

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA **F I L E D**

UNITED STATES OF AMERICA,)
)
 Plaintiff,)

FEB 19 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

vs.)

FANNIE MAE GILES fka Fannie Mae)
Gibson; BOBBY JOE GILES; PACIFIC)
MUTUAL LIFE INSURANCE)
COMPANY; RESOLUTION TRUST)
CORPORATION As Receiver for Southwest)
Savings Association, assignee of the Federal Savings)
and Loan Insurance Corporation as Receiver for)
Briercroft Savings Association, assignee of Briercroft)
Service Corporation; SOUTHWEST)
FEDERAL SAVINGS ASSOCIATION a)
Resolution Trust Corporation Receivership, transferee)
of the Resolution Trust Corporation as Receiver for)
Southwest Savings Association, assignee of the)
Federal Savings and Loan Insurance Corporation as)
Receiver for Briercroft Savings Association, assignee)
of Briercroft Service Corporation;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma; UNKNOWN OCCUPANT OF)
3515 E. Woodrow Pl., Tulsa, Oklahoma,)

ENTERED ON DOCKET
DATE FEB 20 1997

Defendants.

) Civil Case No. 95-C 436B

ORDER OF DISBURSAL

NOW on the 19th day of Feb., 1997, there came on for

consideration the matter of disbursal of \$12,751.00 received by the United States Marshal for the sale of certain property described in the Notice of Sale in this case. The Court finds that the said \$12,751.00 should be disbursed as follows:

| | |
|-------------------------------|---------|
| United States Marshal's Costs | \$15.00 |
| Executing Order of Sale | 3.00 |
| Advertising Sale Fee | 3.00 |

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB 19 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT D. EDWARDS,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner,
Social Security Administration,

Defendant.

Civil Action No. 95-C-1143-J

ENTERED ON DOCKET

DATE 2/20/97

ORDER

On October 31, 1996, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded to the Commissioner for further proceedings consistent with the Order. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on or around January 30, 1997, the parties have stipulated that an award in the amount of \$1,441.30 for attorney fees and \$120.00 for costs for a total of \$1,561.30 for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees of \$1,441.30 and \$120.00 costs under the Equal Access To Justice Act. 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 19th day of February 1997.

S/Sam A. Joyner
U.S. Magistrate

SAM A. JOYNER
United States Magistrate Judge

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

ENTERED ON DOCKET
DATE FEB 20 1997

JOY WRIGHT RHODES,
Plaintiff,
vs.
BED BATH & BEYOND INC.,
Defendant.

Case No. 96-C-346-H

FILED
FEB 19 1997

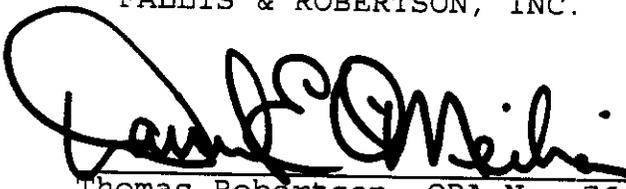
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL, WITH PREJUDICE

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

NICHOLS, WOLFE, STAMPER, NALLY,
FALLIS & ROBERTSON, INC.

ATKINSON, HASKINS, NELLIS,
BOUDREAUX, HOLEMAN, PHIPPS
& BRITTINGHAM



Thomas Robertson, OBA No. 7665
David E. O'Meilia, OBA No. 6779
Old City Hall Bldg, Suite 400
124 East Fourth Street
Tulsa, Oklahoma 74103-5010
(918) 584-5182

Gregory Nellis, OBA No.
1500 ParkCentre
525 South Main
Tulsa, Oklahoma 74103-4524
(918) 582-8877

ATTORNEYS FOR DEFENDANT
BED, BATH & BEYOND, INC.

ATTORNEYS FOR PLAINTIFF
JOY WRIGHT RHODES

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

FILED
FEB 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

POSTAL TECHNOLOGIES, INC.)
an Oklahoma corporation,)
)
Plaintiff,)
)
v.)
)
BELL & HOWELL POSTAL)
SYSTEMS, INC., a Delaware)
corporation,)
)
Defendant.)

Case No. 97-CV-0073-H

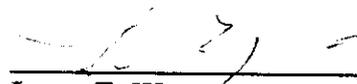
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DATE FEB 19 1997

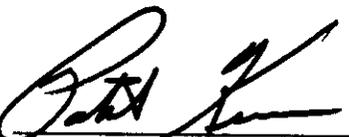
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Postal Technologies, Inc., and Defendant, Bell & Howell Postal Systems, Inc., pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, and hereby dismiss by joint stipulation the above styled and numbered cause with prejudice for the reason that the parties have reached a settlement of the claims made by the Plaintiff in its Verified Petition and Application for Temporary Restraining Order and Motion for Preliminary Injunction filed in the District Court of Tulsa County, State of Oklahoma on January 17, 1997.

It has further been agreed that each party will bear their own attorney fees and costs.

Dated this 17th day of February, 1997.


James E. Weger
JONES, GIVENS, GOTCHER
& BOGAN, P.C.
3800 First National Tower
15 East Fifth Street
Tulsa, Oklahoma 74103
581-8200
Attorneys for Defendant


Patrick H. Kernan, OBA #4983
McKINNEY, STRINGER
& WEBSTER, P.C.
2100 Mid-Continent Tower
401 South Boston
Tulsa, Oklahoma 74103
582-3176
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I do hereby certify that on the 19th day of February, 1997, a true and correct copy of the Joint Stipulation of Dismissal with Prejudice was mailed, postage prepaid to:

Steven P. Handler
James W. Lovett
McDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, Illinois 60606

James E. Weger
JONES, GIVENS, GOTCHER & BOGAN, P.C.
3800 First National Tower
15 East Fifth Street
Tulsa, Oklahoma 74103



PATRICK H. KERNAN

ENTERED ON DOCKET
DATE 2-19-97

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

TINA WILSON,

Plaintiff,

vs.

CITY OF COMMERCE,

Defendant.

No. 96-C-12-K ✓

FILED ✓

FEB 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

This action had previously been administratively closed based upon notice of settlement. Plaintiff has now filed a motion to dismiss, to which defendant has not objected.

It is the Order of the Court that the motion of the plaintiff to dismiss (#6) is hereby GRANTED. This action is dismissed with prejudice.

IT IS SO ORDERED THIS 18th DAY OF FEBRUARY, 1997.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 2-19-97

SUSAN A. HEIDRICK,
Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner,
Social Security Administration,
Defendant.

Civil Action No. 95-C-1172-

FILED

FEB 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On December 30, 1996, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded to the Commissioner. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(d), the parties have stipulated that an award in the amount of \$3,020.75 for attorney fees and \$120.00 for costs, for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees in the amount of \$3,020.75 and costs in the amount of \$120.00, totalling \$3,140.75, under EAJA. 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 14 day of February, 1997.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

18

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUSAN NEWCOMER, individually)
and as Guardian of)
BENJAMIN NEWCOMER, ANDREW)
NEWCOMER and PETER NEWCOMER,)
and JOHN NEWCOMER,)

Plaintiffs,)

v.)

NORTHEAST OKLAHOMA ELECTRIC)
COOPERATIVE, INC., an Oklahoma)
corporation, and CEDAR PORT)
MARINA, an Oklahoma entity;)
and GRAND RIVER DAM AUTHORITY,)
an Oklahoma agency, and JOHN)
DOE CORPORATION;)

Defendants.)

NORTHEAST OKLAHOMA ELECTRIC)
COOPERATIVE, INC., an Oklahoma)
corporation,)

Third-Party Plaintiff,)

v.)

ROBERT M. FORNELL, JR.,)

Third-Party Defendant.)

ENTERED ON DOCKET
DATE 2-19-97

Case No. 95 C-765K

FILED

FEB 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

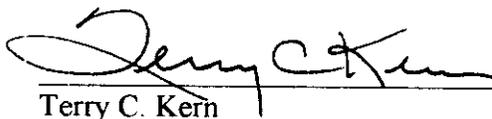
ORDER OF DISMISSAL

On this 18 day of ~~December~~ ^{February}, 1997, upon the written application of the Plaintiffs and Third-Party Plaintiff, Northeast Oklahoma Electric Cooperative, Inc., for a dismissal with prejudice dismissing all claims made by Plaintiffs herein, and the claims against Third-Party Defendant, Robert M. Fornell, Jr. and all causes of action therein, the Court having examined said verified Application

finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint including claims of the minor Plaintiffs. That said Application adequately reflects that Susan Newcomer is acting in the best interest of her children and is permitted on their behalf to execute such papers as will release Defendant and Third-Party Plaintiff, Northeast Oklahoma Electric Cooperative, Inc., and Third-Party Defendant, Robert M. Fornell, Jr., fully; and further, this Order of Dismissal is granted with full consideration that same releases all claims including those of said minor Plaintiffs. That Plaintiffs have requested the Court to dismiss said Complaint with prejudice to any further action. The Court being fully advised in the premises finds said settlement is to the best interest of said Plaintiffs.

THE COURT FURTHER FINDS that said Complaint in this matter should be dismissed pursuant to said Application.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the Complaint and all causes of action of the Plaintiffs, against the Defendant and Third-Party Plaintiff, and Third-Party Defendant be and the same hereby are dismissed with prejudice to any further action.



Terry C. Kern

Judge of the United States District Court

2-19-97

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

FREEMAN R. ARKEKETA, JR.,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ,)
)
 Defendant.)

No. 95-C-337-K ✓

FILED

FEB 18 1997

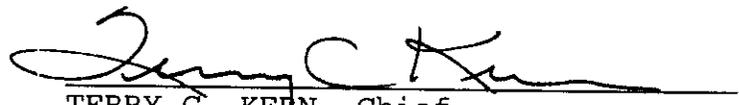
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

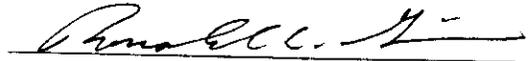
Before the Court is the appeal of the plaintiff from an order entered by Magistrate Judge Joyner which denied plaintiff's motion for default judgment and granted defendant's motion for more definite statement. The Court sees no error in the Magistrate Judge's ruling. Further, defendant has since answered and plaintiff has filed an amended complaint. Accordingly, the issues raised by the appeal are moot.

It is the Order of the Court that the objection/appeal of the plaintiff (#9) to the Magistrate Judge's order is hereby DENIED.

ORDERED this 18 day of February, 1997.



TERRY C. KEEN, Chief
UNITED STATES DISTRICT JUDGE



Ronald E. Goins, OBA #3430
TOMLINS & GOINS
2642 East 21st Street, Suite 230
Tulsa, Oklahoma 74114
(918) 747-6500

ATTORNEYS FOR MICHAEL B. FINE

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

FILED

DONNA LOUISE HANEY,

Plaintiff,

v.

CONTINENTAL CASUALTY COMPANY,
a Corporation;
MANAGEMENT & TRAINING CORPORATION,
a Corporation,

Defendants.

FEB 18 1997

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

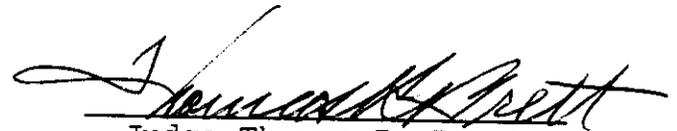
96-C-365 B

ENTERED ON DOCKET

DATE FEB 19 1997

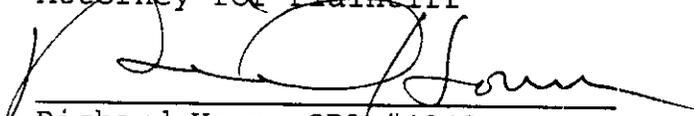
ORDER OF DISMISSAL WITH PREJUDICE

Now on this 18th day of February, 1997, this matter comes on for consideration of the Joint Motion for Dismissal with Prejudice Based upon Settlement Agreement, and the Court, being fully advised in the premises, finds and adjudges that this case should be and it is hereby dismissed with prejudice to refiling in accordance with Rule 42(a)(2) of the Federal Rules of Civil Procedure and pursuant to the terms of the parties' settlement agreement.


Judge Thomas R. Brett

Approved as to form:


Gary A. Baton, OBA #2598
Attorney for Plaintiff


Richard Honn, OBA #4343
Attorney for Defendants

FILED

FEB 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

IN RE:)
 MEANO, BRIAN KEITH,)
 SS # 561-39-4566)
 Debtor.)
)
 BRIAN KEITH MEANO,)
)
 Plaintiff,)
 v.)
)
 STATE OF CALIFORNIA, ex rel.)
 CALIFORNIA STUDENT AID)
 COMMISSION, UNITED STATES)
 OF AMERICA, ex rel., U.S.)
 DEPARTMENT OF EDUCATION, and)
 DIVERSIFIED COLLECTION)
 SERVICES, INC.,)
)
 Defendants,)
 and,)
)
 EDUCATIONAL CREDIT MANAGEMENT)
 CORPORATION, f/k/a TRANSITIONAL)
 GUARANTY CORPORATION,)
)
 Intervenor.)

Case No. 94-02089-C
(Chapter 7)

Adversary No. 96-0060-C

District Case No. 96-C-1086-B ✓

ENTERED FEB 19 1997

ORDER

This order pertains to the appeal of the debtor from the order vacating default judgment of the United States Bankruptcy Court for the Northern District of Oklahoma entered on September 27, 1996 and reconsidered on October 24, 1996 and the Motion to Dismiss Appeal or, Alternatively, Deny Leave to Appeal Interlocutory Order of the Intervening Defendant, Educational Credit Management Corporation ("ECMC").

On February 14, 1996, Debtor filed a complaint to determine the

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dischargeability of student loans in his bankruptcy case. On July 30, 1996, he requested default judgment against the California Student Aid Commission and Diversified Collection Services, Inc. On July 31, 1996, default judgment was entered against them.

On September 13, 1996, ECMC filed a motion to vacate default, for leave to intervene, and to permit filing of answer and counterclaim, and debtor objected. The motion to vacate was heard on September 26, 1996, and the judgment was vacated. On September 27, 1996, the court's written order set aside default, granted leave to ECMC to intervene, and permitted the filing of the answer and counterclaim. On October 15, 1996, debtor moved to reconsider the order vacating default judgment, and ECMC objected. The motion was denied on October 24, 1996, and debtor appealed. ECMC has asked this court to dismiss the appeal or, alternatively, to deny leave to appeal the interlocutory order.

The authority for the district court to hear appeals from a bankruptcy case is found at 28 U.S.C. § 158, which provides in pertinent part:

(a) The district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees; . . . and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

The first issue presented is whether the order being appealed is a final order or an interlocutory order. An order is final, generally, if it ends the litigation on the merits and leaves nothing for the court to do but execute its judgment. Adelman v.

Fourth Nat'l. Bk. & Trust Co. (In re Durability, Inc.), 893 F.2d 264, 265 (10th Cir. 1990) (citing McKinney v. Gannet Co., 694 F.2d 1240, 1246 (10th Cir. 1982)). The order vacating judgment clearly did not end the litigation on the merits. The court in Ches-Mont Utilities Construction Co., Inc. v. Willistown Woods Associates, 1992 WL 96335, at *1 (E.D. Penn. 1992), found that a bankruptcy court's order setting aside a default judgment was an interlocutory order, not a final judgment.

The Tenth Circuit concluded in Glover, Inc. v. Albuquerque Nat'l Bank, 697 F.2d 907, 909-910 (10th Cir. 1983), that remand of a case for further proceedings is ordinarily not appealable "because it is not a final decision. This rule holds true in the bankruptcy context as well. This order requires further steps to be taken to enable the court below to adjudicate the cause on the merits. Therefore, it is not final." (citations omitted). Like a remand order, an order setting aside a default judgment requires further steps to be taken to enable the court below to adjudicate the merits of a case. The order being appealed is an interlocutory one.

Section 158 is silent as to what standards or considerations should be employed by the district court in determining whether leave to appeal an interlocutory order should be granted. In general, exceptional circumstances must be present to warrant allowing an interlocutory appeal. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1977).

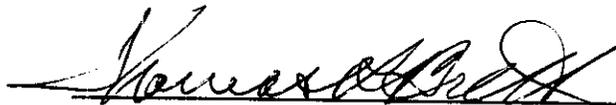
In determining whether to grant a motion for leave to appeal an interlocutory bankruptcy order, several district courts have looked to the standards set forth in 28 U.S.C. § 1292(b). The statute gives the court of appeals the discretion to hear

otherwise nonappealable interlocutory orders of a district court if (1) the order involves a controlling question of law which (2) would entail substantial ground for difference of opinion, and (3) an immediate appeal may materially advance the ultimate termination of the litigation. First Interstate Bank of Denver N.A. v. Werth, 58 B.R. 146, 148 (Bankr. D.Co. 1986).

None of these are present in this case. By its very nature, the order appealed from, vacation of a default judgment, does nothing more than require the plaintiff to actually prove his case. It contains no rulings on questions of law or fact.

Appellant did not properly initiate an appeal from an interlocutory order by filing a motion for leave to appeal under Bankruptcy Rule 8001(b). Therefore this court may treat the notice of appeal as such a motion under Bankruptcy Rule 8003(c). The motion for leave to appeal interlocutory order is denied. The Motion to Dismiss Appeal or, Alternatively, Deny Leave to Appeal Interlocutory Order of the Intervening Defendant, Educational Credit Management Corporation ("ECMC") is granted.

Dated this 13th day of Feb, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

s:\orders\meano

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

FILED

TAMERA and JOSEPH HOWARD,)
both individually and as)
parents and next friends)
of BRITTANY HOWARD, a minor,)
Plaintiffs,)

FEB 14 1997

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

WB

vs.)

Case No. 97-CV-8-BU ✓

UNITED WISCONSIN LIFE)
INSURANCE COMPANY, a)
Wisconsin Corporation,)
Defendant.)

ENTERED ON DOCKET

DATE FEB 18 1997

ADMINISTRATIVE CLOSING ORDER

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

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

Entered this 14th day of February, 1997.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

BS&B SAFETY SYSTEMS, INC.,

Plaintiff,

v.

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PENNSYLVANIA
and AMERICAN MOTORISTS INSURANCE
COMPANY,

Defendants.

ENTERED ON DOCKET

DATE FEB 14 1997

Case No. 96-CV-9-H

FILED

FEB 13 1997

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

ORDER

This matter comes before the Court on cross motions for summary judgment by Defendant National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") (Docket #26), Defendant American Motorist Insurance Company ("American") (Docket #27), and Plaintiff BS&B Safety Systems, Inc. ("BS&B") (Docket #42).

Plaintiff brought this action seeking a declaration of rights under seven (7) insurance policies issued by American and two (2) insurance policies issued by National Union. Specifically, BS&B asks this Court to declare that each of American and National Union owes a defense to BS&B in a federal court action against BS&B in the Southern District of Texas by Continental Disc Corporation ("CDC") and to declare further that there is coverage for any award of damages in that case. Defendants each filed counterclaims seeking a declaration that neither has any obligations under the subject policies. All parties now seek summary judgment on their respective claims.

I.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Widon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480

110

U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated: "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the

record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

II.

An insurance policy, like any other contract of adhesion, should be liberally construed, consistent with the object sought to be accomplished, so as to give reasonable effect to all of its provisions, to the extent possible. See Short v. Oklahoma Farmers Union Ins. Co., 619 P.2d 588, 589 (Okl.), reh'g denied, (1980). In Wiley v. Travelers Ins. Co., 534 P.2d 1293 (Okl. 1974), reh'g denied, (1975), the Oklahoma Supreme Court stated:

Parties to insurance contract are at liberty to contract for insurance to cover such risks as they see fit and are bound by the terms of contract and courts will not undertake to rewrite terms thereof. The construction of an insurance policy should be a natural and reasonable one, fairly construed to effectuate its purpose, and viewed in the light of common sense so as not to bring about an absurd result.

Id. at 1295.

The terms of the parties' contract, if unambiguous, clear, and consistent, are accepted in their plain and ordinary sense, and the contract will be enforced to carry out the intentions of the parties as they existed at the time the contract was negotiated. See Okla. Stat. tit. 15, § 160 (1981). The interpretation of an insurance contract and whether it is ambiguous is a matter of law for the Court to determine and resolve accordingly. See Okla. Stat. tit. 15, § 152 (1981). Neither forced or strained constructions will be indulged, nor will any provision be taken out of context and narrowly focused upon to create and then construe an ambiguity so as to import a more favorable consideration to either party than that expressed in the contract. See Mid-Continent Life Ins. Co. v. Skye, 240 P. 630, 631 (Okl. 1925). If the insurance policy language is doubtful and susceptible to two constructions, then a genuine ambiguity exists, and the contract will be interpreted, consistent with the parties' intentions, most favorably to the insured and against the insurance carrier. Capital Fire Ins. Co. v. Carroll, 109 P. 535 (Okl. 1910).

The issue presented in this case is whether the claims in the Texas action create a duty to defend Plaintiff under certain insurance policies that include coverage for “advertising injury” and “advertising liability.” It is settled law that an insurer has a duty to defend whenever the allegations of an underlying complaint against a policyholder potentially fall within the coverage of the policy. MIC Property & Cas. Ins. Corp. v. International Ins. Co., 990 F.2d 573, 577 (10th Cir. 1993). The duty to defend is independent of, and broader than, the duty to indemnify. Magnum Foods, Inc. v. Continental Cas. Co., 36 F.3d 1491, 1506 (10th Cir. 1994). The nature of the duty to defend is defined by the contractual terms of the insurance policy. In the present case, the Court finds that the allegations against Plaintiff in the Texas action create no potential recovery of covered damages under either Defendants’ policies. Thus, the Court holds that Defendants have no duty to defend.

III.

For purposes of the instant motions, the facts of this case are not in dispute. American issued seven insurance policies to Plaintiff. Three of those policies read in applicable part as follows:

We [American] will pay those sums that the insured [BS&B] becomes legally obligated to pay as damages because of . . . “advertising injury” to which this insurance applies. . . . We will have the right and duty to defend any “suit” seeking those damages.

...

This insurance applies to “advertising injury” only if caused by an offense committed:

- (1) In the “coverage territory” during the policy period; and
- (2) In the course of advertising your goods, products or services.

Ex. Supplement to Mot. for Summ. J. of Def. American, Ex. H at 3-4. The remaining four American policies read as follows:

We [American] will pay those sums that the insured [BS&B] becomes legally obligated to pay as damages because of . . . “advertising injury” to which this

coverage part applies. We will have the right and duty to defend any "suit" seeking those damages.

...

This insurance applies to:

...

"Advertising injury" caused by an offense committed in the course of advertising your goods, products or services;

but only if the offense was committed in the "coverage territory" during the policy period.

Id., Ex. I at 4.

Each of the American policies provides that any "advertising injury" must be "caused by an offense" and that the "offense" must be "committed in the course of advertising your [BS&B] goods, products or services." All of the policies contain the following definition:

"Advertising injury" means injury arising out of one or more of the following offenses:

- a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- b. Oral or written publication of material that violates a person's right of privacy;
- c. Misappropriation of advertising ideas or style of doing business; or
- d. Infringement of copyright, title or slogan.

Id., Ex. H at 9; Ex. I at 9. All of the policies also contain the following exclusions:

This insurance does not apply to:

- a. ... "[A]dvertising injury:"
 - (1) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;
 - (2) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;

- (3) Arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured; or
 - (4) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.
- b. "Advertising injury" arising out of:
- (1) Breach of contract, other than misappropriation of advertising ideas under an implied contract;
 - (2) The failure of goods, products or services to conform with advertised quality or performance;
 - (3) The wrong description of the price of goods, products or services; or
 - (4) An offense committed by an insured whose business is advertising, broadcasting, publishing or telecasting.

Id., Ex. H at 4; Ex. I at 4.

BS&B argues that these policies cover the allegations in the Texas lawsuit and that American therefore has a duty to defend. The Court does not agree.

The definition of "advertising injury" in each of the American policies unambiguously includes (1) slander or libel; (2) violation of individual privacy; (3) unauthorized taking of advertising or style of doing business; and (4) infringement of copyright, title, or slogan. Assuming one of these predicate offenses were found to exist, then the second requirement would have to be met, namely that the injury was "caused by an offense committed in the course of advertising [BS&B's] goods, products, or services." Of course, if no predicate offense exists, then the inquiry ends; there can be no advertising injury and no corresponding duty to defend. St. Paul Fire & Marine Ins. Co. v. Advanced Interventional Sys., Inc., 824 F. Supp. 583, 585 (E.D. Va. 1993), aff'd, 21 F.3d 424 (4th Cir. 1994). BS&B cites case authority in an effort to redefine the words of the policies. These authorities are unavailing, however, because the clear language of the insurance contracts controls. Okla. Stat. tit. 15, § 160 (1981). Therefore, the Court holds

that there is no predicate offense as required by the plain meaning of the policies, and thus there is no advertising injury. See Bankwest v. Fidelity & Deposit Co., 63 F.3d 974, 979 (10th Cir.), reh'g denied, (1995); see also Simply Fresh Fruit, Inc. v. Continental Ins. Co., 94 F.3d 1219, 1222 (9th Cir.) (holding that the injury alleged in the underlying lawsuit “has no causal connection to any advertising activities as a matter of law because it could have occurred independent and irrespective of any advertising by the appellants”), cert. denied, 117 S.Ct. 388 (1996).

BS&B argues that the terms of the American policies should be held to cover the claims of inducement to infringe alleged in the Texas action. BS&B relies in large part on Union Ins. Co. v. Land & Sky, Inc., 529 N.W.2d 773 (Neb. 1995), as authority for this proposition. This argument by BS&B also fails. First, nothing in the plain language of the policies supports this result. The policies’ definition of “advertising injury” simply cannot be read to include inducement to infringe. Moreover, even assuming arguendo that the policies covered inducement to infringe, Oklahoma law prohibits insurance coverage for intentional torts.¹ Okla. Stat. tit. 15, § 212 (1991); Penley v. Gulf Ins. Co., 414 P.2d 305, 308 (Okla. 1966). Therefore, BS&B cannot be found to have purchased insurance coverage for an intentional tort.

Finally, BS&B’s reliance on Land and Sky is misplaced. In that case, the Nebraska Supreme Court determined there was an ambiguity in the terms of certain insurance policies since Union Insurance Company issued both the primary policy and the excess policy, and the excess policy (but not the primary policy) expressly excluded coverage for patent infringement. 529 N.W.2d at 700-02. Based on this discrepancy, the court concluded:

The fact that Union determined it necessary to exclude patent infringement in the excess policy would indicate a belief on Union’s part that patent infringement was included in the primary policy. We find that this inconsistency in the two policies creates an ambiguity regarding the meaning of the term “piracy.”

¹ In the Texas lawsuit, CDC alleges that BS&B’s conduct is “willful and deliberate.”

Id. at 702. In the instant case, no inconsistencies arise to render the American policies ambiguous. Cf. Heil Co. v. Hartford Accident & Indem. Co., 937 F. Supp. 1355, 1364 n.5 (E.D. Wis. 1996) (finding the ambiguity created in Land & Sky by the the inconsistent policy language to be controlling, not the use of the term “piracy”). To the contrary, the policies are consistent and no coverage exists for the activities alleged in the Texas action.

Based on the above, the Court holds as a matter of law there is no potential coverage under the American policies and accordingly no duty to defend. MIC Property & Cas. Ins. Corp., 990 F.2d at 577. Plaintiff’s motion for summary judgment with respect to the American insurance policies (Docket #42) is hereby denied. Defendant American’s motion for summary judgment (Docket #27) is hereby granted.

IV.

BS&B also was insured by National Union under two commercial liability insurance policies. These policies provide coverage as follows:

To pay on behalf of the Insured that portion of the ultimate net loss in excess of the retained limit as hereinafter defined, which the Insured shall become legally obligated to pay as damages for liability imposed upon the Insured by law, or liability assumed by the Insured under contract because of (i) personal injury, (ii) property damage, or (iii) advertising liability, as defined herein caused by an occurrence.

Ex. to Pl.’s Mot. for Summ. J., Vol. I, Ex. 8 at 1. The policies define “personal injury” as follows:

- (B) PERSONAL INJURY shall mean:
- (a) bodily injury, sickness, disease, including death anytime resulting therefrom, shock, fright, mental anguish and mental injury;
 - (b) false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution and humiliation;
 - (c) libel, slander, defamation of character or invasion of right of privacy unless arising out of Advertising Liability;

and

- (d) assault and battery not committed by or at the direction of the insured unless committed for the purpose of preventing or eliminating danger to persons or property

Id. at 4-5. The policies define “advertising liability” as follows:

(D) ADVERTISING LIABILITY shall mean liability for damage because of :

- (a) unintentional Libel, Slander or Defamation of Character;
- (b) infringement of copyright or title or of slogan;
- (c) piracy or unfair competition or idea misappropriation under an implied contract;
- (d) invasion of rights of privacy,

committed or alleged to have been committed during the policy period in any advertisement, publicity article, broadcast or telecast and arising out of the Named Insured’s advertising activities.

Id. at 5. The policies specifically exclude coverage for “Advertising Liability” as follows:

This policy shall not apply:

...

- (H) under Advertising Liability to claims made against the insured;
 - (i) for failure of performance of contract;
 - (ii) for infringement of trade-mark or trade name;
 - (iii) for incorrect description of any article or commodity;
 - (iv) for mistake in advertised prices

Id. at 3.

BS&B argues that the National Union policies potentially provide coverage for the activities that are alleged in the Texas lawsuit and that National Union therefore has a duty to defend BS&B in that action. The Court does not agree.

The definition of “advertising liability” in the National Union insurance policies is set forth above. By its terms, “advertising liability” encompasses (1) slander or libel; (2) infringement of

copyright, title, or slogan; (3) piracy or unfair competition or idea misappropriation under an implied contract; and (4) invasion of rights of privacy. Based on the plain meaning of the words of these policies, the Court finds that no predicate offense covered by the policies has been alleged in the Texas action, and therefore the Court holds there is no duty to defend.

The Court further declines Plaintiff's invitation to redefine the unambiguous terms of the policies so as to cover the allegations in the Texas action. Specifically, the inducement to infringe claims in the Texas lawsuit are not covered by the predicate offenses of "piracy," Heil Co. v. Hartford Accident & Indem. Co., 937 F. Supp. 1355, 1365-66 (E.D. Wis. 1996); Atlantic Mut. Ins. Co. v. Brotech Corp., 857 F. Supp. 423, 428-29 (E.D. Pa. 1994) aff'd 60 F. 3d 813 (3d Cir. 1995); Gencor Indus., Inc. v. Wausau Underwriters Ins. Co., 857 F. Supp. 1560, 1565-66 (M.D. Fla. 1994), "unfair competition," Brotech, 857 F. Supp. 428-29; Gencor Indus., 857 F. Supp. at 1565, or "infringement of title," Brotech, 857 F. Supp. 429; Gencor Indus., 857 F. Supp. at 1564. Moreover, even if the words of the National Union policies arguably covered such inducement to infringe, Oklahoma law prohibits insurance coverage for intentional torts. Okla. Stat. tit. 15, § 212 (1991); Penley v. Gulf Ins. Co., 414 P.2d 305, 308 (Okla. 1966). Therefore, BS&B cannot be found to have purchased insurance coverage for an intentional tort. And finally, for the reasons discussed above in connection with the American policies, the Land and Sky case is inapposite when applied to the National Union policies.

In addition, BS&B argues that the National Union policies are umbrella policies which must provide primary coverage to BS&B in connection with the Texas case. BS&B argues that

National Union's umbrella liability policies provide primary coverage to BS&B for covered occurrences which are not covered by the underlying AMICO policies as well as an excess coverage for covered occurrences which are also covered by AMICO's underlying policies. Thus, as explained by the court in Commercial Union, National Union's umbrella policies provide not only excess coverage, but primary coverage under the circumstances such as these.

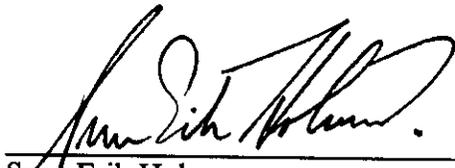
BS&B's Resp. Br. in Opp'n to National Union's Mot. for Summ. J. at 20. As set forth above, the Court holds that the allegations in the Texas case do not constitute "covered occurrences" under the provisions of the National Union policies. Accordingly, this argument also must fail.

Finally, BS&B suggests that the facts of this case may implicate the "reasonable expectations" doctrine. In Max True Plastering Co. v. United States Fidelity & Guar. Co., 912 P.2d 861 (Okl. 1996), the Oklahoma Supreme Court adopted the reasonable expectations doctrine for insurance policies such that "if the insurer or its agent creates any reasonable expectation of coverage in the insured which is not supported by policy language, the expectation will prevail over the policy language." Id. at 864. The court made clear, however, that the doctrine applies only when there is an ambiguity in the policy language. Id. at 868-69. In the instant case, the Court finds that the policy language in each of the subject insurance policies is unambiguous. The plain meaning of the terms of these policies simply does not provide coverage for the allegations in the Texas action. Therefore, the Court holds as a matter of law that the reasonable expectations doctrine does not apply here.

For the reasons set forth above, Plaintiff's motion for summary judgment with respect to National Union (Docket #42) is hereby denied. National Union's motion for summary judgment (Docket #26) is hereby granted.

IT IS SO ORDERED

This 12TH day of February, 1997.



Sven Erik Holmes
United States District Judge

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

BS&B SAFETY SYSTEMS, INC.,

Plaintiff,

v.

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PENNSYLVANIA
and AMERICAN MOTORISTS INSURANCE
COMPANY,

Defendants.

ENTERED ON DOCKET

DATE FEB 14 1997

Case No. 96-CV-9-H

FILED

FEB 13 1997

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

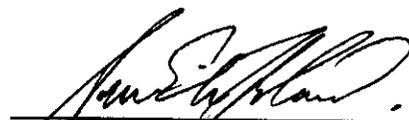
JUDGMENT

This matter came before the Court on a cross motions for summary judgment by Plaintiff and by both Defendants. The Court duly considered the issues and rendered a decision in accordance with the order filed on February 12, 1997.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for the Defendants and against the Plaintiff.

IT IS SO ORDERED

This 12TH day of February, 1997.



Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET
DATE 2-14-97

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

ORVILLE B. NICHOLS, an Individual)
and Citizen of Oklahoma,)
)
Plaintiff,)
)
vs.)
)
JOHN COBB and DANNY VAUGHN,)
Individuals and Citizens of)
California,)
)
Defendants.)

Case No. 96C-00333K

F I L E D
FEB 13 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of February 13, 1997, and the Affidavit of Orville Nichols, that the Defendant, Danny Vaughn, whom judgment for affirmative relief is sought in this action has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedures; 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, February 13, 1997.

Phil Lombardi,
Clerk, U.S. District Court

By: S Schwelke

DATE 2-14-97

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

FILED

FEB 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 95-C-819-K ✓

OPAL BOWLIN,
Plaintiff,

vs.

BAKER HUGHES INCORPORATED,
a Delaware Corporation,
Defendant.

O R D E R

In a pretrial conference held on February 5, 1997, the parties disputed whether or not dismissal of the Plaintiff's federal claims rendered this Court without continued supplemental jurisdiction over the Plaintiff's remaining state law claims for wrongful discharge and handicap discrimination under the Oklahoma Anti-Discrimination Act. Okla. Stat. tit. 25 § 1101. The Court ordered the parties to submit briefs on the issue and is at this time rendering an opinion as to that issue.

It is clear under 28 U.S.C. § 1367 that a trial court's decision whether to exercise supplemental jurisdiction over state law claims after federal claims have been dismissed is a matter of discretion. *Gullickson v. Southwest Airlines Pilots' Association*, 87 F.3d 1176, 1187 (10th Cir. 1996). Ordinarily, a federal court should dismiss pendant state claims upon dismissal of all federal claims. "Needless decisions of state law should be avoided both as a matter of comity and to promote justice

between the parties, by procuring for them a surer-footed reading of applicable law. *Id.* Discretion to try state law claims should only be exercised where, given the nature and extent of pretrial proceedings, judicial economy, convenience, and fairness would be preserved by retaining jurisdiction. *Anglemyer v. Hamilton County Hospital*, 58 F.3d 533, 541 (10th Cir. 1995). Additionally, where novel and complex issues of state law are involved, a case is more appropriately addressed in state court. 28 U.S.C. § 1367(c)(1).

The Court has determined, in its discretion, that the claims raised by the Plaintiff present issues which are currently in a state of evolution in the Oklahoma state courts. A individual's right to pursue a private cause of action for handicap discrimination under the Oklahoma Anti-Discrimination Act was only recently recognized by the Oklahoma legislature. Of the published cases involving the handicap discrimination provisions of the Act, no Oklahoma state courts have addressed the issue of whether or not Oklahoma law requires employers to provide reasonable accommodation.

Additionally, the current case has not involved complex and intricate discovery. Likewise, the Plaintiff is not barred from bringing suit in state court by the running of the statute of limitations. Although the Court recognizes that the parties have prepared for trial and have completed the pretrial process, the Court believes that this is a case that is better suited for

resolution by the Oklahoma state courts.

For the foregoing reasons, the Plaintiff's remaining state law claims are hereby DISMISSED without prejudice.

IT IS SO ORDERED THIS 13 DAY OF FEBRUARY, 1997.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT COURT

RECEIVED ON DOCS
2-14-97

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

DEAN WITTER REYNOLDS, INC.,)
)
Plaintiff,)

v.)

Civil No. 96-CV-847 K ✓

WILBERT H. MAXIMORE, Individually and)
as Trustee of the ELZABAD TRUST, an)
express trust; the ELZABAD TRUST, an)
express trust; and THE UNITED STATES)
OF AMERICA,)
)
Defendants.)

FILED

FEB 13 1997

UNITED STATES OF AMERICA,)
)
Cross Claim-Plaintiff,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

v.)
)
WILBERT H. MAXIMORE, Individually and)
as Trustee of the ELZABAD TRUST; the)
ELZABAD TRUST; and MIDLAND)
MORTGAGE COMPANY,)
)
Defendants)
On Cross Claim.)

ORDER

The Court, having considered the United States' Motion for Entry of Judgment by Default, hereby finds as follows:

1. The Plaintiff, Dean Witter Reynolds, Inc. filed its Complaint against the Defendants, Wilbert H. Maximore, Individually and as Trustee of the Elzabad Trust, the Elzabad Trust, and the

United States of America on September 13, 1996.

2. The Plaintiff, Dean Witter Reynolds, Inc. interplead \$31,648.94 and asked the Court to determine which of the Defendants was entitled to the fund.

3. The Plaintiff, Dean Witter Reynolds, Inc., personally served a summons and Complaint on the Defendants Wilbert H. Maximore, Individually and as Trustee of the Elzabad Trust, and the Elzabad Trust on October 7, 1996.

4. The Plaintiff, Dean Witter Reynolds, Inc., served its First Amended Complaint on the Defendants Wilbert H. Maximore, Individually and as Trustee of the Elzabad Trust, and the Elzabad Trust on November 8, 1996.

5. The Defendants Wilbert H. Maximore, Individually and as Trustee of the Elzabad Trust, and the Elzabad Trust have failed to plead or otherwise defend against the Complaint and Amended Complaint and thus have not asserted any claim to the interpled fund.

6. The United States of America filed an Answer to the Amended Complaint on November 21, 1996, asserting that it is entitled to the interpled fund.

7. The Defendants Wilbert H. Maximore, Individually and as Trustee of the Elzabad Trust, and the Elzabad Trust have failed to challenge the United States' claim that it is entitled to the interpled fund.

8. Cross Claim Defendant Wilbert H. Maximore failed to file a Federal income tax return for the taxable year ending on the last day of 1992.

9. On or about November 21, 1994, a delegate of the Secretary of the Treasury made assessments against, and gave notice and demand for payment thereof, to Cross Claim Defendant Wilbert H. Maximore for a total of \$63,435.48 in unpaid income taxes, penalties and interest for the

calendar year ending on the last day of 1992, as follows:

| <u>Tax</u> | <u>Interest</u> | <u>Penalties</u> |
|-------------|-----------------|------------------|
| \$43,762.00 | \$6,823.48 | \$10,941.00 (1) |
| | | 1,909.00 (2) |

- (1) Delinquency Penalty for failure to file return, 26 U.S.C. section 6651(a)(1).
- (2) Estimated Tax Penalty for failure to pay estimated income tax, 26 U.S.C. section 6654(a)(1).

10. Cross Claim Defendant Wilbert H. Maximore has neglected, failed and refused to pay the assessments described in paragraph 9 above, and there remains due and owing on said assessments a total of \$60,103.07 plus interest and all other additions thereon as provided by law. The balance with accrued interest through May 4, 1996 is \$75,877.61.

11. As a result of the neglect or refusal of Cross Claim Defendant Wilbert H. Maximore to pay the assessments described in paragraph 9, above, after demand, a Federal tax lien arose in favor of the United States as of November 21, 1994. The unpaid balance of the assessment described in paragraph 9, above, is secured by said Federal tax lien, which encumbers all property and rights to property, whether real or personal, tangible or intangible, belonging to Cross Claim Defendant Wilbert H. Maximore including the real property and all improvements and appurtenances thereunto pertaining, described in paragraph 12, below.

12. On the last day of the calendar year and tax year 1992, and continuously from and after December 1984 until at least April 14, 1993, Cross Claim Defendant Wilbert H. Maximore owned or had an interest in certain real property situated in Tulsa County, Oklahoma, and the improvements thereon (hereinafter sometimes collectively referred to as the "Property"), more specifically described as follows:

Lot Twenty (20), Block Three (3), Kendalwood IV, and Addition to the City of Glenpool, Tulsa County, Oklahoma, according to the recorded plat thereof, and also referred to or described as 1097 East 137th Place, Glenpool, Oklahoma 74033.

13. By a Quit Claim Deed dated on or about April 14, 1993, Cross Claim Defendant Wilbert H. Maximore purported to transfer and convey to Cross Claim Defendant Elzabad Trust, Wilbert H. Maximore, Trustee, all of his right, title, and interest in and to the Property.

14. The purported transfer described in paragraph 13, above, was made for inadequate consideration, with the intent to hinder, delay or defraud the United States, and was made at a time when the liabilities of the Cross Claim Defendant William H. Maximore exceeded his assets and he was unable to pay his obligations as they came due.

15. The United States of America is entitled to judgment against Cross Claim Defendant Wilbert H. Maximore in the amount of \$75, 877.61, plus interest accruing after May 14, 1996, and all additions thereon as provided by law.

16. The United States of America has a lien against all property and rights to property, whether real or personal, tangible or intangible, belonging to Cross Claim Defendant Wilbert H. Maximore as of November 21, 1994.

17. The purported transfer of the Property described in paragraph 13, above, was fraudulent. The purported transfer is hereby declared null and void. Cross Claim Defendant Wilbert H. Maximore, individually, is hereby declared the owner of the Property. The tax lien of the United States of America is hereby declared to attach to Wilbert H. Maximore's right, title, and interest in the Property.

18. The tax lien of the United States of America is to be foreclosed on the Property, and

the Property is to be sold by a proper officer of the Court, according to law, free and clear of any rights, title, liens, claims or interest of Cross Claim Defendant Wilbert H. Maximore, his heirs, estate, executors, or other assigns, and the Cross Claim Defendants herein, and that the proceeds of said sale be distributed first in payment of the expenses of the sale, second in satisfaction of the Mortgage serviced by Cross Claim Defendant Midland Mortgage Co., and third to the United States to be applied to the Federal tax liabilities of Cross Claim Defendant Wilbert H. Maximore.

19. That the Cross Claim Plaintiff, the United States of America, is entitled to recover the costs and fees of this litigation from the Cross Claim Defendant Wilbert H. Maximore.

20. Pursuant to Rule 55(a) of the Federal Rules of Civil Procedure, on January 31, 1997, the United States filed with the Clerk of the Court an application for entry of default.

21. Default was entered by the Clerk of the Court against the Defendants Wilbert H. Maximore, Individually and as Trustee of the Elzabad Trust, and the Elzabad Trust on or about February 3, 1997, for their failure to plead or otherwise defend in this action.

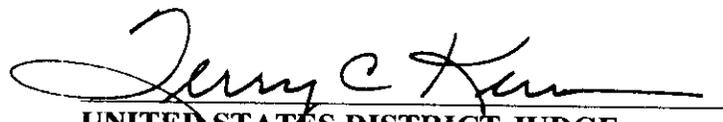
Accordingly, the Court hereby grants the United States' Motion for Entry of Judgment by Default. Plaintiff Dean Witter Reynolds, Inc. is hereby discharged from any further liability to any party in this action and is dismissed from this action.

Because of the default of the Defendants Wilbert H. Maximore, Individually and as Trustee of the Elzabad Trust, and the Elzabad Trust on the Complaint and Amended Complaint, the Court directs the Clerk of the Court for the United States District Court for the Northern District of Oklahoma to pay the interpled fund to the United States of America by delivering a check for the amount of the fund, payable to the United States of America, to the Department of Justice, Tax Division, P.O. Box 7238, Washington, D.C. 20044.

✓ 2/27/97 j - see also 2/27/97 @idw

Because of the default of the Defendants Wilbert H. Maximore, Individually and as Trustee of the Elzabad Trust, and the Elzabad Trust on the United States' Cross Claim, the Court will enter its Judgment of Foreclosure and Order of Sale.

Entered this 12 day of February, 1997.


UNITED STATES DISTRICT JUDGE
HONORABLE TERRY C. KERN

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

ENTERED ON DOCKET
DATE 2-14-97

MARINE MIDLAND BANK,)
)
 Plaintiff,)
)
 v.)
)
 TULSA LITHO COMPANY, Defendant,)
 DWAYNE FLYNN, Defendant and)
 Third-Party Plaintiff, and)
 BANK OF OKLAHOMA, N.A., Defendant,)
)
 v.)
)
 SUPERB PRINTING COMPANY and)
 CONSOLIDATED GRAPHICS, INC.,)
)
 Third-Party Defendants.)

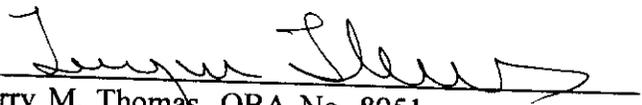
Case No. 96-C-401K ✓

FILED
FEB 13 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

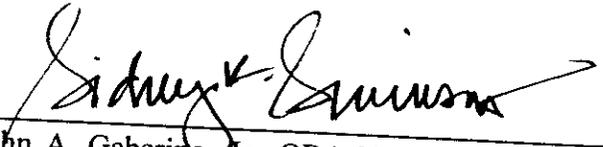
Having entered into a Settlement Agreement, Dwayne Flynn, Third-Party Plaintiff, and Consolidated Graphics, Inc. and Superb Printing Company, Third-Party Defendants, pursuant to Rule 41(a)(1) Fed.R.Civ.P., hereby stipulate to the dismissal of this action, with prejudice, with the parties responsible for their own costs and attorney fees, but request that this Court retain jurisdiction to interpret and, if necessary, enforce the Settlement Agreement.

Dated at Tulsa, Oklahoma this 12th day of February, 1997.


Terry M. Thomas, OBA No. 8951
Kenneth J. Levitt, OBA No. 16262
CROWE & DUNLEVY
321 South Boston, Suite 500
Tulsa, OK 74103-3313
(918) 592-9800
Attorneys for Consolidated Graphics, Inc.
and Superb Printing Company

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OK



John A. Gaberino, Jr., OBA No. 3188
Sidney K. Swinson, OBA No. 8804
ARRINGTON KIHLE GABERINO & DUNN
A Professional Corporation
100 West Fifth Street, Suite 1000
Tulsa, OK 74103-4219
(918) 585-8141
Attorneys for Defendant, Dwayne Flynn

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

020 30 1996

RALPH E. GRAY, formerly d/b/a
GRAYCO COMPANY,

Plaintiff,

v.

THE UNITED STATES OF AMERICA

Defendant.

ENTERED ON DOCKET

FEB 13 1997

Civil No. 95-C-558-C ✓

FILED

FEB 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION FOR DISMISSAL

Pursuant to Fed. R. Civ. P. 41(a), the parties stipulate that the complaint is dismissed with prejudice, the parties to bear their respective costs, including any possible attorneys' fees or other expenses of litigation.

Dated this 31ST day of ~~August~~ ^{December}, 1996

COUNSEL FOR PLAINTIFF:

Paul R. Tom

PAUL R. TOM
2021 South Lewis, Suite 350
Tulsa, Oklahoma 74104
Tel: (918) 743-2000

COUNSEL FOR DEFENDANT:

STEPHEN C. LEWIS
UNITED STATES ATTORNEY

Laurence K. Williams
DENNIS M. DUFFY
LAURENCE K. WILLIAMS
Trial Attorneys
Tax Division
Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, DC 20044
Tel: (202) 616-9326

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clt

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

FILED

FEB 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

YVONNE ASHWOOD,

Plaintiff,

vs.

YALE CLEANERS, INC.,

Defendant.

Case No. 96-CV-835-H

ENTERED ON DOCKET

FEB 13 1997

FILED

FEB 12 1997

DATE

STIPULATION OF DISMISSAL WITH PREJUDICE

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiff Carolyn Yvonne Ashwood and her counsel of record,
Mr. Jeff Nix and Mr. James Watt, hereby dismiss all claims made in
the above styled cause, with prejudice to the refiling of same.

Carolyn Yvonne Ashwood
CAROLYN YVONNE ASHWOOD
PLAINTIFF

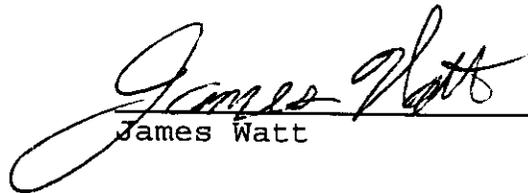
James Watt
JAMES WATT, ESQ.
JEFF NIX, ESQ.
COUNSEL FOR PLAINTIFF

Angelyn L. Dale
ANGELYN L. DALE, ESQ.
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that on the 7th day of February, 1997, a copy of this pleading was hand-delivered to:

Angelyn L. Dale
Nichols, Wolfe, Stamper,
Nally, Fallis & Robertson, Inc.
124 E. 4th St., Suite 400
Tulsa, OK 74103


James Watt

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

FILED

FEB 12 1997

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

DOUG MAYFIELD,)
)
Plaintiffs,)
)
vs.)
)
HERBERT OVERMAN, et al,)
)
Defendants.)

Case No. 96-C-438-B ✓

ENTERED ON CLERK'S
FEB 13 1997

ADMINISTRATIVE CLOSING ORDER

The Paintiff & 3rd Party Defendant having filed its petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any purpose required to obtain a final determination of the litigation.

IF, within 90 days of a final adjudication of the bankruptcy proceedings, 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 February, 1997.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

F I L E D

MIDWEST URETHANE PROCESSING CO., INC.)
)
Plaintiff,)
)
vs.)
)
UNITED STATES FIDELITY AND GUARANTY)
COMPANY,)
)
Defendant.)

FEB 11 1997

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

122
No. 96-C-1022E

ENTERED ON DOCKET

FEB 12 1997

STIPULATION FOR DISMISSAL WITH PREJUDICE

The parties, Midwest Urethane Processing Co., Inc., through its attorneys of record, George M. Miles and Paul H. Burgess, and United States Fidelity and Guaranty Company, through its attorney of record, Kenneth W. Elliott, submit the following Stipulation to the Court for an Order of Dismissal with Prejudice of the captioned cause.

IT IS STIPULATED AND AGREED by and between the parties that the Court may enter an Order dismissing the captioned cause of the Plaintiff, Midwest Urethane Processing Co., Inc., with prejudice against the filing of a future action thereon, for the reason that the parties entered into a compromise settlement agreement whereby the Defendant obtained a full, final and complete release of any and all claims of the Plaintiff.



GEORGE M. MILES, OBA #11433
406 S. BOULDER, SUITE 220
TULSA, OK 74103
Telephone: (918) 587-4436
Facsimile: (918) 585-9619

and

Paul H. Burgess

PAUL H. BURGESS, OBA #15735
of JONES, GIVENS, GOTCHER & BOGAN, P.C.
15 EAST 5TH STREET, SUITE 3800
TULSA, OK 74103
Telephone: (918) 581-8200
Facsimile: (918) 583-1189

ATTORNEYS FOR PLAINTIFF

Kenneth W. Elliott

KENNETH W. ELLIOTT, OBA #2686
of ELLIOTT, MORRIS AND PARKS
119 N. ROBINSON, STE. 630
OKLAHOMA CITY, OK 73102
Telephone: (405) 236-3600
Facsimile: (405) 239-2265

ATTORNEYS FOR DEFENDANT

numerous administrative grievance forms.

Defendant does not specifically respond to Plaintiff's contentions that he has fully complied with all administrative requirements. In his "Objection to Motion for Martinez Report," filed January 13, 1997 [Doc. No. 17-1], Defendant states only that "none of the attempts mention [sic] in the Plaintiff's response address the issues with Defendant Kaiser."

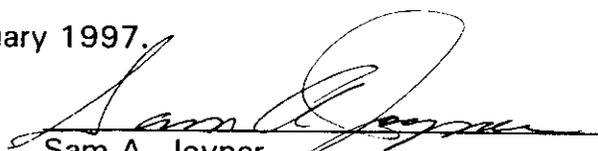
A review by the Court indicates that the issues which Plaintiff raises in his Complaint are each raised in his administrative grievance forms. Defendant does not state whether Plaintiff's claims have been addressed by the grievance system, and Defendant does not otherwise respond to Plaintiff's assertion that he had completed the requirements to comply with administrative exhaustion. The Magistrate Judge therefore recommends that Defendant's Motion to Dismiss be **DENIED**.

RECOMMENDATION

The United States Magistrate Judge recommends that the District Court **DENY** Defendant's Motion to Dismiss [Doc. No. 10-1].

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See, e.g., Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 10 day of February 1997.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

DAVID BRUCE HAWKINS,)

Plaintiff,)

vs.)

STEVE W. KAISER, Chief of Security of the)
Oklahoma Department of Corrections, in his)
official capacity, and in his individual capacity,)
John Does #1 through #5)

Defendants.)

FEB 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-471-B

FILED ON DOCKET
DATE FEB 12 1997

REPORT & RECOMMENDATION

Plaintiff filed his Complaint on May 24, 1996. Service on Defendant Steve W. Kaiser was obtained on July 29, 1996. Plaintiff filed a Motion for Summary Judgment of Default on August 26, 1996 [Doc. No. 4-1]. Plaintiff filed a Petition Amending Motion for Summary Judgment of Default on August 27, 1996 [Doc. No. 5-1]. On September 9, 1996, Plaintiff filed a Motion for Summary Judgment [Doc. No. 6-1]. By minute order dated December 24, 1996, this case was referred to the undersigned Magistrate Judge for all further proceedings.

By Order dated October 3, 1996, the District Court directed the Court Clerk to mail a copy of Plaintiff's motions to the Office of the Attorney General for the State of Oklahoma. [Doc. No. 7-1]. The Defendants were given fifteen days within which to respond to Plaintiff's motions.

Defendant responded on October 18, 1996. [Doc. Nos. 8-1, 9-1]. Defendant Kaiser noted that after being served he completed a request for representation which he forwarded to the Attorney General's office. However, the Attorney General's office has no record of receiving a request for representation from Defendant.^{1/} Defendant additionally notes that under 42 U.S.C. § 1997(e), that "[a]ny defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed." This provision also provides that a court may order a defendant to reply to a complaint.

Defendant requested representation by the Attorney General's office, and due to some unforeseen or undisclosed circumstance, the Attorney General's office has no record of the request. Consequently, Defendant neglected to respond to Plaintiff's Complaint. Following the District Court's order directing that Defendant respond to Plaintiff's Motion for Default, Defendant promptly responded. Under the facts and circumstances of this case, and considering 42 U.S.C. § 1997(e), the Magistrate Judge recommends that Plaintiff's Motions for Default Judgment be denied.

^{1/} Defendant additionally asserts that the Court does not have subject matter jurisdiction over this action and therefore cannot grant judgment for Plaintiff. In a separately filed Report and Recommendation, however, the undersigned Magistrate Judge is recommending that Defendant's Motion to Dismiss for lack of subject matter jurisdiction be denied.

RECOMMENDATION

The United States Magistrate Judge recommends that the District Court **DENY** Plaintiff's Motion for Summary Judgment of Default [Doc. No. 4-1], Plaintiff's Petition Amending Motion for Summary Judgment of Default [Doc. No. 5-1], and Plaintiff's Motion for Summary Judgment [Doc. No. 6-1].

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See, e.g., Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 10 day of February 1997.


Sam A. Joyner
United States Magistrate Judge

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

FILED

FEB 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES M. HANKINS,

Plaintiff,

vs.

SHIRLEY CHATER,
Commissioner of Social Security,

Defendant.

Case No. 95-C-1025-C

ENTERED ON FILE
FEB 12 1997
DATE _____

ORDER

Plaintiff James M. Hankins has filed objections to the Report and Recommendation entered by the magistrate judge on December 30, 1996. The magistrate recommends affirming the decision of the Commissioner of Social Security that plaintiff is not disabled within the meaning of the Social Security Act. Plaintiff raises two objections to the report of the magistrate.

The magistrate's and the administrative law judge's finding that plaintiff's fracture had healed within twelve months are not supported by the evidence.

Contrary to the magistrate's findings, the evidence establishes that plaintiff cannot perform significant numbers of jobs.

The Court has conducted a de novo review of the case file to determine whether the decision of the Commissioner, in regard to plaintiff's specific objections to the magistrate's report, is supported by substantial evidence and that the correct law was applied. The decision of the administrative law judge (ALJ) was entered on January 13, 1995.

Plaintiff contends that a finding that the fracture to his wrist had healed within twelve months of the date of injury is not supported by the evidence. Plaintiff was injured on March 7, 1991 when a large chain cable fell on plaintiff's arm. On May 1, 1991,

plaintiff had arthroscopic surgery on his wrist to repair the "radial ulnar joint area." On August 26, 1991 plaintiff was reported to be "doing well" with only slight soreness about the wrist, with satisfactory range of motion. Plaintiff returned to work on October 3, 1991 and worked for three months. Because plaintiff worked less than six months, the claims representative determined that it was an "unsuccessful work attempt." On February 12, 1992, plaintiff had surgery on his elbow and hand. On March 16, 1992, twelve months following the injury, plaintiff's physician indicated that plaintiff's was "doing well" and had a full range of motion and strength. Plaintiff was released by his physician to return to work effective April 1, 1992, without restriction. Plaintiff again worked for three months. After quitting work, plaintiff returned to his treating physician who detected no wasting or weakness of the "ulnar intrinsic musculature." Plaintiff's treating physician advised plaintiff that he should not return to heavy work, but plaintiff could perform work which limited use of his right upper extremity to lifting no more than 20 pounds. Plaintiff's treating physician released him from his care with an indication that no further medical or surgical treatment would be necessary. The ALJ found that although plaintiff could not return to his past relevant work, plaintiff could perform several alternative work activities in the national economy. Absent a showing of good faith to the contrary, the opinions of treating physicians must be accorded substantial or considerable weight. Lamb v. Bowen, 847 F.2d 698, 703 (11th Cir. 1988).

The Tenth Circuit has noted that a person could have an impairment that briefly prevents the person from working, but if he is able to resume working, he would not be entitled to benefits even if the impairment itself continues for the rest of his life. Alexander

v. Richardson, 451 F.2d 1185, 1186 (10th Cir. 1972). There is substantial evidence to support the finding that plaintiff's functional use of his arm was returned within 12 months of injury.

Further the record establishes that the "five-step sequential evaluation process" for determining whether a claimant is disabled was correctly applied in this case. 20 C.F.R. §§ 404.1520, 416.920 (1986). See, Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir.1988). Plaintiff claims that he qualifies for disability benefits under "step 3" of the sequential evaluation. Step three "determines whether the impairment is equivalent to one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity," pursuant to 20 C.F.R. §§ 404.1520(d), 416.920(d) (1986). It was undisputed that plaintiff could not return to his past relevant work as a seaman merchant, accordingly the burden shifted to the Secretary to determine that plaintiff has the residual functional capacity to perform other alternative work in the national economy in view of his age, education, and work experience. The record clearly supports the Commissioner's determination that based on the plaintiff's age, education, and work experience that plaintiff has the functional capability to work as a janitor, a parking lot attendant or a hand packager and that these jobs are available in Oklahoma. A Residual Functional Capacity Assessment was conducted on May 17, 1993 by Dr. Thomas Feigel, a vocational expert, who indicated that plaintiff could occasionally lift 20 pounds, frequently lift ten pounds, stand or walk approximately six hours in an eight hour day, sit approximately six hours in an eight hour day and push and pull an unlimited amount.

From an independent review of the record, the Court finds that the factual findings

of the Commission are supported by substantial evidence and thus her findings are conclusive, and that the correct law was applied.

Based on the authority set forth within the magistrate's Report and Recommendation, the Court hereby affirms the denial of plaintiff's claim for disability benefits. The Court adopts the Report and Recommendation of the magistrate as the Findings and Conclusions of this Court.

It is so Ordered this 11th day of February, 1997.



H. DALE COOK
United States District Judge

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

F I L E D

FEB 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)

v.)

No. 93-C-0038-B

A TRACT OF LAND IN SECTION 17,)
TOWNSHIP 23 NORTH, RANGE 22)
EAST OF THE I.B.M., DELAWARE)
COUNTY, OKLAHOMA,)
CONTAINING 4.0 ACRES, MORE OR)
LESS, WITH ALL BUILDINGS,)
APPURTENANCES, AND)
IMPROVEMENTS THEREON,)

Defendant.)

ENTERED IN COURT
DATE FEB 12 1997

ORDER TO REOPEN CASE

WHEREAS, on the 11th day of August, 1995, the Court entered its Administrative Closing Order ordering the Clerk to administratively close this action in his records without prejudice pending determination of the underlying state court criminal case; and

WHEREAS, the Plaintiff has filed its Application to Reopen Case in order to allow it to proceed to final resolution of this case.

IT IS THEREFORE ORDERED that the Clerk reopen his records in this case to allow Plaintiff to proceed with this case to final resolution.



THOMAS R BRETT
UNITED STATES DISTRICT JUDGE

Submitted by:

A handwritten signature in black ink, appearing to read 'Catherine Depew Hart', written over a horizontal line.

CATHERINE DEPEW HART, OBA #3836
Assistant United States Attorney

NAUDDLPEADENFCPARMLEYREOPEN.ORD

FILED

FEB 11 1997

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

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

IN RE:

INTERCHANGE WAREHOUSE INVESTORS I,
Debtor,

THE RESOLUTION TRUST CORPORATION,
as Receiver for Commonwealth Federal
Savings Association,

Appellant,

vs.

INTERCHANGE WAREHOUSE INVESTORS I,
Appellee.

Bankruptcy #92-01413-W
Chapter 11

EXCISE
FEB 12 1997

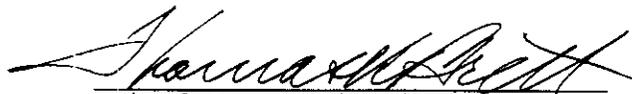
DISTRICT COURT NO.
92-C-1164-B

ORDER

THIS MATTER having come on to be heard this 11 day of Feb.,
1997, upon Joint Stipulation for Dismissal of Appeal, the Court finds good cause
exists for granting such Motion.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the above styled
Appeal is hereby dismissed.

DATED this 11 day of Feb., 1997.


United States District Judge

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

SUSAN NEWCOMER, individually)
and as Guardian of)
BENJAMIN NEWCOMER, ANDREW)
NEWCOMER and PETER NEWCOMER,)
and JOHN NEWCOMER,)

Plaintiffs,)

v.)

NORTHEAST OKLAHOMA ELECTRIC)
COOPERATIVE, INC., an Oklahoma)
corporation, and CEDAR PORT)
MARINA, an Oklahoma entity;)
and GRAND RIVER DAM AUTHORITY,)
an Oklahoma agency, and JOHN)
DOE CORPORATION;)

Defendants.)

NORTHEAST OKLAHOMA ELECTRIC)
COOPERATIVE, INC., an Oklahoma)
corporation,)

Third-Party Plaintiff,)

v.)

ROBERT M. FORNELL, JR.,)

Third-Party Defendant.)

ENTERED ON DOCKET

DATE 2-12-97

Case No. 95 C-765K

FILED
FEB 11 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

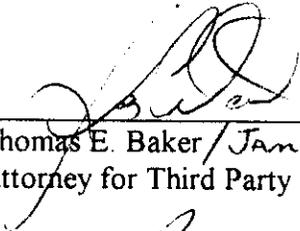
APPLICATION TO DISMISS WITH PREJUDICE

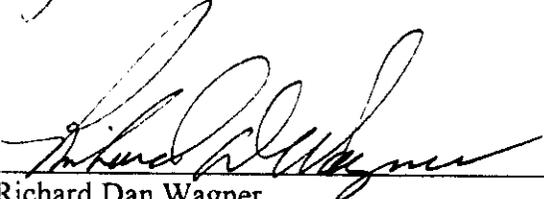
COMES NOW the Plaintiffs, Defendants, Third-Party Plaintiff and Third-Party Defendant and move this Court to dismiss all causes of action with prejudice for the reason that all of the matters, causes of action and issues in the Complaint and Third-Party Complaint have been settled, compromised and released herein.

Furthermore, as some claims as made herein are for and on behalf of three minor children, the Plaintiff Susan Newcomer affirms and attests to this Court that she is the natural mother of said minor children as named in the style herein, Benjamin, Andrew and Peter. That said children were present at time of accident, sustained damages which are not fully ascertainable but includes fright and emotional upset at seeing their mother injured, as well as other injuries and damages. That throughout these proceedings I have been represented by counsel, and fully understand the legal rights which I and my children have, including their right to jury trial, their right to await majority and the conjoint extension of the statute of limitations, their right to have damages assessed by a jury or court, and all other legal rights; that it is likewise understood that if this Court approves this Application and approves Dismissal With Prejudice of Plaintiffs' claims by reason of the settlement effected in the above captioned matter, that all Plaintiffs including said minors are forever precluded from further recovery or making further claim as a result of this incident and occurrence. That it is in the best interest of my minor children that this Court approve said settlement and enter within its Order dismissing this action the appropriate findings to preclude said children from making further claim at any time in the future for known or unknown damages as a result of their injury or injury to either of their parents. Therefore, I do, as signified by my signature below asks this Court, in the best interest of my children, to enter an Order of Dismissal With Prejudice of All Claims thus precluding any further claim in the future by any named Plaintiff or anyone on their behalf, arising or claim to be arising from this incident complained of.

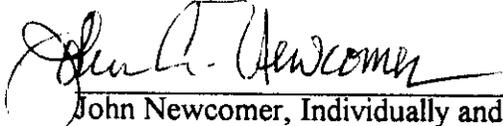
WHEREFORE, premises considered, the Plaintiffs, Defendants, Third-Party Plaintiff and Third-Party Defendant move the Court to order a dismissal with prejudice in the above-styled cause.


Luke J. Wallace
David J. Shea
Attorneys for Plaintiffs


Thomas E. Baker / James C. DANIEL, 10031
Attorney for Third Party Defendant


Richard Dan Wagner
Attorney for Defendant and Third Party Plaintiff


Susan Newcomer, Individually and as mother and
next friend of Benjamin Newcomer, Andrew Newcomer,
and Peter Newcomer


John Newcomer, Individually and as father and
next friend of Benjamin Newcomer, Andrew Newcomer,
and Peter Newcomer

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

FEB 11 1997

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
RORY DAVIS,)
)
Defendant.)

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

Case No. 97-C-87-BU ✓

ENTERED ON DOCKET

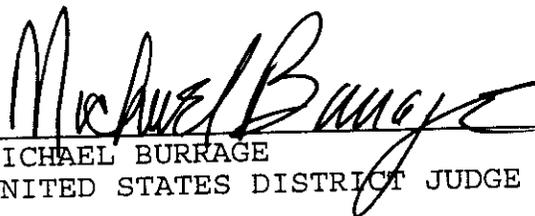
DATE FEB 12 1997

ADMINISTRATIVE CLOSING ORDER

The Court has reviewed the notice of pending bankruptcy filed by Defendant, Rory Davis. Having done so, the Court concludes that this matter should be administratively closed during the pendency of the bankruptcy proceedings before the United States Bankruptcy Court for the Northern District of Oklahoma. It is therefore ordered that the Clerk administratively terminate this action in his records pending resolution of the bankruptcy proceedings.

The parties are **DIRECTED** to notify the Court of the resolution of the bankruptcy proceedings, within ten (10) days thereafter, so that the Court may reopen this matter, if necessary, to obtain a final determination of this litigation.

ENTERED this 11 day of February, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

FEB 11 1997

LORRIE A. JENKINS,)
)
 Plaintiff,)
)
 vs.)
)
 ROYAL VISTA PLASTICS, INC.,)
)
 Defendant.)

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

Case No. 96-CV-682-BU ✓

ENTERED ON DOCKET

DATE FEB 12 1997

ADMINISTRATIVE CLOSING ORDER

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

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

Entered this 11th day of February, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

FILED

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

FEB - 6 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES ALBERT SCIALFO,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION,)
)
 Respondent.)

No. 95-CV-588-B


FEB 11 1997

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, through retained counsel, contends that his guilty pleas were entered unknowingly and involuntarily due to his legal incompetence and that counsel provided ineffective assistance of counsel when she failed to reveal to the trial court her concerns about Petitioner's competency.¹

¹ On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act, H.R.Rep. No. 104-518, 104th Cong., 2d Sess., which provides new standards for analyzing a petition for a writ of habeas corpus. The Court does not believe that the new provisions set out in section 105 apply to petitions, like the one at hand, 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. 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 v. USI Film Prods., 511 U.S. 244, 114 S.Ct. 1483, 1493-96 (1994). Therefore, the 1996 amendments to section 2254 do not apply to the instant case.

I. BACKGROUND

On February 18, 1994, Petitioner pled guilty to Attempted Larceny of Motor Vehicle, Possession of Marijuana with Intent to Distribute, Possession of Firearm in Commission of a Felony, Possession of Obscene Videotapes, and two counts of Attempting to Obtain Controlled Substance by False/Forged Prescription in Tulsa County District Court, Case Nos. CF-93-4836 and CF-93-4850. The trial court conducted a standard plea colloquy with Petitioner and his then counsel, Ginger Brady, and passed sentencing to April 8, 1994, to permit preparation of a presentence investigation.

On April 8, 1994, prior to the commencement of the sentencing proceedings, Petitioner and Ms. Brady presented final testimony in a divorce action on the third floor of the Tulsa County Courthouse. Petitioner then disappeared and was arrested a few hours later by his bondsman at Tulsa International Airport. On April 12, 1994, Ms. Brady filed a motion to withdraw Petitioner's guilty pleas, alleging for the first time that Petitioner was incompetent to undergo further criminal proceedings. On April 14, 1994, the court permitted Ms. Brady to withdraw and current retained counsel entered an appearance. The court then passed sentencing at the request of the defense to permit psychological evaluation of Petitioner by a privately retained psychiatrist.

On April 26, 1994, the court determined that a doubt existed as to Petitioner's present competency, and directed an evaluation by court-appointed psychologist William Cooper, Ph.D. On May 25, 1994, Dr. Cooper reported that Petitioner was incompetent to

undergo further criminal proceedings since he was unable to consult with his lawyer and rationally assist in his defense. On June 15, 1994, the trial court ordered Petitioner committed to the care of Eastern State Hospital to undergo treatment to restore his competency. Petitioner remained hospitalized at Eastern State Hospital until late September of 1994, when the hospital treatment team determined that he had regained his ability to consult and rationally assist in his defense.²

On October 6, 1994, the trial court held a hearing on Petitioner's *Superseding Application to Withdraw Pleas of Guilty*. Dr. Jim O'Carroll, M.D. and board certified psychiatrist of Tulsa, Oklahoma, testified that Petitioner's previous period of incompetency stemmed from bipolar disorder, which was formerly termed manic depression. This mental disorder manifests itself as either recurrent depression or alternative periods of profound, suicidal depression and periods of euphoria, during which the patient may suffer "grandiose delusions," hyperactivity, and feelings of invincibility. The disorder causes destructive and irresponsible judgments which can destroy the patient's life, socially, financially, and emotionally. (Sent. tr. at 9-10.)

²Neither Dr. William Cooper, Ph.D of Tulsa, Oklahoma nor the Eastern State Hospital (Dr. Warren Smith, Ph.D, psychologist) specifically stated defendant Scialfo was legally mentally incompetent in February 1994. Their examination and conclusions simply did not speak to February 1994. Each concluded that between May and August 1994 defendant Scialfo had periods when he was not mentally competent to consult with his lawyers and rationally assist in preparation of his defense. See R. of CF-93-4836, pp. 42, 50.

Dr. O'Carroll further testified that Petitioner had the first break down from this disorder at the age of nine and the first major depression when he went to England to a school of acting and ballet as one of 35 people selected from a group of 2000 by the Dramatic Association of London. Because of his depression, Petitioner could not accomplish anything in London and returned to the United States where he became involved with charismatic Christians. He completed a masters degree at Oral Roberts University and began working with the Christian Fellowship of Psychiatrist. (Id. at 12-13.)

Dr. O'Carroll further testified that Petitioner's family had a history of depression. Petitioner's father, who was an attorney, spent one year and one-half in a state psychiatric institution. Petitioner's mother had been chronically depressed and overly preoccupied with her body ailments which is a feature of bipolar disorder. Lastly, Petitioner's maternal uncle committed suicide. (Id. at 13-14.)

Dr. O'Carroll expressed the opinion that Petitioner was not mentally competent on the day he entered his pleas of guilty, February 18, 1994, because his bipolar disorder prevented his pleas from being voluntary. (Id. at 14-15.) Dr. O'Carroll even expressed the opinion Petitioner was mentally incompetent at the time the offenses were committed, but such is not the basis of the *Superseding Application to Withdraw Pleas of Guilty*. (Id. at 10-11.)

Ms. Brady testified that during the time she represented

Petitioner she had various reports about his past mental illness over several periods of time and had no doubt in her mind that he was having mental problems during the time she represented him. She testified that Petitioner's ability to assist her in preparing a defense "changed from day to day." He had extreme mood swings and his thinking from time to time was absolutely irrational. (Id. at 37-38.) Ms. Brady further testified that after the entry of the guilty pleas several events solidified her suspicion that Petitioner had been unable to assist her at the time he entered his pleas. One message on her answering machine so disturbed her that she saved the tape containing the message. On April 8, 1994, the day of sentencing, Ms. Brady testified Petitioner was frantic and mentally disorganized; he kept going to the telephone to call his father and his hands were shaking such that he had a hard time writing his name. (Id. at 42-44.)

The trial court denied Petitioner's motion to withdraw pleas of guilty, rejecting Dr. O'Carroll's opinion and relying instead on Ms. Brady's statements and the judge's determination at the February 18 plea hearing--that Petitioner was competent to proceed. The court stated as follows:

The Court based on the number of guilty pleas that are entered . . . must rely basically on Attorneys to advise the Court and then the Court makes some determination in questioning of the Defendant on this issue of competency....

In this case, of course, I asked Ms. Brady whether or not she was satisfied that the Defendant understood all of his legal rights and was competent to enter the plea and she told [me] that he was, and she did not express any reservations to me about that.

I've heard testimony here from an expert giving his opinion concerning Mr. Scialfo's competency at the time these pleas were entered. When I hear experts give testimony in court, particularly if the testimony is just before me alone[,] I always remember a jury instruction that I generally give in jury trial cases where experts testify. Jurors are advised that they may consider the testimony of experts, give them such weight and value as they deem it is entitled to receive. Jurors are told you are not required to surrender your own judgment to that of any person testifying as an expert, or to give controlling effect to the opinion of an expert. For the testimony of an expert, like that of any other witness, is to be received by you and given such weight and value as you deem it is entitled to receive. That's a required instruction under Uniform Jury Instructions, and very appropriate, and I think it applies in this case. I don't mean to question Dr. O'Carroll's qualifications or his expertise, but I do question his opinion as opposed to that I received from Ms. Brady and my determination at the time these pleas were entered.

As has been brought out on cross examination, this Motion to Withdraw Plea wasn't made until after the PSI [was] received. It's not unusual at all for this Court to get Motions [to] Withdraw Pleas, and 99 point 9 percent of them are after a Defendant finds out that he's going to the penitentiary. And it's amazing some of the grounds that are given after a Defendant finds that out.

(Sent. tr. at 56-59.)

On February 9, 1995, Petitioner timely filed a certiorari appeal, seeking a reversal of the trial court's ruling refusing to allow him to withdraw his guilty pleas. The Court of Criminal Appeals denied Petitioner's request on April 28, 1995.

In the instant petition for a writ of habeas corpus, Petitioner restates that his pleas were entered unknowingly and involuntarily due to his legal incompetence. The evidence establishes that, although "fragile", Petitioner was restored to competence in the fall of 1994 following 4-5 months of drug therapy at Eastern State Hospital. (Sent Tr. at 8.) Alternatively,

Petitioner alleges his right to effective assistance of counsel was violated because Ms. Brady failed to reveal to the Court that she harbored serious doubts concerning Petitioner's competency to plead guilty.

II. DECISION

A. Competency to Plead Guilty

The dispositive issue before this Court is whether Petitioner has established the invalidity of his plea by a preponderance of the evidence. The Court is mindful of its obligation "to give due regard to the trial court's superior ability to draw the appropriate inferences from its observation of the defendant and expert witnesses." Spitzweiser-Wittgenstein v. Newton, 978 F.2d 1195, 1199 (10th Cir. 1992) (citing Ray v. Duckworth, 881 F.2d 512, 516 (7th Cir. 1989)).

This Court is of the opinion Petitioner has shown by a preponderance of the evidence his guilty pleas were involuntary due to his mental incompetence. In making this determination, the Court weighed the testimony of Dr. O'Carroll and Ms. Brady against the trial judge's determination of competency in light of the plea hearing.

Based on the state of the record and representations by Petitioner and his counsel at the time the guilty pleas were entered on February 18, 1994, the Court is convinced the trial judge acted properly in accepting Petitioner's guilty pleas. However, when the issue of Petitioner's mental incompetence was raised and Petitioner sought to withdraw said guilty pleas, the

Court believes the trial judge's denial of Petitioner's *Superseding Application to Withdraw Pleas of Guilty* was not fairly supported by the record.

At the hearing on Petitioner's *Superseding Application to Withdraw Pleas of Guilty*, Petitioner, through Dr. O'Carroll, provided medical evidence of Petitioner's state of mind at the time he entered the guilty pleas. In sum, Dr. O'Carroll opined Petitioner was not competent to voluntarily enter such pleas at the time he did so due to his bipolar disorder. Dr. O'Carroll's testimony was bolstered by Ms. Brady. Although Ms. Brady harbored concerns about Petitioner's mental state, enough so that she kept a disturbing tape recording of a phone message left by Petitioner on her answering machine, she did not seek a psychological evaluation of Petitioner prior to his guilty pleas.

The State's evidence consists of the plea hearing dialogue between the trial judge, Petitioner, Ms. Brady, and the Assistant District Attorney, along with the trial judge's determination of Petitioner's competence pursuant thereto. It is undeniable Petitioner represented to the trial judge at the plea hearing he was competent to plead guilty and he was not suffering from any mental problems. Ms. Brady made similar representations to the court that Petitioner was competent to enter his guilty pleas and she believed him to be competent. This Court is also mindful of the timing of Petitioner's claim of incompetence to enter a plea of guilty, such claim coming after Petitioner learned of the likelihood he would be sentenced to ten (10) years in the

penitentiary.

For purposes of the record, the Court notes the evaluation of Petitioner by Dr. Cooper and Dr. Smith do not speak to Petitioner's mental state on February 18, 1994. The *Order Directing Examination for Determination of Competency* issued by the trial judge on April 26, 1994, did not require Dr. Cooper or Dr. Smith to express their opinion as to whether Petitioner was competent to enter his guilty pleas at the time the pleas were entered. The Order posed five questions to Dr. Cooper and Dr. Smith and expressly stated the purpose of the evaluation was to determine Petitioner's present competency. (R., CF-93-4836, pp. 31-32.) Whether Petitioner was competent to enter a plea of guilty in May, June, July, or August 1994 is irrelevant as Petitioner did not enter any plea in any of those months. This Court is concerned only with the question of whether Petitioner was competent on February 18, 1994, the date he entered his guilty pleas.

Reviewing *de novo* the transcript of the plea hearing of February 18, 1994, the testimony of Dr. O'Carrol and Ms. Brady given at the hearing on Petitioner's *Superseding Application to Withdraw Pleas of Guilty* of October 6, 1994, and taking into consideration the trial judge's determination of competency, the undersigned is of the opinion Petitioner has shown by a preponderance of the evidence that his guilty pleas were involuntary due to mental incompetence.

B. Ineffective Assistance of Counsel

Next Petitioner contends that in light of his mental state Ms. Brady should have investigated his competency to plead guilty and should have informed the trial court, prior to the entry of the guilty pleas, that she had serious doubts concerning Petitioner's competency.

To prevail on a claim of ineffective assistance of counsel, Petitioner must establish (1) that his attorney's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668 (1984). This same test applies when a defendant alleges ineffective assistance of counsel in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58 (1985). In a guilty plea situation, to satisfy the second prong of the Strickland test, the defendant must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59.

Respondent contends that Ms. Brady's decision to conceal from the trial court her doubts about Petitioner's competence to plead guilty amounts to a tactical decision. Counsel's tactical decision "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 465 U.S. at 691. "This measure of deference, however, must not be watered down into a disguised form of acquiescence." Profitt v. Waldron, 831 F.2d 1245, 1247 (5th

Cir. 1987).

In the Order of August 2, 1996, this Court found Petitioner had met the first prong of Strickland, that Petitioner's counsel's conduct fell below an objective standard of reasonableness. The Court reserved ruling on whether the second prong of Strickland had been met until after a determination of whether Petitioner could meet his burden of proving by a preponderance of the evidence that he was mentally ill and legally incompetent at the time of his guilty pleas on February 18, 1994. Having found Petitioner met his burden, the Court finds Petitioner was denied effective assistance of counsel. See Bouchillon v. Collins, 907 F.2d 589, 595 (5th Cir. 1990) (finding that mental incompetence to plead guilty is sufficient to meet prejudice prong of the Strickland test).

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that Petitioner is in custody in violation of the Constitution of the United States. Accordingly, the petition for a writ of habeas corpus is **GRANTED**. Petitioner's convictions in Tulsa County District Court cases CF-93-4836 and CF-93-4850 are hereby **SET ASIDE** and said cases are **REMANDED** to Tulsa County District Court with instructions Petitioner be allowed to withdraw his pleas of guilty previously entered in each case, without prejudice to the State of Oklahoma to proceed with said prosecutions. If the State proceeds and lawful convictions result, Petitioner is to be given credit for all previous time served on

the set aside convictions. This Court Order is **STAYED** for ten (10) days pending Respondent filing a good faith Notice of Appeal.

SO ORDERED THIS 2nd day of February, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

2/7/97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB 10 1997

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
JOE D. SCOTT; BARBARA A. SCOTT;)
COUNTY TREASURER, Nowata County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Nowata County, Oklahoma,)
)
Defendants.)



FEB 11 1997

CIVIL ACTION NO. 94-C-1076-B

ORDER OF DISBURSAL

NOW on the 10th day of Feb., 1997, there came on for consideration the matter of disbursal of \$70,000.00 received by the United States Marshal for the sale of certain property described in the Notice of Sale in this case. The Court finds that the said \$70,000.00 should be disbursed as follows:

| | | |
|---|-----------|-------------|
| United States Marshal's Costs | | \$ 36.72 |
| Mileage | \$ 18.72 | |
| Executing Order of Sale | 3.00 | |
| Advertising Sale Fee | 6.00 | |
| Conducting Sale | 3.00 | |
| Appointing Appraisers | 6.00 | |
| County Treasurer, Nowata County, Oklahoma | \$ 351.56 | \$ 351.56 |
| United States Department of Justice | | \$69,611.72 |
| Publication fees (USAtty) | \$ 198.44 | |
| Appraisers' Fees (USAtty) | 225.00 | |
| Recording Lis Pendens (USAtty) | 8.00 | |
| Cost to pick up and store chattels (USAtty) | 752.00 | |
| Credit to Judgment of FSA, formerly FmHA | 68,428.28 | |

UNITED STATES DISTRICT JUDGE

25

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741

Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

Order of Disbursal
Civil Action No. 94-C-1076-B (Scott)

PB:cas

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

FILED

FEB 10 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)

v.)

CIVIL ACTION NO. 96-CV-934-B

THE SUM OF ONE THOUSAND)
FOUR HUNDRED FORTY AND)
NO/100 DOLLARS (\$1,440.00))
IN UNITED STATES CURRENCY;)

FEB 11 1997

1991 Plymouth Laser,)
VIN #4P3CS34T8ME085013;)

STIPULATION OF PARTIAL DISMISSAL:

1992 Nissan Maxima,)
VIN #JN1HJ01F3NT012803;)

1989 GMC 1-TON PICKUP,
VIN #2GTHC39N6K1529969

1970 Chevrolet Purple Camaro,)
VIN #12487L513987;)

1989 Buick Regal,)
VIN #2G4WB14W9K1436227;)

1985 Oldsmobile Cutlass,)
VIN #1G3AM1932FD397319;)

1976 GMC Red & White Pickup,)
VIN #TCL146S524232;)

1982 Oldsmobile Cutlass,)
VIN #1G3AX69Y7CM141401;)

1981 Ford Mustang,)
VIN #1FABP13B4BF202451;)

1986 Black Pontiac Firebird,)
VIN #1G2FW87H6GL202504;)

1994 Ford Thunderbird,)
VIN #1FALP6241RH220862;)

CLJ

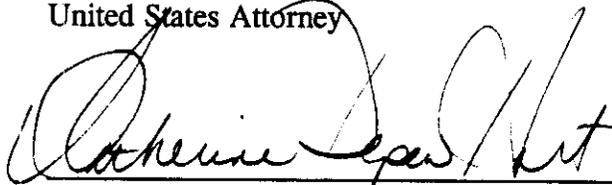
1995 Chevrolet Monte Carlo,)
 VIN #2G1WW12M1S9126450;)
)
 1989 GMC 1-Ton Pickup,)
 VIN #2GTHC39N6K1529969;)
)
 1980 Chevrolet Impala,)
 VIN #1L47JAC127726;)
)
 Defendants.)

STIPULATION OF PARTIAL DISMISSAL

COME NOW the Plaintiff, the United States of America, Arvella Hughes and Johnnie Lee Hughes, by and through Larry Roberson, Esquire, and American General Finance, Inc., by and through Roger A. Long, Esquire, and stipulate that the defendant vehicle 1989 GMC 1-Ton Pickup, VIN #2GTHC39N6K1529969, in this cause of action be dismissed from the above-captioned civil action, without prejudice and without costs, except the cost of storage by the United States Marshals Service since the vehicles were arrested by the United States Marshals Service to be paid by Claimant Arvella Hughes.

Respectfully submitted,

STEPHEN C. LEWIS
 United States Attorney



CATHERINE DEPEW HART OBA #3836
 Assistant United States Attorney
 3460 United States Courthouse
 333 West Fourth Street
 Tulsa, OK 74103
 (918) 581-7463

(96-CV-934-B: Stipulation of Partial Dismissal)



R. LAWRENCE ROBERSON, Esq. OBA #14076
For Claimant Arvella Hughes
Attorney for Johnnie Lee Hughes
3511 E. Admiral Place
Tulsa, OK 74115
(918) 838-1994

(96-CV-934-B: Stipulation of Partial Dismissal)



ROGER A. LONG, Esq.
For American General Finance, Inc.
BARBER & BARTZ
One Ten Occidental Place
110 West Seventh Street, Suite 200
Tulsa, Oklahoma 74119-1018
(918) 599-7755 and (918) 599-7756 FAX

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

FILED

FEB 10 1997

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

JAMES A. CHRISTOPHER,)
an individual,)
)
Plaintiff,)
)
vs.)
)
UNIT RIG, INC., a Delaware corporation;)
KENDAVIS INDUSTRIES INTERNATIONAL,)
INC., a Nevada corporation; GREAT WESTERN)
DRILLING COMPANY, a Texas corporation)
KENDAVIS HOLDING COMPANY, a Nevada)
corporation; and TEREX CORPORATION, a)
Delaware corporation,)
)
Defendants.)

No. 96-CV-905H ✓

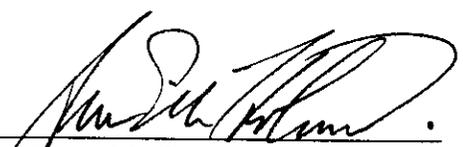
ENTERED ON DOCKET
DATE 2-11-97

**ORDER GRANTING TEREX CORPORATION'S
MOTION TO DISMISS DEFENDANT GREAT WESTERN WITHOUT PREJUDICE**

Before the Court for consideration is Terex Corporations' Motion to Dismiss Defendant Great Western Without Prejudice. For good cause shown,

IT IS HEREBY ORDERED that such motion is GRANTED.

Dated this 10th day of February, 1997.


The Honorable Sven Erik Holmes
United States District Court Judge.

ENTERED ON DOCKET
DATE 2-11-97

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

FILED

FEB 10 1997

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

WILLIAM F. McCracken,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 97-CV-56-H

ORDER

This matter comes before the Court on Defendant's Motion to Dismiss and/or Motion for Summary Judgment with Brief in Support (Docket #4).

Defendant's motion was filed on January 21, 1997. Under Local Rule 7.1(c), "[r]esponse briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested." Plaintiff's response was due February 5, 1997. No response has been filed, nor has Plaintiff sought an extension of time in which to respond. Therefore, the Court will deem the matter confessed.

Moreover, Defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction appears well-founded. Plaintiff has failed to exhaust his administrative remedies under the Federal Tort Claims Act ("FTCA"). See 28 U.S.C. §§ 1346(b), 2671-2680. The filing of an administrative claim is a jurisdictional prerequisite to the filing of an action against the United States under the FTCA. Thus, the Court lacks subject matter jurisdiction over this lawsuit.

Defendant's motion to dismiss for lack of subject matter jurisdiction (Docket #4) is hereby granted.

IT IS SO ORDERED.

This 10TH day of February, 1997.



Sven Erik Holmes
United States District Judge