

FILED

JUL 17 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

LAWRENCE R. RUNELS,

Defendant.

Civil Action No. 96C-379BU

ENTERED ON DOCKET
DATE JUL 18 1996

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of 7-17-96 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendant, Lawrence R. Runels, against whom judgment for affirmative relief is sought in this action failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendant.

Dated at Tulsa, Oklahoma, this 17 day of July, 1996.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By [Signature] Deputy

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

TRANSAMERICA INSURANCE)
FINANCE CORPORATION, a)
Maryland corporation,)
Plaintiff,)

vs.)

MURPHY ENTERPRISES, INC.,)
a Nebraska corporation; and)
RICHARD A. BROOKS, d/b/a)
RICHARD A. BROOKS &)
ASSOCIATES, LTD.,)
Defendants.)

and)

MURPHY ENTERPRISES, INC.,)
a Nebraska corporation,)
Third Party Plaintiff,)

vs.)

TIG SPECIALTY INSURANCE)
COMPANY, a California)
domestic insurance company,)
Third Party Defendant.)

Case No. 95-C-659-BU ✓

ENTERED ON DOCKET

DATE JUL 18 1996

FILED

JUL 17 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MLB

STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1), Fed. R. Civ. P., it is stipulated that the claims of plaintiff Transamerica Insurance Finance Corporation in the above-entitled action as against defendant Richard A. Brooks, d/b/a Richard A. Brooks & Associates, Ltd., be dismissed with prejudice, said parties to each bear their own costs.

~~EXHIBIT D
PAGE 1 OF 3~~

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TRANSAMERICA INSURANCE FINANCE CORPORATION

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ATTORNEY FOR TIG SPECIALTY INSURANCE
COMPANY

02/TIF-MU.STI

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

ENTERED ON THE
DATE 7-17-96

FILED

JUL 16 1996 *sa*

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL HENRY MARTIN)

Plaintiff,)

vs.)

TULSA COUNTY BOARD OF)
COUNTY COMMISSIONERS, et. al.)

Defendants.)

No. 94-C-135-H ✓

REPORT AND RECOMMENDATION

Before the undersigned United States Magistrate Judge for report and recommendation are the motions to dismiss, or for summary judgment filed by the Defendants in this case. [Dkt. 27, 29].

By minute order issued April 1, 1996, Plaintiff was notified of a May 1, 1996 deadline in which to respond. Plaintiff was advised that failure to respond may subject his case to dismissal. Thereafter, on May 3, 1996 Plaintiff requested an extension of time in which to respond which was granted, setting Plaintiff's response deadline on June 7, 1996. As of the date of this report Plaintiff has not responded.

According to N.D.LR 56.1, all material facts set forth by the Defendants are deemed admitted for the purpose of summary judgment as a result of Plaintiff's failure to respond to the Defendants' motions.

The undersigned United States Magistrate Judge RECOMMENDS that Defendants' motion to dismiss or for summary judgment [Dkt. 27, 29] be GRANTED and the above captioned case be DISMISSED WITHOUT PREJUDICE.

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

DATED this 16th day of July, 1996.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

ENTERED OFFICE
DATE 7-17-96

F I L E D

JUL 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

KENNETH L. WOODWARD)

Plaintiff,)

vs.)

No. 95-C-373-H ✓

BUCK JOHNSON, ROGERS COUNTY)
SHERIFF'S DEPARTMENT; NANCY)
LUPER)

Defendants.)

REPORT AND RECOMMENDATION

Before the undersigned United States Magistrate Judge for report and recommendation is Defendant's motion to dismiss or for summary judgment filed on September 18, 1995 [Dkt. 7].

By order dated December 14, 1995, Plaintiff was advised: that pursuant to Fed.R.Civ.P. 12(b)(6), Defendant's motion would be treated as one for summary judgment; that he had the right to file counter-affidavits or other responsive material; that his response was due within 15 days; and that failure to respond may result in an entry of summary judgment against him. [Dkt. 10]. As of the date of this report Plaintiff has not responded.

According to N.D.LR 56.1, all material facts set forth by Defendant are deemed admitted for the purpose of summary judgment as a result of Plaintiff's failure to respond to Defendants' motion.

12

The undersigned United States Magistrate Judge RECOMMENDS that Defendants' motion to dismiss or for summary judgment [Dkt. 9] be GRANTED and the above captioned case be DISMISSED WITHOUT PREJUDICE.

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

DATED this 16th day of July, 1996.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 7-17-96

FILED

JUL 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

TOMMY RAY ISHAM)

Petitioner,)

vs.)

RONALD J. CHAMPION, Warden)
Dick Connors Correctional Center)

Respondent.)

No. 95-C-323-H ✓

REPORT AND RECOMMENDATION

Before the undersigned United States Magistrate Judge for report and recommendation is Respondent's motion to dismiss filed on February 16, 1996 [Dkt. 8].

By order dated December 14, 1995, Petitioner was advised: that pursuant to Fed.R.Civ.P. 12(b)(6), Respondent's motion would be treated as one for summary judgment; that he had the right to file counter-affidavits or other responsive material; that his response was due within 30 days; and that failure to respond may result in an entry of summary judgment against him. [Dkt. 11]. As of the date of this report Petitioner has not responded.

According to N.D.LR 56.1, all material facts set forth by Respondent are deemed admitted for the purpose of summary judgment as a result of Petitioner's failure to respond to Respondent's motion.

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The undersigned United States Magistrate Judge RECOMMENDS that Respondent's motion to dismiss [Dkt. 8] be GRANTED and the above captioned case be DISMISSED WITHOUT PREJUDICE.

In accordance with 28 U.S.C. 5636(b), Fed. R. Civ. P. 72(b), and Rule 10(b)(3), Rules Governing Section 2254 Cases in the United States District Courts, any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the findings and recommendations of the Magistrate Judge. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 16th day of July, 1996.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

ENTERED ON FILE
DATE 7-17-96

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

DOYLE ALLEN CLAGG,

Plaintiff,

vs.

BUCK JOHNSON, ROGERS COUNTY
SHERIFF'S OFFICE,
Defendants.

FILED

JUL 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 95-C-372-H

REPORT AND RECOMMENDATION

Plaintiff, pro se, brought this civil rights action pursuant to 42 U.S.C. § 1983. Defendant filed a motion to dismiss on September 18, 1995 [Dkt. 6]. An Order dated December 14, 1995 advised Plaintiff that pursuant to Fed.R.Civ.P. 12(b)(6), Defendant's motion would be treated as one for summary judgment; that he had the right to file a response and set a deadline for such response. The order was returned to the courthouse stamped "undeliverable as addressed -- no forwarding order on file."

Plaintiff's failure to keep the Court apprised of his address has prevented him from receiving the orders and instructions necessary to prosecute his case. As a result, Plaintiff has failed to respond to Defendant's motion. According to N.D.LR 56.1, all material facts set forth by Defendant are deemed admitted for the purpose of summary judgment as a result of Plaintiff's failure to respond to Defendant's motion.

The undersigned United States Magistrate Judge RECOMMENDS that Plaintiff's action be DISMISSED WITHOUT PREJUDICE for lack of prosecution.

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

DATED this 16TH day of July, 1996.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 7/17/96

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

FILED

JUL 16 1996 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

PAMELA K. PIERCE,)
SS# 445-54-3870,)

Plaintiff,)

v.)

NO. 95-C-112-M ✓

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

Defendant.)

JUDGMENT

Judgment is hereby entered for **Defendant** and against Plaintiff. Dated this 16th
day of JULY, 1996.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 7/17/96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

PAMELA K. PIERCE,
SSN: 445-54-3870,

PLAINTIFF,

vs.

SHIRLEY S. CHATER, Commissioner
of Social Security,

DEFENDANT.

CASE No. 95-CV-112-M ✓

JUL 16 1996 *SLC*

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Plaintiff, Pamela K. Pierce, seeks **judicial** review of a decision of the Commissioner of the Social Security Administration (SSA) **denying** Social Security benefits.¹ In accordance with 28 U.S.C. § 636 the parties have **consented** to proceed before a United States Magistrate Judge. Any appeal of **this decision** will be directly to the Circuit Court of Appeals.

The role of the court in **reviewing** the decision of the Secretary under 42 U.S.C. § 405(g) is to determine whether **there is** substantial evidence in the record to support the decision of the Secretary, and **not** to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir.

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

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1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

The entire record of the proceedings before the Social Security Administration has been meticulously reviewed by the Court. The Court finds that the Administrative Law Judge (ALJ) has adequately and correctly set forth the facts and the required regulatory sequential evaluation process applicable to this case. The Court therefore incorporates that information into this order as the duplication of this effort would serve no useful purpose.

Plaintiff has appealed the denial of benefits by the SSA², alleging that the ALJ did not accord appropriate weight to the reports of Plaintiff's examining physicians,

^{2/} Ms. Pierce filed two applications for disability benefits. The first was filed on March 11, 1991. That claim was denied at the initial determination stage. Plaintiff's second application was filed on August 14, 1992. That claim also was denied on November 18, 1992. The denial was affirmed on reconsideration on January 15, 1993. A hearing before an Administrative Law Judge was held December 1, 1993. By Decision dated July 8, 1994, the ALJ entered the findings which are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on December 5, 1994. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal, 20 C.F.R. §§ 404.981, 416.1481.

that his determination that Plaintiff **lacked** credibility was flawed, that his conclusion that Plaintiff could perform medium and light work was improper and that the jobs identified by the vocational expert that Plaintiff could perform would require the acquisition of new job skills which **she cannot** do.

Plaintiff, Pamela K. Pierce, was, at the time of the final decision, 43 years old, with a high school education and an **accounting** course in Junior College [R. 253]. Her past relevant work has been as a **secretary** and accountant [R. 110, 252]. She has not been gainfully employed since **May 5, 1990**. Plaintiff claims disability due to short term memory loss [R. 114, 132]. **She** claims she cannot work due to inability to remember new information for more **than a few seconds** [R. 115, 184, 257]. Plaintiff has not claimed any exertional limitations. The ALJ found that Plaintiff is impaired by short term memory loss but that **the impairment** neither meets nor equals the Listings of Impairment criteria under 20 C.F.R. 404, Subpart P, Reg. 4. He decided that Plaintiff is unable to perform her **past relevant** work but that she has the residual functional capacity to perform the **nonexertional** requirements of work except for jobs requiring more than simple instructions or repetition. His finding, therefore, was that Plaintiff is not disabled under 42 U.S.C. § 423(d)(1)(A).

Plaintiff had been working **as an accountant** for thirteen years when she suffered a seizure in February, 1990 [R. 118, 153]. After the seizure she had short-term memory loss and was placed **on disability** leave at her place of employment in May, 1990 [R. 188, 254]. She **was treated** by a neurologist, Harvey Blumenthal, M.D., [R. 183-189] and, in the **next several** months, had multiple medical tests

conducted at Saint Francis Hospital [R. 152-157] and at Barnes Hospital in St. Louis, Missouri [R. 134, 158-170]. An EEG conducted in May, 1990 was abnormal [R. 153] as was the EEG in June, 1990 [R. 170]. No exact cause for the memory loss could be identified although all the consultants agreed it was an organic disorder [R. 173, 177, 185].

In September, 1990, Dr. Blumenthal sent Plaintiff to Horace C. Lukens, Jr., Ph.D., for a neuropsychological evaluation [R. 171-174]. Dr. Lukens confirmed acute organic impairment primarily in Plaintiff's immediate and short-term memory and recommended that she "engage in compensatory memory strategies including a memory notebook, utilizing an increase of structure, memory cues, and a highly predictable routine." [R. 174]. Dr. Blumenthal then sent Plaintiff to a psychotherapist, Melanie Rich, who worked with her for three months on learning to cope with her memory loss, including initiating a journal [R. 177, 185]. A psychologist, Jan Capehart, Ed.D., counseled Plaintiff sporadically from February, 1990 to March, 1992 [R. 191-208]. On the date of Plaintiff's last visit with Ms. Capehart, Plaintiff reported that she was "better" and that work as a receptionist "would be ok" [R. 194]. Plaintiff's last EEG, February 21, 1991, revealed no definite abnormality and at that time, Dr. Blumenthal noted improvement in her Mini Mental Status Exam [R. 185]. Plaintiff's last appointment with Dr. Blumenthal was May 18, 1992 when he noted more improvement in Plaintiff's Mini Mental Status Exam and that she was taking no medications [R. 184]. At the time of the hearing before the ALJ, December 5, 1994, Plaintiff was not under any kind of treatment program [R. 256, 258].

There is no dispute that Plaintiff has short-term memory loss. The primary issue in this case is the weight given by the ALJ to two consultative medical examination reports. The first is a psychological evaluation by James K. Shafer, Ph.D. dated October 19, 1992, performed for the insurance company providing Plaintiff's long-term disability benefits [R. 215-216]. Dr. Shafer examined Plaintiff twice in October, 1992, at the request of Quality Care Systems, Inc., to determine if she suffered from an impairment in memory to the degree that she could not return to her former duties as an accountant [R. 215]. He stated that Plaintiff's "current impairment of her short term memory makes performing her previous job functions or acquiring new job skills virtually impossible" [R. 216]. The second report is by Thomas A. Goodman, M.D., dated November 10, 1992. Dr. Goodman examined Plaintiff once at the request of the Social Security Administration [R. 209-212]. His opinion was that, while Plaintiff could not return to her previous employment, "she could probably do simple repetitive type work or even moderately complicated work type activities" [R. 212].³

Plaintiff asserts that Dr. Shafer's report is evidence that she is unable to engage in any substantial gainful activity [Plf's Memorandum Brief, Dkt. 8]. She contends that the ALJ rejected Dr. Shafer's report in favor of Dr. Goodman's report and that he gave

^{3/} The exact wording of the pertinent paragraph in Dr. Goodman's report reads as follows:

"The claimant otherwise has retained her basic intellectual abilities, at least on the mini-mental status examination she did for me. Although she may not be able to return to work at this time, she could probably do simple repetitive type work or even moderately complicated work type activities." [emphasis added].

It is clear from reading the emphasized portion in context, that Dr. Goodman was referring to Plaintiff's inability to return to her former work in this passage, not an inability to return to any work as Plaintiff contends.

no reason for doing so [R. 244; Plf's Brief at page 3]. The Court disagrees.

The ALJ is required to give **specific** and legitimate reasons for rejecting medical opinions of treating physicians, *Talbot v. Heckler*, 814 F.2d 1456, (10th Cir. 1987), *Eggleston v. Bowen*, 851 F.2d 1244 (10th Cir. 1988). However, in this case, the Court notes that neither Dr. Shafer nor Dr. Goodman was Plaintiff's treating physician. Dr. Shafer examined Plaintiff for the **disability** insurance carrier and Dr. Goodman performed an examination at the **request** of the Social Security Administration. There was no preferential requirement in **this case** for either doctor's opinion. The ALJ, as fact finder, has the responsibility for **weighing** the evidence and may choose whichever physician's diagnosis is most **supported** by the record. *Bradley v. Bowen*, 809 F.2d 1054 (5th Cir. 1987). It is for the **Secretary** to decide what weight to accord various medical reports. *Johnson v. Bowen*, 864 F.2d 340 (5th Cir. 1988), (declining to reweigh the evidence to determine **which** of two conflicting examiners' reports to accept). The Secretary, not the **courts**, has the duty to weigh the evidence, resolve material conflicts in the evidence and **decide** the case, *Johnson, id.*, (citing *Chaparro v. Bowen*, 815 F.2d 1008 (5th Cir. 1987)). See also *Brown v. Bowen*, 801 F.2d, 361 (10th Cir. 1986) and *Ellison v. Sullivan*, 929 F.2d 534 (10th Cir. 1990).

The Court finds that the **conclusion** of the ALJ is substantiated by the evidence in the record. While the ALJ based **his decision** in part upon the statement of Dr. Goodman that Plaintiff could perform **repetitive** work, there is no evidence that the ALJ rejected Dr. Shafer's opinion in favor of Dr. Goodman's. Furthermore, the ALJ found no inconsistency between the two reports. Dr. Shafer conducted two examinations

of Plaintiff one week apart [R. 215-216]. He reported that she demonstrated approximately 60% memory loss after one hour and almost 100% memory loss after a week. However, he did not address Plaintiff's ability to retain information that has been reinforced through repetition over a longer period of time or her ability to perform a job applying skills that she retained in long term memory. Dr. Shafer's report, therefore, does not constitute evidence of Plaintiff's inability to do any substantial gainful activity. Dr. Goodman, who also concluded that Plaintiff is unable to return to her former employment as an accountant, went a step further in his assessment and stated that Plaintiff could do simple repetitive type work or even moderately complicated work. The ALJ discussed Plaintiff's medical treatment and consultative examinations in detail and reported that he had carefully reviewed the medical evidence in rendering his decision [R. 27]. The Court finds that the ALJ properly evaluated the reports of the examining physicians in reaching his conclusion that, although Plaintiff is impaired by short-term memory loss, that impairment is not so severe as to prevent her from engaging in any substantial gainful activity and is not, therefore, disabled under the Social Security Act.

An individual is disabled within the meaning of the Social Security Act only if his impairments are so severe 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 which exists in the national economy" 42 U.S.C. 423(d)(2)(A). In order to be eligible for social security benefits, a claimant must show that he suffers from a medically determinable physical or mental impairment and that

his impairment in fact causes inability to engage in any substantial gainful activity. *Lackey v. Celebreeze*, 349 F.2d 76, (C.A.W.Va. 1965), *Wren v. Weinberger*, 390 F.Supp. 507 (D. Kan. 1975). See also discussion of what constitutes "disability" in *Heckler v. Campbell*, 461 U.S. 458, 103 S.Ct. 1952, 76 L.Ed. 2d 66 (1982).

Substantial gainful activity means work that:

- (a) Involves doing significant and productive physical or mental duties;
- and,
- (b) Is done (or intended) for pay or profit.

20 C.F.R. § 404.1510.

Plaintiff's treating physician, Dr. Blumenthal, and the examiners he consulted, noted that Plaintiff was not able to return to her position as an accountant due to short term memory loss. However, none of them stated that she was unable to do any work and, on the contrary, suggested means of coping with and overcoming her condition [R. 174, 177, 186]. The ALJ thoroughly discussed all of Plaintiff's medical evidence, including the records from Plaintiff's treating physicians and counselors as well as the two consultative examinations discussed above. The Court finds that the ALJ did not reject the opinions of any of her physicians, and, the Court finds that there is substantial evidence in the record to support the findings of the ALJ.

Plaintiff asserts that the "inconsistencies" cited by the ALJ in Plaintiff's testimony and exhibits were actually evidence of her disabling condition and that the ALJ improperly implied that Plaintiff was "somehow less than credible". Plaintiff also states that the activities cited by the ALJ are not considered substantial gainful work activities and that they cannot be used "against" the plaintiff.

Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ noted that Plaintiff testified that she has to write everything down and that she normally doesn't go places by herself [R. 18]. However, she had not made such claims early in the application process [R. 20].⁴ Furthermore, in both applications, during contacts with disability examiners and in her hearing testimony, Plaintiff described her daily activities as including housekeeping, visiting with neighbors, talking on the telephone, cooking meals, playing "bunco" and "bingo", bowling, working on jigsaw puzzles and Christmas crafts, cross-stitch sewing, reading, gardening and watching television [R. 122-148 and 250-256]. As Plaintiff's claim progressed, she alleged significant restrictions on these activities until, in her letter to her representative, dated September 26, 1994, she stated she has to read books in one sitting and then won't remember what the book is about, visits only two friends and her mother, can't go to unfamiliar places or park where there are a lot of cars unless accompanied and can't learn new phone numbers [R. 240-243]. The Court notes that, even assuming the latest claims of limitations of Plaintiff's current activities as true, Plaintiff is still, as Dr. Passmore stated on August 6, 1991, "leading a very active life" [R. 179]. The ALJ was entitled to consider Plaintiff's abilities to do household tasks and to engage in

^{4/} The ALJ noted that the first application for benefits, filed 3/11/91, contained statements by Plaintiff that there was no change in her daily activities and that she could "shop and shop and shop til [she] drop[ped]" and that she could drive unfamiliar routes by herself [R. 122-127]. The second application, filed 8/14/92, described the same activities but with an added caveat "in different colored ink" that she has to have someone go along [R. 140-145].

other activity in or outside her home, along with medical evidence, in determining whether she is entitled to disability benefits. See *Gossett v. Bowen*, 862 F.2d 802 (10th Cir. 1988); *Talbot v. Heckler*, 814 F.2d 1456 (10th Cir. 1987). The Court has compared Plaintiff's testimony to the applications, the reports of contact and the other evidence of record and concludes that the record supports the ALJ's observation.

Plaintiff complains that the hypothetical questions expounded by the ALJ to the vocational expert do not conform to the facts of this case [Plf's Brief at page 4]. Plaintiff also complains that the jobs identified by the vocational expert and cited by the ALJ as jobs that Plaintiff is functionally capable of performing, "would require plaintiff to acquire new job skills which she is completely unable to do" [Plf's Brief at page 2]. Again, the Court disagrees.

The examples listed by the ALJ as the types of work Plaintiff "is still functionally capable of performing in combination with her age, education and work experience" are those not requiring the acquisition of new job skills. The jobs listed by the ALJ as available to Plaintiff are office helper, doing stock inventory and general office clerk [R.28]. The descriptions of those jobs are found in the Dictionary of Occupational Titles at 239.567-010, 222.387-026 and 209.562-010, respectively.⁵ They are categorized as "unskilled" jobs and, therefore, would not require the acquisition of new skills [R. 264]. At the hearing on December 1, 1993, a vocational expert, Helen J. Lewis, testified that there are jobs available for Plaintiff as general office clerk (3,921

^{5/} Those jobs include some use of the same type of office equipment listed by Plaintiff on her vocational reports [R. 111, 118].

in Oklahoma, 372,911 in the United States), stock inventory clerk (4,147 in Oklahoma, 307, 595 in the United States), and receptionist (1,871 in Oklahoma, 164,546 in the United States) [R. 264].

The record evidences Plaintiff's abilities to do these jobs. Medical records reveal that shortly after the onset of her symptoms and during the time period when her condition was at its worst, Plaintiff was able to make change quickly and accurately from a \$10.00 bill [R. 187]. In November, 1990, she could follow directions [R. 186]. In August, 1991, she followed a three stage command and a written command [R. 179]. And, in 1992, she could remember, comprehend and carry out instructions on an independent basis if in written form [R. 192].

Indeed, Plaintiff has directly acknowledged her ability to perform tasks previously learned and to follow directions. In her applications for benefits she stated she knows Gregg Shorthand [R. 112], Lotus and First Choice computer programs "real well" [R. 111, 118], and that she could remember phone numbers and directions stored in long-term memory [R. 240, 243]. She has not claimed that she can no longer operate the equipment (e.g. computer keyboard) that she claimed to know "real well" [R. 111, 118]. She was able to perform the vacuuming tasks in her new swimming pool by referring to written instructions and following them "step by step" [R. 240]. She testified at the hearing that she was doing Christmas crafts and working jigsaw puzzles [R. 253]. One could assume that these were not crafts and puzzles that were commenced years ago or repeats from years past but rather projects begun after the initial onset of her symptoms. Additionally, the portions of her

"notebook" that she submitted to the Appeals Council in October, 1994, contain correct mathematical equations presumably in Plaintiff's own handwriting [R. 227, 228, 231, 235].

In posing a hypothetical question, an ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). The Court finds that the restrictions expressed by the ALJ in the hypothetical posed to the vocational expert and upon which the disability determination is based, are supported by substantial evidence. The vocational expert testified that she had reviewed the record regarding Plaintiff's work history and had been in attendance at the hearing during Plaintiff's testimony [R. 260]. Thus, the vocational expert's testimony was based upon evidence of record and constituted substantial evidence to support the ALJ's decision. The Court finds that the ALJ's hypothetical questions to the vocational expert and his reliance upon the vocational expert's testimony in his decision were proper and in accordance with established legal standards. The Court finds that the record supports the final determination by the Secretary that Plaintiff is not disabled.

Finally, the Court addresses Plaintiff's claim that, since her past work was only sedentary, the ALJ was required to show that Plaintiff was capable of performing medium or light work. It is undisputed that Plaintiff's past relevant work was of a sedentary nature. The jobs identified by the vocational expert and cited by the ALJ as those available to Plaintiff and as work which Plaintiff was able to perform, fall within the light and medium strength range. Plaintiff has not asserted any physical

limitations. Plaintiff has not cited any Social Security regulation or any case law in support of her contention that because her former work was sedentary the ALJ is required to limit his findings of available work to the sedentary range. The Court notes that Defendant also failed to cite any authority in characterizing this claim as "ill-founded". The Court has found no precedent requiring a finding of error on the part of the ALJ on this issue and finds no merit in this contention by the Plaintiff.

The record supports a denial of benefits. The Court finds that the ALJ evaluated the record in accordance with the correct legal standards established by the Secretary and the courts. The Court finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Secretary finding Plaintiff not disabled is AFFIRMED.

DATED this 16th day of JULY, 1996.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

s:\pierce.2

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

FILED

JUL 15 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FRANCES E. WILSON,

Plaintiff,

v.

TULSA JUNIOR COLLEGE, and
KENNETH HALL, in his capacity as
supervisor for Tulsa Junior College,

Defendants.

No. 95-C-51-K

ENTERED ON DOCKET

DATE 7-16-96

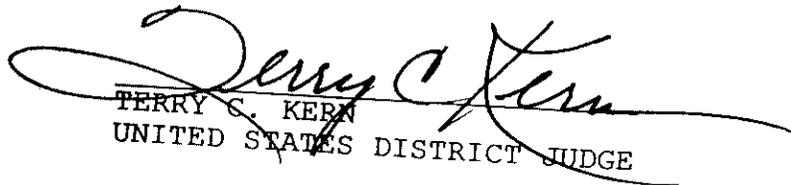
JUDGMENT

This action came on for jury trial before the Court, the Honorable Terry C. Kern, District Judge, presiding, and the jury having returned its verdict for the Plaintiff and against the Defendants as to the Plaintiff's hostile environment sexual harassment claim, and for the Defendants and against the Plaintiff as to the Plaintiff's *quid pro quo* sexual harassment claim and the Plaintiff's retaliation claim, and the jury having awarded \$100,000 in compensatory damages to the Plaintiff,

Judgment is therefore ENTERED for the Plaintiff and against the Defendants as to the Plaintiff's hostile environment sexual harassment claim, and judgment is ENTERED for the Defendants and against the Plaintiff as to the Plaintiff's *quid pro quo* sexual harassment claim and the Plaintiff's retaliation claim.

IT IS THEREFORE ORDERED that the Plaintiff Frances E. Wilson recover from the Defendant Tulsa Junior College the sum of \$100,000, with post-judgment interest thereon at the rate of 5.89 percent as provided by law.

ORDERED THIS 12 DAY OF JULY, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

BITUMINOUS CASUALTY
CORPORATION, an insurance
corporation,
Plaintiff,

vs.

LINECO, INC., an Oklahoma
corporation and the BOARD
OF COUNTY COMMISSIONERS OF
POTTOWATOMIE COUNTY,
OKLAHOMA, and THURMAN
SIMPSON, individually,
Defendant.

No. 95-C-634-K

ENTERED ON DOCKET
DATE 7-16-96

FILED

JUL 15 1996

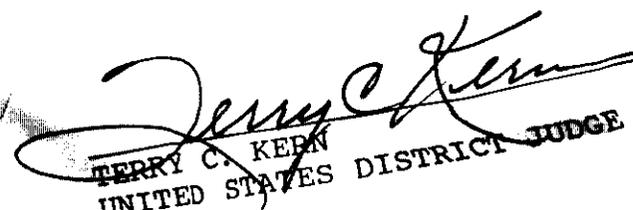
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the plaintiff's 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 plaintiff and against the defendants Board of County Commissioners of Pottowatomie County, Oklahoma, and Thurman Simpson. Plaintiff does not have liability or duty to defend under the insurance policy in question.

ORDERED this 12 day of July, 1996.


TERRY C. KEEN
UNITED STATES DISTRICT JUDGE

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

BITUMINOUS CASUALTY
CORPORATION, an insurance
corporation,

Plaintiff,

vs.

LINECO, INC., an Oklahoma
corporation and the BOARD
OF COUNTY COMMISSIONERS OF
POTTOWATOMIE COUNTY,
OKLAHOMA, and THURMAN
SIMPSON, individually,

Defendant.

ENTERED ON DOCKET
DATE JUL 16 1996

No. 95-C-634-K

FILED

JUL 15 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of the plaintiff for summary judgment against the defendants Board of County Commissioners of Pottowatomie County and Thurman Simpson¹. The motion was filed June 7, 1996, and no response has been filed. Pursuant to Local Rule 7.1(C), the motion may be deemed confessed for failure to respond in fifteen days. The Court has independently reviewed the record, and concludes summary judgment is appropriate.

Plaintiff brought this action for declaratory judgment, seeking a decision that plaintiff does not have an obligation to the Board of County Commissioners and is not obligated to pay for

¹Plaintiff filed a notice of dismissal without prejudice as to named defendant Lineco on October 12, 1995. In its brief supporting its summary judgment motion, plaintiff states: "The Defendant Thurman Simpson has been personally served with summons in this action but has made no appearance." The record reflects a return of service as to Simpson filed February 26, 1996. The service was in apparent compliance with 12 O.S. §2004(C)(1)(c)(1)

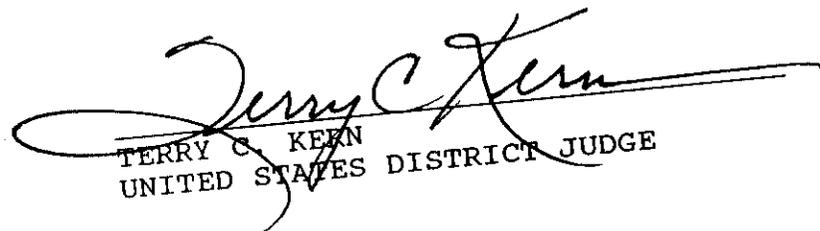
the cost of defense of Thurman Simpson in the event a suit is brought against Simpson by the Board of County Commissioners. The undisputed facts indicate plaintiff issued an insurance policy to Lineco on or about May 11, 1994, providing automobile liability coverage.

On or about January 10, 1995, a truck owned by Lineco was operated by Thurman Simpson and collided with a bridge located in Pottowatomie County, Oklahoma and owned, operated and maintained by the Board. As a result of the collision, the bridge collapsed. The Board has asserted a claimed loss in excess of \$250,000.

Simpson was an employee of Lineco at the time of the collision, but was not authorized to operate the truck. His use at the time was of a purely personal nature (visiting a girlfriend), the collision occurring after all business use of the vehicle had ceased for the day. The policy in question does not provide coverage to one who uses the vehicle without the insured's permission. Also, Simpson was not acting within the scope of his employment at the time of the collision. Under the present record, plaintiff is entitled to judgment.

It is the Order of the Court that the motion of the plaintiff for summary judgment (#8) is hereby granted.

ORDERED this 12 day of July, 1996.


TERRY C. KEEN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
7-16-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 THOMAS R. O'CARROLL,)
)
 Defendant.)

F I L E D

JUL 15 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Action No. 96CV513K

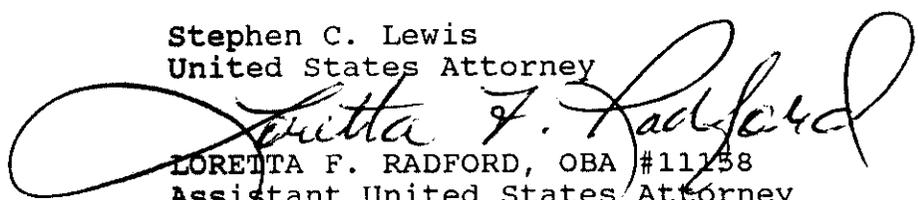
NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action with prejudice.

Dated this 15th day of July, 1996.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th St., Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 15th day of July, 1996, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to:

Thomas R. O'Carroll
2335 W. Tecumseh
Tulsa, OK 74127


Assistant United States Attorney

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

GEOFFREY WELLS,)
)
Plaintiff,)

v.)

Case No. 95-C-1252 E

BOSTON AVENUE REALTY, an Oklahoma)
general partnership comprised of)
Joseph L. Hull, Jr. and Joseph L.)
Hull, III; WORLD PRODUCTIONS,)
INCORPORATION; TIMOTHY BARRAZA;)
and 39 PRODUCTIONS, INC., an)
Oklahoma corporation,)
all d/b/a SRO,)

Defendants.)

and)

39 PRODUCTIONS, INC., an Oklahoma)
corporation,)

Cross-Plaintiff,)

v.)

DALLAS FIRE INSURANCE COMPANY,)
INC., a Texas corporation,)

Cross-Defendant.)

FILED

JUL 15 1996

U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JUL 16 1996

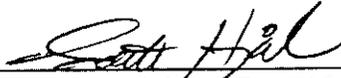
**STIPULATION OF DISMISSAL WITH PREJUDICE
OF THIRD PARTY CLAIM**

Third-Party Plaintiff, 39-Productions, Inc., and Third-Party Defendant, Dallas Fire Insurance Company, the only parties to the Third-Party Action in the above captioned matter, hereby stipulate,

through their counsel of record, to the **dismissal** of all claims in the Third-Party Action with prejudice to refiling, pursuant to Fed. R. Civ. P. 41(c).

Respectfully submitted,

ELIAS, HJELM & TAYLOR, P.C.

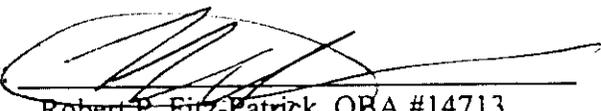
By: 

Scott D. Hjelm, OBA #15624
717 S. Houston, Suite 300
Tulsa, Oklahoma 74127-9006

ATTORNEYS FOR THIRD-PARTY
PLAINTIFF 39 PRODUCTIONS, INC.

AND

HALL, ESTILL, HARDWICK, GABLE
GOLDEN & NELSON

By: 

Robert P. Fitz-Patrick, OBA #14713
Fred M. Buxton, OBA #12234
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708

ATTORNEYS FOR THIRD-PARTY
DEFENDANT DALLAS FIRE INSURANCE
COMPANY

CERTIFICATE OF MAILING

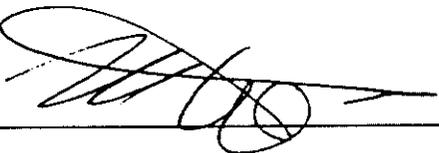
I certify that on the 15th day of July, 1996, a true and correct copy of the above and foregoing instrument was forwarded by U.S. Mail, with proper postage thereon fully prepaid, to the following counsel of record:

James R. Hicks
Steven E. Smith
Morrel, West, Saffa, Craige & Hicks, Inc.
City Plaza West, Suite 900
5310 East 31st Street
Tulsa, Oklahoma 74135

Phil R. Richards
Richards, Paul & Richards
9 East 4th Street, Suite 400
Tulsa, Oklahoma 74103-5118

Thomas H. Hull
1503 ½ South Denver
Tulsa, Oklahoma 74119

Van N. Eden
1717 South Cheyenne
Tulsa, Oklahoma 74119



A handwritten signature in black ink, appearing to be 'J. Hicks', is written over a horizontal line.

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

FILED

JUL 15 1996 *ja*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES M. DIGGS and BRENT W.
TAYLOR,

Plaintiffs,

vs.

PAT BALLARD, et al.,

Defendants.

No. 96-CV-595-K ✓

ORDER

This matter comes before the Court on Plaintiffs' motion for leave to proceed in forma pauperis and civil rights complaint.

After carefully weighing Plaintiffs' right of access to the courts and the policies of the Oklahoma Department of Corrections regarding legal mail and multi-plaintiffs litigation, the Court concludes that it would be in the best interest of justice if the Plaintiffs would each proceed with a separate action alleging the violation of their own constitutional rights. The Court also notes that the present complaint is not on the form approved for use by the United States Court of Appeals for the Tenth Circuit.

Accordingly, Plaintiffs' motion for leave to proceed in forma pauperis is GRANTED and this action is hereby DISMISSED WITHOUT PREJUDICE. The Clerk shall mail to each Plaintiff a copy of the present complaint and a civil rights package which Plaintiffs should complete and return to the Court as soon as possible.

SO ORDERED THIS 12 day of July, 1996.

Terry C. Kern
TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 7-16-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 RODNEY J. PATRICK; AMY M.)
 PATRICK; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
 Defendants.)

FILED

JUL 15 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Case No. 96CV 148K ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12 day of July, 1996. 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; and the Defendants, Rodney J. Patrick and Amy M. Patrick, appear not, but make default.

The Court further finds that the Defendants, Rodney J. Patrick and Amy M. Patrick, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning April 24, 1996, and continuing through May 29, 1996, 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, **Rodney J. Patrick and Amy M. Patrick**, 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, **Rodney J. Patrick and Amy M. Patrick**. 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 Answers on March 18, 1996; and that the Defendants, **Rodney J. Patrick and Amy M. Patrick,** have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on April 10, 1992, **Rodney J. Patrick and Amy M. Patrick** filed their voluntary petition in bankruptcy in Chapter 7 in the United States

Bankruptcy Court, Northern District of Oklahoma, Case No. 92-1253-C. On July 31, 1992, the case was discharged and subsequently closed on November 25, 1992.

The Court further finds that the Defendants, **Rodney J. Patrick and Amy M. Patrick**, are both single unmarried persons.

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

**LOT ONE (1), OF THE SUBDIVISION OF TRACT
ELEVEN (11), TULSA GARDEN ACRES, TULSA
COUNTY, STATE OF OKLAHOMA,
ACCORDING TO THE RECORDED PLAT
THEREOF.**

The Court further finds that on May 26, 1989, the Defendants, **Rodney J. Patrick and Amy M. Patrick**, executed and delivered to WOODLAND BANK, their mortgage note in the amount of \$26,178.00, payable in monthly installments, with interest thereon at the rate of 8.875 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, **Rodney J. Patrick and Amy M. Patrick**, then Husband and Wife, executed and delivered to WOODLAND BANK, a real estate mortgage dated May 26, 1989, and recorded on June 1, 1989, in Book 5186, Page 1072, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 26, 1989, WOODLAND BANK assigned the above-described mortgage note and mortgage to MORTGAGE CLEARING CORPORATION. This Assignment of Mortgage was recorded on June 22, 1989, in Book 5190, Page 1013, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 4, 1991, MORTGAGE CLEARING CORPORATION assigned the above-described mortgage note and mortgage to SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., HIS SUCCESSORS OR ASSIGNS. This Assignment of Mortgage was recorded on November 5, 1991, in Book 5360, Page 189, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 1, 1991, the Defendants, Rodney J. Patrick and Amy M. Patrick, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, Rodney J. Patrick and Amy M. Patrick, 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, Rodney J. Patrick and Amy M. Patrick, are indebted to the Plaintiff in the principal sum of \$35,718.58, plus interest at the rate of 8.875 percent per annum from March 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 Defendants, Rodney J. Patrick and Amy M. Patrick, are in default, and have no right, title or interest in the subject real property.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, **Rodney J. Patrick and Amy M. Patrick**, in the principal sum of \$35,718.58, plus interest at the rate of 8.875 percent per annum from March 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.89 percent per annum until paid, plus the costs of this action and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Rodney J. Patrick, Amy M. Patrick, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

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

First:

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

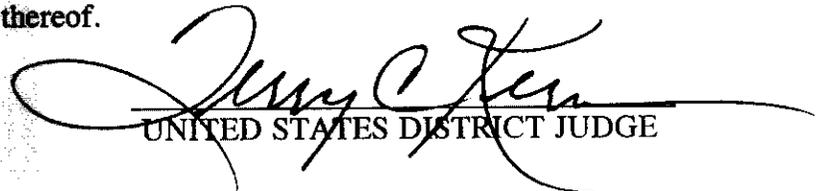
Second:

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

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

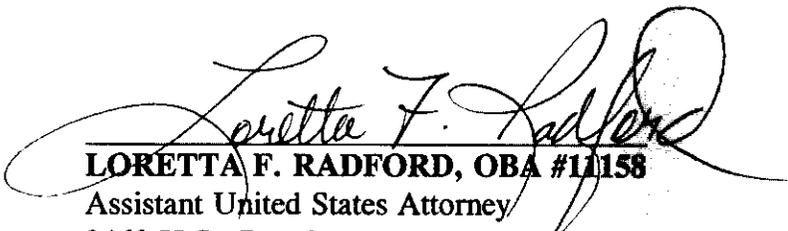
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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

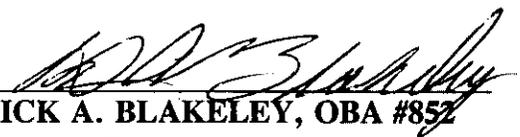
APPROVED:

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. 96CV 148K

LFR:flv

ENTERED ON DOCKET
DATE 7-16-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
JAMES R. HARDGROVE aka James)
Randolph Hardgrove; CHERYL ANN)
HARDGROVE; CITY OF BROKEN)
ARROW, Oklahoma; COUNTY)
TREASURER, Tulsa County, Oklahoma;)
BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

FILED

JUL 15 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Case No. 95 C 479K ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12 day of July, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, CITY OF BROKEN ARROW, Oklahoma, appears by Michael R. Vanderburg, City Attorney, Broken Arrow, Oklahoma; and the Defendants, JAMES R. HARDGROVE aka James Randolph Hardgrove and CHERYL ANN HARDGROVE, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, JAMES R. HARDGROVE aka James Randolph Hardgrove, signed a Waiver of

Summons on June 12, 1995; that the Defendant, CHERYL ANN HARDGROVE, was served of Summons and Complaint on July 17, 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 9, 1995; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its Answer on June 8, 1995; and that the Defendants, JAMES R. HARDGROVE aka James Randolph Hardgrove and CHERYL ANN HARDGROVE, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, JAMES R. HARDGROVE, is one and the same person as James Randolph Hardgrove, and will hereinafter be referred to as "JAMES R. HARDGROVE." The Defendants, JAMES R. HARDGROVE and CHERYL ANN HARDGROVE, are husband and wife.

The Court further finds that on April 15, 1991, James R. Hardgrove, filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-B-1262 C. On August 6, 1991, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on September 26, 1991.

The Court further finds that on September 6, 1995, Cheryl Ann Hardgrove, filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Middle District of Florida, Tampa Division, Case No 95-09050-8P7. On January 10, 1996, the United States Bankruptcy Court, Middle District of Florida, Tampa Division, filed its Discharge of Debtor and the Final Decree was subsequently filed on January 10, 1996.

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 Four (4), Block Seven (7), STACY LYNN 6TH ADDITION, an Addition to the City of Broken Arrow, Tulsa County State of Oklahoma, according to the recorded Plat thereof. aka 1913 W. Gary, Tulsa, Okla

The Court further finds that on April 28, 1989, the Defendant, JAMES R. HARDGROVE, executed and delivered to **COMMERCIAL FEDERAL MORTGAGE COLORATION**, his mortgage note in the amount of \$43,650.00, payable in monthly installments, with interest thereon at the **rate** of 8.875 percent per annum.

The Court further finds that **as** security for the payment of the above-described note, the Defendant, JAMES R. HARDGROVE and CHERYL ANN HARDGROVE, husband and wife, executed and delivered to **COMMERCIAL FEDERAL MORTGAGE CORPORATION**, a mortgage dated April 28, 1989, covering the above-described property. Said mortgage was recorded on May 15, 1989, in Book 5183, Page 1033, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 7, 1990, **COMMERCIAL FEDERAL MORTGAGE CORPORATION**, assigned **the** above-described mortgage note and mortgage to **THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C.**, his successors and assigns. This **Assignment** of Mortgage was recorded on December 26, 1990, in Book 5295, Page 1976, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 25, 1991, the Defendants, JAMES R. HARDGROVE and CHERYL ANN HARDGROVE, 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 26, 1990.

The Court further finds that the Defendants, JAMES R. HARDGROVE and CHERYL ANN HARDGROVE, 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, JAMES R. HARDGROVE and CHERYL ANN HARDGROVE, are indebted to the Plaintiff in the principal sum of \$64,098.75, plus interest at the rate of 8.875 percent per annum from March 14, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$15.00 which became a lien on the property as of June 25, 1993, and a lien in the amount of \$14.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, JAMES R. HARDGROVE and CHERYL ANN HARDGROVE, are in default, and have no right, title or interest in the subject real property.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, JAMES R. HARDGROVE and CHERYL ANN HARDGROVE, in the principal sum of \$64,098.75, plus interest at the rate of 8.875 percent per annum from March 14, 1995 until judgment, plus interest thereafter at the current legal rate of 5.89 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 \$29.00, 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, CITY OF BROKEN ARROW, Oklahoma, has no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, JAMES R. HARDGROVE and CHERYL ANN HARDGROVE, 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, COUNTY TREASURER, Tulsa County, Oklahoma, **in the amount of \$29.00**, 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.

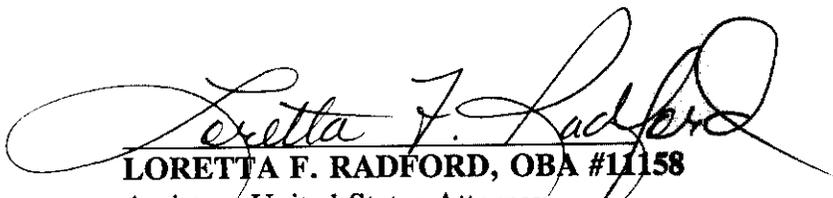
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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:

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United States Attorney


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



MICHAEL R. VANDERBURG, OBA #9180

City Attorney,
CITY OF BROKEN ARROW, Oklahoma
P. O. Box 610
Broken Arrow, OK 74012
Attorney for Defendant,
City of Broken Arrow, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 479K

LFR:flv

ENTERED ON DOCKET

DATE 7/16/96

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

F I L E D

FRANKLIN R. CRAWFORD,)
SS# 441-38-7155,)

Plaintiff,)

v.)

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

Defendant.)

JUL 15 1996 *SP*

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NO. 95-C-473-M ✓

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 15
day of July, 1996.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 7/16/96

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

F I L E D

JUL 15 1996 *JAL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FRANKLIN R. CRAWFORD)
SS# 441-38-7155)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER, ¹ Commissioner)
Social Security Administration,)
)
Defendant.)

NO. 95-C-473-M ✓

ORDER

Plaintiff, Franklin R. Crawford, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits². In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 U. S. C. § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the

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. 103-297. However, this order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

² Plaintiff's current application for disability benefits protectively dated July 27, 1992 was denied January 7, 1993. The denial was affirmed on reconsideration. A hearing before an ALJ was held on June 13, 1994 after which a denial decision was issued on August 8, 1994. The Appeals Council affirmed the findings of the ALJ on March 21, 1995. The decision of the Appeals Counsel represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

The record of the proceedings has been meticulously reviewed by the Court. The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has properly outlined the required sequential analysis. The Court therefore incorporates that information into this order as duplication would serve no useful purpose.

Plaintiff was 53 years old at the time of his hearing. He claims he has been unable to work since June 1992 due to arthritic joint pain, especially in his hands, and also because of stomach problems and diabetes. The ALJ determined that Plaintiff is not able to return to his past relevant work as a welder at the medium exertional level. Finding that Plaintiff has "*no nonexertional limitations*", the ALJ concluded that Plaintiff retains the residual functional capacity to perform the full range of light work. [R. 20]. Relying on both Rule 202.12 of the medical-vocational

guidelines³ ("grids") and the testimony of a vocational expert, the ALJ found that jobs exist in significant numbers in the national economy which Plaintiff can perform despite his impairments. [R. 21]. Accordingly, the ALJ determined Plaintiff was not "disabled" within the meaning of the Social Security Act.

Plaintiff alleges the record does not support the determination of non-disability by substantial evidence and that the ALJ failed to perform the correct analysis. Specifically, Plaintiff argues that the ALJ: (1) ignored Plaintiff's treating physicians in finding that Plaintiff had no nonexertional impairments; (2) erroneously applied the grids; and (3) improperly questioned the vocational expert.

Plaintiff testified that his diabetes, diverticulosis and blood pressure are under control. [R. 46-47]. However, he is prevented from doing his former work because he cannot bend, get into tight places, or climb as his former welding work required. He also testified that problems with his hands prevent him from using a mig (welding) gun or doing tigg (precision) welding. [R. 50-51]. The medical records substantiate the existence of arthritic pain and hand problems.

The records of Plaintiff's treating physician, Dr. Milton Workman, document a long standing, albeit intermittent, problem with arthritic pain, especially in the knees. On March 26, 1990, Dr. Workman noted probable arthritis of the cervical spine, hands and knees. The clinical note reflects x-ray confirmation of moderate patellofemoral arthritic changes and cystic joint changes of the right hand. [R. 192].

³ 29 CFR Pt. 404, Subpt. P, App. 2, Table No. 2.

A radiologist's CT-scan report dated December, 1989 confirms degenerative apophyseal joint disease at C3-4 on the left and C4-5 bilaterally. [R. 183].

Plaintiff has frequently seen Dr. Lewis Greenberg for management of his medical problems. The record contains Dr. Greenberg's office notes extending from June 1992 through April 1994. [R. 217-231; 233-236; 249-254]. Dr. Greenberg's records document only intermittent complaints of shoulder and hand pain but they also reflect that Plaintiff was on "chronic Ansaid [anti-inflammatory] therapy" for these problems. [R. 233]. A January 8, 1993 entry states Plaintiff "has known degenerative disease and right shoulder pain." [R. 218]. Dr. Greenberg's December 9, 1992, note documents that anti-inflammatories are required for Plaintiff's degenerative joint disease, despite a former upper GI bleed. [R. 219]. On August 9, 1993, Dr. Greenberg documents a new complaint of "intermittent left hand numbness, and a carpal tunnel distribution, and occasional unexplained shoulder pain." [R. 234]. Use of a left volar splint was prescribed as treatment for Plaintiff's "possible carpal tunnel findings explaining his left hand numbness." *Id.* There are no further complaints concerning left hand numbness documented in the medical records. However, a January 5, 1994 note records "occasional joint discomfort of shoulders and hands" for which a stronger anti-inflammatory medication, Toradol, was prescribed for a period of 10-14 days, to be followed with the resumption of Ansaid therapy. [R. 233].

The aforementioned excerpts from Plaintiff's medical records demonstrates the lack of substantial support in the record for the ALJ's finding that "[t]here are no

nonexertional limitations at a light level of work." [R. 18, 20]. Plaintiff's testimony of difficulty using his hands for "doing small things or close work . . . putting small parts together" [R. 42, 50,51, 52,] is supported by medical records generated by his treating physicians. The only piece of evidence to contradict Plaintiff's testimony in this regard is the December 1992 report of consultative examiner, Dr. Dalessandro. [R. 209-215]. Dr. Dalessandro noted that fine and gross manipulation was normal as was grip strength. [R. 211]. However, in view of the treating physicians' documentation of hand pain and prescription of medication therefor, Dr. Dalessandro's report of his one-time examination of Plaintiff is not sufficient for the ALJ to rely upon to eliminate hand problems as a source of limitation on Plaintiff's abilities. *See Frey v. Bowen*, 816 F.2d 508, 515 (10th Cir. 1987) (findings of a nontreating physician based upon limited contact and examination are of suspect reliability).

The record contains substantial evidence that Plaintiff is limited in his ability to use his hands for small work. This limitation is a nonexertional impairment which precludes conclusive reliance on the grids, necessitating other evidence of the existence of jobs in significant numbers in the national economy that Plaintiff can perform despite his impairments. *Thompson v. Sullivan*, 987 F.2d 1482, 1492 (10th Cir. 1993). The ALJ did obtain the testimony of a vocational expert in this case. However, the hypothetical questions asked of the vocational expert did not include any limitation on Plaintiff's use of his hands. Such a failure violates the established rule that hypothetical questions must include all those impairments borne out by the

evidentiary record. *Evans v. Chater*, 55 F.3d 530, 532 (10th Cir. 1995). Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). The vocational expert's testimony in this case does not constitute substantial evidence to support the denial decision.

The agency decision in this case is REVERSED and REMANDED for further development of the record and analysis considering limitations on Plaintiff's ability to use his hands for the performance of work.

SO ORDERED this 13th day of July, 1996.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

7-15-96

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

FILED

JUL 12 1996

Paul Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

SL

MAMORU KAWADA, et al.,
Plaintiffs,

v.

ELIAS MASSO, et al.,
Defendants.

Case No. 95-CV-108-H

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by December 15, 1996, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 12TH day of July, 1996.



Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET

DATE 7-15-96

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

FILED

JUL 12 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

GENERAL DYNAMICS
CORPORATION,

Plaintiff,

v.

MARCUS McCafferty,

Defendant.

Case No. 95-CV-922-H

ORDER OF DISMISSAL UPON SETTLEMENT

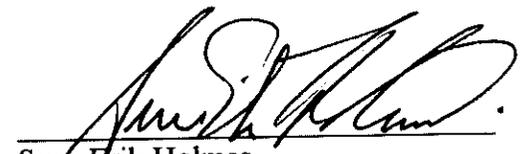
The parties to the action, by their counsel, have advised the court that they have agreed to a settlement.

IT IS HEREBY ORDERED that this matter is DISMISSED WITH PREJUDICE.

However, if any party hereto certifies to this Court, with proof of service of a copy thereon on opposing counsel, within ninety days from the date hereof, that settlement has not in fact occurred, the foregoing order shall be vacated and this cause shall forthwith be restored to the calendar for further proceedings.

IT IS SO ORDERED.

This 12TH day of July, 1996.



Sven Erik Holmes
United States District Judge

FILED ON DOCKET
7-15-96

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

FILED

JUL 12 1996

Paul Lounsbury, Clerk
U.S. DISTRICT COURT

DAVE RYCROFT, d/b/a PROFESSIONAL)
PROPELLER SERVICE,)
)
Plaintiff,)
)
vs.)
)
PREDATOR PROPS, INC.,)
)
Defendant.)

Case No. 95-CV-924-H

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Dave Rycroft, d/b/a Professional Propeller Service, and Defendant, Predator Props, Inc., pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby jointly stipulate for the dismissal of this cause with prejudice.

DATED: July 12, 1996.

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

FILED
JUL 12 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BARBARA LYNN BELL,)
)
Petitioner,)
)
v.)
)
NEVILLE MASSIE, Warden of the)
Mabel Bassett Correctional)
Center, and DREW EDMONDSON,)
Attorney General of the State)
of Oklahoma,)
)
Respondents.)

Case No. 95-C-169-H

ORDER

This matter comes before the Court on Petitioner's Application for Writ of Habeas Corpus (Docket #1) and Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus as Moot (Docket #27).

I.

On September 30, 1993, Petitioner was convicted of second degree murder in Tulsa County District Court for the murder of her husband, Dr. David Bell. She was subsequently sentenced to serve a twenty-year sentence in the Department of Corrections. On October 14, 1993, Petitioner filed a *Motion to Preserve Tape Recording of Trial and to Make it Part of the Original Record on Appeal*. (Docket # 21, ex. A.) An evidentiary hearing on the audiotape issue was held on December 28, 1993, before the Honorable Clifford E. Hopper, who was also the presiding judge in Petitioner's trial. Judge Hopper declined to rule on the motion on jurisdictional grounds.

In the course of Petitioner's direct appeal to the Oklahoma Court of Criminal Appeals, she filed a *Motion to Remand for Evidentiary Hearing Regarding the District Court Record*. (Docket #21, ex. F.) On April 5, 1994, the Court of Criminal Appeals granted the motion and remanded the matter to the district court for further evidentiary hearings. After extensive hearings on the matter, the Honorable B.R. Beasley, who was assigned to the case upon Judge Hopper's disqualification, determined that the destruction of the trial tapes "could be a significant issue." However, he declined to rule on the tape issue, reserving such issue for the Oklahoma Court of Criminal Appeals.

On July 21, 1994, Petitioner filed her *Brief in Support of Motion to Reverse Judgment of Conviction* in the Oklahoma Court of Criminal Appeals. She contended that she had been denied the right to a complete and accurate transcript and that no means existed to correct or complete the record. Petitioner requested the court to reverse her conviction, remand the case for a new trial, and "to order that hearings be conducted to determine whether circumstances exist which prevent a bar to her further prosecution." (Docket #21, ex. K at 40.)

On February 14, 1995, the Oklahoma Court of Criminal Appeals denied Petitioner's motion to reverse the conviction. The court concluded that "the transcripts, as corrected, reasonably and accurately reflect[ed] the events at trial," and that defense counsel did not affirmatively request on the record that the bench conferences, the mistrial motion, and jury instructions be stenographically reported. The court further held that the trial court's alleged refusal to require the court reporter to move her equipment for the purpose of stenographically reporting bench conferences "only constituted a refusal concerning whether the trial court would further facilitate the taking down of statements during bench conferences and did not violate due process under section 106.4(a)." The court also denied Petitioner's request for hearings on her claim of bar to retrial, stating in applicable

part as follows:

Appellant also argues that the alleged intentional destruction of the audio tapes by the court reporter bars any further prosecution of Appellant should her conviction be reversed on appeal. Pursuant to Section 106.4(a), electronic recording of proceedings is not required and, if utilized, is only a supplement to the official stenographic method utilized by the court reporter.

(Docket #21, ex. L at 8-9.)

On February 22, 1995, Petitioner filed the instant Petition for a Writ of Habeas Corpus. Six months later, on August 22, 1995, the Oklahoma Court of Criminal Appeals reversed Petitioner's conviction on the basis of an unconstitutional "presumed not guilty" jury instruction.

II.

Petitioner initially sought habeas relief under 28 U.S.C. § 2254(a) which applies post trial and affords relief to a person "in custody pursuant to the judgment of a State court . . . on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."¹ Although free on bond pending a new trial, Petitioner remains "in custody" for purposes of section 2254. See Hensley v. Municipal Ct., 411 U.S. 345, 345-46 (1973). However, upon reversal of her conviction, Petitioner is no longer "in custody pursuant to the judgment of a State court" as contemplated by section 2254(a). See Delk v. Atkinson, 665 F.2d 90, 93 (6th Cir. 1981) (petitioner, whose murder conviction had been reversed and who was free on bail at the time his habeas corpus petition was filed, was not "a person in custody pursuant to the judgment of a state court" for section 2254

¹The petition does not specify whether Petitioner initially sought habeas relief under 28 U.S.C. § 2254 or under the general habeas corpus statute, 28 U.S.C. § 2241. In her Brief in Opposition to Respondent's Motion to Dismiss, however, Petitioner acknowledges that she sought habeas relief only under section 2254.

purposes). Therefore, Petitioner's bar to retrial claim is not cognizable under section 2254(a).

Instead, Petitioner's only available avenue of federal relief is to seek pretrial habeas relief under 28 U.S.C. § 2241, which she has failed to do. Section 2241 applies to a person in custody regardless of whether final judgment has been rendered and regardless of the present status of the case pending against her. Capps v. Sullivan, 13 F.3d 350, 353 (10th Cir. 1993) (analyzing pretrial habeas claim under § 2241(a)(c)) ; see also Palmer v. Clarke, 961 F.2d 771 (8th Cir. 1992), cert. denied, 114 S.Ct. 2694 (1994) (same); Dickerson v. State of Louisiana, 816 F.2d 220, 224 & n.9 (5th Cir.), cert. denied, 484 U.S. 956 (1987) (same); Delk, 665 F.2d at 93-94 (analyzing pretrial habeas claims solely under section 2241(c)(3) although petitioner had sought relief under both sections 2254 and 2241).²

The Court therefore concludes that Petitioner is seeking habeas relief under the wrong federal habeas statute. She is not eligible for relief on her claim under Section 2254, and she has failed to assert a claim for pretrial habeas relief under Section 2241.

III.

Even if the Court construes the instant petition as seeking pretrial habeas relief under section 2241(c)(3), Petitioner has failed to exhaust her state remedies. See Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 300-03 (1984) (plurality opinion) (petitioner seeking pretrial habeas relief

²Section 2241(c)(3) provides that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . (3) [h]e is in custody in violation of the constitution or laws or treaties of the United States." Some circuits have reviewed pretrial habeas actions on double jeopardy grounds under section 2254 without recognizing the distinction between sections 2254 and 2241. See Satter v. Leapley, 977 F.2d 1259 (8th Cir. 1992); Greyson v. Kellam, 937 F.2d 1409 (9th Cir. 1991); Reimnitz v. State's Attorney of Cook County, 761 F.2d 405 (7th Cir. 1985); Hartley v. Neely, 701 F.2d 780 (9th Cir. 1983). However, the Court does not find these cases persuasive.

must be “in custody” and must have exhausted all available state remedies); Capps, 13 F.3d at 354 n.2 (noting that case law requires exhaustion of state remedies even in a habeas action pursuant to section 2241). To exhaust her bar to retrial claim, Petitioner must have “fairly presented” that specific claim to the Oklahoma Court of Criminal Appeals prior to seeking federal habeas relief. See Picard v. Connor, 404 U.S. 270, 275-76 (1971). “Exhaustion does not, however, require the filing of repetitious applications in the state courts, and when . . . the state’s highest court has been presented with the claims . . . the exhaustion requirement is satisfied, though the court ‘exercises discretion not to review the case’” Moore v. Kirby, 879 F. Supp. 592, 593 (S.D. W. Va. 1995) (quoting 17A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d, § 4264.1 at 344-45 (1988)); see also Dever v. Kansas State Penitentiary, 36 F.3d 1531, 1534 (10th Cir. 1994) (“The exhaustion requirement is satisfied if the highest court exercises discretion not to review the case.”).

The Court finds that Petitioner has not “fairly presented” the merits of her bar to retrial claim to either the state trial court or the Oklahoma Court of Criminal Appeals since the reversal of her conviction. Petitioner argues that she adequately presented her bar to retrial claim when she sought further hearings “to determine whether circumstances exist which prevent a bar to her further prosecution” in her *Brief in Support of Appellant’s Motion to Reverse Judgment of Conviction*.³ Respondent does not dispute that the above brief requested a remand and an order directing that evidentiary hearings be conducted to determine if re-prosecution should be barred. It argues, however, that the Court of Criminal Appeals did not have a fair opportunity to address the merits of

³Petitioner also contends she presented the bar to re-trial issue in Tulsa County District Court on December 23, 1993, in *Defendant’s Application for Expedited Hearing Regarding Tape Recordings of Trial*. (Docket #21 at 4 and ex. D.) This Court has found no reference to bar to retrial in that pleading.

Petitioner's claim. Respondent contends the arguments and cases which Petitioner cited to the Court of Criminal Appeals related to destruction or negligent failure to preserve exculpatory evidence, and not to denial of a complete trial transcript. Respondent further asserts that, "[b]y requesting further evidentiary hearings, in the event of a reversal of her conviction, Petitioner recognized that a motion to bar further prosecution was premature." (Docket #27 at 5.)

While Petitioner may have presented some of the arguments and cases in support of her claim of bar to retrial to the Court of Criminal Appeals, her claim did not ripen until the reversal of her conviction on August 22, 1995. The plea of bar to retrial or "former jeopardy" is made to the trial court prior to trial, not on direct appeal prior to the reversal of the conviction. See Okla. Stat. tit. 22, § 513; Fines v. State, 240 P. 1079 (Okla. Ct. Crim. App. 1925) (plea of former jeopardy should be interposed on arraignment before pleading to merits). Therefore, the Court finds that Petitioner simply could not have exhausted her state remedies as to her bar to retrial claim until her conviction was reversed.⁴

⁴The majority of jurisdictions permit an interlocutory appeal of an order denying a pretrial motion on double jeopardy grounds. See State v. Baranco, 884 P.2d 729, 733 n.4 (Hawaii 1994) (and cases compiled therein). Oklahoma, however, "has interpreted the word 'judgment' in connection with [22 Okla. Stat.] § 1051 as being a final judgment." Gonseth v. State, 871 P.2d 51, 53 (Okla. Ct. Crim. App. 1994); see also Jones v. Dillard, 545 P.2d 209, 209-10 (Okla. Ct. Crim. App. 1976) (ruling adverse to defendant on motion to quash or set aside information is not a final order or judgment but an intermediate order made in progress of case and cannot be appealed from except by review after pronouncement of judgment and sentence); Ex parte Kirk, 252 P.2d 1032, 1034 (Okla. Ct. Crim. App. 1953) (habeas corpus is not available for purpose of discharging a petitioner on the ground of former jeopardy, but the plea of former jeopardy must be presented to the trial court and the remedy in case of adverse decision on plea of former jeopardy is by appeal). However, Petitioner could certainly present her bar to retrial claim to the trial court and then attempt to obtain pre-trial appellate review by applying to the Oklahoma Court of Criminal Appeals for a writ of mandamus or order of prohibition as did the petitioners in Gully v. Kunzman, 592 F.2d 283, 287 (6th Cir.), cert. denied, 442 U.S. 924 (1979). The Gullys applied to the Kentucky Supreme Court for a writ of mandamus or order of prohibition because under Kentucky law there was no right of interlocutory appeal from a pre-trial order denying

In her supplemental brief, Petitioner argues that special circumstances exist demonstrating that exhaustion of state remedies would be futile. She contends that “[i]t is unlikely, if not impossible, for the petitioner to proceed back through the state courts and have those courts remedy their own violations of the petitioner’s rights.” (Docket #21 at 9-10.) The Court does not agree. A new trial judge and prosecutor have been assigned to Petitioner’s case. Moreover, Petitioner has now obtained the discovery that she sought in state court for over one year. Accordingly, the Court finds that Petitioner has remedies available in state court and, therefore, under the exhaustion requirements of the federal habeas statutes, this action must be dismissed without prejudice.

IV.

The Court further notes that even if it reached the merits of Petitioner’s unexhausted claim, as permitted by the recent amendments to section 2254, she would not be entitled to pretrial habeas relief.⁵ Federal courts generally entertain pretrial habeas claims, such as the one at issue in this case,

relief on double jeopardy grounds.

⁵On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act, No. 104-518, 104th Cong., 2d Sess., which enacted significant amendments to the habeas statutes, including section 2254(b)(2). That section now reads as follows: “An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.”

The Court finds the above change to be procedural in nature and therefore applicable retroactively to cases pending prior to the enactment of the legislation. Landgraf v. USI Film Prods., 114 S.Ct. 1483, 1502 (1994).;

The Court further finds, however, that the amendments regarding the standards of deference for state court findings and the petitioner’s burden of proof do not apply to petitions, like the instant petition, which were filed before the passage of the Act. Although Congress specifically mandated that the new procedures for habeas corpus petitions involving capital punishment are to apply to all pending and subsequently filed cases, Congress declined to include such language in section 105, and therefore the Court infers that retroactivity was not intended.

if the constitutional right asserted by Petitioner would be irretrievably lost if the alleged violation is not redressed before trial. See Lydon, 466 U.S. at 300-303 (recognizing the special nature of the double jeopardy right and the fact that the right cannot be fully vindicated on appeal following final judgment). In Capps, the Tenth Circuit stated as follows:

For a federal court to exercise its habeas corpus power to stop a state criminal proceeding “special circumstances” must exist. In general, the constitutional violation must be such that it cannot be remedied by another trial, or other exceptional circumstances exist such that the holding of a new trial would be unjust.

13 F.3d at 352. Petitioner seeks to bar her retrial on the ground that federal due process rights were violated by “the intentional destruction of audiotapes by a reporter in an effort to prevent the petitioner from presenting the trial judge’s prejudicial and hostile remarks to the petitioner, and her counsel, as Due Process violations on appeal.” (Memorandum of Facts & Law in Support of Petition for Writ of Habeas Corpus, Docket #40, at 55.)⁶ While the intentional destruction or suppression of

In any event, even if the Court viewed the statute as lacking the clear intent favoring retroactive application, the Court believes section 105 would have a truly retroactive effect and therefore be subject to the “traditional presumption’ against retroactive application of a statute.” Landgraf, 114 S.Ct. at 1493-96; see also Lennox v. Evans, ___ F.3d ___, 1996 WL 343632 (10th Cir. Jun. 26, 1996) (holding that the amendment in § 102 codifies the substantive standard set out in Barefoot v. Estelle, 463 U.S. 880, 890-92 (1983), for issuance of a certificate of probable cause and, therefore, does not have retroactive effect within the meaning of Landgraf).

⁶Petitioner’s bar to retrial claim does not arise under the Double Jeopardy Clause of the Fifth Amendment which protects “against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense.” Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 306 (1984) (plurality opinion).

In Petitioner’s case, the State of Oklahoma is not attempting to impose multiple punishments for a single offense. Nor is it attempting to convict Petitioner after acquittal. Rather the State of Oklahoma is attempting to re prosecute Petitioner since her conviction was overturned on appeal because of a trial error. In Lydon, the plurality of the Supreme Court made clear that the Double Jeopardy Clause “does not bar re prosecution of a defendant whose conviction is

the trial tapes is quite disturbing to the Court, Petitioner disregards the fact that the Court of Criminal Appeals granted her a new trial over ten months ago. Such a new trial may vindicate Petitioner's rights and afford her a complete and accurate transcript of the trial court proceedings.

In Whitmire-Harris v. State, 863 P.2d 1255 (Okla. Ct. Crim. App. 1993), the Oklahoma Court of Criminal Appeals held the trial transcript to be unreliable for appellate purposes because it contained numerous inaudible, unintelligible, and missing words. Id. at 1257. The Court of Criminal Appeals recognized that where a defendant is denied his or her statutory right to a complete and accurate transcript, the appropriate relief is reversal of the conviction and remand to the trial court for a new trial, not releasing the petitioner from custody. Id.; cf. Hixon v. State, 456 P.2d 117 (Okla. Ct. Crim. App. 1969) (holding a new trial appropriate where defendant sought to challenge sufficiency of affidavit on which search warrant was based, but, through no fault of his own, district court files containing affidavit could not be located).⁷

Petitioner contends the instant case presents "special circumstances" that warrant a bar to reprosecution. Capps v. Sullivan, 13 F.3d at 352-53. She asserts that she will suffer prejudice on retrial because the absence of an accurate and complete transcript denies her the effective use of the transcript upon retrial. In particular, she argues that without an accurate and complete transcript, she is prevented from using a state witness' former trial testimony to show an inconsistency in testimony or to impeach the witness generally. Further, if the State attempts to impeach a defense witness' overturned on appeal." Id.

⁷Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994), is distinguishable from the instant case. In Harris, the Tenth Circuit Court of Appeals recognized that the most appropriate remedy when a petitioner establishes a due process violation arising from delay in adjudicating his state appeal is to grant a conditional writ, releasing the petitioner if the State does not decide the appeal within a specified period of time. Id. at 1566.

former testimony, Petitioner alleges that the **unreliable** transcript may prevent her rehabilitation of that witness. Lastly, Petitioner contends that **she** will not be able to employ with any degree of trustworthiness the favorable testimony of **Richard Raska**, who died of a heart attack in 1996.⁸

The Court concludes that pretrial **resolution** of the above issues is premature. A pretrial habeas action is not the appropriate **forum** to predict what will happen on retrial, i.e., whether Petitioner will successfully **impeach a state witness** or rehabilitate a defense witness. If Petitioner is in fact prejudiced as a result of the allegedly **incomplete** and inaccurate transcript, Petitioner will have an opportunity to present those claims **through the established** appeals process. Therefore, the Court finds that the “special circumstances” **presented** in this case are not sufficient as a matter of law to warrant a bar to further prosecution.

V.

In sum, the Court concludes that **Petitioner** has not alleged a claim under the proper, pretrial habeas statute, 28 U.S.C. § 2241. The Court **further** holds that, if alleged, any such claim should be dismissed without prejudice for **failure to exhaust** state remedies. Finally, even if such remedies were exhausted, the Court holds that **Petitioner is not** entitled to pretrial habeas relief pursuant to 28 U.S.C. § 2241(c)(3).

Respondent’s Motion to Dismiss **Petition as Moot** (Docket #27) is granted on the grounds and to the extent set forth in this Order. **Petitioner’s** Application for a Writ of Habeas Corpus

⁸Mr. Raska testified that the **weapon which** allegedly caused Dr. Bell’s death contained a spent cartridge case in the chamber and the **hammer** was in the “half-cocked” position. Mr. Raska, who was qualified as an expert in **firearms**, concluded that this is “not normal” because typically when a cartridge is fired “it should **eject** from the weapon” and the hammer would close completely.

(Docket #1) is hereby dismissed without prejudice.

IT IS SO ORDERED.

This 12TH day of July, 1996.

A handwritten signature in black ink, appearing to read "Sven Erik Holmes", written over a horizontal line.

Sven Erik Holmes
United States District Judge

COPY

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

OLIN ARCHIE WRIGHT and)
LINDA WRIGHT,)
)
Plaintiffs,)
)
v.)
)
RAYCHEM CORPORATION,)
a Delaware corporation,)
)
Defendant.)

F I L E D

JUL 9 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-1108-B

ENTERED ON DOCKET
JUL 12 1996
DATE _____

NOTICE OF DISMISSAL

COME NOW the Plaintiffs, Olin Archie Wright and Linda Wright, pursuant to Rule 41 (a) (1) (ii), of the Federal Rules of Civil Procedure, and dismiss the above entitled and docketed matter.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN

By: 

James R. Robertson OBA#16409
1700 Southwest Blvd., Suite 100
P.O. Box 799
Tulsa, OK 74101-0799
918/584-4724
Attorney for Plaintiffs

GABLE & GOTWALS

By: Elsie Draper
 Elsie Draper, OBA#2482
 Dennis Cameron, OBA#12236
 2000 Bank IV Center
 Tulsa, OK 74119
 918/582-9201
 Attorneys for Defendant Raychem Corporation

CERTIFICATE OF MAILING

I hereby certify that on the 7 day of July, 1996, I mailed a true and correct copy of the foregoing instrument to:

Elsie Draper
 Dennis Cameron
 2000 Bank IV Center
 Tulsa, OK 74119

with proper postage thereon fully prepaid.

James R. Robertson
 James R. Robertson

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 LYNDA L. HEARD aka)
 Lynda Lee Heard fka Rhonda)
 Jean Heard nka Rhonda Jean)
 Matthews; CECILIA KAY)
 HEARD; JOHN EDWARD HEARD;)
 CRYSTAL JANE HEARD; THE)
 UNKNOWN HEIRS, PERSONAL)
 REPRESENTATIVES, EXECUTORS,)
 ADMINISTRATORS, DEVISEES,)
 TRUSTEES, SUCCESSORS AND)
 ASSIGNS, IMMEDIATE AND REMOTE,)
 KNOWN AND UNKNOWN, OF Leslie)
 Joe Heard, DECEASED; SERVICE)
 COLLECTION ASSOCIATION, INC.;)
 STATE OF OKLAHOMA, ex rel.)
 OKLAHOMA TAX COMMISSION;)
 STATE OF OKLAHOMA, ex rel.)
 DEPARTMENT OF HUMAN)
 SERVICES; CITY OF GLENPOOL,)
 Oklahoma; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET
DATE JUL 12 1996 ✓

CIVIL ACTION NO. 94-C-525-EB

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 11 day
of July, 1996. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Loretta F. Radford, Assistant United States
Attorney; the Defendants, COUNTY TREASURER, Tulsa County,
Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County,
Oklahoma, appear by Dick A. Blakeley, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, SERVICE
COLLECTION ASSOCIATION, INC., appears by its attorney, Daniel M.

Webb, Esq.; the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, appears by Sheila A. Condren, OBA Firm #44; and the Defendants, LYNDA L. HEARD aka Lynda Lee Heard fka Rhonda Jean Heard nka Rhonda Jean Matthews, CECILIA KAY HEARD, JOHN EDWARD HEARD, CRYSTAL JANE HEARD, THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF Leslie Joe Heard, Deceased, and CITY OF GLENPOOL, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, CRYSTAL JANE HEARD, was served with process a copy of Summons and Complaint on October 25, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on May 23, 1994, by Certified Mail; that Defendant, CITY OF GLENPOOL, Oklahoma, was served a copy of Summons and Complaint on May 23, 1994, by Certified Mail; and that Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, was served a copy of Summons and Complaint on September 9, 1994, by Certified Mail.

The Court further finds that the Defendants, LYNDA L. HEARD aka Lynda Lee Heard fka Rhonda Jean Heard nka Rhonda Jean Matthews, CECILIA KAY HEARD and JOHN EDWARD HEARD, by their Guardian Ad Litem, LYNDA L. HEARD aka Lynda Lee Heard fka Rhonda Jean Heard nka Rhonda Jean Matthews, and THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF Leslie Joe Heard, 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 3, 1995, and continuing through December 8, 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, LYNDA L. HEARD aka Lynda Lee Heard fka Rhonda Jean Heard nka Rhonda Jean Matthews, CECILIA KAY HEARD and JOHN EDWARD HEARD by their Guardian Ad Litem LYNDA L. HEARD aka Lynda Lee Heard fka Rhonda Jean Heard nka Rhonda Jean Matthews, and THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF Leslie Joe Heard, 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, LYNDA L. HEARD aka Lynda Lee Heard fka Rhonda Jean Heard nka Rhonda Jean Matthews, CECILIA KAY HEARD, JOHN EDWARD HEARD and THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF Leslie Joe Heard, 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 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 party served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on June 9, 1994; that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., filed its Answer on June 15, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Disclaimer on June 3, 1996; that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, filed its Answer on September 23, 1994; and that the Defendants, CRYSTAL JANE HEARD; LYNDAL L. HEARD aka Lynda Lee Heard fka Rhonda Jean Heard nka Rhonda Jean Matthews, CECILIA KAY HEARD, JOHN EDWARD HEARD, THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF Leslie Joe Heard, Deceased; and CITY OF GLENPOOL, Oklahoma, have

failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, LYNDA L. HEARD is one and the same person as Lynda Lee Heard and formerly referred to as Rhonda Jean Heard nka Rhonda Jean Matthews will hereinafter be referred to as "LYNDA L. HEARD." The Defendant, LYNDA L. HEARD, is appointed as Guardian Ad Litem for the Defendants, CECILIA KAY HEARD and JOHN EDWARD HEARD, who have not reached the age of 18. The Defendants, RHONDA J. HEARD and LESLIE JOE HEARD were divorced in Tulsa District Court on June 14, 1990, Case No. FD-90-2283, recorded on June 14, 1990, Book 5259, Page 123, in the records of Tulsa County, Oklahoma. The Defendant, CRYSTAL JANE HEARD was the spouse of Leslie Joe Heard at the time of his death.

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

**Lot Eleven (11), Block Four (4),
BRENTWOOD II, an Addition to the City of
Glenpool, Tulsa County, State of
Oklahoma, according to the recorded
Amended plat thereof.**

The Court further finds that the Defendant, LYNDA L. HEARD and Leslie Joe Heard, now deceased became the record owners of the real property involved in this action by virtue of a certain General Warranty Deed, dated July 11, 1988, recorded on July 14, 1988, in Book 5114, Page 1300, in the records of Tulsa County, Oklahoma.

The Court further find that Leslie Joe Heard died on March 22, 1995, while seized and possessed of the real property being foreclosed. The Certificate of Death was issued by the Oklahoma State Department of Health certifying Leslie Joe Heard's death.

The Court further finds that this is a suit brought for the further purpose of judicially determine the death of Leslie Joe Heard, a judicial termination of the joint tenancy between Leslie Joe Heard and the Defendant, Lynda L. Heard, and of judicially determine the heirs of Leslie Joe Heard.

The Court further finds that on May 5, 1983, Mark Wayne Johnson, executed and delivered to MIDLAND MORTGAGE CO., his mortgage note in the amount of \$53,150.00, 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, Mark Wayne Johnson, a single person, executed and delivered to MIDLAND MORTGAGE CO., a mortgage dated May 5, 1983, covering the above-described property. Said mortgage was recorded on May 9, 1983, in Book 4689, Page 2254, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 28, 1989, Midland Mortgage Co., 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 March 7, 1989, in Book 5170, Page 766, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, LESLIE JOE HEARD and LYNDA LEE HEARD, became holders of the record title of the property by virtue of General Warranty Deed dated July 11, 1988, and recorded on July 14, 1989, in Book 5114, Page 1300, in the records of Tulsa County, Oklahoma. The Defendants, LESLIE JOE HEARD and LYNDA LEE HEARD, are the current assumptors of the subject indebtedness.

The Court further finds that on March 1, 1989, the Defendant, LYNDA LEE HEARD and Leslie Joe Heard, Deceased, 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 February 1, 1990, June 1, 1991, and March 1, 1992.

The Court further finds that the Defendant, LESLIE JOE HEARD, 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, LESLIE JOE HEARD, is indebted to the Plaintiff in the principal sum of \$98,884.03, plus interest at the rate of 12 percent per annum from May 12, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$352.79 (\$2.40 fees for service of Summons and Complaint, \$350.39 publication fees).

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 \$39.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$34.00 which became a lien on the property as of June 25, 1993 and a lien in the amount of \$33.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., has a lien on the property which is the subject matter of this action by virtue of a Judgment, in the amount of \$7,027.65, plus interest and costs, which became a lien on the property as of March 28, 1990. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of \$8,363.52, which became a lien on the property as of February 25, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, CRYSTAL JANE HEARD; LYNDA L. HEARD; CECILIA KAY HEARD, JOHN EDWARD HEARD; THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF Leslie Joe Heard, Deceased; and CITY OF GLENPOOL, Oklahoma, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, 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, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, disclaims any right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem in the principal sum of \$98,884.03, plus interest at the rate of 12 percent per annum from May 12, 1994 until judgment, plus interest thereafter at the current legal rate of 5.89 percent per annum until paid, plus the costs of this action in the amount of \$352.79 (\$2.40 fees for service of Summons and Complaint, \$350.39 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 the Death of Leslie Joe Heard be and the same is hereby judicially determined to have occurred on March 22, 1995, in the City of Broken Arrow, County of Tulsa, State of Oklahoma. The joint

tenancy between Leslie Joe Heard and the Defendant, LYNDA L. HEARD, is hereby judicially terminated.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that despite the exercise of due diligence by Plaintiff and its counsel no known heirs of Leslie Joe Heard, Deceased, have been discovered and it is hereby judicially determined that Leslie Joe Heard, Deceased, has no known heirs, other than his children the Defendants, CECILIA KAY HEARD AND JOHN EDWARD HEARD. It is hereby judicially determined that Leslie Joe Heard, Deceased, has no personal representatives, executors, administrators, devisees, trustees, successors and assigns immediate and remote, known and unknown.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$106.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., have and recover judgment in the amount of \$7,027.65, plus accrued and accruing interest and attorney fees, and costs, for Judgment lien.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, have and recover judgment in the amount of \$8,363.52, for its Judgment lien, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, CRYSTAL JANE HEARD; LYNDA L. HEARD; CECILIA KAY HEARD; JOHN EDWARD HEARD; THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES,

EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF Leslie Joe Heard, Deceased; CITY OF GLENPOOL, Oklahoma, and STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION, 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 appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, SERVICE COLLECTION ASSOCIATION, INC., in the amount of \$7,027.65, plus accrued and accruing interest and attorney fees, and costs, for a judgment lien.

Fifth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in

the amount of \$73.00, personal property taxes which are currently due and owing.

Sixth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, in the amount of \$8,363.52, for a judgment.

Seventh:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$33.00, personal property taxes which are currently due and owing.

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

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

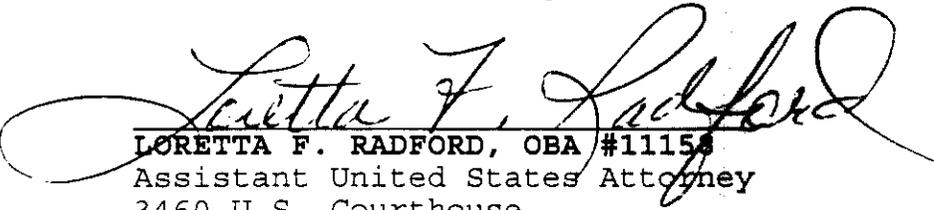
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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


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Service Collection Association, Inc.,


SHEILA CONDREN, OBA FIRM #44
Department of Human Services
Tulsa District Child Support Ofc.
P.O. Box 3643
Tulsa, Oklahoma 74101-2203
Attorney for Defendant,
State of Oklahoma, ex rel.
Department of Humans Services

Judgment of Foreclosure
Civil Action No. 94-C-525-B
LFR:flv

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

FILED
JUL 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JIMMIE CHARLES CROW, JR.,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ, et al.,)

No. 94-CV-1184-B ✓

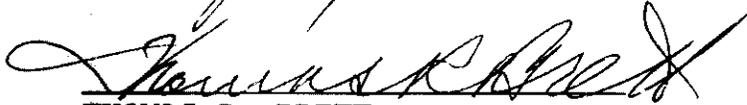
ENTERED ON DOCKET

DATE JUL 12 1996 ✓

JUDGMENT

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby **enters judgment** in favor of all Defendants and against the Plaintiff, Jimmie Charles Crow. Plaintiff shall take nothing on his claim.

SO ORDERED THIS 11th day of July, 1996.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

27

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

FILED

JUL 10 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JIMMIE CHARLES CROW, JR.,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ, et al.,)
)
 Defendants.)

No. 94-CV-1184-B

ENTERED ON DOCKET
DATE JUL 12 1996

ORDER

This matter comes before the Court on Defendants' second motion to dismiss or, in the alternative, for summary judgment (docket #16). Plaintiff has objected. As more fully set out below, the Court concludes Defendants' motion for summary judgment should be granted.

In this civil rights action, Plaintiff, pro se, alleges that his Eighth Amendment rights were violated while he was a federal pretrial detainee at the Tulsa County Jail. He alleges he was denied medical attention after being sprayed with pepper gas and denied a clean change of clothing and towel for long periods of time. Plaintiff seeks damages for his pain and suffering.¹ (Docket #1.) The Court previously granted Defendants' motion for summary judgment on Plaintiff's claims that his constitutional rights were violated "due to overcrowded and "unracially balanced" conditions, lack of cleaning supplies, exposures to tuberculosis, influenza and meningitis, lack of medical care for bleeding hemorrhoids, lack of proper exercise, poor food handling practices,

¹ Plaintiff's request that he be transferred from the Tulsa County Jail is now moot.

and poor lighting in the cells.

I. 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)).

II. ANALYSIS

Given Plaintiff's *pro se* status and his limited response to Defendant's present motion for summary judgment, the Court has considered the arguments and evidence presented in Plaintiff's response to Defendant's first motion for summary judgment.

A. Denial of Medical Care

Under the Fourteenth Amendment Due Process Clause, pretrial

detainees are entitled to the same degree of protection regarding medical care as that afforded convicted inmates under the Eighth Amendment. Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990). Thus, Plaintiff's inadequate medical attention claim must be judged against the "deliberate indifference to serious medical needs" test set out in Estelle v. Gamble, 429 U.S. 97 (1976). See Martin, 909 F.2d at 406. That test has two components: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991).

While there remain issues of fact as to whether Plaintiff requested medical attention following the pepper gas spraying and whether Defendants received his request, the Court finds Plaintiff has failed to establish that his medical condition was sufficiently serious. Seiter, 111 S.Ct. at 2324. In the December 13, 1994, Inmate Health Service Request, Plaintiff states "I have a rash and swollen eyes from a pepper gas spraying. Would like to see the nurse!"² The day following the spraying, Plaintiff submitted a written request for medications, that he had apparently completed, but did not mention the pepper gas incident or the need for medical attention related to the pepper gas spraying. "'Because society does not expect that prisoners will have unqualified access to

² It is unclear whether Tulsa County Jail officials actually received this Inmate Health Service Request.

health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are serious.'" Riddle v. Mondragon, 83 F.3d 1197, 1204 (10th Cir. 1996) (quoting Estelle, 429 U.S. at 103-104"). Vague allegations of reaction to pepper gas spraying, such as the one in this case, do not suffice to establish a constitutional claim. See Riddle, 83 F.3d at 1204.

Even assuming Plaintiff's condition was sufficiently serious, the Court concludes Plaintiff has failed to make any showing that Defendants possessed the requisite culpable state of mind in denying him the opportunity to see a nurse. At most Defendants' conduct amounted to negligence. Negligence, however, does not give rise to a constitutional violation. Estelle, 429 U.S. at 104-05; Ramos, 639 F.2d at 575. Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's claim of denial of medical care.

B. Denial of Clean Uniform and Towel

Next Plaintiff contends he was denied a clean change of clothing and a towel for long periods of time. In denying Defendants' first motion for summary judgment, this Court noted as follows:

Although the Special Report indicates that inmates should receive a complete change of clean clothing at least once a week, Crow has controverted Defendants' evidence by presenting copies of prison grievances that reveal that Crow did not receive a clean towel for over one month. Further, the Court notes that the Special Report addresses Crow's incarceration from November 15, 1994, until February 19, 1995. Crow, however, provided copies of one grievance he filed on July 5, 1994 (regarding not having received a change of clothes in more than 50 days); and two grievances he filed on August 9, 1994 (one regarding being held with 19 men in a 12-man cell, and

one stating that he only received once change of clothes and bed linen since May 16, 1994). The Special Report did not address these grievances nor did it address the discrepancy in dates of incarceration; instead, it only addressed grievances filed after November 15, 1994. Crow did not limit his Complaint solely to the actions taken between November 15, 1994, and February 9, 1995. Because the failure to regularly provide prisoners with clean towels and clothing constitutes a denial of personal hygiene and sanitary living conditions, see, e.g., Dawson v. Kendrick, 527 F. Supp. 1252, 1288-89 (S.D.W.Va. 1981); see also Williams v. Hart, 930 F.2d 36, 1991 WL 47118, at *2 (10th cir. 1991) (unpublished opinion), the Court denies Defendants' motion for summary judgment as to this issue.

(Jan. 23, 1996 order, docket #10, at 8-9.)

Although the above issues of fact remain unresolved, there is nothing that Plaintiff alleges and nothing in the evidence suggesting Defendants were deliberately indifferent to any serious risk to Plaintiff's health or safety sufficient to meet the "sufficiently culpable state of mind" test set out in Farmer v. Brennan, 114 S.Ct. 1970, 1974 (1994), and Wilson v. Seiter, 111 S.Ct. 2321, 2323-24 (1991). Moreover, the Prison Litigation Reform Act of 1996, Pub.L. No. 104-134, 110 Stat. 1321, bars civil rights actions absent a prior showing of physical injury. As noted above, Plaintiff has neither alleged nor shown any physical injury as a result of the failure to regularly provide him with clean towels and clothing, and merely seeks damages for his pain and suffering.³

³ On April 26, 1996, President Clinton signed into law the omnibus fiscal year 1996 appropriations measure, which contains amendments significantly affecting prison litigation. These amendments are entitled the Prison Litigation Reform Act, Pub.L. No. 104-134, 110 Stat. 1321. In Section 803, Congress imposed the following limitation on recovery in prisoner civil actions:

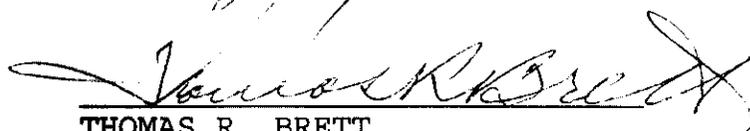
No Federal civil action may be brought by a prisoner

Accordingly, the Court finds that the condition of which Plaintiff complains fail to meet the Supreme Court's test of Constitutional violation under the Eighth Amendment.

III. CONCLUSION

Viewing the evidence in the light most favorable to the nonmoving party for purposes of Defendants' motion for summary judgment, the Court concludes that the motion for summary should be granted. ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion for summary judgment (docket #16) is hereby GRANTED.

SO ORDERED this 10th day of July, 1996.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

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

FILED
JUL 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

State Bank & Trust, a National)
Banking Association,)
)
Plaintiff,)
)
vs.)
)
John Christ, Crew Resources, a trust defendant,)
Dennis Dean Dazey, individually and as)
trustee of Crew Resources a trust defendant,)
Marcus Craig Oswald, Jim Lambert,)
)
Defendants.)

Case No. 96-C-414-B ✓

ENTERED ON DOCKET ✓
DATE JUL 12 1996

ORDER

The Court has for consideration **Plaintiff** State Bank & Trust's ("State Bank") motion for default judgment against **Defendant Crew Resources**, a trust. (Docket # 4). Based on Crew Resources repeated failure to adhere to the **Orders** of this Court, the Court hereby **GRANTS** State Bank's motion for default judgment.

State Bank initiated the instant action on May 10, 1996. On June 3, 1996, Crew Resources, a trust, through a non-lawyer trustee filed a motion for extension of time to answer State Bank's Complaint. (Docket # 2). State Bank filed a motion to strike Crew Resources motion for extension of time on the grounds a non-lawyer may not represent a non-person in federal court. (Docket # 4).

On June 14, 1996 this Court entered an Order which, *inter alia*, granted Crew Resources motion for extension of time to answer and **ordered** Crew Resources to have an attorney file an entry of appearance on its behalf on or before June 21, 1996. The Court also took State Bank's motion for default judgment under advisement.

8

On June 21, 1996, Dennis Dean Dazey, an individually named defendant and a non-lawyer trustee of Crew Resources, a trust, filed a declaration informing the Court of his rather limited effort to secure counsel for Crew Resources. (Docket # 9). The declaration listed two (2) lawyers Mr. Dazey contacted concerning Crew Resources (Grant Cheadle and Eddie Ramirez) who both declined to represent Crew Resources. Mr. Dazey plead his case further and then informed the Court he believed another non-lawyer trustee of Crew Resources to be capable of handling the legal affairs of Crew Resources.

On June 24, 1996, Crew Resources, through Mr. Dazey, a non-lawyer trustee, filed a motion to be allowed to appear without attorney counsel. (Docket # 10).

On June 24, 1996, Crew Resources, through Mr. Dazey, a non-lawyer trustee, filed answers and responses to petition of plaintiff. (Docket # 13).

On June 26, 1996, this Court entered an Order granting Crew Resources leave of Court for the purpose of retaining counsel. (Docket # 14). The Court directed Crew Resources to have their counsel file an entry of appearance on or before July 5, 1996. The Court cited 28 U.S.C. § 1654 and several cases as the applicable law which mandates non-persons be represented by a lawyer in federal court. The Court then warned Crew Resources the consequences of failing to have counsel enter an appearance by July 5, 1996 would be the entry of a default judgment against Crew Resources in the amount of \$163, 812.24, together with costs and attorney fees of State Bank.

On July 5, 1996, Crew Resources, through Mr. Dazey, a non-lawyer trustee, filed a motion for summary judgment. (Docket # 16). The motion is incomprehensible.

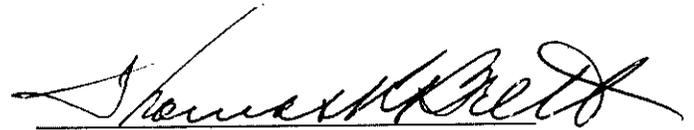
The Court hereby STRIKES the answers and responses of Crew Resources as non-conforming to Local Rules of the Northern District of Oklahoma and 28 U.S.C. § 1654.

The Court hereby STRIKES Crew Resources motion for summary judgment as non-conforming with the Local Rules of the Northern District of Oklahoma.

The Court hereby GRANTS State Bank's motion for default judgment against Crew Resources in the amount of \$163, 812.24, together with costs and attorney fees of State Bank, if timely applied for pursuant to Local Rule 54, as Crew Resources has failed to file an answer conforming with applicable law.

A separate judgment in keeping with this Order shall be entered by the Clerk of the Court.

IT IS SO ORDERED this 11th day of July, 1996.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

JUL 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

STATE BANK & TRUST, N.A.,)
 a national banking association,)
)
 Plaintiff,)
)
 vs.)
)
 JOHN CHRIST; CREW RESOURCES, a)
 trust; DENNIS DAZEY, individually and)
 as trustee of CREW RESOURCES, a)
 trust; MARCUS CRAIG OSWALT; and)
 JIM LAMBERT,)
)
 Defendants.)

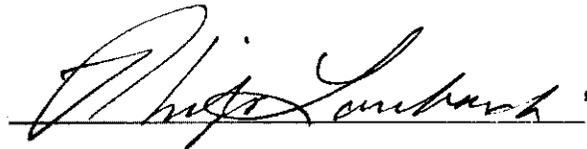
Case No. 96-C-414B ✓

ENTERED ON DOCKET
DATE JUL 12 1996 ✓

DEFAULT JUDGMENT AGAINST DEFENDANT CREW RESOURCES

JUDGMENT is hereby entered in favor of the Plaintiff State Bank & Trust, N.A.,
and against Defendant Crew Resources, a trust, for \$163,812.24.

Dated: ~~June~~ July 11, 1996,



Submitted by:



ANDREW R. TURNER, OBA #9125
of
CONNER & WINTERS
A Professional Corporation
2400 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103
(918) 586-5711

Attorneys for Plaintiff
STATE BANK & TRUST, N.A.

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

FILED

JUL 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

INTER-CHEM COAL COMPANY, a wholly)
owned subsidiary of INTERNATIONAL)
CHEMICAL COMPANY, INC., an Oklahoma)
corporation,)

Plaintiff,)

vs.)

Case No. 95-C-183-K

ALTERNATIVE FUELS, INC., a South)
Carolina corporation, KRISMON KOAL,)
LTD., a Kentucky corporation and)
SUPREME FUELS CORPORATION, a)
Florida corporation,)

Defendants.)

ENTERED ON DOCKET
DATE JUL 12 1996

AGREED ORDER AND JUDGMENT

COMES this day, ~~Inter-Chem~~ Coal Company, a wholly owned subsidiary of International Chemical Company, Inc., ("Interchem" hereafter) by counsel David W. Mills, and Alternative Fuels, Inc., ("AFI" hereafter), by counsel, Grant E. Cheadle, and they represent to this Court that the Defendant, AFI is indebted to Interchem, and Interchem is entitled to judgment against AFI, in the amount of \$97,331.12, attorney's fees in the sum of \$6,485.00, the costs of this action in the amount of \$140.00, and post judgment interest to be calculated at the statutory rate and to run from the date this Order and Judgment is entered.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED BY THIS COURT THAT Interchem is granted a Judgment against AFI in the amount of \$97,331.12, attorney's fees in the amount of \$6,485.00, the costs of this action in the amount of

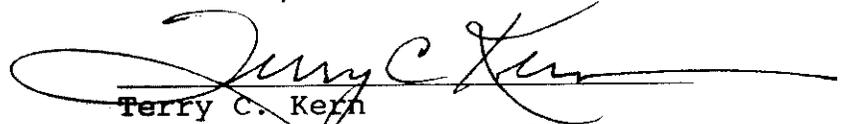
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\$140.00, and post judgment interest to be calculated at the statutory rate and to run from the date this Order and Judgment is entered.

The Clerk is hereby directed to send copies of this Order to counsel of record.

Entered this 11 day of July, 1996.


Terry C. Kern
FEDERAL DISTRICT JUDGE

PREPARED BY:

DAVID W. MILLS
Attorney for Interchem

By: 
David W. Mills, OBA #11678
610 South Main, Suite 212
Tulsa, Oklahoma 74119-1257
(918) 585-8688

AGREED TO BY:

CHEADLE & ASSOCIATES, INC.
Attorneys for AFI

By: 
Grant E. Cheadle, OBA #1634
610 South Main, Suite 210
Tulsa, Oklahoma 74119-1257
(918) 585-8500

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

ENTERED ON DOCKET
JUL 12 1996
DATE _____

KIMBERLY D. NICELY,)
)
 Plaintiff,)
)
 vs.)
)
 HEINZ BAKERY PRODUCTS, INC., a)
 division of PESTRITTO FOODS, INC.,)
 and PESTRITTO FOODS, INC.,)
)
 Defendants.)

Case No. 95-CV-920K

FILED

JUL 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, plaintiff Kimberly D. Nicely, by her attorneys, Doyle & Salisbury, and Defendant Heinz Bakery Products, Inc., by its attorneys, Vedder, Price, Kaufman, Kammholz & Day, stipulate and agree that plaintiff's claims for sexual harassment and sexual harassment retaliation are hereby dismissed without prejudice.

Dated: June 29th, 1996

DOYLE & SALISBURY

VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & DAY

By: Harold W. Salisbury
Harold W. Salisbury, Esq.

By: Alan M. Koral
Alan M. Koral, Esq.

100 West Fifth Street
Suite 550
Tulsa, Oklahoma 74103
(918) 583-7766

805 Third Avenue
Suite 2200
New York, New York 10022
(212) 407-7700

Attorneys for
Kimberly D. Nicely

Attorneys for
Heinz Bakery Products, Inc.

F I L E D

JUL 11 1996

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

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHRIS BLOUNT,)
)
 Plaintiff,)
)
 vs.)
)
 PLAYERS SODA, INC., an)
 Oklahoma corporation,)
 INTERNATIONAL BEVERAGE)
 COMPANY, an Oklahoma)
 corporation,)
 and RICHARD HUB,)
 an individual, jointly and)
 severally,)
)
 Defendants.)

Civ. Action No. 95C1247C

ENTERED ON DOCKET

F I L E D

DATE JUL 12 1996

JUL 2 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOURNAL ENTRY OF DEFAULT JUDGMENT

On the 11th day of July, 1996,
 the Application for Entry of Default Judgment of the Plain-
 tiff, Chris Blount, against Defendants, Players Soda, Inc.,
 International Beverage Company and Richard Hub, jointly and
 severally, came on for hearing in the above-entitled cause.
 This Court, being fully advised in the premises, finds as
 follows:

1. This Court has jurisdiction of the parties and of the
 subject matter of this action and venue is proper in this
 Court.

2. The Defendants, Players Soda, Inc., International
 Beverage Company and Richard Hub, have been duly served with

process, consisting of a copy of the Complaint and Summons respectively filed and issued herein, and, notwithstanding such service of process, have each and all of them wholly failed and refused to answer or move in respect thereto. The time within which they could have done so has expired and not been extended, such Defendants and each of them are now in default, and default has been duly entered against them by the Clerk of this Court on June 17, 1996, a copy of which Clerk's Entry of Default is attached hereto as Exhibit A.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants, Players Soda, Inc., International Beverage Company and Richard Hub, are hereby adjudged to be in default, and that the allegations of Plaintiff's Complaint filed herein be and are hereby taken as true and confessed as against such Defendants, and that Plaintiff, Chris Blount, have and recover judgment of default in his favor and against the Defendants, jointly and severally, as follows:

a. Under Counts I-V of the Complaint, for rescission of the consideration paid by Plaintiff for his shares of stock in Players Soda, Inc. in the amount of Twenty Thousand Dollars (\$20,000.00), together with interest thereon from January 25, 1995, the date of purchase, at the rate of 5.89 percent per annum but less any income received by virtue of his interest in Players Soda, Inc.;

b. Under Count VI of the Complaint for fraud, for actual damages in the amount of Twenty Thousand Dollars (\$20,000.00), less any portion of the purchase price returned or repaid to Plaintiff, and exemplary or punitive damages in the amount of One Hundred Thousand Dollars (\$100,000.00);

c. Under Count VII, a judgment awarding Plaintiff full and complete access to inspect, copy and make data extracts from all of Players Soda, Inc.'s books and records of its activities and affairs since its corporate inception; and

d. Under Count VIII of the Complaint, a judgment for Plaintiff preliminarily and permanently restraining and enjoining Defendants Players Soda, Inc., International Beverage Company and Richard Hub, and each of them, and all others acting by, through, under, for or in behalf of them or any of them, from spending, commingling, encumbering, distributing or in any other manner disposing of the proceeds of the Plaintiff's purchase of Players Soda, Inc. stock, and further directing such Defendants that those proceeds of Plaintiff's stock purchase be forthwith escrowed and suspended from further use or dominion by Defendants or any of them by virtue of this Judgment pending the full return of the stock purchase consideration paid by Plaintiff;

together with reasonable attorneys' fees in the sum of
\$ ~~57,000.~~ 1660.⁰⁰, the costs of this action, and
interest on all money judgments recited above at the rate of
5.89 percent per annum from date of judgment until
paid.

DATED July 3, 1996.

W. S. DeLoach
UNITED STATES DISTRICT JUDGE

Phil Lombardi, Clerk

~~RICHARD M. LAWRENCE, Clerk~~
United States District Court
for the Northern District
of Oklahoma **L. Collins**

by

Deputy

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

JUL 11 1996 JB

MICHAEL TRUJILLO, YVONNE)
 TRUJILLO, and MID-CENTURY)
 INSURANCE COMPANY,)
)
 Plaintiffs,)
)
 vs.)
)
 TULSA LITHO COMPANY and)
 MULLER MARTINI CORPORATION,)
)
 Defendants.)

Phil Lombardi, Clerk
 U.S. DISTRICT COURT
 NORTHERN DISTRICT OF OKLAHOMA

Case No. 95-C-1159-BU ✓

ENTERED ON DOCKET
 JUL 12 1996
 DATE _____

ORDER

This matter comes before the Court upon Defendant Muller Martini Corporation's Motion for Change of Venue, wherein Defendant seeks, pursuant to 28 U.S.C. § 1404(a), an order transferring this case to the United States District Court for the District of Colorado. As Plaintiffs, Michael Trujillo, Yvonne Trujillo and Mid-Century Insurance Company, have confessed Defendant's motion and have also requested that the Court transfer this case to the United States District Court for the District of Colorado, the Court finds that Defendant's motion should be granted.

Accordingly, Defendant Muller Martini Corporation's Motion for Change of Venue (Docket Entry #25) is **GRANTED**. The Court Clerk is **DIRECTED** to effect the transfer of this case to the United States District Court for the District of Colorado.

ENTERED this 11th day of July, 1996.


 MICHAEL BURRAGE
 UNITED STATES DISTRICT JUDGE

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

TRANSAMERICA INSURANCE)
FINANCE CORPORATION, a)
Maryland corporation,)
Plaintiff,)

Case No. 95-C-659-BU

vs.)

FILED

MURPHY ENTERPRISES, INC.,)
a Nebraska corporation; and)
RICHARD A. BROOKS, d/b/a)
RICHARD A. BROOKS &)
ASSOCIATES, LTD.,)
Defendants.)

JUL 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

and)

MURPHY ENTERPRISES, INC.,)
a Nebraska corporation,)
Third Party Plaintiff,)

ENTERED ON DOCKET

DATE JUL 12 1996

vs.)

TIG SPECIALTY INSURANCE)
COMPANY, a California)
domestic insurance company,)
Third Party Defendant.)

JUDGMENT

Plaintiff Transamerica Insurance Finance Corporation ("plaintiff TIFCO") and defendant Murphy Enterprises, Inc. ("defendant Murphy") having entered into a settlement agreement respecting plaintiff TIFCO's claim against defendant Murphy herein, which settlement requires, among other things, entry of a final judgment as set forth hereinbelow, and there being no just reason for delay of the entry of such final judgment (although as to fewer than all the claims or parties herein) and that entry of such final judgment should be directed,

IT IS HEREBY ORDERED AND DIRECTED (all requirements therefor of Rule 54(b), Fed. R. Civ. P., being satisfied) that final judgment be entered as set forth hereinbelow; and

IT IS HEREBY FURTHER ORDERED AND IT IS ADJUDGED that plaintiff TIFCO have and recover against defendant Murphy judgment in the amount of \$265,975.69, plus interest from and after July 9, 1996, at the rate of 5.89% per annum until paid, plus plaintiff TIFCO's costs and attorney fees in the agreed amount of \$18,000.00.

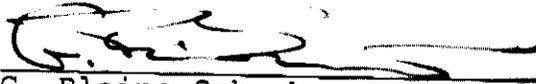
DATED: July 11, 1996.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT COURT

Approved:

TRANSAMERICA INSURANCE FINANCE CORPORATION

By: 

G. Blaine Schwabe, III - OBA #8001
Sarah A. Hall - OBA #13692

Of the Firm:

GABLE GOTWALS MOCK SCHWABE
A Professional Corporation
Fifteenth Floor
One Leadership Square
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Oklahoma City, Oklahoma 73102
Telephone: (405) 235-5500
Telefacsimile: (405) 235-3875

ATTORNEYS FOR TRANSAMERICA INSURANCE
FINANCE CORPORATION

MURPHY ENTERPRISES, INC.

By: *Dwight L. Smith*

Jeffrey G. Levinson
Dwight L. Smith

Of the Firm:

LEVINSON & SMITH
35 East 18th Street
Tulsa, Oklahoma 74119-5201
Telephone: (918) 599-7214

ATTORNEYS FOR MURPHY ENTERPRISES, INC.

RICHARD A. BROOKS, d/b/a RICHARD A.
BROOKS & ASSOCIATES, LTD.

By: *R. P. Propester*

Richard P. Propester
Rodney J. Heggy

Of the Firm

DAY, EDWARDS, FEDERMAN, PROPESTER
& CHRISTENSEN, P.C.
210 Park Ave., Suite 2900
Oklahoma City, OK 73102
Telephone: (405) 239-2121
Telefacsimile: (405) 236-1012

ATTORNEYS FOR RICHARD A. BROOKS, d/b/a RICHARD
A. BROOKS & ASSOCIATES, LTD.

TIG SPECIALTY INSURANCE COMPANY

By: *Harry A. Parrish*

Harry A. Parrish

Of the Firm

KNIGHT, WILKERSON & PARRISH
P.O. Box 1560
Tulsa, OK 74101-1560

ATTORNEY FOR TIG SPECIALTY INSURANCE COMPANY

02/TIF-MU.jud

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

FILED

JUL 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LB

TRACY MAXWELL,)
)
 Plaintiff,)
)
 vs.)
)
 WORLD PUBLISHING)
 COMPANY and KEN FLEMING,)
)
 Defendants.)

Case No. 95-C-557-BU ✓

ENTERED ON DOCKET
DATE JUL 12 1996

JUDGMENT

Having now dismissed with prejudice Counts 2, 4 and 5 of Plaintiff's Complaint upon stipulation of the parties, and having previously granted Defendants' Motion to Dismiss which was converted by the Court to a Motion for Summary Judgment as to Counts 1 and 3 of Plaintiff's Complaint, the Court hereby **ORDERS** and **ADJUDGES** that judgment is entered in favor of Defendants, World Publishing Company and Ken Fleming, and against Plaintiff, Tracy Maxwell, as to Counts 1 and 3 of Plaintiff's Complaint and that Defendants, World Publishing Company and Ken Fleming, are entitled to recover their costs of action in regard to Counts 1 and 3 of Plaintiff's Complaint.

Dated at Tulsa, Oklahoma, this 11 day of July, 1996.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

F I L E D

JUL 11 1996 *uf*

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TRACY MAXWELL,

Plaintiff,

vs.

WORLD PUBLISHING
COMPANY and KEN FLEMING,

Defendants.

Case No: 95-C-557-BU ✓

ENTERED ON DOCKET
DATE JUL 12 1996

ORDER OF DISMISSAL

Pursuant to the stipulation of the parties, the plaintiff's claims against the defendants for discrimination in violation of the Americans with Disabilities Act, the state law disability discrimination claim, and the negligent infliction of emotional distress claim, Counts 2, 4 and 5, respectively, of plaintiff's complaint, are hereby dismissed with prejudice. Each party shall bear its own costs and attorney fees incurred incident to litigation of these claims.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

NEW YORK LIFE INSURANCE)
COMPANY,)

Plaintiff,)

v.)

RAMCO HOLDING CORPORATION;)
RAMCO OIL & GAS, INC.; RAM)
RESERVE CONSOLIDATION, INC.;)
and RB OPERATION COMPANY,)

Defendants.)

Case No. 93-C-1049-H ✓

FILED

JUL 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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ORDER

This matter comes before the Court on Defendants' Motion on Non-Waivable Jurisdictional Issues (Docket #163). The Court construes this motion as a motion to dismiss for lack of subject matter jurisdiction. The Court heard arguments on this motion at a hearing on April 5, 1996.

On October 26, 1987, Plaintiff New York Life Insurance Company ("NYL") and Defendants RAMCO Holding Corporation ("RHC") and Oklahoma Double R. Corporation ("DRC") executed an Agreement of Limited Partnership (the "Partnership Agreement") for the RAMCO-NYL 1987 Limited Partnership (the "Partnership"). The Partnership was formed under the Texas Revised Uniform Limited Partnership Act. Tex. Rev. Civ. Stat. Ann. Art. 6132a-1 et. seq (West. Supp. 1994). Pursuant to the terms of the Partnership Agreement, NYL is the 96.5% limited partner, and RHC and DRC collectively own 3.5% of the Partnership. RHC, which subsequently became RAMCO Operating Company ("RAMCO"), is the managing general partner of the Partnership.

NYL brought this action, alleging multiple breaches of the Partnership Agreement and the

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fiduciary duties owed by the managing general partner, RAMCO. Among other remedies, NYL seeks dissolution of the Partnership and an accounting of Partnership funds. NYL contends that this Court has jurisdiction over the matter because diversity of citizenship exists between the parties and the amount in controversy exceeds the sum of fifty thousand dollars. See 28 U.S.C. § 1332(a)(1).

A non-jury trial in this matter was scheduled to begin on April 15, 1996. One month prior to this date, on March 15, 1996, RAMCO filed the instant motion, challenging the basis for the Court's jurisdiction. RAMCO alleges that the Partnership itself is an indispensable party to this action and that, once the Partnership is joined, complete diversity of citizenship will be destroyed. NYL characterizes this motion as an "eleventh hour 'tail gunner'" attempt to derail the scheduled trial. Pl.'s Answer Br. at 1. However, the Court notes that subject matter jurisdiction may be challenged at any time and objections to such jurisdiction cannot be waived. The Tenth Circuit has stated that "'subject matter jurisdiction is not a matter of equity or of conscience or of efficiency,' but is a matter of the 'lack of judicial power to decide a controversy.'" Laughlin v. Kmart Corp., 50 F.3d 871, 874 (10th Cir. 1995) (citation omitted). The Court therefore heard arguments on this motion at the April 5, 1996, pretrial conference and continued the trial date at that time. At the Court's request, the parties have submitted additional briefs on the issue of subject matter jurisdiction.¹

For purposes of diversity jurisdiction, a limited partnership shares the citizenship of each of its partners, both general and limited. Carden v. Arkoma Assocs., 494 U.S. 185, 195-96 (1990); Bankston v. Burch, 27 F.3d 164, 166 (5th Cir. 1994). NYL is a New York corporation with its principal place

¹Both NYL and RAMCO submitted the requested supplemental briefs on April 26, 1996. Thereafter, each filed a response brief to the other's supplemental brief on May 10, 1996. Because the issue was extensively briefed and exhaustively argued at the April 5, 1996, hearing, the Court found that an additional hearing on the motion was unnecessary.

of business in New York. Each of ROC and DRC is a Delaware corporation with its principal place of business in Oklahoma. Thus, for diversity purposes, the Partnership is also a citizen of New York and Oklahoma. Therefore, if the Partnership is an indispensable party to this action, complete diversity of citizenship cannot exist.

A limited partnership is an indispensable party to any action that includes claims derivative in nature. Bankston, 27 F.3d at 167-68; Buckley v. Control Data Corp., 923 F.2d 96, 98 (8th Cir. 1991).² State law determines whether a claim asserted by a limited partner against a general partner is direct or derivative. 7547 Corp. v. Parker & Parsley Dev. Partners, 38 F.3d 211, 221 (5th Cir. 1994) (applying Texas law); Bankston, 27 F.3d at 167 (applying Hawaii law); Buckley, 923 F.2d at 98 (applying Minnesota law). All parties to the instant case agree that Texas law governs the Court's inquiry into whether NYL has asserted direct or derivative claims against RAMCO.³

Although the parties cite no Texas state court case defining the distinction between direct and derivative claims in the limited partnership context,⁴ two federal district courts in Texas, applying

²A limited partner may pursue one of three types of claims against a general partner of a limited partnership.

[T]he limited partner can bring an individual, direct claim; a direct claim against the general partners by means of a representative action in the form of a class action suit; or a derivative suit on behalf of the partnership itself against the general partners.

Mallia v. PaineWebber, Inc., 889 F. Supp. 277, 281 (S.D. Tex. 1995) (citations omitted). Because this is not a class action, NYL's claims must fit into either the first or last category.

³The court notes that the Texas Revised Uniform Limited Partnership Act expressly allows limited partners to sue derivatively on behalf of the partnership. Tex. Rev. Civ. Stat. Ann. Art. § 6132a-10.01 (West Supp. 1994).

⁴NYL cites Johnson v. J. Hiram Moore, Ltd., 763 S.W.2d 496 (Tex. Ct. App. 1989) as the definitive Texas authority on differentiating between direct and derivative claims. However, as

Texas law, recently have addressed the issue. Moore v. Simon Enter., Inc., 919 F. Supp. 1007 (N.D. Tex. 1995); Mallia v. PaineWebber, Inc., 889 F. Supp. 277 (S.D. Tex. 1995). Both courts applied the following test in distinguishing between derivative and direct claims:

“In a derivative suit, a shareholder [or limited partner] sues on behalf of the corporation [or partnership] for harm done to the corporation [or partnership].” By contrast, a Plaintiff bringing an individual, direct action “must be injured directly or independently of the corporation [or partnership]” Thus, when a limited partner alleges wrongs to the limited partnership that indirectly damaged a limited partner by rendering his or her interest in the partnership of lesser value, the partner is required to bring the claim derivatively.

Mallia, 889 F. Supp. at 282 (quoting Lenz v. Associated Inns & Restaurants Co. of America, 33 F. Supp. 362, 378 (S.D.N.Y. 1993)) (alterations in original); see Moore, 919 F. Supp. at 1010 (quoting Mallia). Accordingly, the Court must determine whether the wrongs alleged by NYL affected NYL independently of its Partnership interest or whether the alleged harm to NYL flowed from harm to the Partnership itself.

Based upon the allegations of NYL contained in the Agreed Pretrial Order (“PTO”) entered in this case on April 5, 1996, the Court concludes that NYL’s claims are predicated primarily on harms allegedly inflicted on the Partnership. In the PTO, NYL contends in pertinent part as follows:

Confronted with a history of RAMCO’s breach of fiduciary duties, resulting in a complete loss of confidence in RAMCO’s management, NYL provided notice to RAMCO on June 3, 1993, of NYL’s decision to dissolve the Partnership. The dissolution notice was based upon multiple material breaches of the Partnership Agreement, including, but not limited to, the failure to distribute \$7.2 million to the partners in 1992-93.

NYL reached an agreement with RAMCO to sell the Partnership properties, subject to the negotiation of a subsequent agreement on the division of the sale proceeds. RAMCO spent \$345,000.00 of the Partnership’s money on a summer, 1993, “sale” of the Partnership’s properties, which was doomed to failure because RAMCO

discussed further below, Johnson offers no guidance on this issue.

prepared a purchase and sale agreement which excluded operations from the sale of the properties. Without operations, the properties were essentially unmarketable to the oil industry. In structuring and conducting the sale for RAMCO's sole benefit, and in claiming ownership of operations, RAMCO again breached its fiduciary duty. The sale was a sham.

In the absence of any offers to purchase the Partnership assets and in the face of RAMCO's continued assertion of ownership/control of operations, litigation became NYL's sole remaining option. When RAMCO threatened to mortgage the best 50% of the Partnership's properties to "cure" one of its defaults, NYL filed this dissolution action on November 24, 1993.

PTO at 3 (emphasis added). Specifically, NYL alleges that RAMCO breached its fiduciary duties under the Partnership Agreement by "wrongfully overcharging millions of dollars in 'tech time,'" PTO at 3, overcharging and miscalculating management fees, id. at 4, and diverting oil sales "service fees" id. at 5. In addition, NYL claims that RAMCO wrongfully retained interest income, id. at 4, the proceeds of oil and gas sales, id. at 5, a "six-figure take-or-pay settlement", id., and a "seven figure 'advance to operator,'" id. at 4. NYL further contends that RAMCO commingled Partnership funds with RAMCO funds. Id. at 5. Based upon these and other allegations by NYL, the Court concludes that this is a clear case of a limited partner asserting a derivative claim against a general partner. Any injury incurred by NYL as a result of RAMCO's alleged wrongdoing is merely a by-product of the harm to the Partnership itself.⁵

NYL argues that because this is an action for dissolution and all partners are currently before the Court, the Partnership will not be prejudiced if it is not joined. The Moore court rejected a similar argument in the dissolution context, noting that:

⁵By contrast, the court in Mallia found that the plaintiffs had asserted direct claims where the complaint focused "exclusively on the allegedly deceptive manner in which [the plaintiffs] were induced to [enter into] the partnerships and **not** on any harm done to the partnerships themselves." Mallia, 889 F. Supp. at 283. In the instant case, NYL does not challenge the formation of the Partnership but asserts claims arising out of its subsequent management.

Like a shareholder in a corporation, a limited partner enjoys limited liability because of the legal form of the limited partnership -- and its separate legal existence. In exchange for this limited liability, the limited partner surrenders his or her rights to bring claims for damages to the limited partnership itself, and must bring such claims derivatively or on behalf of the limited partnership.

919 F. Supp. at 1012. The Court finds this reasoning persuasive.⁶ The parties chose to structure their business relationship by creating a separate legal entity in the form of a limited partnership. They cannot, at this point, proceed as if it does not exist. Because the alleged injuries are the fruits of that partnership, the Partnership itself is an indispensable party to this litigation.

NYL contends that the rationale underlying Rule 19 dictates that the action should proceed without the Partnership. The Court agrees that Rule 19 contemplates equitable considerations. NYL, however, cites no authority and the Court can identify none holding that Rule 19 does not require the joinder of a limited partnership in a derivative action brought by a limited partner against a general

⁶NYL attempts to distinguish Moore v. Simon Enter., Inc., 919 F. Supp. 1007 (N.D. Tex. 1995), on the following grounds:

Despite finding that all parties were before the court, and the limited partnership would not survive the action, the court distinguished other cases and followed a robotic limited partnership law concept to conclude that the partnership was an indispensable party. This decision appears to be an aberration, as it is contrary to any thoughtful and modern interpretation of Rule 19, which calls for a practical consideration of all aspects of the case, rather than adherence to formalistic rituals and the "form-over-substance" result of [Moore v. Simon].

Pl.'s Br. in Resp. to the Court's Request at 7. However, NYL cites only one such "modern and thoughtful interpretation of Rule 19", Curley v. Brignoli, Curley & Roberts, Assocs., 915 F.2d 81 (2d Cir. 1990), and Curley is clearly distinguishable. In Curley, which was pending on appeal when the Supreme Court decided Carden v. Arkoma Assocs., 494 U.S. 185 (1990), the limited partners brought a derivative action against the general partner and the partnership. Applying New York law, the Second Circuit salvaged diversity jurisdiction by recharacterizing the action as a class action brought directly by the limited partners and dismissed the limited partnership as a party-defendant. The instant action does not meet the requirements for class certification under Fed. R. Civ. P. 23(a), therefore, the Curley solution is not available to NYL. The Court concludes that the rationale of Moore v. Simon is applicable.

partner. To the contrary, the authorities cited above specifically engage in a Rule 19 analysis and reject this interpretation of Rule 19. The Court finds no reason to reach a contrary conclusion in the instant case.

Citing Johnson v. J. Hiram Moore, Ltd., 763 S.W.2d 496 (Tex. Ct. App. 1989), NYL asserts that a breach of fiduciary duty can give rise to a direct claim under Texas law. The Court agrees that a limited partner may, in some cases, pursue a direct claim against a general partner. However, the fact that a limited partner may maintain a direct claim does not mean that all claims by limited partners are direct.

In contrast with the instant case, the facts of Johnson support a direct claim by the limited partners. The limited partnership in Johnson built, owned, and operated an office building in Austin, Texas. Some of the limited partners, including the Johnson plaintiffs, leased office space in the building. Each tenant was responsible for “finishing-out” its office space. In supervising this final phase of construction on the building, the general partner received “developer’s fees” from the contractors, including those contractors hired by the limited partners/tenants to finish-out their office space. The contractors added the developer’s fee to the amount they charged the tenants. The limited partners/tenants were unaware of this practice. Thus, the issue before the Texas Court of Appeals was whether the general partner owed a fiduciary duty arising out of the limited partnership to the limited partner/tenants. The general partner claimed that he owed no such duty because the questioned transaction occurred in the landlord/tenant context. The Texas Court of Appeals concluded that the general partner owed a fiduciary duty to the limited partners because the partnership owned the building and the operation of the building was the subject of the suit.

The Johnson court held that the individual limited partners/tenants could maintain direct claims

for breach of fiduciary duty for increasing the cost of their construction through developer's fees without their knowledge. This cannot be construed as a harm to the partnership itself. It is important to note that the court went to great lengths to differentiate the claims of the individual limited partners from any claims of the partnership itself. 763 S.W.2d at 499. The Court explicitly held:

For a breach of the duty owed them, [the limited partners/tenants] were entitled to seek recovery from [the general partner] for actual and exemplary damages. The partnership has no legally cognizable claim to share in [the limited partners/tenants'] individual recoveries from [the general partner].

Id. In fact, the trial judge already had severed the separate claims, leaving the partnership's claims pending at the trial level while the limited partners pursued their appeal. The Court therefore finds that Johnson in inapposite to the instant case.

In summary, the Court concludes that the claims asserted by NYL against RAMCO are derivative claims. Thus, the Partnership is an indispensable party to the instant action under Fed. R. Civ. P. 19(b). In light of the necessity of joining the Partnership, the Court does not have subject matter jurisdiction over this case.

Accordingly, Defendants' Motion on Non-Waivable Jurisdictional Issues is granted (Docket #163). This action is hereby dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

This 11TH day of July, 1996.



Svein Erik Holmes
United States District Judge

DATE 7/11/96

F I L E D

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

JUL 10 1996 *JFK*

ROBERT R. HORTON,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER, Commissioner,)
 Social Security Administration,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Action No. 95-C-943-W ✓

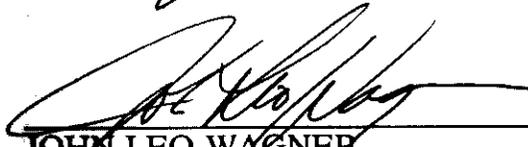
ORDER

On May 23, 1996, this Court remanded this case to the Commissioner pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

Pursuant to plaintiff's application for attorney under the EAJA, 28 U.S.C. §2412(d), the parties have stipulated that an award in the amount of \$918.90 for attorney fees and expenses for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees and expenses under the Equal Access To Justice Act in the amount of \$918.90. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 10th day of July 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

ENTERED ON DOCKET
DATE JUL 11 1996

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 PAULINE M. ROBERSON; LOUIS)
 J. ROBERSON aka LOUIS JAMES)
 ROBERSON; BANCOKLAHOMA)
 MORTGAGE CORPORATION;)
 FEDERAL NATIONAL MORTGAGE)
 ASSOCIATION; COUNTY)
 TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

Case No. 95-C-885-BU ✓

FILED

JUL 10 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

WB

ORDER

This matter comes before this Court upon the Report and Recommendation issued by United States Magistrate Judge John Leo Wagner on June 19, 1996. The court file reflects that none of the Defendants have filed an objection to Magistrate Judge Wagner's Report and Recommendation within the time prescribed by 28 U.S.C. § 636(b)(1).

Upon careful review and consideration of the Report and Recommendation and the record herein, the Court agrees with the recommendation of Magistrate Judge Wagner and accepts Magistrate Judge Wagner's Report and Recommendation in its entirety.

Accordingly, the Court hereby AFFIRMS the Report and Recommendation (Docket Entry #22) and GRANTS Plaintiff's Motion to Confirm Sale (Docket Entry #19).

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 CHARLES E. HARRIS; 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 JUL 11 1996

Case No. 95-C-679-BU

FILED
JUL 10 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter comes before this Court upon the Report and Recommendation issued by United States Magistrate Judge John Leo Wagner on June 19, 1996. The court file reflects that none of the Defendants have filed an objection to Magistrate Judge Wagner's Report and Recommendation within the time prescribed by 28 U.S.C. § 636(b)(1).

Upon careful review and consideration of the Report and Recommendation and the record herein, the Court agrees with the recommendation of Magistrate Judge Wagner and accepts Magistrate Judge Wagner's Report and Recommendation in its entirety.

Accordingly, the Court hereby AFFIRMS the Report and Recommendation issued by Magistrate Judge Wagner on June 19, 1996 (Docket Entry #20) and GRANTS Plaintiff's Motion to Confirm Sale (Docket Entry #17).

IT IS SO ORDERED this 9th day of July, 1996.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
THE UNKNOWN HEIRS, PERSONAL)
REPRESENTATIVES, EXECUTORS,)
ADMINISTRATORS, DEVISEES,)
TRUSTEES, SUCCESSORS AND)
ASSIGNS, IMMEDIATE AND REMOTE,)
KNOWN AND UNKNOWN, OF Syble)
E. Addington aka Syble Eunice)
Addington, DECEASED; STATE OF)
OKLAHOMA, ex rel. OKLAHOMA TAX)
COMMISSION; COUNTY TREASURER,)
Tulsa County, Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
)
Defendants.)

DATE JUL 11 1996

Case No. 95-C-744-BU

FILED

JUL 10 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter comes before this Court upon the Report and Recommendation issued by United States Magistrate Judge John Leo Wagner on June 19, 1996. The court file reflects that none of the Defendants have filed an objection to Magistrate Judge Wagner's Report and Recommendation within the time prescribed by 28 U.S.C. § 636(b)(1).

Upon careful review and consideration of the Report and Recommendation and the record herein, the Court agrees with the recommendation of Magistrate Judge Wagner and accepts Magistrate Judge Wagner's Report and Recommendation in its entirety.

Accordingly, the Court hereby AFFIRMS the Report and Recommendation (Docket Entry #22) and GRANTS Plaintiff's Motion to Confirm Sale (Docket Entry #19).

IT IS SO ORDERED this 9th day of July, 1996.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE JUL 11 1996

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
DEBORAH ANN OSBY,)
aka DEBORAH A. OBSY,)
aka DEBORAH ANN WHITE)
OSBY, COUNTY TREASURER,)
Tulsa County, Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
)
Defendants.)

Case No. 95-C-540-BU ✓

FILED

JUL 10 1996 UB

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter comes before this Court upon the Report and Recommendation issued by United States Magistrate Judge John Leo Wagner on June 19, 1996. The court file reflects that none of the Defendants have filed an objection to Magistrate Judge Wagner's Report and Recommendation within the time prescribed by 28 U.S.C. § 636(b)(1).

Upon careful review and consideration of the Report and Recommendation and the record herein, the Court agrees with the recommendation of Magistrate Judge Wagner and accepts Magistrate Judge Wagner's Report and Recommendation in its entirety.

Accordingly, the Court hereby AFFIRMS the Report and Recommendation issued by Magistrate Judge John Leo Wagner on June 19, 1996 (Docket Entry #23) and GRANTS Plaintiff's Motion to Confirm Sale (Docket Entry #20).

IT IS SO ORDERED this 9th day of July, 1996.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE