAW LIBRARY AND HIS LEGAL MATERIAL

Next, Plaintiff alleges that his transfer to OSP interfered with his constitutional rights of access to the law library.

A convicted inmate has a constitutional right to adequate, effective, and meaningful access to the courts and the law library.

⁵ Plaintiff has no standing to allege claims on behalf of other muslim inmates at DCCC. As noted above, one may not sue or recover damages for violations of another's civil rights under. See McGowan, 366 U.S. 420, 429; Reynoldson, 907 F.2d 124, 125.

Love v. Summit County, 776 F.2d 908, 912 (10th Cir. 1985), cert. denied, 479 U.S. 814 (1986).

The right is one of the privileges and immunities accorded citizens under article four of the Constitution and the Fourteenth Amendment. It is also one aspect of the First Amendment right to petition the government to redress grievances. Finally the right of access is founded on the due process clause and guarantees the right to present to a court of law allegations concerning the violation of constitutional rights.

Smith v. Maschner, 899 F.2d 940, 947 (10th Cir. 1990) (citation omitted).

In Bounds v. Smith, 430 U.S. 817, 827 (1977), the Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."

After reviewing the Special Report and Plaintiff's response, the Court concludes that Plaintiff has not demonstrated a total deprivation of legal materials. The special report reveals that Plaintiff had access to the law library during his stay at OSP through visits from the legal research assistant, direct visits to the library, and receipt of requested legal materials.

At the most Plaintiff has alleged a limited deprivation of access resulting from his temporary inability to use some of his legal materials which he had left at DCCC. To establish a claim of limited deprivation of access, however, Plaintiff must show both cause and some prejudice that followed from the alleged deprivation of legal materials. See Ruark v. Solano, 928 F.2d 947, 950 (10th

Cir. 1991). Plaintiff has failed to meet his burden. Therefore, the Court cannot conclude that Plaintiff has demonstrated prejudice to escape summary judgment in this case. Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's claims of denial of access to the law library.

G. PENDENT STATE CLAIM

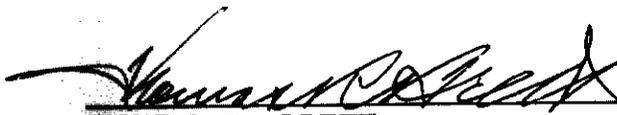
The Court declines to exercise pendent jurisdiction over Plaintiff's state claim of slander. See 28 U.S.C. § 1367(c)(3); see also United Mine Workers v. Gibbs, 383 U.S. 715, 725-26 (1966).

IV. 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 (docket #26-2) is granted. Defendant's motion to dismiss (docket #26-1) is denied as moot. Plaintiff's motion for extension of time (docket #47) is granted.

SO ORDERED THIS 25 day of Sept., 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 25 1995

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

TERRANCE W. SARGENT,)
)
 Plaintiff,)
)
 v.)
)
 PATRICK BALLARD, individually and as)
 Washington County, Oklahoma Sheriff)
)
 Defendant.)

No. 95-C-331-K

ENTERED ON DOCKET
DATE SEP 26 1995

ORDER

This matter comes before the Court on Plaintiff's Motion for Appointment of Counsel (docket #8).

The Court has discretion to appoint an attorney to represent an indigent plaintiff in a civil case where, under the totality of circumstances, a denial of counsel would result in a fundamentally unfair proceeding. 28 U.S.C. § 1915(d); McCarthy v. Weinberg, 753 F.2d 836, 839-40 (10th Cir. 1985); Swazo v. Wyoming Dep't of Corrections State Penitentiary Warden, 23 F.3d 332, 333 (10th Cir. 1994). If the indigent plaintiff has a colorable claim, the Court will "consider the nature of the factual issues raised in the claim and the ability of the plaintiff to investigate the crucial facts." Rucks v. Boergemann, 57 F.3d 978, 979 (10th Cir. 1995) (quoting McCarthy, 753 F.3d at 838).

According to the Tenth Circuit Court of Appeals, the following factors must be considered:

- (1) the merits of Plaintiff's claims,
- (2) the nature of the factual issues involved,

- (3) Plaintiff's ability to investigate the crucial facts,
- (4) the probable type of evidence,
- (5) Plaintiff's capability to present his case, and
- (6) the complexity of the legal issues involved.

See Rucks, 57 F.3d at 979; McCarthy, 753 F.2d at 838-40; and Maclin v. Freake, 650 F.2d 885, 887-89 (7th Cir. 1981). After carefully weighing these factors as they relate to this case, the Court denies Plaintiff's Motion for Appointment of Counsel. Denial of Plaintiff's motion is, however, without prejudice to the reassertion of a motion for appointment of counsel after the Court has had an opportunity to rule on Defendant's Motion for Summary Judgment.

Currently pending before the Court is Defendant's Motion for Summary Judgment. Plaintiff has failed to file a response to this Motion as required by Local Rule 7.1. Because it appears that Plaintiff may have been waiting on a ruling from this Court regarding his Motion for Appointment of Counsel, the Court will grant Plaintiff an additional 15 days from the date of this Order to file a response to Defendant's Motion for Summary Judgment. Plaintiff's response must comply with Local Rule 56.1 and Fed. R. Civ. P. 56. Should Plaintiff fail to file a response as ordered, the Court, pursuant to Local Rule 7.1(C), will be authorized to deem this matter confessed and judgment may be entered for Defendant and against Plaintiff.

Accordingly, Plaintiff's Motion for Appointment of Counsel is denied without prejudice. Plaintiff is further ordered to file a response to Defendants' Motion for Summary Judgment within 15 days of the date of this Order.

Dated this 25 day of September 1995.



Sam A. Joyner
United States Magistrate Judge

FILED

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

SEP 25 1995

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

CHERYL L. SAMPSON,
Plaintiff,

v.

ALBERTSON'S, INC.,
a corporation; and,
RON WELSH,

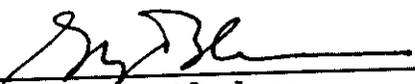
Defendants.

Civil Action No. 94-C-931-K

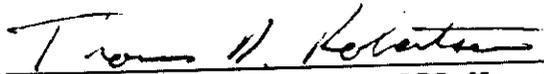
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DATE SEP 26 1995

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties to this proceeding, by and through their attorneys of record, do hereby stipulate pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii) that this action should be and is hereby dismissed, with prejudice. Each party is to bear her or its own costs of this action and attorney's fees.


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OBA No. 0874
1717 S. Cheyenne Ave.
Tulsa, Oklahoma 74119-4664
(918) 599-8123

ATTORNEY FOR PLAINTIFF
CHERYL L. SAMPSON


Thomas D. Robertson, OBA No. 7665
NICHOLS, WOLFE, STAMPER, NALLY,
FALLIS & ROBERTSON, INC.
400 Old City Hall Building
124 East Fourth Street
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(918) 584-5182

ATTORNEYS FOR DEFENDANT
ALBERTSON'S, INC.

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

F I L E D

SEP 25 1995

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

NELLIE WOOTEN,

Plaintiff,

v.

Case No. 95-C-146K

PARAMOUNT APPAREL
MANUFACTURING, INC.,

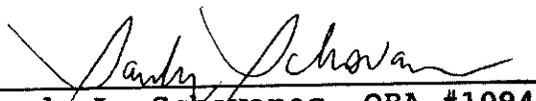
Defendant.

ENTERED ON DOCKET
SEP 26 1995
DATE _____

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties herein hereby stipulate that the above referenced
action may be dismissed with prejudiced.


Cheryl Gan, OBA #14719
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Attorneys for Defendant

MAIL
C94 RT

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

THRIFTY RENT-A-CAR SYSTEM,
INC., an Oklahoma Corporation,

Plaintiffs

v.

NEWCO CORPORATION, a Montana
corporation, and ALLAN G. HOLMS, an
individual

Defendants.

SEP 22 1995

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

Case No. 95-C-265-H

ENTERED ON DOCKET
DATE SEP 25 1995

**MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATIONS**

Being fully apprised of the facts and law regarding the above-captioned matter, the Magistrate Judge makes the following report and recommendation to the Court:

REPORT

1. The Plaintiff, Thrifty Rent-A-Car System, Inc. ("Thrifty"), has sued the Defendants for monies owed in connection with a rental car franchise operated by the Defendant, Newco Corporation, and its principal and guarantor, Defendant, Allan G. Holms ("Holms").
2. Thrifty claims that the Defendants are indebted to Thrifty in the amount of \$124,699.89, plus interest in the amount of \$59.09 per day after March 9, 1995. Thrifty also claims it is entitled to recover its attorney's fees and costs.
3. Thrifty served interrogatories and document requests on or about June 1, 1995.
4. On July 11, 1995 and July 28, 1995, Thrifty inquired about Defendants'

failure to respond to discovery. Defendants indicated that responses would be forthcoming.

5. After Thrifty's written discovery was served, Newco Corporation ("Newco") filed for protection under the United States Bankruptcy Code in another district and this action was stayed as to it.

6. During a status hearing (Case Management Conference) held by this Court on August 14, 1995, this Court ordered Holms to answer interrogatories and respond to document requests no later than August 18, 1995. Holms' counsel represented to the undersigned Magistrate Judge that such counsel had not been aware at that time that the Newco bankruptcy had been filed.

7. Holms failed to comply with the Court's Order.

8. On August 22, 1995, Counsel for Thrifty contacted counsel for Defendant to determine why the Defendant had failed to comply with the Court's Order. Counsel for Defendant indicated that discovery responses would be produced by the next day, August 23, 1995. Defendant, however, failed to do so.

9. On August 24, 1995, Thrifty filed a Motion for Sanctions thereby requesting an order granting Thrifty judgment on all claims asserted by Thrifty or the Defendants in this case under Rule 37(b)(2)(c).

10. Holms failed to respond to Thrifty's Motion for Sanctions in writing, but the Court set it down for hearing, and addressed it on the merits, rather than deeming it confessed pursuant to Local Rule 7.1(c).

11. On or about September 7, 1995, Holms served responses to discovery, which all parties agreed were not fully responsive. On September 18, 1995, the undersigned

Magistrate Judge heard the argument of counsel for both parties in open court. At the hearing, counsel for the Defendants stated that the Defendant Holms was not able to give detailed answers to all of the interrogatories because: (i) Holms, the individual guarantor of the Newco debt, had not been the active manager of the Thrifty franchise owned by the Chapter 11 debtor-in-possession, Newco; (ii) the bankruptcy schedules of Newco had not been filed until mid-August, 1995 and the First Meeting of Creditors had not been held until September 7, 1995; and (iii) Holms needed additional time to examine the books and records of Newco in order to answer Thrifty's detailed interrogatories concerning individual invoices, after which the answers would be supplemented under Rule 33. Counsel orally moved the Court to stay this action temporarily in order to allow Holms time to organize his affairs. The Magistrate Judge finds that Defendants' argument does not excuse his failure to respond to discovery for more than 90 days or obey this Court's order of August 14, 1995. The undersigned Magistrate Judge further finds that the motion to stay has not been properly submitted, is untimely and should not be considered.

12. The undersigned Magistrate Judge finds that the actions described above are due to Holms' failure to cooperate with his counsel, and are not the fault of Holms' counsel.

13. Holms has failed to obey this Court's orders to provide or permit discovery in this case within the times allowed by the Federal Rules of Civil Procedure and by the Court's Order of August 14, 1995.

Recommendation

1. Pursuant to Fed. R. Civ. P. 16(f) and Fed. R. Civ. P. 37, judgment should be entered in favor of the Plaintiff and against Holms on Thrifty's claims against Holms and on Holms' claims against Thrifty.

2. Judgment should be granted as follows:

- a. A judgment in favor of Thrifty and against the Defendant, Holms, in the amount of \$124,699.89, plus interest at \$59.09 per day from March 9, 1995, to the date of judgment;
- b. a judgment awarding Thrifty its costs of this action;
- c. a judgment for reasonable attorney's fees incurred in connection with the motion for sanctions;
- d. a judgment in favor of Thrifty and against Holms on the counterclaims of Holms against Thrifty.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, the Defendant is allowed 13 days from the date of filing of this Report and Recommendation in which to file a written objection.¹

Dated this 22nd day of September, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

T:Thrifty.rr

¹The 13 day period includes the 10 days provided by Rule 72(b), and the additional 3 days provided by Rule 6(e) when service is made by mail.

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

FILED

SEP 22 1995

CAROL A. VARSHAY,)
)
Plaintiff,)
)
vs.)
)
AMERICAN AIRLINES, INC.,)
)
Defendant.)

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

No. 95-C-830-H

ENTERED ON DOCKET

DATE SEP 25 1995

AGREED ORDER FOR ADMINISTRATIVE CLOSURE

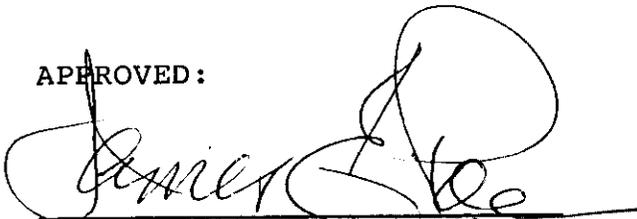
Upon joint motion and by agreement of the parties it is here-
with ordered that this case be administratively closed and all
proceedings herein stayed pending Plaintiff's pursuit of an addi-
tional administrative appeal available under Defendant's long term
disability plan which is a subject of this action. The case may be
reopened upon application of either party, if necessary, following
exhaustion of administrative appeal.

Dated this 22 day of September, 1995.

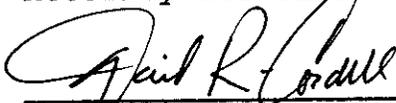
S/ SVEN ERIK HOLMES

HONORABLE SVEN HOLMES
U.S District Judge

APPROVED:



JAMES E. POE, OBA #7198
Attorney for Plaintiff



DAVID R. CORDELL, OBA #11272
Attorney for Defendant

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

GEORGE CUNNINGHAM,)
)
 Plaintiff,)
)
 vs.)
)
 ALVA THOMAS WHITE, SR., Executor)
 of the Estate of RAWLINS HARPER,)
 deceased,)
)
 Defendant.)

Case No. 94-C-719-K

FILED

SEP 22 1995

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

DATE SEP 25 1995

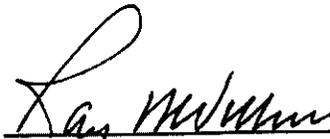
STIPULATION OF DISMISSAL

COME NOW the Parties hereto and hereby stipulate and agree that the above styled and numbered case should be and the same is hereby dismissed without prejudiced.

Authority: Rule 41(a)(1)(ii), Federal Rules of Civil Procedure.



Thomas A. Layon (OBA 5303)
LAYON & CRONIN
1412 South Boston, Suite 210
Tulsa, OK 74119
(918) 583-5538
Attorney for Plaintiff



Ray H. Wilburn, Esq. (OBA #9600)
WILBURN, MASTERSON & SMILING
7134 South Yale, Suite 560
Tulsa, OK 74136-6337
(918) 494-0414

CERTIFICATE OF MAILING

I, Thomas A. Layon, do hereby certify that on this 22nd day of September, 1995, I caused to be mailed a true and correct copy of the above and foregoing document with first-class postage fully pre-paid to:

Mr. Ray H. Wilburn, Esq.
WILBURN, MASTERSON & SMILING
7134 South Yale, Suite 560
Tulsa, OK 74136-6337
Attorney for Defendant



Thomas A. Layon

FILED

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

SEP 22 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

B. F. KELLEY, JR., individually
and as Trustee under the Will of
Ben F. Kelley, deceased, and
MILDRED L. KELLEY,

Plaintiffs,

vs.

WILLIAM B. MICHAELS and
PAINWEBBER, INC., and LIBERTY
BANK & TRUST COMPANY OF TULSA,
N.A., in its capacity as Trustee
of the Trust of Allene H.
Michaels, deceased,

Defendants.

ENTERED ON DOCKET
DATE SEP 25 1995

Case No. 92-C-1004-E

STIPULATED DISMISSAL WITH PREJUDICE

Pursuant to Federal Rule of Civil Procedure 41(a)(1), the parties hereby stipulate that all claims in the above-captioned action shall be dismissed with prejudice without cost to any party.

Respectfully submitted,



James M. Sturdivant, Esq.
Timothy Carney, Esq.
GABLE & GOTWALS
2000 Fourth National Bank Building
15 West 6th Street
Tulsa, OK 74119-5447
(918) 582-9201

**ATTORNEYS FOR B. F. KELLEY, individually
AND AS TRUSTEE UNDER THE WILL OF BEN
F. KELLEY, DECEASED, and MILDRED L.
KELLEY**

William W. O'Connor

Joel L. Wohlgemuth, OBA# 9811
William W. O'Connor, OBA# 13200
NORMAN & WOHLGEMUTH
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 583-7571

ATTORNEYS FOR DEFENDANT,
WILLIAM B. MICHAELS

wbm.dia/mdc

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

SEP 8 2 1995

LAWRENCE OKONYA,
Plaintiff,
vs.
KEEBLER COMPANY, INC.,
Defendant.

)
)
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)
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)

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

Case No. 95-C-115-BU

ENTERED ON DOCKET

DATE SEP 25 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 22nd day of September, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

17



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

CONNIE SPENCER,
Plaintiff,
vs.
PERRY LUTRELL, et al.,
Defendants.

ORDER

No. 94-C-681-K

FILED

SEP 22 1995

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

ENTERED ON DOCKET

DATE ~~SEP 25 1995~~

Before the Court is the application of the plaintiff to dismiss this action without prejudice as to defendants Perry Lutrell and Steven Lutrell (#7). No objection has been filed.

It is the Order of the Court that the plaintiff's application is GRANTED. Defendants Perry Lutrell and Steven Lutrell are hereby dismissed without prejudice.

ORDERED this 22 day of September, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

15

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
PHIL RANDAL ALWORDEN aka Phil R.)
Alworden; PATRICIA ELLEN)
ALWORDEN aka Patricia E. Alworden;)
COUNTYSIDE FUNDING)
CORPORATION; STATE OF)
OKLAHOMA, ex rel. OKLAHOMA TAX)
COMMISSION; CITY OF GLENPOOL,)
Oklahoma; COUNTY TREASURER,)
Tulsa County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)
)
Defendants.)

FILED

SEP 22 1995

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

Civil Case No. 95-C 494K

ENTERED ON DOCKET
DATE SEP 25 1995

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22 day of Sept,

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, PHIL RANDAL ALWORDEN aka Phil R. Alworden and PATRICIA ELLEN ALWORDEN aka Patricia E. Alworden, appear by their Attorney Jack Martin, Esq.; the Defendant, COUNTRYWIDE FUNDING CORPORATION, appears not

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

having previously filed its Stipulation; and the Defendant, CITY OF GLENPOOL, Oklahoma, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, PHIL RANDAL ALWORDEN aka Phil R. Alworden, signed a Waiver of Summons on June 13, 1995; that the Defendant, PATRICIA ELLEN ALWORDEN aka Patricia E. Alworden, signed a Waiver of Summons Complaint on June 13, 1995; that the Defendant, COUNTRYWIDE FUNDING CORPORATION, signed a Waiver of Summons on June 19, 1995; that the Defendant, CITY OF GLENPOOL, Oklahoma, was served a copy of Summons and Complaint on May 31, 1995, by Certified Mail; and that Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on May 31, 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 June 14, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on June 28, 1995; that the Defendant, COUNTRYWIDE FUNDING CORPORATION, filed its Stipulation on July 11, 1995; and that the Defendant, CITY OF GLENPOOL, Oklahoma, has failed to answer and its default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, PHIL RANDAL ALWORDEN, is one and the same person as Phil R. Alworden, and will hereinafter be referred to as "PHIL RANDAL ALWORDEN." The Defendant, PATRICIA ELLEN ALWORDEN, is one and the same person as Patricia E. Alworden, and will hereinafter be referred to as "PATRICIA ELLEN ALWORDEN." The Defendants, PHIL RANDAL ALWORDEN and PATRICIA ELLEN ALWORDEN, 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 Fourteen (14), Block One (1), BRENTWOOD II, an Addition to the City of Glenpool, Tulsa County, State of Oklahoma, according to the AMENDED Plat No. 4153.

The Court further finds that on October 12, 1988, the Defendants, PHIL RANDAL ALWORDEN and PATRICIA ELLEN ALWORDEN, executed and delivered to HARRY MORTGAGE CO., their mortgage note in the amount of \$47,100.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9.50%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, PHIL RANDAL ALWORDEN and PATRICIA ELLEN ALWORDEN, husband and wife, executed and delivered to HARRY MORTGAGE CO., a mortgage dated October 12, 1988, covering the above-described property. Said mortgage was recorded on October 13, 1988, in Book 5134, Page 127, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 20, 1988, HARRY MORTGAGE COMPANY, assigned the above-described mortgage note and mortgage to MARKET STREET MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on November 16, 1988, in Book 5140, Page 924, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 28, 1989, MARKET STREET MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to COUNTRYWIDE FUNDING CORPORATION. This Assignment of Mortgage was

recorded on November 20, 1989, in Book 5220, Page 2263, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 1, 1990, COUNTRYWIDE FUNDING 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 May 18, 1990, in Book 5253, Page 2364, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 1, 1990, the Defendants, PHIL RANDAL ALWORDEN and PATRICIA ELLEN ALWORDEN, 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 April 1, 1991, April 1, 1992, October 1, 1992 and March 1, 1993.

The Court further finds that the Defendants, PHIL RANDAL ALWORDEN and PATRICIA ELLEN ALWORDEN, 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, PHIL RANDAL ALWORDEN and PATRICIA ELLEN ALWORDEN, are indebted to the Plaintiff in the principal sum of \$66,133.21, plus interest at the rate of 9.50 percent per annum from May 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, 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 \$577.10 which became a lien on

the property as of March 7, 1994, and a lien in the amount of \$585.72, which became a lien on the property as of October 6, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendant, COUNTRYWIDE FUNDING CORPORATION, Stipulates that it disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendant, CITY OF GLENPOOL, Oklahoma, is in default and has 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, PHIL RANDAL ALWORDEN and PATRICIA ELLEN ALWORDEN, in the principal sum of \$66,133.21, plus interest at the rate of 9.50 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.52 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, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of \$1,162.82, plus accrued and accruing interest, for state income taxes, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREEDS that the Defendants, COUNTY TREASURER, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, PHIL RANDAL ALWORDEN, PATRICIA ELLEN ALWORDEN, COUNTRYWIDE FUNDING CORPORATION, and CITY OF GLENPOOL, 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, PHIL RANDAL ALWORDEN and PATRICIA ELLEN ALWORDEN, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of \$1,162.82,

plus accrued and accruing interest, and costs of this action, for state income 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

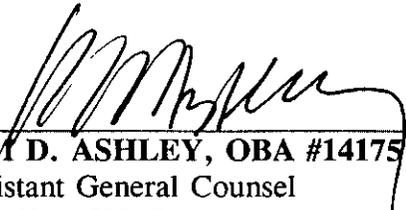
LORETTA F. RADFORD, OBA #11158

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DICK A. BLAKELEY, OBA #852

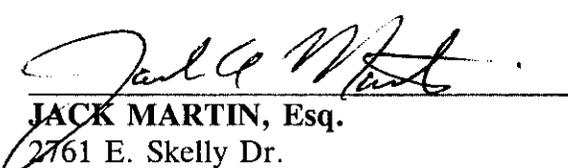
Assistant District Attorney
406 Tulsa County Courthouse
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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma


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State of Oklahoma, ex rel.
Oklahoma Tax Commission


JACK MARTIN, Esq.

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Ste. 700
Tulsa, OK 74105

Attorney for Defendants,
Phil Randal Alworden and
Patricia Ellen Alworden

Judgment of Foreclosure
Civil Action No. 95-C 494K

LFR:flv

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

FILED

SEP 21 1995

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

YVONNE S. WHITTEN,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,¹

Defendant.

Case No: 94-C-888-W

ENTERED ON DOCKET

DATE ~~SEP 25 1995~~

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed September 21, 1995.

Dated this 21st day of September, 1995.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective 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. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.



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

FILED

YVONNE S. WHITTEN)

Plaintiff,)

v.)

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL
SECURITY,¹)

Defendant.)

SEP 21 1995

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

Case No. 94-C-888-W

ENTERED ON DOCKET

DATE SEP 25 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.²

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. Pursuant to Fed.R.Civ.P. 25(a)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

² 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." *Rickerson 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.*

7

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 met the disability insured status requirements of the Act on March 1, 1987, the date she stated she became unable to work, and continued to meet them through June 30, 1987, but not thereafter; that on and prior to June 30, 1987, she had severe exogenous obesity, mild degenerative changes in the lumbosacral spine, minimal degenerative changes in the left hip, and hypertension that was well controlled with medication; that on that date she had the residual functional capacity to perform the full range of light work, and had no nonexertional limitations; that on that date she was unable to perform her past relevant work as a nurse's aid; and that she was not disabled as of the time her insured status terminated.

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

- (1) The ALJ's decision is not supported by substantial evidence.
- (2) The ALJ erroneously held that the claimant's impairments did not meet or equal a listed impairment.
- (3) The ALJ erroneously discounted the claimant's subjective complaints of pain.

I. The ALJ's Decision is Supported by Substantial Evidence.

Mathews, 574 F.2d 359 (6th Cir. 1978).

³ 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).

It is well settled that the claimant bears the burden of proving disability that prevents engagement in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984). The relevant analysis is whether the claimant has demonstrated that he was actually disabled prior to the expiration of his insured status; a retrospective diagnosis without evidence of actual disability is not sufficient. Flint v. Sullivan, 951 F.2d 264, 267 (10th Cir. 1991); Potter v. Secretary of Health & Human Servs., 905 F.2d 1346, 1348-49 (10th Cir. 1990). The claimant has failed to carry that burden in this case.

The record reflects that Claimant was diagnosed with lumbosacral strain and lumbosacral arthritis on February 21, 1976 (TR 272). A radiographic report of an examination conducted on March 12, 1981 noted no gross irregularity with regard to both hips (TR 199).⁴ A radiographic report of films shot on January 19, 1982 found that "[t]he sacroiliac joints show minimal sclerosis and narrowing consistent with rheumatoid type of arthritis" (TR 200).

On March 16, 1984, x-rays were taken of the lumbar spine and left hip. (TR 201). Large anterior spurs were shown at the L1-2, 2-3, and 3-4 levels, with minimal disc space narrowing at all these levels. (TR 201). Bilateral sclerotic changes of the articulating facet joints of L5-S1 were also found, as well as sclerotic changes of the left and right iliac bones near the sacroiliac joints; however, both sacroiliac joints appeared to be patent. (TR 201). The study of the left hip found minimal degenerative changes consisting of some spurring of the superior rim of the acetabulum, but noted that there was no change in appearance since the last study in January, 1992 (TR 201).

⁴It was also noted that "[t]he films are markedly under-penetrated with un-diagnostic studies presented", so any conclusion drawn from these films is marginal.

A radiologic report of films taken on dated October 2, 1985 revealed that the left hip joints appeared symmetrical. (TR 196). Degenerative changes consisting of anterior osteophytes at the L1-2 and 2-3 levels were again noted and appeared unchanged since the last study of March 16, 1984 (TR 196). The radiographic report dated May 14, 1986 concluded: "There is degenerative change of the lumbar spine as described which is unchanged since last study of 10-2-85" (TR 197).

A radiologic report transcribed on February 6, 1987 concluded there were "minimal degenerative changes" in the left hip, "consisting of spurs of the superior rim of the acetabulum on the left and right sides." (TR 198). However, the "joint spaces are not narrowed." (TR 198). The lumbar spine study "shows degenerative disc space disease consisting of minimal narrowing at all levels and anterior osteophytes at all levels" (TR 198).

Dr. D.G. Cox's report of November 10, 1992 helps fix the time frame when claimant's condition worsened so as to include significant radiculopathy.⁵ Dr. Cox had

⁵ Dr. Cox states:

My first contact with Susie Whitten was when she was a 45 year old on 2-27-86, when while working at her job as a nurse's aide, she developed a "pulling sensation" in her left hip. At this point it was felt to be only musculoskeletal strain and this indeed did respond to conservative therapy.

My next encounter was on 10-15-86 when again she hurt her back lifting a patient in the hospital. She had an inflamed [sic] left sacroiliac joint which was injected with Cortizone [sic] and local anesthesia and it apparently resolved without difficulty.

The patient returned three years later on 10-30-89 with left hip pain, increased pain with weight bearing for two weeks, no marked injury, no relief with nonsteroidal anti-inflammatory drugs. She had seen an orthopedic surgeon who diagnosed "pinched nerve." She denied back pain, just pain in the hip radiating down the left leg. X-ray was unremarkable and it was felt that she was suffering bursitis.

The patient has seen Dr. Cotner as well as myself over the last few years. She returns on 11-9-92 complainig [sic] of alot [sic] of pain in the left hip. This has been constant over the last few years. The pain radiates down the left leg. The pain is such that it precludes her from prolonged standing but it [sic] she also has increased pain with prolonged sitting. The only way that she can obtain relief is by lying down. She also experiences some knee pain on the left. She is on Ibuprofen 800 mgs. without relief.

seen claimant on October 15, 1986, when he treated her inflamed left sacroiliac joint with a cortisone injection, which caused it to resolve without difficulty. He did not see her again for over three years, but on October 30, 1989 she returned complaining of left hip pain, and he was left with the impression that she was suffering from bursitis (TR 164).⁶ Clinical notes for the interim period show only episodic complaints of back pain, treated with medication, with no finding that claimant's pain had reached disabling proportions.⁷ (TR 145-152). Although it does appear from Dr. Cox's report that claimant experienced increased levels of radiating pain from the left hip and perhaps lower back in 1989, this was long after her insured status expired on June 30, 1987. Dr. Cox's conclusion in his report of November 10, 1992, that "[i]n her present state she is certainly unable to be gainfully employed", and his comment that "I have encouraged her in view of her steadily increasing debility over the last three years to proceed with her application for Social

On physical examination the patient is noted to have a psoriatic type rash on the elbows, hands, knees, and face. She has a very slow gait favoring the left leg. She has alot [sic] of difficulty getting off and on the exam table secondary to pain and she has positive straight leg raising on the left at 30 degrees.

My assessment at this time is possible psoriatic arthritis and perhaps even a lumbar disc with left leg radiculopathy.

In her present state she is certainly unable to be gainfully employed. She could benefit from further testing such as rheumatology consult and/or MRI-CT scan of the lumbar spine to evaluate any evidence of any nerve injury by disc disease.

I have encouraged her in view of her steadily increasing debility over the last three years to proceed with her application for Social Security Disability.

(TR 164-165).

⁶It is significant that on this occasion, the claimant denied back pain (TR 164).

⁷A progress note dated December 9, 1987, (after claimant's insured status had already expired) states:

Complains of pain in left hip that radiates to foot and also has a whitish discharge with vaginal itch. Patient was nurses aid for 25 years - states has had hip problem for 12 years. Very bad last year. Was told she had sciatica. Was told by Dr. Corner that degenerative disc. Disc was going to get worse. Takes Tylenol #3 - not clear as to how long. Wants to go after S.S. [social security]. Has seen no orthopedic or neurosurgery physicians.... (emphasis added) (TR 149).

Security Disability", support the ALJ's decision. (TR 165) (emphasis added). There is substantial evidence to support the ALJ's conclusion that Claimant was not disabled as of June 30, 1987.

II. Claimant's Impairments did not Meet or Equal a Listed Impairment.

Claimant argues that the ALJ erred in failing to find that her impairments met or equalled Listings 1.02, 1.03, and 1.05.⁸ No physician has ever found that Claimant met

⁸These listings provide:

- 1.02 Active rheumatoid arthritis and other inflammatory arthritis. With both A and B.
- A. History of persistent joint pain, swelling, and tenderness involving multiple major joints (see 1.00D) and with signs of joint inflammation (swelling and tenderness) on current physical examination despite prescribed therapy for at least 3 months, resulting in significant restriction of function of the affected joints, and clinical activity expected to last at least 12 months; and
 - B. Corroboration of diagnosis at some point in time by either:
 - 1. Positive serologic test for rheumatoid factor; or
 - 2. Antinuclear antibodies; or
 - 3. Elevated sedimentation rate; or
 - 4. Characteristic histologic changes in biopsy of synovial membrane or subcutaneous nodule (obtained independent of Social Security disability evaluation).
- 1.03 Arthritis of a major weight-bearing joint (due to any cause): With history of persistent joint pain and stiffness with signs of marked limitation of motion or abnormal motion of the affected joint on current physical examination.
- With:
- A. Gross anatomical deformity of hip or knee (e.g. subluxation, contracture, bony or fibrous ankylosis, instability) supported by X-ray evidence of either significant joint space narrowing or significant bony destruction and markedly limiting ability to walk and stand; or
 - B. Reconstructive surgery or surgical arthrodesis of a major weight-bearing joint and return to full weight-bearing status did not occur, or is not expected to occur, within 12 months of onset.
- 1.05 Disorders of the spine:
- A. Arthritis manifested by ankylosis or fixation of the cervical or dorsolumbar spine at 30 degrees or more of flexion measured from the neutral position, with X-ray evidence of:
 - 1. Calcification of the anterior and lateral ligaments; or
 - 2. Bilateral ankylosis of the sacroiliac joints with abnormal apophyseal articulations; or
 - B. Osteoporosis, generalized (established by X-ray) manifested by pain and limitation of back motion and paravertebral muscle spasm with X-ray evidence of either:
 - 1. Compression fracture of a vertebral body with loss of at least 50 percent of the estimated height of the vertebral body prior to the compression fracture, with no intervening direct traumatic episode; or
 - 2. Multiple fractures of vertebrae with no intervening direct traumatic episode; or
 - 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 of significant motor loss with muscle weakness and sensory and reflex loss.

any of these listings. Claimant contends she has met listing 1.02 (active rheumatoid arthritis), citing the 1982 radiographic report that stated "[t]he sacroiliac joints show minimal sclerosis and narrowing consistent with rheumatoid type arthritis" (TR 200), the 1984 radiographic report reflecting "minimal degenerative changes" (TR 201), and a single lab report which shows an elevated sedimentation rate (TR 208).⁹ Even if the isolated sedimentation rate test were sufficient to satisfy the "B" criterion, this record does not contain substantial evidence that the "A" criteria of Listing 1.02 have been met. Further, Claimant does not point out any part of the record that would satisfy either the "A" or "B" criteria of Listing 1.03 (arthritis of a major weight-bearing joint).

Finally, claimant relies on a single indecipherable reference to muscle spasms (TR 202), and straight leg raising tests that were positive at 30 degrees after the insured period expired (TR 149 and 164), to establish satisfaction of Listing 1.05 (disorders of the spine). The record is clearly not sufficient to establish that this listing has been met.

III. The Claimant's Subjective Complaints of Pain were Properly Considered by the ALJ.

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

⁹According to Taber's Cyclopedic Medical Dictionary, 17th Edition, the erythrocyte sedimentation rate is a nonspecific laboratory test of the speed at which erythrocytes (red blood cells) settle. The sedimentation rate is a nonspecific indicator of disease, especially inflammatory conditions. However, an unexplained increase in the sedimentation rate is usually transitory and rarely due to serious disease. The normal rate in females is slightly above 10 mm/hr. The lab test relied upon by Claimant showed a sedimentation rate of 18 mm/hr.

"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. Frey, 816 F.2d at 515. She 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 some objective medical evidence to show that plaintiff had a back

problem producing pain, the ALJ was **required** to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). "[T]he 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." Luna, 834 F.2d at 165.

The ALJ specifically discussed the **factors** in Luna, including the nature of claimant's complaints, medications and side effects, her irregular complaints of pain despite her regular contact with physicians, the **conservative** nature of her treatment, the lack of restrictions during the pertinent time **period**, and the limited measures used to relieve pain (TR 39-40). He also closely observed **her** at the hearing, and found:

She did not complain of **pain**, did not appear to be experiencing pain or discomfort, and in fact, **appeared** to be relaxed and comfortable. ... She did not exhibit any **signs** of difficulty or discomfort in walking, standing, sitting, or rising **from** a seated position. She stated she had never used braces or a **crutch**. She stood erect, walked with a normal gait, did not require an **assistive** device to ambulate, and did not display an observable **limp** (TR 39).

The ALJ concluded that she did not **suffer** from disabling pain as of June 30, 1987, the date she last met the special earning **requirements** (TR 40). There is substantial evidence to support this conclusion.

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

Dated this 21st day of September, 1995.

A handwritten signature in cursive script, appearing to read "John Leo Wagner", written over a horizontal line.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:whitten.ss

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 22 1995

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

DAVID L. DAVIS,)
)
)
 Plaintiff,)
)
)
 v.)
)
)
 GROUP K, INC., an Oklahoma corporation)
 d/b/a THE OCEAN CLUB; and STEVE)
 KITCHELL, individually,)
)
)
 Defendants.)

No. 93-C-1098-J

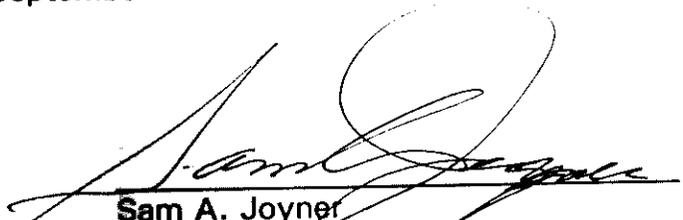
ENTERED ON DOCKET
DATE SEP 25 1995

ORDER

On this 22nd day of September 1995, the Court has before it Plaintiff's Motion for Judgment as a Matter of Law, pursuant to Fed. R. Civ. P. 50, and Motion for New Trial, pursuant to Fed. R. Civ. P. 59. After a thorough review of the parties' briefs, the Court has decided to overrule both the Motion for Judgment as a Matter of Law and the Motion for New Trial. The Judgment which was entered based on the unanimous verdict of the jury will stand.

IT IS SO ORDERED.

Dated this 22nd day of September 1995.


Sam A. Joyner
United States Magistrate Judge

45

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 23 1995

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

SUN COMPANY, INC., (R & M), a)
Delaware corporation, and TEXACO INC.,)
a Delaware corporation,)

Plaintiffs,)

vs.)

BROWNING-FERRIS, INC., a Delaware)
corporation, successor in interest to Tulsa)
Container Services, Inc.; et al.)

Defendants.)

Case No. 94-C-820-K

ENTERED ON DOCKET

DATE SEP 25 1995

ORDER

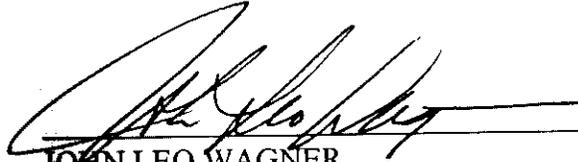
NOW on this 5th day of September, 1995, comes on for hearing the Application for Attorney Fees for Liaison Counsel for Group II which was filed by Terence P. Brennan, Liaison Counsel for the Group II Defendants, on July 20, 1995.

No objections have been filed with respect to said Application and no objection is made in open Court.

The Court finds that said Application is in compliance with the rules of this Court; that the fees and charges set forth therein are reasonable and proper in all respects; and that said Application should be approved.

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IT IS THEREFORE ORDERED that the above-referenced Application is approved, and Liaison Counsel is hereby authorized and ordered to pay the same forthwith from the Group II Liaison Counsel Assessment account.

A handwritten signature in black ink, appearing to read "John Leo Wagner", written over a horizontal line.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE
JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 21 1995

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
AMYBETH MARIE KAUFFMAN;)
UNKNOWN SPOUSE OF Amybeth Marie)
Kauffman, if any;)
BILLY DOYLE KAUFFMAN;)
UNKNOWN SPOUSE OF Billy Doyle)
Kauffman, if any;)
CITY OF BIXBY, Oklahoma)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
DATE SEP 22 1995

Civil Case No. 95-C-0022-B

ORDER

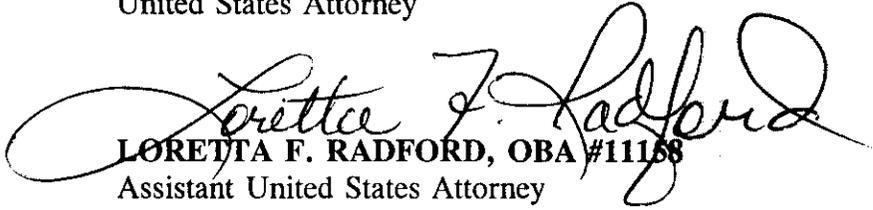
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that the Judgment filed on the 27th day of June 1995 is hereby vacated, the Notice of Sale filed on the 22nd day of August, 1995 is hereby vacated, the sale scheduled to be held on the 11th day of October, 1995, is hereby canceled, and this action is hereby dismissed without prejudice.

Dated this 21 day of Sept., 1995.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in cursive script, reading "Loretta F. Radford". The signature is written in black ink and is positioned above the typed name and contact information.

LORETTA F. RADFORD, OBA #11168

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463

LFR:flv

FILED

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

SEP 21 1995

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

AMANDA LAKEY,

Plaintiff,

vs.

No. 95-C 0031BU

U.S. EXPRESS, INC., an
Arkansas corporation, and RICARDO
FLORES, an individual,

Defendants.

SEP 22 1995

ORDER OF DISMISSAL WITH PREJUDICE

The Court, having before it the written Joint Stipulation for Dismissal With Prejudice signed by all parties to this litigation, finds that based upon the agreement of the parties the Joint Stipulation for Dismissal With Prejudice should be granted, and

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the litigation captioned herein, including all complaints, counterclaims, cross-complaints and causes of action of any type by any party, should be and the same is hereby dismissed with prejudice.

IT IS SO ORDERED this 21 day of Sept, 1995.

s/ MICHAEL BURRAGE

MICHAEL BURRAGE
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 21 1995

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

ANGELA HOUSER-YOST,)
Plaintiff,)
)
vs.)
)
LIBERTY BANCORP, INC.)
Defendant.)

Case No. 94-C-1096B

ENTERED ON DOCKET

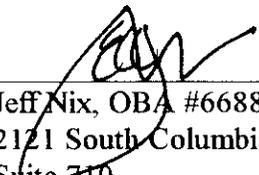
DATE SEP 22 1995

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

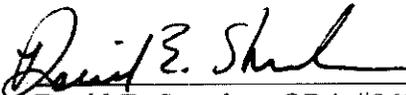
The Plaintiff, Angela Houser-Yost and the Defendant, Liberty Bancorp, Inc., jointly stipulate and agree that this case be dismissed with prejudice, each party to bear her or its own costs, expenses and attorneys' fees.

Attorney for Plaintiff

Attorneys for Defendants



Jeff Nix, OBA #6688
2121 South Columbia
Suite 710
Tulsa, Oklahoma 74114
(918) 742-4486



David E. Strecker, OBA #8687


Connie Lee Kirkland, OBA #14262
Petroleum Club Building
601 South Boulder - Suite 412
Tulsa, Oklahoma 74119
(918) 582-1760

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 21 1995

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL D. HAGGARD

aka Michael Haggard
aka Michael Dean Haggard;

MONALISA P. HAGGARD

aka Mona Lisa Haggard
aka Mona Lisa Patricia Haggard
aka Mona Lisa Patricia Latzel
aka Mona Lisa Latzel
aka Mona Lisa Patricia Dawson;

LEON DAWSON;
COUNTY TREASURER, Tulsa County,
Oklahoma;

BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C-371-B

ENTERED ON DOCKET

DATE SEP 22 1995

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that this action shall be dismissed without prejudice and that the status hearing set for September 29, 1995 at 1:30 p.m. is stricken.

Dated this 21 day of Sept., 1995.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

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

PB/esf

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

FILED

SEP 21 1995

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

MARK A. MAYER,
Plaintiff,
vs.
TULSA JUNIOR COLLEGE, et al.,
Defendant.

Case No. 94-C-1140-BU

ENTERED ON DOCKET
DATE SEP 22 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 21 day of September, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

11

#1

received
9-22-95

JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

DIRECT REPLY TO:

MAN:
Judge John F. Nangle
United States District Court
Southern District of Georgia

MEMBERS:
Judge Robert R. Merhige, Jr.
United States District Court
Eastern District of Virginia

Judge John F. Grady
United States District Court
Northern District of Illinois

Patricia D. Howard
Clerk of the Panel
One Columbus Circle, NE
Thurgood Marshall Federal
Judiciary Building
Room G-255, North Lobby
Washington, DC 20002-8004

Judge William B. Enright
United States District Court
Southern District of California

Judge Barefoot Sanders
United States District Court
Northern District of Texas

Telephone: [202] 273-2800

Judge Clarence A. Brimmer
United States District Court
District of Wyoming

Judge Louis C. Bechtel
United States District Court
Eastern District of Pennsylvania

September 19, 1995

ENTERED ON DOCKET

DATE SEP 22 1995

TO INVOLVED COUNSEL

Re: MDL-875 -- In re Asbestos Products Liability Litigation (No. VI)

George M. Huggins, et al. v. AC Product Liability Trust, et al., N.D. Oklahoma, C.A. No. 4:95-772

Dear Counsel:

For your information, I am enclosing a copy of an order filed today by the Judicial Panel on Multidistrict Litigation involving the above-captioned matter.

Very truly,

Patricia D. Howard
Clerk of the Panel

By Charissa Fowler
Deputy Clerk

Enclosure

- cc: Transferee Judge: Hon. Charles R. Weiner
- Transferor Judge: Hon. Terry C. Kern
- Transferee Clerk: Michael E. Kunz
- Transferor Clerk: Richard M. Lawrence

25

JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION
FILED

SEP 19 95

PATRICIA D. HOWARD
CLERK OF THE PANEL

DOCKET 875

**BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION
IN RE ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)**

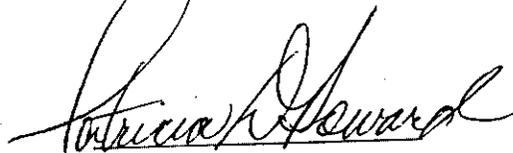
George M. Huggins, et al. v. AC Product Liability Trust, et al.,
N.D. Oklahoma, C.A. No. 4:95-772

ORDER CORRECTING CIVIL ACTION NUMBER

The above-referenced civil action was identified with Western District of Oklahoma Civil Action No. 95-979 on CTO-78 filed on September 11, 1995. Pursuant to an order filed on August 8, 1995, in the Western District of Oklahoma, the action was transferred to the Northern District of Oklahoma and assigned Civil Action No. 4:95-772.

IT IS THEREFORE ORDERED that the Panel's conditional transfer order designated as "CTO-78" filed on September 11, 1995, be, and the same hereby is, CORRECTED to reflect the correct district and civil action number as indicated above.

FOR THE PANEL:



Patricia D. Howard
Clerk of the Panel

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
DWAYNE Y. TAPP aka Dewayne Y.)
Tapp; PHYLLIS J. TAPP; UNITED)
BANKERS MORTGAGE)
CORPORATION; FIRSTBANK)
MORTGAGE CO.; NEW YORK)
GUARDIAN MORTGAGEE CORP.;)
GOVERNMENT NATIONAL)
MORTGAGE ASSOCIATION;)
AMERICAN FUNDING CORP., INC.;)
SECURITY PACIFIC FINANCE CORP.;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
Defendants.)

ENTERED ON DOCKET
DATE SEP 22 1995

Civil Case No. 95-C 0099K

F I L E D

SEP 21 1995

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

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 21 day of Sept,

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, UNITED BANKERS MORTGAGE CORPORATION, appears not having previously filing a Disclaimer; and the Defendants, DWAYNE Y. TAPP aka Dewayne Y. Tapp, PHYLLIS J. TAPP; FIRSTBANK MORTGAGE CO, NEW YORK GUARDIAN MORTGAGEE CORP., AMERICAN

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

FUNDING CORP., INC.; SECURITY PACIFIC FINANCE, and GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, DWAYNE Y. TAPP aka Dewayne Y. Tapp, was served with process a copy of Summons and Complaint on March 27, 1995; that the Defendant, PHYLLIS J. TAPP, was served with process a copy of Summons and Complaint on March 28, 1995; that the Defendant, UNITED BANKERS MORTGAGE CORPORATION, acknowledged receipt of Summons and Complaint on March 7, 1995, by Certified Mail; that Defendant, NEW YORK GUARDIAN MORTGAGEE CORP., signed a Waiver of Summons on February 13, 1995; that Defendant, SECURITY PACIFIC FINANCE CORP., acknowledged receipt of Summons and Complaint on February 3, 1995, by Certified Mail.

The Court further finds that the Defendants, FIRSTBANK MORTGAGE CO., GOVERNMENT NATIONAL MORTGAGE ASSOCIATION and AMERICAN FUNDING CORP., INC., 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 July 6, 1995, and continuing through August 10, 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, FIRSTBANK MORTGAGE CO., GOVERNMENT NATIONAL MORTGAGE ASSOCIATION and AMERICAN FUNDING CORP., INC., 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, FIRSTBANK MORTGAGE CO., GOVERNMENT NATIONAL MORTGAGE ASSOCIATION and AMERICAN FUNDING CORP., INC. 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 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 February 9, 1995; that the Defendant, UNITED BANKERS MORTGAGE CORPORATION, filed its Disclaimer on June 2, 1995; and that the Defendants, DWAYNE Y. TAPP aka Dewayne Y. Tapp, PHYLLIS J. TAPP; FIRSTBANK MORTGAGE CO, NEW YORK GUARDIAN MORTGAGEE CORP., AMERICAN FUNDING CORP., INC.; SECURITY PACIFIC FINANCE, and GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, DWAYNE Y. TAPP, is one and the same person as Dewayne Y. Tapp, and will hereinafter be referred to as "DWAYNE Y. TAPP." The Defendants, DWAYNE Y. TAPP and PHYLLIS J. TAPP, are husband and wife.

The Court further finds that on March 22, 1993, DWAYNE Y. TAPP and PHYLLIS J. TAPP, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 93-905-W. On July 27, 1993, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor, and the case was subsequently closed on October 20, 1993.

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

**LOT NINE (9), BLOCK FIVE (5), EDISON ROAD 4TH
ADDITION, A SUBDIVISION TO THE CITY OF TULSA,
COUNTY OF TULSA, STATE OF OKLAHOMA,
ACCORDING TO THE RECORDED PLAT THEREOF.**

The Court further finds that on November 5, 1985, the Defendants, DWAYNE Y. TAPP and PHYLLIS J. TAPP, executed and delivered to UNITED BANKERS MORTGAGE CORPORATION, their mortgage note in the amount of \$57,764.00, payable in monthly installments, with interest thereon at the rate of Eleven and One-Half percent (11.50%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, DWAYNE Y. TAPP and PHYLLIS J. TAPP, husband and wife, executed and delivered to UNITED BANKERS MORTGAGE CORPORATION, a mortgage

dated November 5, 1985, covering the above-described property. Said mortgage was recorded on November 6, 1985, in Book 4904, Page 1022, in the records of Tulsa County, Oklahoma. A Corrected Mortgage was filed on November 27, 1985, Book 4909, Page 74, in the records of Tulsa County, Oklahoma, to correct the spelling of Mortgagor's First Name.

The Court further finds that on November 5, 1985, UNITED BANKERS MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to Firstbank Mortgage Co. This Assignment of Mortgage was recorded on January 24, 1986, in Book 4920, Page 2248, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 30, 1987, FIRSTBANK MORTGAGE CO., assigned the above-described mortgage note and mortgage to The New York Guardian Mortgagee Corporation. This Assignment of Mortgage was recorded on December 28, 1987, in Book 5071, Page 2242, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 24, 1990, The New York Guardian Mortgagee Corporation, assigned the above-described mortgage note and mortgage to GOVERNMENT NATIONAL MORTGAGE ASSOCIATION. This Assignment of Mortgage was recorded on October 30, 1990, in Book 5285, Page 1498, in the records of Tulsa County, Oklahoma. This Assignment was re-recorded on August 10, 1992, in Book 5426, Page 896, in the records of Tulsa County, Oklahoma, to correct the signatory line.

The Court further finds that on September 24, 1990, The Government 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 October 30, 1990, in Book 5285, Page 1497, in the records of Tulsa County, Oklahoma. A corrected Assignment dated

December 1, 1988, was recorded on **September 8, 1992**, in Book 5433, Page 2410, in the records of Tulsa County, Oklahoma, to **show a correct chain of title**. Said corrected assignment was re-recorded on **November 3, 1992**, in Book 5449, Page 1824, in the records of Tulsa County, Oklahoma, to correct **the mortgage** recording information.

The Court further finds that on **May 31, 1989**, the Defendants, **DWAYNE Y. TAPP** and **PHYLLIS J. TAPP**, 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 **May 9, 1990**.

The Court further finds that **the Defendants, DWAYNE Y. TAPP and PHYLLIS J. TAPP**, 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, **DWAYNE Y. TAPP and PHYLLIS J. TAPP**, are indebted to the Plaintiff in the principal sum of **\$94,373.01**, plus interest at the rate of 11.50 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 personal property taxes in the **amount** of \$33.00 which became a lien on the property as of **June 26, 1992**, and a **lien in the amount** of \$30.00 which became a lien on the property as of **June 25, 1993**. Said **liens are inferior** to the interest of the Plaintiff, United States of America.

The Court further finds that **the Defendants**, DWAYNE Y. TAPP, PHYLLIS J. TAPP; FIRSTBANK MORTGAGE CO, NEW YORK GUARDIAN MORTGAGEE CORP., AMERICAN FUNDING CORP., INC.; SECURITY PACIFIC FINANCE, and GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, are in default, and have no right, title or interest **in the** subject real property.

The Court further finds that **the Defendant**, UNITED BANKERS MORTGAGE CORPORATION, disclaims **any** 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 In Rem against the Defendants, DWAYNE Y. TAPP and PHYLLIS J. TAPP, in the principal sum of \$94,373.01, plus interest at the rate of 11.50 percent per **annum** from November 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.5% 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 \$63.00, plus costs and interest, for personal property taxes for the years 1991 and 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, UNITED BANKERS MORTGAGE CORPORATION, DWAYNE Y. TAPP, PHYLLIS J. TAPP; FIRSTBANK MORTGAGE CO, NEW YORK GUARDIAN MORTGAGEE CORP., AMERICAN FUNDING CORP., INC.; SECURITY PACIFIC FINANCE, and GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, 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 Y. TAPP and PHYLLIS J. TAPP, 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 appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$63.00, 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.

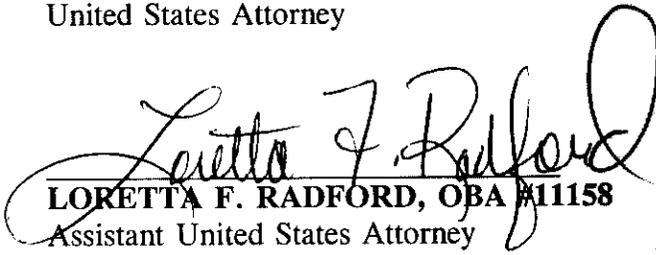
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

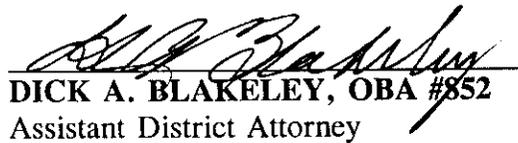
STEPHEN C. LEWIS
United States Attorney



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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. 95-C 0099K

LFR:flv

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

CAROL A. AINSWORTH,
Plaintiff,

vs.

CITY OF TULSA and PRESTON
WHITSON,

Defendants.

No. 93-C-1145-K

ENTERED ON DOCKET
DATE SEP 22 1995

FILED

SEP 21 1995

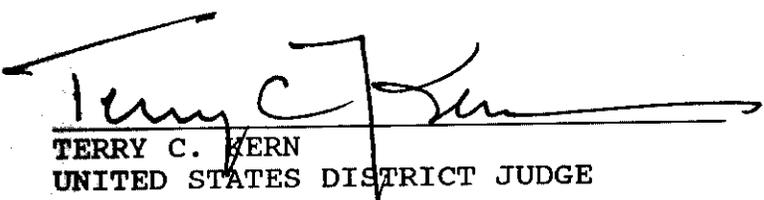
JUDGMENT

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

This matter came before the Court for consideration of the defendants' motion for 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 defendants and against the plaintiffs.

ORDERED this 21 day of September, 1995.


TERRY C. ZERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

DATE SEP 22 1995

CAROL A. AINSWORTH,
Plaintiff,

vs.

CITY OF TULSA and PRESTON
WHITSON,

Defendants.

No. 93-C-1145-K

F I L E D

SEP 21 1995

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

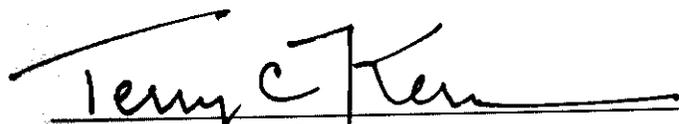
ORDER

Now before the Court is the motion of the defendants for summary judgment. Plaintiff brings this action pursuant to 42 U.S.C. §1981, 42 U.S.C. §§2000(d) and 2000(e). She alleges that she was an employee of the Human Rights Department of the City of Tulsa who was denied a promotion because she is black. She named the City of Tulsa and its Director of Personnel as defendants.

Defendants move for entry of judgment, asserting that discovery has demonstrated no impropriety on the defendants' part and plaintiff's inability to establish a prima facie case of discrimination. Plaintiff has filed a response and brief, in which she confesses the pending motion. The Court has independently reviewed the record and concludes the motion should be granted.

It is the Order of the Court that the motion of the defendants for summary judgment is hereby GRANTED.

ORDERED this 21 day of September, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

19

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

THRIFTY RENT-A-CAR)
)
Plaintiff,)
)
vs.)
)
MAR MARKETING ENTERPRISES,)
)
Defendant,)

No. 94-C-1075FK

FILED

SEP 21 1995

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

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 21 day of September, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

2

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

ENTERED ON DOCKET
SEP 22 1995
DATE _____

OMAR R. OSBORNE,
Plaintiff,
vs.
RON CHAMPION, et al.,
Defendants.

No. 94-C-1079-K

FILED

SEP 21 1995

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

ORDER

Plaintiff, a state prisoner appearing pro se, brings this action pursuant to 42 U.S.C. § 1983, alleging that prison officials charged him with multiple, false misconducts and failed to adequately investigate the charges in violation of his due process rights. Plaintiff also alleges that his due process rights were violated when his disciplinary hearings were held before a single disciplinary officer and not a three-member committee. Defendants have moved to dismiss or, in the alternative, for summary judgment on the basis of the court-ordered Martinez report. Plaintiff has objected. For the reasons stated below, the Court concludes that Defendants' motion for summary judgment should be granted.

I. UNDISPUTED FACTS

The following facts are undisputed.

1. On March 22, 1993, several inmates at DCCC were involved in a major disturbance and fight which left one of the inmates, inmate Foye, severely injured. (Special Report, Attachment B.)
2. Plaintiff received three misconducts: Battery, Menacing,

and Individual Disruptive Behavior. The Battery misconduct was a result of Plaintiff's involvement in the assault on inmate Foye. As some inmates attacked inmate Foye, Plaintiff held other inmates at bay with a homemade knife. (Special Report, Attachment B at 1 and Confidential Attachment C.) The second misconduct arose after the assault on inmate Foye but before the facility was locked down, when Plaintiff threatened another inmate with the homemade knife. (Special Report, Attachment B at 15 and Confidential Attachment C.) The third misconduct arose instead while Officer Andrews escorted Plaintiff to custody and Plaintiff broke loose and ran in an attempt to escape from the Officer's custody. (Special Report, Attachment B at 35-36.)

3. On April 5, 1993, Plaintiff received a disciplinary hearing on each of the three charges and was found guilty. Punishment was assessed at thirty days of disciplinary segregation on each of the charges.

4. On April 23, 1993, Plaintiff was transferred to Oklahoma State penitentiary (OSP), a maximum security facility, as he had four Class "A" misconducts on his record.

II. SUMMARY JUDGMENT STANDARD

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 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. 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

To determine if Plaintiff's procedural due process rights were violated in connection with the three misconducts and ninety days of disciplinary segregation, the Court must first determine whether he had a liberty or property interest with which the State has interfered. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). Because the Due Process Clause, itself, does not create a protected liberty interest in remaining in the general population, Plaintiff must show that state law created such an interest. See Hewitt v. Helms, 459 U.S. 460, 468-69 (1982).

The Supreme Court recently reformulated the test for determining whether a state law creates a protected liberty

interest. See Sandin v. Conner, 115 S.Ct. 2293 (1995).¹ In Sandin, the court abandoned the methodology established in Hewitt and Thompson and decided to return to the due process principles established in Wolff v. McDonnell, 418 U.S. 539 (1974) and Meachum v. Fano, 427 U.S. 215, 224-225 (1976).² Under Sandin, therefore, courts no longer examine the language of prison regulations to determine whether such regulations place substantive restrictions on an official's discretion. Rather, courts must focus on the particular discipline imposed and ask whether it "present[s] the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Sandin, 115 S.Ct. at 2301.³

¹ The Supreme Court's decision in Sandin applies retroactively to the instant case because the Court applied the rule announced in Sandin to the parties in that case. See Harper v. Virginia Dep't of Taxation, ___ U.S. ___, 113 S.Ct. 2510, 2517 (1993) (no court may refuse to apply rule of federal law retroactively once the Court applies it to the parties before it).

² Under Hewitt, in order for a state law establishing procedural guidelines for prisons to create a liberty interest, the law must use "explicitly mandatory language" that forbids certain outcomes absent "specific substantive predicates." Hewitt, 459 U.S. at 472. This approach focused on the language of the regulation rather than the nature of the deprivation and "encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges." Sandin, 115 S.Ct. at 2299. The methodology of Hewitt has discouraged states from codifying prison management procedures and involved federal courts in the day-to-day management of prisons. Id.

³ In Sandin, the plaintiff was involved in an altercation with a prison guard and was charged with misconduct. The plaintiff appeared before an adjustment committee, which refused his request to present witnesses at the hearing. The committee found him guilty and sentenced him to 30 days disciplinary segregation. Nine months later, an administrator found one of the charges against the plaintiff unsupported and expunged his record of that charge. Id. at 2295-96. Alleging a deprivation of due process related to the disciplinary hearing, the plaintiff sued for injunctive relief,

In the case at hand, Defendants placed Plaintiff in segregation for ninety days as a result of three misconducts. Based on the Supreme Court's decision in Sandin, the Court finds that there is no liberty interest at issue. The deprivation allegedly suffered by Plaintiff, 90 days in disciplinary segregation, is not of the "atypical" or "significant" kind that the Supreme Court has determined constitute deprivations in which a state might create a liberty interest. See Mujahid v. Meyer, 59 F.3d 931, 932 (9th Cir. 1995) (fourteen days in disciplinary segregation as a result of a misconduct did not implicate any liberty interest pursuant to Sandin). The conditions in disciplinary segregation are not dramatically different from what prisoners expect to encounter in the general population. Since no liberty interest was implicated, the Court finds that Plaintiff was

declaratory relief and damages. Id. The Ninth Circuit Court of Appeals found that plaintiff had a liberty interest in remaining free from disciplinary segregation based on a prison regulation that "instructs the committee to find guilt when a charge of misconduct is supported by substantial evidence." Id. at 2296-97.

The Supreme Court applied its new test and reversed. The Court found that segregated confinement of inmates did not implicate the Due Process Clause because it did not "present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Id. at 2301. The Court noted that disciplinary segregation conditions were substantially similar to those faced by inmates in administrative segregation and protective custody. Id. Therefore, plaintiff's confinement "did not exceed similar, but totally discretionary confinement in either duration or degree of restriction." Id. The Court further noted that even inmates in the general population at the prison in question are subject to significant amounts of "lockdown time." Id. Because the plaintiff's confinement for 30 days in disciplinary segregation "did not work a major disruption in his environment," the Court held that the prison regulation had not created a constitutionally protected liberty interest. Id. at 2301-02.

not even entitled to a hearing. See Brown v. Champion, 1995 WL 433221 (10th Cir. July 24, 1995) (unpublished opinion) (inmate was not entitled to hearing because no constitutional liberty interest was implicated either by his ten-day disciplinary segregation or by his reclassification by prison officials).

In any event, Plaintiff's allegations based on the falsity of the charges and the impropriety of Defendants' involvement in the disciplinary hearing do not amount to a constitutional violation. See Freeman v. Rideout, 808 F.2d 949, 951-52 (2d Cir. 1986) (allegation that false evidence was planted by prison guard does not state a constitutional claim where procedural due process protections are provided), cert. denied, 485 U.S. 982 (1988). Plaintiff "has no constitutionally guaranteed immunity from being falsely or wrongly accused of conduct which may result in the deprivation of a protected liberty interest," see id. at 951, and Plaintiff has not alleged that the allegedly false accusation infringed on any of his substantive constitutional rights. See Franco v. Kelley, 854 F.2d 584, 589 (2d. Cir. 1988) (claim that prison guard falsely accused inmate of insubordination in retaliation for the inmate's cooperation with authorities investigating abuse of inmates stated a claim); see also Jones v. Couglin, 45 F.3d 677, 679-80 (2d Cir. 1995); Payne v. Axelrod, 871 F.Supp. 1551, 1556 (N.D.N.Y. 1995).

Moreover, "some evidence" existed to support the conclusion of the disciplinary officer that Plaintiff was guilty of Battery, Menacing, and Individual Disruptive Behavior. See Superintendent.

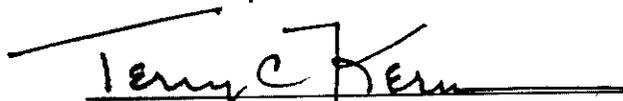
Mass. Correctional Inst. v. Hill, 472 U.S. 445, 454-55 (1985) (once an inmate receives all the process due under Wolff the findings of the prison disciplinary board need only be supported by "some evidence in the record"). The "some evidence" standard does not require proof with certainty, proof beyond a reasonable doubt, or even proof by a preponderance of the evidence. All that is necessary is "any evidence in the record that could support the conclusion reached by the disciplinary board." Hill, 472 U.S. 445, 455-56 (1985).

Lastly, the Court finds nothing in Wolff to preclude the use of a single neutral hearing officer, and Plaintiff does not argue the officer lacked neutrality.

III. CONCLUSION

Accordingly, Defendants' motion for summary judgment (docket #4-2) is granted and their motion to dismiss (docket #4-1) is denied as moot.

SO ORDERED THIS 21 day of September, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 LEE OWENS aka CLIFFORD LEE)
 OWENS; STATE OF OKLAHOMA ex rel)
 OKLAHOMA TAX COMMISSION;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)

ENTERED ON FILE
DATE SEP 22 1995

Civil Case No. 95-C 80K

Defendants.

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 21 day of Sept, 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 Defendant, LEE OWENS aka CLIFFORD LEE OWENS, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, LEE OWENS aka CLIFFORD LEE OWENS will hereinafter be referred to as ("LEE OWENS"). Further, the Defendant, LEE OWENS, is a single, unmarried person, as stated on the Affidavit filed of record on June 28, 1995 by the Defendant, LEE OWENS.

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

COMPANY a mortgage dated April 8, 1982, covering the above-described property. Said mortgage was recorded on April 14, 1982, in Book 4606, Page 1943, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 15, 1987, Charles F. Curry Company assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on June 26, 1987, in Book 5034, Page 19534, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 28, 1987, the Defendant, LEE OWENS, 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 November 29, 1988 and April 20, 1990.

The Court further finds that the Defendant, LEE OWENS, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, LEE OWENS, is indebted to the Plaintiff in the principal sum of \$56,989.34, plus interest at the rate of 15.5 percent per annum from October 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 \$1.00 which became a lien on the property

The Court being fully advised and having examined the court file finds that the Defendant, LEE OWENS, acknowledged receipt of Summons and Complaint via certified mail on May 26, 1995; and the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint via certified mail on January 27, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on February 9, 1995; that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, filed its Answer on March 7, 1995; and that the Defendant, LEE OWENS, has failed to answer and his default has therefore been entered by the Clerk of this Court.

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

Lot Eighty-three (83), of the Resubdivision of Lots 1,2, 3, 4, 5, 16, 17, 18, 19, and 20, Block 1, and Lot 1, Block 2, RODGERS HEIGHTS SUBDIVISION, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on April 8, 1982, the Defendant, LEE OWENS, executed and delivered to CHARLES F. CURRY COMPANY his mortgage note in the amount of \$24,900.00, payable in monthly installments, with interest thereon at the rate of fifteen and one-half percent (15.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, LEE OWENS, executed and delivered to CHARLES F. CURRY

as of June 23, 1994; and a lien in the amount of \$1.00 which became a lien as of June 25, 1993. 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 in the amount of \$3,707.36, which became a lien as of November 5, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, LEE OWENS, is 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 Defendant, LEE OWENS, in the principal sum of \$56,989.34, plus interest at the rate of 15.5 percent per annum from October 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.5% 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 \$2.00, 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 \$3,707.36 for a tax warrant, plus the costs and interest.

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

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

First:

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

Second:

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

Third:

In payment of the Defendant, STATE OF OKLAHOMA ex rel
OKLAHOMA TAX COMMISSION, in the amount of \$3,707.36,
plus accrued and accruing interest, for state taxes
currently due and owing.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa
County, Oklahoma, in the amount of \$2.00, 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.

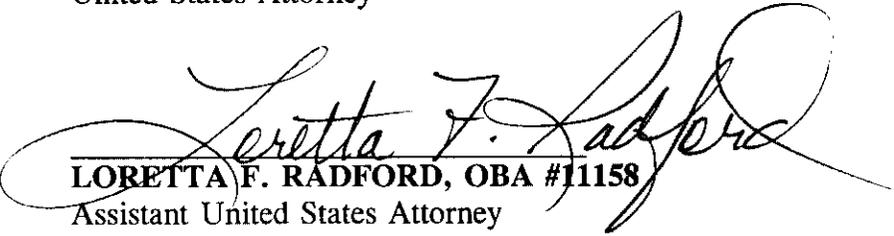
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from
and after the sale of the above-described real property, under and by virtue of this judgment
and decree, all of the Defendants and all persons claiming under them since the filing of the
Complaint, be and they are forever barred and foreclosed of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



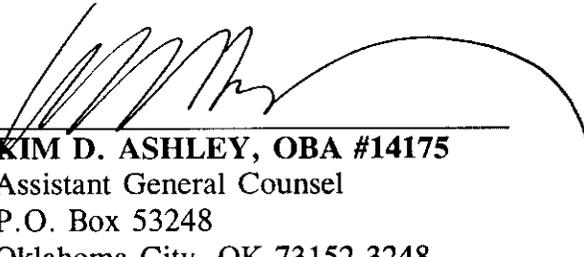
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Judgment of Foreclosure
Civil Action No. 95-C 80K

F I L E D

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

SEP 21 1995

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

MICHAEL R. HATFIELD,
Plaintiff,

§
§
§
§
§
§
§
§

vs.

Case No. 95-C-519K

LABELS ONE, INC.,
Defendant.

ENTERED ON DOCKET
DATE SEP 22 1995

ORDER OF DISMISSAL PURSUANT TO FRCP RULE 41 (a) (1)

COMES ON FOR CONSIDERATION the parties' stipulation pursuant to Federal Rules of Civil Procedure Rule 41(a)(1) for dismissal of Plaintiff's Petition which had been removed to this court from the District Court for Tulsa County. The court having considered the stipulation reached by all counsel as signified by their signatures thereto, hereby dismisses without prejudice Plaintiff's cause of action.


UNITED STATES DISTRICT COURT JUDGE

BRIGGS, SMITH & CATCHELL
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Tulsa, OK 74103
(918) 599-7730
ATTORNEYS FOR PLAINTIFF

11

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

FILED
SEP 20 1995

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

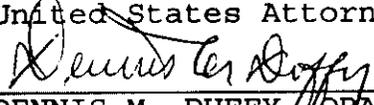
RALPH E. GRAY, formerly d/b/a)
GRAYCO COMPANY,)
)
Plaintiffs,)
)
v.)
THE UNITED STATES OF AMERICA)
and)
JERRY McCULLEY)
Defendants.)

Civil No. 95-C-558-C

ENTERED ON DOCKET
DATE SEP 21 1995

**JOINT STIPULATION DISMISSING ACTION AGAINST
DEFENDANT, JERRY McCULLEY**

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties stipulate that the complaint against Jerry McCulley is dismissed with prejudice, each party to bear their own litigation expenses, including costs and attorneys' fees, as to the portion of the lawsuit pertaining to Jerry McCulley.

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formerly d/b/a Grayco
Company

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

FILED

RONALD S. AKERS,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 Commissioner of Social Security,²)
)
 Defendant.)

SEP 20 1995

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

Case No: 94-C-627-W

ENTERED ON DOCKET

DATE SEP 21 1995

JUDGMENT

Judgment is entered in favor of the Plaintiff, Ronald S. Akers, in accordance with this court's Order filed September¹ 20, 1995.

Dated this 20th day of September, 1995.



JOHN LEO WAGNER

UNITED STATES MAGISTRATE JUDGE

²Effective 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. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

F I L E D

SEP 20 1995

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

RONALD S. AKERS,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

Case No. 94-C-627-W

ENTERED ON DOCKET
DATE SEP 21 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.²

¹Effective 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. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

² 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.

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for lifting more than 20 pounds at a time or lifting/carrying more than 10 pounds frequently, standing or walking more than 6 hours in the course of an 8-hour workday, and doing more than occasional stooping due to pain and low energy level. He concluded that claimant was unable to perform his past relevant work as a foreign car parts salesman, but had the residual functional capacity to perform the full range of light work. He noted that claimant became 50 years old in October 1985, which is defined as a person approaching advanced age, had completed the 11th grade, and did not have any acquired work skills which were transferable to other work. Applying the medical-vocational guidelines, the ALJ concluded that he was not disabled under the Social Security Act at any time through March 31, 1987.

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

- (1) The ALJ's decision is not supported by substantial evidence because he did not properly evaluate claimant's medical impairments, including mental problems, fatigue, diabetes, and morbid obesity.

Mathews, 574 F.2d 359 (6th Cir. 1978).

³ 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).

- (2) The ALJ erred in relying on the medical-vocational guidelines to determine that claimant was not disabled.

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 claims he has been disabled since April 12, 1982 because of diabetic neuropathy and clinical depression (TR 12, 122). He was last insured for social security benefits on March 31, 1987, so he is required to establish that he became disabled on or before that date (TR 12).

Claimant received psychiatric counseling at Kaiser Medical Center in California from April 12, 1982 until August 30, 1985 (TR 203-225). He was given supportive counseling and medication for depression, a decrease in his energy level, an inability to lose weight, and headaches, during which time he reported an improvement in his lethargy and depression (TR 215-222). On July 18, 1982, the claimant was feeling better since he had been on vacation, hopeful about his legal matters, and had the urge to go back to work and keep busier (TR 215).

Claimant was not seen again until May 13, 1983, when he complained of severe obesity, depression, and some suicidal thoughts (TR 213-214). He was diagnosed as suffering from a major depression, single episode, together with psychological factors affecting his physical condition and passive features (TR 213). The doctor decided not to try medications, but started claimant in the diet clinic, suggested that he join OverEaters Anonymous, and did some work on "helping him differentiate between violent fantasies and realities of it, and [giving] him permission to have the fantasies without the degree of guilt

that he has previously experienced." (TR 213).

Claimant was counseled from May 26, 1983 until January 4, 1984, during which time he was described as having some feelings of depression without suicidal tendencies, outbursts of aggressive and angry behavior, and conflicts with his wife (TR 208-212). He was placed in an assertion group and stated he had "handled several situations quite assertively and has overcome his anger and withdrawal inclinations in a couple of situations." (TR 208).

Claimant was seen again on May 23, 1985, due to problems at work when he tore a door off its hinges and threw it at a coworker (TR 206). The doctor noted that he had taken the MMPI, a psychological personality inventory, which showed he had exaggerated his symptoms (TR 206). He was seen three times in 1985, and on the last visit on May 23, 1985 he discussed moving to Oklahoma and starting to work again (TR 204-206). There is no record that he was hospitalized or treated for psychiatric complaints anytime between August, 1985 and April, 1987 and his comment on May 23, 1985 suggested he went back to work during this period. At the end of 1987, his insurance benefits ended.

There is no evidence that claimant received psychiatric care after 1987, except a letter from Dr. David Trobaugh, who had examined claimant once and reviewed his medical records (TR 238-240).

The doctor concluded:

It is my medical opinion, based on both my examination of Mr. Akers and the examination of his medical records from April 12, 1982, through August 30, 1985, that Mr. Akers is suffering from a severe, recurrent depression. His psychiatric difficulties, paranoia and labile mood, are of such a pervasive nature that his personal life, social life, and his ability to function in the work place have been severely affected. He is unlikely to be able to

function with co-workers or meet the demands associated with the competitive work place due to this paranoia and labile mood. He has been unable to either find or keep a job since 1980, and, in my opinion, has demonstrated a failure to adapt to work settings.

His inability to keep a job or to find new work increased his level of anxiety, stress and frustration, which in turn increased his degree of depression, paranoia, and anger. As a result, he has created a very isolated, structured environment for himself where only his wife and her parents are accepted. He trusts no one else and will not allow anyone else to enter into his very small, tightly controlled micro-environment. In this manner, Mr. Akers keeps the Godless, lying, thieving world from doing him any more harm. This all goes on in spite of several years of psychotherapy and of having tried several different psychotropic medications.

It is my opinion that Mr. Akers suffers from a chronic mental illness, the impairment of which has been documented since 1982. This illness has resulted in grossly impaired social functioning, as well as the inability to function under the demands of a competitive work place.

(TR 239-240).

Dr. Thomas Goodman, a psychiatrist, reviewed all of claimant's medical records and responded to interrogatories by the ALJ on September 1, 1993 (TR 245-250). He concluded as follows:

There is enough evidence to establish that the claimant has probably met the "A" criteria of the affective disorders listing between 1982 and 1985 and possibly may meet the "A" criteria of the same listing at this time. However, there is no objective evidence that he has ever met the "B" criteria of this listing at any time, at least for any appreciable period of over two or three days.

...

It would appear from the medical records that for unclear periods of time between 1982 and 1985, as well as at the time of the claimant's last evaluation in August of 1993, he would have some psychological impairments. These would include suspiciousness and anger in his relationship to people in authority, and difficulty in controlling his aggressive impulses. These symptoms appear to have been easily treatable through the appropriate psychiatric treatment including medications.

...

It is not reasonable to believe that psychological pain has been a significant factor limiting this claimant's ability to work.

(TR 248-249).

There is evidence that claimant has a long history of diabetes which has not been controlled by medication, resulting in peripheral neuropathy (TR 177, 180, 194, 197, 201-202, 213). He also is obese and his weight was consistently over 300 pounds between 1985 and 1987 (TR 159, 169, 171, 176-178, 197). The weight caused him to have difficulty breathing and talking (TR 147, 214). Dr. Crosby, his treating physician in 1987, wrote on April 6, 1992, as follows:

Ron Akers is an unfortunate gentleman with severe diabetes complicated by diabetic polyneuropathy. He also suffers from depression and has had episodes of hypertension. He does have angina which is currently well controlled on Procardia. His symptoms are severe to the point that he should be considered disabled and it would be unreasonable to expect him to do any sort of work-related activity outside of sitting and the most sedentary of jobs.

(TR 194).

While the ALJ recognized that claimant suffered from hypertension, diabetes and related neuropathy, an affective disorder, and obesity during the relevant period, he concluded that claimant retained the residual functional capacity to do the full range of light work (TR 23-26). When he concluded that claimant could not perform his past relevant work, the burden shifted to him to show that other jobs existed in significant numbers in the national economy which claimant could perform consistent with his medically determinable impairments, functional limitations, age, education, and work experience. The ALJ did not seek the assistance of a vocational expert, but applied the

medical-vocational guidelines ("grids") and concluded claimant was not disabled.

The grids contain tables of rules which direct a determination of disabled or not disabled on the basis of a claimant's residual functional capacity, age, education, and work experience. 20 C.F.R. Pt. 404, Subpt. P, App. 2. "Under the Secretary's own regulations, however, 'the grids may not be applied conclusively in a given case unless the claimant's characteristics precisely match the criteria of a particular rule.'" Frey v. Bowen, 816 F.2d 508, 512 (10th Cir. 1987) (quoting Teter v. Heckler, 775 F.2d 1104, 1105 (10th Cir. 1985) (other citations omitted)). A mismatch may occur because of a particular exertional or nonexertional impairment, or a particular combination of impairments.

"Residual functional capacity" is defined by the regulations as what the claimant can still do despite his or her limitations. Davidson v. Secretary of Health & Human Servs., 912 F.2d 1246, 1253 (10th Cir. 1990). The Secretary has established categories of sedentary, light, medium, heavy, and very heavy work, based on the physical demands of the various kinds of work in the national economy. 20 C.F.R. § 404.1567. "Light work" involves "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds [A] job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls." 20 C.F.R. § 404.1567(b).

An ALJ may rely conclusively on the grids if he finds that the claimant has no significant nonexertional impairment, can do the full range of work at some RFC level on a daily basis, and can perform most of the jobs in that RFC level; each of these findings must be supported by substantial evidence. Thompson v. Sullivan, 987 F.2d 1482, 1488

(10th Cir. 1993).

There is merit to claimant's contention that the ALJ erred in relying on the grids. There is substantial evidence that claimant had nonexertional impairments which would limit his ability to do certain jobs during the relevant time period, particularly if his physical problems are considered in combination. While the ALJ concluded that claimant's subjective complaints of pain, low energy, and depression were not sufficiently credible to support a finding of disability (TR 25), this credibility determination was just a step on the way to the ultimate decision. *Id.* at 1491. The ALJ had to also determine whether claimant had an residual functional capacity level and could perform the full range of work at that level on a daily basis and most of the jobs at that level. *Id.*

There is not substantial evidence that claimant could do the full range of light work, which requires a good deal of walking or standing⁴. In addition, many of the jobs involve dealing with people in the work place, and doctors have found claimant to be suspicious of people and at times hostile to them. Generally, if the claimant suffers from nonexertional impairments that limit his ability to perform the full range of work in a specific guideline category, the ALJ is required to utilize testimony of a vocational expert. Reed v. Sullivan, 988 F.2d 812, 816 (8th Cir. 1993). The ALJ should have called a

⁴ The court assumes that the ALJ refused to recognize the impact of claimant's obesity on his ability to stand and walk for long periods because the condition was remediable. The ALJ stated: "the medical documents do not suggest a medical disorder preventing the claimant from losing weight, raising the possibility of failure to comply with prescribed treatment." (TR 24). Disability benefits may be denied when a claimant, without good reason, fails to follow a prescribed course of treatment that could restore his ability to work. McCall v. Bowen, 846 F.2d 1317, 1319 (11th Cir. 1988). Admittedly, claimant's physicians advised him to lose weight, but no evidence has been presented suggesting that he refused to follow a plan of prescribed treatment. A physician's recommendation to lose weight does not necessarily constitute a prescribed course of treatment, nor does a claimant's failure to accomplish the recommended change constitute a refusal to undertake such treatment. *Id.*; Johnson v. Secretary of Health & Human Servs., 794 F.2d 1106, 1113 (6th Cir. 1986). Claimant's obesity, of itself, does not justify the conclusion that he has refused treatment or the consequent denial of disability benefits. McCall, 846 F.2d at 1319. Further findings of fact and conclusions of law are required before the Secretary may determine that a claimant has refused treatment. *Id.*

vocational expert to determine what **limitation** claimant's acknowledged physical and mental problems in combination might **impose** on his capacity to do light work. When a claimant has more than one severe **impairment**, 42 U.S.C. § 423(d)(2)(C) requires the ALJ to consider the combined effect of the **impairments** in making a disability determination. The ALJ's impression that plaintiff **exaggerated** his symptoms is not substantial evidence, by itself, to support the finding that **plaintiff** can perform work at the light work level. While he submitted interrogatories to Dr. Goodman, a psychiatric expert, regarding claimant's mental impairment, the **doctor** expressed no opinion regarding the physical limitations which might affect claimant's residual functional capacity.

The ALJ erred in relying **conclusively** on the grids because the required underlying findings were not supported by **substantial evidence**. Where exertional limitations prevent the claimant from doing the full range of work specified in his assigned residual functional capacity, or where nonexertional **impairments** are also present, the grids alone cannot be used to determine the claimant's ability to perform alternative work. *Id.* at 1492. If the claimant has both exertional and **nonexertional** impairments, the ALJ must use the grids only as a framework to consider how **much** his work capability is diminished in terms of any types of jobs that would be **contraindicated** by nonexertional limitations. *Id.*

This case is remanded for **testimony** by a consultative medical expert and a vocational expert to determine what **limitation** claimant's physical and mental problems in combination might impose on his **ability** to do light work.

Dated this 19th day of September, 1995.

A handwritten signature in cursive script, appearing to read "John Leo Wagner", written over a horizontal line.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:akers

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

FILED

SEP 20 1995

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

JUDITH BLANKENSHIP,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 COMMISSIONER OF SOCIAL)
 SECURITY,¹)
)
 Defendant.)

Case No. 94-C-43-W

ENTERED ON DOCKET
DATE SEP 21 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

¹Effective 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. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

the meaning of the Social Security Act.²

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform work-related activities, except for work involving lifting more than 20 pounds occasionally or 10 pounds frequently and changing positions. He concluded that claimant's past relevant work as a security guard or waitress did not require the performance of work-related activities precluded by the above limitations, so she was not prevented from performing her past work. Having determined that claimant's impairment 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 that the ALJ's decision is not supported by substantial evidence because he did not consider her impairments in combination.

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

² 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).

³ 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).

Claimant alleges that she has been **disabled** since September 28, 1989 (TR 65). She complains of a multitude of problems, **including** foot and leg ailments and left side and chest wall pain (TR 92). Much of the **medical** record pertains to medical treatment claimant received prior to September of 1989.

On September 1, 1989, claimant **saw** a doctor complaining of chest wall strain and spasm resulting from lifting at work (TR 239). There is no record of further treatment and chest x-rays taken on April 22, 1993 **showed** that her heart and lungs were normal (TR 311). On June 20, 1990, she was **seen at the hospital** for an injury to her left wrist and contusions on her arm, and x-rays **showed** "no significant bone, joint, or soft tissue abnormality" (TR 233-234). Follow-up **examinations** showed steady improvement (TR 236-238). On August 27, 1990, a **doctor examined** her swollen wrist and stated that a CAT scan would be run, but he noted **that she** had continued to work in spite of the injury (TR 235).

On February 3, 1991, claimant **was** seen for an injury to her left foot, but x-rays showed no fracture or dislocation (TR 260-261). On May 18, 1991, she was hit by a car, and the doctor concluded there was a **fracture** of the right fibular head (TR 126, 264-265). Claimant telephoned the clinic **ten days later** complaining of knee tenderness and swelling and requested additional penicillin, but **the doctor** told her that her symptoms were normal and refused her request (TR 126). On October 10, 1991, she was examined with complaints of neck and head pain after **she** alleged being involved in another car accident, but x-rays of her skull, cervical spine, **and left shoulder** were all normal (TR 134).

On February 18, 1992, x-rays showed no bony abnormality in the left tibia or fibula after claimant stepped into a hole and cut her leg (TR 129, 269). She saw her treating physician a few weeks after her injury to combat an infection, but the medical report indicated that her condition on leaving the clinic was good (TR 285). On April 13, 1992, the claimant complained about a lump on her leg and chest, knee, and neck pain, and the doctor concluded she had "possible fibromyalgia and knee crepitus." (TR 154). On May 11, 1992, claimant called her doctor to ask that he provide her with a letter to submit to the food stamp office stating that she was unable to work because of her leg injury, but he refused her request (TR 153).

On May 26, 1992, plaintiff was examined to address complaints of pain in both legs resulting from her 1991 car accident (TR 160). Her doctor found no deformity of her leg or new injury and prescribed Extra Strength Tylenol and Darvocet. On November 28, 1992, she was seen at the hospital alleging that she had fallen and injured her feet, ankles, and head, but x-rays of her right foot and left ankle were completely normal (TR 324-327).

A consultative examination of claimant was done on April 22, 1992, by Dr. Richard Cooper (TR 148-150). She complained of left chest wall pain and low back, shoulder, neck, and left foot pain (TR 148). His examination of her heart revealed a regular rhythm without murmurs (TR 149). Except for some reduced light touch sensation in her left foot and ankle, plaintiff's lower extremities were normal and she was found to walk with a good gait and without assistive devices (TR 149). Neurological examination revealed that plaintiff had full and equal biceps, triceps, shoulder shrug and grip strengths, her biceps, triceps and radial reflexes were equal, and she had restricted abduction of her shoulders

and osteoarthritis in some of her fingers but full range of motion in her hips, ankles, wrists, and elbows (TR 149). Straight leg raising tests were negative, and she had adequate leg strength and knee structure (TR 150). The doctor concluded:

In SUMMARY then, this lady has had several injuries and continues to have some restriction of motion of the cervical and thoracolumbar spine and restricted abduction of the two shoulders and some discomfort in the right upper extremity when doing the strengths test, although I believe the gross strength is equal. Some more leg discomfort in the both forearms. There does seem to be some osteoarthritis in some of the fingers, as listed above. She does have tenderness of the left lower ribs. She believes that's secondary to one of her on-the-job injuries or the motor vehicle injury, I don't remember which. Dizzy spells, which we did not find out much about and rather frequent headaches. In my opinion, she would be impaired at activities that require prolonged standing, walking, bending, twisting, lifting.

(TR 150).

There is no merit to claimant's contention that the ALJ "missed the x-rays, the hospitalizations, the emergency room visits, and the bruises, polyps, scoliosis, wounds, and other physical injuries reported in the 150 pages of medical records." (Plaintiff's First Brief in Support of Remand, Docket #11, pg. 1). The records clearly show that claimant has sustained several injuries, but under 20 C.F.R. § 404.1505(a) disability is defined as "the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." (emphasis added). It is clear that none of claimant's problems have lasted for a continuous twelve-month period. X-rays have only shown normal organs and bones, and no treating doctors have found her unable to work.

Claimant argues that the ALJ, in determining that her testimony regarding the extent

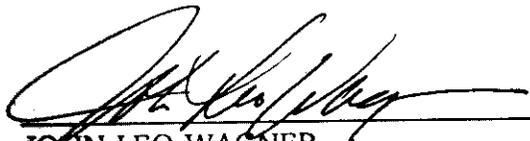
of her pain was not credible, relied on "one single piece of paper," the treating physician's note which stated he denied a request to write a letter stating claimant was unable to work to provide to the food stamp office. (Plaintiff's First Brief in Support of Remand, Docket #11, pg. 4). There is absolutely no merit to this claim. Subjective complaints must be evaluated both in light of the available medical evidence and plaintiff's credibility. Ellison v. Sullivan, 929 F.2d 534, 537 (10th Cir. 1990).

The ALJ reviewed the medical records, the nature of her complaints, aggravating factors, medications taken, treatment, daily activities, and functional limitations in reaching his conclusion that claimant's testimony was not credible and was "overstated." (TR 19-21). Courts generally treat credibility determinations made by an ALJ as binding upon review. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1599 (10th Cir. 1992). The ALJ then relied on the testimony of a vocational expert to conclude that claimant was able to do her past relevant work (TR 22, 55-62).

Claimant also contends that the ALJ found that she could perform her past relevant work because he "apparently believed" that written statements in the record from friends of plaintiff were false. (Plaintiff's First Brief in Support of Remand, Docket #11, pg. 7). The record contains a statement, dated June 15, 1993, from Alice Bruns Lyn that claimant had a "history of falls for the past year or so" and that she cut her leg when she stepped in a water meter hole (TR 328). A second statement from Edith Sneed dated June 16, 1993 states that claimant cannot work because she had several falls (TR 329). These statements only reiterate what is established in the medical records, that claimant suffered a series of injuries which, even when considered in combination, were not disabling.

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

Dated this 19th day of September, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:blankens

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

FILED

JUDITH BLANKENSHIP,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
Commissioner of Social Security,¹)
)
Defendant.)

SEP 20 1995

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

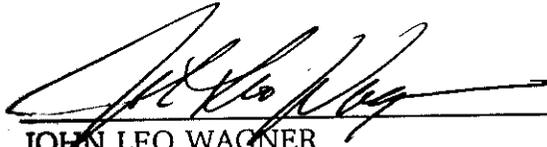
Case No: 94-C-43-W

ENTERED ON DOCKET
DATE SEP 21 1995

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed September 20, 1995.

Dated this 20th day of September, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective 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. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

15

FILED

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

SEP 20 1995

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

DENNIS W. CLARK,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER, Commissioner of)
 Social Security,¹)
)
 Defendant.)

No. 94-C-159-J

ENTERED ON DOCKET
DATE SEP 21 1995

ORDER

Plaintiff Dennis W. Clark, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Secretary of Health and Human Services denying Social Security benefits.² Plaintiff contends that the Secretary erred as a matter of law because: (1) the Secretary failed to follow the correct legal standard in evaluating Plaintiff's complaints of pain, and (2) the Secretary failed to consider all relevant evidence in determining that Plaintiff could perform his past relevant work.

¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

² Plaintiff filed an application for disability insurance benefits claiming disability due to lower back pain. The application was denied initially and upon reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held December 3, 1991. By order dated January 27, 1992, the ALJ determined that although Plaintiff could not perform his past relevant work, he was not disabled and was not entitled to disability insurance. *R. at 370*. The Plaintiff appealed the ALJ's decision, and on December 2, 1992, the Appeals Council remanded the case to the ALJ for additional consideration of evidence submitted by Plaintiff's treating physician. *R. at 388*. On October 22, 1993, following a second hearing, the ALJ denied benefits, finding that Plaintiff could perform his past relevant work. *R. at 21*. Plaintiff's second appeal to the Appeals Council was denied on January 4, 1994. *R. at 18*.

A decision by the Secretary will be upheld on appeal if it is supported by substantial evidence and follows applicable legal standards. See Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). For the reasons outlined below, the Court affirms the decision of the Secretary.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on July 10, 1944, and was 49 years old at the time of his second hearing before the ALJ. *R. at 119*. Plaintiff has a high school diploma. *R. at 57*.

Plaintiff's past relevant work includes work as a construction worker and custodian. Plaintiff was a custodian until December 1987 when he injured himself. *R. at 60*. Plaintiff claims disability from December 18, 1987. *R. at 115*.

Plaintiff testified that he was no longer able to work because of lower back pain. *R. at 62*. According to Plaintiff, he initially injured his back in 1976, and reinjured it in 1979 and 1984. *R. at 67-68*. Plaintiff stated that he is able to sit for one to three hours, stand for fifteen to twenty (and perhaps forty) minutes, and walk about six to seven blocks (but has to rest about ten minutes after walking). *R. at 73, 98*. Although he believes he could lift ten pounds, he stated that he would feel it the next day and might not be able to stand. *R. at 81*.

Dr. William Shelton Dandridge, a board certified orthopedic surgeon testified at Plaintiff's second hearing. *R. at 103*. Dr. Dandridge testified that Plaintiff's medical

records reveal a diagnosis of grade one spondylolisthesis.³¹ *R. at 104.* Dr. Dandridge stated that "a spondylolisthesis of one degree is a very minimal slipping. . . ." *R. at 106.* According to Dr. Dandridge, although Plaintiff may experience some muscle spasms or discomfort, and should avoid heavy lifting, he should not experience spasms or discomfort on a continual basis. *R. at 106.* Dr. Dandridge believes Plaintiff retains the ability to lift 50 pounds occasionally, 25 pounds frequently, stand six out of eight hours and sit six out of eight hours. *R. at 105.*

Plaintiff's "treating" physician has been the Veterans Administration ("VA"). VA records indicate that Plaintiff's back has hurt since early childhood. *R. at 254.* Plaintiff was diagnosed with Grade I spondylolisthesis, and was referred to CHART (Comprehensive Health and Active Rehabilitation Training) for rehabilitation. *R. at 259, 260, 284.* Plaintiff's medical records also indicate that he suffers from bronchitis. *R. at 274.* The results of a myelogram (September 4, 1990) were reported as "unimpressive." *R. at 289.* Plaintiff's medical records also contain numerous references to Plaintiff's complaints of pain.

Plaintiff attended six of twelve CHART sessions, and according to CHART records, stopped attending because of his back pain. *R. at 242.* At the time Plaintiff was discharged from CHART (March 11, 1988), CHART reported that he was able to perform forty minutes in his work cycle (of mopping, walking, sweeping, dusting, vacuuming, and climbing), and that he was able to lift twenty pounds. *R. at 242.*

³¹ Spondylolisthesis is "a forward displacement or slipping of one of the bony segments of the spine over its fellow below, but usually the slipping of the fifth or last lumbar vertebra over the body of the sacrum." Spondylosis is "an abnormal fusion or growing together of two or more vertebrae." J.E. Schmidt, M.D. Attorneys' Dictionary of Medicine, 1995.

CHART notes that Plaintiff was "discharged at a physical demand level of sedentary light." *R. at 242*. In addition, Plaintiff required heat after his exercise due to his pain. *R. at 242*. A February 17, 1988 CHART evaluation reports that Plaintiff's numerical pain rating on a scale of 0-10, prior to the start of testing, was a "1." *R. at 243*.

On his Disability report, Plaintiff noted that a Dr. Shaddock had placed him on "light duty" and had informed him that "he should be employed in a capacity that does not involve straining his back." *R. at 149*.

Dr. Richard G. Cooper examined Plaintiff on February 28, 1991. *R. at 297*. Dr. Cooper noted that Plaintiff walked with a good gait within the confines of the office. *R. at 298*. Plaintiff's range of motion with respect to his cervical spine, knees, shoulders, ankles, wrists, elbows and fingers was described as full range. *R. at 298*. Dr. Cooper was unable to complete further tests because of Plaintiff's complaints of pain. "I feel it would [be] inappropriate for me to do any more because of the 'apparent' pain of this man." *R. at 299 (quotations in original)*. In his November 21, 1988 report, Dr. Cooper notes that all x-rays indicate that Plaintiff has some spondylolysis, and would be impaired in bending, twisting, and lifting. *R. at 247*.

Dr. Lawrence A. Reed examined Plaintiff in connection with Plaintiff's workers' compensation claims. In a letter dated April 28, 1989, Dr. Reed determined that Plaintiff had a 21.5% "whole man" impairment due to restricted motion of the lumbar spine. *R. at 347*. By letter dated July 15, 1988, Dr. Reed stated that Plaintiff was temporarily totally disabled since December 18, 1987, and "remains so for an

indefinite period of time into the future." *R. at 345.* Dr. Reed concluded that Plaintiff was totally disabled by letter dated July 30, 1991. *R. at 330.*

A Residual Functional Capacity Assessment, completed on December 1, 1988, indicated that Plaintiff could lift a maximum of fifty pounds, frequently lift 25 pounds, stand/walk for about six hours in an eight hour day, sit for about six hours in an eight hour day, and push and pull an unlimited amount. *R. at 184-85.* The doctor conducting the Assessment also noted that Plaintiff has lower back pain and spondylolisthesis in the lumbar area which limits Plaintiff's bending, stooping and flexion. *R. at 184-85.* A second Assessment, conducted on June 11, 1991 indicated similar results. *R. at 192-199.* The doctor also noted that Plaintiff complained of chronic back pain and had grade one spondylolisthesis, and that pain limited Plaintiff's stooping and crouching ability. *R. at 193, 195.* A third assessment on March 14, 1991, reported that Plaintiff retained the ability to lift a maximum of fifty pounds, frequently lift 25 pounds, stand/walk for about six hours in an eight hour day, sit for about six hours in an eight hour day, and push and pull an unlimited amount. *R. at 213.* The doctor also noted that Plaintiff's pain does not further limit his RFC. *R. at 214.*

Plaintiff attended an eight week truck driving school, and obtained a certificate in October 1989 for successful completion of the course. *R. at 366, 59.* Plaintiff testified that although he completed the training course, his "discomfort" or lower back and leg pain prevented him from working as a truck driver. *R. at 58-59.*

Plaintiff has taken varying medications. Plaintiff's September 25, 1991 medication form indicates that Plaintiff takes salsalate for back pain, amitriptyline for sleeping, diphenhydramine for allergies and methocarbamol as a muscle relaxer. Plaintiff's December 3, 1991 medication form states that Plaintiff takes ibuprofen and acetaminophen with codeine for his back pain. *R. at 367.*

Dr. William N. Harsha examined Plaintiff on May 17, 1993. Dr. Harsha noted Plaintiff's stand/walk limitations as approximately 45 minutes at a time for four hours (eight hour work day), and his sit limitations as four hours (eight hour work day). *R. at 410-11.* Dr. Harsha indicated that Plaintiff's ability to push/pull would be affected, and that Plaintiff would be unable to climb, stoop, kneel, balance, crouch, or crawl. *R. at 411.* Dr. Harsha concluded it was improbable that Plaintiff would successfully return to the labor market because of the amount of time that he had been out of work. *R. at 406.*

II. THE SEQUENTIAL EVALUATION PROCESS

The Secretary has established a five-step⁴¹ process for the evaluation of social security claims. See 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988). A claimant is disabled under the Social Security Act if:

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The ALJ's evaluation of Plaintiff's claim in this case terminated at step four of the sequential evaluation process. The ALJ determined that Plaintiff had the ability to perform his past relevant work.

III. STANDARD OF REVIEW

The Secretary's disability determinations are reviewed, on appeal, to determine if: (1) the correct legal principles have been followed, and (2) the decision is supported

⁴¹ Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal to or the medical equivalence of an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

by substantial evidence. See 42 U.S.C. § 405(g); Williams, 844 F.2d at 750. The Court, in determining whether the decision of the Secretary is supported by substantial evidence⁵¹ does not reweigh the evidence or examine the issues *de novo*. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993).

Plaintiff asserts only that the Secretary erred as a matter of law by not considering all of the evidence.

IV. REVIEW

Legal Standard: Evaluation of Pain

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that

⁵¹ Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

impairment are sufficiently consistent to require consideration of all relevant evidence.

Id. at 164.

Plaintiff asserts that the ALJ erred because although the record indicates a nexus exists between Plaintiff's complaints of pain and the medical evidence, the ALJ required proof that Plaintiff's pain was **disabling** before the ALJ would consider all of the evidence. However, the ALJ's opinion indicates that the ALJ did consider all relevant evidence.

Initially, the ALJ summarizes Luna and its requirements, the Plaintiff's medical record, the Plaintiff's testimony, and the testimony of the expert medical witness. *R. at 25-27*. In evaluating Plaintiff's complaints of pain, the ALJ notes that Dr. Reed, an examining physician,⁶¹ merely recorded Plaintiff's complaints of pain without providing additional substantiation or analysis. *R. at 28, 29*. The ALJ additionally considered the medical records from the V.A., but noted that a CT scan was read to show no impingement, Plaintiff's records indicated no atrophy, Plaintiff was observed to have a normal gait in Dr. Cooper's office, and generally, the Plaintiff's medical records indicated a lack of disabling pain. *R. at 28-29*.

Plaintiff asserts that the ALJ did not adequately consider Plaintiff's testimony that Plaintiff experiences sharp pain in his back and has to lie down to seek relief from the pain. However, the mere existence of pain is insufficient to support a finding of disability, the pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802,

⁶¹ The ALJ identifies the V.A. as Plaintiff's treating physician. Dr. Reed, who evaluated Plaintiff with respect to Plaintiff's workers' compensation claims, is identified as an examining physician.

807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment."). Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

In this case, the ALJ indicated Plaintiff's testimony regarding his pain was considered, but that Plaintiff's pain was not disabling. *R. at 27, 29*. Plaintiff was able to attend and complete an eight week truck driving course. *R. at 58-59, 366*. At least three RFC Assessments indicated that the Plaintiff's RFC was medium.⁷¹ *R. at 184-85, 192-99, 213-14*. During Plaintiff's rehabilitative work at CHART, Plaintiff indicated that the pain he was experiencing on a 0-10 scale, prior to the start of the training, was "1." *R. at 243*. In addition, the ALJ separately summarized the testimony of Dr. Dandridge, who testified that Plaintiff's level of spondylolisthesis (grade one) would not cause pain on a continuous basis. *R. at 27*.

Consequently, the record indicates that the ALJ did examine the relevant evidence related to Plaintiff's complaints of pain. However, the ALJ determined that Plaintiff's testimony with respect to his pain was credible only to the extent that it was consistent with a residual functional capacity of medium, and that the medical

⁷¹ The ALJ determined that Plaintiff retained the RFC to perform medium work (based in part on three RFC assessments, and the testimony of Dr. Dandridge). Some evidence in the record indicates that Plaintiff retained a RFC consistent with light or sedentary work. Although Plaintiff did not appeal this issue, at Plaintiff's first hearing, the ALJ posed several hypotheticals to the vocational expert, and included such limitations as: sedentary work, low back pain, and limited bending or twisting ability. The vocational expert concluded that such an individual would be able to engage in work in the national economy. *R. at 81-84*.

evidence, although indicating that Plaintiff did suffer some pain, did not support a finding that Plaintiff had disabling pain. *R. at 27-29.*

Plaintiff additionally asserts that the ALJ failed, as a matter of law, by refusing to consider Plaintiff's pain in determining that Plaintiff retained the residual functional capacity to perform medium work. As discussed above, the ALJ's opinion indicates that the ALJ did consider Plaintiff's testimony and the medical evidence relating to Plaintiff's pain in determining Plaintiff's residual functional capacity.

Plaintiff alleges that the ALJ erred as a matter of law because the ALJ failed to consider all of the medical records of Doctors Reed, Cooper, and Harsha. Once a nexus is established, an ALJ must consider all relevant evidence. However, an ALJ must also weigh the evidence which is considered.

The ALJ's summary of the evidence indicates that the testimony of Dr. Reed and Dr. Cooper was considered. The ALJ noted, with respect to Dr. Reed, that he was a non-treating physician.⁸¹ In addition, the ALJ identifies Dr. Reed's opinion as "brief, conclusory and restates the claimant's allegations of pain without any definitive diagnosis based on a physical examination of the claimant." *R. at 29. Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987) (a treating physician's report may be disregarded when such a report is brief, conclusory, or unsupported by medical evidence).*

⁸¹ The Appeals Council reversed the ALJ's first finding because the ALJ considered Dr. Reed a non-treating physician, and remanded for further consideration. After the second hearing, the ALJ still categorized Dr. Reed as an examining, non-treating physician, but additionally explained that Dr. Reed's reports were conclusory, related to workers compensation disability percentages, and not supported by analysis or medical data, but merely related Plaintiff's subjective complaints of pain. *R. at 27-28.* The ALJ's treatment of Dr. Reed's reports does not indicate that the ALJ failed to consider the reports, it merely indicates the weight that the ALJ decided to give to the reports.

With respect to Dr. Cooper, the ALJ notes that Plaintiff was able to walk with a good gait within the doctor's office, that Plaintiff had driven himself to the examination, that Plaintiff had a full range of motion with respect to his cervical spine, knees, shoulders, ankles, wrists, elbows, and fingers, and that Plaintiff tensed every muscle in his body making a complete examination impossible. *R. at 26.* Plaintiff emphasizes Dr. Cooper's finding that Plaintiff would be impaired in bending, twisting, and lifting, and concludes that the ALJ failed to consider this evidence.⁹¹ *R. at 247.* However, the record indicates that the ALJ did consider the evidence, but interpreted and weighed it differently.

Plaintiff's date of last insurance was March 31, 1991. The ALJ explained that evidence compiled after that date was not generally probative in considering whether Plaintiff was disabled prior to March 31, 1991, especially since Plaintiff's condition was considered degenerative. *R. at 27-28.* Dr. Harsha's report is dated May 17, 1993, and consequently the ALJ did not consider it probative with respect to whether Plaintiff was disabled prior to March 31, 1991.

Regardless, Dr. Harsha's report does not dictate a finding of disability. Dr. Harsha did find that Plaintiff had a limitation of motion, but his conclusion that Plaintiff would be unable to work seems more related to Plaintiff's long absence from work. "For a person who has been off of work of any sort for this number of years,

⁹¹ Dr. Cooper's report is inconsistent with the three RFC assessments, and Dr. Dandridge's testimony, which all concluded that Plaintiff could perform work at the medium level. Plaintiff does not assert as error the lack of substantial evidence in the record to support an RFC of "medium." Regardless, as previously noted, a hypothetical was presented to the vocational expert which included the limitations indicated by Dr. Cooper, and the vocational expert testified that work did exist in the national economy for an individual who possessed such limitations. *R. at 81-84.*

it is improbable that he will successfully return to the labor market." *R. at 406.* Dr. Harsha additionally noted that although Plaintiff did exhibit symptoms consistent with lower back pain, the degree of Plaintiff's pain seemed to be exaggerated. *R. at 412.* The ALJ's decision that Dr. Harsha's 1993 report was not relevant in determining whether Plaintiff was disabled before March 31, 1991 was not error. Potter v. Secretary of Health and Human Services, 905 F.2d 1346, 1348-49 (10th Cir. 1990) ("the relevant analysis is whether the claimant was actually *disabled* prior to the expiration of her insured status. . . . A retrospective diagnosis without evidence of actual disability is insufficient. This is especially true where the disease is progressive.").

Accordingly, the Secretary's decision is **AFFIRMED**.

Dated this 20 day of September 1995.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 20 1995

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

DENNIS W. CLARK,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,¹¹

Defendant.

No. 94-C-159-J

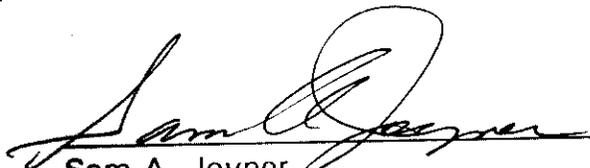
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DATE SEP 21 1995

JUDGMENT

This action has come before the Court for consideration and an Order affirming the decision of the Administrative Law Judge has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 20 day of September 1995.


Sam A. Joyner
United States Magistrate Judge

¹¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action.

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 20 1995

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

ALLAN D. VERNON,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,¹¹

Defendant.

No. 94-C-889J

ENTERED ON DOCKET
DATE SEP 21 1995

JUDGMENT

This action has come before the Court for consideration and an Order affirming the decision of the Administrative Law Judge has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 20 day of September 1995.


Sam A. Joyner
United States Magistrate Judge

¹¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 20 1995

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

ALLAN D. VERNON,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,¹⁾

Defendant.

No. 94-C-889J

ENTERED ON DOCKET

DATE SEP 21 1995

ORDER

Plaintiff Allan D. Vernon, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Secretary denying Social Security benefits.²⁾ Plaintiff contends that the Secretary erred because: (1) the Secretary failed to find that Plaintiff's impairments meet or equal a Listing; (2) the Secretary failed to consider Plaintiff's complaints of pain; and (3) the Secretary improperly relied on the vocational expert in determining that Plaintiff could perform work at the sedentary level.

¹⁾ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

²⁾ Plaintiff filed an application for disability insurance benefits on December 17, 1991. *R. at 113*. The application was denied initially and upon reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held March 22, 1993. *R. at 70*. By order dated November 23, 1993, the ALJ determined that although Plaintiff could not perform his past relevant work, he could perform work at the sedentary level. *R. at 370*. The Plaintiff appealed the ALJ's decision, and on December 2, 1992 the Appeals Council remanded the case to the ALJ for consideration of additional evidence submitted by Plaintiff's treating physician. *R. at 388*. On October 22, 1993, following a second hearing, the ALJ denied benefits, finding that Plaintiff could perform his past relevant work. *R. at 21*. Plaintiff's second appeal to the Appeals Council was denied on January 4, 1994. *R. at 18*.

A decision by the Secretary will be upheld on appeal if it is supported by substantial evidence and follows applicable legal standards. See Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). For the reasons outlined below, the Court affirms the Secretary's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on March 1, 1964, and has completed the twelfth grade. *R. at 76, 113.* Plaintiff's past relevant work includes work as an iron worker, a vinyl siding applicator, a custom mill worker, and an asphalt layer. *R. at 77-78, 131.*

Plaintiff's Testimony

Plaintiff testified that in September of 1989 he was on a scaffolding when somebody moved it. Plaintiff was knocked from the scaffolding and fell approximately 38 feet, landing on the ground. *R. at 90.* Plaintiff claims disability beginning September 15, 1989 due to injuries incurred from the fall. *R. at 76.* Plaintiff injured his lower back (fractures to L1-2, L2-3, T2, and injury to L5, S1) and shattered his left ankle. *R. at 90.*

Plaintiff testified that he has had eight operations: two on his back (one of those was a diskogram), and the remainder on his ankle (including four fusions and the removal of hardware). *R. at 92.* Plaintiff stated that he had no range of motion in his left foot, except that he could move his toes. *R. at 92.* Plaintiff testified that because one of the bolts in his foot rubs against a joint, he is currently scheduled for outpatient surgery the Friday after the hearing. *R. at 93.* Plaintiff additionally experiences numbness in his feet and hands. *R. at 93-94.*

Plaintiff testified that he is able to drive to Tulsa every Friday to pick up his workers' compensation check. *R. at 82*. The drive takes approximately forty minutes, and he is usually hurting **after** the drive. *R. at 94-95*. Plaintiff can sit approximately thirty minutes before he **begins** to get agitated, and he can stand long enough to do one load of dishes (approximately fifteen minutes) before his back starts hurting. *R. at 79*. Plaintiff can also **hold** his six-month-old daughter for approximately five or six minutes before he starts hurting, and can walk about 100 feet before he has to rest a few minutes. *R. at 79*. At the end of each day his foot is usually swollen from walking around the house. *R. at 80*. In addition, Plaintiff vacuums once a week, using the vacuum for support while vacuuming. *R. at 81, 97*.

According to Plaintiff, he has trouble bending and squatting; he has constant pain in his back, and he estimates his pain as "severe" approximately sixty percent of the time. *R. at 84, 86*. Plaintiff testified that he has severe ankle pain when he walks too much (about 100 feet). *R. at 87*. However, Plaintiff does not take any pain pills because he does not want to become addicted to them. *R. at 89*. Plaintiff also testified that he has some hearing loss. *R. at 94*.

Residual Functional Capacity Assessments

Three Residual Functional Capacity Assessments indicated that Plaintiff could occasionally lift twenty pounds, frequently lift ten pounds, stand or walk about six hours in an eight hour day, sit about **six** hours in an eight hour day, and had unlimited push/pull capability. *R. at 164-170, 186, 174-80*. However, Plaintiff's ability to

stoop was marked as occasionally limited on two of the assessments. *R. at 186, 174-80.*

Ankle Injury

Plaintiff's medical records indicate that Plaintiff was taken to the emergency room on September 15, 1989, with an extremely swollen and broken left ankle, and a fracture at L2-L3 of the lumbar spine and T8-9 of the thoracic spine. *R. at 193-95.* Surgery was performed by Dr. Bruce R. Stivers, who reconstructed Plaintiff's left ankle and placed a bone screw in it. *R. at 198.* Subsequent x-rays on September 23, 1989 indicated that the bone alignment in the ankle was satisfactory. *R. at 202-204.* Plaintiff was discharged September 26, 1989. *R. at 296.*

A letter dated October 6, 1989 from Dr. Stivers indicated that the ankle was still swollen and x-rays of Plaintiff's back appeared satisfactory. *R. at 230.* Plaintiff's ankle cast was removed on January 29, 1990, and a new fiberglass cast was applied. X-rays at that time indicated that the ankle was in an acceptable position. *R. at 225.* On March 2, 1990, Dr. Stivers reported that Plaintiff had experienced no pain in his ankle over the past month, and that Plaintiff's activity program will continue to be increased. *R. at 224.* In a letter dated June 19, 1990, Dr. Stivers notes that Plaintiff was being trained "as a locksmith and will therefore not have to climb ladders or platforms." *R. at 219.* On August 28, 1990, Dr. Stivers noted that Plaintiff showed early evidence of degenerative arthrosis of his ankle, and was a candidate for ankle fusion. *R. at 217.* Dr. Stivers additionally wrote that Plaintiff "has been unable to perform the duties of his regular occupation since the date of accident, and in all

probability will require ankle fusion. This will extend his disability for at least one additional year." *R. at 217.*

Dr. Alan G. Lewis saw Plaintiff on October 24, 1990 at the request of Dr. Stivers because of Plaintiff's continued complaints of pain. *R. at 272.* Dr. Lewis concluded that Plaintiff was a candidate for ankle arthrodesis (a surgical fusion) because of Plaintiff's continued pain. *R. at 272.*

According to the medical records, Plaintiff continued to experience pain in his left ankle and was admitted for surgery on his ankle on November 27, 1990. *R. at 236-38.* In his post-operative report Dr. Lewis noted that Plaintiff "tolerated the surgery well." *R. at 236-38.* Plaintiff was discharged on December 3, 1990, and at the time of discharge "was able to ambulate [on crutches] in excess of 200 feet without difficulty. . . ." *R. at 236.*

By letter dated January 11, 1991, Dr. Lewis noted that Plaintiff was making good progress, but would be unable to return "to a full duty type job for another two to three months." *R. at 269.* On February 22, 1991, Dr. Lewis commented that Plaintiff could begin advancing his activities, start wearing normal foot wear, and begin school for re-training purposes, "or some very light duty, primarily sedentary." However, Plaintiff could not be released to do his normal job activities at this time. *R. at 268.*

Dr. Lewis, by letter dated April 1, 1991, noted that Plaintiff's wounds were well healed, and that Plaintiff was nearing satisfactory recovery. *R. at 266.* In addition, Dr. Lewis states that he recommended to Plaintiff that he "obtain retraining

in a job description that is primarily **sedentary** with brief periods of time spent on his feet, and without any stooping, **squatting** or climbing." *R. at 266.*

Plaintiff saw Dr. Lewis on June 17, 1991. *R. at 264.* Plaintiff stated that he could not stand for long periods of time. *R. at 264.* Dr. Lewis additionally noted in his June 17, 1991 letter that he **believed** Plaintiff had "reached a static point in his recovery." *R. at 264.* Dr. Lewis explained to Plaintiff that Plaintiff should "not return to a steel working type job," but that "[h]e could return to something of a more sedentary nature or possibly be **retrained** to do work which does not require him to be on his feet quite so much." *R. at 264.* Dr. Lewis concluded that Plaintiff had sustained a permanent partial physical impairment of 36% to his left foot. *R. at 265.*

On February 27, 1992, surgery was performed on Plaintiff to remove metal screws in his left ankle. *R. at 454, 459.* No complications developed, and Plaintiff was discharged to go home that **same day.** *R. at 464.*

According to Dr. Lewis, although Plaintiff's prior surgery on his ankle did provide Plaintiff with "good relief of his ankle symptom," as Plaintiff increased his activity, Plaintiff's pain also increased. *R. at 472.* Plaintiff was admitted for surgery on his left ankle on June 5, 1992. *R. at 472.* Plaintiff was fully ambulatory with crutches when he was discharged on June 9, 1992. *R. at 472.* On June 18, 1992, Dr. Lewis reported that Plaintiff's **wounds** were healing well. *R. at 260.*

A letter from Dr. Lewis dated **September 15, 1992** states that Plaintiff is still experiencing discomfort in his ankle and the bottom of his foot. *R. at 530.* Examination revealed good stability of the foot, and Dr. Lewis noted that the

discomfort was probably related to Plaintiff's increased activity following his long period of inactivity. *R. at 530.*

On November 10, 1992, Dr. Lewis indicated that Plaintiff has a permanent partial physical impairment to his left foot of 65%. *R. at 511.* According to Dr. Lewis, Plaintiff could be employed in a sedentary occupation and could be on his feet for short periods of time if his back treatment recommendations did not indicate further restrictions. *R. at 511.*

Dr. Lewis wrote on December 2, 1992 that Plaintiff was still experiencing some pain in the heel of his left foot, but that the pain he previously had on the lateral side of his foot had been resolved by the surgery. *R. at 611.*

Plaintiff was admitted on March 10, 1993 for exploratory surgery on his left ankle. *R. at 548.* Dr. Lewis noted that Plaintiff has done well postoperatively, but union of the arthrodesis sites had been a problem. *R. at 548.* Plaintiff was discharged on March 13, 1993. *R. at 548.*

Back Surgery

On August 27, 1991, Plaintiff was admitted to the hospital for an "awake lumbar diskogram" which was performed by Dr. Mark A. Hayes *R. at 243.* According to Dr. Hayes, the diskogram clearly showed internal disc disruption at L5-S1 which required surgical treatment. *R. at 256.* On September 25, 1991, Plaintiff was admitted for back surgery³¹ which was performed by Dr. Hayes. *R. at 244-47.*

³¹ Plaintiff's discharge report indicates the following surgical procedures were performed: "(1) segmental pedicle screw fixation at L5-S1; (2) bilateral lateral mass fusion at L5-S1; (3) right iliac crest bone graft through a separate incision; (4) bilateral decompressive laminotomy and discectomy done by Dr. Brenner, neurosurgeon." *R. at 244.*

Plaintiff's discharge report notes that Plaintiff was able to ambulate the first day after the operation, and was independent at the time of his discharge on September 30, 1991. *R. at 244, 426.*

Dr. Hayes saw Plaintiff on November 7, 1991, and reported that Plaintiff was proceeding nicely and would start therapy. *R. at 255.* On February 3, 1992, Dr. Hayes noted that Plaintiff was doing quite well, and recommended that Plaintiff begin vocational rehabilitation. Dr. Hayes noted that at the end of two months Plaintiff should be limited to no lifting over 34-40 pounds on a repetitive basis. *R. at 255.* On his April 9, 1992 visit, Plaintiff stated that he had no pain. *R. at 255.*

Examining Doctors

Dr. Jim Martin, after an examination of Plaintiff and a review of his records, by letter dated July 30, 1991, stated that Plaintiff was temporarily totally disabled, and had been disabled since his initial injury in September 1989. *R. at 601.* On December 10, 1992, Dr. Martin stated that he believed Plaintiff was 100% temporarily totally disabled for an indefinite period of time pending further treatment and evaluation. *R. at 597-98.*

Plaintiff was examined by Dr. Benjamin G. Benner with respect to a workers' compensation claim on November 7, 1991. Dr. Benner noted that Plaintiff was functioning fairly well at six weeks after his surgery, and that Plaintiff walks with a limp and wears a sports brace on his back. *R. at 250.*

On May 4, 1993, Dr. Lewis noted that it was still too early "to tell when [Plaintiff] will be able to go back to work activities or what his ultimate duty

restrictions will be." *R. at 604*. By letter dated May 18, 1993, Dr. Lewis again notes that although Plaintiff will be unable to return to his previous work, he has encouraged him to pursue any vocational rehabilitation that will allow him to obtain employment. *R. at 602*. An August 5, 1993 letter from Dr. Lewis states that Plaintiff is permanently unable to remain on his feet for long periods of time, and at best will be able to do only sedentary occupations. *R. at 615*.

II. THE SEQUENTIAL EVALUATION PROCESS

The Secretary has established a five-step⁴¹ process for the evaluation of social security claims. See 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988). A claimant is disabled under the Social Security Act if:

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

⁴¹ Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal to or the medical equivalence of an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

The ALJ's evaluation of Plaintiff's claim in this case terminated at step five of the sequential evaluation process. The ALJ determined that Plaintiff had the RFC to perform sedentary work, and that a substantial number of jobs in the national economy exist to permit a finding of non-disability. *R. at 59.*

III. STANDARD OF REVIEW

The Secretary's disability determinations are reviewed to determine if: (1) the correct legal principles have been followed, and (2) the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Williams, 844 F.2d at 750. The Court, in determining whether the decision of the Secretary is supported by substantial evidence, does not reweigh the evidence or examine the issues *de novo*. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993).

Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

IV. REVIEW

The Listings 1.03

At step three of the sequential evaluation process, a claimant's impairment is compared to the Listings (20 C.F.R. Pt. 404, Subpt. P, App. 1). If the impairment is equal or medically equivalent to an impairment in the Listings, the claimant is presumed disabled. A plaintiff has the burden of proving that a Listing has been equalled or met. Bowen v. Yuckert, 482 U.S. at 140-42 (1987); Williams v. Bowen, 844 F.2d at 750-51 (10th Cir. 1988).

Plaintiff initially argues that the ALJ erred in determining that Plaintiff's injuries were not the medical equivalence of Listing 1.03. Listing 1.03 provides:

Arthritis of a major weight-bearing joint (due to any cause):

With history of persistent joint pain and stiffness with signs of marked limitation of motion or abnormal motion of the affected joint on current physical examination. With:

* * *

B. Reconstructive surgery or surgical arthrodesis of a major weightbearing joint and return to full weight-bearing status did not occur, or is not expected to occur, within 12 months of onset.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.03.

Plaintiff asserts that his condition is the medical equivalence of Listing 1.03B. According to Plaintiff's medical records, Plaintiff's range of motion in his left ankle is limited. In addition, Plaintiff's medical records establish that Plaintiff has had several operations on his left ankle. However, Plaintiff's records also indicate that he was

able to return to full weight-bearing status following each operation.⁵¹ Consequently, the ALJ's decision that Plaintiff did not meet or equal Listing 1.03 is supported by substantial evidence, and the ALJ did not err in concluding that Plaintiff's medical impairments do not meet or equal the described impairments in Listing 1.03.

Pain Analysis

Plaintiff additionally alleges that the ALJ erred by discounting Plaintiff's complaints of pain. The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529, 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second,

⁵¹ Plaintiff was initially injured on September 15, 1989, and reconstructive surgery was performed on Plaintiff's left ankle on that date. *R. at 198*. In March 1990, Dr. Stivers reported that Plaintiff had experienced no ankle pain over the past month. *R. at 224*. Within eight months of the operation (by May 1990), Plaintiff was able to ambulate without an ankle brace. *R. at 220*.

Plaintiff was again admitted for surgery on his ankle on November 27, 1990. Plaintiff was discharged on December 3, 1990, and at the time of discharge "was able to ambulate [on crutches] in excess of 200 feet without difficulty. . . ." *R. at 236*. By February 22, 1991, Dr. Lewis commented that Plaintiff could begin advancing his activities, start wearing normal foot wear, and begin school for re-training purposes, "or some very light duty, primarily sedentary." *R. at 268*.

A Residual Functional Capacity Assessment conducted on February 8, 1991 indicated that Plaintiff could occasionally lift twenty pounds, frequently lift ten pounds, stand or walk about six hours in an eight hour day, sit about six hours in an eight hour day, and had unlimited push/pull capability. *R. at 164-170*.

On February 27, 1992, surgery was performed on Plaintiff to remove metal screws in his left ankle. *R. at 454, 459*. No complications developed, and Plaintiff was discharged to go home that same day. *R. at 464*.

On April 8, 1992, a second Residual Functional Capacity Assessment was performed. Plaintiff's described limitations were in accord with Plaintiff's previous Residual Functional Capacity Assessment, with Plaintiff's ability to stoop marked as occasionally limited. *R. at 186*.

Plaintiff was admitted for surgery on his left ankle on June 5, 1992. *R. at 472*. Plaintiff's surgery went well, and Plaintiff was fully ambulatory with crutches when he was discharged on June 9, 1992. *R. at 472*. On June 18, 1992, Dr. Lewis reported that Plaintiff's wounds were healing well. *R. at 260*.

A September 8, 1992 Residual Functional Capacity Assessment reported that Plaintiff could occasionally lift twenty pounds, frequently lift ten pounds, stand or walk about six hours in an eight hour day, sit about six hours in an eight hour day, and had unlimited push/pull capability. Plaintiff's ability to stoop or crouch was described as occasionally limited. *R. at 174-180*.

Plaintiff was admitted on March 10, 1993 for exploratory surgery with respect to his left ankle. *R. at 548*. Plaintiff's hearing before the ALJ was March 22, 1993. *R. at 70*. By May 19, 1993, Plaintiff's doctor indicated that Plaintiff was able to ambulate. *R. at 602*.

assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." *Id.* Third, the decision maker, considering all of the medical data presented, and any objective or subjective indications of the pain, must assess the claimant's credibility. In assessing a claimant's complaints of pain, the following factors may be considered.

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.

Id. at 165.

However, the mere existence of pain is insufficient to support a finding of disability, the pain must be considered "disabling." *Gosset v. Bowen*, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment."). In addition, credibility determinations by the trier of fact are given great deference. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

The ALJ summarized Plaintiff's medical records and Plaintiff's testimony. *R. at 56-57.* In evaluating Plaintiff's complaints of pain, the ALJ noted Plaintiff's testimony that Plaintiff takes no prescribed medications for pain, that Plaintiff could hold his six-month-old daughter (fourteen pounds) for five to six minutes, and that

Plaintiff performed some limited household chores. *R. at 57.* Plaintiff's doctors additionally indicated that Plaintiff could perform work at the sedentary level. *R. at 265, 266, 269, 511, 255.* Plaintiff's RFC was described as sedentary and not limited by Plaintiff's pain. *R. at 164, 174, 186.*

The ALJ determined that Plaintiff's pain was not of such severity to interfere with Plaintiff's performance of work at the sedentary level. The ALJ's decision indicates that the ALJ considered Plaintiff's testimony regarding his pain, but determined that Plaintiff's pain was not disabling. *R. at 57.* Because the ALJ's decision is supported by substantial evidence, the Court may not reverse the ALJ's decision.

Vocational Expert's Testimony

Plaintiff asserts that because Plaintiff had both exertional and non-exertional impairments the ALJ was precluded from applying or relying upon the Grids.⁶¹ However, "the mere presence of a nonexertional impairment does not automatically preclude reliance on the grids. The presence of nonexertional impairments precludes reliance on the grids only to the extent that such impairments limit the range of jobs available to the claimant." Gossett v. Bowen, 862 F.2d 802, 807-08 (10th Cir. 1988). Regardless, in this case the ALJ did not rely solely upon the grids, but also on the testimony of a vocational expert. *R. at 57-58.*

⁶¹ The Medical-Vocational Guidelines, commonly referred to as the "Grids," are located at 20 C.F.R. Pt. 404, Supbt. P, App. 2.

Plaintiff additionally asserts that the ALJ's reliance on the vocational expert was improper because the ALJ failed to properly consider Plaintiff's exertional and non-exertional impairments. Plaintiff relies on the hypothetical submitted to the vocational expert which required the vocational expert to assume all of Plaintiff's complaints as true.

The ALJ initially asked the vocational expert whether an individual with the traditional restrictions applicable for work at the sedentary level could find work. The vocational expert listed several available jobs. *R. at 99-100.* The ALJ also asked whether an individual with sedentary restrictions, possessing no range of motion of the left ankle, who cannot be on his feet all day, but must alternate between sitting and standing each hour, would be able to perform jobs in the national economy. *R. at 100-101.* The vocational expert listed several jobs which such an individual could perform. *R. at 100-101.*

Three RFC assessments indicated that Plaintiff could perform work at the sedentary level. *R. at 164, 174, 186.* Plaintiff's treating physicians indicated, on several occasions, that Plaintiff would be able to perform work at the "sedentary" level. *R. at 255, 265, 266, 269, 511.* In addition, Plaintiff testified that he drove to Tulsa every Friday (approximately forty minutes round-trip), was able to hold his fourteen pound child for five to six minutes, and performed some limited household chores.

An ALJ is not required to accept all of a plaintiff's testimony with respect to restrictions as true, but may pose such restrictions to the vocational expert which are

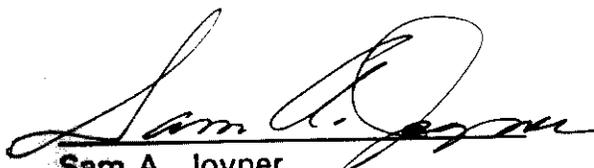
accepted as true by the ALJ. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). In addition, credibility determinations by the trier of fact are given great deference on review. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). Considering Plaintiff's medical record and the ALJ's determinations, the hypothetical posed by the ALJ adequately included Plaintiff's restrictions.

In addition, Plaintiff relies solely on a "hypothetical" to the vocational expert to consider "all the testimony" as true. *R. at 101*. The vocational expert testified that no particular qualification was prohibitive, but that, if everything was considered, Plaintiff "might not be able to show up the next day [at work]" which the vocational expert stated might be prohibitive to employment. *R. at 101*. The ALJ was not compelled to rely solely upon this portion of the vocational expert's testimony.

Because the ALJ's determination that work in the national economy was available, which Plaintiff was capable of performing, was supported by substantial evidence, the ALJ's opinion may not be reversed.

Accordingly, the Secretary's decision is **AFFIRMED**.

Dated this 20 day of September 1995.


Sam A. Joyner
United States Magistrate Judge

FILED

SEP 20 1995

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

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

AMANDA LAKEY,

Plaintiff,

vs.

U.S. EXPRESS, INC., an
Arkansas corporation, and RICARDO
FLORES, an individual,

Defendants.

ENTERED ON DOCKET

DATE SEP 21 1995

No. 95-C 0031BU

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

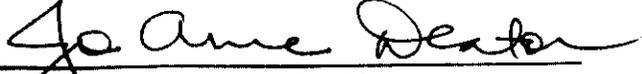
Pursuant to FED.R.CIV.P. 41, the parties, and each of them, by and through their respective counsel of record, herewith stipulate and agree to the dismissal with prejudice of said cause, including all complaints, counterclaims, cross complaints and causes of action of any type by any party against any or all of the other parties. Each party shall bear his, its, or her own costs, expenses, and attorney fees without assessment against any other party.

Executed the respective dates shown adjacent to each signature.

9/12/95
Date


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remedies.¹

The United States Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the state highest Court. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

Rosteck has provided evidence that his appeal has been filed, and denied, in the Court of Appeals for the State of Illinois. However, there is no evidence before the Court that Rosteck has appealed to the Illinois Supreme Court. See United States v. Searcy, 768 F.2d 906, 907 (7th Cir. 1985) (petitioner's writ of habeas corpus "was dismissed ... because he had failed to exhaust his state court remedies by not seeking leave to appeal to the Illinois Supreme Court").

After carefully reviewing the record in this case, the Court

¹Rosteck's previous habeas corpus petition in this Court, Case No. 94-C-1-B, was dismissed for failure to exhaust Illinois state judicial remedies. The same issue is before the Court in this case.

again concludes that Rosteck has not exhausted his state judicial remedies in the State of Illinois or brought himself within one of the exceptions to the exhaustion rule. See Hall v. Spears, No. 92-6164, slip op. at 2 (10th Cir. Aug. 4, 1992) (unpublished opinion; attached to this Order) (holding that petitioner who attacked an Oklahoma conviction because it was enhanced by an invalid Iowa conviction had to exhaust his state remedies by first challenging his Iowa conviction in the Iowa courts); see also 28 U.S.C. § 2254(b).

The Court again concludes that Rosteck must exhaust his Illinois state remedies by first challenging his prior conviction in the Illinois Supreme Court. The Oklahoma Courts and the Federal Courts then will become available for Rosteck to pursue his remedy. See Hall, slip op. at 2.

ACCORDINGLY, IT IS HEREBY ORDERED that Respondent's motion to dismiss (Docket #5) be **granted**, and that the petition for a writ of habeas corpus be **dismissed without prejudice** for failure to exhaust state judicial remedies.

IT IS SO ORDERED this 20th day of September, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Unpublished Disposition
(Publication page references are not available for this document.)

NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

David W. HALL, Petitioner-Appellant,
v.
Denise SPEARS, Respondent-Appellee.

No. 92-6164.

United States Court of Appeals, Tenth Circuit.

Aug. 4, 1992.

W.D.Okl., No. 91-CV-971.

W.D.Okl.

AFFIRMED.

Before JOHN P. MOORE, TACHA and
BRORBY, Circuit Judges.

ORDER AND JUDGMENT [FN*]

BRORBY, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Mr. Hall, an Oklahoma State inmate, appeals the dismissal of his pro se petition for habeas relief. We grant permission for Mr. Hall to proceed in forma pauperis and affirm.

Mr. Hall, in June 1990, entered guilty pleas in Oklahoma to several counts of sexual offenses and a

firearm charge, all after conviction of a former felony. The prior conviction took place in the State of Iowa, and it was this conviction that resulted in an enhancement of his Oklahoma sentences, which were ten years each to run concurrently.

Mr. Hall, in his pro se petition, claimed his guilty plea to some of the Oklahoma convictions was not knowingly and voluntarily entered as the prior Iowa conviction used to enhance his Oklahoma sentence was invalid. Mr. Hall asserted in a conclusory fashion that the Iowa conviction was coerced, was a product of ineffective assistance of counsel, was a product of the Iowa court's failure to advise him of his rights, and was accomplished without a competency hearing.

Mr. Hall pursued his remedies in the Oklahoma courts, which held: (1) the proper method of attacking a former conviction is in the state imposing the conviction, i.e., Iowa; and (2) Mr. Hall failed to adequately explain his failure to directly appeal the Iowa conviction and he was therefore procedurally barred from presenting this claim to the Oklahoma courts. However, the Oklahoma courts stated Mr. Hall could again come before them and receive relief if he successfully challenged his Iowa conviction in the Iowa courts.

The bottom line is that no state court has addressed the merits of Mr. Hall's claims concerning his Iowa conviction. To make this situation more interesting, the State of Oklahoma failed to raise the issue of exhaustion and instead conceded Mr. Hall had exhausted his state remedies. Mr. Hall alleged he had no Iowa trial court records to support his claim.

The district court dismissed Mr. Hall's petition without prejudice until Mr. Hall properly challenged his Iowa conviction in the Iowa courts. [FN1] The district court reasoned that as Iowa has all of the court records, it is in a better position to hear and weigh any evidence bearing on the validity of the Iowa conviction and is better equipped to apply Iowa law.

In his pro se appeal of this decision, Mr. Hall raises the same six arguments raised in the district court, i.e., the Iowa conviction is constitutionally invalid, and asserts he is attacking the Oklahoma

sentence that was enhanced by the invalid Iowa conviction. The State of Oklahoma has elected not to respond. [FN2]

28 U.S.C. § 2254(b) provides that an application for habeas shall not be granted "unless it appears that the applicant has exhausted the remedies available in the courts of the State." The question we must answer is which state: the state imposing the enhanced sentence, or the state where the conviction arose which gives rise to the enhanced sentence?

The exhaustion doctrine is designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings. It is therefore improper to upset a state court conviction without any opportunity to the state court to correct an alleged constitutional violation. In the case before us, it would be equally improper for either an Oklahoma court or a federal court to upset an Iowa conviction without first extending to Iowa the opportunity to correct any alleged constitutional violations. We therefore hold that when a conviction is attacked under 28 U.S.C. § 2254, the petitioner attacking the conviction must first exhaust available remedies in the state of conviction or bring himself within one of the exceptions to the exhaustion rule. Mr. Hall has done neither.

Mr. Hall misperceives the "in custody" requirement and argues the federal district court has jurisdiction as he is "in custody" because of the Iowa conviction's use in enhancing his Oklahoma sentence. Mr. Hall cites *Maleng v. Cook*, 490 U.S. 488 (1989); *Gamble v. Parsons*, 898 F.2d 117 (10th Cir.), cert. denied, 111 S.Ct. 212 (1990); and *Lowery v. Young*, 887 F.2d 1309 (7th Cir.1989). All three cases hold a state prisoner is in custody when another state has imposed a conviction used to enhance petitioner's present sentence. Mr. Hall is indeed "in custody"; however, this does not excuse him from the requirement of exhausting his remedies in the state imposing the conviction he now challenges. The "in custody" requirement is basically jurisdictional while the exhaustion requirement is founded upon principles of comity.

Mr. Hall must exhaust his state remedies by first challenging his Iowa conviction in the Iowa courts, then the Oklahoma courts and the federal courts become available for Mr. Hall to pursue his remedy.

The judgment of the district court is AFFIRMED.

FN* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir.R. 36.3.

FN1. The district court dismissed until Mr. Hall "successfully challenged" the prior conviction in the Iowa courts. We assume the word "successfully" was inadvertently used to mean allowing the Iowa courts an opportunity to review Mr. Hall's claims.

FN2. States undoubtedly save time and money in electing this course of action. In so doing, the state shifts its burden of examining the other side of the coin to this Court. Oklahoma's position before the trial court was that Mr. Hall's petition was an attempt to appeal the prior Iowa conviction and an assertion that the district court lacked jurisdiction. We simply note this Court always appreciates a response by the state.

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

FILED

SEP 20 1995

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

BILLY GENE MARSHALL,
Plaintiff,
vs.
LARRY FIELDS, et al.,
Defendants.

Case No. 94-C-1069-B

ENTERED ON DOCKET
DATE SEP 21 1995

O R D E R

Before the Court is Defendants' Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(6) (Docket #10). Defendants allege the statute of limitations has run on Plaintiff's civil rights complaint.

Plaintiff Billy Gene Marshall ("Marshall"), appearing *pro se* and *in forma pauperis*, filed this civil rights action pursuant to 42 U.S.C. § 1983. He alleges that his constitutional rights were violated during administrative disciplinary procedures that occurred from January 1992 to April 1992.

Because § 1983 does not include statute of limitations, federal courts must look to the applicable statute of limitations in the state in which they sit. Wilson v. Garcia, 105 S.Ct. 1938, 1947-49 (1985). Wilson characterized § 1983 claims as personal injury claims for limitations purposes. Id. at 1949. Therefore, this Court must look to Oklahoma's statute of limitations for personal injury actions, which is two years. See 12 O.S. § 95(3); EEOC v. Gaddis, 733 F.2d 1373 (10th Cir. 1984); Jackson v. Grider, 691 P.2d 468 (Okla. Ct. App. 1984).

It appears to the Court that the actions of which Marshall complains occurred either during the disciplinary procedures (from January 1992 to April 1992) or before the procedures began, which means Marshall's claims are barred by the relevant statute of limitations. In Marshall's response to Defendants' Motion to Dismiss, Marshall alleges a continuing violation of his civil rights. As evidence of this continuing violation, he points to the fact that his sentence has been "unconstitutionally and intentionally illegally extended". (Plaintiff's Response Brief, p. 3) He further alleges that: his rights were violated because Defendants deprived him of earned credits; the Defendants misapplied state statutes regarding length of a sentence; and that Defendants violated his Eighth Amendment rights by extending his sentence beyond its proper term.¹

Marshall's inmate status does not provide sufficient justification for tolling the statute of limitations. Hudson v. McCormick, 1994 WL 237520, *1 (10th Cir. June 3, 1994) (unpublished opinion). See also Hardin v. Straub, 490 U.S. 536, 540 n.8 (1989) (Oklahoma has no tolling provision for civil lawsuits filed by prisoners). Marshall's claims are barred by the two-year statute

¹The Court notes that a § 1983 action is not the proper method to seek redress for restoration of earned credits or for an illegal sentence. "When a state prisoner is challenging the ... duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to ... a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). Therefore, Marshall may seek relief on this issue only in a habeas corpus action after exhausting state judicial remedies.

of limitations. Accordingly, Defendants' Motion to Dismiss is hereby GRANTED with prejudice.

IT IS SO ORDERED THIS 20th DAY OF SEPTEMBER, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE