

ENTERED ON DOCKET
8-20-97

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

MAX LEE RISHELL, curator of
the person and the estate of
KATHLEEN LACEY, an incapacitated
person,

Plaintiff,

and

MARRIOTT CORPORATION, as Plan
Fiduciary of the Marriott Corporation
Multi-Med Health Plan,

Intervening Plaintiff,

vs.

Case No. 94-C-636-H

JANE PHILLIPS EPISCOPAL
MEMORIAL MEDICAL CENTER, JANE
PHILLIPS EPISCOPAL HOSPITAL,
INC., f/k/a Jane G. Phillips Memorial
Hospital, Inc. d/b/a Oklahoma Medical
Collection Services, and
CHARLES WELLSHEAR, M.D.

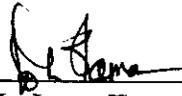
Defendants.

FILED
AUG 18 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL WITH PREJUDICE

Comes now the Plaintiff, Max Lee Rishell, Curator of the person and the estate of Kathleen Lacey, an incapacitated person and dismisses with prejudice only the Defendants, Jane Phillips Episcopal Memorial Medical Center, Jane Phillips Episcopal Hospital, Inc. f/k/a Jane G. Phillips Memorial Hospital, Inc d/b/a Oklahoma Medical Collection Services. The Plaintiff reserves his right to proceed further against the Defendant, Charles Wellshear, M.D.

Respectfully submitted,



Mr. Larry Tawwater
Ms. Jo L. Slama
McCaffrey & Tawwater
1100 Bank of Oklahoma Plaza
201 Robert S. Kerr
Oklahoma City, Oklahoma 73102

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing document was deposited in the mail this 18th day of August, 1997, with proper postage thereon, addressed to the following:

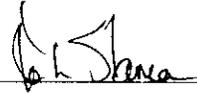
Stephen J. Rodolf, OBA #7702
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ATTORNEYS FOR
DR. CHARLES WELLSHEAR



ENTERED ON DOCKET
8-20-97

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

FILED
AUG 20 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

SAMUEL J. WILDER,)
)
Plaintiff,)
)
vs.)
)
THE OKLAHOMA DEPARTMENT OF)
HUMAN SERVICES,)
)
Defendant,)
)

Case No. 97-C-478-B ✓

ORDER

Before the Court is the motion to dismiss filed by Defendant Oklahoma Department of Human Services ("DHS") (Docket No. 5). Plaintiff Samuel J. Wilder ("Wilder") filed this action for declaratory and injunctive relief to order DHS to follow proper procedures in the processing of his application for food stamps and in providing a timely hearing on the denial of such. DHS moves to dismiss this action on two grounds: the Court lacks subject matter jurisdiction and Wilder has failed to exhaust his administrative remedies.

Although Wilder characterizes his claim as one under the Declaratory Judgment Act, 28 U.S.C. §2201, his claim is pursuant to 56 O.S. §168 which addresses the hearing and appeals process for the denial of benefits by DHS.¹ Section 168 states in pertinent part the following:

A. Any applicant or recipient adversely affected by a decision of the Department of Human Services on benefits or services provided pursuant to the provisions of this

¹ The Court has previously explained its lack of subject matter jurisdiction over a claim for denial of benefits by the DHS in two other cases filed by Wilder in this Court, Case Nos. 96-C-276-B and 96-C-277-B, which were consolidated. Wilder cannot escape the hearing and review procedures set forth in 56 O.S. §168 by seeking declaratory relief under 28 U.S.C. §2201.

title shall be afforded an opportunity for a hearing pursuant to the provisions of subsection B of this section after such applicant or recipient has been notified of the adverse decision of the Department.

B. 1. Upon timely receipt of a request for a hearing specified in the notice of adverse decision, the Department shall hold a hearing pursuant to the provisions of Section 310 of Title 75 of the Oklahoma Statutes.

* * * *

C. Any decision of the Department after such a hearing pursuant to subsection B of this section shall be subject to review by the Director of Human Services upon a timely request for review by the applicant or recipient. The Director shall issue a decision after review or may refer review of the hearing decision to the Commission for Human Services. The referral shall be based on criteria established by the Commission. A hearing decision of the Department shall be final and binding unless a review is requested pursuant to the provisions of this subsection. The Director's decision may be appealed to the district court in which the applicant or recipient resides within thirty (30) days of the date of the Director's decision . . .

Pursuant to §168, Wilder may seek a hearing before DHS regarding the denial of his application for food stamps, which hearing is subject to the Director of DHS' review. If the decision is adverse, Wilder may then appeal to the state district court.

Wilder has not yet had an administrative hearing on the denial of his application for food stamps. Therefore, he has failed to exhaust his administrative remedies. In addition, as §168 requires judicial review by the Tulsa County district court (the district court in which Wilder resides), the Court lacks subject matter jurisdiction over this action. Accordingly, the Court grants DHS' motion to dismiss (Docket No. 5).

Further, having reviewed Wilder's multiple requests to file pleadings and finding no merit therein, the Court denies the requests. (Docket Nos. 3, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19).

IT IS SO ORDERED this 10 day of August, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT COURT

502

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

WILLIAM R. McCONAHA,)
)
Plaintiff,)
)
v.)
)
AMERICAN AIRLINES, INC., a)
Delaware corporation; TRANSPORT)
WORKERS UNION OF AMERICA,)
AFL-CIO, LOCAL 514; and MARION)
FINLEY, in his official capacity as)
President of the Transport Workers)
Union of America, AFL-CIO, Local)
514,)
)
Defendants.)

ENTERED ON DOCKET
AUG 20 1997
DATE

Case No. 96-CV-932-BU ✓

FILED
AUG 16 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF PARTIAL DISMISSAL

COME NOW the parties to the above styled and numbered cause pursuant to Federal Rule of Civil Procedure 41 (a) (1), and stipulate to the dismissal of the above styled and numbered cause as against Defendants Transport Workers Union of America, AFL-CIO, Local 514, and Marion Finley, in his official capacity as President of the Transport Workers Union of America, AFL-CIO, Local 514, only, each party to bear its own costs and attorney's fees.

16

17

D.C. PHILLIPS & ASSOCIATES, P.C.

By: David C. Phillips, III
David C. Phillips, III., OBA#13551

Sherrin Watkins, OBA#10998
115 W. 3rd Street, Suite 525
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CONNOR & WINTERS

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FRASIER, FRASIER & HICKMAN

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Attorneys for Defendants Transport Workers
Union of America, AFL-CIO, Local 514; and Marion
Finley, in his official capacity as President of the
Transport Workers Union of America, AFL-CIO,
Local 514

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

FILED

AUG 13 1997

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

NANCY R. MACK,

Plaintiff,

v.

JOHN J. CALLAHAN, Acting
Commissioner of the Social Security
Administration,

Defendant.

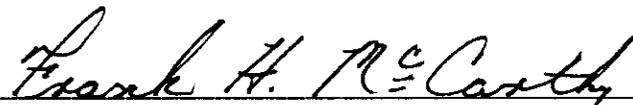
CASE NO. 96-cv-503-M ✓

ENTERED ON DOCKET

DATE AUG 20 1997

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 19th day of AUG., 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 19 1997

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

NANCY R. MACK,
SSN: 564-17-3902,

PLAINTIFF,

vs.

JOHN CALLAHAN, Acting
Commissioner of the Social
Security Administration,¹

DEFENDANT.

CASE No. 96-CV-503-M ✓

ENTERED ON DOCKET

DATE AUG 20 1997

ORDER

Plaintiff, Nancy R. Mack, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.² In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine

¹ President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security, effective March 1, 1997, to succeed Shirley S. Chater. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, John J. Callahan should be substituted, therefore, for Shirley S. Chater, as defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

² Plaintiff's March 14, 1994 application for disability benefits was denied May 11, 1994 and was affirmed on reconsideration. A hearing before an Administrative Law Judge (ALJ) was held March 16, 1995. By decision dated March 31, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on May 10, 1996. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991).

Plaintiff was born March 19, 1963 and has a high school education and some junior college credit. [R. 33]. She claims to be unable to work since January 8, 1993, as the result of fatigue, dizziness, lightheadedness, shortness of breath, nausea, nervousness, cold sweats, confusion, migraine headaches and vertigo. [Plf's Brief, p. 1, R. 31, 33]. The ALJ determined that Plaintiff is impaired by a cardiac impairment [sic] but that she retains the residual functional capacity (RFC) to perform a full range of sedentary work, that her RFC is not reduced by any nonexertional impairments and that she is able to perform her past relevant work (PRW) as an accounts receivable clerk or billing clerk. The case was thus decided at step four of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the Commissioner's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ failed to properly

consider the evidence and that he improperly evaluated Plaintiff's nonexertional subjective impairments which rendered his questioning of the vocational expert (VE) and his step four analysis incorrect.

Plaintiff complains that the ALJ did not properly discuss in his opinion the evidence he considered in reaching the conclusions he expressed on the PRT form.³ Plaintiff argues that the ALJ ignored evidence of her "mental impairment" and substituted his personal conclusion for the medical opinion of Dr. Passmore.

Tit. 20 C.F.R. § 416.920a requires the completion of the PRT form by the Secretary. The form must be appended to the decision of the ALJ, 20 C.F.R. § 416.920a(d)(2). There must be competent evidence in the record to support the conclusions recorded on the PRT form and the ALJ must discuss in his opinion the evidence he considered in reaching the conclusions expressed on the form. See *Washington v. Shalala*, 37 F.3d 1437 (10th Cir. 1994; *Woody v. Secretary of Health & Human Servs.*, 859 F.2d 1156 (3rd Cir. 1988).

Ronald C. Passmore, M.D. examined Plaintiff once, on April 20, 1994, and reported a history of panic attacks given to him by Plaintiff. [R. 241-243]. His impression was "Panic disorder" based upon that history and he labeled the condition

³ The procedure for evaluation of a mental impairment is outlined at 20 C.F.R. § 1520a. If a claimant has a mental impairment, the degree of functional loss resulting from the impairment must be rated in four areas: (1) activities of daily living, (2) social functioning, (3) concentration, persistence or pace; and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. § 1520a(b)(3). If each of the four areas is rated as having an impact of "none", "never", "slight", or "seldom", the conclusion is that the impairment is not severe, unless the evidence otherwise indicates there is significant limitation of the claimant's mental ability to do basic work activities. See 20 C.F.R. § 1520a(c)(1). An ALJ must attach to his decision a PRT form detailing his assessment of the claimant's level of mental impairment. 20 C.F.R. § 1520a(d).

“not treated” also based upon Plaintiff’s statements to him that the Xanax being prescribed for her by her treating physician did not relieve her “attacks.” [R. 242]. Dr. Passmore did not address Plaintiff’s ability or non-ability to work. There are no other reports from any other psychiatric physicians or psychologists in the record.

David Leifeste, M.S., LPC, documented Plaintiff’s depression and anxiety associated with her work, her heart condition and dealing with her husband and his family in 1992. [R. 208-209]. He noted Plaintiff’s improvement with medication and “relaxation” exercises and, in exploring her options, noted that she could “stay home”, “look for other work” or “do same thing.” [R. 207]. There is nothing in the records of Leifeste to suggest that he considered her unable to work.

Plaintiff was apparently prescribed medication for anxiety by Maureen A. Clothier, D.O., Plaintiff’s general practitioner, [R. 148-150], and Michael P. Carney, D.O., her cardiologist, [R. 190-192] in 1992, while she was still working. The medication prescribed for the treatment of anxiety underwent several adjustments from 1992 through 1994, with improvement of “depression” and reduction of “panic attacks” documented. [R. 135, 137, 138, 140, 143, 145, 198]. Plaintiff did not point to any evidence from her treating physicians for support for her contention that the PRT form filled out by the ALJ was contrary to the medical evidence. Nor is there any evidence in the record to support Plaintiff’s claim that she is unable to work due to a mental impairment.

In step four of the sequential evaluation process used to analyze disability claims, claimant bears the ultimate burden of proving a disability that prevents her

from engaging in any gainful work activity. *Henrie v. United States Department of Health & Human Services*, 13 F.3d 359, 360 (10th Cir. 1993); *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984).

The PRT filled out by the ALJ assessed anxiety related disorders and generalized anxiety with functional limitation and degree of limitation marked as slight, seldom and never. [R. 20-22]. In his discussion of the PRT findings, the ALJ stated that the evidence shows that the severity of Plaintiff's panic disorder has fluctuated over time, that most of the medical reports indicate that Plaintiff is able to function fully and that she can perform mental work-related activities without significant compromise. The ALJ determined that Plaintiff's anxiety was not severe enough, singly or in concert with her other impairments, to meet or equal the severity set forth in the regulations. In order to establish a disabling mental impairment, Plaintiff must provide evidence to establish marked or frequent functional limitations in at least two of the behavior signs set forth in 20 C.F.R. 404, Subpt. P, App. 1, 12.04. The ALJ determined that Plaintiff had not met this burden. Therefore, on the basis of the record, the ALJ's findings are adequate and supportable.

As to Plaintiff's cardiac problems, fatigue, dizziness, nausea and confusion are all symptoms documented in Plaintiff's medical record. However, the dizziness and nausea conditions were traced to side effects of some of the medications which were adjusted after the symptoms were exhibited. [R. 143-146, 195, 198, 220, 256]. Plaintiff was diagnosed with supraventricular tachycardia in 1992. [R. 190]. A radiographic evaluation of the chest conducted at the PHS Indian Hospital in

Claremore, Oklahoma on April 7, 1994, was unremarkable [R. 230], an EKG conducted on April 7, 1994 was normal [R. 228], and a Holter test correlated with sinus rhythm/bradycardia on April 14, 1994. [R. 227]. The last report in the record by Plaintiff's treating physician, Lewis Greenberg, M.D., on June 30, 1994 stated that this condition remained stable on medical management. [R. 194]. In February 1995, Plaintiff was hospitalized for complaints of light-headedness and bradycardia at which time, Steven Landgarten, M.D. indicated that her problems were in part related to her medication, "though in part may represent 'athletic heart', due to her strenuous exercise regimen." [R. 251].

The ALJ found that Plaintiff has a history of paroxysmal atrial tachycardia, that this condition is stable and that her residual functional capacity (RFC) is limited to sedentary work not further reduced by nonexertional impairment. [R. 17-18]. He determined that Plaintiff's past relevant work as an accounts receivable clerk or billing clerk is sedentary in nature and is, therefore, within the range of her ability. Plaintiff has not presented any evidence, other than her own testimony which the ALJ found not credible, to refute this finding. The ALJ stated:

After such due considerations, the primary reasons that I find claimant's allegations to not be fully credible are, but are not limited to, the objective findings, or the lack thereof, by treating and examining physicians, the lack of medication for severe pain, the frequency of treatments by physicians and the lack of discomfort shown by claimant that [sic] the hearing.

Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ's opinion

indicates that he considered all of the medical reports in the record in making his determination that Plaintiff retains the capacity to do sedentary work. The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 and appropriately applied the evidence to those guidelines. The record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled.

The Court finds that the ALJ evaluated the record and Plaintiff's credibility and allegations of nonexertional impairments in accordance with the correct legal standards established by the Secretary and the courts. The Court finds that the decision of the Commissioner to deny benefits is supported by substantial evidence. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

SO ORDERED this 19th day of AUG., 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

8-14-97

RECEIVED
AUG 14 1997
U.S. DISTRICT COURT
N.D. OKLAHOMA

ENTERED ON DOCKET
8-20-97

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

UNITED STATES OF AMERICA)
)
PLAINTIFF,)
)
v.)
)
BENJAMIN LEAT MCNEELY,)
TERRY BENDURE, RICHARD TROSPER)
D/B/A AND GREEN COUNTRY LOGGING,)
)
DEFENDANTS.)

CIV. NO. 97CV441 *K* (M)

FILED
AUG 18 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the Defendant Benjamin Leat McNeely, having consented to the making and entry of this Judgment without trial, hereby agrees as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.
2. The Defendant Benjamin Leat McNeely hereby acknowledges and accepts service of the Complaint filed herein.
3. The Defendant Benjamin Leat McNeely hereby agrees to the entry of Judgment in the principal sum of \$1,198.
4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which Defendant Benjamin Leat McNeely has provided it and the Defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation of the Defendant that he will and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for

the Defendant's payment of the Judgment, as follows:

(a) Beginning on or before the 15th day of August, 1997, the Defendant shall authorize the Miami Agency, Bureau of Indian Affairs, Individual Indian Monies ("I.I.M.") Section, to withdraw from Defendant's I.I.M. account the balance of his I.I.M. account on that day to be distributed to the other restricted Indian co-owners, and in a like manner on or before the 15th day of each following month deduct from his I.I.M. account until the entire amount of the Judgment is paid in full.

(b) Defendant Benjamin Leat McNeely agrees that he will not withdraw or receive any funds from his I.I.M. account until the Judgment is paid in full.

5. Default under the terms of this Agreed Judgment will entitle the United States to execute this Judgment without notice to the defendant.

6. The defendant has the right of prepayment of this debt without penalty.

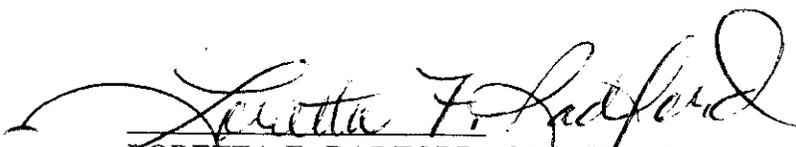
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against the Defendant Benjamin Leat McNeely in the amount of \$1,198.

Dated this 15 day of August, 1997.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney


LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney

U.S. Department of Justice
3460 Federal Courthouse
333 W. 4th St.
Tulsa, OK 74103
(918) 581-7463

Benjamin L. McNeely #238224

Benjamin Leat McNeely
DOC #238224

~~Howard McLeod Correctional Center~~ Davis Correctional Facility
~~HC 82, Box 812~~ Rt. 4, Box 40 (D-N)
~~Atoka, OK 745255-9152~~ Holdenville, OK 74848

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

BANCOKLAHOMA MORTGAGE CORP.,)
)
Plaintiff,)
)
v.)
)
)
JOSEPH A. IADEVITO, TERESA M. JANSON,)
PETER M. SHAW, CAPITAL TITLE COMPANY,)
INC., INVESTORS TITLE COMPANY, OLD)
REPUBLIC TITLE COMPANY of ST. LOUIS,)
U.S. TITLE GUARANTY COMPANY, INC.,)
AND U.S. TITLE GUARANTY COMPANY)
OF ST. CHARLES, INC.,)
)
Defendants.)

ENTERED ON DOCKET

DATE 8-19-97

Case No. 94-C-847-H ✓

FILED

AUG 15 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

This Court entered orders on October 10, 1996, February 21, 1997, and August 13, 1997, granting Defendants' Motions for Summary Judgment.

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

IT IS SO ORDERED.

This 14th day of August, 1997.



Sven Erik Holmes
United States District Judge

365

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

F I L E D

AUG 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LAUREN C. REED,
Plaintiff,

v.

TULSA PUBLIC SCHOOL
DISTRICT,
Defendant.

Case No. 96-CV-824 B

ENTERED ON DOCKET

DATE AUG 19 1997

JOINT STIPULATION OF DISMISSAL

The plaintiff, Lauren C. Reed, and the defendant, Tulsa Public School District, advise the court of a settlement agreement between the parties and pursuant to Rule 41(a)(1)(ii), Fed. R. Civ. P., jointly stipulate that the plaintiff's action against the defendant, Tulsa Public School District, be dismissed with prejudice, the parties to bear their respective costs, including all attorney's fees and expenses of this litigation.

Dated this 15th day of August, 1997.



Patterson Bond
406 S. Boulder Ave., Suite 420
Tulsa, OK 74103-3825
(918) 583-0303

Attorney for Plaintiff, Lauren C. Reed

10

15



Mark S. Rains, OBA #10935
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 700
Tulsa, Oklahoma 74103
(918) 585-9211

**Attorneys for Defendant, Independent
School District No. 1 of Tulsa County,
Oklahoma**

Sm
7-14-97

FILED

AUG 18 1997

PL

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff

v.

ROBERT S. FREY,

Defendant.

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)
)
)
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)

Civil Action No. 97CV 410E

ENTERED ON DOCKET
DATE AUG 19 1997

DEFAULT JUDGMENT

This matter comes on for consideration this 15th day of August, 1997, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Robert S. Frey, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Robert S. Frey, was served with Summons and Complaint on July 7, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

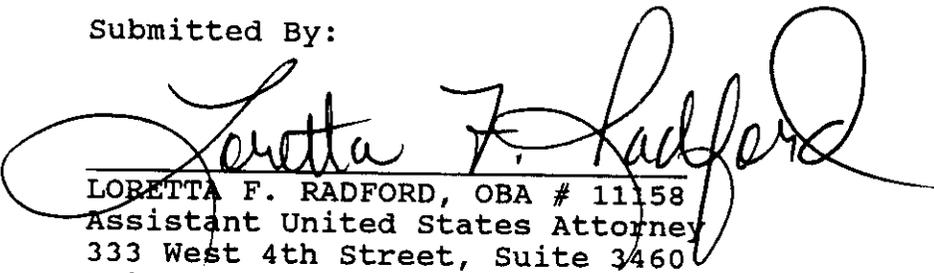
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Robert S. Frey, for the principal amount of \$2,696.03, plus accrued interest of \$2,013.57, plus administrative charges in the amount of \$4.77, plus interest thereafter at the rate of 8 percent per annum until judgment, a surcharge of 10% of the amount of the debt in

6

connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.58 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERRY E. WINCHESTER,)
)
Petitioner,)
)
vs.)
)
T. LOGAN BROWN, ex rel.)
OKLAHOMA BAR ASSOCIATION,)
et al.,)
)
Defendants.)

No. 97-CV-31-E

ENTERED ON DOCKET

DATE AUG 19 1997

ORDER

Now before the Court is Petitioner's Motion to Withdraw (Docket # 14), and his request that, upon dismissal, the Court return the \$17.64 paid toward the filing fee for this matter. The Court construes Petitioner's Motion to Withdraw as a Motion to Dismiss, and, finding good cause, grants same. Petitioner's request for return of amounts paid, made without any factual justification or legal support, is denied.

IT IS THEREFORE ORDERED that this action is dismissed.

DATED this 15TH day of August, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FRED E. WASHINGTON,)
)
 Petitioner,)
)
 vs.)
)
 DAMON CANTRELL, and CHAD GREER,)
)
 Respondent.)

Case No. 97-C-155-E(J) ✓

ENTERED ON DOCKET

AUG 19 1997

ORDER

A Report and Recommendation of the Magistrate was filed July 23, 1997. No objections have been filed by the parties. The Court has reviewed and hereby adopts the Magistrate's Report and Recommendation. Plaintiff's cause of action is **DISMISSED** without prejudice.

SO ORDERED THIS 15TH day of August 1997.


JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

JULIE BAILEY, an individual,)
)
Plaintiff,)
)
vs.)
)
MEDCARE FINANCIAL SOLUTIONS,)
a Texas corporation; THN)
ENTERPRISES, d/b/a BESTCARE)
MEDICAL, a Texas corporation,)
)
Defendants.)

Case No. 96-CV-989-C

FILED
AUG 18 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON CLERK
AUG 19 1997

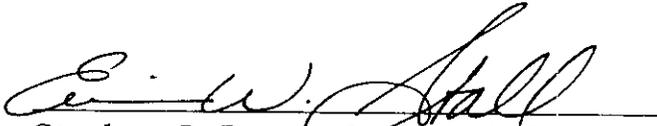
STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, Julie Bailey ("Bailey"), by and through her attorneys of record Stephen Q. Peters and Eric W. Stall of Harris, McMahan & Peters, P.C., and the Defendant, MedCare Financial Solutions, by and through its attorney of record, Kenneth E. Wagner of Feldman, Franden, Woodard, Farris & Taylor, and, pursuant to F.R.C.P. 41(a)(1), enter into this Stipulation of Dismissal dismissing this case without prejudice as to all parties which have appeared herein. It is hereby stipulated and agreed by and among the parties that the above captioned action, and all claims, be dismissed without prejudice as to all parties, with all parties to this Stipulation to bear their own costs and attorney fees. Defendant, MedCare Financial Solutions, specifically reserves its rights pursuant to F.R.C.P. 41(d).

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WHEREFORE, premises considered, the parties request that this matter be dismissed without prejudice, with all parties to this Stipulation bearing their own costs and attorney fees.



Stephen Q. Peters, OBA #11469
Eric W. Stall, OBA #13886
HARRIS, McMAHAN & PETERS, P.C.
1924 South Utica, Suite 700
Tulsa, Oklahoma 74104
(918) 743-6201
**ATTORNEYS FOR PLAINTIFF,
JULIE BAILEY**

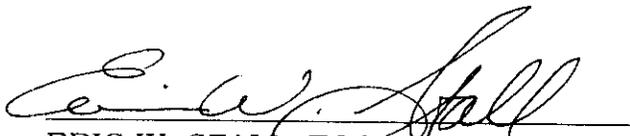


Kenneth E. Wagner
Feldman, Franden, Woodard, Farris
& Taylor
Suite 1400 Park Center
525 South Main
Tulsa, Oklahoma 74103-4409
**ATTORNEY FOR DEFENDANT,
MEDCARE FINANCIAL SOLUTIONS**

CERTIFICATE OF MAILING

I, Eric W. Stall, do hereby certify that on this 13th day of August, 1997, a true, correct and complete copy of the above and foregoing Stipulation of Dismissal Without Prejudice was deposited in the United States mail, postage prepaid thereon, to the following:

Kenneth E. Wagner
Feldman, Franden, Woodard, Farris
& Taylor
Suite 1400 Park Center
525 South Main
Tulsa, Oklahoma 74103-4409


ERIC W. STALL, ESQ.

DECLASSIFIED ON 03-03-2001
8-18-97

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

F I L E D

AUG 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ARTIE J. STANTON,)
)
Plaintiff - Petitioner,)
)
v.)
)
RON CHAMPION, Warden,)
Conner Correctional Center,)
Hominy, Oklahoma, and)
THE ATTORNEY GENERAL,)
State of Oklahoma,)
)
Defendants - Respondents.)

Case No. 96-C-8-K

ORDER AND REPORT AND RECOMMENDATION

Order

This order and report and recommendation pertains to Petitioner's Request for Extension and Partial Submission of Documents (Docket #17). Defendant has not responded. Petitioner requests a second extension of time of about fifteen days, within which to submit the documents referred to in the court's order of March 24, 1997, as extended by its order of May 30, 1997. Petitioner's counsel states that he did not receive a copy of the Attorney General's Supplemental Response to Petition for Writ of Habeas Corpus (Docket #16) and was not aware that it had been filed until June 25, 1997, even though he filed a formal appearance in this case on May 23, 1997, and conversed briefly with Mr. Holmes, the Assistant Attorney General handling this case, on that same date. Petitioner's counsel asks that he be allowed to file the Request for Extension and Partial Submission of Documents (Docket #17) one day late because the delay has been occasioned by his recent learning of the state's filing

of June 10, 1997. He states that he plans to visit the petitioner personally and will request a longer period within which to tender the briefing referred to in the court's March 24, 1997 order and to respond to the Attorney General's supplemental response. He submits certain of the items set out by the court on March 24, 1997.

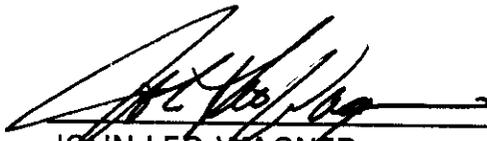
Petitioner's Request for Extension and Partial Submission of Documents (Docket #17) is granted. Counsel is given fifteen days from the date of this order to submit the documents referred to in the court's order of March 24, 1997 and to respond to the Attorney General's Supplemental Response to Petition for Writ of Habeas Corpus (Docket #16).

Stephen Kaiser, Warden at the Davis Correctional Facility, Holdenville, where petitioner is incarcerated, is substituted as respondent for Ron Champion, Warden at the Conner Correctional Center, Hominy.

Report and Recommendation

Petitioner's counsel has stated that he does not object to the Attorney General being dismissed as a party respondent from this case. The Attorney General should be dismissed.

Dated this 15th day of August, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:\orders\stant2.

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

BANCOKLAHOMA MORTGAGE CORP.,

Plaintiff,

v.

JOSEPH A. IADEVITO, TERESA M. JANSON,
PETER M. SHAW, CAPITAL TITLE COMPANY,
INC., INVESTORS TITLE COMPANY, OLD
REPUBLIC TITLE COMPANY of ST. LOUIS,
U.S. TITLE GUARANTY COMPANY, INC.,
AND U.S. TITLE GUARANTY COMPANY
OF ST. CHARLES, INC.,

Defendants.

ENTERED ON DOCKET

DATE 8-18-97

Case No. 94-C-847-H

FILED

AUG 15 1997

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

ORDER

This matter comes before the Court on Plaintiff's motion to dismiss, with prejudice, Defendants Joseph A. Iadevito and Teresa M. Janson (Docket # 355).

The Defendant title companies have stated that they do not object to Plaintiff's motion. Accordingly, pursuant to Fed. R. Civ. P. 41(a)(2), Defendants Joseph Iadevito and Teresa Janson are dismissed with prejudice.

In addition, the following pending motions are dismissed as moot, as a result of orders previously entered by this Court: Docket # 214, Docket # 220, Docket # 224, Docket # 236, Docket # 248, Docket # 271, Docket # 320, Docket # 323, Docket # 324, Docket # 325, Docket # 326, Docket # 342, Docket # 347, Docket # 349, Docket # 354, and Docket # 356.

IT IS SO ORDERED

This 14TH day of August, 1997.


Sven Erik Holmes
United States District Judge

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PRINTED ON DOCKET
8-18-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff

v.

ROBERT S. FREY,

Defendant.

)
)
)
)
) Civil Action No. 97CV 410E
)
)
)
)

FILED
AUG 15 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 8/14/97 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendant, **Robert S. Frey**, against 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 Procedure; now, therefore,

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

Dated at Tulsa, Oklahoma, this 15th day of August, 1997.

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

By A. Schweitzer
Deputy Court Clerk for Phil Lombardi

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

FILED

AUG 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PEGGY J. NEECE and BUEL H. NEECE,)

Plaintiffs,)

vs.)

No. 88-C-1320-E

INTERNAL REVENUE SERVICE OF THE UNITED STATES OF AMERICA,)
THE UNITED STATES OF AMERICA,)
and FIRST NATIONAL BANK OF TURLEY, N.A.,)

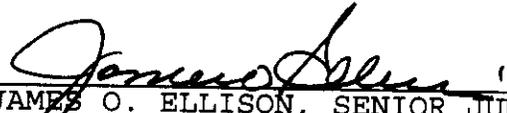
Defendants.)

ENTERED ON DOCKET
DATE AUG 18 1997

J U D G M E N T

In accord with the Order Fixing Attorney Fees as Damages filed this date, the Court hereby enters judgment in favor of the plaintiffs, Peggy J. Neece and Buel H. Neece and against the Internal Revenue Service of the United States of America and The First National Bank of Turley in the amount of \$105,026.68. The damage amount should be apportioned between the defendants, with the bank paying one-fourth of the amount (\$25,657.92) and the IRS paying three-fourths of the amount (\$76,973.76).

Dated, this 15th day of August, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

F I L E D

AUG 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PEGGY J. NEECE and
BUEL H. NEECE,

Plaintiffs,

vs.

INTERNAL REVENUE SERVICE OF
THE UNITED STATES OF AMERICA,
et al.,

Defendants.

No. 88-C-1320-E

ENTERED ON DOCKET

DATE AUG 18 1997

ORDER FIXING ATTORNEY FEES AS DAMAGES

This matter was presented to the Court pursuant to remand by the Tenth Circuit in Neece v. United States, 96 F.3d 460 (10th Cir. 1996). This trial court was directed to determine the amount of attorney's fees Plaintiffs reasonably incurred in litigating the jeopardy assessment abatement action together with the amount of attorney's fees for "services performed on appeal" in connection with the issue on which Plaintiffs were successful.

The Court, in arriving at a decision in this matter has considered all previous testimony, exhibits, briefs and arguments of counsel.

Plaintiffs claim the sum of \$76,272.80 as attorney fees in the Jeopardy Assessment proceedings as part of Plaintiffs' RFPAs damages together with the sum of \$28,753.88 in attorney's fees in connection with the successful portion of their Tenth Circuit appeal.

In addition, Plaintiffs urge the Court to reconsider the issue

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of enhancement; an enhancement of Plaintiffs' \$10,500.00 attorney fee to the sum of \$491,248.60 is requested.

The Court will consider the re-urged issue of enhancement first. Our circuit has given precise directions to trial courts in considering the issue of fee enhancement in Ramos v. Lamm, 713 F.2d 546 (1983). The court stated (in reference to "Exceptional Success cases"):

Thus, we believe that bonuses or multipliers of the normal fee because of the extraordinary skill of counsel should be rarely awarded, and should be confined to cases in which the bulk of the work was done by a single attorney who exhibits extraordinary skill or to cases in which the work was done well in a relatively short time given the complexity of the task.

The work performed in this case does not meet either of these standards - nor does it involve the "undesirability" of a civil rights case or the problems entailed by a contingency factor, the two remaining enhancement considerations enumerated in Ramos. Thus, the Court, upon reconsideration, must again find enhancement not appropriate under the history of this litigation.

With respect to the \$105,026.68 fee requested, Defendants urge that the amount should be reduced because of duplication or overlap. They charge that Plaintiffs' itemization contains charges not properly made to this case for time spent on tax matters not litigated here or upon issues on which Plaintiffs did not prevail. In connection with the appellate work Defendants argue that it was a one-lawyer task and time is billed for the services of two lawyers.

The Court accepts Defendants' contentions insofar as billings

attributable to the tax court case, the bankruptcy proceedings and those charges for which no documentation exists. The Court finds such charges total \$2,395.00, which sum shall be deducted from Plaintiffs' damages.

However, it was not unreasonable for two attorneys to be involved in the preparation of briefs, organization of argument and its presentation at the Circuit level. Plaintiffs were facing two competent, experienced adversaries at each step of the litigation. Plaintiffs' use of two lawyers was reasonable under these circumstances. The Court therefore finds that a fee in the amount of \$102,631.68 is appropriate.

The remaining issue is that of division of liability for the damages. The chain of events leading to the jeopardy assessment was initiated by the phone call from the Bank's president to the Internal Revenue Service, together with the unauthorized delivery of documents relating to the account of Mr. Neece.

The Tenth Circuit found that:

"The IRS decision to issue a jeopardy assessment was based in large part upon the information Benuzzi gained in violation of the RFPFA; therefore it was not 'independent of the original act'".

The erroneous action by the IRS which followed was the major source of Plaintiffs' damage. Its participation was greater than that of the Bank. A reasonable and fair allocation of responsibility would be Bank one-fourth, IRS three-fourths.

Therefore the Defendant bank will be liable to Plaintiffs in the sum of \$25,657.92 which represents one-fourth of the total of

Plaintiffs' attorney fees, damages and costs.

The Defendant Internal Revenue Service will be liable to Plaintiffs in the sum of \$76,973.76 which represents three-fourths of the total of Plaintiffs' attorney fees, damages and costs.

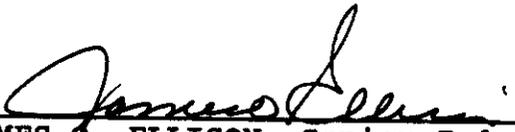
In summary, Plaintiff is entitled to judgment in the following amounts for the purposes indicated:

Attorney fee damages, jeopardy assessment abatement action	\$73,877.80
---	-------------

Attorney fees, successful portion Tenth Circuit appeal	\$28,753.88
---	-------------

Liability shall be apportioned one-fourth to the Bank and three-fourths to the Internal Revenue Service.

IT IS SO ORDERED this 15th day of August, 1997.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

F I L E D

AUG 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

CHARLES POLK,
Plaintiff,

vs.

ADMINISTRATOR OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION, and COUNTY
TREASURER OF ROGERS COUNTY and
KENNETH CLIFTON CORNS and ALICE
KATHLEEN CORNS,
Defendants,

and

KENNETH CLIFTON CORNS and ALICE
KATHLEEN CORNS,
Third Party Plaintiffs,

vs.

COMMONWEALTH MORTGAGE COMPANY
OF AMERICA, L.P.,
Third Party Defendant.

ENTERED ON DOCKET
DATE AUG 18 1997

Case No. 97-C-524-B(J)

ORDER

Before the Court is Defendant Department of Veterans Affairs' ("VA") motion to dismiss the cross claim of Third Party Plaintiffs, Kenneth Clifton Corns and Alice Kathleen Corns (hereinafter referred to as the "Corns") for lack of subject matter jurisdiction and failure to state a claim. (Docket No. 6).

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I. Background

On August 3, 1979, the Corns purchased the real property in Rogers County, Oklahoma which is the subject matter of this quiet title action. On that date, the Corns mortgaged this property, on a VA guaranteed loan, to First Continental Mortgage Company which was later assigned to Commonwealth Mortgage Company of America, L.P ("Commonwealth").

On March 18, 1988, Commonwealth filed a petition to foreclose the mortgage against the Corns in the District Court of Rogers County, Oklahoma. The Corns contend that service of summons in that case was void as it was served on their son, who was under the age of fifteen (15) at the time. Okla. Stat.tit.12, §2004(C)(1)(c)(1). The suit, however, proceeded to default judgment and a sheriff's sale was set for September 27, 1988.

On September 26, 1988, a day before the sheriff's sale, the Corns' house on the subject property was totally destroyed by fire. On October 27, 1988, the sheriff's sale was confirmed by the Rogers County court and a sheriff's deed was issued to the VA and recorded in the office of the Rogers County Clerk on November 23, 1988. The VA remained record owner of the subject property until July 28, 1996, when the VA quit claimed the deed to the Corns.

The Corns adjusted the insurance fire loss in November 1988. The Corns requested and received a pay-off statement from Commonwealth and on November 11, 1988, an insurance company draft made payable to the Corns and Commonwealth in the amount of the pay-off was indorsed and mailed to Commonwealth. Commonwealth, however, did not file a release of the mortgage until November 22, 1989, a year later.

On November 10, 1988, the Corns, who remained in possession of the property, received a building permit and began rebuilding their house from the insurance proceeds over and above the

amount of the note and mortgage and from insurance proceeds for personal property loss.

Apparently, Commonwealth paid the ad valorem taxes for 1988 from escrowed funds. Thereafter, all annual ad valorem tax notices were sent to the VA, as it held record title, and not to the Corns. The Corns did not pay taxes on the subject property for the tax year of 1989. On October 1, 1990, after notice was given to the VA by Rogers County Treasurer, the property was sold to Rogers County at the tax sale, as there were no other bidders. Taxes continued to go unpaid for the years 1990, 1991 and 1992. On April 5, 1993, the County Treasurer issued a notice of a tax resale of the property to the highest bidder to occur on July 14, 1993, and sent the notice to the VA and not the Corns. The notice listed the VA as the owner of the property. At the July 14, 1993 tax resale, Robec, Inc., a corporation wholly owned by Plaintiff Charles Polk, purchased the property, which was later conveyed to Charles Polk ("Polk").

Polk commenced this quiet title action in Rogers County District Court on October 31, 1995. On March 27, 1997, the Corns filed their answer, third party petition and cross claim against the VA in this action. On April 10, 1997, the VA filed a disclaimer. The VA removed the action on May 30, 1997.

II. Motion to Dismiss

In their cross claim against the VA, the Corns contend that the VA was "negligent in retaining legal title to the subject property after full payment of the VA guaranteed note and mortgage, by failure to forward notices of taxes due, of delinquent taxes due, of tax sales and tax resales, depriving the Corns of the opportunity to pay taxes, delinquent taxes and redeeming said property from tax sales." *Case Management Plan §I(C)*. The VA argues, *inter alia*, that it is entitled to sovereign immunity. The Court agrees.

The VA, as an agency of the United States, is immune from suit unless it consents to be sued. *United States v. Testan*, 424 U.S. 392, 399 (1975); *Ascot Dinner Theatre, Ltd. v. Small Business Administration*, 887 F.2d 1024, 1027 (10th Cir. 1989). The Corns contend that sovereign immunity does not bar their claim because (1) the “sue and be sued clause” in 38 U.S.C. §3720 provides the statutory basis for the VA’s consent to suit and waiver of immunity;¹ (2) the suit is against an individual officer, the Administrator of Veteran Affairs, and not a suit against the United States; and (3) the tort committed is of constitutional dimension. None of these arguments has merit.

First, because the Corns’ allegations sound in tort, their exclusive remedy against the VA is pursuant to the Federal Tort Claims Act (“FTCA”) and the FTCA expressly provides:

The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. §2679; *Ascot*, 887 F.2d at 1028. Further, the Corns are barred from pursuing their “exclusive” claim under the FTCA based on 28 U.S.C. §§2401(b) and 2675(a). The FTCA requires as a prerequisite to suit that the “claimant shall have first presented the claim to the appropriate Federal agency.” 28 U.S.C. §2675(a); *Moya v. United States*, 35 F.3d 501, 503 (10th Cir.1994).

In addition, section 2401(b) states:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was

¹The statute provides in pertinent part the following:

(a) Notwithstanding the provisions of any other law, with respect to matters arising by reason of this chapter, the Secretary [of Veteran Affairs] may -

(1) sue and be sued in the Secretary’s official capacity in any court of competent jurisdiction, State or Federal . . .

38 U.S.C. §3720(a)(1).

presented.

The Corns never presented a claim to the VA, let alone a timely one; thus, they have no remedy under the FTCA.

Second, the Corns' claim is not against a specific individual official at the VA for acting outside the scope of his/her authority; the claim is against the Administrator of Veteran Affairs, as representative of the VA. Thus, the suit is against the VA, an agency of the United States, and is barred by sovereign immunity.

Third, the Corns cannot avoid the defense of sovereign immunity by characterizing their tort as a violation of due process under the Fifth Amendment. The nature of the alleged wrongdoing by the Administrator of the VA is negligence. "[T]he Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property." *Daniels v. Williams*, 474 U.S. 332, 328 (1986). Thus, "despite the constitutional claim injected," the Corns' claim against the VA and its Administrator in his official capacity is barred by sovereign immunity. *Ascot*, 887 F.2d at 1031.

Further, this finding of immunity is not altered by the fact that the Corns' negligence claim against the VA is a cross claim in this case. This is not an action brought by the VA against the Corns. It is a quiet title action brought by Polk against the VA as record title holder of the property at the time the suit was filed. Once served, the VA disclaimed any interest in the subject property. The Corns' claim against the VA, therefore, does not involve any set-off or recoupment and does not arise from the same transaction or occurrence. See *United States v. U.S. Fidelity & Guarantee Co.*, 309 U.S. 506 (1940).

This suit was removed to federal court based on the Corns' cross claim against the VA.

Because the Court grants the VA's motion to dismiss for lack of subject matter jurisdiction (Docket No. 6), there is no basis for this Court's jurisdiction. Accordingly, the case is remanded to the District Court of Rogers County for further proceedings.

IT IS SO ORDERED this 14th day of August, 1997.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett".

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILE

AUG 14 1997

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

BRIAN WALLS, *et al.*,

Plaintiffs,

-vs-

THE AMERICAN TOBACCO COMPANY,
INC., *et al.*,

Defendants.

Civil Case No. 97-CV-218-H ✓

ENTERED ON DOCKET

DATE 8-15-97

NOTICE OF DISMISSAL WITHOUT PREJUDICE

COME NOW the plaintiffs in the above-entitled action, by and through counsel of record, and pursuant to Rule 42 of the Federal Rules of Civil Procedure notify the court and the parties that the causes of action of the plaintiffs against the following defendants herein are hereby dismissed without prejudice to refileing:

1. American Brands, Inc.
2. RJR Nabisco, Inc.
3. Batus, Inc
4. Batus Holdings, Inc.
5. B.A.T. Industries P.L.C. c/o Batus Holdings, Inc.
6. Batco, Ltd.
7. Lorillard, Inc.
8. Loews Corporation
9. Liggett Group, Inc.
10. Liggett & Myers, Inc.

**HUTTON
& HUTTON**

Mail: P.O. Box 638
Wichita, KS 67201-0638

8100 E. 22nd Street N.
Building 1200
Wichita, KS 67226-2312
Phone: (316) 688-1166
Fax: (316) 686-1077

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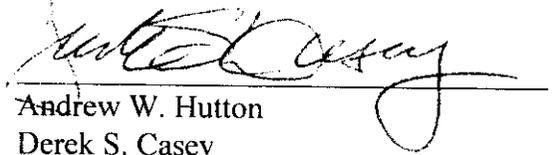
mail
clx

11. Brooke Group, Ltd.
12. Standard Tobacco Co.
13. Chebon Enterprises

This dismissal should in no way be construed as a dismissal of the causes of action of the plaintiffs against the other named defendants in this lawsuit.

Respectfully submitted,

HUTTON & HUTTON



Andrew W. Hutton
Derek S. Casey
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document was mailed, postage prepaid and properly addressed, on the ____ day of August, 1997, to:

Richard C. Ford
Leanne Burnett
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102

*Attorneys for Defendants The American Tobacco Company
American Brands, Inc., Brown & Williamson Tobacco Corporation,
Batus, Inc., and Batus Holdings, Inc.*

John C. Niemeyer
Linda G. Alexander
Anne E. Zachritz
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Oklahoma City, Oklahoma 73102-1800

Attorneys for Defendants R.J. Reynolds Tobacco Company and

HUTTON
& HUTTON

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Oklahoma City, Oklahoma 73102

*Attorneys for Defendants Philip Morris Incorporated
and Philip Morris Companies, Inc.*

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*Attorneys for Defendants Liggett & Myers Inc., The Brooke Group
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*Attorneys for Defendants Lorillard Tobacco Co., Lorrillard, Inc., Loews
Corporation and United States Tobacco Company and UST Inc.*

George S. Corbyn
Joe M. Hampton
CORBYN & HAMPTON
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Oklahoma City, Oklahoma 73102

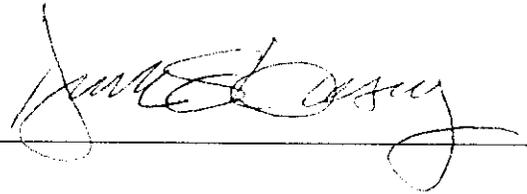
Attorneys for Defendant The Council for Tobacco Research — U.S.A., Inc.

Don R. Nicholson, II
Mark J. Pordos
Kent A. Nicholson
EAGLETON & NICHOLSON
201 Robert S. Kerr Avenue, Suite 310
Oklahoma City, Oklahoma 73102

Attorneys for Defendant The Tobacco Institute, Inc.

and the original to the Clerk of this Court.

By _____



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& HUTTON

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Wichita, KS 67201-0638

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Mark B. Hutton · †
Andrew W. Hutton

Derek S. Casey ·
Anne H. Pankratz
Christopher P. Christian
Chan P. Townsley ··
· Also Admitted in Oklahoma
·· Also Admitted in Missouri
† Certified Trial Advocate
National Board of Trial Advocacy

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Wichita, Kansas 67201-0638

General Office
(316) 688-1166
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Tax I.D.# 48-0966751

August 11, 1997

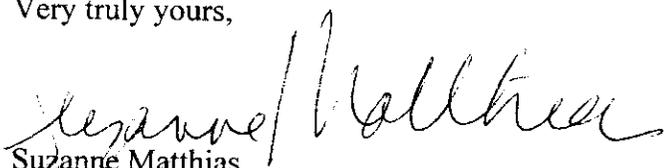
Clerk, U.S. District Court
Northern District of Oklahoma
441 U.S. Courthouse
333 W. 4th Street
Tulsa, OK 74103

Re: *Walls, et al. v. The American Tobacco Company, et al.*
Case No. 97-CV-218-H

Dear Clerk:

Please find enclosed for filing an original and one copy of plaintiffs' Notice of Dismissal Without Prejudice.

Very truly yours,


Suzanne Matthias
Legal Assistant to
Andrew W. Hutton

/sm

Enclosure

RECEIVED

AUG 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

8-15-97

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

F I L E D

AUG 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CAROLE RICHMOND,)
)
 Plaintiff,)
)
 vs.)
)
 BOARD OF REGENTS FOR THE,)
 UNIVERSITY OF OKLAHOMA,)
 THE UNIVERSITY OF OKLAHOMA)
 d/b/a UNIVERSITY OF OKLAHOMA)
 HEALTH SCIENCES CENTER,)
)
 Defendants.)

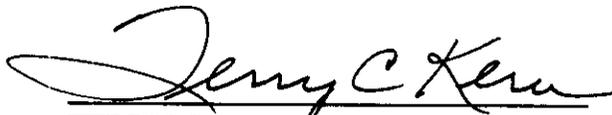
No. 96-C-340-K

JUDGMENT

This matter came before the Court for consideration of the Defendant's Motion for Summary Judgment pursuant to *Fed. R. Civ. P.* 56. The issues having been duly considered and a decision having been rendered in accordance with the Order filed on August 15, 1997, the Court finds summary judgment is appropriate in favor of Defendant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Board of Regents for the University of Oklahoma, and the University of Oklahoma d/b/a the University of Oklahoma Health Sciences Center and against Carole Richmond.

ORDERED this 15 day of August, 1997.


 TERRY C. KERN, CHIEF
 UNITED STATES DISTRICT JUDGE

29

8-15-97

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

FILED
AUG 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CAROLE RICHMOND,)
)
 Plaintiff,)
)
 vs.)
)
 BOARD OF REGENTS FOR THE,)
 UNIVERSITY OF OKLAHOMA,)
 THE UNIVERSITY OF OKLAHOMA)
 d/b/a UNIVERSITY OF OKLAHOMA)
 HEALTH SCIENCES CENTER,)
)
 Defendants.)

No. 96-C-340-K

ORDER

Before this Court is Defendant's Motion for Summary Judgment (docket # 17). Plaintiff has voluntarily dismissed all claims with the exception of her claim for retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(e),¹ thus the Court's Order will address only that claim.

Statement of Facts

Plaintiff was employed by the Defendant as a licensed clinical social worker at the Women's Clinic of the University of Oklahoma College of Medicine at Tulsa beginning September 8, 1987. On or about November 1, 1993, the Plaintiff presented a petition to Dean Harold Brooks requesting replacement of a door lock. *Defendant's Exhibit 2*. Plaintiff was placed on administrative leave on November 16, 1993, pending an investigation of the petition, and was subsequently terminated on the grounds that she (1) failed to follow appropriate lines of reporting, (2) falsely represented facts regarding the issues, (3) misrepresented the Clinic staff's support and (4) undermined the ability of

¹ The Court notes that the Plaintiff is also seeking compensatory damages under the Civil Rights Act of 1991, 42 U.S.C. 1981A.

the clinic administration to address operational issues in the clinic in an appropriate manner. *Defendant's Ex. 13*. Prior to November 16, 1993, Plaintiff informed Defendant of her intent to file a complaint with the university's affirmative action office. *Plaintiff's Ex. A*, ¶ 7. Plaintiff claims that she did, in fact, file a complaint with the Health Sciences affirmative action office alleging that her discharge was based in part on gender discrimination. *Id.* at ¶ 8.

The Plaintiff filed a grievance regarding her termination on December 1, 1993 seeking reinstatement, payment of lost benefits, clearing of her personnel record and reputation, a transfer to a comparable position, and the costs associated with pursuing her grievance. *Defendant's Ex. 14*. Pending resolution of her grievance, Plaintiff's employment status was changed from "terminated" to "administrative leave without pay". *Defendant's Ex. 15*, ¶ 4. Plaintiff asserts that subsequent to filing her grievance, she sought the assistance of Connie Gould in addressing Plaintiff's perception that the university was violating its own policies, especially referring to the unfavorable treatment of women as compared to men. *Plaintiff's Ex. A* ¶¶ 9, 10.

In January, 1994, before the grievance procedure was completed, the Plaintiff filed a complaint with the Oklahoma Human Rights Commission ("OHRC") asserting that her termination was the result of gender discrimination. *Defendant's Ex. 16*. The Defendant was notified of this complaint on January 28, 1994. *Plaintiff's Ex. A, Attachment 4*.

On April 1, 1994, Harold L. Brooks, Dean of the College of Medicine, submitted a proposed reduction in force ("RIF") to Jay Stein, Senior Vice President and Provost. *Defendant's Ex. 17*. This proposed RIF eliminated social worker positions at the women's clinic, and was approved by Jay Stein on April 15. *Defendant's Ex. 18*.

On April 4, the grievance committee submitted its recommendation to the Provost, Jay Stein,

wherein it determined that the Plaintiff's termination was unjustified, and that she should be reinstated with backpay and lost benefits. *Plaintiff's Ex. A, Attachment 3*. The committee also recommended that the university make "every effort to assist [Plaintiff] in relocating within the University." *Id.*

On April 14, 1994, Plaintiff, as well as seven other employees, received a notice that, effective May 16, 1994, their positions were to be eliminated pursuant to the RIF. *Defendant's Ex. 19-26*.

The grievance procedure was completed on or about April 27, 1994. The grievance committee's recommendation that Plaintiff's termination was unjustified was upheld, and the Senior Vice President and Provost of the Health Sciences Center, Jay Stein, ordered, among other things, that the Plaintiff should be reinstated, that every effort be made to relocate Plaintiff within the university system, and that the Plaintiff should be provided back pay and lost benefits. *Plaintiff's Ex. A, Attachment 7*. As a result of this letter, the Plaintiff's employment status was changed from administrative leave without pay to administrative leave with pay, retroactive to November 18, 1993; however, pursuant to the RIF, Plaintiff's position was terminated on May 16, 1994.

Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992). Additionally, although the non-

moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *Thomas v. Internat'l Business Machines*, 48 F.3d 478, 485 (10th Cir. 1995).

Discussion

To establish a prima facie case of retaliation under Title VII, the Plaintiff must show that: (1) she engaged in protected activity; (2) the Defendant took adverse action contemporaneously or subsequent to the employee's protected activity; and (3) a causal connection exists between the Defendant's adverse actions and the Plaintiff's protected activity. *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1176 (10th Cir. 1996). Once the Plaintiff establishes a prima facie case, the burden of production shifts to the Defendant to articulate a legitimate, nondiscriminatory reason for the adverse action. *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996). If the Defendant presents evidence of a legitimate business reason, the Plaintiff must then be allowed to demonstrate that the defendant's offered reasons are a mere pretext for discrimination. *Id.*

In this case, it is clear that the Plaintiff engaged in protected activity on at least two occasions. First, the Plaintiff brought a complaint to the Defendant's affirmative action office in November, 1993 regarding perceived gender discrimination at the university; and second, the Plaintiff filed a formal complaint with the OHRC sometime in January, 1994. *McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1486 (10th Cir. 1996) (complaining to employer about statutory rights or filing formal complaints are "hallmark[s] of protected activity").

It is equally apparent that the Defendant took adverse actions contemporaneously or subsequent to the Plaintiff's protected activity. Defendant seeks to limit this adverse action to Plaintiff's termination; however, the record supports that Defendant's agents also declined to give

effect to a direct order from the Provost. *Defendant's Ex. 15*, ¶ 10. Rather, the Defendant made a unilateral determination that the Provost's order directing that the Plaintiff be given all possible assistance in relocating, issued on April 27, 1994, was inapplicable beyond May 16, 1994 in light of the Provost's earlier reduction in force order. *Defendant's Reply, Ex. 2*.

Additionally, the Plaintiff cites two other adverse actions: (1) Defendant's decision in May, 1994 to treat Plaintiff as an ex-employee rather than give her short-term disability support; and (2) Defendant's denying Plaintiff the opportunity to file a grievance protesting her lay-off. Thus the Court finds four possible adverse actions: (1) Plaintiff's termination on May 16, 1994; (2) Defendant's refusal to enforce the Provost's order regarding assisting the Plaintiff in relocating within the university subsequent to April 27, 1994; (3) Defendant's denial of short-term disability benefits; and (4) Defendant's failure to allow the Plaintiff to file a grievance regarding the lay-off decision.

Defendant seeks summary judgment on the ground that the Plaintiff has failed to establish a causal connection between Plaintiff's complaints of gender discrimination, and Plaintiff's termination. While evidence showing that an employer's adverse employment action was caused by an employee's protected opposition to discrimination in the workplace is generally circumstantial in nature, *Daniel v. Loveridge*, 32 F.3d 1472, 1476 (10th Cir. 1994), a causal connection is established when a Plaintiff presents sufficient evidence to allow a jury to infer that her protected activity was the likely reason for the adverse action. *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1507 (10th Cir. 1996). Causal connection may be shown if protected activity was "closely followed" by adverse action, *Chavez v. City of Arvada*, 88 F.3d 861, 866 (10th Cir. 1996); however, the mere filing of a complaint prior to an adverse action is insufficient to establish a causal connection. *Meredith v. Beech Aircraft Co.*, 18 F.3d 890, 897 (10th Cir. 1994).

There is no firmly established period of time which constitutes an inference of causal connection. Case law indicates that the passage of a mere few days or weeks is sufficient as a matter of law, *see e.g., McClendon v. Indiana Sugars, Inc.*, 108 F.3d 789 (7th Cir. 1997) (2-3 days); whereas the passage of a year or more has been held insufficient as a matter of law. *See e.g., Burrus v. United Telephone Co. of Kansas, Inc.*, 683 F.2d 339 (10th Cir. 1982) (three years). However, while a passage of months between events does not by itself foreclose a claim of retaliation, it weakens the inference of retaliation that arises when a retaliatory act occurs shortly after a complaint. *McClendon*, 108 F.3d at 796. *See also, Smith v. St. Louis University*, 109 F.3d 1261, 1266 (8th Cir. 1997) (holding that a six-month period of time between protected activity and adverse action does not preclude a finding of causal connection where there is evidence that the adverse actions were not warranted).

In this case, the adverse actions all took place from April, 1994 forward, six months after the initial complaint and four months after the formal OHRC filing. This span of time, *standing alone*, indicates insufficient causal connection to support a prima facie case. *See, Richmond v. ONEOK, Inc.*, --- F.3d ----, 1997 WL 411505, *3 (10th Cir.(Okla.) (affirming district court holding that a three month period between protected activity and adverse actions standing alone was insufficient as a matter of law to establish a causal connection in an FLSA retaliation claim); *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1089 (8th Cir. 1992) (finding passage of six months insufficient to establish causal connection in ERISA retaliation claim where other evidence seemed to justify termination decision); *Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986) (holding that the mere fact that an employee was discharged four months after filing a discrimination claim is insufficient to support an inference of retaliation). Thus, the Court must determine if there is other

evidence of causal connection to support Plaintiff's claims aside from the timing of adverse actions.

A review of the record indicates that the Plaintiff has no supplemental evidence of a causal connection with regard to the Defendant's decision to eliminate the Plaintiff's position in the RIF. The Defendant claims that the RIF was instituted due to budget deficits, that the college determined that its social work needs were limited, and that services could be contracted out on an "as needed" basis. *Defendant's Ex. 17*. Defendant further asserts that both social worker positions were eliminated, not just the Plaintiff's, and that the positions have remained unfilled. *Defendant's Ex. 15 ¶ 13*. Plaintiff has done nothing to rebut this evidence. As for the grievance issue, the Defendant submits that the Plaintiff was advised in her notice of lay-off letter that she had ten days to file a grievance. Plaintiff failed to file a grievance within those ten days, and thus the Defendant claims it was not obligated to allow her to file a later grievance. Plaintiff has failed to establish that this was not the Defendant's policy, or that she was treated any differently than any other employee in the application of this policy. Thus, the Court concludes as a matter of law that the Plaintiff has failed to establish a prima facie case of retaliation based upon her termination, or the Defendant's failure to allow the Plaintiff to grieve her lay-off.

The Court reaches the same result with regard to the Defendant's denial of short-term disability benefits for the six-month period following the Plaintiff's termination. The Defendant contends that the Plaintiff never informed the college that she was seeking such benefits, and that, as a former rather than current employee, the Plaintiff was not entitled to such benefits. *Defendant's Ex. 15 ¶ 12, Ex. 40 ¶ 3.11*. The Plaintiff fails to provide any evidence that she requested such benefits, and in fact admits that she did not know how to apply for them. *Plaintiff's Ex. A ¶ 33*.

The remaining adverse action is the Defendant's determination that the Provost's order

requiring the university to reinstate the Plaintiff, and to “make every effort to assist [Plaintiff] with relocating within the University” was effective only until May 16, 1994.² The Defendant claims that it did not assist the Plaintiff in finding another job within the university system after May 16 because (1) it believed that it was only obliged to contact the Plaintiff if another social work position within the Tulsa campus came available; (2) the Plaintiff did not inform Connie Gould that she was interested in obtaining other employment within the OU system; (3) the Plaintiff did not apply for any other positions within the university system; and (4) the Defendant determined that it was no longer bound by the Provost's April 27, 1994 order to assist in Plaintiff's relocation. *Plaintiff's Ex. H at 33, 35, 49-54; Defendant's Reply Ex. 2 ¶ 4*. Plaintiff asserts that the Defendant did not seek to relocate her in retaliation for filing discrimination complaints, and asserts as evidence the fact that Connie Gould, in a letter dated July 11, 1994, recognized her obligation to offer Plaintiff assistance with any potential positions within the University of Oklahoma. *Plaintiff's Ex. A, Attachment 10*. Additionally, Plaintiff submits an advertisement which appeared in the Tulsa World newspaper on April 30, 1995. *Plaintiff's Ex. F*. This advertisement indicated that there was a social worker opening at the Health Services College in Oklahoma City. *Id.* Plaintiff also contends that there were a number of non-social worker positions open within the university throughout the year after the Plaintiff was laid off; however, Connie Gould never considered Plaintiff for anything other than a social worker position at the Tulsa campus. *Plaintiff's Ex. H*.

In its reply brief, the Defendant argues that Plaintiff's “failure to rehire” claim cannot be

² Clearly the reinstatement order was superceded by the RIF order as the Plaintiff could not be reinstated into a position that no longer existed, thus the Court will focus solely on the issue of whether the Defendant failed to offer Plaintiff assistance in relocating in retaliation for filing a discrimination complaint.

pursued because Plaintiff alleged in her EEOC complaint only that she had been discriminatorily discharged. Thus, Defendant contends that the Plaintiff failed to exhaust her administrative remedies. Plaintiff urges the Court to strike those portions of the Defendant's Reply which address exhaustion; however, because in the Tenth Circuit exhaustion is a jurisdictional matter, the Court must address this argument. *Jones v. Runyon*, 91 F.3d 1398, 1399-1401 (10th Cir.1996), *cert. denied*, --- U.S. ---, 117 S.Ct. 1243, 137 L.Ed.2d 326 (1996). The only EEOC documentation provided to the Court is the OHRC Complaint filed on or about January 1994. *Defendant's Ex. 16*. In that complaint, the Plaintiff alleges that she was terminated on November 18, 1993, and that her discharge was because of her gender. *Id.* The Court finds that the acts of which the Plaintiff now complains are reasonably related to the January, 1994 EEOC complaint. *See, Ingels v. Thiokol Corp.*, 42 F.3d 616, 625 (10th Cir. 1994) ("an act committed by an employer in retaliation for the filing of an EEOC complaint is reasonably related to that complaint, obviating the need for a second EEOC complaint.") *quoting Oubichon v. North American Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973).

The Defendant alternatively argues that the Plaintiff has failed to present a prima facie case for failure to rehire; however, the Defendant's analysis is incorrect. Plaintiff does not have to prove a failure to rehire case - she must only prove a retaliation case. The Court infers from the Defendant's argument that it is asserting that the Plaintiff has failed to establish that the Defendant's failure to assist her in relocating constituted an adverse action; however, the Court already determined as a matter of law that such failure could indeed constitute an adverse action. Thus, the remaining issues are whether there is sufficient causal connection between the Defendant's failure and the Plaintiff's protected activity, and whether the Defendant's explanations for its actions are pretextual.

The Court determines that the timing of Defendant's adverse actions, coupled with Connie

Gould's acknowledgment of her continuing obligation under the grievance order, and her failure to contact the Plaintiff about university jobs available in Tulsa outside of a social work position, or a social work position available on the Norman campus, provides insufficient evidence to support a causal connection between Plaintiff's complaints and Defendant's failure to assist her in relocating within the University. Although Ms. Gould testified that she thought she was obliged only to follow the RIF procedures, which seems to contradict her letter of July 11, it is beyond question that, according to Dean Brooks' interpretation of the Provost's orders, Gould had no obligation beyond the RIF procedures. Plaintiff has failed to present any evidence that she was treated any differently than any of the other employees who lost their positions under the RIF. Thus, Plaintiff has failed to establish a prima facie case of retaliation.

Even if the Plaintiff had established a prima facie case of retaliation, she has failed to rebut the Defendant's legitimate, non-discriminatory reason for failing to assist her in relocation, namely Harold Brooks' interpretation of the interaction between the Provost's April 27, 1994 memo and the RIF order, which is that the April 27, 1994 order was effective only until May 16, 1994, the point at which the Plaintiff's position would be terminated pursuant to the RIF. Beyond that, the Defendant contends that it was obliged only to follow the RIF procedures, which it interpreted to require only that the Defendant inform the Plaintiff if a social worker or comparable position became available at the Tulsa campus. *Defendant's Ex. 15 ¶ 10*. Defendant asserts that, even if the Defendant had an obligation to take a more proactive role, its failure to do so was merely a mistaken interpretation of the Defendant's responsibility rather than a pretext for discrimination.

Plaintiff contends that “[o]ther than retaliation against Plaintiff for standing up for her rights under the law, there is simply no plausible explanation for Defendant's acts described above.”

Defendant maintains that it did not assist Plaintiff in finding another position because it did not interpret the RIF and the subsequent reinstatement order as imposing a continuing duty to assist the Plaintiff. The Plaintiff has propounded no evidence in support of her allegations of retaliatory motive other than the fact that Harold Brooks received her OHRC complaint; Harold Brooks, four months later, made the determination that the Provost's April 27, 1994 order applied only through May 16, 1994; and that this resulted in the Plaintiff's loss of a position with the University of Oklahoma. Although the Plaintiff contends that Harold Brooks' interpretation was erroneous, and that Connie Gould's July 11 letter suggests that the grievance order was still in effect after May 16, the Plaintiff fails to provide any evidence that Brooks' interpretation was based upon retaliatory motive. Connie Gould's interpretation is irrelevant as she was not the individual at the university responsible for interpreting the orders of the Provost. The simple fact that Plaintiff's interpretation of Gould's responsibilities, indeed, even Gould's potentially erroneous interpretation, differs from that of Harold Brooks, is insufficient evidence to establish a genuine issue of material fact as to whether the Defendant acted with retaliatory intent.

Conclusion

For the foregoing reasons, Defendant's Motion for Summary Judgment (docket # 17) is hereby GRANTED. Plaintiff's Motion to Strike Defendant's Reply (docket # 26) is DENIED.

IT IS SO ORDERED THIS 15 DAY OF AUGUST, 1997.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

8-15-97

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

FILED

AUG 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GERALD VANOVEN,)
)
 Plaintiff,)
)
 vs.)
)
 NORTHLAND INSURANCE)
 COMPANY, a foreign Corporation.)
)
 Defendant.)

Case No. CV-97-128K

DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, Gerald Vanoven, by and through his Attorney of Record, Douglas Kirkley of Boettcher, Ryan & Martin, and hereby dismisses his claim against the Defendant, Northland Insurance Company, without prejudice to the bringing of any further action.

Respectfully Submitted,



Douglas A. Kirkley OBA# 14646
BOETTCHER, RYAN & MARTIN
Attorneys for Plaintiff
4200 E. Skelly Dr., Suite 352
Tulsa, OK 74135
(918) 493-2700

af

8-15-97

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

PRUDENCE BALMAIN,)
)
Plaintiffs,)
)
vs.)
)
THERAPEUTIC SERVICES, INC.,)
A Corporation, dba SILOAM)
SPRINGS SPORTS & PHYSICAL)
THERAPY,)
)
Defendant.)

No. 96-CV-970-K

F I L E D

AUG 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before this Court is the Defendant's Motion to Dismiss (docket # 2). Defendant contends that Plaintiff's first count, alleging discrimination based upon Plaintiff's gender and pregnancy, fails to allege that Plaintiff properly exhausted her administrative remedies by filing a timely complaint with the Equal Employment Opportunity Commission within 180 days of her termination. Additionally, Defendant urges that Plaintiff's second count should be dismissed because it is grounded purely on diversity jurisdiction, and fails to meet the amount in controversy (\$50,000 at the time of filing). Plaintiff has failed to file a response, and thus the Defendant's motion is deemed confessed pursuant to N.D. LR 7.1(C). Additionally, Plaintiff's Title VII claim is facially invalid, and must be dismissed for failure to exhaust administrative remedies.

Since Plaintiff's remaining claim is a claim for breach of employment contract, the claim is based upon diversity jurisdiction, and must meet the amount in controversy to be maintained in federal court. Plaintiff's second count asserts that she had a contract of employment with the Defendant, and that the Defendant breached that contract when it terminated her. Plaintiff further alleged that the Defendant's breach caused her to lose pregnancy insurance benefits in the amount

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

AUG 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VICKIE WROTEN,)
)
 Plaintiff,)
)
 vs.)
)
 FIRST DATA RESOURCES, INC.,)
 a Delaware Corporation,)
)
 Defendant.)

No. 96-C-938-C ✓

ENTERED ON DOCKET
AUG 15 1997
DATE _____

JUDGMENT

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

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for defendant, First Data Resources, Inc., and against plaintiff, Vickie Wroten, on plaintiff's claim of intentional infliction of emotional distress.

IT IS SO ORDERED this 14th day of August, 1997.


H. Dale Cook
U.S. District Judge

20

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

AUG 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VICKIE WROTEN,)
)
 Plaintiff,)
)
 vs.)
)
 FIRST DATA RESOURCES, INC.,)
 a Delaware Corporation,)
)
 Defendant.)

No. 96-C-938-C ✓

ENTERED ON DOCKET

DATE AUG 15 1997

ORDER

Currently pending before the Court is the motion filed by defendant, First Data Resources, Inc. ("First Data"), seeking to dismiss for lack of subject matter jurisdiction and for failure to state a claim, pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure.

On September 24, 1996, plaintiff, Vickie Wroten, filed her Petition against First Data in the District Court of Tulsa County, alleging the negligent, reckless and intentional infliction of emotional distress. On October 11, 1996, First Data filed Notice of Removal based upon diversity of citizenship. On October 21, the present case was remanded to state court on the grounds that neither plaintiff's Petition nor defendant's Notice of Removal stated with any degree of certainty the amount in controversy required in order to invoke diversity jurisdiction. On October 25, the Court granted First Data's motion for reconsideration upon First Data's submission of documents establishing diversity jurisdiction, and the present case was reopened.

First Data filed its present motion on June 23, 1997, and seeks dismissal on the following grounds: 1) Wroten's alleged injuries fall within the exclusive jurisdiction of the Oklahoma industrial court, thereby depriving this Court of subject matter jurisdiction, and 2) Wroten failed to state a claim

for intentional infliction of emotional distress. Wroten counters that her alleged injuries do not fall within the exclusive jurisdiction of the Oklahoma industrial court, since such injuries resulted from an intentional tortious act, and that she has submitted sufficient evidence to avoid dismissal. On August 4, 1997, pursuant to Rule 12(b), the Court converted the motion to dismiss to a motion for summary judgment, and provided the parties with a reasonable opportunity to supplement their materials.

The present action arises solely from an alleged verbal assault upon Wroten during a single company meeting. It is undisputed that on the morning of January 20, 1995, Wroten, along with twenty or thirty fellow employees of First Data, attended a company meeting conducted by Michael Massey, an executive vice president who was sent from First Data's home office in December of 1994 to reorganize the Tulsa operation. Massey opened the meeting to general discussion regarding employee concerns and morale. Some of the employees attending the meeting voiced concerns about pay cuts, the loss of jobs, job insecurity, and the possibility that some Tulsa operations may be eliminated or moved. Massey continued to prompt further questions and input from the employees and encouraged an open forum. Some attendees asked Massey what was going to happen to them and their jobs.

Wroten stated in her deposition that, in response to these concerns, Massey did not say much; rather, he seemed to "slough off" their concerns. Wroten further stated that in her twenty-two years of experience, she had never met a manager that talked down to people like Massey does. Wroten stated that although Massey encouraged an open forum, he refused to discuss specific concerns raised by some employees. Wroten thought Massey's responses were rude but not outrageous.

After witnessing the manner in which Massey had treated the others at the meeting, Wroten

became afraid to present her concerns. Wroten therefore waited until the end of the meeting to speak. Wroten acted as a lead in First Data's embossing department, and the employees whom Wroten represented had asked Wroten to ask Massey if they were going to have a job as a result of reorganization or whether the Tulsa operations would be moving to Omaha. Wroten felt compelled to voice her department's concerns because she feared that if she did not do so, people would discover that she failed in her task as a representative. Thus, Wroten asked Massey if he knew anything about the relocation of the embossing room, and whether a date had been set to relocate. Massey responded that he did not know. Massey further replied that "you might have a job, you might not. You might be replaced." Wroten then asked whether another job would be offered within the company, or whether severance packages would be offered. To this, Wroten stated that Massey "went bonkers." Massey asked Wroten what she was doing, and asked whether she was trying to make the company not work. Massey asked if Wroten was trying to sabotage the company. Massey further exclaimed that everybody else in the meeting is trying to make the company work, but Wroten is trying to tear it apart. Massey threatened Wroten and those she represented with termination. Massey concluded by telling Wroten to "chill out" and then advising her that this is not a big deal, but don't ever try to come up against the company. Wroten proceeded to get up and leave the meeting.

Subsequent to the meeting, Massey's secretary approached Wroten and advised Wroten that Massey would like to speak to her. Massey allegedly did not know that Wroten was at the top of her rating in the company. Wroten proceeded to meet with Massey in private. Massey asked Wroten if she had a husband and whether she told him what transpired at the meeting. Wroten advised Massey that she told her husband that she quit because she could not go through such treatment,

especially since she was doing everything she could to hold the operations together. However, Massey did not terminate Wroten. Following January 20, 1995, Wroten had no further meetings with Massey.

Following the January 20 meeting, Wroten became ill, and she advised her supervisor that she was quitting effective February 3, 1995 because she could not handle the job. Although Wroten missed a few days of work, she did not quit First Data. When she returned to work, blackout spells began. Rumors had circulated around First Data that Wroten was fired, and that she had "really been told off." Wroten experienced no further conflict when she returned to work; rather, she had a lot of support from First Data personnel. On April 10, 1995, Wroten quit working for First Data due to increasing physical and mental problems. Wroten has sought medical treatment, including psychiatric care, and has been under continued care.

First Data first seeks to have the present action dismissed for lack of subject matter jurisdiction. First Date claims that under Oklahoma law, the Worker's Compensation Act is an employee's exclusive remedy and it deprives this Court of jurisdiction over the present action. First Data contends that this case involves an accidental personal injury sustained by an employee arising out of and in the course of employment, and, as such, Wroten's exclusive remedy is worker's compensation. First Data argues that Wroten herself alleges that her injuries arose as a result of Massey's abusive language directed toward her at the January 20 meeting. Thus, Wroten's injuries arose out of and in the course of her employment. Further, First Data argues that Wroten suffered an accidental injury. Hence, First Data maintains that jurisdiction is exclusive to the Oklahoma industrial court, and that this Court lacks jurisdiction over the claims presented herein. The Court disagrees.

As an initial matter, the Court notes that in “actions where jurisdiction is based on diversity of citizenship, the substantive law . . . of the forum state is applied.” Moore v. Subaru of America, 891 F.2d 1445, 1448 (10th Cir.1989). First Date is correct in that Oklahoma law generally provides for an exclusive worker’s compensation remedy to employees who suffer an accidental injury arising out of and in the scope of employment. 85 O.S. §§ 11 and 12. However, Oklahoma has excepted some work-related injuries from the exclusivity requirements of worker’s compensation. “[W]orker’s compensation statutes were designed to provide the exclusive remedy for accidental injuries sustained during the course and scope of a worker’s employment. The statutes were not designed to shield employers or co-employees from willful, intentional or even violent conduct.” Thompson v. Madison Machinery Co., Inc., 684 P.2d 565, 568 (Okla.App.1984). Thus, when a plaintiff alleges that her injuries resulted from an intentional act, she is not precluded from bringing a common law tort action. Id. See, also, Pursell v. Pizza Inn Inc., 786 P.2d 716, 717 (Okla.App.1990) (appellant’s allegations of intentional and/or willful injury at the hand of supervisors, agents of the company, take appellant’s claims outside the exclusive remedy provision of § 12); Tyner v. Fort Howard Paper Co., 708 F.2d 517, 518 (10th Cir.1983) (under Oklahoma law, an intentional injury is not accidental and is therefore not covered by the Worker’s Compensation Act.).

In the present case, Wroten has alleged intentional infliction of emotional distress. Inasmuch as this involves an alleged intentional tort and not merely an accidental injury, the Court concludes that Oklahoma’s Worker’s Compensation Act does not provide the exclusive remedy. However, the Court’s inquiry into its jurisdiction does not end here. The Court further notes that Wroten filed an action with Oklahoma’s Worker’s Compensation Court in Oklahoma City on June 25, 1996. In that action, Wroten cites “stress in workplace” as the nature of injury. The record reveals that the

worker's compensation action is still pending, although Wroten now represents to this Court that she has no chance of recovery in the Worker's Compensation Court because her injuries are not recognized nor compensable under the Act. By filing her worker's compensation action, plaintiff may have elected her remedy thereby precluding subsequent jurisdiction in this Court over her intentional tort claim. An "employee who has two remedies for the same injury and has prosecuted one of them to conclusion (securing an award or judgment), is barred from resort to the other remedy. This rule, which in essence erects a res judicata bar, is applicable to compensation claimants who may also press a tort remedy." Dyke v. St. Francis Hospital, Inc., 861 P.2d 295, 302 (Okla. 1993).¹ The record, however, does not reveal that Wroten has received any worker's compensation benefits or that she prosecuted her worker's compensation case to conclusion. Hence, the "election-of-remedies" rule does not bar the prosecution of the present action in this Court.

There is one other issue which causes the Court considerable concern. The very fact that Wroten has simultaneous claims pending in the Oklahoma industrial court and this Court causes this Court to view its jurisdiction as highly questionable. In Pryse Monument Co. v. District Court of Kay County, 595 P.2d 435, 437 (Okla. 1979), the Oklahoma Supreme Court held that where an employee has a right to pursue his claim either in the State industrial court or in the district court based on tort, the "pursuit of one will preclude simultaneous prosecution of the other. Were suits pursuing both remedies pending at the same time, one of them, at claimant's election, would be abatable as

¹ Although the Court was unable to find an Oklahoma decision precisely on point, it would appear that an employee's intentional tort claim is barred as a matter of law if he elects and receives a worker's compensation remedy. See, Medina v. Herrera, 927 S.W.2d 567 (Texas 1996). But see, Egan v. National Distillers & Chemical Corp., 495 N.E.2d 904 (Ohio 1986) (receiving worker's compensation benefits does not preclude an employee's action against the employer for intentional tort).

vexatious.” That court further noted that a suit may be abated where another action is pending that is between the same parties and the relief sought is for the same event or transaction. Id. at n.9. The Oklahoma Supreme Court then held that the “abatement’s inchoate bar becomes absolute and conclusive when the remedy, once chosen has been pursued to a point of conclusion.” Id. Pryse dealt with a situation in which the employer was impermissibly uninsured, and, therefore, the employee had the option of pursuing his claim in the industrial court or in the district court in a tort action; that case did not involve the situation currently before the Court in which the employee alleges an intentional tort and seeks a remedy in both courts.

It appears, however, that Wroten may rightfully pursue her claims simultaneously in this Court as well as the industrial court without being in violation of the Pryse holding. The present action in this Court only involves Wroten’s claim of intentional infliction of emotional distress arising out of an event occurring on January 20, 1995. Wroten’s industrial court action, on the other hand, merely alleges stress in the workplace and cites April 11, 1995, as the date of the accident or last exposure. Hence, although the two pending actions are between the same parties, it appears that the relief sought may not be for the same event or transaction. This Court therefore finds that it does possess subject matter jurisdiction over the intentional tort claim, and, as such, the Court will turn to First Data’s motion for summary judgment.

The standard for granting summary judgment is rather strict and demanding. Rule 56(c) of the F.R.C.P. provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” See also, Russillo v. Scarborough, 935 F.2d 1167, 1170 (10th

Cir.1991). The initial burden is on the moving party to show that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once this initial showing has been made, the burden shifts to the nonmoving party to put forth specific facts demonstrating that there is a genuine issue of fact for trial. Id. at 324. The nonmoving party's evidence is to be believed, all justifiable inferences are to be drawn in its favor, and the evidence must be viewed in the light most favorable to the nonmoving party. See, Multistate Legal Studies, Inc. v. Harcourt Brace Publ., Inc., 63 F.3d 1540, 1545 (10th Cir.1995), cert. denied, 116 S.Ct. 702 (1996); Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024 (10th Cir.1992), cert. denied, 506 U.S. 1013 (1992). Summary judgment is not appropriate if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "However, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative;' . . . the nonmovant must come forward with specific facts showing a genuine issue for trial." Frank v. U.S. West, Inc., 3 F.3d 1357, 1361 (10th Cir.1993).

Upon examining the briefs and exhibits submitted by the parties, the Court concludes that First Data's motion has merit and that summary judgment should be granted in First Data's favor. All inferences that may properly be drawn from the documents presented indicate that First Data is not liable in tort for the intentional infliction of emotional distress ("IIED"). First Data argues that the one encounter between Wroten and Massey during a "highly charged" meeting concerning First Data's reorganization cannot support a claim for IIED. The Court agrees.

In Daemi v. Church's Fried Chicken, 931 F.2d 1379, 1387 (10th Cir.1991), the Circuit, interpreting Oklahoma law, held that to establish a prima facie case of IIED, Wroten must show 1) that the defendant acted intentionally or recklessly; 2) that the defendant's conduct was extreme and

outrageous; 3) that Wroten actually experienced emotional distress; and 4) that the emotional distress was severe. In Breeden v. League Services Corp., 575 P.2d 1374, 1377 (Okla. 1978), the Oklahoma Supreme Court adopted § 46, Restatement of Torts (Second), 1965, which provides that one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability. With respect to the standard to be used in IIED case, Breeden adopted Comment d to § 46, which provides that liability only arises where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. Id. at 1378. The court in Breeden found that if “the law allowed liability based upon mere insults or indignities, there would be great danger of frivolous claims.” Id. at 1376.

Breeden further held that the “court, in the first instance, must determine whether the defendant’s conduct may reasonably be regarded so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where, under the facts before the court, reasonable persons may differ, it is for the jury . . . to determine whether the conduct . . . has been significantly extreme and outrageous to result in liability.” Id. at 1377. See also, Daemi, 931 F.2d at 1388 (the court should make the initial determination whether the conduct at issue is sufficiently extreme and outrageous as a matter of law).

In Eddy v. Brown, 715 P.2d 74, 76 (Okla. 1986), the Oklahoma Supreme Court noted that Oklahoma recognizes IIED as an independent tort. The Eddy court further noted that not “every abusive outburst or offensive verbal encounter may be converted into a tort; on the contrary, it would be indeed unfortunate if the law were to close all the safety valves through which irascible tempers might legally blow off steam.” Id. at 77 Liability does not extend to mere insults, indignities,

threats, annoyances, petty oppressions, or other trivialities. Id. at 76. “Conduct which, though unreasonable, is neither ‘beyond all possible bounds of decency’ in the setting in which it occurred, nor is one that can be ‘regarded as utterly intolerable in a civilized community,’ falls short of having actionable quality. Hurt feelings do not make a cause of action . . .” Id. at 77.

The Court, in the present case, finds that Wroten failed to establish a prima facie case of IIED. The verbal assault of which Wroten complains was not so outrageous in character, nor so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. Breeden, 575 P.2d at 1378. While Massey’s rude and insolent behavior in admonishing Wroten may have caused her certain personal embarrassment and elevated her degree of anxiety about the security of her job and her value to the company, the conduct simply does not rise to the level of outrage sufficient to maintain a cause of action. It is quite clear that the conduct at issue occurred during a corporate meeting at which reorganization plans were being discussed, job security and wages were prime issues, the anxiety level was high, and tempers flared. Wroten admits that Massey was generally rude and condescending to everyone at the meeting. In her deposition, Wroten stated that she had never in her twenty-two and a half years met a man as a manager that talked to people or talked down to people like he does. Of course, Wroten goes on to state that Massey’s conduct toward the others was merely rude, while his conduct toward her was outrageous. However, nothing in the facts which the Court outlined above gives credence to Wroten’s claims that Massey’s conduct was either atrocious or utterly intolerable.

If a subordinate employee were permitted to maintain an IIED action every time he or she was berated, humiliated, or scorned by his or her superior, the courts would be flooded with claims. Wroten admits that Massey was doing his job at the meeting, and as a result of him doing his job,

Written claims she was injured. Overbearing, demanding, and harsh supervisors who create stress in the workplace tend to be a fact of life in many organizations. Job conflicts, personality conflicts and related stress are inevitable in the workplace. Furthermore, job performance evaluations, reorganizations, and position eliminations are unavoidable and often result in stress. An employee cannot reasonably expect to be free from negative criticisms or insulting, demeaning remarks aimed at his or her work performance. It is likewise unreasonable to expect that comments, questions, or suggestions offered by the employee will always be met with politeness and appreciation rather than attack and ridicule. Moreover, threats of termination do not rise to the level of extreme and outrageous behavior. See, Spence v. Maryland Cas. Co., 995 F.2d 1147, 1158 (2d Cir.1993) (criticisms of an employee's job performance and conditional threats of termination fall far short of the extreme and outrageous conduct that is actionable in IIED).

The Court is aware of no cases similar to the present in which liability was imposed under IIED. Rather, it is apparent that instances where IIED claims have been sustained between employers and employees have been truly extreme. See, for example, Gilardi v. Schroeder, 833 F.2d 1226 (7th Cir.1986) (liability for IIED established where employer drugged and raped female employee); Class v. New Jersey Life Ins. Co., 746 F.Supp. 776 (N.D.Ill.1990) (plaintiff made a valid claim for IIED when supervisor repeatedly exposed himself to plaintiff and threatened to get even with her when she reported his conduct); see also, White v. Monsanto Co., 585 So.2d 1205, 1210 (La. 1991) (successful workplace IIED claims have usually been limited to cases involving a pattern of deliberate, repeated harassment over a period of time, and the distress suffered must be such that no reasonable person could be expected to endure it). Quite simply, none of the alleged actions in the present case satisfy the outrageousness standard. This is not a case in which the recitation of the facts to an average

member of the community would arouse his resentment against the actor and lead him to exclaim, "Outrageous!" Breedon, 575 P.2d at 1376. On the contrary, the average member of the community may concede that Massey's conduct was rather typical of a supervisor in a heated meeting. Further, there is no indication that Massey knew or should have known that Wroten was already in a weakened emotional state at the time of the meeting.

Accordingly, First Data's motion for summary judgment pursuant to Rule 56 is hereby GRANTED.

IT IS SO ORDERED this 14th day of August, 1997.



H. Dale Cook
U.S. District Judge

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

FILED

AUG 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILMA JOHNSON WATSON,)
)
 Plaintiff,)
)
 vs.)
)
 PHILLIP J. EVANS, CLARENCE)
 BAKER, CITY OF TULSA POLICE)
 DEPARTMENT, et al.)
)
 Defendants.)

No. 97-C-105-B ✓

ENTERED ON DOCKET

DATE AUG 15 1997

ORDER

Before the Court is Defendants' Motion to Dismiss. (Docket No. 8). Plaintiff Wilma Johnson Watson ("Ms. Watson") brought this action pursuant to 42 U.S.C. §1983 asserting that her husband's Fourth Amendment rights were violated when Defendant Tulsa Police Officers, Phillip J. Evans and Clarence Baker, used deadly force against him during an incident which occurred on February 4, 1995. Defendants moved to dismiss based on Ms. Watson's lack of standing to bring this §1983 claim.

At the Case Management Conference held this date (and in her response to defendants' motion), Ms. Watson conceded that she lacks standing to bring the §1983 claim; however, she requested that the Court allow her to amend her complaint to substitute her husband, David Ted Watson ("Mr. Watson"), as plaintiff. Defendants objected to the substitution.

The Court denies Ms. Watson's request for leave to amend complaint. (Docket No. 9). As Ms. Watson lacks standing to pursue this action, the Court grants Defendants' motion to dismiss. (Docket No. 8).

ORDERED this th14 day of August, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT COURT

RNB/gky

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

FILED

AUG 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ALLSTATE INSURANCE COMPANY,)
an Illinois corporation,)
)
Plaintiff,)
)
vs.)
)
MICHAEL PARSONS, an individual, and)
CHRISTINA STILLION, an individual,)
)
Defendants.)

Case No. 96-C-587-B

ENTERED ON DOCKET

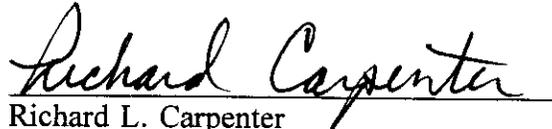
DATE AUG 15 1997

STIPULATION OF DISMISSAL WITH PREJUDICE

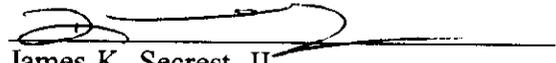
COMES NOW the Plaintiff, Allstate Insurance Company, and the Defendant, Michael Parsons, and stipulates that this case should be dismissed with prejudice to refiling.

Respectfully submitted

By:



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CERTIFICATE OF MAILING

I hereby certify that a true, correct and complete copy of the above and foregoing was mailed on the ~~13th~~ day of ~~July~~ ^{Aug.}, 1997, proper postage prepaid thereon:

Mr. Galen Brittingham
1500 ParkCentre
525 S. Main Street
Tulsa, OK 74103-4524

Mr. Roger Butler, Jr.
Secret, Hill & Foluo
7134 S. Yale, Suite 900
Tulsa, OK 74136

Richard Carpenter

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

FILED

AUG 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERESA SUE FABES,)

Plaintiff,)

v.)

GULF INSURANCE COMPANY,)
a foreign corporation, THE TRAVELERS)
INSURANCE COMPANY, a)
foreign corporation, TRAVELERS)
GROUP, INC., a foreign corporation)

Defendants.)

Case No. 96-C-357-B ✓

ENTERED ON DOCKET
DATE AUG 14 1997

ORDER

This litigation involves a claim for uninsured motorist benefits arising from alleged injuries sustained by Plaintiff, Teresa Sue Fabes ("Fabes") in a February 6, 1993 automobile accident. Fabes also pleads Gulf Insurance Company ("Gulf"), The Travelers Insurance Company and Travelers Indemnity Company (collectively "Travelers") have breached their duty of good faith and fair dealing in the handling of her claim. The Court has jurisdiction pursuant to 28 U.S.C. § 1332.

At issue before the Court are the following Motions:

1. Fabes' Motion For Partial Summary Judgment Against Gulf On The Issue Of Liability For Uninsured Motorist Benefits;
2. Travelers' Motion For Summary Judgment Against Fabes;
3. Gulf's Motion For Partial Summary Judgment Against Fabes;
4. Fabes' Amended Motion For Partial Summary Judgment Against Gulf;

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5. Fabes' Motion For Partial Summary Judgment Against Travelers;
6. Gulf's Motion To Strike Fabes' Amended Motion For Partial Summary Judgment;
7. Travelers' Motion To Strike Fabes' Motion For Partial Summary Judgment;
8. Gulf's Motion To Bifurcate Trial.

I. Uncontroverted Material Facts¹

1. On Thursday, February 6, 1993, Fabes was involved in a motor vehicle accident with an uninsured motorist, Marvin Whitaker, who was at fault. (Accident Report, pp. 8-9, Exhibit B to Fabes' Response To Gulf's Motion For Partial Summary Judgment).

2. The vehicle Fabes was driving at the time of the accident was owned by her mother, Mary Klein. (Fabes' depo., dated 9/27/96, p. 88, Exhibit A to Travelers' Motion For Summary Judgment).

3. The Klein vehicle was insured by Mary Klein through Gulf Insurance Company. (Fabes' depo., dated 9/27/96, p. 90, Exhibit A to Travelers' Motion For Summary Judgment).

4. Fabes was taken by ambulance from the accident scene to Saint Francis Hospital, Tulsa, Oklahoma, where she was treated and released with a diagnosis of soft

¹For purposes of brevity, the Court adopts these Uncontroverted Material Facts for each Motion For Summary Judgment at issue herein.

tissue injury of the neck and back. (Medical record of Saint Francis Hospital, Exhibit B to Gulf's Motion For Partial Summary Judgment).

5. The accident was reported to Gulf on February 9, 1993, by the Gordon Tyler Agency, Fabes' insurance agent. (Fax from Gordon Tyler Agency to Gulf, Exhibit A to Travelers' Motion For Summary Judgment).

6. Gulf is contractually liable to Fabes for any uninsured motorist benefits to which Fabes may be entitled to the limits of the \$100,000.00 coverage. (Gulf's Response to Fabes' Motion For Partial Summary Judgment Against Gulf On The Issue Of Liability For Uninsured Motorist Benefits, p. 1).

7. The medical bills submitted by Fabes to Gulf which related to the February 6, 1993, accident have been timely paid by Gulf. (Exhibit A to Gulf's Motion For Partial Summary Judgment; Fabes' depo., p. 152, lines 16-19, Exhibit C to Gulf's Motion For Partial Summary Judgment).

8. Fabes' property damage claim was timely settled by Gulf on February 23, 1993. (Report, dated 2/2/93, Exhibit C to Travelers' Motion For Summary Judgment).

9. From February 10, 1993, through December of 1994, Gulf claims adjuster Zaculyn M. French-Wilson ("Wilson") handled Fabes' file. (Wilson depo., p. 96, Exhibit D to Travelers' Motion For Summary Judgment).

10. Wilson contacted Fabes for the first time on February 10, 1993. Fabes opted against giving a recorded statement at that time as she wanted to hear what her

doctor had to say regarding her condition prior to giving any statement. (Report, dated 2/10/93, Exhibit C to Travelers' Motion For Summary Judgment).

11. Fabes did not give a recorded statement per Gulf's requests of February 23, 1993, and March 11, 1993, claiming she was too sore. (Report, dated 2/23/93 and 3/11/93, Exhibit C to Travelers' Motion For Summary Judgment).

12. On March 11, 1993, Fabes requested a \$3,000.00 advance against her uninsured motorist bodily injury claim. (Report, dated 3/11/93, Exhibit A to Gulf's Motion For Partial Summary Judgment).

13. On March 16, 1993, Milo Evans ("Evans") of USA Home Sales, to which Fabes was an independent contractor, sent a letter to Gulf advising that "Fabes' anticipated income per month would have been approximately \$3,000.00 if she had been able to work." (Letter from Evans, dated 3/16/93, Exhibit A to Gulf's Motion For Partial Summary Judgment).

14. On March 24, 1993, Fabes gave a recorded statement to Wilson. (Transcript, Exhibit A to Gulf's Motion For Partial Summary Judgment).

15. On March 25, 1993, although not required under the terms of the policy, Gulf advanced Fabes \$1,500.00 against her uninsured motorist bodily injury claim. (Letter from Wilson, dated 3/25/93, Exhibit A to Gulf's Motion For Partial Summary Judgment).

16. On March 25, 1993, Wilson's notes reflect she requested from Fabes a "doctor's report that relates your disability to this accident; must include a diagnosis and prognosis (2) wage loss needs to specify a basis for anticipated income." (Letter from Wilson, dated 3/25/93, Exhibit A to Gulf's Motion For Partial Summary Judgment).

17. On April 14, 1993, Dr. David Kondos, M.D., Fabes' treating physician, provided Fabes an evaluation letter which was forwarded to Gulf. Dr. Kondos opined that while he anticipated a full recovery, Fabes, at that time, was temporarily and totally disabled. (Letter from Dr. Kondos, dated 4/14/93, Exhibit A to Gulf's Motion For Partial Summary Judgment).

18. On April 15, 1993, Milo Evans of USA Home Sales forwarded to Gulf a second letter claiming the \$3,000.00 per month income estimate was very conservative and that the USA Home Sales' staff averages over \$4,000.00 per month. Evans letter further states he anticipates Fabes' 1993 income to be \$40,000.00 to \$45,000.00.² (Letter from Evans, dated 4/15/93, Exhibit A to Gulf's Motion For Partial Summary Judgment).

²Although prepared after the filing of this lawsuit, a September 24, 1996 letter forwarded to Gulf from Evans states the average annual commissions of the full-time salespeople of USA Home Sales were as follows:

1991- \$35,155.00	1993-\$36,404.00	1995-\$37,067.00
1992- \$30,346.00	1994-\$38,246.00	

(See Letter from Evans, Exhibit E to Gulf's Motion For Partial Summary Judgment).

19. The record reveals that for approximately three months prior to the accident Fabes had average real estate sales commissions not in excess of \$1,200.00 per month. (1992 and 1993 Ledger of Fabes, Exhibit E to Gulf's Motion For Partial Summary Judgment).

20. In February of 1993, the same month in which the subject accident occurred, Fabes began working as a volunteer for the American Red Cross in the Processing Lab. On April 5, 1993, Fabes was hired as a full-time employee by the American Red Cross. On May 12, 1993, Fabes was fired by the American Red Cross as her skills and work performance were sub-standard. (Memorandum from Shelley Wiley, Exhibit C to Gulf's Reply to Fabes' Response to Gulf's Motion For Partial Summary Judgment).

21. Despite being a volunteer, then full-time employee, of the American Red Cross, Fabes did not inform Dr. Kondos or USA Home Sales she had taken this employment. (Fabes' depo., p. 71, line 6 through p. 72 line 8 (USA), p. 275, line 25 through p. 276, line 3 (Kondos), Exhibit C to Gulf's Motion For Partial Summary Judgment).

22. Fabes holds an Oklahoma Insurance license in the areas of life, health, and accident insurance. (Fabes' depo., p. 9, lines 14-23, Exhibit C to Gulf's Motion For Partial Summary Judgment).

23. On April 26, 1993, Wilson erroneously responded to Fabes' inquiry as to the applicable statute of limitations by telling Fabes a two (2) year statute of limitations applied.³ (Report, dated 4/26/93, Exhibit A to Gulf's Motion For Partial Summary Judgment).

24. In late April of 1993, Gulf denied Fabes' request for an additional advance against her uninsured motorist bodily injury claim. (Report, dated 4/26/93, Exhibit A to Gulf's Motion For Partial Summary Judgment; Fabes' depo., dated 12/10/96, pp. 227-28, Exhibit G to Travelers' Motion For Summary Judgment).

25. Erika Strasser ("Strasser") of Lowry Claims Service began handling Fabes' claim in January of 1995 for Gulf. On January 25, 1995, Strasser forwarded to Fabes a written "offer" of \$12,000.00 as settlement of Fabes' claim. The letter explained that a draft for \$12,000.00 would be forwarded to Fabes upon her return of an enclosed full and final release, signed by Fabes. The letter also documents that Gulf has paid \$4,904.20 for Fabes' medical bills under the medical payments coverage (less than the \$5,000.00 med pay limit), and notes the \$1,500.00 advance. Thus, the total amount received by Fabes should she elect to accept the "offer" of \$12,000.00 would be \$18,404.20. (Letter from Strasser, dated 1/25/95, Exhibit A to Gulf's Motion For Partial Summary Judgment).

³In January of 1995, Gulf correctly informed Fabes the applicable statute of limitations is five (5) years. (Letter from Erika Strasser, dated 1/25/95, Exhibit A to Gulf's Motion For Partial Summary Judgment; see also Okla.Stat.tit. 12, § 95).

26. Fabes rejected the \$12,000.00 offer. (Fabes' depo., pp. 120-121, Exhibit C to Gulf's Motion For Partial Summary Judgment).

27. Fabes demanded the \$100,000.00 policy limit and never considered acceptance of less than \$100,000.00. (Fabes' depo., p. 120, line 23 through p. 121, line 7, Exhibit C to Gulf's Motion For Partial Summary Judgment).

28. Prior to January, 1995, Fabes was not ready to settle her claim and had previously so advised Gulf. (Fabes' depo., p. 229, lines 17-23, Exhibit C to Gulf's Motion For Partial Summary Judgment).

29. All communications between Fabes and Gulf are reflected within the claims file. (Fabes' Answers to Interrogatories, No. 15, Exhibit F to Gulf's Motion For Partial Summary Judgment).

30. Fabes and Gulf never reached an agreement on the total value of Fabes' claim; she is standing on her \$100,000 demand and Gulf offering the \$12,000. (Fabes' depo., p. 342, lines 3-6, Exhibit C to Gulf's Motion For Partial Summary Judgment).

II. The Standard of Fed.R.Civ.P. 56 Motion for Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

The 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.

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. See Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. See Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative." . . .

A movant is not required to provide evidence negating an opponent's claim. . . Rather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant

has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). Id. at 1521.

III. Fabes' Motion For Partial Summary Judgment On The Issue Of Liability For Uninsured Motorist Benefits

Gulf does not dispute Fabes' entitlement to summary judgment on this narrow issue and admits that Gulf is the liable entity. Thus, the Motion is **GRANTED**.

IV. Travelers' Motion For Summary Judgment Against Fabes

Both Travelers entities seek judgment as a matter of law relieving them of contractual and tort liability on Fabes' claims. The insurance policy at issue here was entered into between Mary Klein, Fabes' mother, and Gulf. Travelers Indemnity Company and, among others, Gulf entered into a Service Agreement and a Reinsurance Agreement, both effective March 31, 1995. Under the Service Agreement, Travelers Indemnity Company agreed to administer certain reinsured policies written by Gulf. Under the Reinsurance Agreement, Travelers Indemnity Company agreed to reinsure certain policies written by Gulf, including the policy at issue herein. The Service Agreement states Travelers Indemnity Company is and shall remain an independent contractor of Gulf, and that Travelers Indemnity Company has the authority to use subcontractors and affiliates. See ¶ 20, Service Agreement. The Reinsurance Agreement states Travelers Indemnity Company agrees to accept 100% of Gulf's net liabilities for Paid Losses and Outstanding Loss Reserves. See Art. IV, Reinsurance Agreement.

Prior to the effective date of the Service Agreement and the Reinsurance Agreement, Fabes' file was shipped from Kansas City to Dallas. Upon its arrival in Dallas in late 1994 or early 1995, Strasser and Angelo Tessone ("Tessone") began to administer Fabes' file. Strasser was an employee of Lowry Claims Service, hired by Travelers on a contract basis to adjust, among others, Gulf policy claims, and Tessone was an employee of Travelers Insurance Company. See Depo. of Strasser, p. 21, Exhibit E to Fabes' Response to Travelers' Motion For Summary Judgment and Depo. of Tessone, p. 7, Exhibit F to Fabes' Response to Travelers' Motion For Summary Judgment.

Notwithstanding the fact it appears Travelers Indemnity Company may be ultimately liable for any judgment or settlement in favor of Fabes, Gulf has admitted, and the Court has found, Gulf is liable to Fabes for any uninsured motorist bodily injury damages. See Uncontroverted Material Fact No. 6. At most, Fabes is entitled to only one recovery of compensatory damages for her alleged injuries arising from the February 6, 1993 accident as double recoveries of compensatory damages for the same injury are not permitted under the law. See Kraszewski v. Baptist Medical, 916 P.2d 241, 243 n. 2 (Okla. 1996) (citing Carris v. John R. Thomas & Assoc., 896 P.2d 522, 530 (Okla. 1995) and Tate v. Browning-Ferris, Inc., 833 P.2d 1218, 1223 (Okla. 1992)). Further, for purposes of her Amended Motion For Partial Summary Judgment Fabes has accepted as true Gulf's representation that the claims adjusters who worked on Fabes' file were

loaned servants.⁴ Gulf has not cross-claimed against either Travelers entities for contribution or indemnification and the time to do so has passed. The Court is of the opinion the issue of whether Gulf or Travelers is ultimately responsible for any adverse judgment against Gulf is a contractual matter between Gulf and Travelers. As between Fabes, Gulf, and Travelers, Gulf is primarily liable and Travelers is secondarily liable for compensatory damages relating to Fabes' uninsured motorist claim.

Fabes is **GRANTED** partial summary judgment regarding her compensatory damage claim under the uninsured motorist policy.

The Court will address the issue of bad faith within Travelers' Motion For Summary Judgment in conjunction with Gulf's Motion For Partial Summary Judgment.

V. Gulf's Motion For Partial Summary Judgment

Gulf seeks a dispositive ruling in its favor that it is not liable under Oklahoma law for the tort of bad faith in connection with its handling of Fabes' uninsured motorist bodily injury claim. Analysis of Travelers' Motion For Summary Judgment on Fabes' bad faith claim is herein addressed.

It is fundamental under Oklahoma law that a bad faith cause of action will not lie where there is a legitimate dispute between an insurer and its insured. See Manis v. Hartford Fire Insurance Company, 681 P.2d 760, 762 (Okla. 1984); see also McCorkle v. Great Atlantic Insurance Co., 637 P.2d 583, 587 (Okla. 1981) (citing Christian v.

⁴See footnote 1, Fabes' Brief in support of Amended Motion For Partial Summary Judgment Against Gulf.

American Home Insurance Company, 577 P.2d 899 (Okla. 1977)). The Oklahoma Supreme Court recognizes

[T]hat there can be disagreements between insurer and insured on a variety of matters such as insurable interest, extent of coverage, cause of loss, amount of loss, or breach of policy conditions. Resort to a judicial forum is not per se bad faith or unfair dealing on the part of the insurer regardless of the outcome of the suit. Rather, *tort liability may be imposed only where there is a clear showing that the insurer unreasonably, and in bad faith, withholds payment of the claim of its insured.*

McCorkle, 637 P.2d at 587 (citing Christian, 577 P.2d at 904-905) (emphasis in original).

Fabes fails to make the required clear showing that Gulf and/or Travelers unreasonably, and in bad faith, withheld payment of her uninsured motorist bodily injury claim. It is undisputed Gulf and/or Travelers evaluated Fabes' uninsured motorist bodily injury claim and offered Fabes \$12,000.00 to settle the claim. See Uncontroverted Material Fact No. 25. Strasser, the principal claims adjuster, felt this to be a fair amount as settlement. See Depo. of Strasser, p. 95, lines 2-4, Exhibit G to Gulf's Reply to Fabes Response to Gulf's Motion For Partial Summary Judgment. Fabes' claim was evaluated based on the amount of medical bills submitted arising from the accident, the type of injury involved, the amount of money already advanced Fabes toward said claim, and the alleged loss of earnings documentation provided. See Depo. of Angelo Tessone, p. 89, lines 12-19, Exhibit H to Gulf's Reply to Fabes Response to Gulf's Motion For Partial Summary Judgment. In fact, a mistake in calculating Fabes'

purported monthly income may have resulted in an excessive amount attributed to lost earnings. See Depo. of Strasser, p. 62, line 12 through p. 63, line 19, Exhibit G to Gulf's Reply to Fabes Response to Gulf's Motion For Partial Summary Judgment. Strasser also believed many of Fabes' medical problems were from pre-existing conditions and/or due to the aging process. See Evaluation Plan, dated 1/24/95, Exhibit A to Gulf's Motion For Partial Summary Judgment.

Without providing any reason beyond the statement that the premiums paid on the subject policy are for \$100,000.00 in uninsured motorist bodily injury coverage, Fabes values her uninsured motorist bodily injury claim at \$100,000.00. The record shows the income information submitted by Evans, on Fabes behalf, to be unsubstantiated and questionable. The total medical bills submitted by Fabes for payment were just less than the \$5,000.00 med pay limit. Medical information provided by Dr. Kondos called for a "full recovery" after some continuing treatment and described the injuries as "whiplash type injuries." Letter from Dr. Kondos, dated 4/14/93, Exhibit A to Gulf's Motion For Partial Summary Judgment. Further medical information from Dr. Kondos reiterates Fabes' subjective complaints of pain, but a dearth of objective findings to support a \$100,000.00 bodily injury claim. See Letter from Dr. Kondos, dated 12/29/94, Exhibit A to Gulf's Motion For Partial Summary Judgment. Fabes has documented pre-existing neck and back problems from as early as 1964, although the record is unclear if Gulf possessed Fabes' medical history prior to 1987 at the time Fabes'

claim was evaluated. See Exhibits to Gulf's Response to Fabes' Motion For Partial Summary Judgment On The Issue Of Liability For Uninsured Motorist Benefits; see also Report, p. 100, Fabes' Response to Gulf's Motion For Partial Summary Judgment.

On January 25, 1995, Strasser, on Gulf letterhead, submitted a written offer to Fabes in the amount of \$12,000.00 as settlement of her claim. Fabes did not accept that offer, and according to Strasser, did not respond or supplement the file as long as Strasser continued to handle the file through April 26, 1995. See Depo. of Strasser, p. 96 lines 17-21 and p. 100 lines 2-9, Exhibit E to Fabes' Response to Gulf's Motion For Partial Summary Judgment; see also Report, p. 99, Exhibit B to Fabes' Response to Gulf's Motion For Partial Summary Judgment. Prior to this suit, the record is unclear what, if anything, transpired with regards to Fabes' claim after the January 25, 1995 offer.

In light of the following factors revealed by the record:

1. Fabes discontinued submitting medical bills;
2. Fabes apparently sustained total medical bills of less than \$5,000.00;
3. Fabes provided unsubstantiated loss of earnings information;
4. The \$1,500.00 advance by Gulf;
5. Fabes' pre-existing medical history;
6. Soft tissue injury of the low back and neck, absent permanent disability;
7. The offer of \$12,000.00 over and above the prior advance;

the Court is of the opinion the trier of fact may conclude such an evaluation was reasonable. That Fabes disagrees with the value placed on her claim creates a legitimate dispute between her and Gulf, thus precluding a bad faith cause of action under Oklahoma law. Plaintiff so much as acknowledges this in her brief in support of her first motion in limine at page 9, where she states: "***the only remaining question being one of damages, and not one of liability."

The Court acknowledges the Service Agreement and Reinsurance Agreement between Travelers Indemnity Company and, among others, Gulf, creates an issue of fact as to for whom Strasser and Tessone worked during their contact with Fabes' claim in late 1994 and early 1995. However, the Court's finding the handling of Fabes' claim does not amount to bad faith renders such immaterial.

Gulf is entitled to, and hereby **GRANTED**, judgment as a matter of law on its Motion For Partial Summary Judgment Against Fabes regarding the bad faith claim. Travelers is entitled to, and **GRANTED**, judgment as a matter of law on its Motion For Summary Judgment on Fabes' bad faith claim.

VI. Fabes' Amended Motion For Summary Judgment Against Gulf

In her Amended Motion For Partial Summary Judgment Against Gulf, Fabes seeks judgment as a matter of law on the following three propositions:

1. The contract of insurance does not provide Gulf with the right to withhold payment of uninsured motorist benefits, until or unless the plaintiff signs a release.

2. Oklahoma uninsured motorist law does not allow an insurer to condition payment of uninsured motorist benefits upon the insured's extra-contractual agreement to sign a release of all claims, but requires swift payment of the undisputed amount owed to the insured.
3. Oklahoma law prohibits an uninsured motorist insurer from reducing the amount of uninsured motorist coverage by taking a med pay set off.

As has been previously stated, genuine issues of material fact remain concerning such issues as pain and suffering, extent of injuries, lost earnings, and pre-existing conditions or injury. Gulf evaluated the alleged compensatory damages at \$12,000.00, plus the \$1,500.00 advance. Fabes evaluated such at \$100,000.00. This is what juries are impaneled to decide. The parties have a legitimate dispute. If Fabes refuses Gulf's settlement offer there is no legal obligation under the uninsured motorist liability coverage to advance such a sum. Under the facts and circumstances, a legitimate dispute regarding evaluation of the compensatory damage claim is for the trier of fact.

Fabes' Amended Motion For Partial Summary Judgment is **DENIED**.

VII. Fabes' Motion For Partial Summary Judgment Against Travelers

In her Motion For Partial Summary Judgment Against Travelers, Fabes seeks a ruling in her favor holding:

1. Travelers are not "strangers to the contract" and may be held liable for the tort of bad faith.
2. That employees or agents of Travelers were not "loaned servants" to Gulf during the period of time in which they were engaged in handling and adjusting Fabes' claim.

3. That Oklahoma law requires the swift payment of the undisputed amount of an insured's claim for uninsured motorist benefits, and that Travelers had no legal right under Oklahoma law to condition or withhold the undisputed amount of Fabes' uninsured motorist claim on the extra-contractual condition that Fabes sign and execute a release of all claims to any amounts over and above Travelers' evaluation or value of Fabes' claims.

For the reasons aforesaid, Fabes' Motion For Partial Summary Judgment Against Travelers is **DENIED**.

VIII. Gulf and Travelers' Motions To Strike Fabes' Amended Motion For Partial Summary Judgment

Both Motions, while perhaps well-taken, are **DENIED**.

IX. Gulf's Motion To Bifurcate Trial

As the bad faith element of this suit has been disposed of as aforesaid, Gulf's Motion To Bifurcate Trial seeking separation of the bad faith claim and the uninsured motorist benefits claim is rendered **MOOT**.

Conclusion

Fabes' Motion For Partial Summary Judgment Against Gulf On The Issue Of Liability For Uninsured Motorist Benefits is **GRANTED** per Gulf's admission.

Travelers' Motion For Summary Judgment Against Fabes is **GRANTED** as to the issue of bad faith and **DENIED** as to the issue of secondary liability on Fabes' bodily injury claim.

Gulf's Motion For Partial Summary Judgment Against Fabes is **GRANTED**.

Fabes' Amended Motion For Partial Summary Judgment Against Gulf is **DENIED**.

Fabes' Motion For Partial Summary Judgment Against Travelers is DENIED.

Gulf's Motion To Strike Fabes' Amended Motion For Partial Summary Judgment is DENIED.

Travelers' Motion To Strike Fabes' Amended Motion For Partial Summary Judgment is DENIED.

Gulf's Motion To Bifurcate Trial is MOOT.

The remaining compensatory damage issues are set for jury trial on the 20th day of October, 1997.

The parties are to file any trial brief (limited to 15 pages), requested voir dire, and requested jury instructions on or before the 14th day of October, 1997.

A Joint Pretrial Order shall be filed on or before the 6th day of October, 1997.

Pre-numbered Exhibits are to be exchanged by the 6th day of October, 1997.

IT IS SO ORDERED this 13th day of August, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

RECEIVED ON DOCKET
8-14-97

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

BRENDA HOLMAN, BEVERLY
DAUGHTRY, and TIM DAUGHTRY,

Plaintiffs,

vs.

OKLAHOMA DEPT. OF LABOR,
BRENDA RENEAU, Commissioner of
Labor, State of Oklahoma, and BRIAN
KIRTLEY, Deputy Comm. of Labor,
State of Oklahoma, JIM MARSHALL,

Defendants.

No. 97-CV-272-K ✓

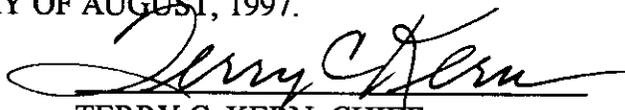
FILED
AUG 14 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before this Court is the Defendant's Motion to Dismiss on grounds of improper venue, and that the Defendants, in their individual capacities, are improper parties (docket # 2). In response, Plaintiff agrees that venue in the Northern District of Oklahoma is improper, and requests that the Court transfer venue to the United States District Court for the Western District of Oklahoma. The Defendant agrees with Plaintiff's request. Additionally, Plaintiffs contend that they have filed an Amended Complaint suing Defendants in their official capacities, thus addressing the Defendants' second ground for dismissal.

For good cause shown, the Court finds that the agreed motion to transfer venue pursuant to 28 U.S.C. § 1406 should be GRANTED. The above-captioned case is hereby transferred to the United States District Court for the Western District of Oklahoma.

IT IS SO ORDERED THIS 13th DAY OF AUGUST, 1997.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 8-14-97

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

F I L E D

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

AUG 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-CV-1034-K

ORDER

This matter comes before the Court on the motion to dismiss (#11)¹ filed by Defendant Stifel, Nicolaus and Company, Inc. ("Stifel"). Plaintiff has not responded to Defendant's motion to dismiss. However, Plaintiff Stouffer has filed a motion for a sixty-day extension of time "to reply to defendants [sic] answer to the complaint" (#12), a supplemental motion for extension of time (#13), a response to Defendant's objection and motion for leave to amend complaint (#15) and a request for appointment of counsel (#16). Plaintiffs also seek entry of default judgment against Defendants (#17). Defendant Stifel has filed an objection to Plaintiffs' supplemental motion for an extension of time (#14), Plaintiff's request for appointment of counsel (#20), and a single response to Plaintiffs' three separate filings entitled response to Defendant's objection and motion for leave to amend complaint, memorandum response to Defendant's objections to supplemental motion for

¹Parenthetical references are to docket entries in the court record for this case.

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extension of time, and motion for default judgment (#21).

BACKGROUND

Plaintiff Bigler Jobe Stouffer, an inmate on Oklahoma's death row proceeding *pro se* and *in forma pauperis*, and plaintiff F.A.I.T.H. (Families Against Injustice to Humanity) as alleged beneficiary of trust, bring this action pursuant to "28 USCA 1331 and 1332 and 1964" against Stifel, Nicolaus Company, Inc. of St. Louis, Missouri, for fraud, deception and conversion of certain accounts held under the "Uniform Transfers to Minors Act" (#1).

Plaintiffs seek to recover \$108,000 plus costs. Defendant Stifel has moved to dismiss the action as time-barred. Defendant further argues for dismissal on the grounds that service was more than 120 days from the date of filing and that Plaintiffs' fraud, deception and "corruption" claims lack specificity (#11).

On June 23, 1997, Plaintiff filed a motion for extension of time "to reply to defendants [sic] answer to the complaint" on the grounds that he had deadlines in a pending state habeas action that required his immediate attention; and, since "plaintiffs [sic] legal documents have been confiscated by prison staff illegally and held in storage," he would seek an "order from this Court ... to release plaintiffs [sic] legal data" (#12 at pg. 2). In Plaintiffs' supplemental request for extension, Stouffer adds that prison official have continued to "obstruct" his access to his legal documents and have "obstructed his rights to correspond, visit, phone and otherwise communicate with pro se counsel, Joyce Stouffer, for F.A.I.T.H." (#13).

Defendant has objected to any extension of time for Plaintiff "to reply to defendants

[sic] answer to the complaint" as the answer states no counterclaim and no reply is appropriate. *See Fed.R.Civ.P. 7.* Defendant argues that Stouffer's deadlines in his capital murder appeal as well as the complaints of "obstruction" have no relationship to the civil case at bar. Furthermore, Defendant objects to any delay to the extent it relates to Joyce Stouffer "acting as 'pro se' attorney for Plaintiff 'Families Against Injustice to Humanity (F.A.I.T.H.).'" (#14).

In the interest of justice and for the reasons stated more fully below, the Court finds that an extension until August 23, 1997 creates an unnecessary delay and therefore Plaintiff's motion and supplemental motion for extension should be denied. Furthermore, and for the reasons discussed below, the Court finds that Defendant's motion to dismiss should be granted.

ANALYSIS

As a preliminary matter, the Court notes that documents have been submitted to the Court on behalf of Plaintiff that were not signed by Plaintiff. Instead, they were signed by Joyce Stouffer, plaintiff's mother (See #7, #12, #17, #18). Federal Rule of Civil Procedure 11 states that "all papers must be signed by the party's attorney, if the party is represented by counsel, or by the party if he or she is not represented by an attorney." Plaintiff Bigler Stouffer is proceeding *pro se* and must sign all his own papers. See also Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533, 111 S.Ct. 922 (1991). Joyce Stouffer is neither an attorney nor a party and cannot act as an attorney in this case.

Therefore, the Court finds that the Entry of Appearance (#7), Motion for Default Judgement (#17), and Memorandum Response to Defendants [sic] Objections to Supplemental Motion for Extension of Time (#18) shall be stricken from the docket. To the extent Plaintiff alleges failure of the Defendants to properly serve a copy of all pleadings upon Ms. Stouffer as his "pro se counsel," such service is deemed inappropriate and unnecessary.

Appointment of Counsel: (#16)

Secondly, the Plaintiff represents to this Court that he is "not competent in the game of law" and therefore is entitled to appointment of counsel. But the fact of the matter is Plaintiff is well acquainted with the court system. The Court takes judicial notice that within the federal court system for the State of Oklahoma, Plaintiff, appearing *pro se* and *in forma pauperis*, has filed at least the following petitions and/or pleadings:

1. 94-CV-1395 Filed 08/23/94 in Western District of Oklahoma, USDC
Civil rights complaint dismissed October 20, 1995 in favor of defendants.
Motion by plaintiff to proceed in forma pauperis;
Praecipe for and issued 3 summonses by plaintiff;
Motion by plaintiff for leave to present exhibits for review;
Motion by plaintiff to stay proceedings and request for hearing;
Second Motion by plaintiff for order to present exhibits for review;
Motion by plaintiff to introduce exhibits and request for hearing;
Appeal from Magistrate's Order by plaintiff concerning order;
Motion by plaintiff for leave to introduce limited exhibits as per order filed 12/8/94;
Response by plaintiff to defendant's motion to dismiss case and brief in support;
Motion by plaintiff to request response to Notice of Appeal filed 12/15/94;
Partial Response by plaintiff to motion to dismiss case and brief in support;
Motion by plaintiff to present procedures OSP 090117;
Motion by plaintiff to compel photocopies;
Supplemental motion by plaintiff to compel photocopies of exhibits;
Objections by plaintiff to Report and Recommendation;

Supplement by plaintiff re Report and Recommendation objection;
Notice of Appeal by plaintiff from District Court decision, order and judgment entered 10/20/95 granting judgment in favor of defendants.

2. 94-CV-1144 Filed 12/15/94; civil rights complaint dismissed for lack of subject matter jurisdiction on 7/17/95; Northern District of Oklahoma, USDC.
Motion to proceed in forma pauperis;
Response by plaintiff Stouffer to motion to dismiss for lack of subject matter jurisdiction;
Motion by plaintiff Stouffer for appointment of counsel;
Reply by plaintiff Stouffer to motion to dismiss;
Motion by plaintiff Stouffer to continue for 60 days;
Supplemental response by plaintiff Stouffer to defendant's reply;
Reply by plaintiff Stouffer to defendant's response;
Motion by plaintiff Stouffer to extend time;
Motion by plaintiff Stouffer for new trial and for reconsideration of order dismissing;
Notice of Appeal by plaintiff Stouffer from District Court decision;
Motion by plaintiff Stouffer for hearing on merits and for sanctions;
Notice by plaintiff Stouffer of statement on issues against sanctions;
Motion by plaintiff Stouffer to produce trust documents;
Response by plaintiff Stouffer to reply to motion for sanctions.

Tenth Circuit Court of Appeals affirmed District Court's dismissal of this action by Order and Judgment entered February 3, 1997.

3. 95-CV-0401 Filed 03/16/95 in Western District of Oklahoma, USDC
Habeas corpus, stay of execution in his death penalty case, filed March 16, 1995; dismissed May 22, 1997.
Motion by petitioner for order of non-compliance of mailing oath;
Attorney Appearance for petitioner by B.J. Stouffer;
Objections by petitioner to premature petition for habeas;
Request by petitioner to respond to 6/14/95 order;
Motion by petitioner for leave to expand the record;
Objections by petitioner to states' response to order of Court;
Motion by petitioner for order to introduce Grievance 95-134 on Fax to 6/14/95 Court Order;
Notice of Appeal by petitioner from District Court decision;
Motion by petitioner for extension of time;
Response to 6/14/95 and 8/25/95 Court Orders by petitioner;
Supplemental Response by petitioner to 6/14/95 Court Order;

Motion for complete order by plaintiff, requiring complete copy of order of 10/11/95;
Motion by petitioner to extend time to secure legal counsel;
Petition for writ of mandamus by petitioner;
Response to court order filed 10/11/95 by petitioner;
Motion by petitioner for order providing for a new trial, or to alter or amend order of 11/15/95;
Affidavit of B.J. Stouffer in support of conflict of interest;
Motion by petitioner to amend petition for writ of habeas corpus;
Motion by petitioner for order appointing investigator for apposite issues;
Response to order and Request for reconsideration of order by petitioner;
Motion by petitioner to compel release and transfer of evidence of DNA testing;
Motion by petitioner for order allowing access to the Court;
Emergency application by petitioner for writ of mandamus to compel access to courts;
Motion by petitioner for abeyance to exhaust state proceedings;
Motion by petitioner for reconsideration of order filed 10/24/96 for abeyance;
Notice to this Court regarding the ineffective or incompetent assistance of counsel by petitioner;
Motion by petitioner for reconsideration of order of 10/24/96 for abeyance;
Notice to this Court of issues not yet raised by counsel which are relevant for review on appeal by petitioner;
Motion by petitioner for appointment of different counsel due to ineffectiveness of present counsel and brief in support;
Motion by petitioner to amend petition and brief in support;
Motion by petitioner for leave to file supplemental authority;
Second Motion by petitioner for reconsideration of 10/24/96 order for abeyance;
Motion by petitioner for order confirming access to laboratory;
Reply by petitioner to the Court's order/response (filed 1/6/97) to petitioner's motion for reconsideration of 10/24/96 order for abeyance (stricken for failure to obtain leave to file a reply brief);
Reply by petitioner to response to petitioner's motion pursuant to 1/6/97 order of this court (stricken for failure to obtain leave to file a reply brief);
Second Motion by petitioner requesting leave to reply to response of 1/27/97 ordered by this Court;
Memorandum pursuant to Court order of 1/6/97 filed by petitioner;
Reply Brief/Response by petitioner to this Court's 2/25/97 order;
Motion by petitioner to extend for 30 days to file the facsimile from the Innocence Project;

Supplement by petitioner re: his motion to extend for 30 days to file the facsimile from the Innocence Project;
Addendum Memorandum pursuant to court order of 1/6/97 filed by petitioner;
Notice of incomplete record and request/motion by petitioner to participate in discovery (stricken for failure to comply with Court's admonishments re pro se filings);
Motion by petitioner to amend/supplement petition;
Motion by petitioner for order to examine state court records submitted to Court on 4/7/97 and 4/10/97 (stricken by order of Court);
Memorandum request pursuant to rule 60 and notice of intent to appeal order of 5/22/97 dismissing case;

4. 96-CV-1034 Filed 11/08/96 in Northern District of Oklahoma, USDC (the case at bar)
Motion with supporting declaration by plaintiff Stouffer to proceed in forma pauperis;
Motion by plaintiff Stouffer, plaintiff FAITH for process;
Motion by plaintiff Stouffer to extend reply deadlines;
Supplemental motion by plaintiff Stouffer for extension of time;
Reply by plaintiff Stouffer to defendant's objection and motion for leave to amend complaint;
Motion by plaintiff Stouffer for appointment of counsel.

5. 97-CV-654 Filed 07/15/97 by plaintiffs F.A.I.T.H. and Bigler Jobe Stouffer II in the Northern District of Oklahoma, USDC.
Motion by plaintiffs to proceed *in forma pauperis*

Motion by plaintiff Stouffer for preliminary injunction and brief;
Motion by plaintiff Stouffer for appointment of counsel.

(This case was transferred to the Eastern District of Oklahoma, USDC, on 8/1/97.)

Although Plaintiff alleges he does not "have a staff of research assistants and secretaries at his disposal to assist in the correct language to use for each reply to the Court," he nevertheless has filed at least 93 separate pleadings and motions, including 7 addressed in the case at bar. It can hardly be said that Plaintiff is a novice at the "game of law" or has

demonstrated an inability to present his claims to the Court.

In the case of an indigent plaintiff, the Court has discretion to appoint an attorney to represent the indigent plaintiff where, under the totality of circumstances of the case, the denial of counsel would result in a fundamentally unfair proceeding. McCarthy v. Weinberg, 753 F.2d 836, 839-40 (10th Cir. 1985); Swazo v. Wyoming Dep't of Corrections State Penitentiary Warden, 23 F.3d 332, 333 (10th Cir. 1994). The Tenth Circuit Court of Appeals reiterated that "if the plaintiff has a colorable claim then the district court should consider the nature of the factual issues raised in the claim and the ability of the plaintiff to investigate the crucial facts." Rucks v. Boergermann, 57 F.3d 978, 979 (10th Cir. 1995) (quoting McCarthy, 753 F.3d at 838).

After reviewing the merits of Plaintiff's case, the nature of the factual issues involved, Plaintiff's ability to investigate the crucial facts, the probable type of evidence, Plaintiff's capability to present his case, and the complexity of the legal issues, see Rucks, 57 F.3d at 979 (cited cases omitted); see also McCarthy, 753 F.2d at 838-40; Maclin v. Freake, 650 F.2d 885, 887-89 (7th Cir. 1981), the Court denies Plaintiff's motion for appointment of counsel without prejudice.

Motion to Dismiss: (#11)

In its motion to dismiss, Defendant Stifel argues that Plaintiffs' claims are time-barred as the applicable limitations period for fraud under Oklahoma law is two years. The Court agrees. "Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards: . .

. Third. Within two (2) years: ... an action for relief on the ground of fraud -- the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." 12 Okla. Stat. §95(3); see also Jones v. Jones, 459 P.2d 603 (Okla. 1969). In his handwritten complaint, Plaintiff Stouffer alleges fraud, deception and conversion of certain accounts established under the "Uniform Transfers to Minors Act,"² claiming jurisdiction under "1331 and 1332 and 1964."³ Oklahoma courts have long held that whether an action is based on

²The Oklahoma Uniform Transfers to Minors Act (Title 58, § 1201 et seq.) applies to a transfer within the scope of the provisions of Section 3 of this act (Title 58, § 1203) which is made after the effective date of this act (O.S.L. 1986, c. 261, eff. Nov. 1, 1986) if:

1. the transfer purports to have been made according to the provisions of the Oklahoma Uniform Gifts to Minors Act (Title 60, § 401 et seq. [repealed]); or

2. the instrument by which the transfer purports to have been made uses in substance the designation "as custodian under the Uniform Gifts to Minors Act" or "as custodian under the Uniform Transfers to Minors Act" of any other state, and the application of the Oklahoma Uniform Transfers to Minors Act is necessary to validate the transfer.

See 58 Okla. Stat. § 1222.

³§1331 - Federal question. 28 U.S.C. § 1331.

§ 1332 - Diversity of citizenship; amount in controversy; costs. 28 U.S.C. § 1332.

§ 1964 - Constructive notice of pending actions.

Where the law of a State requires a notice of an action concerning real property pending in a court of the State to be registered, recorded, docketed, or indexed in a particular manner, or in a certain office or county or parish in order to give constructive notice of the action as it relates to the real property, and such law authorizes a notice of an action concerning real property pending in a United States district court to be registered, recorded, docketed, or indexed in the same manner, or in the same place, those requirements of the State law must be complied with in order to give constructive notice of such an action pending in a United States district court as it relates to real property in such State.

The Court notes this action does not involve real property, and therefore, declines to address the jurisdictional validity of the statutes pled in view of the dismissal of the complaint as stated herein.

fraud or breach of trust, the date on which the fraud or breach of trust is first discovered is the date on which the limitations begin to run. McNeal v. Steinberger, 135 P.2d 490 (Okla. 1943). Similarly, the two-year limitations period applies to actions for conversion of personalty and begins to run at the time of conversion. See Williams v. Harper Bros. Auto. Dealers, 276 P.2d 217 (Okla. 1954). The allegations in Plaintiffs' complaint reveal that Stouffer had knowledge of the alleged "fraud and conversion" claim as early as December 9, 1992, the date "defendants closed accounts assigned to Minors Act held under social security numbers 441 58 8215; 442 64 8489; 442 64 7590; and 441 48 0136" (#1). Thus, the allegations in the complaint establish that the two-year statute of limitations has expired and that Plaintiff knew the facts upon which his current claim is based within the limitations period. Even assuming, *arguendo*, that the action were deemed as one brought upon a liability created by statute (Uniform Transfers to Minors Act), the applicable limitations period of three years has also expired. See 12 Okla. Stat. § 95(2). Therefore, Defendants' motion to dismiss should be granted and Plaintiff's complaint dismissed with prejudice.

Failure to Comply with Rules:

Additionally, the Court finds that Plaintiff's complaint should be dismissed for failure to comply with the Federal Rules of Civil Procedure because (1) "averments in a pleading to which a responsive pleading is required ... are admitted when not denied in the responsive pleading (Fed.R.Civ.P. 8 and N.D. LR 7.1C), and (2) "in all averments of fraud or mistake,

the circumstances constituting fraud or mistake shall be stated with particularity." Fed.R.Civ.P. 9.

Defendant filed its motion to dismiss on June 3, 1997. Plaintiff failed to file a responsive pleading. Plaintiff's failure to respond to Defendant's motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See N.D. LR 7.1C.⁴

Furthermore, Plaintiff fails to allege a specific federal and/or state statute which Defendant has violated, or to present any valid evidence or argument to support his conclusory allegations. The Tenth Circuit Court of Appeals has recognized that "conclusory allegations are insufficient to state a cause of action." Brown v. Zavaras, 63 F.3d 967, 972 (10th Cir. 1995); see also Northington v. Jackson, 973 F.2d 1518, 1521 (10th Cir. 1992) (holding that although a court should construe a *pro se* plaintiff's complaint liberally, "the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations"). Plaintiff alleges that "in 1989, and prior to completion of intents of plaintiff, a written addendum to the Uniform Transfer to Minors Act was put in force by parties due to specific extended terms for minors . . . that through influence extrinsic to written terms of the contract defendants violated state and federal

⁴N.D. LR 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

securities laws by closing accounts, transfers, re-opening closed accounts and improperly distributing assets from the newly re-opened accounts without legal authority." Plaintiff seeks relief from Defendants for an allegedly unlawful conversion of \$108,000 "through fraud, deception and corruption." (#1, at 2). Plaintiff's allegations are too vague and conclusory to be sufficient to state a claim arguably based in law or fact. Therefore, the Court finds that Plaintiff's complaint should be dismissed for failure to state a claim upon which relief can be granted.

The Prison Litigation Reform Act:

Additionally, Plaintiff requested and received leave to proceed *in forma pauperis* in this matter. The Prison Litigation Reform Act of 1996 (the "Act"), added a new section to the *in forma pauperis* statute, section 1915(e)(2). Under that section, a district court may dismiss an *in forma pauperis* action as frivolous if the "claim [is] based on an indisputably meritless legal theory" or if it is founded on "clearly baseless" factual contentions. Schlischer v. Thomas, 111 F.3d 777, 779 (10th Cir. 1997) (quoting Neitzke v. Williams, 490 U.S. 319, 327 (1989)); 28 U.S.C. § 1915(e)(2). After liberally construing Plaintiff's *pro se* pleading, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action lacks an arguable basis in law as it is clear from the face of the complaint that Plaintiff's claims against Defendants are barred by the two-year statute of limitations. Under the provisions of 28 U.S.C. § 1915(e)(2)(B), even if Defendant's motion to dismiss had not been granted, the Court finds that Plaintiffs' conversion, fraud and deception claim against would be dismissed as it is clear from the face of the complaint the claim lacks an

arguable basis in law.

One last item must be addressed --- the proliferation of frivolous litigation by this *pro se* plaintiff. Pursuant to the Act, a prisoner may not "bring a civil action or appeal a judgment in a civil action or proceeding [*in forma pauperis*] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g); see also Schlicher, 111 F.3d at 781. The case at bar presents the textbook example of the burdens which can be placed upon the courts and officials by *pro se* litigants. Review of the complaint demonstrates that Plaintiff Stouffer failed to use the form complaint required of *pro se* prisoners by N.D. LR 9.3, instead bringing the action pursuant to "28 USCA § 1331 and 1332 and 1964." He altered the standard motion for leave to proceed *in forma pauperis*, by adding "pursuant to 28 U.S.C. § 1331, 1332, 1964." He mixed several different actions for relief including "fraud and conversion," civil rights (denial of access to court, confiscation of legal materials, inability to correspond with "*pro se* counsel"), and habeas corpus (affidavit as to mental competency at trial) --- all under this Court's jurisdiction of federal question, diversity and "constructive notice of pending action." He joined as a plaintiff, F.A.I.T.H. (Families Against Injustice to Humanity), an "inspired and therefore elected ... acronym," albeit an unknown entity represented by non-lawyer Joyce Stouffer. It is precisely this type of litigation which the Act calls into question and limits through § 1915(g).

Furthermore, the Act's amendments provide for dismissal as a remedy to halt wasteful abuse of judicial resources in these cases. See 28 U.S.C. §§ 1915(e)(2), 1915A.

For all the foregoing reasons, the Court finds that the dismissal of this action shall count as a "prior occasion" under 28 U.S.C. § 1915(g).

ACCORDINGLY, IT IS ORDERED THAT:

1. Defendant's motion to dismiss (docket #11) is **granted** and the case is **dismissed with prejudice**.

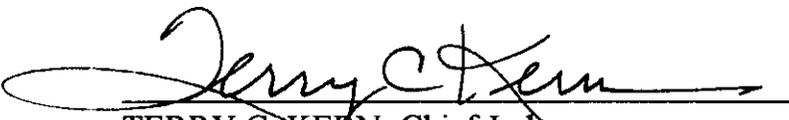
2. Plaintiff's motion and supplemental motion for an extension of time (#12, #13) are hereby **denied**.

3. Plaintiff's motion for appointment of counsel (#16), for leave to amend complaint (#15), and for default judgment (#17) are **denied** as moot.

4. The Clerk of the Court is directed to **strike** the following pleadings signed by Joyce Stouffer: docket #7, #17, and #18.

5. The Clerk of the Court is directed to **flag** this case as dismissed under 28 U.S.C. § 1915(e)(2)(b).

SO ORDERED THIS 13 day of August, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

FILED ON DOCKET
8-14-97

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

LAWSON PETROLEUM COMPANY,)
)
Plaintiff,)
)
vs.)
)
EXXON CORPORATION,)
)
Defendant.)

No. 96-C-846-K

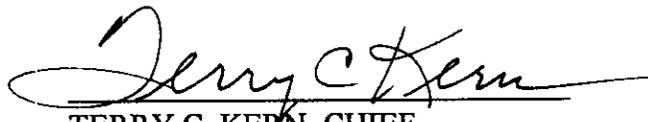
FILED
AUG 14 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised that the parties to this action have agreed to a settlement and dismissal with prejudice of all claims, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 13 day of August, 1997.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
8-14-97

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

FLORENTINA LAPSEY, an individual,)
)
Plaintiffs,)
)
vs.)
)
MEMORIAL MEDICAL CENTER, an)
Oklahoma Health Care Facility,)
)
Defendant.)

No. 96-C-833-K

FILED

AUG 14 1997

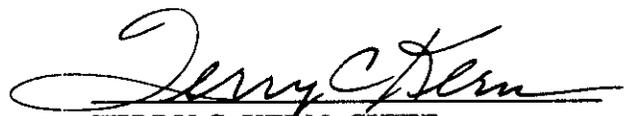
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the Defendant's Motion for Summary Judgment pursuant to *Fed. R.Civ. P.* 56. The issues having been duly considered and a decision having been rendered in accordance with the Order filed on August 14, 1997, the Court finds summary judgment is appropriate in favor of Defendant Memorial Medical Center.

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

ORDERED this 13 day of August, 1997.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

8-14-97

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

FLORENTINA LAPSEY, an individual,)
)
Plaintiffs,)
)
vs.)
)
MEMORIAL MEDICAL CENTER, an)
Oklahoma Health Care Facility,)
)
Defendant.)

No. 96-C-833-K/

F I L E D

AUG 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before this Court is the Defendant's Motion for Summary Judgment (docket # 15).

Statement of Facts

Plaintiff was employed by the Defendant as Director of Pastoral Care from June 5, 1995 until March 25, 1996. Defendant Memorial Medical Center ("MMC"), is a secular, Oklahoma facility licensed to provide health care to the public under the laws of the state of Oklahoma, and doing business in the city of Tulsa. Plaintiff is a practicing Pentecostal, and she received her education at Oral Roberts University ("ORU") and Rhema Bible College ("Rhema"). Plaintiff also believes in "faith healing". The decision to hire the Plaintiff was not made by Sandra Jackson; however, during Plaintiff's tenure, Sandra Jackson was appointed as supervisor over pastoral care, and, along with Terry Bruce, was ultimately responsible for terminating the Plaintiff's employment. When Plaintiff was hired, she was told by the acting Director of Pastoral Care, Dr. Gerald Ellison, that middle management was not pro-Rhema or pro-ORU. Additionally Plaintiff contends that the nurses warned her not to talk about faith healing because the management allegedly did not like "that Rhema stuff".

Plaintiff further states that House Supervisor, Marie Housewright told Plaintiff that she was “disgusted and disappointed” that the Plaintiff had been hired, in part, for religious reasons. Plaintiff also contends that Ms. Housewright told her that she was “keeping a book” on Plaintiff. Marie Housewright testified in her affidavit that she attends a nondenominational Christian charismatic church with tenets very similar to those of Rhema, and that she believes in faith healing. *Defendants Reply, Ex. B.* Additionally, Ms. Housewright stated that she never discussed Plaintiff’s employment or job performance with Sandra Jackson. *Id.*

While Plaintiff was employed at MMC, at least two articles were written about Plaintiff’s work at MMC. Plaintiff was told that she was to contact Lynne Kennedy, MMC’s public relations director, or Sandra Jackson, whenever she was contacted by someone outside the hospital for publicity purposes. Plaintiff was told that the hospital was trying to rid itself of its image of being affiliated with ORU since the hospital was located in the former ORU City of Faith building. The Defendant engaged in an active publicity campaign to enhance its image as a secular institution. When Plaintiff informed Ms. Kennedy that Rhema wanted to do an article about her since she was a Rhema graduate, Ms. Kennedy stated “Oh, you’re one of them too?” and “Sandra didn’t know you were one of them.”

Sandra Jackson has testified that she is not anti-ORU, anti-Rhema, or anti-faith healing. *Defendant’s Rely, Ex. A.* Defendant has, for many years, allowed Rhema students to use a room at the hospital to teach a faith healing classes bi-weekly to patients. *Id.* Additionally, Sandra Jackson, subsequent to Plaintiff’s termination, hired two part-time chaplains who are both practitioners of Pentecostal and/or charismatic Christian beliefs. *Id.* One of the chaplains hired, Michael Langham, testified that he received his bachelor’s degree in Pastoral Ministry from ORU, that he is currently

attending ORU to obtain his Masters of Divinity, and that he believes in faith healing. *Defendant's Reply, Ex. E.* Langham also testified that Sandra Jackson and Terry Bruce were aware of his religious beliefs both at the time he was initially hired, and when they promoted him as full-time Chaplain.

Plaintiff asserts that while she was employed at MMC, she witnessed several incidents of patient neglect. Plaintiff reported these incidents to various personnel at MMC from as early as July 2, 1995 through March, 1996; however, none of these reports were made to Sandra Jackson or Terry Bruce, but rather were made to individuals who had no supervisory authority over the Plaintiff. Sandra Jackson has testified that she had no knowledge of Plaintiff's complaints regarding patient care or religious harassment prior to terminating Plaintiff. *Defendant's Reply, Ex. A.*

On March 7, Plaintiff was present in a manager's meeting in which she allegedly voiced concerns about "harassment" she was experiencing; however, Plaintiff has not indicated who was present at that meeting, nor has she specified the "harassment" to which she was referring. Another meeting was held with Plaintiff on March 11, 1996 at which Marie Housewright and Terry Bruce were present. Plaintiff expressed no complaints at that meeting; however, apparently Ms. Housewright voiced some complaints about Plaintiff's performance including her failure to respond to calls, failure to properly train junior [employees], and failure to accurately relate information to patients and their families. *Defendant's Reply, Ex. B.* Although Plaintiff referred to these complaints as "petty" and "insignificant", she did not deny Ms. Housewright's allegations. Plaintiff called Sandra Jackson at home that night and told her that she felt she was being "attacked" during the meeting that day. Plaintiff further requested a meeting with Ms. Jackson, but did not detail what she wished to discuss with her. The meeting was postponed until March 18, at which time Plaintiff still did not

voice any of her concerns regarding patient care or religious harassment. Instead, Ms. Jackson confronted Plaintiff about a complaint which was received from Deacon Richard Campbell of Saint Bernard's Catholic Church. Deacon Campbell was concerned about not being informed of Catholic patients who were admitted to the hospital. *Defendant's Ex. 12*. Additionally, Ms. Jackson questioned Plaintiff about her non-responsiveness to pages. Plaintiff requested an additional meeting with Sandra Jackson and Terry Bruce, which was held on March 20, 1996. At that time, Plaintiff still did not mention her concerns regarding patient care or religious harassment. Ms. Bruce and Ms. Jackson again confronted Plaintiff about some of the concerns expressed in the March 11 meeting including inadequate staffing, and the fact that unqualified chaplains were sent to deal with deaths. At that meeting, Ms. Jackson requested that Plaintiff resign. After informing Ms. Jackson of her decision not to resign, Plaintiff was terminated on March 26, 1996. According to the Plaintiff, Ms. Jackson told her that she did good work, but just didn't fit in and that she had "too many issues". Ms. Jackson denied making such comments.

The position of Director of Pastoral Care has remained unfilled.

Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P.* 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *Mares v.*

ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992). Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *Thomas v. Internat'l Business Machines*, 48 F.3d 478, 485 (10th Cir. 1995).

Discussion

Plaintiff's Title VII Claim

Plaintiff has asserted a claim for religious discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) ("Title VII") based upon her belief that she was terminated because the Defendant either wished to rid itself of its "ORU image", or because it was opposed to "faith healing", which was a belief held by the Plaintiff. Title VII provides that "it shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). Religion includes "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). The Tenth Circuit has interpreted Title VII to protect against requirements of religious conformity, insulating those who refuse to hold, as well as those who hold, specific religious beliefs. *Shapolia v. Los Alamos Nat. Laboratory*, 992 F.2d 1033, 1036 (10th Cir. 1993).

The Plaintiff may prove intentional discrimination by providing direct evidence of discriminatory intent, or by providing circumstantial evidence of discriminatory intent. *E.E.O.C. v. WilTel, Inc.*, 81 F.3d 1508, 1513 (10th Cir. 1996). If a plaintiff provides direct evidence that a termination decision was motivated in part by discrimination, the burden shifts to the defendant to prove by a preponderance of the evidence that the same decision would have been made absent the discriminatory reason(s). *Id.* at 1514. If, however, a plaintiff relies on circumstantial evidence, then

the plaintiff must establish a prima facie case of religious discrimination, and must provide sufficient evidence to overcome a defendant's legitimate, non-discriminatory justification for its adverse decision. *Id.* at 1513.

In this case, Plaintiff contends that she can provide both direct and circumstantial evidence of religious discrimination. Plaintiff's direct evidence consists of four things: (1) a statement by a former director that Sandra Jackson and middle management didn't like faith healing; (2) statements made to Plaintiff by nurses to "be quiet" because management didn't like "Rhema healing stuff"; (3) an alleged statement made by the house supervisor, Plaintiff's peer, that she was "disgusted and disappointed" that the Plaintiff had been hired for "religious reasons"; and (4) Lynne Kennedy's "one of them" statement. Assuming that these statements would be admissible,¹ they do not constitute direct evidence of discriminatory discharge under Tenth Circuit law. *WilTel, Inc.*, 81 F.3d at 1514 ("statements which are merely expressions of personal opinion or bias do not constitute direct evidence of discrimination Because such statements require the trier of fact to infer that discrimination was a motivating cause of an employment decision, they are at most circumstantial evidence of discriminatory intent."). Neither the nurses, the house supervisor, or Lynne Kennedy were in any way involved in the termination decision. Additionally, it is clear that the Defendant did not have a policy of terminating persons who believe in faith healing as it has allowed Rhema students to teach a faith healing class in a room at the hospital for many years. Thus, Plaintiff must prove her discrimination claim using the *McDonnell-Douglas/Burdine* burden-shifting analysis.

To prove a prima facie case of discrimination based upon religion, the Plaintiff must prove that

¹ The second and third statements constitute hearsay, and do not appear to fall within any recognized exceptions. The first and fourth statements, however, could be construed as a party admission, and thus an exclusion from the hearsay rule.

(1) she was a member of a protected class; (2) that she was qualified for the position she held at MMC; (3) that she was terminated despite her qualifications; and (4) that the Defendant hired other persons possessing Plaintiff's qualifications who were not members of her protected class. *WilTel, Inc.*, 81 F.3d at 1515. Once the Plaintiff establishes a prima facie case, the burden shifts to the Defendant to articulate a legitimate, non-discriminatory reason for its decision to terminate the Plaintiff. *Shapolia v. Los Alamos Nat. Laboratory*, 992 F.2d 1033, 1039. If the Defendant meets its burden, the burden of proof lies with the Plaintiff to provide sufficient evidence to create a material issue of fact that the Defendant's stated reason is a pretext for religious discrimination. *Id.*

Defendant's motion for summary judgment is based upon the argument that Plaintiff has failed to establish the first and fourth prongs of her prima facie case. Alternatively, Defendant contends that Plaintiff cannot provide evidence to support her contention that Defendant's stated reasons for her termination were a pretext for religious discrimination.

Although it is somewhat difficult to discern, it appears that the Plaintiff is asserting that her protected class is either persons who believe in faith healing, or persons associated with ORU. The Court finds that this is a sufficient statement of a protected class for purposes of summary judgment. *See e.g., WilTel, Inc.*, 81 F.3d at 1515 (accepting "evangelical Christians" as a protected class). As for the fourth prong, Defendant contends that the Plaintiff was not replaced. However, Defendant admits that two chaplains were hired by Sandra Jackson after Plaintiff's termination, one of which, Michael Langham, was affiliated with ORU, and was a proclaimed believer in faith healing. According to Mr. Langham's affidavit, Sandra Jackson and Terry Bruce had full knowledge of his religious tenets and educational background when they hired him.

The Court finds that the Plaintiff has failed to establish a prima facie case of religious

discrimination; however, assuming that Plaintiff had survived the prima facie analysis, she has not provided sufficient evidence that the Defendant's stated reasons for her termination were pretextual. The Defendant submits that the Plaintiff was terminated because of performance problems including her "inability to establish cordial relationships with the representatives of other religious organizations in the community, and to assure patients access to the spiritual representative of their choice." This explanation is supported by documentation of complaints received by the Defendant including that (1) Marsha Haymes, a member of Victory Christian Center, was being denied access to friends staying at the hospital; (2) Deacon Richard Campbell, a Catholic minister was not consulted about a policy change which allowed the Plaintiff to "screen" patients who were Catholic by asking if they wanted to see a Catholic minister rather than just directly referring all patients listing their religion as "Catholic" as had been the procedure in the past; and (3) family complaints regarding Plaintiff's allegedly inappropriate behavior during a patient's death.

Plaintiff attempts to rebut this explanation by submitting (1) the fact that she never received written or verbal warnings prior to requesting meetings with Sandra Jackson; (2) that, in her opinion, she was doing a good job; and (3) Sandra Jackson's alleged statement to the Plaintiff that she did "good work," but "just ha[d] too many issues". Plaintiff also attempts to defend her actions with regard to the complaints documented by the Defendant; however, she does not dispute that the incidents occurred. Instead, the Plaintiff seeks to convince the Court, without supporting evidence, that these complaints were "other fabricated issues" which were "clearly bogus and pretextual". However, conclusory, self-serving assertions are insufficient to rebut a legitimate, non-discriminatory reason for Plaintiff's termination. *Sample v. Aldi, Inc.*, 61 F.3d 544, 549 (7th Cir. 1995). Additionally, the Plaintiff herself uses Sandra Jackson's alleged comment in support of both her

discrimination claim and her wrongful discharge claim, thus exposing the ambiguous nature of the alleged statement. The Court finds that, in light of the fact that the Plaintiff failed to dispute the numerous complaints about her performance, Plaintiff's vague and conclusory evidence of pretext falls short of that required to create an issue of material fact.

Plaintiff's Wrongful Termination Claim

Plaintiff has also asserted a claim for wrongful discharge pursuant to *Burk v. K-Mart Corp.*, 770 P.2d 24 (Okla. 1989) stating that she reported various incidents throughout her tenure at MMC including patient neglect, failure to honor Advance Directives, and failure to make proper referrals to the Medical Examiner. Plaintiff admits that she never made these reports to Sandra Jackson, the person responsible for her termination, nor did she report to any outside authority. Instead, Plaintiff made internal complaints either to peers or subordinates.

The wrongful discharge in violation of public policy doctrine is an exception to the common law rule that employment relationships are terminable at-will. *Burk*, 770 P.2d at 28. This exception is intended to apply only to a narrow class of cases in which the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law. *Id.* The initial determination of public policy is a question of law to be resolved by the Court. *Pearson v. Hope Lumber & Supply Co., Inc.*, 820 P.2d 443, 444 (Okla.1991).

Some of the instances cited by Plaintiff in support of her claim are clearly not matters of public policy, but rather are internal policy disputes. The Court assumes that the Plaintiff ultimately recognizes this rule of law as her brief narrows her claims to include only her allegations of patient neglect and mistreatment. In support of the requirement that there be a "clear mandate of public policy", Plaintiff cites to Article 7 of the Oklahoma Health Code, *Okla. Stat. tit. 63 § 1-701 et seq.*,

which deals with the licensing of hospitals. Plaintiff specifically relies on Section 1-706(b)(3), which states that “The Commissioner may suspend or revoke any such license on any of the following grounds: conduct of practices deemed by the Commissioner to be detrimental to the welfare of the patients of the hospital.”

Defendant urges the Court to follow the unpublished Tenth Circuit case, *Neville v. United States Fidelity & Guar. Co.*, 1996 WL 194754 (10th Cir. (Okla.)), and grant summary judgment in its favor. In *Neville*, the Tenth Circuit holds that there is no clear mandate of Oklahoma public policy against terminating employees for internal whistleblowing activity. *Neville* 1996 WL at **2. The Court declines to follow the *Neville* case on the grounds that the Oklahoma Supreme Court recognized a wrongful discharge cause of action based upon internal whistleblowing in *Vannerson v. Bd. of Regents*, 784 P.2d 1053 (Okla. 1989). Similarly, the Oklahoma Court of Civil Appeals also declined to dismiss a wrongful discharge claim on the grounds that it was based solely on internal whistleblowing in *Tyler v. Original Chili Bowl, Inc.*, 934 P.2d 1106 (Okla. Ct. App. 1997). Thus, this Court will not grant Defendant's motion on the ground that Plaintiff's complaints prior to her discharge were purely internal.

Defendant also contends that summary judgment is appropriate because *Okla. Stat. tit. 63 § 1-701 et seq.* is not sufficiently specific to constitute clearly articulated public policy. Defendant asserts that it is well-established in other jurisdictions that regulations governing a particular profession are not necessarily a source of well-defined public policy, and that the Oklahoma licensing statute does not even define what conduct the Commissioner would deem detrimental. The Defendant cites *Bowe v. Charleston Area Medical Center, Inc.*, 428 S.E.2d 773 (W. Va. 1993) in support of this argument. In *Bowe*, the court held that “[i]nherent in the term 'substantial public

policy' is the concept that the policy will provide specific guidance to a reasonable person." *Bowe*, 428 S.E.2d at 777. The Defendant also cites *Farnam v. CRISTA Ministries*, 807 P.2d 830, 834-35 (Wash. 1991) as an example of a statutory provision which specifically requires employees of nursing homes to report abuse and neglect, and provides guidelines for determining what constitutes abuse and neglect. The Court finds Defendant's arguments persuasive, and holds that *Okla. Stat. tit. 63 § 1-701 et seq.* is not sufficiently specific to serve as a "clear mandate" of public policy. However, the Court finds that even if *Okla. Stat. tit. 63 § 1-701 et seq.* could suffice as a statement of public policy, summary judgment would be appropriate because of the lack of causal connection between Plaintiff's complaints, and her subsequent termination.

The Defendant argues that, even if the Plaintiff has stated a public policy, the Plaintiff has failed to establish a causal link or nexus between her complaints and subsequent termination. In support of this contention, Defendant presents evidence that Sandra Jackson, the individual responsible for making the termination decision, did not even know about Plaintiff's complaints regarding patient care, and therefore could not have possibly been motivated by Plaintiff's protected activity. Although no Oklahoma cases have addressed the elements of a whistleblower case, Defendant persuasively analogizes to Title VII retaliation law as stated by the Tenth Circuit. *See e.g., Murray v. City of Sapulpa*, 45 F.3d 1417 (10th Cir. 1995); *Graham v. American Airlines, Inc.*, 731 F. Supp. 1494, 1503 (N.D. Okla. 1989). The Court agrees that, if the Oklahoma Supreme Court were faced with this question, they would adopt the requirement of a causal connection between the whistleblower's protected activity and the subsequent adverse action taken by the employer. Indeed, the Oklahoma Uniform Jury Instructions ("OUJI") list the elements of wrongful discharge as follows: (1) the Plaintiff was terminated; (2) during the course of her employment, the Plaintiff engaged in

protected activity; (3) a significant factor in the decision to terminate the Plaintiff was retaliation for Plaintiff's protected activity; and (4) Plaintiff was damaged as a result of the discharge. OUJI No. 21.3. Because the Plaintiff has admitted that she was not able to voice any of her concerns to Sandra Jackson, and because Sandra Jackson has testified that she was unaware of Plaintiff's concerns regarding patient care, Plaintiff cannot establish that Jackson's termination decision was motivated by retaliatory intent. Although Plaintiff contends that she voiced some of her complaints to Marie Housewright, and asserts, without supporting evidence, that Ms. Housewright "played a role in [Plaintiff's] termination," Ms. Housewright has testified that she had no involvement in Plaintiff's termination, and that she never discussed or communicated in any manner about Plaintiff or her job performance with Sandra Jackson.

Because the Plaintiff has failed to articulate a clearly established public policy, and because she failed to present any evidence of a causal connection between her termination and her complaints regarding patient care, summary judgment must be granted in favor of the Defendant.

Conclusion

For the foregoing reasons, Defendant's Motion for Summary Judgment (docket # 15) is GRANTED.

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


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

FILED ON DOCKET
8-14-97

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

UNITED STATES OF AMERICA)
)
 PLAINTIFF,)
)
 v.)
)
 BENJAMIN LEAT MCNEELY,)
 TERRY BENDURE, RICHARD TROSPER)
 D/B/A AND GREEN COUNTRY LOGGING,)
)
 DEFENDANTS.)

CIV. NO. 97CV441 K (M)✓

FILED

AUG 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the Defendant Richard Trospen D/B/A Green Country Logging, having consented to the making and entry of this Judgment without trial, hereby agrees as follows:

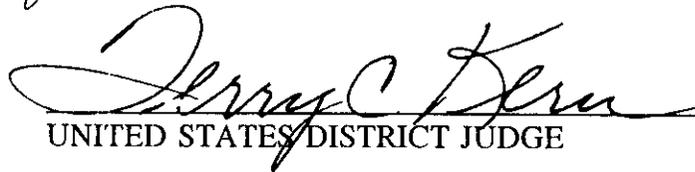
1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.
2. The Defendant hereby acknowledges and accepts service of the Complaint filed herein.
3. The Defendant hereby agrees to the entry of Judgment in the principal sum of \$9,068 in full.
4. Plaintiff consents to the entry of this Judgment payment of damages of \$9,068 and on or before the 15th day of August, 1997, Defendant Richard Trospen shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$9,068.
5. Upon receipt of Defendant's payment in full, the Plaintiff will execute a release of

judgment to Defendant Richard Troser.

6. Default under the terms of this Agreed Judgment will entitle the United States to execute this Judgment without notice to the Defendant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against the Defendant Richard Troser D/B/A Green Country Logging, in the amount of \$9,068.

Dated this 11th day of August, 1997.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
U.S. Department of Justice
3460 Federal Courthouse
333 W. 4th St.
Tulsa, OK 74103
(918) 581-7463


JOSEPH D. FINCHER, OBA #10807
Hall, Estill, Hardwick, Gable,
Golden & Nelson, P.C.
320 S. Boston, Suite 400
Tulsa, OK 74103-3708

Attorney for Defendant Richard
Trosper and Richard Trosper D/B/A
Green Country Logging

ENTERED ON DOCKET
8-14-97

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

FILED

AUG 14 1997

Neil Lombardi, Clerk
S. DISTRICT COURT

EVA F. WALLACE and TED WALLACE,
individually and as wife and husband,

Plaintiffs,

v.

ICON HEALTH & FITNESS, INC. and
VENTURE STORES, INC.,

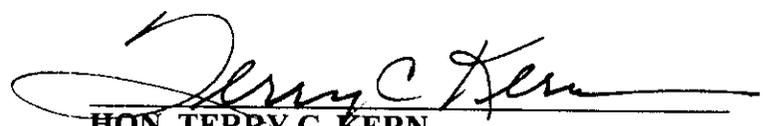
Defendants.

CASE NO. 96-C-849-K

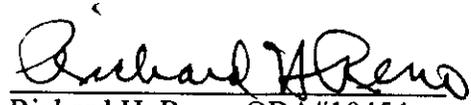
JUDGMENT

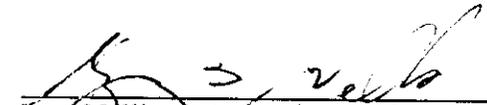
Pursuant to the Offer to Accept Judgment and the Acceptance thereof filed in the above captioned case on July 21, 1997 the Court finds that judgment should be and hereby is rendered for the Plaintiff against each of the Defendants jointly and severally for **One Hundred Thousand Dollars (\$100,000.00)** which is inclusive of all damages, pre-judgment interest, fees, attorneys' fees and costs.

Dated this 13 day of August, 1997.


HON. TERRY C. KERN
UNITED STATES DISTRICT COURT JUDGE

APPROVED AS TO FORM:


Richard H. Reno, OBA#10454
15 West 6th Street, Suite 1500
Tulsa, Oklahoma 74119
ATTORNEY FOR THE PLAINTIFF


Greg Nellis, OBA# 6609
1500 Park Centre
525 South Main
Tulsa, OK 74103
ATTORNEY FOR THE DEFENDANT

8-14-97

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

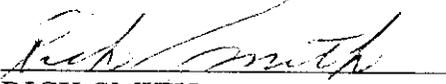
RICK SMITH and JAMIE SMITH,)
)
Plaintiffs,)
)
vs.)
)
NORTH AMERICAN VAN LINES,)
)
Defendant.)

FILED
AUG 14 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97CV-472(K)

DISMISSAL WITH PREJUDICE

COMES now the Plaintiff, RICK SMITH, pro se, and dismisses with prejudice, any of his right, title or interest in and to the above styled and captioned matter.


RICK SMITH
c/o Asbestos Handlers, Inc.
6924 E. Reading Place
Tulsa, OK 74115

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Instrument was mailed on this 15 day of ~~June~~^{Aug}, 1997, with proper postage thereon fully prepaid to: Mr. David A. Cheek, Attorney for Defendant, 101 N. Broadway, Oklahoma City, OK 73102; Mr. Phil Frazier, Attorney at Law, 1424 Terrace Drive, Tulsa, Oklahoma 74104-4626 and Mrs. Jamie Smith, Plaintiff, 905 Country Meadow Lane, Skiatook, OK 74070.


RICK SMITH

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

F I L E D
AUG 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BANCOKLAHOMA MORTGAGE CORP.,
Plaintiff,
v.
JOSEPH A. IADEVITO, TERESA M. JANSON,
PETER M. SHAW, CAPITAL TITLE COMPANY,
INC., INVESTORS TITLE COMPANY, OLD
REPUBLIC TITLE COMPANY of ST. LOUIS,
U.S. TITLE GUARANTY COMPANY, INC.,
AND U.S. TITLE GUARANTY COMPANY
OF ST. CHARLES, INC.,
Defendants.

Case No. 94-C-847-H ✓

ENTERED ON DOCKET
DATE 8-14-97

ORDER

This matter comes before the Court on a motion for summary judgment by Defendant Investors Title Company ("Investors") (Docket # 283).

The Court has recited the facts of this case in its previous orders granting summary judgment in favor of each of the Defendant title companies¹ on Plaintiff's civil RICO claims (Docket # 269) and the state law claims assigned to Plaintiff by 31 homeowners (Docket # 348). As stated in those orders, Plaintiff BancOklahoma Mortgage Company ("BOMC") is an Oklahoma corporation whose business includes purchasing residential home mortgage loans and reselling them in the secondary market while retaining certain loan servicing rights. Lenders Mortgage Services, Inc. ("LMS") was a Missouri corporation which, until it was forced into bankruptcy in March 1994, originated residential home mortgage loans principally in the St. Louis, Missouri area for sale to mortgage loan companies and other upstream investors, including BOMC. In April 1993, BOMC entered into an agreement to purchase home mortgage loans from

¹Defendant Joseph Iadevito and Defendant Teresa Janson did not join in the title companies' motions for summary judgment.

360

8-13-97
Parties phoned by DC-CP

LMS. As discussed in greater detail below, the purchase agreement provided that LMS would close all the loans that it originated and sold to BOMC.

Between May 1993 and March 1994, BOMC purchased approximately 700 loans from LMS. On March 18, 1994, certain St. Louis titles companies, including Defendant Investors, forced LMS into involuntary bankruptcy. Soon afterwards, BOMC learned that LMS had not paid off the prior mortgage on certain refinance loans that BOMC had purchased.² BOMC paid the respective homeowners the outstanding mortgages on these loans and was assigned all claims by each of the 31 homeowners involved in these refinance transactions. BOMC then sued Defendants, alleging fraud, breach of fiduciary duty, and violations of the civil RICO statute, 18 U.S.C. § 1961, *et seq.* As noted above, the Court has already granted summary judgment in favor of Defendant title companies on the RICO claims and the state law claims that were assigned to BOMC by the homeowners. Defendant Investors now moves for summary judgment on BOMC's claims of fraud and breach of fiduciary duty.

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 Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), *cert. denied*, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court held that

[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.

²Pleadings filed by BOMC initially indicated that LMS failed to pay off the prior mortgage on 42 of the refinance loans. However, BOMC's appendix contains a "Moving Homeowners Chart" which shows that LMS did not pay off the prior mortgage on 31 refinance loans. The Court accepts this chart as stating the correct number of loans at issue.

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) (holding that “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 where “there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” Id. at 250. As the Supreme Court held, “[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); see also Anderson, 477 U.S. at 250 (“there 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

The material facts necessary to decide this motion for summary judgment are uncontroverted. Accordingly, the Court finds that there is no genuine issue of material fact, and summary judgment on BOMC’s claims for fraud and breach of fiduciary duty is appropriate.

Applicable choice of law rules clearly dictate that Missouri law applies to BOMC's state law claims.³ Therefore, the Court will analyze BOMC's fraud and breach of fiduciary duty claims under Missouri law.⁴

Before analyzing BOMC's claims against Investors, the Court must first carefully review the loan purchase agreement between BOMC and LMS. As noted above, the agreement specifically provided that LMS would close the loans it originated for sale to BOMC: paragraph 2 of the agreement stated that "Seller [LMS] agrees to originate Loans and after receipt of approval as described in this Agreement, close Loans in Seller's name and to deliver to Purchaser [BOMC] for purchase by Purchaser, in accordance with the terms of this Agreement, the documents evidencing, securing and insuring such Loans." Loan Purchase Agreement, ¶ 2 (emphasis added). Investors was not a party to the agreement, nor was Investors in any way subject to its terms. Moreover, the agreement did not state or even suggest that Investors would serve as a settlement agent, close loans, or disburse loan proceeds. Furthermore, the agreement provided that BOMC was not obligated to purchase loans originated by LMS unless certain conditions were satisfied,

³A federal court sitting in diversity must apply the choice of law rules of the state in which it sits. Barrett v. Tallon, 30 F.3d 1296, 1300 (10th Cir. 1994). The same choice of law rule applies when a federal court exercises supplemental jurisdiction over state law claims in a federal question action. See Paracor Finance, Inc. v. General Elec. Cap. Corp., 96 F.3d 1151, 1164 (9th Cir. 1996); Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132, 136 (6th Cir. 1996).

Oklahoma choice of law rules require courts to apply the tort law of the state with the most significant relationship to the occurrence and to the parties. See Barrett, 30 F.3d at 1300; White v. White, 618 P.2d 921, 924 (Okla. 1980). In making this determination, courts consider the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation and place of business of the parties; and the place where the relationship, if any, between the parties occurred. Id. In this case, BOMC's alleged injuries occurred in Oklahoma, and it is incorporated in and resides in Oklahoma. However, other factors significantly outweigh these facts and compel application of Missouri law: Investors's conduct occurred in Missouri, where it is incorporated and resides, and any alleged relationship between BOMC and Investors would have existed in Missouri.

⁴BOMC argues that the Court should apply Oklahoma law to its state law claims. As stated above, applicable choice of law rules dictate that Missouri law applies in this matter. The Court notes, however, that BOMC has offered no authorities which support the conclusion that Oklahoma tort law, as applied to the facts of this case, is substantively different from that of Missouri.

including BOMC's approval of a loan origination package prior to closing, and the closing of such loan in accordance with BOMC's instructions to LMS. Loan Purchase Agreement, ¶ 6. The agreement also required LMS to repurchase from BOMC any loans closed without compliance with BOMC's conditions and requirements, Loan Purchase Agreement, ¶ 7, and to indemnify BOMC for any losses or claims arising out of the origination, processing, closing, or purchase of any loan purchased by BOMC from LMS, Loan Purchase Agreement ¶ 10.

The loan purchase agreement created a relationship between BOMC and LMS, and set forth the terms and conditions of that relationship. The agreement did not in any way create a relationship between BOMC and Investors or any other Defendant title company. Nor did the terms of the agreement create an agency relationship between LMS and Investors or any other Defendant title company.⁵ In addition, there is nothing in the record indicating that Investors or any other Defendant title company had an agreement or understanding with BOMC that it would serve as settlement agent, close loans, or disburse funds on any of the loans originated by LMS and sold to BOMC. In fact, there is no evidence whatsoever that BOMC had any communication with Investors or any other Defendant title company until after LMS was forced into bankruptcy in March 1994.⁶

⁵ In addition to its fraud and breach of fiduciary duty claims, BOMC suggests at various points in its brief that Investors is directly responsible for fraudulent misrepresentations made by others, apparently including Defendant Joseph Iadevito, Defendant Teresa Janson, LMS, and PBCS. For example, in its response brief BOMC states that "LMS was the duly authorized agent of Investors to sign documents representing Investors to be LMS's Settlement Agent and disbursing entity, and as a result there was an understanding between Investors and BOMC that Investors was serving in that capacity." Pl.'s Resp. Br. at 2, ¶ 14, 15, 16. This bare assertion, which is discussed below in connection with BOMC's claims for breach of fiduciary duty, is unsupported by any facts in the record.

⁶The Court notes that in the fall of 1993 BOMC received notification from First American Title Company, which is not a party to this lawsuit, that, contrary to the statement in the HUD-1 delivered to BOMC by LMS, First American had not closed or disbursed funds on a certain LMS loan refinance transaction. The HUD-1 indicated that First American had served as the "Settlement Agent." BOMC did not contact First American following receipt of this notification.

The Court analyzes BOMC's fraud and breach of fiduciary duty claims in light of these facts.

III

Missouri law requires nine elements to establish fraud: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity, or his or her ignorance of its truth, (5) the speaker's intention that it should be acted on by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of the falsity of the representation, (7) the hearer's reliance on the representation being true, (8) his or her right to rely thereon, and (9) the hearer's consequent and proximately caused injury. Emerick v. Mutual Benefit Life Ins. Co., 756 S.W.2d 513, 519 (Mo. 1988) (*en banc*). Failure to establish any one of the essential elements of fraud is fatal to recovery. *Id.* In addition, a plaintiff alleging fraud must establish each element of fraud by clear and convincing evidence. See Rackley v. Rackley, 922 S.W.2d 49, 52 (Mo. Ct. App. 1996); Centerre Bank of Independence, N.A. v. Bliss, 765 S.W.2d 276, 284 (Mo. Ct. App. 1988) (stating that "[t]he plaintiff bears the burden of proof for each element of fraud and must satisfy that burden with clear and convincing evidence").

To establish a fiduciary relationship, Missouri law requires the following elements: (1) as between the parties, one must be subservient to the dominant mind and will of the other as a result of age, state of health, illiteracy, mental disability, or ignorance; (2) things of value such as land, monies, a business, or other things of value which are the property of the subservient person must be possessed or managed by the dominant party; (3) there must be a surrender of independence by the subservient party to the dominant party; (4) there must be an automatic or habitual manipulation of the actions of the subservient party by the dominant party; and (5) there must be a showing that the subservient party places a trust and confidence in the dominant party. Emerick, 756 S.W.2d at 526-27. However, "[f]iduciary duty is not created by a unilateral decision to repose trust and confidence; it derives from the conduct or undertaking of the purported fiduciary

which is recognized by the law as justifying such reliance.” Farmers Ins. Co. v. McCarthy, 871 S.W.2d 82, 87 (Mo. Ct. App. 1994).

Investors was involved with two of the 31 refinance transactions at issue in this case: LMS ordered title insurance policies⁷ from Investors for one transaction involving Diane Rau and one involving Rufus and Judy Sisson. The Court finds that the material facts involved in these transactions are uncontroverted, and that Investors is entitled to summary judgment on BOMC’s fraud and breach of fiduciary duty claims against it.

BOMC has not alleged--much less proved by clear and convincing evidence--any facts that would establish the elements of fraud. The first element of fraud is a representation. Investors made no representations to BOMC. Indeed, BOMC had no contact with Investors until after LMS collapsed in March 1994. Thus, any claim of fraud must rest on Investor’s failure to speak when it had a duty to do so. A duty to disclose information exists where “a classical fiduciary duty exists or where one party has superior knowledge which is not within the fair and reasonable reach of the other party.” Ringstreet Northcrest, Inc. v. Bisanz, 890 S.W.2d 713, 720 (Mo. Ct. App. 1995). Whether a duty to disclose exists, and whether the circumstances amount to fraud, must be determined from the facts of each case. *Id.* As discussed above, none of the Defendant title companies, including Investors, had any contractual relationship with BOMC, nor are there facts giving rise to a fiduciary relationship between Investors and BOMC. Accordingly, Investors had no duty to speak based on fiduciary duty. In addition, there is no evidence that Investors had any superior knowledge that was not within BOMC’s power to discover, which would give rise to a duty to speak. Indeed, the record shows that BOMC knew, or should have known, that LMS was closing the loans at issue and disbursing funds: the loan purchase agreement specifically

⁷As the Court noted in its order granting summary judgment in favor of the Defendant title companies on the homeowners’ claims, each Defendant title company, including Investors, issued a “lender’s policy” title commitment on each transaction at issue in this case. A lender’s policy commitment is issued solely in favor of the lender, and is not intended to benefit the owner.

stated that LMS would close the loans; BOMC sent funds for disbursal directly to LMS; and documents sent to BOMC after BOMC funded the loans reflected the fact that LMS had been closing and disbursing funds on these loans.⁸ In summary, BOMC's inability to produce evidence that Investors failed to communicate with BOMC when it had a duty to do so is fatal to its fraud claim.

In addition, BOMC's claim against Investors for breach of fiduciary duty fails because there is no evidence to support the existence of a fiduciary relationship between BOMC and Investors. There is no evidence that BOMC was subservient to Investors in any way; that BOMC surrendered its independence to Investors; that Investors habitually manipulated BOMC's actions; or that BOMC placed trust and confidence in Investors. Instead, the record indicates that there was no legal relationship between BOMC and Investors at any time. For example, BOMC and Investors had no contractual relationship--Investors issued loan policy commitments to LMS, not BOMC. Indeed, there was no communication between Investors and BOMC until after certain title companies, including Investors, forced LMS into bankruptcy. Viewing all the facts in the light most favorable to BOMC, it is clear that Investors is entitled to summary judgment on the claim for fraud and the claim for breach of fiduciary duty.

IV

In its response brief, BOMC attempts to dispute Investors's statement of uncontroverted facts. These efforts are inadequate and must be rejected. For example, Investors states that BOMC and LMS executed a purchase agreement in April, 1993 which established the terms and conditions under which LMS would sell loans to BOMC. Def. Investors Title Company's Br. at 3, ¶ 7. BOMC disputes this contention, asserting that "The representation that title companies would conduct the closings and disburse BOMC's money was an inducing representation to the

⁸ The Court notes that under the terms of the loan purchase agreement, BOMC could have exercised its right to demand repurchase of loans not closed in compliance with its policies. Loan Purchase Agreement, ¶ 10.

Purchase Agreement and is therefore a part of BOMC's contract with LMS." Pl.'s Resp. Br. at 1, ¶ 7. BOMC purports to substantiate this assertion with citation to an affidavit by David Laughlin, president of BOMC. However, self-serving affidavits such as this, without more, cannot form the basis of a successful defense against summary judgment. See Murray v. City of Sapulpa, 45 F.3d 1417, 1422 (10th Cir. 1995) ("To survive summary judgment, 'nonmovant's affidavits must be based on personal knowledge and set forth facts that would be admissible into evidence; conclusory and self-serving affidavits are not sufficient.'). Furthermore, even assuming that LMS made any alleged "inducing representations" to the effect that Investors would close loans and disburse funds, such representations could not bind Investors because there is nothing to support the contention either that any such "representations" were made for or on behalf of Investors, or that Investors was in any way subject to the terms of the loan purchase agreement.⁹

BOMC also claims, with reference to the Laughlin affidavit, that the purchase agreement did not provide that LMS would physically close the loans sold to BOMC; that BOMC's contract with LMS instead in some way required that Defendant title companies close on the loans; and that the purchase agreement was only part of the contract. Pl.'s Rep. Br. at 1, ¶¶ 8 & 9. These alleged "facts" are simply without support in the record. Paragraph 2 of the purchase agreement specifically states that LMS would close the loans in LMS's name. Nothing in the agreement required Investors or any other Defendant title company to close the loans to be sold to BOMC, and there is no evidence in the record, except for the conclusory assertions in the Laughlin affidavit, of any other contract or agreement between LMS and BOMC requiring that any Defendant title company close on loans or disburse funds. Furthermore, as explained above, the

⁹The Court observes that even if Investors was subject to the terms of the loan purchase agreement, evidence about representations not memorialized in that agreement is parol evidence and cannot be considered when deciding this motion for summary judgment. Unless a written contract is ambiguous, courts determine the meaning and intention of a contract solely by reference to the language of the contract itself. See Paul's Rod & Bearing, LTD. v. Kelly, 847 S.W.2d 68, 73 (Mo. Ct. App. 1991).

record contains no evidence of an agreement between BOMC and Investors, or any other Defendant title company. In short, there is simply no basis upon which to find Investors or any other Defendant title company liable to BOMC for fraud or breach of fiduciary duty.

Investors contends that it did not serve as settlement agent, close, or disburse funds on either of the two transactions at issue. Furthermore, Investors contends that there was no agreement between Investors and BOMC that they would serve as settlement agent, or close or disburse loans, nor did BOMC or LMS ever ask Investors to serve as settlement agent, or close or disburse loans. Def. Investors' Br. at 5, ¶¶ 14, 15 & 16. BOMC undertakes to controvert these contentions, claiming that

Investors agreed with, acquiesced in, authorized and taught LMS/PBCS to show Investors as, and to sign Investors' name as, Settlement Agent and disbursing entity on HUD-1 forms, on Closing Instructions and otherwise, on an ongoing basis, in refinance transactions LMS originated for purchase by BOMC and which LMS closed and disbursed. Investors knew said documents would be given to BOMC and intended to deceive BOMC through non-disclosure of who the Settlement Agent and disbursing entity really was, through misrepresentations of same on HUD-1 forms, Closing Instructions, and otherwise. By agreeing to be shown as Settlement Agent on the HUD-1, Investors undertook the fiduciary duty to dispose of BOMC's money/the homeowners' loan proceeds as required in the HUD-1, which includes payoff of the prior mortgage. . . . In addition, LMS was the duly authorized agent of Investors to sign documents representing Investors to be LMS's Settlement Agent and disbursing entity, and as a result there was an understanding between Investors and BOMC that Investors was serving in that capacity.

Pl.'s Resp. Br. at 2, ¶ 14, 15, 16. In effect, BOMC asserts both that Investors was directly responsible for the fraudulent conduct of LMS and PBCS, and that Investors breached its alleged fiduciary duty to BOMC by failing to prevent the fraudulent conduct of LMS and PBCS. In support of these assertions, BOMC cites, among other documents, an affidavit by Defendant Teresa Janson,¹⁰ former president of PBCS, and wife of Defendant Joseph Iadevito. Ms. Janson's

¹⁰ In addition to Ms. Janson's affidavit, BOMC cites to Defendant Joseph Iadevito's answer, the First Amended Complaint, a deposition of Defendant Joseph Iadevito, HUD-1 forms and closing documents related to the transactions at issue, and depositions of various employees of the Defendant title companies. Like the Janson affidavit, none of these documents creates a genuine issue of material fact in this case.

affidavit states that Investors knew that LMS prepared closing papers showing Investors as settlement agent. Ms. Janson further states that “PBCS, who prepared LMS’s HUD-1 Forms, showed a title company as Settlement Agent . . . and was taught to do this by several title companies, including Old Republic, Capital Title and Investors Title.”

Ms. Janson’s assertions in her affidavit do not raise genuine issues of material fact. As Investors points out in its reply brief, Ms. Janson’s statements in her affidavit contradict her earlier deposition testimony, in which she stated that she was unaware of any agreement between Investors and PBCS that Investors would be shown as settlement agent. Furthermore, Ms. Janson does not state with particularity exactly what Investors “taught” PBCS, or the circumstances under which any alleged teaching occurred. The Court is left to wonder when, where, and what happened. This affidavit is not credible evidence. More importantly, for purposes of this motion, Ms. Janson’s affidavit is vague and conclusory and lacks the particularity required in a case of alleged fraud to raise a genuine issue of material fact.

BOMC also cites to excerpts from a deposition of Defendant Joseph Iadevito to support its contention that Investors owed a fiduciary duty to BOMC. BOMC states that “[a] fiduciary duty exists in a refinance transaction where the title company knows it is shown as the Settlement Agent on the HUD-1 Form, regardless of whether the title company gets the money in its own hands.” Pl.’s Resp. Br. at 4, ¶ (k). To support this assertion, BOMC cites the following exchange from a deposition of Mr. Iadevito:

Q. [by counsel for Defendant Old Republic Title Co.] Why do you believe that the defendant title companies owed a fiduciary duty to Bancoklahoma [sic] to apply the proceeds of the mortgages in the manner required by the closing documents when in fact those proceeds were never delivered to the defendant title companies by [LMS]?

A. Okay. Now you are going back to my point of relevance. I don’t believe it’s relevant that the money never got to the title company in terms of whether they were responsible or had a fiduciary duty to who was shown on -- to the investor who sent the money based on what is shown on the closing documents. That was my relevant point. I don’t think that that violates in any form or fashion the

fiduciary responsibility that they had a responsibility to get the money and disburse the money based on what was shown on the documents.

The record is devoid of any evidence that any Defendant title company, including Investors, knew that LMS or PBCS was showing a title company as Settlement Agent on the HUD-1 forms. Furthermore, Mr. Iadevito is currently in federal prison, after pleading guilty to fraud in connection with a \$653,000 transaction involving United Postal Savings. Indeed, BOMC has stated in previous filings that Mr. Iadevito "ran a classic Ponzi scheme," and that his company, LMS, "committed RICO violations against BOMC." Pl.'s Br. in Opp'n to Mot. for Partial Summ. J. at 10, ¶ 5. The effrontery attendant to citing this felon's opinion of Investors's alleged fiduciary duty is manifest. More importantly, for purposes of this motion, his legal conclusion does not provide factual support for BOMC's contention that a fiduciary duty existed on the part of Investors.

In summary, BOMC has not raised any genuine issues of material fact with respect to the two Investors transactions at issue in this case. The uncontroverted facts and applicable law compel the conclusion that Investors is not liable for fraud or breach of fiduciary duty. Accordingly, Investors's motion for summary judgment (Docket # 283) is hereby granted.

IT IS SO ORDERED

This 13th day of August, 1997.


Sven Erik Holmes
United States District Judge

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

F I L E D
AUG 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BANCOKLAHOMA MORTGAGE CORP.,
Plaintiff,
v.
JOSEPH A. IADEVITO, TERESA M. JANSON,
PETER M. SHAW, CAPITAL TITLE COMPANY,
INC., INVESTORS TITLE COMPANY, OLD
REPUBLIC TITLE COMPANY of ST. LOUIS,
U.S. TITLE GUARANTY COMPANY, INC.,
AND U.S. TITLE GUARANTY COMPANY
OF ST. CHARLES, INC.,
Defendants.

Case No. 94-C-847-H

ENTERED ON DOCKET
DATE 8-14-97

ORDER

This matter comes before the Court on a motion for summary judgment by Defendants U.S. Title Guaranty Company, Inc. ("U.S. Title") and U.S. Title Guaranty Company of St. Charles, Inc. ("U.S. Title of St. Charles") (Docket # 286).

The Court has recited the facts of this case in its previous orders granting summary judgment in favor of each of the title company Defendants¹ on Plaintiff's civil RICO claims (Docket # 269) and on the state law claims assigned to Plaintiff by 31 homeowners (Docket # 348). As stated in those orders, Plaintiff BancOklahoma Mortgage Company ("BOMC") is an Oklahoma corporation whose business includes purchasing residential home mortgage loans and reselling them in the secondary market while retaining certain loan servicing rights. Lenders Mortgage Services, Inc. ("LMS") was a Missouri corporation which, until it was forced into bankruptcy in March 1994, originated residential home mortgage loans principally in the St. Louis, Missouri area for sale to mortgage loan companies and other upstream investors, including

¹Defendant Joseph Iadevito and Defendant Teresa Janson did not join in the title companies' motions for summary judgment.

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Parties proved by Nibst CU 8-13-

BOMC. In April 1993, BOMC entered into an agreement to purchase home mortgage loans from LMS. The purchase agreement provided that LMS would close all the loans that it originated and sold to BOMC.

Between May 1993 and March 1994, BOMC purchased approximately 700 loans from LMS. On March 18, 1994, certain St. Louis titles companies forced LMS into involuntary bankruptcy. Soon afterwards, BOMC learned that LMS had not paid off the prior mortgage on 31 of the refinance loans that BOMC had purchased.² BOMC paid the outstanding mortgages on these loans and was assigned all claims by each of the 31 homeowners. BOMC then sued the defendants in this case, alleging fraud, breach of fiduciary duty, and violations of the civil RICO statute, 18 U.S.C. § 1961, *et seq.* As noted above, the Court has already granted summary judgment in favor of Defendant title companies on the RICO claims and the state law claims of the homeowners. Defendants U.S. Title and U.S. Title of St. Charles now move for summary judgment on BOMC's claims of fraud and breach of fiduciary duty.

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 Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), *cert. denied*, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court held that

[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.

²Pleadings filed by BOMC initially indicated that LMS failed to pay off the prior mortgage on 42 of the refinance loans. However, BOMC's appendix contains a "Moving Homeowners Chart" which shows that LMS did not pay off the prior mortgage on 31 refinance loans. The Court accepts this chart as stating the correct number of loans at issue.

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) (holding that “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 where “there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” Id. at 250. As the Supreme Court held, “[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); see also Anderson, 477 U.S. at 250 (“there 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

The material facts necessary to decide this motion for summary judgment are uncontroverted. Accordingly, the Court finds that there is no genuine issue of material fact, and summary judgment on BOMC’s fraud and breach of fiduciary duty claims against Defendants U.S.

Title Guaranty Company (“U.S. Title”) and U. S. Title Guaranty Company of St. Charles (“U.S. Title of St. Charles”) is appropriate. Applicable choice of law rules dictate that Missouri law applies to BOMC’s state law claims.³ Therefore, the Court will analyze BOMC’s fraud and breach of fiduciary duty claims under Missouri law.⁴

Before analyzing BOMC’s claims against U.S. Title and U.S. Title of St. Charles, the Court must first carefully review the loan purchase agreement between BOMC and LMS. As noted above, the agreement specifically provided that LMS would close the loans it originated for sale to BOMC: paragraph 2 of the agreement stated that “Seller [LMS] agrees to originate Loans and after receipt of approval as described in this Agreement, close Loans in Seller’s name and to deliver to Purchaser [BOMC] for purchase by Purchaser, in accordance with the terms of this Agreement, the documents evidencing, securing and insuring such Loans.” Loan Purchase Agreement, ¶ 2 (emphasis added). Neither U.S. Title nor U.S. Title of St. Charles was a party to the agreement, nor was either company in any way subject to its terms. Moreover, the agreement

³A federal court sitting in diversity must apply the choice of law rules of the state in which it sits. Barrett v. Tallon, 30 F.3d 1296, 1300 (10th Cir. 1994). The same choice of law rule applies when a federal court exercises supplemental jurisdiction over state law claims in a federal question action. See Paracor Finance, Inc. v. General Elec. Cap. Corp., 96 F.3d 1151, 1164 (9th Cir. 1996); Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132, 136 (6th Cir. 1996).

Oklahoma choice of law rules require courts to apply the tort law of the state with the most significant relationship to the occurrence and to the parties. See Barrett, 30 F.3d at 1300; White v. White, 618 P.2d 921, 924 (Okla.1980). In making this determination, courts consider the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation and place of business of the parties; and the place where the relationship, if any, between the parties occurred. Id. In this case, BOMC’s alleged injuries occurred in Oklahoma, and it is incorporated in and resides in Oklahoma. However, other factors significantly outweigh these facts and compel application of Missouri law: the conduct of U.S. Title and U.S. Title of St. Charles occurred in Missouri, where they are incorporated and reside, and any alleged relationship between BOMC and either U.S. Title and U.S. Title of St. Charles would have existed in Missouri.

⁴BOMC argues that the Court should apply Oklahoma law to its state law claims. As stated above, applicable choice of law rules dictate that Missouri law applies in this matter. The Court notes, however, that BOMC has offered no authorities which support the conclusion that Oklahoma tort law, as applied to the facts of this case, is substantively different from that of Missouri.

did not state or even suggest that either U.S. Title or U.S. Title of St. Charles would serve as settlement agents, close loans, or disburse loan proceeds. Furthermore, the agreement provided that BOMC was not obligated to purchase loans originated by LMS unless certain conditions were satisfied, including BOMC's approval of a loan origination package prior to closing, and the closing of such loan in accordance with BOMC's instructions to LMS. Loan Purchase Agreement, ¶ 6. The agreement also required LMS to repurchase from BOMC any loans closed without compliance with BOMC's conditions and requirements, Loan Purchase Agreement, ¶ 7, and to indemnify BOMC for any losses or claims arising out of the origination, processing, closing, or purchase of any loan purchased by BOMC from LMS, Loan Purchase Agreement, ¶ 10.

The loan purchase agreement created a relationship between BOMC and LMS, and set forth all the terms and conditions of that relationship. The agreement did not in any way create a relationship between BOMC and any Defendant title company, including U.S. Title and U.S. Title of St. Charles. Nor did the terms of the agreement create an agency relationship between LMS and any Defendant title company, including U.S. Title and U.S. Title of St. Charles.⁵ In addition, there is nothing in the record indicating that any Defendant title company, including U.S. Title and U.S. Title of St. Charles, had an agreement or understanding with BOMC that it would serve as settlement agent, close loans, or disburse funds on any of the loans originated by LMS and sold to BOMC. In fact, there is no evidence that BOMC had any communication with U.S. Title or

⁵ In addition to its fraud and breach of fiduciary duty claims, BOMC suggests at various points in its brief that U.S. Title and U.S. Title of St. Charles are directly responsible for fraudulent misrepresentations made by others, apparently including Defendant Joseph Iadevito, Defendant Teresa Janson, LMS and PBCS. For example, in its response brief BOMC states that "LMS was the duly authorized agent of U.S. Title [and U.S. Title St. Charles] to sign documents representing U.S. Title [and U.S. Title St. Charles] to be LMS's Settlement Agent and disbursing entity, and as a result there was an understanding between U.S. Title [and U.S. Title St. Charles] and BOMC that U.S. Title [and U.S. Title St. Charles] was serving in that capacity." Pl.'s Resp. Br. at 1, ¶¶ 9, 11-17 & 26. This bare assertion, which is discussed below in connection with BOMC's claims for breach of fiduciary duty, is unsupported by any facts in the record.

U.S. Title of St. Charles or any other Defendant title company until after LMS was forced into bankruptcy in March 1994.⁶

The Court analyzes BOMC's fraud and breach of fiduciary duty claims in light of these facts.

III

Missouri law requires nine elements to establish fraud: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity, or his or her ignorance of its truth, (5) the speaker's intention that it should be acted on by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of the falsity of the representation, (7) the hearer's reliance on the representation being true, (8) his or her right to rely thereon, and (9) the hearer's consequent and proximately caused injury. Emerick v. Mutual Benefit Life Ins. Co., 756 S.W.2d 513, 519 (Mo. 1988) (*en banc*). Failure to establish any one of the essential elements of fraud is fatal to recovery. *Id.* In addition, a plaintiff alleging fraud must establish each element of fraud by clear and convincing evidence. See Rackley v. Rackley, 922 S.W.2d 49, 52 (Mo. Ct. App. 1996); Centerre Bank of Independence, N.A. v. Bliss, 765 S.W.2d 276, 284 (Mo. Ct. App. 1988) (stating that "[t]he plaintiff bears the burden of proof for each element of fraud and must satisfy that burden with clear and convincing evidence").

To establish a fiduciary relationship, Missouri law requires the following elements: (1) as between the parties, one must be subservient to the dominant mind and will of the other as a result of age, state of health, illiteracy, mental disability, or ignorance; (2) things of value such as land, monies, a business, or other things of value which are the property of the subservient person must be possessed or managed by the dominant party; (3) there must be a surrender of independence by

⁶The Court notes that in the fall of 1993 BOMC received notification from First American Title Company, which is not a party to this lawsuit, that, contrary to the statement in the HUD-1 delivered to BOMC by LMS, First American had not closed or disbursed funds on a certain LMS loan refinance transaction. The HUD-1 indicated that First American had served as the "Settlement Agent." BOMC did not contact First American following receipt of this notification.

the subservient party to the dominant party; (4) there must be an automatic or habitual manipulation of the actions of the subservient party by the dominant party; and (5) there must be a showing that the subservient party places a trust and confidence in the dominant party. Emerick, 756 S.W.2d at 526-27. However, “[f]iduciary duty is not created by a unilateral decision to repose trust and confidence; it derives from the conduct or undertaking of the purported fiduciary which is recognized by the law as justifying such reliance.” Farmers Ins. Co. v. McCarthy, 871 S.W.2d 82, 87 (Mo. Ct. App. 1994).

U.S. Title and U.S. Title of St. Charles, respectively, were involved with one and eleven of the 31 refinance transactions at issue in this case: LMS ordered a title insurance policy⁷ from U.S. Title for one transaction involving Marietta Veluz; LMS ordered title insurance policies from U.S. Title of St. Charles for eleven separate transactions involving James Basily, David and Tammy Betach, Bill and Sonya Crum, Cheryl Dunham, Gary and Janice Gerber, Barry and Lanette Gibson, Michelle and Stephen Grojean, Mark and Barbara Haase, Robert and Rachel Kentner, John and Marjorie McConnell, and Danny and Sherri Meyer. The Court finds that the material facts involved in these transactions are uncontroverted, and that U.S. Title and U.S. Title of St. Charles are entitled to summary judgment on BOMC’s fraud and breach of fiduciary duty claims against them.

BOMC has not alleged--much less proved by clear and convincing evidence--any facts that would establish the elements of fraud. The first element of fraud is a representation. Neither U.S. Title nor U.S. Title St. Charles made any representations to BOMC. Indeed, BOMC had no contact with either U.S. Title or U.S. Title St. Charles until after LMS collapsed in March 1994. Thus, any claim of fraud must rest on a failure to speak when these title companies had a duty to

⁷As the Court noted in its order granting summary judgment in favor of the Defendant title companies on the homeowners’ claims, each Defendant title company, including U.S. Title and U.S. Title St. Charles, issued a “lender’s policy” title commitment on each transaction at issue in this case. A lender’s policy commitment is issued solely in favor of the lender, and is not intended to benefit the owner.

do so. A duty to disclose information exists where “a classical fiduciary duty exists or where one party has superior knowledge which is not within the fair and reasonable reach of the other party.” Ringstreet Northcrest, Inc. v. Bisanz, 890 S.W.2d 713, 720 (Mo. Ct. App. 1995). Whether a duty to disclose exists, and whether the circumstances amount to fraud, must be determined from the facts of each case. Id. As discussed above, none of the Defendant title companies, including U.S. Title and U.S. Title St. Charles, had any contractual relationship with BOMC, nor are there facts giving rise to a fiduciary relationship between these title companies and BOMC.

Accordingly, neither U.S. Title nor U.S. Title St. Charles had a duty to speak based on fiduciary duty. In addition, there is no evidence that either U.S. Title or U.S. Title St. Charles had any superior knowledge that was not within BOMC’s power to discover, which would give rise to a duty to speak. Indeed, the record shows that BOMC knew, or should have known, that LMS was closing the loans at issue and disbursing funds: the loan purchase agreement specifically stated that LMS would close the loans; BOMC sent funds for disbursement directly to LMS; and documents sent to BOMC after BOMC funded the loans reflected the fact that LMS had been closing and disbursing these loans.⁸ In summary, BOMC’s inability to produce evidence that either U.S. Title or U.S. Title of St. Charles failed to communicate with BOMC when they had a duty to do so is fatal to its fraud claim.

In addition, BOMC’s claim for breach of fiduciary duty fails because there is no evidence to support the existence of a fiduciary relationship between BOMC and either U.S. Title or U.S. Title St. Charles. There is no evidence that BOMC was subservient to either of these title companies in any way; that BOMC surrendered its independence to these title companies; that these title companies habitually manipulated BOMC’s actions; or that BOMC placed trust and confidence in these title companies. Instead, the record indicates that there was no legal

⁸ The Court notes that under the terms of the loan purchase agreement, BOMC could have exercised its right to demand repurchase of loans not closed in compliance with its policies. Loan Purchase Agreement, ¶ 10.

relationship between BOMC and U.S. Title or U.S. Title St. Charles at any time. For example, BOMC and U.S. Title and U.S. Title of St. Charles had no contractual relationship--these title companies issued loan policy commitments to LMS, not BOMC. Indeed, there was no communication between either U.S. Title or U.S. Title St. Charles and BOMC until after certain title companies forced LMS into bankruptcy. Viewing all the facts in the light most favorable to BOMC, it is clear that both U.S. Title and U.S. Title St. Charles are entitled to summary judgment on the claim for fraud and the claim for breach of fiduciary duty.

IV

In its response brief, BOMC attempts to dispute the statement of uncontroverted facts by U.S. Title and U.S. Title St. Charles. These efforts are inadequate and must be rejected. For example, U.S. Title and U.S. Title St. Charles state that BOMC and LMS executed a purchase agreement in April, 1993 which established the terms and conditions under which LMS would sell loans to BOMC. Def. U.S. Title and U.S. Title St. Charles's Br. at 2, ¶ 6. BOMC disputes this contention, asserting that "The representation that title companies would conduct the closings and disburse BOMC's money was an inducing representation to the Purchase Agreement and is therefore a part of BOMC's contract with LMS." Pl.'s Resp. Br. at 1, ¶ 6. BOMC purports to substantiate this assertion with citation to an affidavit by David Laughlin, president of BOMC. However, self-serving affidavits such as this, without more, cannot form the basis of a successful defense against summary judgment. See Murray v. City of Sapulpa, 45 F.3d 1417, 1422 (10th Cir. 1995) ("To survive summary judgment, 'nonmovant's affidavits must be based on personal knowledge and set forth facts that would be admissible into evidence; conclusory and self-serving affidavits are not sufficient.'"). Furthermore, even assuming that LMS made any alleged "inducing representations" to the effect that U.S. Title and U.S. Title of St. Charles would close loans and disburse funds, such representations could not bind these title companies because there is nothing to support the contention either that any such "representations" were made for or on

behalf of U.S. Title and U.S. Title St. Charles or that U.S. Title and U.S. Title St. Charles were subject to the terms of the loan purchase agreement.⁹

In their brief, U.S. Title and U. S. Title of St. Charles incorporate by reference the facts set forth in the briefs of the other Defendant Title Companies. BOMC correspondingly incorporates by reference its response briefs to the other Defendant title companies' motions. In these briefs, BOMC claims, with reference to the Laughlin affidavit, that the purchase agreement did not provide that LMS would physically close the loans sold to BOMC; that BOMC's contract with LMS instead in some way required that Defendant title companies close the loans; and that the purchase agreement was only part of the contract. Pl.'s Rep. Br. to Investors motion at 1, ¶¶ 8 & 9. These alleged "facts" are simply without support in the record. Paragraph 2 of the purchase agreement specifically states that LMS would close the loans in LMS's name. Nothing in the agreement required US. Title and U.S. Title of St. Charles or any other Defendant title company to close on the loans to be sold to BOMC, and there is no evidence in the record, except for the conclusory assertions in the Laughlin affidavit, of any other contract or agreement between LMS and BOMC requiring that any Defendant title company close on loans or disburse funds. Furthermore, as explained above, the record contains no evidence of an agreement between BOMC and US. Title and U.S. Title of St. Charles, or any other Defendant title company. In short, there is simply no basis upon which to find US. Title and U.S. Title of St. Charles or any other Defendant title company liable to BOMC for fraud or breach of fiduciary duty.

U.S. Title and U.S. Title St. Charles contend that they did not serve as settlement agents, close, or disburse funds on any of the twelve transactions in which they were involved.

⁹The Court observes that even if U.S. Title and U.S. Title St. Charles were subject to the terms of the loan purchase agreement, evidence regarding representations not memorialized in that agreement is parol evidence and cannot be considered when deciding this motion for summary judgment. Unless a written contract is ambiguous, courts determine the meaning and intention of a contract solely by reference to the language of the contract itself. See Paul's Rod & Bearing, LTD. v. Kelly, 847 S.W.2d 68, 73 (Mo. Ct. App. 1991).

Furthermore, these title companies contend that there was no agreement between themselves and BOMC that they would serve as settlement agents, or close or disburse loans, nor did BOMC or LMS ever ask them to serve as settlement agents, or close or disburse loans. Def. U.S. Title and U. S. Title of St. Charles's Br. at 4-5, ¶¶ 11 & 14. BOMC undertakes to controvert these contentions, claiming that

U.S. Title [and U.S. Title St. Charles] agreed with, acquiesced in, authorized and taught LMS/PBCS to show U.S. Title [and U.S. Title St. Charles] as, and to sign U.S. Title [and U.S. Title St. Charles]'s name as, Settlement Agent[s] and disbursing entit[ies] on HUD-1 forms, on Closing Instructions and otherwise, on an ongoing basis, in refinance transactions LMS originated for purchase by BOMC and which LMS closed and disbursed. U.S. Title [and U.S. Title St. Charles] knew said documents would be given to BOMC and intended to deceive BOMC through non-disclosure of who the Settlement Agent and disbursing entity really was, through misrepresentations of same on HUD-1 forms, Closing Instructions, and otherwise. By agreeing to be shown as Settlement Agent[s] on the HUD-1, U.S. Title [and U.S. Title St. Charles] undertook the fiduciary duty to dispose of BOMC's money/the homeowners' loan proceeds as required in the HUD-1, which includes payoff of the prior mortgage. . . . In addition, LMS was the duly authorized agent of U.S. Title [and U.S. Title St. Charles] to sign documents representing U.S. Title [and U.S. Title St. Charles] to be LMS's Settlement Agent and disbursing entity, and as a result there was an understanding between U.S. Title [and U.S. Title St. Charles] and BOMC that U.S. Title [and U.S. Title St. Charles] was serving in that capacity.

Pl.'s Resp. Br. at 1, ¶¶ 9, 11-17 & 26. In effect, BOMC asserts both that these two title companies were directly responsible for the fraudulent conduct of LMS and PBCS, and that these two title companies breached their alleged fiduciary duty to BOMC by failing to prevent the fraudulent conduct of LMS and PBCS. In support of these assertions, BOMC cites, among other documents, an affidavit by Defendant Teresa Janson,¹⁰ former president of PBCS, and wife of Defendant Joseph Iadevito. Ms. Janson's affidavit states that U.S. Title and U.S. Title St. Charles knew that LMS prepared closing papers showing them as settlement agents. Ms. Janson further

¹⁰ In addition to Ms. Janson's affidavit, BOMC cites to Defendant Joseph Iadevito's answer, the First Amended Complaint, a deposition of Defendant Joseph Iadevito, HUD-1 forms and closing documents related to the transactions at issue, and depositions of various employees of the Defendant title companies. Like the Janson affidavit, none of these documents creates a genuine issue of material fact in this case.

states that "PBCS, who prepared LMS's HUD-1 Forms, showed a title company as Settlement Agent . . . and was taught to do this by several title companies, including Old Republic, Capital Title and Investors Title."

Ms. Janson's assertions in her affidavit do not raise genuine issues of material fact. As U.S. Title and U.S. Title of St. Charles point out in their reply brief, Ms. Janson's statements in her affidavit contradict her earlier deposition testimony, in which she stated that she was unaware of any express agreement between any title company and PBCS that a title company would be shown as settlement agent.

Ms. Janson also states in her affidavit that PBCS "was taught [to show a title company as settlement agent] by several title companies, including Old Republic, Capital Title and Investors Title." The Court notes that Ms. Janson did not identify either U.S. Title or U.S. Title St. Charles among those title companies who allegedly "taught" PBCS to show a title company as settlement agent--by implication, it appears that U.S. Title and U.S. Title St. Charles did not at any time "teach" PBCS to show a title company as settlement agent. Thus, BOMC's statement that U.S. Title and U.S. Title St. Charles "taught" PBCS to do anything is totally unsupported in the record. Furthermore, the Janson affidavit lacks the particularity required in a case of alleged fraud to raise a genuine issue of material fact in this case.

BOMC also cites to excerpts from a deposition of Defendant Joseph Iadevito to support its contention that U.S. Title and U.S. Title St. Charles owed a fiduciary duty to BOMC. BOMC states that "[a] fiduciary duty exists in a refinance transaction where the title company knows it is shown as the Settlement Agent on the HUD-1 Form, regardless of whether the title company gets the money in its own hands." Pl.'s Resp. Br. at 3, ¶ 9(j). To support this assertion, BOMC cites the following exchange in a deposition of Mr. Iadevito:

Q. Why do you believe that the defendant title companies owed a fiduciary duty to Bancoklahoma [sic] to apply the proceeds of the mortgages in the manner required by the closing documents when in fact those proceeds were never delivered to the defendant title companies by [LMS]?

A. Okay. Now you are going back to my point of relevance. I don't believe it's relevant that the money never got to the title company in terms of whether they were responsible or had a fiduciary duty to who was shown on -- to the investor who sent the money based on what is shown on the closing documents. That was my relevant point. I don't think that that violates in any form or fashion the fiduciary responsibility that they had a responsibility to get the money and disburse the money based on what was shown on the documents.

The record is devoid of any evidence that any Defendant title company, including U.S. Title and U.S. Title Company of St. Charles, knew that LMS and PBCS were showing them as Settlement Agent on HUD-1 forms. Furthermore, Mr. Iadevito is currently in federal prison, after pleading guilty to fraud in connection with a \$653,000 transaction involving United Postal Savings. Indeed, BOMC has stated in previous filings that Mr. Iadevito "ran a classic Ponzi scheme," and that his company, LMS, "committed RICO violations against BOMC." Pl.'s Br. in Opp'n to Mot. for Partial Summ. J. at 10, ¶ 5. The effrontery attendant to citing this felon's opinion of these two title companies' alleged fiduciary duty is manifest. More importantly, for purposes of this motion, his legal conclusion does not provide factual support for BOMC's claim that a fiduciary duty existed on the part of either of these two title companies.

In summary, BOMC has not raised any genuine issues of material fact with respect to the twelve transactions involving U.S. Title and U.S. Title St. Charles. The uncontroverted facts and applicable law compel the conclusion that these two title companies are not liable for fraud or breach of fiduciary duty. Accordingly, U.S. Title and U.S. Title St. Charles's motion for summary judgment (Docket # 286) is granted.

IT IS SO ORDERED

This 13TH day of August, 1997.


Sven Erik Holmes
United States District Judge

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

FILED
AUG 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BANCOKLAHOMA MORTGAGE CORP.,
Plaintiff,
v.
JOSEPH A. IADEVITO, TERESA M. JANSON,
PETER M. SHAW, CAPITAL TITLE COMPANY,
INC., INVESTORS TITLE COMPANY, OLD
REPUBLIC TITLE COMPANY of ST. LOUIS,
U.S. TITLE GUARANTY COMPANY, INC.,
AND U.S. TITLE GUARANTY COMPANY
OF ST. CHARLES, INC.,
Defendants.

Case No. 94-C-847-H

ENTERED ON DOCKET

DATE 8-14-97

ORDER

This matter comes before the Court on a motion for summary judgment by Defendant Capital Title Company, Inc. and Defendant Peter M. Shaw (Docket # 290).¹

The Court has recited the facts of this case in its previous orders granting summary judgment in favor of each of the Defendant title companies² on Plaintiff's civil RICO claims (Docket # 269) and on the state law claims assigned to Plaintiff by 31 homeowners (Docket # 348). As stated in those orders, Plaintiff BancOklahoma Mortgage Company ("BOMC") is an Oklahoma corporation whose business includes purchasing residential home mortgage loans and reselling them in the secondary market while retaining certain loan servicing rights. Lenders Mortgage Services, Inc. ("LMS") was a Missouri corporation which, until it was forced into bankruptcy in March 1994, originated residential home mortgage loans principally in the St. Louis, Missouri area for sale to mortgage loan companies and other upstream investors, including

¹For purposes of this motion, Mr. Shaw, who is president of Capital Title Company, Inc., will be referred to collectively with Capital Title Company as "Capital" or "Capital Title Company."

²Defendant Joseph Iadevito and Defendant Teresa Janson did not join in the title companies' motions for summary judgment.

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BOMC. In April 1993, BOMC entered into an agreement to purchase home mortgage loans from LMS. As discussed in greater detail below, the purchase agreement provided that LMS would close all the loans that it originated and sold to BOMC.

Between May 1993 and March 1994, BOMC purchased approximately 700 loans from LMS. On March 18, 1994, certain St. Louis titles companies forced LMS into involuntary bankruptcy. Soon afterwards, BOMC learned that LMS had not paid off the prior mortgage on certain refinance loans that BOMC had purchased.³ BOMC paid the respective homeowners the outstanding mortgages on these loans and was assigned all claims by each of the 31 homeowners involved in these refinance transactions. BOMC then sued Defendants, alleging fraud, breach of fiduciary duty, and violations of the civil RICO statute, 18 U.S.C. § 1961, *et seq.* As noted above, the Court has already granted summary judgment in favor of Defendant title companies on the RICO claims and the state law claims that were assigned to BOMC by the homeowners. Defendant Capital Title Company now moves for summary judgment on BOMC's claims of fraud and breach of fiduciary duty.

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 Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), *cert. denied*, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court held that

[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.

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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) (holding that “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 where “there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” Id. at 250. As the Supreme Court held, “[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); see also Anderson, 477 U.S. at 250 (“there 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

The material facts necessary to decide this motion for summary judgment are uncontroverted. Accordingly, the Court finds that there is no genuine issue of material fact, and

summary judgment on BOMC's claims for fraud and breach of fiduciary duty is appropriate. Applicable choice of law rules clearly dictate that Missouri law applies to BOMC's state law claims.⁴ Therefore, the Court will analyze BOMC's fraud and breach of fiduciary duty claims under Missouri law.⁵

Before analyzing BOMC's claims against Capital, the Court must first carefully review the loan purchase agreement between BOMC and LMS. As noted above, the agreement specifically provided that LMS would close the loans it originated for sale to BOMC: paragraph 2 of the agreement stated that "Seller [LMS] agrees to originate Loans and after receipt of approval as described in this Agreement, close Loans in Seller's name and to deliver to Purchaser [BOMC] for purchase by Purchaser, in accordance with the terms of this Agreement, the documents evidencing, securing and insuring such Loans." Loan Purchase Agreement, ¶ 2 (emphasis added). Capital was not a party to the agreement, nor was Capital in any way subject to its terms. Moreover, the agreement did not state or even suggest that Capital would serve as a settlement agent, close loans, or disburse loan proceeds. Furthermore, the agreement provided that BOMC

⁴A federal court sitting in diversity must apply the choice of law rules of the state in which it sits. Barrett v. Tallon, 30 F.3d 1296, 1300 (10th Cir. 1994). The same choice of law rule applies when a federal court exercises supplemental jurisdiction over state law claims in a federal question action. See Paracor Finance, Inc. v. General Elec. Cap. Corp., 96 F.3d 1151, 1164 (9th Cir. 1996); Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132, 136 (6th Cir. 1996).

Oklahoma choice of law rules require courts to apply the tort law of the state with the most significant relationship to the occurrence and to the parties. See Barrett, 30 F.3d at 1300; White v. White, 618 P.2d 921, 924 (Okla. 1980). In making this determination, courts consider the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation and place of business of the parties; and the place where the relationship, if any, between the parties occurred. Id. In this case, BOMC's alleged injuries occurred in Oklahoma, and it is incorporated in and resides in Oklahoma. However, other factors significantly outweigh these facts and compel application of Missouri law: Capital's conduct occurred in Missouri, where it is incorporated and resides, and any alleged relationship between BOMC and Capital would have existed in Missouri.

⁵BOMC argues that the Court should apply Oklahoma law to its state law claims. As stated above, applicable choice of law rules dictate that Missouri law applies in this matter. The Court notes, however, that BOMC has offered no authorities which support the conclusion that Oklahoma tort law, as applied to the facts of this case, is substantively different from that of Missouri.

was not obligated to purchase loans originated by LMS unless certain conditions were satisfied, including BOMC's approval of a loan origination package prior to closing, and the closing of such loan in accordance with BOMC's instructions to LMS. Loan Purchase Agreement, ¶ 6. The agreement also required LMS to repurchase from BOMC any loans closed without compliance with BOMC's conditions and requirements, Loan Purchase Agreement, ¶ 7, and to indemnify BOMC for any losses or claims arising out of the origination, processing, closing, or purchase of any loan purchased by BOMC from LMS, Loan Purchase Agreement ¶ 10.

The loan purchase agreement created a relationship between BOMC and LMS, and set forth the terms and conditions of that relationship. The agreement did not in any way create a relationship between BOMC and Capital or any other Defendant title company. Nor did the terms of the agreement create an agency relationship between LMS and Capital or any other Defendant title company.⁶ In addition, there is nothing in the record indicating that Capital or any other Defendant title company had an agreement or understanding with BOMC that it would serve as settlement agent, close loans, or disburse funds on any of the loans originated by LMS and sold to BOMC. In fact, there is no evidence whatsoever that BOMC had any communication with Capital or any other Defendant title company until after LMS was forced into bankruptcy in March 1994.⁷

⁶ In addition to its fraud and breach of fiduciary duty claims, BOMC suggests at various points in its brief that Capital is directly responsible for fraudulent misrepresentations made by others, apparently including Defendant Joseph Iadevito, Defendant Teresa Janson, LMS and PBCS. For example, in its response brief BOMC states that "LMS was the duly authorized agent of Capital to sign documents representing Capital to be LMS's Settlement Agent and disbursing entity, and as a result there was an understanding between Capital and BOMC that Capital was serving in that capacity." Pl.'s Resp. Br. at 2, ¶¶ 15 & 16. This bare assertion, which is discussed below in connection with BOMC's claims for breach of fiduciary duty, is unsupported by any facts in the record.

⁷The Court notes that in the fall of 1993 BOMC received notification from First American Title Company, which is not a party to this lawsuit, that, contrary to the statement in the HUD-1 delivered to BOMC by LMS, First American had not closed or disbursed funds on a certain LMS loan refinance transaction. The HUD-1 indicated that First American had served as the "Settlement Agent." BOMC did not contact First American following receipt of this notification.

The Court analyzes BOMC's fraud and breach of fiduciary duty claims in light of these facts.

III

Missouri law requires nine elements to establish fraud: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity, or his or her ignorance of its truth, (5) the speaker's intention that it should be acted on by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of the falsity of the representation, (7) the hearer's reliance on the representation being true, (8) his or her right to rely thereon, and (9) the hearer's consequent and proximately caused injury. Emerick v. Mutual Benefit Life Ins. Co., 756 S.W.2d 513, 519 (Mo. 1988) (en banc). Failure to establish any one of the essential elements of fraud is fatal to recovery. Id. In addition, a plaintiff alleging fraud must establish each element of fraud by clear and convincing evidence. See Rackley v. Rackley, 922 S.W.2d 49, 52 (Mo. Ct. App. 1996); Centerre Bank of Independence, N.A. v. Bliss, 765 S.W.2d 276, 284 (Mo. Ct. App. 1988) (stating that "[t]he plaintiff bears the burden of proof for each element of fraud and must satisfy that burden with clear and convincing evidence").

To establish a fiduciary relationship, Missouri law requires the following elements: (1) as between the parties, one must be subservient to the dominant mind and will of the other as a result of age, state of health, illiteracy, mental disability, or ignorance; (2) things of value such as land, monies, a business, or other things of value which are the property of the subservient person must be possessed or managed by the dominant party; (3) there must be a surrender of independence by the subservient party to the dominant party; (4) there must be an automatic or habitual manipulation of the actions of the subservient party by the dominant party; and (5) there must be a showing that the subservient party places a trust and confidence in the dominant party. Emerick, 756 S.W.2d at 526-27. However, "[f]iduciary duty is not created by a unilateral decision to repose trust and confidence; it derives from the conduct or undertaking of the purported fiduciary

which is recognized by the law as justifying such reliance.” Farmers Ins. Co. v. McCarthy, 871 S.W.2d 82, 87 (Mo. Ct. App. 1994).

Capital was involved with sixteen of the 31 refinance transactions at issue in this case: LMS ordered title insurance policies⁸ from Capital for transactions involving Aqueeb and Nargis Ahmad, Lena Capapas, Stanton and Bernadette Dotson, Mary Gabriel, Ralph and Jill Gatcombe, Raymond and Diane Halagera, Carla Hoff, Margaret Krush, Stephen and Gail Manche, Gary and Rosemary Mitchell, Barry and Susan Parnas, Nir Regev, Jeffery and Terri Schulenberg, Michael and Frances Stevens, Gary and Teresa Thompson, and Stephen and Diane Williams. The Court finds that the material facts involved in these transactions are uncontroverted, and that Capital is entitled to summary judgment on BOMC’s fraud and breach of fiduciary duty claims against it.

BOMC has not alleged--much less proved by clear and convincing evidence--any facts that would establish the elements of fraud. The first element of fraud is a representation. Capital made no representations to BOMC. Indeed, BOMC had no contact with Capital until after LMS collapsed in March 1994. Thus, any claim of fraud must rest on Investor’s failure to speak when it had a duty to do so. A duty to disclose information exists where “a classical fiduciary duty exists or where one party has superior knowledge which is not within the fair and reasonable reach of the other party.” Ringstreet Northcrest, Inc. v. Bisanz, 890 S.W.2d 713, 720 (Mo. Ct. App. 1995). Whether a duty to disclose exists, and whether the circumstances amount to fraud, must be determined from the facts of each case. Id. As discussed above, none of the Defendant title companies, including Capital, had any contractual relationship with BOMC, nor are there facts giving rise to a fiduciary relationship between Capital and BOMC. Accordingly, Capital had no duty to speak based on fiduciary duty. In addition, there is no evidence that Capital had any

⁸As the Court noted in its order granting summary judgment in favor of the Defendant title companies on the homeowners’ claims, each Defendant title company, including Capital, issued a “lender’s policy” title commitment on each transaction at issue in this case. A lender’s policy commitment is issued solely in favor of the lender, and is not intended to benefit the owner.

superior knowledge that was not within BOMC's power to discover, which would give rise to a duty to speak. Indeed, the record shows that BOMC knew, or should have known, that LMS was closing the loans at issue and disbursing funds: the loan purchase agreement specifically stated that LMS would close the loans; BOMC sent funds for disbursement directly to LMS; and documents sent to BOMC after BOMC funded the loans reflected the fact that LMS had been closing and disbursing funds on these loans.⁹ In summary, BOMC's inability to produce evidence that Capital failed to communicate with BOMC when it had a duty to do so is fatal to its fraud claim.

In addition, BOMC's claim against Capital for breach of fiduciary duty fails because there is no evidence to support the existence of a fiduciary relationship between BOMC and Capital. There is no evidence that BOMC was subservient to Capital in any way; that BOMC surrendered its independence to Capital; that Capital habitually manipulated BOMC's actions; or that BOMC placed trust and confidence in Capital. Instead, the record indicates that there was no legal relationship between BOMC and Capital at any time. For example, BOMC and Capital had no contractual relationship--Capital issued loan policy commitments to LMS, not BOMC. Indeed, there was no communication between Capital and BOMC until after certain title companies forced LMS into bankruptcy. Viewing all the facts in the light most favorable to BOMC, it is clear that Capital is entitled to summary judgment on the claim for fraud and the claim for breach of fiduciary duty.

IV

In its response brief, BOMC attempts to dispute Capital's statement of uncontroverted facts. These efforts are inadequate and must be rejected. For example, Capital states that BOMC and LMS executed a purchase agreement in April, 1993 which established the terms and conditions under which LMS would sell loans to BOMC. Def. Capital Title Company's Br. at 2,

⁹ The Court notes that under the terms of the loan purchase agreement, BOMC could have exercised its right to demand repurchase of loans not closed in compliance with its policies. Loan Purchase Agreement, ¶ 10.

¶ 7. BOMC disputes this contention, asserting that “The representation that title companies would conduct the closings and disburse BOMC’s money was an inducing representation to the Purchase Agreement and is therefore a part of BOMC’s contract with LMS.” Pl.’s Resp. Br. at 1, ¶ 7. BOMC purports to substantiate this assertion with citation to an affidavit by David Laughlin, president of BOMC. However, self-serving affidavits such as this, without more, cannot form the basis of a successful defense against summary judgment. See Murray v. City of Sapulpa, 45 F.3d 1417, 1422 (10th Cir. 1995) (“To survive summary judgment, ‘nonmovant’s affidavits must be based on personal knowledge and set forth facts that would be admissible into evidence; conclusory and self-serving affidavits are not sufficient.’”). Furthermore, even assuming that LMS made any alleged “inducing representations” to the effect that Capital would close loans and disburse funds, such representations could not bind Capital because there is nothing to support the contention either that such “representations” were made for or on behalf of Capital, or that Capital was in any way subject to the terms of the loan purchase agreement.¹⁰

BOMC also claims, with reference to the Laughlin affidavit, that the purchase agreement did not provide that LMS would physically close the loans sold to BOMC; that BOMC’s contract with LMS instead in some way required that Defendant title companies close the loans; and that the purchase agreement was only part of the contract. Pl.’s Rep. Br. at 1, ¶¶ 8 & 9. These alleged “facts” are simply without support in the record. Paragraph 2 of the purchase agreement specifically states that LMS would close the loans in LMS’s name. Nothing in the agreement required Capital or any other Defendant title company to close on the loans to be sold to BOMC, and there is no evidence in the record, except for the conclusory assertions in the Laughlin

¹⁰The Court observes that even if Capital was subject to the terms of the loan purchase agreement, evidence about representations not memorialized in that agreement is parol evidence and cannot be considered when deciding this motion for summary judgment. Unless a written contract is ambiguous, courts determine the meaning and intention of a contract solely by reference to the language of the contract itself. See Paul’s Rod & Bearing, LTD. v. Kelly, 847 S.W.2d 68, 73 (Mo. Ct. App. 1991).

affidavit, of any other contract or agreement between LMS and BOMC requiring that any Defendant title company close on loans or disburse funds. Furthermore, as explained above, the record contains no evidence of an agreement between BOMC and Capital, or any other Defendant title company. In short, there is simply no basis upon which to find Capital or any other Defendant title company liable to BOMC for fraud or breach of fiduciary duty.

Capital contends that it did not serve as settlement agent, close, or disburse funds on the sixteen transactions at issue. Furthermore, Capital contends that there was no agreement between Capital and BOMC that they would serve as settlement agent, or close or disburse loans, nor did BOMC or LMS ever ask Capital to serve as settlement agent, or close or disburse loans. Def. Capital' Br. at 5, ¶ 16. BOMC undertakes to controvert these contentions, claiming that

Capital agreed with, acquiesced in, authorized and taught LMS/PBCS to show Capital as, and to sign Capital' name as, Settlement Agent and disbursing entity on HUD-1 forms, on Closing Instructions and otherwise, on an ongoing basis, in refinance transactions LMS originated for purchase by BOMC and which LMS closed and disbursed. Capital knew said documents would be given to BOMC and intended to deceive BOMC through non-disclosure of who the Settlement Agent and disbursing entity really was, through misrepresentations of same on HUD-1 forms, Closing Instructions, and otherwise. By agreeing to be shown as Settlement Agent on the HUD-1, Capital undertook the fiduciary duty to dispose of BOMC's money/the homeowners' loan proceeds as required in the HUD-1, which includes payoff of the prior mortgage. . . . In addition, LMS was the duly authorized agent of Capital to sign documents representing Capital to be LMS's Settlement Agent and disbursing entity, and as a result there was an understanding between Capital and BOMC that Capital was serving in that capacity.

Pl.'s Resp. Br. at 2, ¶¶ 15 & 16. In effect, BOMC asserts both that Capital was directly responsible for the fraudulent conduct of LMS and PBCS, and that Capital breached its alleged fiduciary duty to BOMC by failing to prevent the fraudulent conduct of LMS and PBCS. In support of these assertions, BOMC cites, among other documents, an affidavit by Defendant Teresa Janson,¹¹ former president of PBCS, and wife of Defendant Joseph Iadevito. Ms. Janson's

¹¹ In addition to Ms. Janson's affidavit, BOMC cites to Defendant Joseph Iadevito's answer, the First Amended Complaint, a deposition of Defendant Joseph Iadevito, HUD-1 forms and closing documents related to the transactions at issue, and depositions of various employees of the Defendant title companies. Like the Janson affidavit, none of these documents creates a

affidavit states that Capital knew that LMS prepared closing papers showing Capital as settlement agent. Ms. Janson further states that "PBCS, who prepared LMS's HUD-1 Forms, showed a title company as Settlement Agent . . . and was taught to do this by several title companies, including Old Republic, Capital Title and Investors Title."

Ms. Janson's assertions in her affidavit do not raise genuine issues of material fact. As Capital points out in its reply brief, Ms. Janson's statements in her affidavit contradict her earlier deposition testimony, in which she stated that she was unaware of any agreement between Capital and PBCS that Capital would be shown as settlement agent. Furthermore, Ms. Janson does not state with particularity exactly what Capital "taught" PBCS, or the circumstances under which any such alleged teaching occurred. The Court is left to wonder when, where, and what happened. This affidavit is not credible evidence. More importantly, for purposes of this motion, Ms. Janson's affidavit is vague and conclusory, and lacks the particularity required in a case of alleged fraud to raise a genuine issue of material fact.

BOMC also cites to excerpts from a deposition of Defendant Joseph Iadevito to support its contention that Capital owed a fiduciary duty to BOMC. BOMC states that "[a] fiduciary duty exists in a refinance transaction where the title company knows it is shown as the Settlement Agent on the HUD-1 Form, regardless of whether the title company gets the money in its own hands." Pl.'s Resp. Br. at 4, ¶ (k). To support this assertion, BOMC cites the following exchange from a deposition of Mr. Iadevito:

Q. [by counsel for Defendant Old Republic Title Co.] Why do you believe that the defendant title companies owed a fiduciary duty to Bancoklahoma [sic] to apply the proceeds of the mortgages in the manner required by the closing documents when in fact those proceeds were never delivered to the defendant title companies by [LMS]?

A. Okay. Now you are going back to my point of relevance. I don't believe it's relevant that the money never got to the title company in terms of whether they were responsible or had a fiduciary duty to who was shown on -- to the investor

genuine issue of material fact in this case.

who sent the money based on what is shown on the closing documents. That was my relevant point. I don't think that that violates in any form or fashion the fiduciary responsibility that they had a responsibility to get the money and disburse the money based on what was shown on the documents.

The record is devoid of any evidence that any Defendant title company, including Capital, knew that LMS or PBCS was showing a title company as Settlement Agent on the HUD-1 forms. Furthermore, Mr. Iadevito is currently in federal prison, after pleading guilty to fraud in connection with a \$653,000 transaction involving United Postal Savings. Indeed, BOMC has stated in previous pleadings that Mr. Iadevito "ran a classic Ponzi scheme," and that his company, LMS, "committed RICO violations against BOMC." Pl.'s Br. in Opp'n to Mot. for Partial Summ. J. at 10, ¶ 5. The effrontery attendant to citing this felon's opinion of Capital's alleged fiduciary duty is manifest. More importantly, for purposes of this motion, his legal conclusion does not provide factual support for BOMC's claim that a fiduciary duty existed on the part of Capital.

In summary, BOMC has not raised any genuine issues of material fact with respect to the two Capital transactions at issue in this case. The uncontroverted facts and applicable law compel the conclusion that Capital is not liable for fraud or breach of fiduciary duty. Accordingly, Capital's motion for summary judgment (Docket # 290) is hereby granted.

IT IS SO ORDERED

This 13TH day of August, 1997.



Sven Erik Holmes
United States District Judge

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

F I L E D
AUG 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BANCOKLAHOMA MORTGAGE CORP.,)
)
Plaintiff,)
)
v.)
)
JOSEPH A. IADEVITO, TERESA M. JANSON,)
PETER M. SHAW, CAPITAL TITLE COMPANY,)
INC., INVESTORS TITLE COMPANY, OLD)
REPUBLIC TITLE COMPANY of ST. LOUIS,)
U.S. TITLE GUARANTY COMPANY, INC.,)
AND U.S. TITLE GUARANTY COMPANY)
OF ST. CHARLES, INC.,)
)
Defendants.)

Case No. 94-C-847-H ✓

ENTERED ON DOCKET
DATE 8-14-97

ORDER

This matter comes before the Court on a motion for summary judgment by Defendant Old Republic Title Company of St. Louis ("Old Republic") (Docket # 295).

The Court has recited the facts of this case in its previous orders granting summary judgment in favor of each of the Defendant title companies¹ on Plaintiff's civil RICO claims (Docket # 269) and on the state law claims assigned to Plaintiff by 31 homeowners (Docket # 348). As stated in those orders, Plaintiff BancOklahoma Mortgage Company ("BOMC") is an Oklahoma corporation whose business includes purchasing residential home mortgage loans and reselling them in the secondary market while retaining certain loan servicing rights. Lenders Mortgage Services, Inc. ("LMS") was a Missouri corporation which, until it was forced into bankruptcy in March 1994, originated residential home mortgage loans principally in the St. Louis, Missouri area for sale to mortgage loan companies and other upstream investors, including BOMC. In April 1993, BOMC entered into an agreement to purchase home mortgage loans from

¹Defendant Joseph Iadevito and Defendant Teresa Janson did not join in the title companies' motions for summary judgment.

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LMS. As discussed in greater detail below, the purchase agreement provided that LMS would close all the loans that it originated and sold to BOMC.

Between May 1993 and March 1994, BOMC purchased approximately 700 loans from LMS. On March 18, 1994, certain St. Louis titles companies forced LMS into involuntary bankruptcy. Soon afterwards, BOMC learned that LMS had not paid off the prior mortgage on certain refinance loans that BOMC had purchased.² BOMC paid the respective homeowners the outstanding mortgages on these loans and was assigned all claims by each of the 31 homeowners involved in these refinance transactions. BOMC then sued Defendants, alleging fraud, breach of fiduciary duty, and violations of the civil RICO statute, 18 U.S.C. § 1961, *et seq.* As noted above, the Court has already granted summary judgment in favor of Defendant title companies on the RICO claims and the state law claims that were assigned to BOMC by the homeowners. Defendant Old Republic now moves for summary judgment on BOMC's claims of fraud and breach of fiduciary duty.

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); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), *cert. denied*, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court held that

[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.

²Pleadings filed by BOMC initially indicated that LMS failed to pay off the prior mortgage on 42 of the refinance loans. However, BOMC's appendix contains a "Moving Homeowners Chart" which shows that LMS did not pay off the prior mortgage on 31 refinance loans. The Court accepts this chart as stating the correct number of loans at issue.

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) (holding that “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 where “there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” Id. at 250. As the Supreme Court held, “[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); see also Anderson, 477 U.S. at 250 (“there 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

The material facts necessary to decide this motion for summary judgment are uncontroverted. Accordingly, the Court finds that there is no genuine issue of material fact, and summary judgment on BOMC’s claims for fraud and breach of fiduciary duty is appropriate.

Applicable choice of law rules clearly dictate that Missouri law applies to BOMC's state law claims.³ Therefore, the Court will analyze BOMC's fraud and breach of fiduciary duty claims under Missouri law.⁴

Before analyzing BOMC's claims against Old Republic, the Court must first carefully review the loan purchase agreement between BOMC and LMS. As noted above, the agreement specifically provided that LMS would close the loans it originated for sale to BOMC: paragraph 2 of the agreement stated that "Seller [LMS] agrees to originate Loans and after receipt of approval as described in this Agreement, close Loans in Seller's name and to deliver to Purchaser [BOMC] for purchase by Purchaser, in accordance with the terms of this Agreement, the documents evidencing, securing and insuring such Loans." Loan Purchase Agreement, ¶ 2 (emphasis added). Old Republic was not a party to the agreement, nor was Old Republic in any way bound by its terms. Moreover, the agreement did not state or even suggest that Old Republic would serve as a settlement agent, close loans, or disburse loan proceeds. Furthermore, the agreement provided that BOMC was not obligated to purchase loans originated by LMS unless certain conditions

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Oklahoma choice of law rules require courts to apply the tort law of the state with the most significant relationship to the occurrence and to the parties. See Barrett, 30 F.3d at 1300; White v. White, 618 P.2d 921, 924 (Okla. 1980). In making this determination, courts consider the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation and place of business of the parties; and the place where the relationship, if any, between the parties occurred. Id. In this case, BOMC's alleged injuries occurred in Oklahoma, and it is incorporated in and resides in Oklahoma. However, other factors significantly outweigh these facts and compel application of Missouri law: Old Republic's conduct occurred in Missouri, where it is incorporated and resides, and any alleged relationship between BOMC and Old Republic would have existed in Missouri.

⁴BOMC argues that the Court should apply Oklahoma law to its state law claims. As stated above, applicable choice of law rules dictate that Missouri law applies in this matter. The Court notes, however, that BOMC has offered no authorities which support the conclusion that Oklahoma tort law, as applied to the facts of this case, is substantively different from that of Missouri.

were satisfied, including BOMC's approval of a loan origination package prior to closing, and the closing of such loan in accordance with BOMC's instructions to LMS. Loan Purchase Agreement, ¶ 6. The agreement also required LMS to repurchase from BOMC any loans closed without compliance with BOMC's conditions and requirements, Loan Purchase Agreement, ¶ 7, and to indemnify BOMC for any losses or claims arising out of the origination, processing, closing, or purchase of any loan purchased by BOMC from LMS, Loan Purchase Agreement ¶ 10.

The loan purchase agreement created a relationship between BOMC and LMS, and set forth the terms and conditions of that relationship. The agreement did not in any way create a relationship between BOMC and Old Republic or any other Defendant title company. Nor did the terms of the agreement create an agency relationship between LMS and Old Republic or any other Defendant title company.⁵ In addition, there is nothing in the record indicating that Old Republic or any other Defendant title company had an agreement or understanding with BOMC that it would serve as settlement agent, close loans, or disburse funds on any of the loans originated by LMS and sold to BOMC. In fact, there is no evidence whatsoever that BOMC had any communication with Old Republic or any other Defendant title company until after LMS was forced into bankruptcy in March 1994.⁶

⁵ In addition to its fraud and breach of fiduciary duty claims, BOMC suggests at various points in its brief that Old Republic is directly responsible for fraudulent misrepresentations made by others, apparently including Defendant Joseph Iadevito, Defendant Teresa Janson, LMS and PBCS. For example, in its response brief BOMC states that "LMS was the duly authorized agent of Old Republic to sign documents representing Old Republic to be LMS's Settlement Agent and disbursing entity, and as a result there was an understanding between Old Republic and BOMC that Old Republic was serving in that capacity." Pl.'s Resp. Br. at 2, ¶¶ 13, 14, 15. This bare assertion, which is discussed below in connection with BOMC's claims for breach of fiduciary duty, is unsupported by any facts in the record.

⁶The Court notes that in the fall of 1993 BOMC received notification from First American Title Company, which is not a party to this lawsuit, that, contrary to the statement in the HUD-1 delivered to BOMC by LMS, First American had not closed or disbursed funds on a certain LMS loan refinance transaction. The HUD-1 indicated that First American had served as the "Settlement Agent." BOMC did not contact First American following receipt of this notification.

The Court analyzes BOMC's fraud and breach of fiduciary duty claims in light of these facts.

III

Missouri law requires nine elements to establish fraud: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity, or his or her ignorance of its truth, (5) the speaker's intention that it should be acted on by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of the falsity of the representation, (7) the hearer's reliance on the representation being true, (8) his or her right to rely thereon, and (9) the hearer's consequent and proximately caused injury. Emerick v. Mutual Benefit Life Ins. Co., 756 S.W.2d 513, 519 (Mo. 1988) (*en banc*). Failure to establish any one of the essential elements of fraud is fatal to recovery. *Id.* In addition, a plaintiff alleging fraud must establish each element of fraud by clear and convincing evidence. See Rackley v. Rackley, 922 S.W.2d 49, 52 (Mo. Ct. App. 1996); Centerre Bank of Independence, N.A. v. Bliss, 765 S.W.2d 276, 284 (Mo. Ct. App. 1988) (stating that "[t]he plaintiff bears the burden of proof for each element of fraud and must satisfy that burden with clear and convincing evidence").

To establish a fiduciary relationship, Missouri law requires the following elements: (1) as between the parties, one must be subservient to the dominant mind and will of the other as a result of age, state of health, illiteracy, mental disability, or ignorance; (2) things of value such as land, monies, a business, or other things of value which are the property of the subservient person must be possessed or managed by the dominant party; (3) there must be a surrender of independence by the subservient party to the dominant party; (4) there must be an automatic or habitual manipulation of the actions of the subservient party by the dominant party; and (5) there must be a showing that the subservient party places a trust and confidence in the dominant party. Emerick, 756 S.W.2d at 526-27. However, "[f]iduciary duty is not created by a unilateral decision to repose trust and confidence; it derives from the conduct or undertaking of the purported fiduciary

which is recognized by the law as justifying such reliance.” Farmers Ins. Co. v. McCarthy, 871 S.W.2d 82, 87 (Mo. Ct. App. 1994).

Old Republic was involved with one of the 31 refinance transactions at issue in this case: LMS ordered a title insurance policy⁷ from Old Republic for a single transaction which involved Jay and Shelley Isaak. The Court finds that the material facts involved in this transaction are uncontroverted, and that Old Republic is entitled to summary judgment on BOMC’s fraud and breach of fiduciary duty claims against it.

BOMC has not alleged--much less proved by clear and convincing evidence--any facts that would establish the elements of fraud. The first element of fraud is a representation. Old Republic made no representations to BOMC. Indeed, BOMC had no contact with Old Republic until after LMS collapsed in March 1994. Thus, any claim of fraud must rest on Investor’s failure to speak when it had a duty to do so. A duty to disclose information exists where “a classical fiduciary duty exists or where one party has superior knowledge which is not within the fair and reasonable reach of the other party.” Ringstreet Northcrest, Inc. v. Bisanz, 890 S.W.2d 713, 720 (Mo. Ct. App. 1995). Whether a duty to disclose exists, and whether the circumstances amount to fraud, must be determined from the facts of each case. Id. As discussed above, none of the Defendant title companies, including Old Republic, had any contractual relationship with BOMC, nor are there facts giving rise to a fiduciary relationship between Old Republic and BOMC. Accordingly, Old Republic had no duty to speak based on fiduciary duty. In addition, there is no evidence that Old Republic had any superior knowledge that was not within BOMC’s power to discover, which would give rise to a duty to speak. Indeed, the record shows that BOMC knew, or should have known, that LMS was closing the loans at issue and disbursing funds: the loan

⁷As the Court noted in its order granting summary judgment in favor of the Defendant title companies on the homeowners’ claims, each Defendant title company, including Old Republic, issued a “lender’s policy” title commitment on each transaction at issue in this case. A lender’s policy commitment is issued solely in favor of the lender, and is not intended to benefit the owner.

purchase agreement specifically stated that LMS would close the loans; BOMC sent funds for disbursement directly to LMS; and documents sent to BOMC after BOMC funded the loans reflected the fact that LMS had been closing and disbursing funds on these loans.⁸ In summary, BOMC's inability to produce evidence that Old Republic failed to communicate with BOMC when it had a duty to do so is fatal to its fraud claim.

In addition, BOMC's claim against Old Republic for breach of fiduciary duty fails because there is no evidence to support the existence of a fiduciary relationship between BOMC and Old Republic. There is no evidence that BOMC was subservient to Old Republic in any way; that BOMC surrendered its independence to Old Republic; that Old Republic habitually manipulated BOMC's actions; or that BOMC placed trust and confidence in Old Republic. Instead, the record indicates that there was no legal relationship between BOMC and Old Republic at any time. For example, BOMC and Old Republic had no contractual relationship--Old Republic issued loan policy commitments to LMS, not BOMC. Indeed, there was no communication between Old Republic and BOMC until after certain title companies forced LMS into bankruptcy. Viewing all the facts in the light most favorable to BOMC, it is clear that Old Republic is entitled to summary judgment on the claim for fraud and the claim for breach of fiduciary duty.

IV

In its response brief, BOMC attempts to dispute Old Republic's statement of uncontroverted facts. These efforts are inadequate and must be rejected. For example, Old Republic states that BOMC and LMS executed a purchase agreement in April, 1993 which established the terms and conditions under which LMS would sell loans to BOMC. Def. Old Republic Title Company's Br. at 2, ¶ 5. BOMC disputes this contention, asserting that "The representation that title companies would conduct the closings and disburse BOMC's money was

⁸ The Court notes that under the terms of the loan purchase agreement, BOMC could have exercised its right to demand repurchase of loans not closed in compliance with its policies. Loan Purchase Agreement, ¶ 10.

an inducing representation to the Purchase Agreement and is therefore a part of BOMC's contract with LMS 'establishing terms and conditions.'" Pl.'s Resp. Br. at 1, ¶ 5. BOMC purports to substantiate this assertion with citation to an affidavit by David Laughlin, president of BOMC. However, self-serving affidavits such as this, without more, cannot form the basis of a successful defense against summary judgment. See Murray v. City of Sapulpa, 45 F.3d 1417, 1422 (10th Cir. 1995) ("To survive summary judgment, 'nonmovant's affidavits must be based on personal knowledge and set forth facts that would be admissible into evidence; conclusory and self-serving affidavits are not sufficient.'"). Furthermore, even assuming that LMS made any alleged "inducing representations" to the effect that Old Republic would close loans and disburse funds, such representations could not bind Old Republic because there is nothing to support the contention either that such "representations" were made for or on behalf of Old Republic, or that Old Republic was in any way subject to the terms of the loan purchase agreement.⁹

BOMC also claims, with reference to the Laughlin affidavit, that the purchase agreement did not provide that LMS would physically close the loans sold to BOMC; that BOMC's contract with LMS instead in some way required that Defendant title companies close the loans; and that the purchase agreement was only part of the contract. Pl.'s Rep. Br. at 1, ¶¶ 6 & 7. These alleged "facts" are simply without support in the record. Paragraph 2 of the purchase agreement specifically states that LMS would close the loans in LMS's name. Nothing in the agreement required Old Republic or any other Defendant title company to close on the loans to be sold to BOMC, and there is no evidence in the record, except for the conclusory assertions in the Laughlin affidavit, of any other contract or agreement between LMS and BOMC requiring that

⁹The Court observes that even if Old Republic was subject to the terms of the loan purchase agreement, evidence about representations not memorialized in that agreement is parol evidence and cannot be considered when deciding this motion for summary judgment. Unless a written contract is ambiguous, courts determine the meaning and intention of a contract solely by reference to the language of the contract itself. See Paul's Rod & Bearing, LTD. v. Kelly, 847 S.W.2d 68, 73 (Mo. Ct. App. 1991).

any Defendant title company close on loans or disburse funds. Furthermore, as explained above, the record contains no evidence of an agreement between BOMC and Old Republic, or any other Defendant title company. In short, there is simply no basis upon which to find Old Republic or any other Defendant title company liable to BOMC for fraud or breach of fiduciary duty.

Old Republic contends that it did not serve as settlement agent, close, or disburse funds on the transaction at issue here. Furthermore, Old Republic contends that there was no agreement between Old Republic and BOMC that they would serve as settlement agent, or close or disburse loans, nor did BOMC or LMS ever ask Old Republic to serve as settlement agent, or close or disburse loans. Def. Old Republic' Br. at 4, ¶¶ 13, 14 & 15. BOMC undertakes to controvert these contentions, claiming that

Old Republic agreed with, acquiesced in, authorized and taught LMS/PBCS to show Old Republic as, and to sign Old Republic' name as, Settlement Agent and disbursing entity on HUD-1 forms, on Closing Instructions and otherwise, on an ongoing basis, in refinance transactions LMS originated for purchase by BOMC and which LMS closed and disbursed. Old Republic knew said documents would be given to BOMC and intended to deceive BOMC through non-disclosure of who the Settlement Agent and disbursing entity really was, through misrepresentations of same on HUD-1 forms, Closing Instructions, and otherwise. By agreeing to be shown as Settlement Agent on the HUD-1, Old Republic undertook the fiduciary duty to dispose of BOMC's money/the homeowners' loan proceeds as required in the HUD-1, which includes payoff of the prior mortgage. . . . In addition, LMS was the duly authorized agent of Old Republic to sign documents representing Old Republic to be LMS's Settlement Agent and disbursing entity, and as a result there was an understanding between Old Republic and BOMC that Old Republic was serving in that capacity.

Pl.'s Resp. Br. at 2, ¶¶ 13,14, 15. In effect, BOMC asserts both that Old Republic was directly responsible for the fraudulent conduct of LMS and PBCS, and that Old Republic breached its alleged fiduciary duty to BOMC by failing to prevent the fraudulent conduct of LMS and PBCS. In support of these assertions, BOMC cites, among other documents, an affidavit by Defendant Teresa Janson,¹⁰ former president of PBCS, and wife of Defendant Joseph Iadevito. Ms. Janson's

¹⁰ In addition to Ms. Janson's affidavit, BOMC cites to Defendant Joseph Iadevito's answer, the First Amended Complaint, a deposition of Defendant Joseph Iadevito, HUD-1 forms and closing documents related to the transactions at issue, and depositions of various employees

affidavit states that Old Republic knew that LMS prepared closing papers showing Old Republic as settlement agent. Ms. Janson further states that “PBCS, who prepared LMS’s HUD-1 Forms, showed a title company as Settlement Agent . . . and was taught to do this by several title companies, including Old Republic, Capital Title and Investors Title.”

Ms. Janson’s assertions in her affidavit do not raise genuine issues of material fact. As Old Republic points out in its reply brief, Ms. Janson’s statements in her affidavit contradict her earlier deposition testimony, in which she stated that she was unaware of any agreement between Old Republic and PBCS that Old Republic would be shown as settlement agent. Furthermore, Ms. Janson does not state with particularity exactly what Old Republic “taught” PBCS, or the circumstances under which any such alleged teaching occurred. The Court is left to wonder when, where, and what happened. This affidavit is not credible evidence. More importantly, for purposes of this motion, Ms. Janson’s affidavit is vague and conclusory and lacks the particularity required in a case of alleged fraud to raise a genuine issue of material fact.

BOMC also cites to excerpts from a deposition of Defendant Joseph Iadevito to support its contention that Old Republic owed a fiduciary duty to BOMC. BOMC states that “[a] fiduciary duty exists in a refinance transaction where the title company knows it is shown as the Settlement Agent on the HUD-1 Form, regardless of whether the title company gets the money in its own hands.” Pl.’s Resp. Br. at 4, ¶ (k). To support this assertion, BOMC cites the following exchange from a deposition of Mr. Iadevito:

Q. [by counsel for Defendant Old Republic Title Co.] Why do you believe that the defendant title companies owed a fiduciary duty to Bancoklahoma [sic] to apply the proceeds of the mortgages in the manner required by the closing documents when in fact those proceeds were never delivered to the defendant title companies by [LMS]?

A. Okay. Now you are going back to my point of relevance. I don’t believe it’s relevant that the money never got to the title company in terms of whether they

of the Defendant title companies. Like the Janson affidavit, none of these documents creates a genuine issue of material fact in this case.

were responsible or had a fiduciary duty to who was shown on -- to the investor who sent the money based on what is shown on the closing documents. That was my relevant point. I don't think that that violates in any form or fashion the fiduciary responsibility that they had a responsibility to get the money and disburse the money based on what was shown on the documents.

The record is devoid of any evidence that any Defendant title company, including Old Republic, knew that LMS or PBCS was showing a title company as Settlement Agent on the HUD-1 forms. Furthermore, Mr. Iadevito is currently in federal prison, after pleading guilty to fraud in connection with a \$653,000 transaction involving United Postal Savings. Indeed, BOMC has stated in previous pleadings that Mr. Iadevito "ran a classic Ponzi scheme," and that his company, LMS, "committed RICO violations against BOMC." Pl.'s Br. in Opp'n to Mot. for Partial Summ. J. at 10, ¶ 5. The effrontery attendant to citing this felon's opinion of Old Republic's alleged fiduciary duty is manifest. More importantly, for purposes of this motion, his legal conclusion does not provide factual support for BOMC's claim that a fiduciary duty existed on the part of Old Republic.

In summary, BOMC has not raised any genuine issues of material fact with respect to the one Old Republic transaction at issue in this case. The uncontroverted facts and applicable law compel the conclusion that Old Republic is not liable for fraud or breach of fiduciary duty. Accordingly, Old Republic's motion for summary judgment (Docket # 295) is hereby granted.

IT IS SO ORDERED

This 13TH day of August, 1997.


Sven Erik Holmes
United States District Judge

AUG 1 2 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

DENNIS DEAN WRIGHT,)
)
Petitioner,)
)
vs.)
)
STEPHEN KAISER,)
)
Respondent.)

No. 90-CV-855-B ✓

ENTERED ON DOCKET
DATE AUG 1 4 1997

ORDER

Before the Court is Petitioner's motion for Rule 60(b) relief (Docket # 11) filed on February 20, 1996. Respondent filed his response to Petitioner's motion on April 19, 1996.

Together with two of his co-defendants, Noah Harjo and Paula Marie Wright, Petitioner was convicted in Tulsa County District Court, case no. CRF-87-260, of first degree murder and conspiracy to commit murder. He was sentenced to life imprisonment and twenty (20) years imprisonment, respectively. A fourth co-defendant, Marty Langley, was acquitted. The Oklahoma Court of Criminal Appeals affirmed the convictions on appeal. Harjo v. State, 797 P.2d 338 (1990). On September 18, 1990, Petitioner filed his petition for writ of habeas corpus alleging ineffective assistance of counsel due to a conflict of interest.¹ This Court denied the petition for writ of habeas corpus on March 25, 1991, ruling that Petitioner failed to demonstrate the existence of an *actual* conflict of interest as required by Cuyler v. Sullivan, 446 U.S. 335, 351 (1980) (holding that a

¹Petitioner also alleged that the trial court committed reversible error when it admitted hearsay testimony of a coconspirator prior to establishing the existence of the conspiracy by independent evidence. However, that claim, denied by this Court along with Petitioner's Sixth Amendment claim, was not contested by Petitioner in his Rule 60(b) motion and, therefore, is not relevant to the considerations currently before the Court.

petitioner "must establish that an actual conflict of interest adversely affected his lawyer's performance"). On September 9, 1991, the Tenth Circuit Court of Appeals issued an Order affirming this Court's denial of the petition for writ of habeas corpus.

One of Petitioner's co-defendants, Noah Harjo, filed his petition for writ of habeas corpus on April 2, 1993, seeking relief on the basis of ineffective assistance of counsel due to a conflict of interest. On May 2, 1994, the Tenth Circuit Court of Appeals issued its opinion in Selsor v. Reynolds, 22 F.3d 1029 (10th Cir. 1994), a decision addressing the constitutional standards required where a defendant objects to joint representation alleging the existence of a conflict of interest. In Selsor, the appellate court emphasized that where a trial court refuses to appoint separate counsel after a defendant timely objects to joint representation on the basis of a conflict of interest, prejudice to the defendant is presumed and a showing of an *actual* conflict of interest is not required. Id., at 1032. In Harjo's case, the Honorable Terry C. Kern found that Harjo timely objected to the joint representation on the basis of the existence of a conflict of interest. Pursuant to Selsor, prejudice was presumed, and the state trial judge was obligated to inquire as to whether appointment of separate counsel and/or severance of the trial was required. Judge Kern also found that the state trial judge failed to make the mandatory inquiry prior to denying defense counsel's motions for separate counsel and for severance. As a result, on July 27, 1995, Judge Kern ruled that Harjo's Sixth Amendment right to assistance of counsel was violated and conditionally granted the writ, ordering that Harjo be released from custody within 120 days of the date of the order unless he was retried by the State. On October 28, 1996, the Tenth Circuit Court of Appeals affirmed. Harjo v. Ward, 99 F.3d 1149, 1996 WL 621965 (10th Cir. 1996).

On December 1, 1995, Petitioner's wife and co-defendant, Paula Marie Wright, filed her

petition for writ of habeas corpus in the U.S. District Court for the Northern District of Oklahoma, case no. 95-CV-1183-K. Again, the focus of the Court was the issue of ineffective assistance of counsel due to a conflict of interest. On August 1, 1997, the Court entered its Order conditionally granting the writ, ordering that Petitioner Paula Marie Wright be released from custody within 120 days of the date of the order unless she was retried by the State.

While the Harjo appeal was pending, Petitioner Dennis Wright filed the instant motion for Rule 60(b) relief, requesting that the Court vacate its Order denying the habeas petition. Respondent objected to the relief requested on the bases that it is untimely and that the Selsor decision, upon which the Harjo decision was based, does not establish new intervening law but instead provides a new interpretation of Holloway v. Arkansas, 435 U.S. 475 (1978). Respondent further argues that even if Selsor could be considered new law, it is inapplicable to Petitioner because his conviction became final prior to the decision. Teague v. Lane, 489 U.S. 288 (1989).

ANALYSIS

A. Timeliness of Motion for Rule 60(b) Relief

Petitioner seeks relief pursuant to Fed. R. Civ. P. 60(b)(4) and (6). By the terms of the rule itself, requests for relief under those subsections must be brought within a "reasonable" time. The timeliness of a Rule 60(b)(6) motion is to be determined on a case-by-case basis. Pelican Production Co. v. Marino, 893 F.2d 1143, 1147 (10th Cir. 1990). In Robison v. Maynard, 958 F.2d 1013, 1018 (10th Cir. 1992), an eight (8) year delay in bringing a Rule 60(b)(6) motion was found to be unreasonable. Similarly, where the petitioner failed to provide persuasive reasons to justify his delay, a one (1) year delay was found to be unreasonable. PRC Harris, Inc. v. Boeing Co., 700 F.2d 894,

897 (2d Cir. 1983). In the instant case, Petitioner filed his motion for Rule 60(b) relief after Judge Kern's decision to conditionally grant the writ in the case of his co-defendant Harjo and while the respondent's appeal of that decision was pending. The Court finds that, under these facts and circumstances, Petitioner's motion was timely filed.

B. Appropriateness of Rule 60(b) Relief

The Court finds that relief in this case may be considered only under Rule 60(b)(6),² which provides that, "On motion, and upon such terms as are just, the court may relieve a party ... from a final judgment, order, or proceeding for ... (6) any other reason justifying relief from the operation of the judgment." Rule 60(b)(6) has been described as a "grand reservoir of equitable power to do justice in a particular case." Johnston v. Cigna Corp., 14 F.3d 486, 497 (10th Cir. 1993) (quoting Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975) (en banc), *cert. denied*, 423 U.S. 1079 (1976)). "Relief under Rule 60(b) is discretionary and is warranted only in exceptional circumstances." Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir. 1991).

In Pierce, the Tenth Circuit Court of Appeals granted Rule 60(b)(6) relief to plaintiffs, whose decedent was killed in an automobile accident, and who had previously been denied relief in federal court based on the application of state law. In a later suit brought in state court by a passenger injured in the same accident, the state supreme court overruled the decision forming the basis of the federal court's decision, awarding relief to the injured passenger. In considering the propriety of Rule 60(b)(6) relief, the appellate court recognized that while "[a]n adjudication must at some time become final ... in extraordinary situations, relief from final judgments may be had under Rule 60(b)(6), when such action is appropriate to accomplish justice. . . ." Id., at 723. In distinguishing the Pierce facts

²None of the other five (5) subdivisions of Rule 60(b) is applicable to the facts of this case.

from an earlier decision where Rule 60(b)(6) relief had been denied, Collins v. City of Wichita, Kansas, 254 F.2d 837, 839 (10th Cir. 1958), the court emphasized that, unlike Collins, the Pierce cases arose out of the same accident and the decisional change or judicial view of an established rule of law arose from a related case. Id. In order to accomplish justice, the court concluded that Rule 60(b)(6) relief was appropriate. Id., at 724.

This Court is persuaded that exceptional circumstances justifying Rule 60(b) relief exist in this case. Based on identical facts, Petitioner's co-defendants, Noah Harjo and Paula Marie Wright, received substantially different treatment from this Court than did Petitioner. Because the decisions to grant conditionally the writ in Harjo and Paula Wright conflict directly with the Court's earlier 1991 denial of Petitioner's request for issuance of the writ and reflect a change in the judicial view of an established rule of law, see Pierce, 518 F.2d at 723; Van Skiver, 952 F.2d at 1245, the Court finds that, in order to accomplish justice, Petitioner's petition for Rule 60(b)(6) relief should be granted and the Order filed March 25, 1991, vacated.

The Court further finds that for the reasons discussed below, the writ of habeas corpus must conditionally issue in this case.

C. Conditional Issuance of the Writ of Habeas Corpus

The issues before the Court in this case, as in the cases presented by Petitioner's co-defendants, are whether Petitioner entered a timely objection to the multiple representation by the Public Defender's Office and, if so, whether the trial court failed to inquire adequately into the potential conflict of interest thereby violating Petitioner's Sixth Amendment right to assistance of counsel. The Court embraces herein the analytical rationale relied on in the Harjo and Paula Marie Wright cases.

The right to counsel under the Sixth Amendment entails "a correlative right to representation that is free from conflicts of interest." Wood v. Georgia, 450 U.S. 261, 271 (1981). A brief review of Supreme Court jurisprudence in this area is in order. In Glasser v. United States, 315 U.S. 60, 70 (1942), a case where one attorney represented two co-defendants charged with conspiracy to defraud the United States, the Supreme Court held it was clear the assistance of counsel guaranteed by the Sixth Amendment "contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired." The Court went on to instruct that "[t]he trial court should protect the right of an accused to have the assistance of counsel." Id. at 71. The Court concluded, from examination of the trial record, the attorney's representation of the defendant "was not as effective as it might have been if the appointment had not been made." Id. at 76. The Supreme Court reversed the conviction.

In Holloway v. Arkansas, 435 U.S. 474 (1978), the Supreme Court made apparent a trial judge's solemn duty to insure that each defendant is given effective assistance of counsel. In Holloway, the lawyer for three defendants moved for appointment of separate counsel for each defendant. Counsel represented that the defendants had stated to him there was a possibility of conflict of interest. The trial court held a hearing and denied the motion. Counsel subsequently renewed the motion, arguing one or two of the defendants might testify and, if they did, counsel would not be able to cross-examine them because counsel had received confidential information. The motion was again abruptly denied. On the second day of trial, after the prosecution had rested, counsel advised the trial court that, against counsel's recommendation, all three defendants had decided to testify. The trial court denied a renewed objection based upon inability to cross-examine.

The defendants were convicted; the Supreme Court reversed.

The Court said while "[r]equiring or permitting a single attorney to represent co-defendants, often referred to as joint representation, is not per se violative of constitutional guarantees of effective assistance of counsel," id. at 482, "once an attorney indicates to the trial court a possible conflict of interest exists, the trial court is obligated to either appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel." Id. at 484. The Supreme Court found the trial judge had done neither. The court in Holloway stated: "We read the Court's opinion in Glasser, however, as holding that whenever a trial court improperly requires joint representation over timely objection, reversal is automatic." 435 U.S. at 488.

Finally, the Supreme Court revisited the issue in Cuyler v. Sullivan, 446 U.S. 335 (1980). Sullivan and two others were charged with murder. Two attorneys represented all three defendants. Sullivan did not object to the joint representation. Sullivan was convicted; the other two defendants were acquitted at separate trials. Referring to Holloway, the Court in Cuyler said, "Since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial." Id. at 348. Sullivan had raised no such objection. "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Id.

As discussed supra, Judge Kern has previously addressed these issues in habeas actions brought by Petitioner's co-defendants, Noah Harjo and Paula Marie Wright. In Orders filed July 27, 1995, in Harjo v. Reynolds, 93-C-285-K, and July 31, 1997, in Paula Marie Wright v. Massie, 95-C-1183-K, Judge Kern held that the state trial court's requirement that the same counsel represent the

co-defendants violated the Petitioners' right to assistance of counsel. The Tenth Circuit Court of Appeals affirmed the Court's ruling in Harjo in an unpublished order and judgment, Harjo v. Ward, No. 95-5171 (Oct. 28, 1996).

The Court is now persuaded that in the instant case, Petitioner objected timely to the joint representation and, therefore, the "actual conflict" showing required under Cuyler is inapplicable to Petitioner's case. In a motion for severance³ filed prior to trial, defense counsel for Petitioner and his co-defendants stated "it will be difficult to argue to the jury that some co-defendants are innocent and some not as culpable as others, when the same attorney must represent all four co-defendants" (emphasis added). In paragraph 8 is stated: "The attorney for co-defendants would again request that he be permitted to withdraw from representation of all four co-defendants, but if this court will not grant the motion to withdraw, then the attorney would request a severance of all four co-defendants from each other for trial to mitigate the conflict of interest" (emphases added). The Court believes this constituted sufficient notice to the trial court of a potential conflict affecting all four defendants and of an objection to the multiple representation on behalf of each of the four co-defendants. Because Petitioner timely objected to the joint representation, Holloway is controlling and Cuyler is inapplicable. Selsor v. Kaiser, 22 F.3d 1029, 1032 (10th Cir. 1994).

Having found that Petitioner entered a timely objection to the joint representation, this Court's next task is to determine whether the trial court took "adequate steps" to ascertain whether the risk

³The motion for severance filed in the state trial court on behalf of all four co-defendants was referenced in Petitioner's brief filed in his direct appeal before the Oklahoma Court of Criminal Appeals. That brief was provided to this Court by Respondent as Exhibit B to the Response to Petition for Writ of Habeas Corpus filed on November 7, 1990. As the motion for severance is part of a public record in a related case, this Court hereby takes judicial notice of its contents. See Henson v. CSC Credit Servs., 29 F.3d 280, 284 (7th Cir. 1994); Kramer v. Time Warner, Inc., 937 F.2d 767, 774 (2d Cir. 1991).

was too remote to warrant separate counsel and whether the requirement of joint representation was "improper." The Supreme Court has not yet defined what constitutes "adequate steps" for a trial court's inquiry to pass muster. The Holloway court gave a strong indication of proper interpretation in the following passage: "Additionally, since the decision in Glasser, most courts have held that an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted." 435 U.S. at 485. The Supreme Court went on to say it found the considerations cited by such courts "persuasive." Id. at 486. Among those, the Court specifically mentioned "an 'attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.'" Id. at 485 (quoting State v. Davis, 514 P.2d 1025, 1027 (Ariz.1973)).

Once the conflict is brought to the trial court's attention, it is the duty of the trial court to investigate, to the point of inquiring of the defendants individually. Cf. Rule 44(c), Federal Rules of Criminal Procedure. The record provided in these habeas cases indicates that no such investigation or inquiry was made by the state trial judge. Defense counsel presented to the trial judge the basis for the asserted conflict of interest in his motions to withdraw and for severance, the trial court denied the motions after a brief discussion. Although this is not a case in which the trial judge "'turn[ed] a blind eye to an obvious possible conflict,'" Cook, 45 F.3d 388, 394 (quoting United States v. Levy, 25 F.3d 146, 154 (2d Cir. 1994), the adequacy of inquiry is subject to review. Defense counsel clearly presented relative culpability as a potential issue, with reference to statements already made by the defendants. Where there are markedly different degrees of relative culpability between defendants, a likelihood of conflict of interest may exist. Parker v. Parratt, 662 F.2d 479, 484 (8th

Cir.1981), cert. denied, 459 U.S. 846 (1982).⁴

Here, the trial judge did not consider the motion on its merits until the day of trial, immediately prior to jury selection. The trial judge did not inquire whether the other co-defendants intended to testify. Clearly, if none of the defendants intended to take the stand, the problem of "relative culpability" was much diminished. Also, the trial judge did not address the defendants personally and inquire as to their reasons for desiring separate counsel. Such an inquiry might well have revealed if the request was dilatory or had merit. The trial judge made little attempt to verify independently whether the conflict of interest warranted the appointment of separate counsel. This Court concludes the trial court did not take the "adequate steps" required by Holloway.⁵ Cf. Hernandez v. Mondragon, 824 F.2d 825, 826-27 (10th Cir. 1987) (where trial judge held a "hearing" in chambers with defense counsel, prosecutor, and the defendant).

Under these facts, the Court concludes the Holloway v. Arkansas standard applies to Petitioner and, for the reasons elaborated above, the writ should be granted.

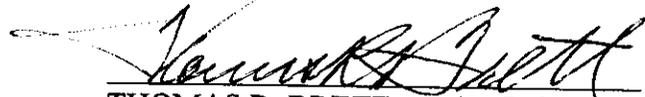
⁴It was made obvious to the trial court this was not a case falling within Justice Frankfurter's description: "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." Glasser, 315 U.S. at 92 (dissenting opinion).

⁵Petitioner relies on United States v. Donahue, 560 F.2d 1039 (1977), and United States v. Foster, 469 F.2d 1, 4-5 (1972), for the proposition that the trial court had a duty to ensure that each defendant was fully aware of the advantages and disadvantages of multiple representation by a single attorney. Those cases, however, precede the Supreme Court's decision in Holloway and focus on a federal district court's independent duty to advise a defendant of his right to separate counsel. See Fed. R. Crim. P. 44(c); see also United States v. Martin, 965 F.2d 839, 843 (10th Cir. 1992); United States v. Burney, 756 F.2d 787, 789 (10th Cir. 1985).

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's petition for Rule 60(b) relief (Docket #11) is **granted**.
2. This Court's Order filed March 25, 1991 (Docket #6) is **vacated**.
3. The petition for a writ of habeas corpus is **conditionally granted**. The writ shall issue unless, within one hundred twenty (120) days from the date of entry of this order, the State has commenced proceedings to retry Petitioner.

SO ORDERED THIS 12th day of August, 1997.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

AUG 11 1997



**Phil Lombardi, Clerk
U.S. DISTRICT COURT**

DAVID W. HOLDEN, an individual, and)
HOLLIMAN, LANGHOLZ, RUNNELS &)
DORWART, an Oklahoma corporation,)

Plaintiff(s),)

vs.)

EMERALD SERVICES CORPORATION, a)
Delaware corporation, and LOEHR H. SPIVEY,)
a/k/a LARRY SPIVEY, an individual,)

Defendant(s).)

Case No. 94-C-1021-Bu(J) ✓

ENTERED ON DOCKET

DATE AUG 13 1997

REPORT & RECOMMENDATION

By minute order dated May 1, 1997, the District Court referred the Motions for Attorneys Fees [Doc. Nos. 227-1, 229-1] to the undersigned Magistrate Judge. The Bill of Costs was referred to the undersigned Magistrate Judge by minute order dated May 30, 1997.

On June 24, 1997, the Magistrate Judge heard argument by the parties with respect to the Motions for Attorneys Fees and the Bill of Costs. At the June 24, 1997 hearing, Plaintiffs David Holden and Holliman, Langholz, Runnels & Dorwart ("HLRD") appeared by and through attorneys Joel Wohlgemuth and Bill O'Connor. Defendants Emerald Services Corporation and Loehr H. Spivey appeared by and through attorneys Phil Burleson and Tom Hillis.

The court has heard the arguments of counsel, reviewed the case file and the pleadings filed by the parties, and considered the exhibits prepared by the parties. The

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court recommends that Plaintiffs' Motion for attorneys fees [Doc. No. 227-1] be granted in part and denied in part. The court recommends that considering the facts and issues in this case, and the applicable case law and statute, that the Plaintiffs be declared the "prevailing party" under 12 O.S. 1991, § 936 for the purpose of an award of attorneys fees in regard to Plaintiffs' claim on the promissory note, but not on the remaining claims. The court declines, at this point, to determine the amount of a reasonable attorneys fee, and requests additional information from the parties as outlined below. With respect to Defendants' Motion for Attorneys Fees [Doc. No. 229-1], the court recommends that it be denied. With respect to the Bill of Costs [Doc. No. 228-1] filed by Plaintiffs, the court recommends that it be denied.

I. PLAINTIFFS' MOTION FOR ATTORNEYS FEES

Plaintiffs request attorneys fees pursuant to Fed. R. Civ. P. 54 and 12 O.S. 1991, § 936. Section 936 provides:

In any civil action to recover on an open account, a statement of account, accounts stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, unless otherwise provided by law or the contract which is the subject of the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.

12 O.S. 1991, § 936. Plaintiffs assert that Plaintiffs are the prevailing party on Plaintiffs' breach of contract claim "which was based on Emerald's default on the Term Note." Plaintiffs note that they received a judgment for \$20,000.00 (excluding pre-judgment interest at 8.5%). Plaintiffs also argue that they are the prevailing party

with respect to Defendants' claim for rescission of the "fee agreement" for legal services. Plaintiffs request that they be compensated for the total fees charged for legal services provided for Plaintiffs in this action, a sum of \$192,826.01.

Defendants initially argue that Plaintiffs are not the prevailing party. Defendants note that Plaintiffs alleged claims based on (1) Rule 12b-5 Securities Fraud, (2) the Oklahoma Securities Act Claims, (3) fraud and deceit, (4) breach of contract, (5) libel *per se* and (6) slander *per se*. In addition, Defendants' counterclaims were based on (1) negligence, (2) breach of fiduciary duty, and (3) rescission. Defendants assert that Plaintiffs "prevailed" only on the breach of contract claim involving the \$20,000.00 term note, and therefore an award of \$200,000.00 in attorneys fees would be improper. Defendants additionally argue that the contract claim and the other claims do not involve a "common core of facts," and that Plaintiffs should therefore not be compensated for attorneys fees for all of the claims, when Plaintiffs "prevailed" on only one relatively small claim. Finally, Defendants assert that § 936 cannot apply to the rescission claim, and Plaintiffs therefore cannot be awarded attorneys fees with respect to that claim.

To obtain attorneys fees under § 936, Plaintiffs must establish that they are the prevailing party in the lawsuit, and that fees are properly awarded under § 936 for a claim based on a note and for a rescission claim.

A. Plaintiffs' Claims: Rescission & the Note

Defendants do not argue that § 936 does not apply to a breach of contract claim based on the failure to pay in accordance with a note. The provisions of § 936

clearly apply to any "action to recover on [a] . . . note. . . ." 12 O.S. 1991, § 936. Therefore, in accordance with § 936, if Plaintiffs are a "prevailing party," attorneys fees may be properly awarded to Plaintiff for their cause of action to recover on the note.

The more difficult issue is whether § 936 applies to an action for rescission of a "labor and services" agreement. Defendants argue, in part, that § 936 does not apply to a rescission action because a rescission claim is "equitable" in nature. However, the Oklahoma Supreme Court has applied § 936 to an action for rescission of a contract to sale goods. See Arine v. McAmis, 603 P.2d 1130 (Okla. 1979).^{1/} Therefore, attorneys fees may be properly awarded for a cause of action that is based on rescission.

However, Oklahoma cases interpreting § 936 have concluded that attorneys fees cannot be awarded, under this Section, based on a contract that "relates" to labor and services. The status of the Oklahoma case law was summarized by the Tenth Circuit Court of Appeals in Merrick v. Northern Natural Gas Co., a division of Enron Corp., 911 F.2d 426 (10th Cir. 1990).

In Russel v. Flanagan, 544 P.2d 510 (Okla. 1975), the Oklahoma Supreme Court construed section 936 and held that the phrase "relating to" modified "the purchase or sale of goods, wares, or merchandise" but did not modify "for labor or services." Id. at 512. As a result, to recover under section 936, a prevailing party on a labor or services

^{1/} In this case, Defendants requested rescission of a labor and services contract whereas the claim for rescission in Arine is related to the sale of "goods" (a horse). Therefore, the two claims focus on separate clauses in § 936. However this distinction is not relevant with respect to the determination of whether or not a claim for "rescission" is appropriate under § 936.

contract claim must demonstrate that the claim is for labor or services rendered, not just that the claim relates to the performance of labor or services. "The question is whether the damages arose directly from the rendition of labor or services, such as a failure to pay for those services, or from an aspect collaterally relating to labor or services, such as loss of profits on a contract involving the rendition of labor and services." Burrows Constr. Co. v. Independent School Dist., 704 P.2d 1136, 1138 (Okla. 1985). The statute applies if "recovery is sought for labor and services as in the case of a failure to pay for them. . . . Its provisions are inapposite if the suit be one for damages arising from the breach of an agreement that relates to labor and services." Holbert v. Exheverria, 744 P.2d 960, 966 (Okla. 1987) (footnote omitted). Because Merrick sought damages for the alleged breach of a labor contract and not for the value of services rendered, we conclude that section 936 does not apply.

Id. at 434 (citations in original). Oklahoma and the Tenth Circuit both key on the requirement that the action must be for the failure to pay for labor or services.

In this action, Defendants sought to rescind an attorneys fees agreement. Plaintiffs successfully defended against Defendants' rescission action. Plaintiffs, however, did not maintain an action, and do not characterize their defense of the rescission action as an action, for recovery for fees owed.^{2/} Therefore, § 936 does not apply, and Plaintiffs cannot recover fees.

Plaintiffs suggest that Comavi International, Ltd. v. Rockwell International Corporation, 797 F.2d 912 (10th Cir. 1986) supports an award of fees under § 936. Comavi did uphold an award of attorneys fees under § 936 in an action to enforce an

^{2/} Plaintiffs discuss their entitlement to payment under the fee agreement in terms of "contingencies" which must occur before payment would be "triggered." See Brief of Holliman, Langholz, Runnels & Dorwart in Response to Defendants' Supplemental Brief on Attorneys' Fees, filed July 21, 1997, at 4, 5.

attorneys fees agreement. However, in Comavi, the attorney had already performed the work and was attempting to collect his contingency fee pursuant to the agreement. All contingencies, in Comavi, had been satisfied. This is contrary to the situation in this case.

Plaintiffs have established that § 936 applies to Plaintiffs' action to recover for Defendants' default on the note. Plaintiffs have not established that § 936 applies to Plaintiffs' defense of Defendants' action for rescission.

B. Prevailing Party

Plaintiffs must additionally establish that they are a "prevailing party" in order to qualify for an award of attorneys fees under § 936. Under the facts of this case, the court concludes that the "correct result" is to find that Plaintiffs are a prevailing party and entitled to attorneys fees with respect to Plaintiffs' claim to recover on the note. In Tulsa Litho Co. v. Tile & Decorative Surfaces Magazine Publishing, Inc., 69 F.3d 1041 (10th Cir. 1995), the Tenth Circuit, in addressing an award of attorneys fees under 12 O.S. § 936, noted:

The general rule is that attorney fees and costs in multi-party cases as well as in certain consolidated cases are awarded to different parties on the basis of the separate judgments obtained, not the overall trial result.

Id. at 1043, *citing* Christie-Lambert Van & Storage Co. v. McLeod, 39 Wash. App. 298, 693 P.2d 161, 166 (1984). The Tenth Circuit concluded that Oklahoma follows this general rule.

In this case, the District Court entered Judgment on April 15, 1997. [Doc. No. 223-1]. Judgment was entered in favor of the Plaintiffs on Count V of the Amended Complaint for breach of contract in the amount of \$20,000 exclusive of pre-judgment interest which accrued at 8.5%, and on Count IV of Emerald's counterclaim for cancellation and rescission of the April 1, 1993 Fee Agreement. Judgment was entered in favor of the Defendants on: (1) Count I of the Amended Complaint brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and Rule 10b-5 of the Securities and Exchange Commission, (2) Count III of the Amended Complaint brought pursuant to 71 O.S. 1991, § 408(a)(2), (3) Count IV of the Amended Complaint for common law and statutory fraud, (4) Count VII of the Amended Complaint for libel *per se*, (5) Count II of Emerald's counterclaim for legal negligence, but assessing no damages, (6) and Counts II and VI of Emerald's counterclaim for breach of fiduciary duty, assessing actual damages of \$233,731.00. Plaintiffs are "prevailing parties" on the Plaintiffs' action to recover the \$20,000.00 due on the note, and the claim for rescission of the attorneys fees agreement. However, as discussed above, because the rescission agreement "relates" to labor and services, attorneys fees are appropriate only with respect to Plaintiffs action to collect under the terms of the note. Regardless, Plaintiffs prevailed on the only cause of action for which attorneys fees are appropriate under § 936.

Defendants argue that Oklahoma recognizes only "one" prevailing party in a lawsuit. Defendants rely on Quapaw Co. v. Varnell, 566 P.2d 164 (Okla. Ct. App. 1977). In Quapaw, the court noted that

There can be but one prevailing party in an action at law for the recovery of a money judgment. It transpires frequently that in the verdict each party wins on some issues and as to such issues he prevails, but the party in whose favor the verdict compels a judgment is the prevailing party. Each side may score, but the one with the most points at the end of the contest is the winner, and . . . is entitled to recover his costs. The words 'prevailing party' can have no other meaning except the party in whose favor judgment should be entered. . . . Where there is one plaintiff and one defendant, there can be but one prevailing party and but one judgment. The prevailing party is regarded as that party who has affirmative judgment rendered in his favor at the conclusion of the entire case.

Id. at 167. In Tulsa Litho, the Tenth Circuit distinguished Quapaw, noting that it involved a single party against another single party. In addition, although Quapaw involved four causes of action, each cause of action was for the breach of an employment contract, and therefore attorneys fees could be awarded on each cause of action under § 936. This situation is not present in the current case. In this case, attorneys fees pursuant to § 936 are appropriate with respect to only one of the causes of action -- Plaintiffs cause of action based on the note.

The court concludes that the correct result is to find Plaintiffs the prevailing party on Plaintiffs' cause of action to recover under the Note. See also Pursley v. Mack Energy Co., 908 P.2d 289 (Okla. Ct. App. 1995) (Plaintiff was prevailing party under "net judgment rule," but Defendant awarded attorneys fees for prevailing on one claim); Smith v. Jenkins. 873 P.2d 1044 (Okla. 1994) (recognizing two prevailing parties in the comparative negligence context). Regardless, it would be an anomalous result if Plaintiffs are permitted attorneys fees if they bring a separate action on a note

(and prevail), but are denied attorneys fees if they choose to bring that action along with other claims (upon which they did not prevail). In addition, arguably, if the outcome of an action is that Plaintiff prevails on one claim (that is an attorneys fees claim) but Defendant prevails on nine claims (none of which provide for attorneys fees), arguably, the "one prevailing party rule" could result in the Defendant being awarded attorneys fees for being the "prevailing party" in the action even though Defendant did not prevail on the only cause of action which permits fees. Certainly this result could not be the intended consequence of the rule. The court concludes that Oklahoma law, and the result that makes more sense, is to permit a prevailing party on an attorneys fees claim to recover his attorneys fees.

C. The Note

The court concludes that attorneys fees are appropriate under § 936 with respect to Plaintiffs' claim under the note. However, even if fees were not appropriate under § 936, the Note contains a provision which expressly provides for attorneys fees.

In the event the indebtedness evidenced by this Note is collected by legal action or through an attorney-at-law, all costs of collection, including reasonable attorneys' fees, shall be paid by Borrower.

See Motion and Supporting Brief of Holliman, Langholz, Runnels, & Dorwart for Attorneys' Fees, filed April 30, 1997, at 5, referencing Exhibit "B."

D. Determining the Amount of the Fee Award

Plaintiffs additionally argue that the claims in the lawsuit were all interrelated and involved "common questions of fact" and therefore Plaintiffs' fee award should not be limited to only the fees expended on the claim on which Plaintiffs prevailed. The court disagrees. Plaintiffs have not established the degree of interrelatedness necessary to justify an award of all fees expended by Plaintiffs in this lawsuit. Furthermore, an examination of Plaintiffs' claims and Defendants' counterclaims reveals that many of the claims have unique requirements. The court therefore concludes that although Plaintiffs are a prevailing party with respect to Plaintiffs' claim on the note, Plaintiffs' attorneys fees are limited to the attorneys fees related to that claim. See, e.g., Sisney v. Smalley, 690 P.2d 1048, 1051 (Okla. 1984) (approving apportionment of fees).

The court has reviewed Plaintiffs' attorneys fees application, but is unable to discern from the application the attorneys fees which are related to the claim upon the promissory note. Fees statements from November 1994 through April 1996 do not indicate the number of hours each attorney worked on a project. Therefore, even if the court segregated the time entries applicable to the two claims upon which Plaintiffs prevailed, determining the number of hours spent on those claims would not be possible. In addition, the fees statements clearly indicate that not all of the time was spent solely on the claim upon which Plaintiffs prevailed. For example, an entry from March 20, 1995, for WWO, reads "issues for proceedings in state and federal

court;" an entry from December 13, 1995, for CDL, reads "research re statute of limitations in a Rule 10b-5 claim."

Therefore, the court directs Plaintiffs to file an amended application isolating only the attorneys fees which are attributable to their recovery on the promissory note within fifteen days. Defendants are given ten days to respond.

II. DEFENDANTS' MOTION FOR FEES

Defendants request attorneys fees pursuant to 71 O.S. 1991, § 408i. This statute provides attorneys fees to a prevailing defendant in an action "brought under paragraph (1) or (2) of subsection (a) . . . of this section," to recover reasonable attorneys fees and costs if "the court, in its discretion, determines that the action was without substantial merit." Defendants contend that Plaintiffs filed an action which had no merit and that Plaintiffs intended solely to harass Defendants. Defendants request that the court award a reasonable attorneys fee.

Plaintiffs argue that their claims had substantial merit and therefore an award of fees would not be proper. Plaintiffs additionally refer to Dotson v. Rainbolt, 894 P.2d 1109, 1115 (Okla. 1995), to support their contention that lack of "substantial merit" is equated with "frivolous." Defendants, at oral argument, agreed that Defendants must establish that Plaintiffs' claims were frivolous, but Defendants claim that they have met this burden. The court concludes, after a review of the case law, the arguments of the parties, and the pleadings, that Plaintiffs' claims were not frivolous and that Defendants should not be awarded an attorneys fee.

III. BILL OF COSTS

Plaintiffs assert that as the "prevailing party" they are entitled to costs pursuant to Fed. R. Civ. P. 54(d). [Doc. No. 228-1]. Plaintiffs request \$120.00 for the filing fee, \$451.00 for court reporter fees, \$73.70 for witness fees, \$2,580.17 for copying costs, and \$5,505.33 for deposition costs, for a total of \$8,797.70.

Defendants assert that Plaintiffs are not the prevailing party and therefore are not entitled to fees. Defendants rely on The Company, Inc. v. Trion Energy, 761 P.2d 470, 471-72 (Okla. 1988), and Bullard's Oil Field Serv., Inc. v. Williford Energy Co., 839 P.2d 185 (Okla. 1992).

Although state attorneys fees provisions may be applied by a federal court in the award of attorneys fees with respect to causes of action based on state law, federal law governs the award of costs. See, e.g., Gobbo Farms & Orchards v. Poole Chemical Co., 81 F.3d 122, 123 (10th Cir. 1996). In addition, the Tenth Circuit has recognized that a "prevailing party" under Oklahoma statute § 936 may be different than the "prevailing party" under Fed. R. Civ. P. 54(d). Arkla Energy Resources, a division of Arkla, Inc. v. Roye Realty & Developing, Inc., 9 F.3d 855, 865 (10th Cir. 1993) ("The 'prevailing party' under Rule 54(d) is not necessarily a prevailing party under Oklahoma's section 936.").

Plaintiffs "prevailed" on Plaintiffs' promissory note (awarded \$20,000), and the defense of Emerald's rescission counterclaim. Defendants prevailed on Plaintiffs' Rule 10b-5 claim, Plaintiffs' Oklahoma Securities Act claim, Plaintiffs' claims based on fraud and deceit, Plaintiff David Holden's claims for libel and slander *per se*, Defendant's

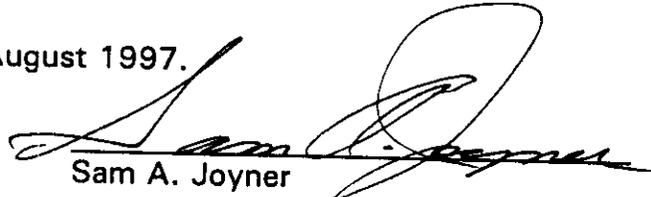
negligence counterclaim, and Defendant's breach of fiduciary duty counterclaim (award of \$237,731). Based on the verdict of the jury, the presentations made by the parties, and the judgment entered by the District Court, the Magistrate Judge concludes that Plaintiffs are not a prevailing party for the purposes of an award of costs pursuant to Fed. R. Civ. P. 54(d). See, e.g., Howell v. Petroleum Corp. v. Samson Resources Co., 903 F.2d 778, 783 (10th Cir. 1990) ("The court was within its discretion to refuse to award costs to a party which was only partially successful.") *citing* In re Corrugated Container Antitrust Litigation, 756 F.2d 411, 418 (5th Cir. 1985).

IV. RECOMMENDATION

The United States Magistrate Judge recommends that the District Court find Plaintiffs are a prevailing party for the purpose of an award of attorneys fees under 12 O.S. § 936 on the promissory note, but that Plaintiffs are not a prevailing party under Fed. R. Civ. P. 54(d). The United States Magistrate Judge additionally recommends that the District Court deny an award of attorneys fees to Defendants under 74 O.S. § 408(i).

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., Talley v. Hesse, 91 F.3d 1411, 1412 (10th Cir. 1996), Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 11 day of August 1997.



Sam A. Joyner
United States Magistrate Judge

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

FILED

AUG 12 1997

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

FANNIE E. BROWN

486-60-3335

Plaintiff,

vs.

Case No. 96-CV-464-M

JOHN J. CALLAHAN¹,
Acting Commissioner Social Security
Administration,

Defendant,

ENTERED ON DOCKET
AUG 13 1997
DATE _____

ORDER

Plaintiff, Fannie E. Brown, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.² In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26

¹ President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security, effective March 1, 1997, to succeed Shirley S. Chater. Pursuant to Fed.R.Civ.P. 25(d)(1) John J. Callahan is substituted as the defendant in this suit.

² Plaintiff's April 28, 1993 application for disability benefits was denied June 22, 1993 and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held November 14, 1994. By decision dated March 22, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 26, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991).

Plaintiff was born April 28, 1952 and was 42 years old at the time of the hearing. She has a 10th grade education and has worked as a sewing machine operator, sausage packer, rope factory and poultry plant worker. She claims to be unable to work as a result of pain due to recurrent adhesion disease, irritable bowel syndrome, degenerative joint disease, and medication side effects. The ALJ determined that Plaintiff is capable of performing her past relevant work as a sewing machine operator. The case was thus decided at step four of the five-step evaluative sequence for determining whether Plaintiff is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to give proper weight to the opinion of her treating physician; (2) failed to properly evaluate the demands of her past relevant work; and (3) failed to evaluate the effect of Plaintiff's medication on her ability to perform her past relevant work.

Social Security regulations require the ALJ to fully develop the factual record regarding the claimant's residual functional capacity (RFC) and the claimant's past relevant work (PRW), make specific findings of fact regarding the claimant's RFC and PRW and then compare the two to determine if the claimant's RFC would permit a return to his or her PRW. SSR 82-62. Specific findings must be included in the decision:

In finding that an individual has the capacity to perform a past relevant job, the determination or decision must contain, among other findings, the following specific findings of fact:

1. A finding of fact as to the individual's RFC.
2. A finding of fact as to the physical and mental demands of the past job/occupation.
3. A finding of fact that the individual's RFC would permit a return to his or her past job or occupation.

The importance of the specific findings of fact lies in their utility for the Court in adhering to its limited role in reviewing Social Security appeals. The Court is not to reweigh the facts or exercise discretion in Social Security appeals. The Court's function is to determine if there is substantial evidence to support the decision and to determine if the correct legal standards were applied. *Musgrave, supra.* at 1374. In the absence of specific findings of fact, the Court has difficulty confining its review to the appropriate parameters and runs the risk of engaging in fact finding and discretionary judgments on its own.

In the present case the Court finds that the ALJ did not perform the analysis required by SSR 82-62. Although the record contains a fairly thorough description

of the requirements of Plaintiff's past work as a sewing machine operator [R. 94-95], the ALJ's decision is devoid of any comparison of Plaintiff's RFC to those requirements. In this regard the Court notes that Plaintiff described her past work as requiring constant bending, the record reflects that such stress is what precipitates pain from her abdominal adhesions. Further, it would seem to be significant that Plaintiff attempted to return to her former work on February 12, 1991, but was only able to work until February 22, 1991 [R. 77], yet the ALJ's decision contains no discussion of that fact. In addition, although Plaintiff testified that the medication she takes would inhibit her ability to operate machinery [R. 38], the ALJ's decision contains no discussion of the effects of her medications on her ability to perform work.

The Court finds that the ALJ's analysis at step four was flawed. *See Winfrey v. Chater*, 92 F.3d 1017 (10th Cir 1996). The case is REVERSED and REMANDED for analysis of the mental and physical demands of Plaintiff's past work in accordance with SSR 82-62, for consideration of the effects of Plaintiff's medication on her ability to work, and for such further development of the record and other proceedings as deemed necessary by the Social Security Administration in light of this Order.

SO ORDERED this 12th day of July, 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

AUG 12 1997

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

FANNIE E. BROWN,

Plaintiff,

v.

JOHN J. CALLAHAN, Acting
Commissioner of the Social Security
Administration,

Defendant.

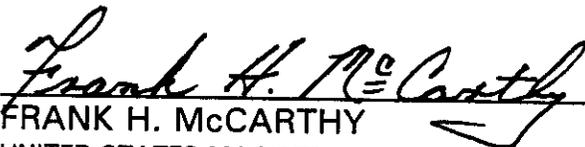
CASE NO. 96-cv-464-M

ENTERED ON DOCKET

DATE AUG 13 1997

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 12th day of AUG., 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

(23)

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

FILED

AUG 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PHILLIPS PIPE LINE COMPANY,)
)
 Plaintiff,)
)
 v.)
)
 DIAMOND SHAMROCK REFINING)
 AND MARKETING COMPANY,)
)
 Defendant.)

Case No. 92-C-315-E

ENTERED ON DOCKET

DATE AUG 12 1997

ORDER OF DISMISSAL WITH PREJUDICE

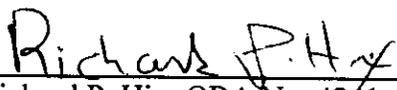
This cause comes before the Court on the parties' Stipulation of Dismissal With Prejudice, and upon being advised that the parties are in agreement regarding the dismissal of this case as indicated by said Stipulation, finds that said Stipulation is proper, and this case should be dismissed with prejudice.

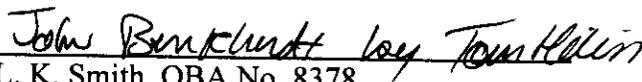
IT IS THEREFORE ORDERED, that this action, including all claims and counterclaims between the parties, is hereby dismissed with prejudice, each party to bear its own costs and fees.

Dated this 11th day of August, 1997.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:


Richard P. Hix, OBA No. 4241
Steven K. Metcalf, OBA No. 14780
Doerner, Saunders, Daniel & Anderson
320 South Boston, Suite 500
Tulsa, OK 74103


L. K. Smith, OBA No. 8378
John A. Burkhardt, OBA No. 1336
Boone, Smith, Davis, Hurst & Dickman
500 ONEOK Plaza, 100 W. 5th Street
Tulsa, OK 74103

Attorneys for Defendant,
Diamond Shamrock Refining
and Marketing Company
S:\JAB\PHILLIPS\DIAMOND\PLEADING\STIPORD.DOC

Attorneys for Plaintiff,
Phillips Pipe Line Company

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

F I L E D

AUG 11 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;)

ENTERED ON DOCKET
DATE AUG 12 1997

Defendants.)

STIPULATION OF PARTIAL DISMISSAL:
1991 Plymouth Laser,
VIN #4P3CS34T8ME085013:

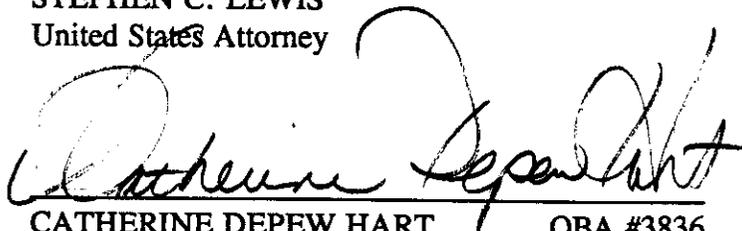
STIPULATION OF PARTIAL DISMISSAL

COME NOW the Plaintiff, the United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, by Catherine Depew Hart, Assistant United States Attorney, Claimant/Lienholder Auto Marketing Network, d/b/a AMN Receivable Finance, and stipulate that the defendant vehicle 1991 Plymouth Laser, VIN 4P3CS34T8ME085013, 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/Lienholder Auto Marketing Network d/b/a AMN Receivable Finance.

ST

Respectfully submitted,

STEPHEN C. LEWIS
United States Attorney

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

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

OBA #3836

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

A handwritten signature in black ink that reads "David O. Beal". The signature is written in a cursive style with a horizontal line underneath the name.

David O. Beal
Love, Beal & Nixon, P.C.
P.O. Box 32738
Oklahoma City, OK 73123
Attorneys for Claimant/Lienholder Auto Marketing
Network d/b/a AMN Receivable Finance

N:\UDD\PEADEN\FCSA\FRHOME\HICKS\DISM-90p.JTI

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

ALFRED RAY CARTER

Petitioner,

vs.

STEVE KAISER, Warden, and THE
ATTORNEY GENERAL OF OKLAHOMA

Respondents.

Case No. 97-CV-96-H ✓

ENTERED ON DOCKET

DATE 8-12-97

FILED
AUG 08 1997
C
ombardi, Clerk
DISTRICT COURT
OF OKLAHOMA

REPORT AND RECOMMENDATION

Respondent's MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS [Dkt. 8] has been referred to the undersigned United States Magistrate Judge for report and recommendation.

Respondent seeks dismissal of the petition for writ of habeas corpus under 28 U.S.C. § 2244, which provides, in relevant part:

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application **shall be dismissed**. [emphasis supplied].

28 U.S.C. § 2244(b)(1) was amended as part of the Antiterrorism and Effective Death Penalty Act of 1996 and was signed into law on April 24, 1996. The instant petition was filed January 31, 1997. Because the amendment was already in place at the time the petition was filed, it is appropriately applied to this case. *Hatch v. State of Okl.*, 92 F.3d 1012, 1014 (10th Cir. 1996).

Review of the copy of Petitioner's 1992 petition for writ of habeas corpus reveals that Petitioner has previously presented **identical** claims to this court in Case

No. 92-C-8-E. [Dkt. 9, Ex. F]. In the 1992 case Petitioner alleged the Tulsa District Court lacked jurisdiction to impose an enhanced sentence upon him. He claimed that over 10 years had elapsed between completion of his prior conviction and the date he was convicted on his current charge. [Dkt. 9, Ex. F, p. 8]. The denial of his petition was affirmed by the Tenth Circuit on February 10, 1994, Case No. 93-5196:

The federal district court held it could not second-guess the Oklahoma Court's construction of State law and dismissed the petition.

* * *

The district court was correct in refusing to review a state holding on a state law.

[Dkt. 9, Ex. E, p. 2]. In the present case Petitioner presents the same claim: "The Tulsa District Court lacked jurisdiction to sentence Petitioner as a second and subsequent offender, thereby, sentencing Petitioner illegally." [Dkt. 1, p. 6].

The Court finds that the allegation that the court lacked jurisdiction to sentence petitioner as a second and subsequent offender is a second habeas corpus application under § 2254 which was presented in a prior application. This claim is therefore subject to dismissal pursuant to 28 U.S.C. § 2254(b)(1).

After Petitioner filed his response to the motion to dismiss, Petitioner filed two additional documents. The first document is a motion requesting leave to supplement his brief in support of this petition in which Petitioner seeks to add ineffective assistance of counsel to his petition. [Dkt. 11]. The second document is a "Notice to the Court" which outlines Petitioner's claim he was denied effective assistance of counsel in connection with his conviction. Specifically, Petitioner claims his

appointed counsel's representation of the co-defendants was a conflict of interest. This claim was not raised in the previous application for habeas corpus relief. An ineffective assistance of counsel claim was raised in the state court application for post-conviction relief. [Dkt. 9, Ex. C, D]. However, it is not apparent that the precise issue of attorney conflict of interest was raised. Regardless of whether this claim was exhausted § 2244 requires that this claim be dismissed.

Section 2244(b)(2) provides, in relevant part:

A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; [emphasis supplied].

The Court has reviewed Petitioner's arguments concerning his right to conflict-free counsel and notes that all of the cases Petitioner cited pre-date his 1992 application for habeas relief. It is apparent that Plaintiff does not rely on a new rule of constitutional law. Therefore, Petitioner's proposed amended claim does not fall within the exception set out in § 2244(b)(2)(A).

Petitioner's claim of ineffective assistance of counsel is based upon an alleged conflict arising from appointed counsel's representation of Petitioner and a co-defendant, Mr. West. According to Petitioner, Mr. West signed a statement

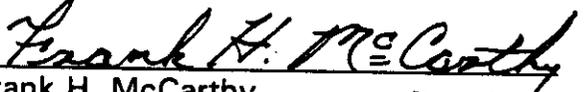
implicating him in the commission of a robbery with a firearm and for knowingly concealing stolen property. Since the same attorney was appointed to represent both defendants, Petitioner alleges a conflict of interest prevented counsel from adequately representing his interests. Petitioner has submitted a letter authored by his appointed counsel, Richard L. Clark, Assistant Public Defender, dated June 9, 1989, addressed to the General Counsel of the Oklahoma Bar Association. [Dkt. 12, Ex. A]. The letter was apparently written in response to a grievance filed by Petitioner and specifically addresses Petitioner's claim of conflict of interest based upon the co-defendant's statement implicating him. This demonstrates that Petitioner was aware of the factual predicate for his claim of ineffective assistance of counsel at the time he filed his 1992 application for habeas relief. Therefore, Petitioner's proposed amended claim does not fall within the exception set out in § 2244(b)(2)(B)(i).

The undersigned United States Magistrate Judge RECOMMENDS that Respondent's MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS [Dkt. 8] be GRANTED and that the present application be DISMISSED pursuant to 28 U.S.C. § 2244.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and

recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 8th day of August, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing was served on each of the parties to this case and on them or their attorneys as shown on the

12th day of August, 1997.

L. Fortillo, Deputy Clerk

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

8-12-97

UNITED STATES OF AMERICA,)
)
 Appellant,)
)
 vs.)
)
 SAMUEL L. BEWLEY and ELIZABETH)
 BEWLEY,)
)
 Appellees.)

No. 96-C-279-K

F I L E D

AUG 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

Before the Court is the objection of the United States to the Report and Recommendation of the United States Magistrate Judge. The Magistrate recommended that the decision of the United States Bankruptcy Court for the Northern District of Oklahoma in In re Bewley, 191 B.R. 459 (Bankr.N.D.Okla.1996) be affirmed. The government has timely filed its objection.

The facts are thoroughly set forth in the bankruptcy court opinion and the Magistrate's recommendation. To summarize, Samuel Bewley ("Debtor") incorporated Phoenix Transportation, Inc. ("Phoenix") in 1987. Debtor operated Phoenix until January 1990, when he fell into ill health. (At the time of the 1995 trial in bankruptcy court, debtor was 81 years old). In January 1990, debtor and his wife transferred all Phoenix stock to their son, Mike Bewley. Mike operated Phoenix from early 1990 until his death on May 28, 1992. Upon his son's death, debtor began operating Phoenix again. During the period when Mike operated the company, it accrued outstanding federal withholding taxes in the amount of \$110,742.57.

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The Internal Revenue Service ("IRS") approached debtor, and on or about June 17, 1992, Phoenix and the IRS entered into an agreement which allowed Phoenix to continue to operate and to make payments on the outstanding taxes owed. Phoenix agreed to pay a percentage of its gross monthly revenues to the IRS each month and to use the balance of gross revenues to meet operating expenses. Phoenix remained in operation for some months and made payments to the IRS in the amount of \$26,789.03. After approximately four months, Phoenix ceased operations. On August 5, 1993, the debtor and his wife filed a voluntary petition under Chapter 13 of the United States Bankruptcy Code. The IRS filed a proof of claim in the amount of \$113,076.00 for unpaid trust fund taxes of Phoenix. Debtor filed a motion to disallow claim pursuant to 11 U.S.C. §502(a).

The Internal Revenue Code requires employers to withhold income and Federal Insurance Contribution Act taxes from their employees' wages. The amounts collected from the employees' wages are considered to be held by the employer in trust for the United States. The funds may not be used by the employer for any other obligations, including but not limited to operating expenses. United States v. Kim, 111 F.3d 1351, 1356 (7th Cir.1997). In seeking satisfaction of unpaid tax liability, the IRS may create a lien against the employer's property or may seek to impose personal liability pursuant to 26 U.S.C. §6672. It is the second course which the IRS chose in the case at bar.

Section 6672(a) provides in pertinent part:

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to [sic] a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

The §6672 penalty may be assessed against (1) any responsible person¹ (2) who has willfully failed to collect, account for, or pay over federal employment taxes. Muck v. United States, 3 F.3d 1378, 1380 (10th Cir.1993). Once the IRS assesses a putatively responsible person with a penalty under §6672, that person bears the burden of showing by a preponderance of the evidence either he was not a responsible person or he did not act willfully. Finley v. United States, 82 F.3d 966, 970-71 (10th Cir.1996).

The bankruptcy court rejected the IRS penalty claim, ruling (1) debtor could not be liable because there were insufficient assets in the corporation when debtor reassumed control² and (2) debtor did not act "willfully" because he used company funds to keep the business running pursuant to the agreement between Phoenix

¹A person who is "required to collect, truthfully account for, and pay over" the tax is commonly referred to as a "responsible person". Kim, 111 F.3d at 1357.

²A responsible person under §6672 does not violate that statute by willfully using employer funds for purposes other than satisfaction of the trust-fund tax claims of the United States when at the time he assumed control there were no funds with which to satisfy the tax obligation and the funds thereafter generated are not directly traceable to collected taxes referred to by that statute. Slodov v. United States, 436 U.S. 238, 259-60 (1978).

and the IRS. The Magistrate Judge rejected the first rationale, but accepted the second. Debtor has not filed an objection to the Report and Recommendation.³ The only issue before this Court is whether debtor acted willfully.

The determination of willfulness under §6672 is an issue of fact, which can only be overturned if clearly erroneous. Bradshaw v. United States, 83 F.3d 1175, 1182-83 (10th Cir.1995), cert. denied, 117 S.Ct. 296 (1996). In Finley v. United States, 82 F.3d 966, 971 (10th Cir.1996) (citations omitted), the court stated:

Generally, a responsible person's failure to pay over withholding taxes may be described as willful under two theories. First, under what might be called a theory of actual knowledge or intent, a responsible person's conduct is willful if that person 'acts or fails to act consciously and voluntarily and with knowledge or intent that as a result of his action or inaction trust funds belonging to the government will not be paid over but will be used for other purposes.' Second, a responsible person can also act willfully if she 'acts with a reckless disregard of a known or obvious risk that trust funds may not be remitted to the government.'

For reasons unexplained by the parties, the agreement itself is not present in the record.⁴ The government argues that by signing the agreement on behalf of Phoenix, debtor "made a voluntary, conscious and intentional decision to prefer other creditors over the United States." (Appellant's Brief at 4). In other words, debtor had not acted willfully and was not personally

³Debtor has also inexplicably not filed a response to the government's objection.

⁴The agreement was apparently not introduced into evidence before the bankruptcy court. See Bewley, 191 B.R. at 460 n.2.

liable until he entered the installment agreement with the IRS. The Court rejects this reasoning. It bears repeating that personal liability under §6672 is a penalty, and penalties are imposed for some sort of fault. No fault is to be ascribed to an individual who enters into an installment agreement presented to him by the IRS itself, and which contemplates by its terms that a percentage of the company's funds will be used for operating expenses.

The government further states that "[i]f the debtor wanted personal protection under the agreement, he could have negotiated a contract term that provided personal protection." (Appellant's Brief at 5 n.3). Leaving aside the grossly unequal bargaining position of the parties, the very purpose of the "willfulness" requirement is to avoid across-the-board imposition of personal liability against all responsible persons. It is a drastic change in status to become personally liable for taxes owed by one's company. The Court believes such a change in status must be explicitly set forth in the installment agreement and explained to the person potentially liable. The debtor in this case did not have the burden to "negotiate" the point that he was not agreeing to become personally liable for over \$100,000.⁵

The government additionally opines that "[i]f the IRS cannot

⁵At trial, the IRS agent who negotiated the agreement with debtor testified that the agent did not tell debtor he would be held harmless or would be relieved of personal liability if the corporation made payments (July 28, 1995 transcript at 6 ll.19-25) and that the agent told debtor it "looked like [debtor] would be a responsible person of this corporation" (Id. at 7 ll. 6-8). Again, at that point debtor had no personal liability of which to be "relieved" because only a responsible person who willfully fails to pay is personally liable.

enter into installment agreements without a guarantee that the terms of the agreement are limited to those written in the contract, the IRS will simply use its powers of seizure and levy to get its money and will refrain from entering into installment agreements. This would be an unfortunate result." Id. The government has failed to produce a copy of the agreement, and therefore the Court cannot determine what the terms of the agreement were. In any event, the Court fails to see the undue burden on the IRS in placing a provision in such installment agreements that clearly explains to the debtor the implications of personal liability for potentially huge sums. If the IRS deems it "unfortunate" that it cannot lay snares for unwary laypersons, so be it.

Finally, the government relies upon the statement in Muck v. United States, 3 F.3d 1378, 1382 (10th Cir.1993), that "[o]nly if plaintiff can establish that the agreement specifically provided that he, individually, would be held harmless can the presence of the agreement relieve him of personal liability." Muck is distinguishable. First, the agreement in that case was between the corporation's general manager (not the plaintiff) and the IRS. Second, as the Magistrate Judge has pointed out, the plaintiff in Muck sought to use the agreement to relieve liability which already existed. Here, the IRS seeks to use the agreement to impose personal liability upon an individual who sought nothing more than to keep his company operating, a circumstance forced upon him by his son's death. Upon review of the record, the Court concludes

that the bankruptcy judge's finding of lack of willfulness was not clearly erroneous.

It is the Order of the Court that the appellant's objection (#8) to the Magistrate Judge's Report and Recommendation is hereby DENIED. The decision of the bankruptcy court below is AFFIRMED.

ORDERED this 11 day of August, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

FILED ON DOCKET
8-12-97

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

FREDERICK E. LAMPORT,)
)
Plaintiff,)
)
vs.)
)
CASA BONITA INC., a foreign)
corporation; HILLCREST MEDICAL)
CENTER, INC., an Oklahoma Nonprofit)
Corporation and JONATHAN LOVE,)
an individual,)
)
Defendants.)

No. 97-C-419-K

F I L E D

AUG 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of the Plaintiffs to remand proceedings to state court pursuant to 28 U.S.C. § 1447(c) on the grounds that complete diversity does not exist between the Plaintiff and the named Defendants.

On October 10, 1996, Plaintiff filed his claim against Casa Bonita Incorporated ("Casa Bonita") and Jonathan Love. On April 4, 1997, the claim was amended to include Hillcrest Medical Center ("Hillcrest"). Casa Bonita was served with process on April 7, 1997. According to Oklahoma law, Plaintiff had 180 days from October 10, 1996 to serve Jonathon Love. Plaintiff failed to do so at that time, and, to the best of the Court's knowledge, still has not done so. However, Jonathan Love has not been officially dismissed from the case. Similarly, Hillcrest has not been served with process; however, the time limitation for service of process under Oklahoma law does not expire until October 1, 1997.

On April 28, 1997, Casa Bonita removed the case to federal court. Plaintiff notified Casa

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Bonita that complete diversity did not exist, and requested that Casa Bonita withdraw its Notice of Removal. Casa Bonita declined, and now asserts that neither Defendant Jonathan Love nor Defendant Hillcrest should be considered for purposes of determining whether this case was properly removed as neither party has been served. Additionally, Casa Bonita asserts that Hillcrest was joined solely to defeat diversity jurisdiction.

In support of its argument based upon lack of service, Casa Bonita insists that, under the plain language of 28 U.S.C. § 1441(b), only Defendants who are properly served should be considered for purposes of determining whether complete diversity exists.¹ Casa Bonita cites two cases in defense of this position. The first case, *Robertson v. Nye*, 275 F. Supp. 497 (W.D. Okla. 1967), relies solely on 1 Barron & Holtzoff Federal Practice and Procedure § 103 at 279 (1996 Pocket Part), in which the authors assert that the 1948 amendment to 28 U.S.C. § 1441(b) renders *Pullman Co. v. Jenkins*, 305 U.S. 534, 59 S. Ct. 347, 83 L.Ed. 334 (1939) inapplicable.² The second case cited by Casa Bonita, *Marquette v. Matra Transport, S.A.*, 1997 WL 222933 (N.D. Ill.), does not support Casa Bonita's position at all as it merely holds that the failure to obtain consent to remove from unserved defendants did not render the served defendant's removal invalid.

The Plaintiff relies heavily on *Pullman Co. v. Jenkins*, 305 U.S. 534, 59 S. Ct. 347, 83 L.Ed. 334 (1939) in arguing that the fact that Hillcrest and Jonathan Love have not been served is irrelevant in determining whether diversity jurisdiction exists.

¹ 28 U.S.C. § 1441(b) states that “[a]ny civil action [not arising under the Constitution, treaties or laws of the United States] shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”

² The *Pullman* case held that removal was not proper in a case based on diversity jurisdiction where there was a state resident named in the complaint, but had not been served.

Surprisingly, neither party cites Tenth Circuit cases which are directly on point, and which rather conclusively resolve this issue in favor of the Plaintiff. In *The United States for the Use & Benefit of General Rock & Sand Corp. v. Chuska Development Corp.*, 55 F.3d 1491, 1495 (10th Cir. 1995), the complaint at issue identified the plaintiff as an Arizona corporation, and stated that the named defendants were residents either of Arizona or Utah. The plaintiff tried to overcome the apparent lack of complete diversity in the pleading by arguing that the individual defendants from Arizona were never served, and that the 120-day period for service allotted by *Fed. R. Civ. Pro.* 4(m) (“Rule 4(m)”) had passed. The plaintiff urged the court to disregard those named defendants arguing that the court would have to dismiss this action as to those defendants pursuant to Rule 4(m). The Tenth Circuit flatly rejected this argument on the grounds that dismissal was not mandatory under Rule 4(m). The court also cited *Oppenheim v. Sterling*, 368 F.2d 516, 518 (10th Cir. 1966) *cert. denied* 386 U.S. 1011, 87 S. Ct. 1357, 18 L.Ed.2d 441 (1967), which held that “in the absence of [actual] dismissals, [diversity] jurisdiction must be determined from the face of the pleading and not from returns of service of process or lack thereof.”

Like Rule 4(m), *Okla. Stat. tit. 12, §2004* does not contain a mandatory dismissal provision, and allows for service of process out of time for good cause. This Court is bound by the Tenth Circuit interpretation of the applicable law, and thus remand in favor of the Plaintiff is clearly warranted on the grounds that the complaint names two defendants who are residents of the state of Oklahoma, and who have not been formally dismissed from this cause of action.³ *See also*, 14A Charles A. Wright, *et al.*, *Federal Practice & Procedure* § 3723 at 319 (West 1985).

³ Because the motion is resolved on the grounds cited above, the Court declines to address Casa Bonita's fraudulent joinder claim against the Plaintiff as to Defendant Hillcrest.

For the foregoing reasons, Plaintiffs' Motion to Remand [docket # 10] is GRANTED. Plaintiff's request for attorney fees and costs is DENIED. This case is hereby REMANDED to the Oklahoma District Court of Creek County, Bristow Division for all further proceedings.

ORDERED this 8 day of AUGUST, 1997.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

PRINTED ON DOCKET
8-12-97

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

JUNE LAWSON,

Plaintiff,

vs.

INTERNAL DATA MANAGEMENT,

Defendant.

No. 96-C-489-K

FILED
AUG 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

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

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

ORDERED THIS DAY OF 11 AUGUST, 1997


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

FILED ON DOCKET
8-12-97

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

JUNE LAWSON,)
)
 Plaintiff,)
)
 vs.)
)
 INTERNAL DATA MANAGEMENT,)
)
)
 Defendant.)

No. 96-C-489-K/

FILED

AUG 11 1997 *AV*

ORDER

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Before the Court is the motion of the defendant for summary judgment. Plaintiff commenced this action alleging a claim or claims under the Employee Retirement Income Security Act ("ERISA") (29 U.S.C. §§1001-1461) and the Consolidated Omnibus Budget Reconciliation Act ("COBRA") (29 U.S.C. §§1161-1169). Plaintiff alleges she was defendant's employee and defendant provided her with coverage under its group health care plan ("the Plan"). Defendant terminated plaintiff on July 22, 1992, and allegedly failed to notify plaintiff of her right to continuation coverage. Plaintiff alleges she incurred medical expenses after her termination for which she would have been covered under the Plan.

COBRA gives employees who had been covered by a group health care plan and had undergone a "qualifying event," such as job loss, which would otherwise mean termination of medical coverage, the chance to choose to continue their coverage at the group rate for 18 months following the event. 29 U.S.C. §1161. COBRA also requires employers to notify covered employees of their right to

elect continuation. 29 U.S.C. §1166. Failure to provide proper notice can render the plan administrator liable in the amount of up to \$100 per day and the court may order "such other relief as it deems proper." 29 U.S.C. §1132(c)(1).

Defendant filed a motion to dismiss based upon statute of limitation grounds. The Court granted the motion as to the alleged violation of the COBRA notice requirement, but denied the motion as to the alleged claim for denial of plan benefits as it required consideration of materials outside the pleadings. Defendant has now filed the present motion, which has been fully briefed.¹

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

The Court is persuaded by defendant's argument that "under

¹In her response brief, filed January 7, 1997, plaintiff requested an extension of time in which to supplement her response based upon an outstanding motion to compel. The record reflects that the Magistrate Judge granted plaintiff's motion to compel, but no supplement has been filed.

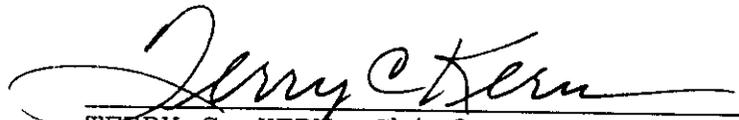
ordinary circumstances defects in fulfilling the reporting and disclosure requirements of ERISA do not give rise to a substantive remedy other than that provided for in [29 U.S.C. §1132(c)]." Disabatino v. Disabatino Bros., Inc., 894 F.Supp. 810, 815 (D.Conn.1995) (quoting Ackerman v. Warnaco, Inc., 55 F.3d 117, 124 (3rd Cir.1995)). This Court has already ruled in its previous order that the applicable statute of limitation for a claim under §1132(c) is three years. Plaintiff's termination took place July 22, 1992 and she did not commence this action until May 30, 1996. Her claim is time-barred. See Middleton v. Russell Group, Ltd., 924 F.Supp. 28 (M.D.N.C.1996).

Plaintiff argues, as she did in opposition to the motion to dismiss, that her claim is one for denial of plan benefits pursuant to 29 U.S.C. §1132(a)(1)(B). The Court has found no decision which permitted a plaintiff to characterize a violation of the COBRA notice requirement as a denial of plan benefits in order to come within a longer statute of limitation. Even accepting the claim as stated, the plaintiff's insurance coverage ceased upon her termination, and she paid no further premiums or ever sought any plan benefits. As defendant argues, exhaustion of remedies is an implicit prerequisite to seeking judicial relief under §1132(a)(1)(B). Gaylor v. John Hancock Mut. Life Ins. Co., 112 F.3d 460, 467 (10th Cir.1997). Further, it is well established that the proper defendant to a §1132(a)(1)(B) suit is the plan itself. Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482, 1490 (7th Cir.1996).

Plaintiff is between Scylla and Charybdis. If her claim is properly characterized as one under §1132(c) it is barred by the statute of limitation. If it is properly characterized as one under §1132(a)(1)(B), she fails to state a claim.

It is the order of the Court that the motion of Defendant for summary judgment (#10) is hereby GRANTED.

ORDERED this 11 day of August, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
8-12-97

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

JEAN ANTONIDES,)
)
)
Plaintiffs,)
)
vs.)
)
RONDO HOSANG and NORFOLK)
SECURITIES CORPORATION,)
)
)
Defendant.)

No. 96-C-1128-K

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

JUDGMENT ON ISSUE OF LIABILITY

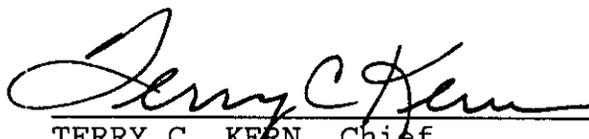
Upon motion for default judgment filed by plaintiff Jean Antonides, the Court finds as follows:

Defendants Rondo Hosang and Norfolk Securities Corporation were served by publication, but have failed to answer the complaint and are in default. Pursuant to Rule 8(d) F.R.Cv.P., the allegations of plaintiff's complaint are deemed admitted except as to damages.

IT IS THEREFORE ORDERED that judgment on the issue of liability is hereby granted against defendants Rondo Hosang and Norfolk Securities Corporation and in favor of plaintiff, Jean Antonides.

IT IS FURTHER ORDERED that the issue of damages is hereby reserved until the amount of damages is proved to this Court. Plaintiff is granted thirty (30) days to make the appropriate motion.

ORDERED this 11 day of August, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

FILED ON RECEIPT
8-12-97

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

JEAN ANTONIDES,)
)
)
Plaintiffs,)
)
vs.)
)
RONDO HOSANG and NORFOLK)
SECURITIES CORPORATION,)
)
Defendant.)

FILED

AUG 11 1997

No. 96-C-1128-K/Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of the plaintiff for default judgment against defendants. Plaintiff was unable to obtain conventional service of process against the defendants and requested service by publication. Rule 4(e)(1) F.R.Cv.P. permits service "pursuant to the law of the state in which the district court is located." In turn, 12 O.S. §2004(C)(3) permits service by publication. The Court entered its order permitting such service, and plaintiff has filed a Publisher's Affidavit indicating the requirements of §2004(c)(3)(c) were followed.

However, §2004(c)(3)(e) provides that "[b]efore entry of a default judgment or order against a party who has been served solely by publication under this paragraph, the court shall conduct an inquiry to determine whether the plaintiff, or someone acting in his behalf, made a distinct and meaningful search of all reasonably available sources to ascertain the whereabouts of any named parties who have been served solely by publication under this paragraph."

The Court has examined the affidavit submitted by plaintiff in support of his application for service by publication, and is persuaded the affidavit sets forth that a "distinct and meaningful search" was made.

The complaint does not set forth a prayer for a sum certain. Therefore, the Court shall enter judgment as to liability only.

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

ORDERED this 11 day of August, 1997.

A handwritten signature in cursive script, reading "Terry C. Kern", written over a horizontal line.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

FILED
AUG 08 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

STEPHEN LEE BUTLER,
Plaintiff,

vs.

LARRY FUGATE, et al.,
Defendants.

Case No.95-CV-441-BU

ENTERED ON DOCKET
DATE AUG 12 1997

MAGISTRATE'S REPORT AND RECOMMENDATION

Defendants' Motion to Dismiss Plaintiff's Amended Complaint [Dkt. 43] has been referred to the undersigned United States Magistrate Judge for report and recommendation.

Plaintiff, a state prisoner proceeding pro se and in forma pauperis, brings this action pursuant to 42 U.S.C. § 1983, alleging violation of his Eighth Amendment right to be free from cruel and unusual punishment. Defendants have moved to dismiss, relying on the contents of the court-ordered special report [Dkt. 14]. The Court has advised the parties that the motion is being treated as one for summary judgment under Fed.R.Civ.P. 56. The parties have been given an opportunity to present all material pertinent to such a motion. [Dkt. 48]. Fed.R.Civ.P. 12(b).

I. BACKGROUND

On September 28, 1994, while Plaintiff was detained in the Creek County Jail awaiting formal sentencing for felony convictions, he fractured his hand in a fight in his cell. He was transported to the hospital and a splint was applied. Follow-up care was recommended with Dr. Milo. On September 30, 1994, Dr. Milo applied a cast

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and scheduled a follow-up appointment in two weeks on October 12, 1994. However, on October 5, 1994 Plaintiff was taken to Dr. Milo for treatment of a sore caused by the splint, at which time the splint was changed. At the October 12 appointment Dr. Milo determined that the fracture had shifted and that surgical treatment was necessary. The parties dispute whether the surgery was ever scheduled. It was not performed.

Plaintiff maintains that Dr. Milo scheduled the surgery for October 18th and that the defendants canceled the surgery, preferring to let the surgery be performed at the expense of the Department of Corrections rather than Creek County. Defendants state that following the October 12 exam, Dr. Milo's office notified the Sheriff's office that Plaintiff needed surgery. However, Plaintiff was scheduled to be formally sentenced on October 14 and once sentenced all medical procedures require the approval of the medical officer at the Department of Corrections. Dr. Milo's office advised that this type of surgery was not an emergency and could not be scheduled before the sentencing date. Because of Plaintiff's medical problem, he was given an early transfer to the Department of Corrections on October 20, 1994. Plaintiff states that although he was told he was being given a medical transfer, the Department of Corrections has not provided any treatment and he has not yet had surgery.

II. SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the pleadings, affidavits and exhibits show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp.*

v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). To survive a motion for summary judgment, the non-moving party "must establish that there is a genuine issue of material fact . . ." and "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, 106 S.Ct. 1348, 1455-56 (1986).

III. DISCUSSION

The court may treat the special report as an affidavit in support of the motion for summary judgment, but may not accept the factual findings of the report if the prisoner has presented conflicting evidence. *See Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991). This process aids the court in determining possible legal bases for relief for unartfully drawn pro se prisoner complaints, and not to resolve material factual issues. *Id.* at 1109. The court must also construe the plaintiff's pro se pleadings liberally. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Nevertheless, the Court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. *Hall*, 935 F.2d at 1110.

In considering Defendants' motion for summary judgment, the Court has examined the special report. Although Plaintiff has responded to the motion, he has presented no evidence to refute the facts in Defendants' motion and the special

report. Plaintiff's response merely contains conclusory allegations which are not sufficient to controvert the special report. Because Plaintiff has not presented conflicting evidence, the Court accepts the factual findings of the special report. See *Hall*, 935 F.2d at 1111.

The special report reveals that Plaintiff received prompt emergency medical treatment on 9/28/94 when he reported his injury. He received follow-up care with Dr. Milo on 9/30/94 pursuant to emergency room discharge instructions. Dr. Milo changed Plaintiff's splint on 10/5/94 when he complained of a pressure sore. On 10/12/94 he was provided additional follow-up care and an x-ray. Dr. Milo's office notes for 10/12/94 state:

Patient came with new set of x-rays showing shifting of the fracture site, which is now unacceptable. This should be fixed for proper treatment.

[Dkt. 14, Ex. G]. Aside from Plaintiff's unsupported allegations, there is no indication that Dr. Milo recommended surgery to be performed on an emergent basis.

Prison officials violate a prisoner's Eighth Amendment rights if they are deliberately indifferent to the prisoner's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). The deliberate indifference standard has two components: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind. With regard to the subjective component, allegations of inadvertent failure to provide adequate medical care or of a negligent diagnosis simply fail to establish the requisite culpable state of

mind." *Wilson v. Seiter*, 501 U.S. 294, 297, 11 S.Ct. 2321, 2323, 115 L.Ed.2d 271 (1991); *see also El'Amin v. Pearce*, 750 F.2d 829, 832-33 (10th Cir. 1984).

Assuming that surgery for his hand fracture is a serious medical need, Plaintiff has made no showing that the defendants possessed the requisite culpable state of mind. He does not complain that he did not receive treatment. Rather, he argues that the failure to schedule hand surgery prior to his transfer to state custody constitutes an Eighth Amendment violation. After carefully reviewing the record, the Court concludes that the defendants' failure to obtain Plaintiff's surgery on an emergent basis does not amount to deliberate indifference as required to establish an Eighth Amendment claim.

Plaintiff received prompt medical care of his hand injury and follow-up care. That Plaintiff differs with the judgment exercised by jail staff with respect to his medical care does not support a claim of cruel and unusual punishment. *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *McCraken v. Jones*, 562 F.2d 22 (10th Cir. 1977), *cert denied*, 435 U.S. 917 (1978); *Smart v. Villar*, 547 F.2d 112 (10th Cir. 1976). Even if plaintiff were claiming the defendants exercised poor judgment with respect to scheduling his surgery, defendants would still be entitled to judgment as a matter of law. Neither negligence nor gross negligence meets the deliberate indifference standard required for a violation of the cruel and unusual punishment clause of the Eighth Amendment. *Estelle*, 429 U.S. at 104-05; *Ramos*, 639 F.2d at 575.

Plaintiff also alleges a Fourteenth Amendment violation arising from his medical care. The Fourteenth Amendment rather than the Eighth Amendment applies to pre-trial detainees. The injury to Plaintiff's hand occurred after his trial but before his sentencing.¹ Thus Plaintiff was not a pre-trial detainee during the relevant time frame. Therefore, the Fourteenth Amendment is not applicable to Plaintiff's claim. However, the standards and requisite components for a constitutional violation relative to medical care are the same under both the Eighth and Fourteenth Amendments. *Martin v. Board of County Com'rs of County of Pueblo*, 909 F.2d 402, 406 (10th Cir. 1990). Accordingly, Plaintiff's failure to establish that defendants possessed a culpable state of mind to support an Eighth Amendment claim, also entitles defendants to judgment as a matter of law on Plaintiff's Fourteenth Amendment claims.

CONCLUSION

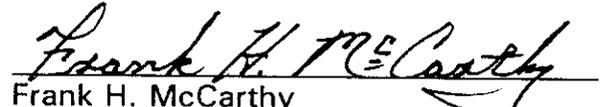
The undersigned United States Magistrate Judge RECOMMENDS that defendants be granted judgment as a matter of law. Plaintiff has produced no evidence demonstrating that defendants acted with deliberate indifference to his serious medical needs.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections

¹Plaintiff was convicted on 9/24/94, injured on 9/28/94, and sentenced on 10/17/94. [Dkt. 14, Ex. B].

within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 8th day of August, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET
8-12-97

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

KAREN A. JENCKS,)
)
 Plaintiff,)
)
 vs.)
)
 MODERN WOODMEN OF AMERICA,)
)
 Defendant.)

No. 95-C-948-K

F I L E D

AUG 11 1997

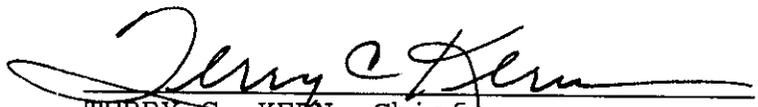
AMENDED JUDGMENT

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Having considered the post-trial motions of the parties,

IT IS THEREFORE ORDERED that the Plaintiff Karen A. Jencks recover from the Defendant Modern Woodmen of America the sum of \$135,173.00, with post-judgment interest thereon at the rate of 5.49 percent, measured from the date of the original judgment. As to the back pay award of \$70,173.00, plaintiff shall also recover prejudgment interest at the rate of 5.49 percent, for the period between the date of her demotion, August 1, 1994, until the date of the original judgment.

ORDERED this 11 day of August, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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FILED ON DOCKET
8-12-97

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

MARTY GOSSETT,)
)
Plaintiff,)
)
v.)
)
STATE OF OKLAHOMA ex rel.)
BOARD OF REGENTS FOR LANGSTON)
UNIVERSITY AND THE AGRICULTURAL)
AND MECHANICAL COLLEGES, ERNEST)
HOLLOWAY as President of)
Langston University, CAROLYN)
KORNEGAY as Dean of the School)
of Nursing of Langston)
University, STATE OF OKLAHOMA)
ex rel. ROGERS UNIVERSITY BOARD)
OF REGENTS, and RODGER A. RANDLE)
as President of Rogers)
University,)
)
Defendants.)

Case No. CV-97-115-K

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

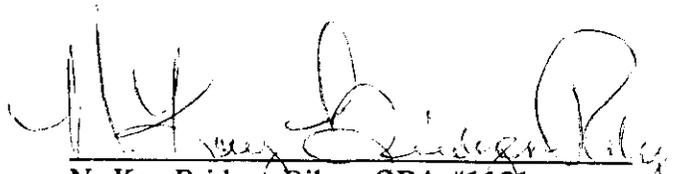
STIPULATION OF DISMISSAL

The Plaintiff, Marty Gossett, represented by his attorney N. Kay Bridger-Riley, of Bridger-Riley & Associates, P.C., and the Defendants State of Oklahoma ex rel. Rogers University Board of Regents and Rodger A. Randle as President of Rogers University, represented by their attorney Graydon Dean Luthey, Jr., of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., stipulate to the dismissal with prejudice of Defendants, in the above styled matter.

The parties stipulate that each will be responsible for and pay their own attorney fees and costs.

14

06



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8908 South Yale Avenue, Suite 450
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(918) 494-6699 (Telephone)
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ATTORNEYS FOR PLAINTIFF



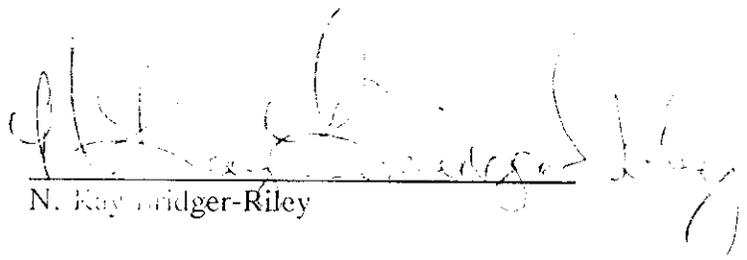
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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that on the 8th day of August, 1997, a true and correct copy of the foregoing was sent via U.S. Mail with postage prepaid and properly affixed thereon to the following counsel of record:

David W. Lee
Comingdeer & Lee
6011 N. Robinson
Oklahoma City, OK 73118
Telephone (405) 848-1983
Telefax (405) 848-4978
Attorneys for Defendant



N. Kay Bridger-Riley

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

FILED

AUG 7 1997

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

HALLMARK INSURANCE COMPANY,

Plaintiff,

v.

PRODUCERS OIL COMPANY,

Defendant.

Case No. 97-CV-197-H ✓

ENTERED ON DOCKET

DATE AUG 11 1997

ORDER

This matter comes before the Court on Plaintiff's motion to dismiss this matter without prejudice on the grounds that a justiciable controversy no longer exists. (Docket # 7) Defendant concurs. (Docket # 8).

IT IS THEREFORE ORDERED that Plaintiff's motion is granted. This matter is DISMISSED without prejudice, and stricken from the docket.

This 7TH day of August, 1997.


Sven Erik Holmes
United States District Judge

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

F I L E D

AUG 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WAYNE McKNIGHT, individually, and for all)
others similarly situated,)
)
Plaintiff,)

vs.)

Case No. 96-C-121-E

KIMBERLY CLARK CORPORATION, a Delaware)
corporation; GUARDSMARK, INC., a Delaware)
corporation; and TAN JEAN PATTON, an)
individual,)
)
Defendants.)

ENTERED ON DOCKET

DATE AUG 11 1997

J U D G M E N T

In accord with the Order filed this date sustaining Defendants' Motion for Summary Judgment, the Court hereby enters Judgment in favor of the Defendants, Kimberly Clark Corporation, Guardsmark, Inc., and TanJean Patton, and against the Plaintiff, Wayne McKnight. Plaintiff shall take nothing of his claim. Costs and attorney fees may be awarded upon proper application.

Dated this 7th day of August 1997


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

AUG 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WAYNE McKNIGHT, individually, and for all)
others similarly situated,)
)
Plaintiff,)

vs.)

Case No. 96-C-121-E

KIMBERLY CLARK CORPORATION, a Delaware)
corporation; GUARDSMARK, INC., a Delaware)
corporation; and TAN JEAN PATTON, an)
individual,)
)
Defendants.)

ENTERED ON DOCKET

DATE AUG 11 1997

ORDER

Now before the Court is the Motion for Summary Judgment (Docket #25) of the defendant, Kimberly Clark Corporation (KCC), the Motion for Summary Judgment (Docket #21) of the defendant, Guardsmark, Inc., and the Motion for Summary Judgment (Docket # 23) of the defendant Tan Jean Patton (Patton). Also before the Court are the Plaintiff's Motion to Amend Complaint (Docket # 54) and KCC's Motion To Strike Affidavits Submitted in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment (Docket #58).

Statement of the Case

Wayne C McKnight (McKnight), a former employee of KCC, brings this action claiming that KCC discriminated against him on the basis of age and gender when it terminated him; that KCC defamed McKnight by repeating the details of his termination; and that KCC owes McKnight some unpaid wages. McKnight also brings claims against TanJean Patton, an independent contractor security guard for KCC and against Guardsmark, the firm that employed Patton. The claims against

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Patton and Guardsmark are also for defamation and result from the repetition of Patton's allegations against McKnight, which resulted in his termination.

McKnight was employed by KCC as a maintenance associate at its Jenks facility on February 10, 1992. McKnight was 50 at the time he was hired, and 54 at the time he was discharged, on July 25, 1995. He was terminated after TanJean Patton informed a human resources representative for KCC that she had been sexually assaulted by McKnight on July 17, 1995. She claimed she was assaulted in the security control center at the Jenks facility when McKnight came to repair a refrigerator that had not been working. After Patton reported the alleged assault, KCC investigated the incident by interviewing Patton, McKnight, McKnight's partner Tom Matheny, Patton's supervisor Brad Moore, and several other KCC employees: Jacqueline Del Castillo, Rob Weklar, and Carol Pinkham. After conducting these interviews, Toru Taniguchi and Randy Watson, McKnight's supervisor, and the Human Resource team leader, determined that there were no eyewitnesses to the incident, that Patton was credible, and that Plaintiff had demonstrated inappropriate behavior to other employees. They determined therefore that McKnight had violated KCC's Code of Conduct and that he should either resign or be terminated. The Code of Conduct provides that employees are to conduct themselves with dignity and refrain from participating in unreasonable acts towards other workers. Since McKnight refused to resign, he was terminated.

Analysis

Standard of Review

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The 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."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Gender Discrimination and ADEA claims

McKnight's first two claims against KCC are that he was actually terminated on the basis of his gender and his age in violation of Title VII and the Age Discrimination in Employment Act (ADEA). In order to make out a *prima facie* case of discrimination, a plaintiff must prove he is (1) a member of a protected class; (2) doing satisfactory work; (3) who was subject to an adverse employment decision; (4) under circumstances giving rise to an inference of discrimination. Jones v. Unisys Corp., 54 F.3d 624, 630 (10th Cir. 1995). Proof of a *prima facie* case results in a rebuttable presumption that the employer unlawfully discriminated against the employee. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). The employer then must rebut the presumption by demonstrating that it made the adverse employment decision for a legitimate nondiscriminatory reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). Once the employer satisfies this burden, the plaintiff must then persuade the court that the nondiscriminatory reasons proffered are pretexts for discrimination. Cone v. Longmont United Hospital, 14 F.3d 526, 529 (10th

Cir. 1994). A plaintiff demonstrates pretext by showing either “that a discriminatory reason more likely motivated the employer or . . . that the employer’s proffered explanation is unworthy of credence.” Burdine, 450 U.S. at 256. The plaintiff need not prove that the defendant’s reasons were false, Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1425 (10th Cir. 1993), “or that age was the sole motivating factor in the employment decision.” EEOC v. Prudential Fed. Savings & Loan Ass’n, 763 F.2d 1166, 1170 (10th Cir. 1985). The plaintiff simply must show that age or gender played a role in the defendant’s decision making process and had a determinative influence on the outcome. Faulkner, 3 F.3d at 1425-26.

In this motion for summary judgment, KCC concedes that McKnight can make out a *prima facie* case, but argues that McKnight has no evidence to prove that its proffered reason for the termination, violation of the Code of Conduct by the assault of Patton, is merely a pretext for discrimination. KCC asserts that McKnight has no evidence to prove that either age or gender played a determinative role in the defendant’s decision making process.

Plaintiff’s evidence of pretext consists of 1) KCC’s and Guardsmark’s failure to properly investigate background and performance issues involving Patton, 2) KCC’s failure to acknowledge McKnight’s “airtight alibi” provided by four KCC employees, and 3) age-sensitive and gender-sensitive comments made by his supervisors. In essence, McKnight claims that, if KCC had investigated thoroughly enough it would have found out that Patton has a reputation for not being truthful and that McKnight had “an airtight alibi.” The Court cannot conclude, on these facts, that the investigation of the incident was unreasonable. It is undisputed that KCC concluded that there were no eyewitnesses to the event, that Patton had not previously been involved in any similar incident and had satisfactory job performance, and that McKnight had previously demonstrated

inappropriate behavior to other female employees. Further, McKnight and his partner admitted that they were apart for several minutes on the evening in question. This investigation does not in any way support an inference of pretext. There is nothing to suggest that the investigation was conducted in a manner which would serve to purposely conceal information.

The Court similarly finds that the comments alluded to do not support such an inference. “Isolated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions.” Cone, 14 F.3d at 531. Plaintiff asserts that he was the recipient of age-related comments by co-workers, but does not demonstrate that these comments were made by any person who played a decision-making role in his termination. The only exception to this is his assertion that his supervisor, Taniguchi, made the comment during their conversation on the Patton incident, that he was “not as old” as McKnight. This comment, which is true, does not support any inference that he was terminated because of his age.

With respect to gender, McKnight claims that the facility manager’s statement that plaintiff would have been terminated even if Patton had consented to the alleged act demonstrates that gender was ‘a substantial and motivating factor’ in his termination. The Court disagrees. Obviously KCC’s manager was simply stating that engagement in sexual activity during work hours was improper and could give rise to termination. This statement in no way targets any gender, and therefore cannot demonstrate that gender was ‘a substantial and motivating factor’ in McKnight’s termination. The Court grants KCC’s motion for summary judgment on McKnight’s discrimination claims.

Wage claims

McKnight also makes a claim for unpaid wages based on three theories. The first one is that he was not given a pay increase to which he was entitled from April 28, 1995 to the time of his

discharge. The only evidence before the Court on this issue is the affidavit of the Human Resources Team Leader that McKnight received \$17.32 per hour from April to July of 1995, and that this was the wage to which McKnight was entitled based on KCC's wage structure. McKnight submits no evidence whatsoever to dispute this statement by KCC.

McKnight's second theory of unpaid wages is that he paid for flex-time which he did not get to take because he was terminated. He admits, however, that he believes he was paid for that time in his last paycheck. Moreover, the Human Resources Team Leader stated that McKnight was paid for this time, and that statement is also undisputed.

The last theory of unpaid wages is that he was not paid for lunch breaks, and should have been, because he was on-call during those lunch breaks and prohibited from leaving the facility. KCC's undisputed explanation of the lunch break system is that maintenance associates are given thirty minute lunch breaks, and if they are called to work at any time during their lunch break, they are allowed to take another thirty minute break. If they are unable to take an uninterrupted lunch break, they are responsible for noting it on their time card, and they are paid overtime for the thirty minute period. Plaintiff's position that his lunch break is work time because he is restricted from leaving the facility and may be called to work is without merit. As the Court in Norton v. Worthen Van Service, Inc., 839 F.2d 653, 655 (10th Cir. 1988) noted the Supreme Court, in Armour v. Wantock, 323 U.S. 126 (1944) affirmed a lower court holding that time spent eating and sleeping did not constitute work time. Since plaintiff's lunch break would constitute "time spent eating," it would not be considered work time despite its "on-call" status. Summary judgment is also appropriate on McKnight's wage claims.

Defamation claims

McKnight brings claims for defamation against KCC, Patton, and Guardsmark. McKnight asserts three different defamation claims against KCC: 1) defamation resulting from intracompany communications, 2) defamation resulting from compelled self-publication of Patton's allegations and the basis for termination of McKnight's employment, and 3) defamation resulting from publication by co-workers to third parties of Patton's allegations and the basis for termination of McKnight's employment. McKnight also asserts three different defamation claims against Guardsmark and Patton: 1) defamation resulting from Patton telling her immediate supervisor of the assault, 2) defamation resulting from Patton reporting the incident to KCC officials, and 3) defamation resulting from Patton and co-workers making statements to third persons not in the scope of their employment. Defamation resulting from compelled self-publication is not recognized as a theory of recovery under Oklahoma law. Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1554 (10th Cir. 1995). Moreover, McKnight completely failed to address the undisputed facts set forth by all defendants demonstrating that there is no admissible evidence regarding publication to third parties.

Therefore the only remaining issue with respect to the defamation claims are whether there is an actionable claim for communications within a company (i.e. communication from one Guardsmark employee to another, or communication from one KCC employee to another) or for communications between employees of the two companies. The starting point for this analysis is Magnolia Petroleum Co. V. Davidson, 148 P.2d 468 (Okla. 1944), which holds that intra-company communications do not constitute actionable publication. In stating this rule the Court in Magnolia Petroleum explained it as follows:

Until the appellant himself spread the letter broadcast to the world, it does not appear from the complaint that it was exhibited to any one other than the officers and employes of the respondent company, whose very duties, in the conduct of the ordinary business of the company, brought them in contact with it. Agents and

employees of this character are not third persons in their relations to the corporation, within the meaning of the laws pertaining to the publication of libels. For the time being, they are a part and parcel of the corporation itself, so much so, indeed, that their acts within the limits of their employment are the acts of the corporation.

Id. at p. 471. Plaintiff asserts that the facts of this case, with respect to KCC, are distinguishable from Magnolia Petroleum “because of the improper use of Team Management by KC coupled with the Negligent Retention of T.J. Patton by its independent contractor, Guardsmark who held itself out to perform a higher duty of retaining qualified employees and because it intentionally failed to conduct a good faith investigation as required by law.” This argument is unavailing because it has nothing whatsoever to do with a defamation claim. Moreover, while McKnight certainly faults the investigation of KCC, he has no evidence either that its shortcomings were intentional or that it was not conducted in good faith. In addition, the Court in Starr points out that intra-corporate communications do not constitute publication for the purpose of a defamation claim regardless of the intent of the communication. Starr, 54 F.3d at 1153. The rule of Magnolia Petroleum precludes a claim against KCC for communications between KCC employees. This same analysis precludes a claim against Patton or Guardsmark for communications within Guardsmark.

The Court also finds that the Magnolia Petroleum Doctrine applies to communications between Guardsmark and KCC or Patton and KCC. The only contact between Patton and McKnight was through their mutual employment, and any communication to KCC by guardsmark was to the employees of KCC whose very duties, in the conduct of the ordinary business of the company, brought them in contact with Patton’s claims. Magnolia Petroleum, 148 P.2d at p. 471. The Court is further persuaded of Magnolia Petroleum’s applicability to communications between Guardsmark and KCC by the use of the word “agent” in the Magnolia Petroleum decision. The doctrine does not appear to be limited to employees, but rather stretches to agents. Certainly, in this situation, Patton

and Guardsmark were acting as agents of KCC.

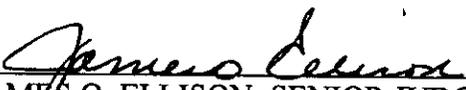
Lastly, Anson v. Erlanger Minerals and Metals, Inc., 702 P.2d 393, 395 (Okla. App. 1985), relied upon by plaintiff, is distinguishable from this case in that the Court merely held that the intra-corporate communications were relevant to the issue of malice with respect to the defendant's publications. The Court specifically did not hold that the intra-corporate communications were actionable. The Court concludes, therefore, that summary judgment is appropriate on the defamation claims.

Motion to Amend

Plaintiff filed a Motion to Amend his Complaint, seeking to add claims for negligent hiring and retention of an employee, intentional interference with contractual relations, negligent hiring of an independent contractor and negligent retention of an agent. The Motion to Amend, however, comes one year after the case was filed, five months after the discovery cutoff, and almost four months after the deadline for the filing of dispositive motions. Based on the untimeliness of the motion, the prejudice to the defendants because of the expiration of the discovery and dispositive motion deadlines, and the lack of any explanation for the tardiness of the request the Court finds that the Motion to Amend Complaint should be denied.

In conclusion, the Motion for Summary Judgment (Docket #25) of the defendant, Kimberly Clark Corporation is granted, the Motion for Summary Judgment (Docket #21) of the defendant, Guardsmark, Inc. is granted, and the Motion for Summary Judgment (Docket # 23) of the defendant Tan Jean Patton is granted. The Plaintiff's Motion to Amend Complaint (Docket # 54) is denied, and KCC's Motion To Strike Affidavits Submitted in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment (Docket #58) is denied as moot.

IT IS SO ORDERED THIS 7TH DAY OF AUGUST, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

AUG 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

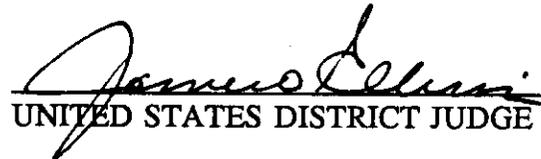
JAMES S. BISHOP)
d/b/a Essence of Life,)
)
Plaintiff,)
)
v.)
)
EQUINOX INTERNATIONAL CORP.,)
a Nevada corporation,)
)
Defendant.)

No. 96-C-0006-E

AUG 11 1997

ORDER

Pursuant to the stipulation filed herewith, the Court hereby awards to James S. Bishop and against Equinox International Corp., Attorney Fees and Costs in the amount of \$110,000.00.


UNITED STATES DISTRICT JUDGE

8/7/97
DATE

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In imposing the ten day time frame the Court recognized that Plaintiff had already endured an unreasonably long delay in receiving the highly relevant materials, that depositions had been scheduled and were ongoing, and the parties were operating under a rapidly approaching discovery deadline. In addition, Defendants had previously been assessed fees and costs by Judge Burrage in part for "the failure of Defendants to comply with discovery requests." [Dkt. 56]. The discovery requests to which Judge Burrage's order referred are the same requests which are the subject of the June 6 order. See Dkt. 45, p. 6. Defendants' motion for extension of time [Dkt. 74] is DENIED.

Although some materials have been provided, in large part those materials were not responsive to Plaintiff's requests which seek production of documents supportive of Defendants' denial of Plaintiff's allegations, defenses and Defendants' counterclaim for damages. Further, the materials produced were not provided within the time-frame set out in the Court's order. The Court finds, therefore, that Defendants have failed to obey its order to provide discovery.

Fed.R.Civ.P. 37(b)(2) provides, in relevant part:

If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

* * *

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

In view of the upcoming trial date, Plaintiff's continued efforts to obtain appropriate responses to routine discovery, and the high degree of relevancy of the information sought,² the undersigned United States Magistrate Judge recommends that an order be entered prohibiting Defendants from introducing any evidence documentary, or otherwise, which was not timely produced in response to Plaintiff's discovery in accordance with the June 6, 1997 order.

Since Defendants maintain that they have produced all relevant materials, and that their production is responsive to the requests, the recommended sanction should have no effect on their ability to proceed with their case and should therefore work no hardship on Defendants. It will also enable Plaintiff to continue its trial preparation with confidence that it will not be prejudiced by any last minute disclosures.

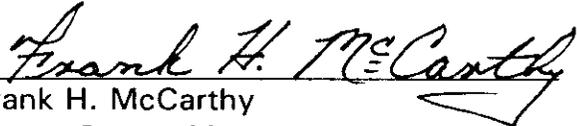
IT IS THEREFORE RECOMMENDED THAT Thrifty's Motion For Sanctions For Defendants' Failure To Obey This Court's Order [Dkt. 81] be GRANTED to the extent that Defendants should be prohibited from introducing any evidence documentary, or otherwise, which was not timely produced in response to Plaintiff's discovery in accordance with the June 6, 1997 order. Defendants' Motion For Extension Of Time [Dkt. 74] is DENIED.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within

² The Court notes that the information sought is the type which is required to be disclosed without awaiting a discovery request under Fed.R.Civ.P. 26(a)(1)(B). Although this district has declined to adopt that specific provision, that the information sought is included within the initial disclosure provisions of Rule 26 is indicative of its high degree of relevance.

ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 8th day of August, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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ENTERED ON DOCKET

8-11-97

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

BERRI NORRIS,)
)
 Plaintiff,)
)
 vs.)
)
 MOHAWK CARE CENTER,)
 an Oklahoma Health Care Facility,)
)
 Defendant.)

F I L E D

AUG - 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-959-K

VOLUNTARY DISMISSAL

Plaintiff hereby voluntarily dismisses the above-styled cause without prejudice.



Brian E. Duke, OBA #14710
BRIAN E. DUKE, P.C.
616 South Main Street, Suite 308
Tulsa, Oklahoma 74119
(918) 582-7748

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